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THE INVENTION OF THE RIGHT TO PRIVACY

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The right to privacy is, as a legal concept, a fairly recent invention. It dates back to a law review article published in December of 1890 by two young Boston lawyers, Samuel Warren and Louis Brandeis.¹ Roscoe Pound described this article as having done "nothing less than add a chapter to our law."² Fewer than ninety years later it is surprising to find that this relatively new chapter in our law appears to have fallen into such disarray that one United States Supreme Court Justice has characterized the right to privacy cases decided by his Court as "defying categorical description."³ Paradoxically, a categorical description of the right to privacy was precisely what Warren and Brandeis invented in 1890. My purpose here is to place in historical perspective the inventors' original conception of the right to privacy. My hope is that careful consideration of this original conception will offer a way out of the current welter of competing right-to-privacy the-

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1. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2. Letter from Roscoe Pound to William Chilton (1916) *quoted in* A. MASON, *BRANDEIS: A FREE MAN'S LIFE* 70 (1956).

3. *Paul v. Davis*, 424 U.S. 693, 713 (1976) (Rehnquist, J.). Justice Rehnquist is not alone in his puzzlement over what, if anything, the right to privacy means. Twenty years earlier Judge Biggs more whimsically likened the law of privacy to a "haystack in a hurricane." *Ettore v. Philco Telev. Broad. Corp.*, 229 F.2d 481, 485 (3d Cir. 1956). Even such a strong advocate of increased protections for the right to privacy as Arthur R. Miller had to admit that privacy law is "a thing of threads and patches" in his seminal work, *THE ASSAULT ON PRIVACY* 169 (1971).

ories.⁴ However, this Article is intended not as a polemic but as an explication.

Warren and Brandeis originally described the right to privacy as an already existing common law right which embodied protections for each individual's "inviolable personality"⁵: "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others . . . fix[ing] the limits of the publicity which shall be given them."⁶ To its inventors, the right to privacy meant that each individual had the right to choose to share or not to share with others information about his or her "private life, habits, acts, and relations."⁷

Warren and Brandeis argued that it was necessary for the legal system to recognize the right to privacy because, when information about an individual's private life is made available to others, it tends to influence and even to injure the very core of an individual's personality—"his estimate of himself."⁸ Warren's and Brandeis' original concept of the right to privacy thus embodied a psychological insight, at that time relatively unexplored, that an individual's personality, especially his or her self-image, can be affected, and sometimes distorted or injured, when information about that individual's private life is made available to other people.⁹ In simplest terms, for Warren and Brandeis the right to privacy was the right of each individual to protect his or her psychological integrity by exercising control over information which both reflected and affected that individual's personality.¹⁰

This right to privacy was not new.¹¹ Warren and Brandeis did not even coin the phrase, "right to privacy,"¹² nor its common soubriquet,

4. Two recent symposia on privacy contain a sampling of the wide variety of theoretical positions. See 12 GA. L. REV. 393 (1978) and 4 PHIL. & PUB. AFF. 295 (1975). It is, of course, possible to take the Humpty Dumpty approach of making the right to privacy mean anything we want it to mean. See L. CARROLL, *THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE*, ch. 6 (1872). However, such an approach tends to be costly in terms of conceptual coherence as well as simple communication and rational discussion about the right to privacy.

5. Warren & Brandeis, *supra* note 1, at 205.

6. *Id.* at 198.

7. *Id.* at 216. It was a right to privacy and not privacy itself that Warren and Brandeis invented. They assumed that privacy itself was a condition, specifically, a state of psychological security characterized by an individual's being in control of reflections of his or her personality in the minds of others. This notion of privacy is discussed in greater detail in relating the right to privacy to the tradition of American individualism at notes 109-39 *infra*.

8. Warren & Brandeis, *supra* note 1, at 197.

9. See generally I. BERLIN, *TWO CONCEPTS OF LIBERTY* (1958); E. GOFFMAN, *BEHAVIOR IN PUBLIC PLACES* (1963); E. GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959); Fried, *Privacy*, 77 YALE L.J. 475 (1968).

10. See Warren & Brandeis, *supra* note 1, at 197. The duality of Warren's and Brandeis' concept of the right to privacy as both a part of and a protection for individual personality is discussed more fully at notes 114-27 *infra*.

11. See Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROB. 272 (1966) for a discussion of the historical development of a right to privacy beginning with Biblical and ancient Greek conceptions.

12. See, e.g., T. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE*

"the right to be let alone."¹³ Indeed, much of the force of their argument for legal recognition and enforcement of the right to privacy derives from their ingenious evocation of a broad historical sweep in which such legal recognition and enforcement appear as natural and inevitable developments.¹⁴ All that Warren and Brandeis ever claimed to have invented was a legal theory which brought into focus a common "right to privacy" denominator already present in a wide variety of legal concepts and precedents from many different areas of the common law. It is for that reason that their article reads as if the authors had literally ransacked every traditional area of the common law they could find—such as contracts, property, trusts, copyright, protection of trade secrets, and torts—in order to pluck out the already existing legal principle underlying all of these various parts of the common law. This underlying legal principle was the right to privacy. Their novel legal theory gave this principle shape and form.

