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BRANDEIS AND WARREN'S THE RIGHT TO PRIVACY AND THE BIRTH OF THE RIGHT TO PRIVACY

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I. INTRODUCTION AND MODERN PERSPECTIVE

It has been called an “unquestioned ‘classic[,],’”¹ the “most influential law review article of all,”² “one of the most brilliant excursions in the field of theoretical jurisprudence,”³ an “outstanding example of the influence of legal periodicals upon the American law,”⁴ and “a pearl of common-law reasoning” that “single-handedly created a tort.”⁵ Roscoe Pound, Dean of Harvard Law School from 1916 to 1936, said that it did “nothing less than add a chapter to our law.”⁶ Over 100 years after it was written, courts as divergent as the Supreme Court of Mississippi and the United States Court of Appeals for the Ninth Circuit have dubbed it as “momentous”⁷ and “brilliant.”⁸

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I would like to dedicate this Article to Leonard Helton, former history teacher at Los Altos High School, and Jon Bridgman, retired Professor of History at the University of Washington, whose passion for teaching history and making it come alive evoked my love of history and historical research. Finally, I want to express heartfelt appreciation to my brother, David, whose love and encyclopedic knowledge of history is truly contagious, and to my parents, Nancy and Robert, each of whom supports me in everything I do.

1. Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1545 (1985).
2. Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966).
3. Elbridge L. Adams, *The Right of Privacy, and its Relation to the Law of Libel*, 39 AM. L. REV. 37, 37 (1905).
4. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383 (1960).
5. Ruth Gavison, *Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech*, 43 S.C. L. REV. 437, 438 (1992).
6. ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 70 (1946).
7. *Miller v. State*, 636 So. 2d 391, 394 (Miss. 1994).
8. *Albert D. Seeno Constr. Co. Ltd. v. Twin City Fire Ins. Co.*, No. 94-17024, 94-17039,

These are some of the accolades that have been bestowed upon an ageless law review article, penned over a century ago by future Supreme Court Justice Louis Dembitz Brandeis and Boston attorney Samuel Warren: *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).⁹ The citation alone is a ubiquitous one in privacy law circles and familiar to most lawyers or scholars whose work has touched on the law's protections of privacy.

In their twenty-eight page piece, Brandeis and Warren chastised the journalists of their day, particularly photojournalists, for prying into people's private lives in search of tawdry and alluring "news," and then made a cogent plea for the law to recognize a right to privacy and to impose liability in tort for these and other types of invasions of privacy. They got what they wanted—and more.

Brandeis and Warren's work is almost universally regarded as the origin of the four invasion of privacy torts that are recognized in most American jurisdictions today and that are laid out in the *Restatement (Second) of Torts* as follows: (1) "unreasonable intrusion upon the seclusion of another," (2) "appropriation of the other's name or likeness," (3) "unreasonable publicity given to the other's private life," and (4) "publicity that unreasonably places the other in a false light before the public."¹⁰ But the influence of Brandeis and Warren's article now extends far beyond the limited realm of tort law. In the more than 110 years since its publication, Brandeis and Warren's article has attained what some might call legendary status. It has been widely recognized by scholars and judges, past and present, as *the* seminal force in the development of a "right to privacy" in American law.¹¹

1997 WL 285930, at *2 (9th Cir. May 27, 1997).

9. Samuel D. Warren and Louis D. Brandeis, 4 HARV. L. REV. 193 (1890).

10. RESTATEMENT (SECOND) OF TORTS § 652A (1977). For the general view that the article is the origin of modern tort law on privacy, see James H. Barron, *Warren and Brandeis, The Right To Privacy*, 4 Harv. L. Rev. 193 (1890); *Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875, 877 (1979) (stating that there is "near unanimity among courts and commentators that the Warren-Brandeis conceptualization created the structural and jurisprudential foundation of the tort of invasion of privacy"), and Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703, 718-19 (1990).

11. See, e.g., *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 69 (Ga. 1905) ("[A] claim to a right of privacy, independent of a property or contractual right, or some right of a similar nature, had, up to [1890], never been recognized in terms in any decision."); *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 443 (N.Y. 1902) (informing that the right to privacy has not "been asserted prior to about the year 1890, when it was presented with attractiveness, and no inconsiderable ability, in the Harvard Law Review"); Elbridge L. Adams, *The Law of Privacy*, 175 N. AM. REV. 361, 364 (1902); Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1342-47; Prosser, *supra* note 4, at 383. For more recent pronouncements on the foundational and seminal nature of the article, see, for example, *Anderson v. Romero*, 72 F.3d 518, 521 (7th Cir. 1995) (including Judge Posner's comment that "the legal concept of privacy. . . originated in a famous article by Warren and Brandeis"), and *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 642 (Tenn. 2001) (remarking in a false

In the view of at least one scholar, virtually all of the varied twentieth century jurisprudence that could be said to fall within the parameters of "privacy law"—whether it be the federal constitutional zone of privacy implicated in abortion, "right to die," and other like cases; statutes prohibiting the disclosure of the identity of rape victims; privacy initiatives in state constitutions; or invasion of privacy tort actions—in theory can be traced back ultimately to Brandeis and Warren's assertion in 1890 that we all have what Judge Thomas Cooley called "a right to be let alone."¹² As an example, in the 1965 landmark case of *Griswold v. Connecticut*,¹³ when the Supreme Court established a constitutional right of privacy drawn from the "penumbra" of several amendments in the Bill of Rights, dissenting Justice Hugo Black claimed the Court was "exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a constitutional rule."¹⁴ Indeed, it has been suggested that *The Right to Privacy* "developed and articulated a concept that provided some of the basis for the constitutional right to privacy, although the proximity of this relationship remains a subject of debate."¹⁵

light invasion of privacy case that "Warren and . . . Brandeis . . . established the concept of the right to privacy in the common law"). See also *infra* Part III.A for a historical analysis of the unprecedented nature of a common law "right to privacy" in the late nineteenth century.

12. Gormley, *supra* note 11, at 1340, 1342-43. Gormley postulates that there are five general areas of privacy law, and contends the seeds of each of them were planted by Brandeis and Warren. He identifies: (1) "[t]ort privacy;" (2) "Fourth Amendment privacy;" (3) "First Amendment privacy;" (4) "[f]undamental-decision privacy" (such as abortion); and (5) "[s]tate constitutional privacy." *Id.* at 1340.

13. 381 U.S. 479 (1965).

14. *Id.* at 510 n.1 (Black, J., dissenting).

15. *Symposium: The Right to Privacy One Hundred Years Later*, 41 CASE W. RES. L. REV. 643, 643 (1991). This article was one of several presented in 1990 at various symposia commemorating the 100th anniversary of *The Right to Privacy*'s publication. In addition to Case Western Reserve Law School, Northern Illinois University Law School, and the Boalt Hall School of Law at the University of California at Berkeley conducted 100th anniversary symposia. See 10 N. ILL. U. L. REV. No. 3, at ii (1990); Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CAL. L. REV. 1133, 1133 n.† (1992). Articles presented at the centennial symposia covered a wide range of topics. See, e.g., Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441 (1990) (discussing gender bias in privacy law); Dorothy Glancy, *Privacy and the Other Miss M*, 10 N. ILL. U. L. REV. 401 (1990) (considering the rights of entertainment figures to prevent advertisers from using impersonations of their voices to endorse products); Richard C. Turkington, *Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy*, 10 N. ILL. U. L. REV. 479 (1990) (addressing the developing constitutional right to informational privacy in the electronic age).

The 100th anniversary was even newsworthy enough to warrant an article in *The New York Times* that discussed Brandeis and Warren's piece and its influence on later legal decisions. Linda Greenhouse, *Milestone Anniversary for the Right to Privacy*, N.Y. TIMES, Dec. 26, 1990, at 22.

Of course, Brandeis and Warren's work has attracted, and continues to attract, the attention of the bench. In a wide variety of recent opinions on privacy-related questions, state and federal court judges have proclaimed Brandeis and Warren's article to be the original source of a privacy right in American law and, to varying degrees, have analyzed the article's arguments as part of the opinions' reasoning. For example, the Supreme Court of Kentucky called upon Brandeis and Warren's article in reaching its holding that a statute criminalizing sodomy violated the privacy and equal protection provisions of the state constitution.¹⁶ The Supreme Court of California did the same when it held that the National Collegiate Athletic Association's drug-testing program did not violate the Privacy Initiative of its state constitution.¹⁷ The United States Court of Appeals for the Federal Circuit invoked Brandeis and Warren's article to emphasize the importance of a property owner's "right to be let alone" when it held that the Environmental Protection Agency's placement of groundwater wells on private property was a taking under the Fifth Amendment.¹⁸ And the United States Court of Appeals for the Ninth Circuit distinguished Brandeis and Warren's arguments in reaching its holding that a personal injury insurance policy that covered "wrongful entry or eviction or other invasion of an individual's right of privacy" did not cover the settling of dust.¹⁹ Other similar examples abound.²⁰

Privacy law and conceptions of a right to privacy have, of course, evolved considerably since Brandeis and Warren penned their article, but the fact remains that judges and scholars continue to cite 4 HARV. L. REV. 193 as the original source of a right to privacy in American legal history. Are they right? Quite apart from any argument about how attenuated the link might be between Brandeis and Warren's specific proposals and the current state of privacy law,²¹ did Brandeis and Warren's *The Right to Privacy* give birth to

16. *Commonwealth v. Wasson*, 842 S.W.2d 487, 494 (Ky. 1992).

17. *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 646-47 (Cal. 1994).

18. *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991).

19. *Albert D. Seeno Constr. Co. Ltd. v. Twin City Fire Ins. Co.*, No. 94-17024, 94-17039, 1997 WL 285930, at *2 (9th Cir. May 27, 1997).

20. See, e.g., *Anderson v. Romero*, 72 F.3d 518, 521 (7th Cir. 1995) (holding that a prisoner's putative constitutional right to privacy was not violated by disclosure of his HIV-positive status); *Dirkes v. Borough of Runnemeade*, 936 F. Supp. 235, 238-39 (D. N.J. 1996) (holding that a discharged police officer could go forward with his lawsuit under the Videotape Privacy Protection Act, alleging wrongful disclosure of the fact that he had rented pornographic videotapes); *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995) (holding that a newspaper could not be held liable for publishing information from which a rape victim's identity could be deduced by her friends).

21. Many modern scholars have questioned the viability of Brandeis and Warren's proposed tort remedy in light of developments in First Amendment law regarding freedom of the press and speech. These scholars have read Brandeis and Warren's arguments narrowly, and have observed that the specific conduct of the print media that Brandeis and Warren contended should be actionable in tort, had become, in the latter half of the twentieth century, staunchly

its namesake in the lexicon and substance of American law? And, if so, how did a law review article manage this feat?

The law and the legal and historical literature from the late nineteenth century and early twentieth century strongly support the argument that Brandeis and Warren's article did indeed "give birth" to a right to privacy. And it is this "birth," and the initial growth of the right to privacy over the two decades after the article's publication, that form the focus of this Article.

Part II will present a summary of what Brandeis and Warren actually wrote in 4 HARV. L. REV. 193. While the authors focused intensely on the conduct of the print media and commercial publishers, and while their specific proposal was for an invasion of privacy remedy at law (for damages), the premise of their legal argument was that the law should recognize a general right "to be let alone."²² The presence of this argument in the article set the stage for courts to apply the "precedent" of 4 HARV. L. REV. 193 broadly to a wide variety of factual scenarios, including cases against defendants other than newspapers or commercial publishers. It also set the stage for courts to impose equitable remedies for violations of the new right to privacy.

Part III will present what were, by all accounts, the two greatest obstacles to the establishment of a right to privacy and an invasion of privacy remedy in the United States in the late nineteenth century and early twentieth century. First, there was essentially no primary authority available in American common law to serve as legal precedent for establishing the proposed right or remedy. (This also lends support to the characterization of *The Right to Privacy* as "giving birth" to its namesake.) Second, there was the very real potential that Brandeis and Warren's proposed cause of action would infringe on federal and state constitutional protections of freedom of the press and speech.

protected by the First Amendment. See, e.g., Edward J. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611 (1968); Kalven, *supra* note 2, at 327; Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 341-44 (1983); Barron, *supra* note 10; Lorelei Van Wey, Note, *Private Facts Tort: The End Is Here*, 52 OHIO ST. L.J. 299, 301-03 (1991). In recent years, some have taken up the opposing cause, arguing that the tort for public disclosure of private facts can and should be revived. See Gavison, *supra* note 5, at 438-39; John P. Elwood, Note, *Outing, Privacy and the First Amendment*, 102 YALE L.J. 747, 752 (1992) (advocating an invasion of privacy tort for "outing"); Robert A. Muckenfuss, *The Right "To Be Let Alone" in the 21st Century*, 11 S.C. LAW., May-June 2000, at 36-37 (advocating use of public disclosure of private facts tort to redress dissemination of private facts through the Internet). Recent articles have also argued for the re-invigoration of the intrusion upon seclusion tort, June Mary Z. Makdisi, *Genetic Privacy: New Intrusion A New Tort?*, 34 CREIGHTON L. REV. 965, 966 (2001); and the false light tort, Nathan E. Ray, Note, *Let There Be False Light: Resisting the Growing Trend Against an Important Tort*, 84 MINN. L. REV. 713 (2000).

22. Warren & Brandeis, *supra* note 9, at 205.

Part IV will discuss what happened notwithstanding the obstacles: the gradual recognition by several state courts and legislatures of a right to privacy, and legal and equitable remedies for invasion of that right. During the twenty years after the article's publication, Brandeis and Warren's arguments were the indisputable catalyst for the creation of a body of privacy law in several states. The judicial opinions from 1891 until 1911 that addressed claims of invasion of an alleged right to privacy almost invariably cited and discussed Brandeis and Warren's article, and most opinions recognizing a right to privacy placed substantial reliance on the article as a form of authority. Moreover, many of the state legislatures that enacted statutes protecting privacy during the same time period were prompted by Brandeis and Warren's arguments. Acceptance of a right to privacy and the invasion of privacy tort was not universal, but opinions by state appellate courts rejecting the new right discussed the article extensively, were usually split decisions that included a strong dissent, and often deferred to the legislature, which in some states acted to fill the void.

By 1911, a small but growing body of common law and statutory law afforded protections from a variety of invasions of privacy. In several states, plaintiffs could obtain injunctions or recover damages, or both. And the defendants in privacy cases were not just intrusive journalists or photographers whose behavior was specifically and so strongly targeted by Brandeis and Warren; rather, the cases represented a wider spectrum of American commerce and life.

Part V seeks to answer the critical question of why the words of Brandeis and Warren achieved the influence that they did. It is not enough to say merely that the two authors presented cogent arguments. They did, but they also had a potent ally for their arguments, an ally that Brandeis himself identified as a great engine of change in the law: public opinion.²³ Professional and popular opinion of the era were overwhelmingly and passionately in support of protecting people's privacy in the face of cramped social conditions and the proliferation of amateur photography and gossip-mongering "yellow" journalism in the newly urban America. Almost unanimously, legal and lay commentators from various scholarly publications, and editorial writers from major mainstream newspapers such as *The New York Times*, condemned intrusions on people's private lives that were perpetrated by the "tabloid" newspapers, as well as by commercial advertisers and amateur photographers. These commentators wrote ardently in support of legal redress for invasion of privacy, lauding the decisions of courts establishing it, and criticizing—sometimes contemptuously—the decisions of courts rejecting it. *The Right to Privacy* achieved its early and generalized influence because its authors harnessed the

23. In a letter to his fiancée, Alice Goldmark, shortly after the article was published, Brandeis wrote that "law is a dead letter without public opinion behind it. But law and public opinion interact—and they are both capable of being made." 1 LETTERS OF LOUIS D. BRANDEIS 97 (Melvin I. Urofsky & David W. Levy eds., 1971) [hereinafter 1 LETTERS] (reprinting letter from Louis D. Brandeis to Alice Goldmark (Dec. 28, 1890)).

public's outrage at the intrusive elements of the newly urban society, and channeled it into a forceful and well-reasoned appeal for change to the judicial and legislative establishment.

II. THE RIGHT TO PRIVACY: A POLEMIC AGAINST YELLOW JOURNALISM AND A COGENT PLEA FOR A CHANGE IN THE LAW

The 1890 article was not the first joint venture that Brandeis and Warren undertook. Indeed, it was not even the first law review article they wrote together.²⁴ Both men graduated from Harvard Law School in 1877, Brandeis graduating first in the class, and Warren second.²⁵ In 1879 the two friends established a law practice together in Boston.²⁶

It is generally accepted that Warren's distaste for the Boston print media and what he perceived to be its intrusions into the social privacy of citizens was the impetus for *The Right to Privacy*.²⁷ Although there is some disagreement among scholars over whether Warren was disturbed about a specific report in a Boston newspaper regarding private affairs of his own family, Warren was, by all accounts, the one who initiated the idea of writing the article.²⁸ There is even some indication that Brandeis may not have been extremely enthusiastic about the venture. When he saw proofs of the article a few weeks before its publication, Brandeis wrote to his fiancée that he had "not looked over all of it yet, but the little I read did not strike me as being as good as I had thought it was."²⁹

Brandeis and Warren began with the premise that the common law had always protected both person and property to some extent. The earliest protections for the person were from physical violations in the nature of a battery; the earliest protections for property were just for corporeal property.³⁰ Then the authors argued that over the course of history, the common law had

24. See Samuel D. Warren, Jr. & Louis D. Brandeis, *The Watuppa Pond Cases*, 2 HARV. L. REV. 195 (1888); Samuel D. Warren & Louis D. Brandeis, *The Law of Ponds*, 3 HARV. L. REV. 1 (1889).

25. MASON, *supra* note 6, at 47, 54.

26. *Id.* at 54-55.

27. See 1 LETTERS, *supra* note 23, at 302-03 ("My own recollection is that it was . . . a specific suggestion of yours, as well as your deepseated abhorrence of the invasions of social privacy, which led to our taking up the inquiry." (quoting Letter from Louis D. Brandeis to Samuel Dennis Warren (April 8, 1905))). Warren wrote back, confirming to Brandeis, "You are right about the genesis of the article." *Id.* at 303 n.3.

28. For a thorough historical analysis of the possible specific intrusions on Warren's private life that prompted the article, see Barron, *supra* note 10, at 895-922.

29. 1 LETTERS, *supra* note 23, at 94-95 (quoting Letter from Louis D. Brandeis to Alice Goldmark (Nov. 29, 1890)); see also *id.* at 100 (describing Brandeis's desire to do an article on "'The Duty of Publicity'—a sort of companion piece to the last one that would really interest me more." (quoting Letter from Louis D. Brandeis to Alice Goldmark (Feb. 26, 1891))).

30. Warren & Brandeis, *supra* note 9, at 193-94.

responded to social, political and economic changes by expanding the protection it affords person and property. Hence, persons were now protected from a threat of a battery (assault), and also from damage to reputation (slander and libel).³¹ Similarly, property protected by the common law expanded to include intangible items, such as products of the mind (copyright, trademarks, good will).³²

The authors then alleged that the recent inventions of "[i]nstantaneous photographs and newspaper enterprise[s]," which were invading the "sacred precincts of private and domestic life," were the latest changes in society that demanded accommodation from the common law.³³ Brandeis and Warren engaged in a page-long diatribe against the newspaper press of the day to help support their argument:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.³⁴

The authors also bemoaned the "unauthorized circulation of portraits"³⁵ and pictures of private persons by commercial photographers and advertisers.³⁶ These alleged invasions of privacy were damaging to the feelings of the person whose private life was invaded, according to Brandeis and Warren.³⁷ The existing cause of action for libel would not suffice, they argued, because such an action only provided a remedy for damage to one's reputation with others in the community and did not focus on direct damage to the feelings of the person aggrieved.³⁸

The authors asserted that, as a foundation, there must first be a legal right to one's privacy. The stepping stone to a right to privacy, Brandeis and Warren asserted, was what they described as a then existing common law right for a person to decide if, when, and to what extent his "thoughts, sentiments, and emotions [would] be communicated to others."³⁹ The authors cited as illustrative of this right some English cases in which injunctions were granted

31. *Id.*

32. *Id.* at 194-95.

33. *Id.* at 195.

34. *Id.* at 196.

35. *Id.* at 195.

36. *Id.* at 195-96.

37. *Id.* at 197.

38. *Id.*

39. *Id.* at 198. Brandeis and Warren pointed out the distinction between this right, which is the right to determine if one's creation *will be* published, and statutory rights from copyright law, which are of value *after* publication. *Id.* at 198-200.

to stop the publishing of someone else's intellectual or artistic property without that person's consent.⁴⁰ Any form of expression—by word, music, painting, or otherwise—was covered by this right.⁴¹ This had generally been said to be an enforcement of a right of property, the authors pointed out, but, relying on more common law from England, they argued that such a basis for the protection was a legal fiction. They declared, "[T]he protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone."⁴² This is the principle that Brandeis and Warren called the "involute personality."⁴³ If the legal "fiction of property" was to be maintained, Brandeis and Warren wrote, it could simply be said that the law should protect one from the gossip-monger who takes that which is the "property" of another—facts about his private life.⁴⁴

While Brandeis and Warren contended that, in some cases, courts of equity should grant injunctions to stop invasions of the right to privacy, the crux of their proposal was that courts of law should recognize a cause of action for damages resulting from invasions of the right.⁴⁵ Their proposed cause of action arose out of one that existed in common law at the time: breach of implied contract, trust, or confidence.⁴⁶ The authors pointed out two English cases in which defendant photographers used copies of photographs of the plaintiffs for their own commercial purposes.⁴⁷ The photographing sessions were done, in both cases, under contract or an understanding that only a certain number of copies were to be made, and only for the plaintiff.⁴⁸ In both cases, the defendants were found to have breached the contract or the confidence.⁴⁹ Brandeis and Warren claimed that now, with the developments in the science of photography allowing sudden snapshots on the sly, it was no longer sufficient to rely on contract law.⁵⁰ Contract law did not allow a remedy against a stranger, such as a prowling newspaper photographer.⁵¹ What they perceived then as the next logical step was to allow a cause of action in tort, for invasion of privacy.⁵²

40. *Id.* at 201-04.

41. *Id.* at 199.

42. *Id.* at 205.

43. *Id.*

44. *Id.* at 204-05.

45. *Id.* at 219.

46. *Id.* at 207-08.

47. *Id.* at 208-09 (discussing *Tuck v. Priestester*, 19 Q.B.D. 639 (1887) and *Pollard v. Photographic Co.*, 40 Ch. Div. 345 (1888)).

48. *Id.*

49. *Id.*

50. *Id.* at 211.

51. *Id.*

52. *Id.* at 210-11.

The authors described a tort for which there was no need to plead special damages; recovery could be had for "injury to feelings."⁵³ The limitations placed on the tort were several. First, the tort would not cover publication of matters of "public or general interest."⁵⁴ This is a reference—albeit an implicit one—to a constitutionally protected zone for the press. Brandeis and Warren carved out a category of public characters who "renounced their right to live their lives screened from public observation," including candidates for, and holders of, public office and others.⁵⁵ The issues surrounding freedom of the press and freedom of speech will be addressed in Part III.

Brandeis and Warren recognized other caveats to the tort as well: (1) the tort would not cover privileged communications, such as those made to a public or legislative body; (2) the right to sue would cease upon publication by the individual or upon his consent to publication; (3) the truth of the private matter invaded and/or disclosed would not provide a defense; and (4) absence of malice would not provide a defense.⁵⁶

Brandeis and Warren did not believe they were arguing for a new right, but rather the expansion of an existing one. The authors maintained that for a century and a half, courts had protected a right to privacy, to a certain extent, under the guise of a right to property and other legal fictions. They explained that "to grant the further protection now suggested would be merely another application of an existing rule."⁵⁷ Notwithstanding the authors' modest assertion, the relevant "existing rules" in nineteenth century American law were in fact long-established principles that would have to be fundamentally altered to create a distinct right to privacy.

III. OBSTACLES TO THE ESTABLISHMENT OF A "RIGHT TO PRIVACY"

A. A Conspicuous Shortage of Precedent

As a concise but illuminating note in the 1981 *Harvard Law Review* pointed out,⁵⁸ the law in nineteenth century America did afford a mishmash of limited protections of people's privacy. The phrase "right of privacy" and similar language certainly were not unknown to the law in 1890. Courts and legislators of the nineteenth century invoked the phrase in a variety of contexts.⁵⁹ However, excepting protections provided through the criminal

53. *Id.* at 219.

54. *Id.* at 214.

55. *Id.* at 215.

56. *Id.* at 216-18.

57. *Id.* at 213 n.1.

58. Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892 (1981).

59. See *id.* at 1895 (citing *De May v. Roberts*, 9 N.W. 146, 149 (Mich. 1881) (involving a trespass case in which an unauthorized medical assistant entered the bedchamber of a woman

law, such as the Fourth Amendment or statutes making eavesdropping a crime, purported protections of privacy in nineteenth century American legislation and common law were merely by-products of equitable and legal remedies designed to address other wrongs.

If, in 1890, one were to seek an injunction from an American court of equity to stop another person's prospective or actual conduct, that court would almost certainly not take the case under consideration if the challenged conduct did not cause injury to *property*.⁶⁰ And if one brought a cause of action for damages in a court of law, that court would almost certainly not take the case under consideration or permit it to reach a jury if the only damages suffered by the plaintiff were a mental or psychological injury.⁶¹ It was only within these parameters that aggrieved parties could obtain redress for invasions of privacy in the nineteenth century in the United States. Thus, in 1890, existing protections for privacy were completely unavailing, for example, for the citizen whose most private and personal affairs were made public by a newspaper or commercial profiteer. As such, there was no legally protected right to privacy before 1890 in the United States.

Nineteenth century protections of privacy, all of which fell short of constituting a meaningful "right to privacy," fell generally into the following five categories:

(1) Libel: Libel was widely recognized before 1890, but truth was a defense to any libel action. Hence, causes of action for libel were unavailing for truthful accounts of private events or facts. In addition, as Brandeis and Warren pointed out, libel was not a remedy for damage to feelings, but for damage to one's reputation among others.⁶²

(2) Fourth Amendment: The sanctity of domestic privacy, or the right to be left alone in one's house, was enshrined in American law and culture throughout the nineteenth century, and dated back to the birth of the republic and the enactment of the Fourth Amendment.⁶³ Similarly indigenous to American law and culture, and also a product of the Fourth Amendment, was the "sanctity of the mails" and private papers, which in the mid nineteenth

in childbirth, thereby infringing on her "right of privacy"); *Newell v. Whitcher*, 53 Vt. 589, 591 (1880) (involving a trespass case in which the court spoke of a houseguest's "right of quiet occupancy and privacy"); *id.* at 1901-02 & n.74 (citing comments of a representative in the 1876 Congressional Record objecting to Congressional subpoenas for telegraph messages as an "invasion of [private citizens'] privacy").

60. See *Corliss v. E. W. Walker Co.*, 57 F. 434, 435 (C.C.D. Mass. 1893) ("The subject-matter of the jurisdiction of a court of equity is civil property, and injury to property, whether actual or prospective, is the foundation on which its jurisdiction rests."); see also *Atkinson v. John E. Doherty & Co.*, 80 N.W. 285, 287 (Mich. 1899) (quoting same passage from *Corliss*).

61. *Chapman v. W. Union Tel. Co.*, 15 S.E. 901, 903-04 (Ga. 1892) ("[T]he law does not yet attempt to guard the peace of mind, the feelings, or the happiness of every one by giving recovery of damages for mental anguish . . .").

62. Warren & Brandeis, *supra* note 9, at 197.

63. Note, *supra* note 58, at 1894-98.

century was the driving force behind legislative efforts to protect the privacy of messages sent by telegraph.⁶⁴ Nonetheless, while a source of significant protection for personal privacy, the Fourth Amendment to this day covers only state action and safeguards against just certain types of intrusions on privacy. Hence, it was not helpful to aggrieved parties, except in a small category of cases.

(3) Tort of Trespass: The civil remedy for an invasion of one's domestic privacy was a trespass action. However, these actions were limited to actual physical invasions of private property.⁶⁵

(4) Criminal Eavesdropping Laws: The only possible legal protections from non-physical intrusions into one's private affairs (for example, the publication of a truthful private fact about a person) were criminal laws of the era outlawing eavesdropping. However, these precursors to today's wiretap laws applied to only a limited category of non-physical invasions, and cases implicating these statutes were rarely prosecuted.⁶⁶

(5) Injunctions preventing publication of private letters: The civil remedy for "invasion" of one's private papers was in equity. Equitable relief was granted by some American courts of the nineteenth century to stop publication of private letters contrary to the sender's wishes.⁶⁷ This was an enforcement of the common law right to which Brandeis and Warren referred in their article, but in support of which they cited only English cases. The injunctions granted in United States courts enjoined publication of written materials only, but did so in some instances regardless of the literary merit or pecuniary value.⁶⁸ Most important, though, is that these injunctions were granted expressly on the basis of the tangible property right the sender or writer had in the physical object: the letter.⁶⁹

Extending the tradition-laden concept of property rights to include a right to privacy was a leap that some courts were not willing to countenance. An illustrative example is the 1899 decision by the Supreme Court of Michigan in *Atkinson v. John E. Doherty & Co.*,⁷⁰ an invasion of privacy case in which the court rejected the arguments of Brandeis and Warren. The court upheld the denial of an injunction to stop the defendant from naming a cigar for the plaintiff or placing his likeness on the cigar label, in large part because the name and likeness of the plaintiff were not, in the court's view, "property," and hence the defendant had not violated any recognized right.⁷¹ The court

64. *Id.* at 1899-1904.

65. *Id.* at 1894-96; Kramer, *supra* note 10, at 705-06.

66. Note, *supra* note 58, at 1896.

67. See, e.g., *Rice v. Williams*, 32 F. 437, 441 (C.C.E.D. Wis. 1887); *Folsom v. Marsh*, 9 F. Cas. 342, 346 (C.C.D. Mass. 1841).

68. See, e.g., *Rice*, 32 F. at 441; *Folsom*, 9 F. Cas. at 346.

69. See, e.g., *Rice*, 32 F. at 441; *Folsom*, 9 F. Cas. at 346.

70. 80 N.W. 285 (Mich. 1899).

71. *Id.* at 288-89.

simply was not willing to eschew precedent and create a new right to privacy on par with property rights.

Likewise, changing the tradition-laden rule that the law did not award damages for psychological injury in the absence of a compensable physical injury was a leap many courts were reluctant to take. A widely cited statement of this rule regarding damages appeared in *Chapman v. Western Union Telegraph Co.*,⁷² in which the Supreme Court of Georgia observed,

The body, reputation, and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But, outside these protected spheres, the law does not yet attempt to guard the peace of mind, the feelings, or the happiness of every one by giving recovery of damages for mental anguish. . . . The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries.⁷³

The *Chapman* case proved to be influential. In *Atkinson*, for example, the Supreme Court of Michigan relied on the principle set forth in *Chapman* as an additional basis for rejecting Brandeis and Warren's proposals.⁷⁴ When the Court of Appeals of New York rejected the invasion of privacy cause of action in 1902, the court also announced the above principle and quoted extensively from *Chapman*.⁷⁵ Warren and Brandeis themselves recognized in their article that the law did not provide damages for "spiritual" injury.⁷⁶ They argued that the law should expand to encompass such a remedy, but that clearly was a tall order given the attitudes of two very prominent state courts of last resort.

B. The Weighty Guns of the First Amendment⁷⁷

With the benefit of several decades of twentieth century First Amendment jurisprudence, some scholars have seen an insoluble conflict between the invasion of privacy tort fashioned by Brandeis and Warren and the First Amendment Freedom of the Press Clause.⁷⁸ They have found that conflict to

72. 15 S.E. 901 (Ga. 1892).

73. *Id.* at 903-04.

74. *Atkinson*, 80 N.W. at 288-89.

75. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 446 (N.Y. 1902)

76. *Warren & Brandeis*, *supra* note 9, at 197.

77. In 1890, and for at least three decades thereafter, it had not been established that the First Amendment applied to the states through the Fourteenth Amendment. *See Hall v. Post*, 372 S.E.2d 711, 713 (N.C. 1988) (collecting cases in which U.S. Supreme Court recognized First Amendment incorporation). However, similar protection was afforded by most state constitutions. *See Corliss v. E. W. Walker Co.*, 57 F. 434, 435 (C.C.D. Mass. 1893) ("Freedom of speech and of the press is secured by the constitution of the United States and the constitutions of most of the states.").

78. *See supra* note 21. In the landmark defamation case of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and in invasion of privacy cases such as *Time, Inc. v. Hill*, 385

be the "greatest shortcoming" of the invasion of privacy remedy for which the two authors argued.⁷⁹ The issue of freedom of the press arises, of course, because of the considerable focus that Brandeis and Warren placed on the print media and its alleged violations of privacy. However, Brandeis and Warren did not concentrate exclusively on the press.⁸⁰ They argued that a tort remedy was needed not just to curb a nosy press, but also to redress the unauthorized dissemination and commercial exploitation of photographs of private persons taken "surreptitiously and without [their] consent."⁸¹ Naturally, this means their proposed remedy had the additional potential of infringing on the right of free *speech*, particularly commercial speech.

How weighty was a defense of freedom of the press or speech in 1890? Brandeis and Warren implicitly acknowledged this concern in their article by crafting the "public interest" or "public character" exception to their tort, which recognized that the press or commercial photographers had to be free to record and report the actions of public characters and officials.⁸² However,

U.S. 374 (1967), *Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308 (1977), and *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), the Supreme Court established the news media's right to publish matters of "public interest" as a nearly insurmountable defense in an invasion of privacy cause of action alleging unreasonable publicity of one's private life (the "public disclosure" or "private facts" tort). See Gormley, *supra* note 11, at 1386-90.

79. See Kramer, *supra* note 10, at 722.

80. Nonetheless, *The Right to Privacy's* admittedly heavy concentration on activities of the press has led some scholars to conclude that Brandeis and Warren were truly only concerned with one of the four invasion of privacy torts we know today. Barron, *supra* note 10, at 879; Kalven, *supra* note 2, at 330. That is, of course, the third of the torts listed in the *Restatement (Second)*: "unreasonable publicity given to the other's private life." RESTATEMENT (SECOND) OF TORTS § 652A (1977). This has become known as the "public disclosure" or "private facts" tort. However, the conduct of photographers (not necessarily affiliated with the print media), of which Brandeis and Warren also complained, could implicate several, if not all, of the remaining three invasion of privacy torts. Indeed, the taking of someone's photograph during a private moment without his or her consent could be accomplished through an "unreasonable intrusion upon the seclusion of another." *Id.* If the perpetrator then used the photograph for commercial gain, he would be engaging in the "appropriation of the other's name or likeness." *Id.* The last of the four torts, the "false light" tort, is not far afield either, as once photographs or portraits of individuals are obtained without consent, they could be used in advertisements to imply that the individual endorsed a certain product. See, e.g., *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905), discussed *infra* Part IV.

81. Warren & Brandeis, *supra* note 9, at 195 n.7. Brandeis and Warren referred to a then-pending case in which a Broadway performer clad in tights was photographed during her performance. *Id.* She sought an injunction to stop the defendants from using the photograph. *Id.* The case, *Manola v. Stevens & Myers*, apparently was never published in a legal reporter. *Id.*

82. See Warren & Brandeis, *supra* note 9, at 214-15. In 1966, torts scholar Harry Kalven went so far as to write that the "public interest" defense recognized by Warren and Brandeis was "so overpowering as virtually to swallow the tort." Kalven, *supra* note 2, at 336. However, one would be hard pressed to criticize Brandeis and Warren for failing to foresee that over a half-

it was not until the latter half of the twentieth century that First Amendment freedom of the press jurisprudence matured to fully address the impact of freedom of the press on invasion of privacy actions.⁸³ It was likewise not until the latter half of the twentieth century that the Supreme Court began to define commercial speech and the subordinate level of protection it would receive under the First Amendment.⁸⁴ A century ago, courts were wont to draw on the treatise of famed nineteenth century judge and constitutional scholar, Thomas Cooley, for a statement of the constitutional protection afforded speech and the press.⁸⁵ Cooley's proclamation on the issue suggests that freedoms of the press and speech were, in essence, lumped together and treated more uniformly than they are today:

The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals.⁸⁶

This potent right of "publication," encompassing the rights of free speech and free press, surfaced as a matter of considerable concern for many state courts confronting invasion of privacy cases of first impression in the late

century after writing their article, the Supreme Court would greatly expand on their "public interest" defense to create a First Amendment "public interest" shield, which effectively permits the print media to publish truthful information about anyone's private life if deemed newsworthy. *See supra* note 78. *See generally* Gormley, *supra* note 11, at 1386-90.

83. *See supra* note 78.

84. Until the 1970s, the Supreme Court's only explicit pronouncement on the degree of protection afforded to commercial speech was in the case of *Valentine v. Chrestensen*, 316 U.S. 52 (1942). In *Chrestensen*, the Court stated that the First Amendment imposes no restraint on government's authority to regulate "purely commercial advertising," accomplished in that case by distributing handbills on a public thoroughfare. 316 U.S. at 54. In a series of opinions beginning in 1973, the Court narrowed the holding of *Chrestensen* and carved out a special category of "commercial speech" that was afforded a significant level of protection, but a level less than that afforded to certain other types of speech. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

85. *See, e.g., Corliss v. E.W. Walker Co.*, 57 F. 434, 435 (C.C.D. Mass. 1893) (citing THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 518 (6th ed. 1890) [hereinafter COOLEY 6th ed.]); *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 73 (Ga. 1905) (citing THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 521 (5th ed. 1883) [hereinafter COOLEY 5th ed.]).

86. COOLEY 5th ed., *supra* note 85, at 521, quoted in *Pavesich*, 50 S.E. at 73; *see also* COOLEY 6th ed., *supra* note 85, at 518, quoted in *Corliss*, 57 F. at 435.

nineteenth and early twentieth centuries.⁸⁷ In 1893, the Federal Circuit Court for the District of Massachusetts denied the plaintiff an injunction to prevent the publishing of a "biographical sketch" of his life.⁸⁸ In so doing, the court relied on freedom of speech and freedom of the press, citing Cooley's treatise.⁸⁹ It also distinguished another ruling in which an injunction was granted to prevent invasion of privacy because the "right of publication" was not at issue in that other case.⁹⁰ Likewise, the Supreme Court of Georgia, when it recognized the invasion of privacy tort in 1905, discussed freedom of speech and of the press extensively and counted it as a significant factor to be weighed in an invasion of privacy case.⁹¹

Thus, the First Amendment and state constitutional protections of free speech and freedom of the press were an impediment to acceptance of *The Right to Privacy*'s proposals. Moreover, due to Brandeis and Warren's heavy concentration on the conduct of the news media and photographers, the door was left open for courts to interpret the article's arguments narrowly in privacy-related cases unrelated to any right of publication—much like limiting the precedential value of a case's holding to its specific facts. However, what several courts of the era in fact did was read Brandeis and Warren's arguments as more of a general endorsement of legal protection of privacy. Those courts then proceeded to establish an invasion of privacy remedy or, in a few cases, respectfully declined to do so but deferred to the states' legislatures.⁹² As will be shown in Part IV, this broad interpretation of Brandeis and Warren's work as a treatise on the general importance of a legal right to privacy—an interpretation not unlike that contained in judicial opinions on privacy-related cases today—appears in several published opinions from the era, some of which did not pertain to a right of publication⁹³ or even concern freedom of speech or freedom of the press at all.⁹⁴

IV. THE INVENTION OF A LEGAL RIGHT AND A TORT

Throughout the published cases from 1891 to 1911 addressing claimed invasions of privacy, in both those accepting the cause of action and in those rejecting it, there is discussion of *The Right to Privacy* and its arguments. Even when a court did not expressly discuss *The Right to Privacy* in its opinion, it still

87. See, e.g., *Pavesich*, 50 S.E. at 73 ("The stumbling block which many have encountered in the way of a recognition of the existence of a right of privacy has been that the recognition of such right would inevitably tend to curtail the liberty of speech and of the press.").

88. *Corliss*, 57 F. at 434.

89. *Id.* at 435 (citing COOLEY 6th ed., *supra* note 85, at 518).

90. *Id.* The other case is *Schuyler v. Curtis*, 15 N.Y.S. 787 (N.Y. Spec. Term 1891), discussed *infra* Part IV.

91. *Pavesich*, 50 S.E. at 74.

92. See *infra* notes 152-55.

93. See, e.g., *Schuyler*, 15 N.Y.S. 787.

94. See, e.g., *Pritchett v. Bd. of Comm'rs*, 85 N.E. 32 (Ind. App. 1908).

acknowledged the article and considered theories and concepts that had been addressed by Brandeis and Warren.⁹⁵ One can also see the obvious influence of the *Right to Privacy* in the statutes that established an invasion of privacy cause of action.⁹⁶

The first published opinion in an invasion of privacy case that cited *The Right to Privacy* was *Schuyler v. Curtis*,⁹⁷ a case in which the defendant was not a member of the press or a commercial publisher. The case before the Supreme Court of New York, Special Term, New York County, was brought by the nephew of the deceased Mrs. George Schuyler.⁹⁸ The defendant intended to erect a statue of Mrs. Schuyler to be exhibited as a "[t]ypical [p]hilanthropist" at the Columbian Exposition in Chicago.⁹⁹ No one in the Schuyler family ever consented to the project.¹⁰⁰ The suit was for a preliminary injunction to stop the defendant from erecting the statue.¹⁰¹ Judge O'Brien granted the injunction, acknowledging that "there is no reported decision which goes to this extent in maintaining the right of privacy, and in that respect this is a novel case."¹⁰² O'Brien expressly relied on the Brandeis-Warren article to justify his extension of the law, quoting three full paragraphs from the article and asserting that it "well deserves and will repay the perusal of every lawyer."¹⁰³ Consistent with Brandeis and Warren's theories, Judge O'Brien assessed whether Schuyler was a "public character" and concluded she was not.¹⁰⁴

In two subsequent appeals, New York intermediate appellate courts upheld the injunction.¹⁰⁵ The suit in *Schuyler* was clearly suggested by *The Right to Privacy*, and the decisions of all three courts were based upon the theories that Brandeis and Warren advanced.¹⁰⁶ Brandeis and Warren "may flatter themselves with having pointed the way for both court and counsel in the Schuyler case," wrote one author of a law review article in 1897.¹⁰⁷

95. See, e.g., *Mackenzie v. Soden Mineral Springs Co.*, 18 N.Y.S. 240, 248-49 (N.Y. Spec. Term 1891).

96. See *infra* notes 128-29 and accompanying text regarding the New York legislature's enactment of a statute creating a right to privacy.

97. 15 N.Y.S. 787 (N.Y. Spec. Term 1891). A full text of this opinion appeared in the journal *Green Bag*. *The Right to Privacy*, 3 GREEN BAG 524 (1891).

98. 15 N.Y.S. at 787.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 788.

103. *Id.*

104. *Id.*

105. *Schuyler v. Curtis*, 19 N.Y.S. 264 (N.Y. Gen. Term 1892); *Schuyler v. Curtis*, 24 N.Y.S. 509 (N.Y. Spec. Term 1893).

106. Adams, *supra* note 3, at 41.

107. Augustus N. Hand, *Schuyler Against Curtis and the Right to Privacy*, 36 AM. LAW REG. & REV. (n.s.) 745, 752 (1897).

In December 1893, an injunction was granted in the case of *Marks v. Jaffa*,¹⁰⁸ in which the defendant, a newspaper, published pictures of two actors and asked readers to vote for the one they found more appealing.¹⁰⁹ The pictures were printed without the actors' consent.¹¹⁰ The *Marks* opinion cited *Schuyler v. Curtis* and *The Right to Privacy* to support its result.¹¹¹ Interestingly, freedom of speech and freedom of the press were not discussed in *Marks*.

The New York Court of Appeals ultimately reversed the granting of the *Schuyler* injunction in 1895,¹¹² but the holding was based on the fact that the statue was to be of a woman who was deceased, and her right of privacy, if any, had died with her.¹¹³ The question of whether New York recognized an invasion of privacy cause of action remained unresolved by the state's highest court. However, Judge (and future United States Supreme Court Justice) Peckham, in dicta, argued strongly in favor of recognizing such a cause of action.¹¹⁴

Seven years later, the courts of New York decided another prominent case, *Roberson v. Rochester Folding Box Co.*¹¹⁵ The defendant, without the knowledge or consent of the plaintiff, printed thousands of lithographic prints of the plaintiff and used them in poster advertisements for flour.¹¹⁶ Above the portrait of the plaintiff—a young woman—were the words "Flour of the Family."¹¹⁷ Copies of the advertisement were posted in stores, warehouses and saloons throughout the United States.¹¹⁸ The plaintiff sought an injunction to restrain the use of the lithographic likeness of her.¹¹⁹ The lower court granted the injunction, which was affirmed by the Supreme Court of New York, Appellate Division, Fourth Department, in an opinion by Judge Rumsey.¹²⁰ In the opinion, Judge Rumsey conceded that the theory upon which the plaintiff relied was new and even questioned if "it can be said that there are any authoritative cases establishing her right to recover in this action."¹²¹ The precedents upon which Rumsey relied partially were *Schuyler* and *Marks*.¹²² Rumsey cited many of the same English cases upon which

108. 26 N.Y.S. 908 (N.Y. City Super. Ct. 1893).

109. *Id.* at 909.

110. *Id.*

111. *Id.*

112. 42 N.E. 22 (N.Y. 1895).

113. *Id.* at 25.

114. *Id.* at 26.

115. 64 N.E. 442 (N.Y. 1902).

116. *Id.* at 442.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Roberson v. Rochester Folding-Box Co.*, 71 N.Y.S. 876 (N.Y. App. Div. 1901).

121. *Id.* at 877.

122. *Id.* at 883.

Brandeis and Warren relied in order to come to the conclusion that equity can protect more than just property rights.¹²³ Then he argued, much as Warren and Brandeis did, that if there must be a right of property at issue, the injunction in the case can rest upon the right of property the plaintiff has in her own body.¹²⁴

The New York Court of Appeals, in an opinion by Chief Judge Parker for a bare 4-3 majority, reversed Judge Rumsey's decision.¹²⁵ The court relied heavily on the lack of precedent for the legal and equitable remedies sought. The court wrote that establishing the suggested tort action would inundate courts with petty, absurd claims of invasion of people's privacy, such as "a comment upon one's looks, conduct, domestic relations or habits."¹²⁶ Judge Gray authored the dissenting opinion, in which he argued that the plaintiff had a property right in her face and any portrait of it.¹²⁷

The decision of New York's highest court was widely criticized and, as will be seen in Part V, produced nothing short of a public outcry. The outcry led directly to the New York legislature's 1903 enactment of a statute making it a misdemeanor to use the name, portrait or picture of anyone for advertising purposes or purposes of trade without that person's consent.¹²⁸ The law also allowed a court to issue an injunction in a civil case to enjoin someone from doing such an act.¹²⁹ The statute, clearly a direct response to the factual scenario in *Roberson*, created a limited scope of protected privacy and was certainly an accommodation of Brandeis and Warren's view. That statute was upheld as constitutional by the New York Court of Appeals¹³⁰ and the United States Supreme Court.¹³¹ It is still on the books in New York today.¹³²

Following the lead of New York, the legislatures of Virginia,¹³³ in 1904, and Utah,¹³⁴ in 1909, adopted very similar statutes. They were also following the lead of California's legislature, which in 1899 had criminalized the non-consensual publication of a person's portrait.¹³⁵

123. *Id.* at 879-80.

124. *Id.* at 880.

125. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

126. *Id.* at 443.

127. *Id.* at 450 (Gray, J., dissenting).

128. 1903 N.Y. Laws 132, § 1.

129. *Id.* § 2.

130. *Rhodes v. Sperry & Hutchinson Co.*, 85 N.E. 1097 (N.Y. 1908).

131. *Sperry & Hutchinson Co. v. Rhodes*, 220 U.S. 502 (1911) (holding that prohibiting a purported owner of another's photograph from using it for commercial gain does not deprive that owner of property without due process of law under the Fourteenth Amendment).

132. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1992 & Supp. 2001).

133. VA. CODE ANN. § 8.01-40 (Michie 2000); *see also* Gormley, *supra* note 11, at 1354.

134. UTAH CODE ANN. § 76-9-406 (1999); UTAH CODE ANN. § 45-3-3 (1998 & Supp. 2000); *see also* Gormley, *supra* note 11, at 1354.

135. *See* Gormley, *supra* note 11, at 1354 n.90. The California provision, made a part of the state's criminal libel laws, was repealed in 1915. *Id.* In 1903, Pennsylvania passed a law

The first court of last resort to adopt the invasion of privacy cause of action was the Supreme Court of Georgia, which, in the 1905 case of *Pavesich v. New England Life Insurance Co.*,¹³⁶ recognized a cause of action in tort almost identical to the action that Brandeis and Warren set forth. The facts involved a non-consensual use of the plaintiff's picture in a newspaper advertisement on which there was a promotional statement falsely attributed to the plaintiff.¹³⁷ The Supreme Court of Georgia found the right to privacy in natural law,¹³⁸ and held that special damages are not necessary to state a cause of action because an infringement on privacy "is a direct invasion of a legal right."¹³⁹ The opinion cited *The Right to Privacy* very favorably and mentioned the authors by name.¹⁴⁰ In fact, Judge Cobb, who wrote the opinion, sent a letter to Brandeis calling his attention to the decision.¹⁴¹ As previously noted, Cobb addressed freedom of speech and of the press, but concluded that publishing another's picture in an advertisement without his consent was not the expression of a sentiment or an idea that should receive constitutional protection.¹⁴² In the following passage, Judge Cobb elevated the newfound right to privacy to a status essentially on par with that of the long-established protections of freedom of speech and of the press:

Those to whom the right to speak and write and print is guaranteed [*sic*] must not abuse this right, nor must one in whom the right of privacy exists abuse this right. The law will no more permit an abuse by the one than by the other. Liberty of speech and of the press is and has been a useful instrument to keep the individual within limits of lawful, decent, and proper conduct; and the right of privacy may be well used within its proper limits to keep those who speak and write and print within the legitimate bounds of the constitutional guaranties [*sic*] of such rights. One may be used as a check upon the other, but neither can be lawfully used for the other's destruction.¹⁴³

The decision in *Pavesich* gave Brandeis and Warren's arguments a tremendous assist because other states' courts now had an opinion from a respected state supreme court on which to rely. As a direct result, within six years, four other states had recognized some form of an invasion of privacy remedy. In 1907, a chancery court in New Jersey enjoined the commercial

allowing the recovery of civil damages for "negligent but nondefamatory newspaper publications." *Id.* at 1354 n.92. In 1907, it was repealed. *Id.* (citing 1907 Pa. Laws 124).

136. 50 S.E. 68 (Ga. 1905).

137. *Id.* at 68-69.

138. *Id.* at 70-71.

139. *Id.* at 73.

140. *Id.* at 74.

141. See 1 LETTERS, *supra* note 23, at 303 ("I thank you for your courtesy in calling my attention to the decision. . . ." (quoting letter from Louis Brandeis to Andrew Jackson Cobb (April 17, 1905))).

142. *Pavesich*, 50 S.E. at 80.

143. *Id.* at 74.

usage of Thomas Edison's name, picture, and certificate on a product of the defendant.¹⁴⁴ The court reviewed the history of cases, including *Pavesich* and *Roberson*, and concluded that *Pavesich* was the better view.¹⁴⁵ In 1908, in a case having nothing to do with the print media or commercial use of another's likeness, an Indiana appellate court recognized a limited right to privacy, granting a new trial on a homeowner's claim of invasion of privacy due to prisoners in a nearby jail being able to see into her home.¹⁴⁶ The court cited *Pavesich* as authority.¹⁴⁷ The Court of Appeals of Kentucky recognized an invasion of privacy tort, specifically for the commercial use of another's picture, in the 1909 case of *Foster-Millburn Co. v. Chinn*.¹⁴⁸ The court cited *Pavesich* as authority for the new cause of action, for which special damages were not necessary.¹⁴⁹ Then, in early 1911, a Missouri intermediate appellate court adopted a very similar cause of action, again not requiring special damages.¹⁵⁰ The Missouri court cited directly to *Pavesich* and *The Right to Privacy* as authority.¹⁵¹

By 1911, the courts in Georgia, New Jersey, Indiana, Kentucky, and Missouri, and the legislatures in California, New York, Utah, and Virginia all had recognized some right to privacy and adopted a means of seeking redress for violations of that right. The rights and remedies established by most of these states were similar to those for which Brandeis and Warren had argued in 1890, but they were not limited in every state to redressing only the misbehavior of the press or commercial publishers. To be sure, some states did limit the cause of action to only non-consensual publication of one's photograph or portrait, and others granted only equitable remedies or adopted only criminal penalties. However, the common link in all of the new causes of action was reliance on the theories posited by Brandeis and Warren in *The Right to Privacy*.

Even the courts that rejected a right to privacy or declined to apply it to the specific facts of a case found the article of considerable importance. As noted above, the Michigan Supreme Court, in *Atkinson*, cited the article, considered the arguments, and deferred to the legislature.¹⁵² The same goes for the New York Court of Appeals in *Roberson*;¹⁵³ the Rhode Island Supreme Court in the 1909 case of *Henry v. Cherry & Webb*, in which the article is quoted extensively;¹⁵⁴ and the Supreme Court of Washington in *Hillman v. Star Publishing Co.*¹⁵⁵

144. *Edison v. Edison Polyform Mfg. Co.*, 67 A. 392, 395 (N.J. Ch. 1907).

145. *Id.* at 394.

146. *Pritchett v. Bd. of Comm'rs*, 85 N.E. 32, 33 (Ind. App. 1908).

147. *Id.* at 35.

148. 120 S.W. 364, 366 (Ky. 1909).

149. *Id.*

150. *Munden v. Harris*, 134 S.W. 1076, 1079 (Mo. Ct. App. 1911).

151. *Id.*

152. *Atkinson v. John E. Doherty & Co.*, 80 N.W. 285, 286 (Mich. 1899).

153. 64 N.E. 442, 443-44 (N.Y. 1902).

154. 73 A. 97, 100 (R.I. 1909).

155. 117 P. 594, 596 (Wash. 1911).

V. "LAW IS A DEAD LETTER WITHOUT PUBLIC OPINION BEHIND IT"

Why did *The Right to Privacy*—a law review article, after all—influence such a change in the law? And why did it attract the dutiful and deferential attention of the courts that declined to adopt an invasion of privacy remedy? The evidence points rather convincingly to a classic engine of change in the law: public opinion. Among the lay public, and in the legal profession of the day, there was a fervid desire for some protection of privacy. This fervor provided the push that the law needed to overcome the obstacles standing in the way of the growth of a privacy right. Brandeis himself wrote shortly after the article was published that "law is a dead letter without public opinion behind it. But law and public opinion interact—and they are both capable of being made."¹⁵⁶ To a great extent, *The Right to Privacy* "made" the law protecting privacy, but it was the social and cultural changes of the industrial era that "made" the public opinion in support of enacting such laws, and that gave the article a potent assist in giving birth to its namesake.

The social and cultural impact of industrialization and urbanization in the last two decades of the nineteenth century reveals a country suffering growing pains. In the ten years before *The Right to Privacy* was published, the number of Americans living in cities with populations over 2,500 rose by seven million.¹⁵⁷ In 1840, there were only twelve cities in the United States with populations over 25,000; by 1890, there were 124.¹⁵⁸ Many people in these new industrial urban centers lived in "overcrowded tenements . . . and teeming slums."¹⁵⁹ The close proximity in which people were forced to live, and the necessity in the big cities of relying on others for many services, made privacy a dwindling commodity.

A parallel development of the industrial era was the rampant growth of newspapers and photojournalism. There were 625 daily newspapers in the United States that began publishing between 1880 and 1889.¹⁶⁰ Most of these newspapers appealed to the new industrial urban workers with titillating gossip and prurient details about the private lives of public figures and members of high society—with accompanying photographs.¹⁶¹ This was "yellow journalism" at its peak.

It was not just Warren and Brandeis who found the press to be meddlesome and worthy of reproach. In an 1886 speech, President Grover Cleveland condemned journalists as publishers of "silly, mean, and cowardly lies that every day are found in the columns of certain newspapers which

156. 1 LETTERS, *supra* note 23, at 97 (quoting Letter from Louis Brandeis to Alice Goldmark (Dec. 28, 1890)).

157. DON R. PEMBER, *PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT 7* (1972).

158. *Id.* at 7-8.

159. *Id.* at 8.

160. *Id.* at 10.

161. *Id.* at 13.

violate every instinct of American manliness, and in ghoulish glee desecrate every sacred relation of private life."¹⁶² It was widely known that President Theodore Roosevelt was very annoyed by photojournalists who followed him and snapped photographs of him during his administration.¹⁶³ Elbridge Adams, who was the attorney for the victorious defendant in the *Roberson* case before the New York Court of Appeals, wrote in a 1905 law review article, "It will probably not be seriously questioned that the American newspaper press . . . has far overstepped the bounds of decency and propriety in its betrayal by word and by picture of the private life of individuals."¹⁶⁴ An article in one publication in 1902 referred to "these days of unbridled and reckless advertising and sensationalism in newspapers."¹⁶⁵

American urbanites of the late nineteenth century were confronted not only with the pervasiveness of professional "yellow journalism," but also with the popularization of amateur photography. The invention and marketing of the hand-held camera in the 1880s, most notably George Eastman's "Kodak" camera,

completely changed the conception of who was to practice photography. Photography was no longer the province of the professional and affluent amateur, but was practiced by thousands and thousands of people. . . . By 1889, the *New York Tribune* was able to report that "[a]mateur photography is rapidly approaching, if it has not already reached, the dignity of a 'craze.' The *New York Times* also reported a remarkable increase in the popularity of phobby."¹⁶⁶

With a portable, easily concealed camera in hand, some of these amateur photographers, like the professional photojournalists of the day, were an opportunistic sort. They responded to the market demand for photographs of prominent people at unguarded moments by snapping them on the sly and then selling them to newspapers or other publications.¹⁶⁷ One scholar's essay on the impact of amateur photography on privacy in New York City argues that the popular fascination with cameras and photographs in the 1880s and 1890s

162. *Id.* at 16 (quoting *Newspaper Espionage*, FORUM, August 1886, at 533).

163. See, e.g., *The Right of Privacy*, N.Y. TIMES, Aug. 23, 1902, at 8.

164. Adams, *supra* note 3, at 50.

165. *The Right of Privacy*, 24 NAT'L CORP. REP. 709 (1902).

166. Robert E. Mensel, "Kodakers Lying in Wait": *Amateur Photography and the Right of Privacy in New York, 1885-1915*, 43 AM. Q. 24, 28 (1991) (citing the *New York Tribune*, Sept. 5, 1889, at 6, and the *New York Times*, Feb. 25, 1889, at 8; May 14, 1889, at 9; May 20, 1889, at 5; Aug. 5, 1889, at 2).

167. *Id.* at 31. Mensel argues that the popularization of cameras and amateur photography in New York City produced a "culture" of photography that prized capturing a subject's "real" feelings, character and personality," traits that could best be recorded when the subject was unaware of the photographer's presence. *Id.* He further argues that because this "culture" of photography necessarily led to intrusions on the privacy of unwitting subjects, it was a potent impetus for the recognition of a right of privacy by the New York legislature. *Id.* at 25, 32.

also produced a very large market for various and sundry pictures of common, everyday members of the working class, and that such pictures were sold at a wide variety of shops throughout New York City, and even dispensed in vending machines.¹⁶⁸

This urban environment of the late nineteenth century, with close living quarters, interdependent citizens, and intrusive journalists and amateur photographers, was conducive to the law stepping in and providing some relief.

A. Opinion of the Legal Community

The opinions of those in the legal profession who wrote during this era reflect the widespread support among lawyers and legal commentators for some remedy for invasion of privacy. Scores of articles appeared in legal periodicals in the two decades after *The Right to Privacy* was published. Articles were written about Brandeis and Warren's work itself, the right to privacy, cases addressing the right to privacy, and the potential remedies for invasion of privacy. Research reveals only two articles from the era expressly and unequivocally opposed to the cause of action suggested by Brandeis and Warren.¹⁶⁹ One of these articles was written by a judge of the New York Court of Appeals, who wrote to defend the *Roberson* decision after it was attacked by *The New York Times*.¹⁷⁰

Legal writers found much to praise in the Brandeis-Warren article itself. The popular legal journal, *Green Bag*, called the article a "very able review" and quoted extensively from it in an article calling for the recognition of a right to privacy.¹⁷¹ In an 1895 article in the *American Law Register and Review*, the author wrote that the Brandeis-Warren piece "admirably and exhaustively discussed" the right to privacy.¹⁷² One lawyer wrote that "excellent legal analogies can be invoked in support of such a right [to privacy] and none of the arguments against it are at all convincing."¹⁷³

In both the more popularly oriented legal periodicals and in the law reviews of the day, there was strong support for court decisions establishing an invasion of privacy remedy and criticism for those rejecting it. As early as 1891, after the first *Schuyler* decision, *Green Bag* characterized the decision granting the injunction and recognizing a right to privacy as "edifying to the

168. *Id.* at 32-33.

169. Hadley, *The Right to Privacy*, 3 Nw. U. L. Rev. 1 (1894); Denis O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902).

170. O'Brien, *supra* note 169, at 438; see *infra* Part V.B.

171. *The Right to Privacy*, 6 GREEN BAG 498, 498 (1894).

172. Samuel Dreher Matlack, *Corliss v. E.W. Walker Co.* *United States Circuit Court, District of Massachusetts*, 43 AM. LAW REG. & REV. 134, 135 (1895).

173. Hand, *supra* note 107, at 759.

profession, and cover[ing] a subject of . . . vital importance."¹⁷⁴ The *Schuyler* lower court opinions upholding the injunction produced a large amount of commentary in legal publications, the majority of which was positive. The legal press also approved of the lower court opinions in *Roberson* that recognized a right to privacy.¹⁷⁵ The same press was very critical of the reversal by the New York Court of Appeals, leading one legal publication to conclude that *every* comment on the decision, save one, had been adverse.¹⁷⁶ The *Yale Law Journal* wrote that the Court of Appeals's decision would only strengthen the claim of the "sensational press of to-day, of a right to pry into and grossly display before the public matters of the most private and personal concern."¹⁷⁷ The *Michigan Law Review* criticized the Washington Supreme Court for its decision rejecting the invasion of privacy tort in the *Hillman* case, concluding that "[t]he demands of yellow journalism hardly should be the final test of legitimate legal publicity."¹⁷⁸

B. Opinion of the Lay Public

Among the lay public, many of whom were the private citizens whose privacy was being curtailed, support was strong for a legal right to privacy and for the theories advanced by Brandeis and Warren. The main gauge of public opinion I have employed—editorial and news coverage in *The New York Times* and a few other popular publications—is, to be sure, not necessarily representative of public sentiment throughout the United States. In addition, when one considers that it is newspapers themselves whose rights might be infringed upon if the invasion of privacy tort were to be accepted, drawing public opinion from the pages of newspapers is, at first blush, suspect. However, in light of the anti-press attitude that was part of the push for a right to privacy, it seems the strong *support* for the right in the editorial pages of *The New York Times* and in other publications, and the repeated coverage of major privacy-related cases in their news pages, are all the more remarkable and all the more telling of the vigor of public opinion.

All four of the *Schuyler* decisions and both of the reported *Roberson* decisions were covered in a news article and/or discussed in an editorial in *The New York Times*.¹⁷⁹ The first *Schuyler* appeal, before the General Term

174. *The Right to Privacy*, 3 GREEN BAG 524, 524 (1891).

175. See, e.g., *The Right of Privacy*, *supra* note 165.

176. *Protection of Privacy*, 25 NAT'L CORP. REP. 183 (1902).

177. Comment, *An Actionable Right of Privacy?* *Roberson v. Rochester Folding Box Co.*, 12 YALE L.J. 35, 37-38 (1902).

178. *Libel—Right of Privacy—Publication of Photograph*, 10 MICH. L. REV. 335 (1912).

179. See N.Y. TIMES, Sept. 27, 1891, at 4; *The Mrs. Schuyler Statute Case: Argument on Appeal Heard in Supreme Court Yesterday*, N.Y. TIMES, May 14, 1892, at 8; *Must Not Build the Statue: Decision in the Mrs. Mary Hamilton Schuyler Matter*, N.Y. TIMES, June 5, 1892, at 12; *Victory for the Schuylers: No Statue of Mary Hamilton Schuyler at the World's Fair*, N.Y. TIMES, Jan. 22, 1893, at 16; *The Right to Privacy*, N.Y. TIMES, Nov. 28, 1895, at 4; *Used*

of the Supreme Court, was considered newsworthy enough to warrant an article summarizing the arguments that both sides were making before the court.¹⁸⁰ This news article made reference to the public opinion regarding the facts of the case: "When the case first came up last year it caused a great deal of comment, and there was a general condemnation of the determination of the [defendant] to carry out the project against the wishes of Mrs. Schuyler's relatives."¹⁸¹

From 1891 to 1902, there were at least five editorials in *The New York Times* regarding decisions in the *Schuyler* or *Roberson* cases.¹⁸² All of them were in favor of recognizing an invasion of privacy cause of action, some of them passionately so. In response to the first *Schuyler* opinion of September 1891, which recognized a right to privacy, the *Times*'s editors commented that it is "a very good thing for society in general, that a court of law should have been invoked with success to vindicate the right to privacy."¹⁸³ The editorials were most impassioned and determined when criticizing the New York Court of Appeals for its decisions adverse to the right to privacy. The *Times* denounced the Court of Appeals's 1895 decision in *Schuyler* (reversing the grant of an injunction to stop erection of the statue of the late Mrs. Schuyler, on the grounds that Mrs. Schuyler's alleged right to privacy did not survive her), declaring one of the duties of "conscientious journalism" to be "[o]verruling the courts of last resort" whenever appropriate.¹⁸⁴ In this particular case, to the editors of the *Times*, it was appropriate.

The *Times*'s strongest venom was reserved for the Court of Appeals's 1902 decision in the *Roberson* case. The *Roberson* decision was criticized heavily in three editorials, one of which provides a revealing look at the public sentiment of the day. In it, the *Times*'s editors bitterly condemned the opinion and launched nothing short of a personal attack on the author of it, Judge Parker:

If that young woman [the plaintiff] had happened to be the daughter of Judge PARKER, we are of the opinion that the incident might have induced his Honor to reconsider with some care the decision that no private person had any rights which the purveyors of publicity were bound to respect.

In this series of events we can see political evolution at work. We can see the effect of public opinion upon law and institutions in the making. For all these things appeal to the decent and unsophisticated human mind as

Her Picture Wrongfully: Miss Roberson Wants Damages Because Her Face Adorns an Advertisement, N.Y. TIMES, July 24, 1901, at 5; *The Right of Privacy*, N.Y. TIMES, July 3, 1902, at 8.

180. *The Mrs. Schuyler Statute Case: Argument on Appeal Heard in Supreme Court Yesterday*, N.Y. TIMES, May 14, 1892, at 8.

181. *Id.*

182. N.Y. TIMES, Sept. 27, 1891, at 4; *The Right to Privacy*, Nov. 28, 1895, at 4; *The Right of Privacy*, N.Y. TIMES, July 3, 1902, at 8; *The Right to Privacy*, Aug. 23, 1902, at 8; *The Right of Privacy*, N.Y. TIMES, Nov. 16, 1902, at 5.

183. N.Y. TIMES, Sept. 27, 1891, at 4.

184. *The Right to Privacy*, N.Y. TIMES, Nov. 28, 1895, at 4.

outrages. And the highest legal authority in the greatest State in the Union assures us that they are outrages for which the law provides no remedy. So much the worse for the law, say all the decent people.¹⁸⁵

In that same editorial, the *Times* boldly asserted that “[w]e happen to know” the Court of Appeals’s *Roberson* decision excited “amazement” among the lay public.¹⁸⁶

Public disapproval of the decision was not limited to New York. The *National Corporation Reporter*, published in Chicago, criticized the decision in one article, calling for legislative action.¹⁸⁷ The attention the decision attracted was widespread. Elbridge Adams wrote three years after the decision that it, in fact, caused discussion of the issue “all over the world.”¹⁸⁸

The appearance of the *New York Times* editorial castigating the New York Court of Appeals for its decision in *Roberson* was enough to cause Court of Appeals Judge Denis O’Brien, who was in the *Roberson* majority, to write an article in the *Columbia Law Review* defending and explaining the decision, which he thought had been misconstrued by the *Times* and by the public.¹⁸⁹ As if that exchange of opinion between a daily newspaper and a state court judge was not remarkable enough, the *New York Times* responded to the response with another editorial.¹⁹⁰ This time, the editors used gentler language but argued again that the decision of the court was wrong. The editorial closed by arguing that “some legislation is needed.”¹⁹¹ As was seen in Part IV, legislation was in fact enacted in 1903, and the statute was certainly a direct response to the public disapproval of the Court of Appeals’s decision. As such, the rapidity with which the statute was passed is reflective of the strength of public sentiment.

Three years after *Roberson*, in an editorial praising the *Pavesich* decision from Georgia, the *Times*’s editors got in a few more digs at the Court of Appeals when they wrote that the conclusion reached by the Supreme Court of Georgia “is that which most open-minded men, including a formidable part of bench and bar, reached in the discussion which the decision of our Court of Appeals, instead of closing, merely opened.”¹⁹²

The *Pavesich* decision of 1905 was naturally a newsworthy event in Georgia as well. The *Atlanta Constitution* ran a lengthy news article about the Georgia Supreme Court’s decision the day after it was issued.¹⁹³ The very large headline read “Used Picture Without Right.”¹⁹⁴

185. *The Right of Privacy*, N.Y. TIMES, August 23, 1902, at 8.

186. *Id.*

187. *The Right of Privacy*, *supra* note 165.

188. Adams, *supra* note 3, at 45.

189. O’Brien, *supra* note 169.

190. *The Right of Privacy*, N.Y. TIMES, Nov. 16, 1902, at 5.

191. *Id.*

192. *The Right of Privacy*, N.Y. TIMES, April 23, 1905, at 8.

193. *Used Picture Without Right*, ATLANTA CONST., March 4, 1905, at 7.

194. *Id.*

It seems beyond dispute that at the dawn of the twentieth century, the American legal community and lay public zealously supported the enactment of legal protection for their privacy. At least in New York, that support was overwhelming and acted as a catalyst for the state's legislative branch to act. It would appear that the public outrage over intrusions into privacy was so fervid that if Warren and Brandeis had not formulated a legal remedy for such intrusions, "somebody else would have had to invent a similar legal concept, by whatever name, in short order."¹⁹⁵ But, it was Warren and Brandeis who keenly recognized the public's distress over the waning of privacy, and they craftily devised and disseminated an original legal remedy to placate that distress. By so doing, they get the credit for spawning a mini-revolution in the law, a revolution that eventually spread throughout the United States and throughout several fields of law to give us a wide-ranging right to privacy.

VI. CONCLUSION

For years to come, when American judges, legal commentators and scholars of many stripes are confronted with cases and issues about someone's right to privacy, many of them will do as their predecessors have been doing for more than a century—begin their analysis with a review of Louis Brandeis and Samuel Warren's *The Right to Privacy* and credit it with having invented the right to privacy. And they will be justified in doing so.

To be sure, Brandeis and Warren did not write an article in 1890 expounding on the need for the myriad protections of privacy the law now provides. Even within their limited focus of fashioning a tort remedy for invasions of privacy, they proposed something far from perfect: a cause of action that bucked well-established precedent, and that had the potential to infringe severely on the First Amendment rights of freedom of the press and of speech.

However, what Brandeis and Warren did so effectively was provide a voice before the law for the public's outrage over intrusions into private lives by gossip-mongering newspapers and commercial and amateur photographers. The "voice" Brandeis and Warren provided was in the form of an incisive and cogently written law review article about the need for the common law to respond to society's new threats to privacy by giving privacy its own legal protection. Accordingly, despite its flaws, Brandeis and Warren's article succeeded in prodding the common law to change and in influencing some legislatures to act. Through its well-reasoned plea for recognition of a new right protecting privacy, Brandeis and Warren's treatise was *the* catalyst and *the* "precedent" for the evolution of such a right, a right that ultimately blossomed into all that we know today as "privacy law."

While the question of whether *The Right to Privacy* had a direct influence on the development of more modern privacy law can be, and has been,

195. Gormley, *supra* note 11, at 1353.

debated by scholars, any attenuation of the article's link to privacy law in the latter part of the twentieth century and early part of the twenty-first century was, and is, the result of the changing needs of societies in new eras. Brandeis and Warren could not have been expected to anticipate society's and law's multitudinous changes in the next century when they wrote in 1890. Brandeis and Warren responded to the needs of the society in the era during which they wrote and lived. To their credit, they did so with profound insight and compelling words that resound still today, even after a century of societal and legal changes. As a result, they should not be denied their place as the inventors of the right to privacy, and their article should not be denied its status as a true classic in legal literature.