Although primarily intent on establishing the right to privacy as a practical legal protection which could function in the social context of their day, Warren and Brandeis were also participants in what Roscoe Pound called "the organizing, systematizing era after the Civil War."¹⁵ Accordingly, they carefully located the right to privacy within the context of the highly schematic jurisprudence of late nineteenth century American law. They placed the right to privacy within the more general category of the individual's right to be let alone.¹⁶ The right to be let alone was itself part of an even more general right, the right to enjoy life, which was in turn part of the individual's fundamental right to life itself. The right to life was part of the familiar triad of fundamental, inherent, individual rights reflected in the fifth amendment to the United States Constitution: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."¹⁷ Unlike the

UNITED STATES OF AMERICA 210 (1880); Godkin, *The Rights of the Citizen: IV.-To His Own Reputation*, 8 SCRIBNER'S MAGAZINE 58 (July 1890).

13. Thomas Cooley appears to have coined the phrase "the right to be let alone" in his *TREATISE ON THE LAW OF TORTS* (1st ed. 1879): "*Personal immunity*—the right of one's person may be said to be a right of complete immunity; the right to be alone." *Id.* at 29. Warren and Brandeis were careful to credit Cooley with this creation and cited the second edition of the treatise. Warren & Brandeis, *supra* note 1, at 195 n.4.

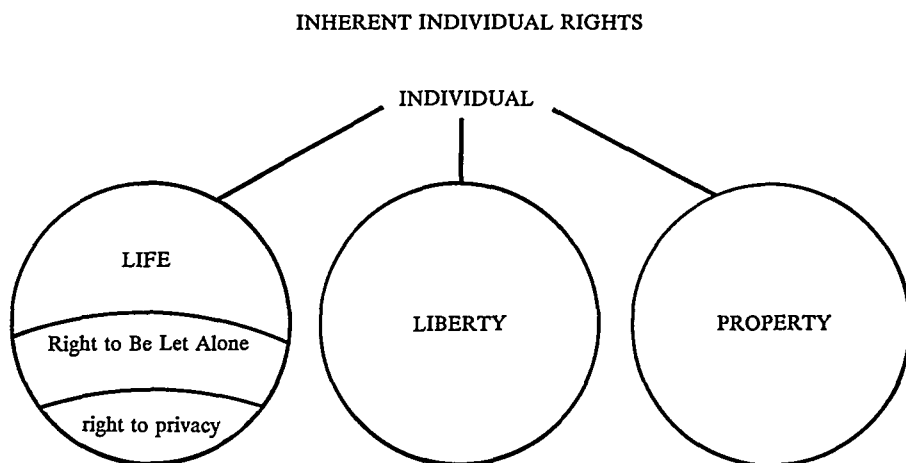
14. Warren and Brandeis deliberately concluded their article with the powerful image of the common law right to privacy in the hands of the embattled individual as an age-old weapon "forged in the slow fire of the centuries, and to-day fitly tempered to his hand." Warren & Brandeis, *supra* note 1, at 220.

15. R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 157 (1938).

16. Warren & Brandeis, *supra* note 1, at 205. "Preventing publication, is merely an instance of . . . the more general right of the individual to be let alone." *Id. Accord*, *Olmstead v. United States*, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting).

17. U.S. CONST. amend. V. The fourteenth amendment later guaranteed this same triad of individual rights against state deprivation. *Id.*, amend. XIV, § 1. See G. WILLS, *INVENTING AMERICA* 229-55 (1978), for an interesting argument regarding the slightly different triad of fundamental individual rights which Thomas Jefferson included in the Declaration of Independence, which states: "We declare these truths to be self evident,—that all men are . . . endowed by their

United States Supreme Court in recent opinions, Warren and Brandeis carefully disassociated the right to privacy both from the right to liberty and from the right to property.¹⁸ According to Warren and Brandeis, the right to liberty "secures extensive civil privileges," but not privacy.¹⁹ They also contrasted the right to property, which comprised the individual's material interests, "every form of possession—intangible as well as tangible," with the right to privacy's concern for spiritual interests.²⁰ A schematic representation of Warren's and Brandeis' placement of their concept of the right to privacy in the corpus juris of individual rights would look like the following:



In seeking to understand the original concept of the right to privacy, it is important to bear in mind just who its inventors were. In 1890, when they published their famous article, *The Right to Privacy*, Samuel D. Warren and Louis D. Brandeis had been friends for at least fifteen years. They had been classmates at the Harvard Law School from which they graduated second and first in their class, respectively. They had been law partners from 1879 to 1889, when the death of War-

Creator with inalienable rights; that among these are rights to life, liberty and the pursuit of happiness."

18. Warren & Brandeis, *supra* note 1, at 193.

19. *Id. Contra, Roe v. Wade*, 410 U.S. 113, 153 (1973).

20. Warren & Brandeis, *supra* note 1, at 193, 205. *Contra, Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977), which appears to treat privacy as a property right on the part of the "human cannon ball" to his performance.

ren's father required Warren to resign from the partnership in order to manage his father's business. The name of their Boston law firm remained "Warren & Brandeis" until 1897.²¹ According to Professor Paul Freund, Brandeis was the primary author of *The Right to Privacy*,²² although the article, like others on which Warren and Brandeis collaborated, bore the authors' names exactly as they appeared in the law firm's name.²³

Samuel D. Warren was the son of a wealthy paper manufacturer, and a member of the well-established commercial elite in Boston. Upon graduation from the Harvard Law School in 1878, Warren began law practice in Boston. A year later he invited Brandeis to return to Boston from Louisville, Kentucky, to join him in establishing a law firm. Warren's marriage to the daughter of Senator Thomas Francis Bayard, Sr. in 1883 further solidified Warren's place among the social elite of Boston, who were favorite targets for the late nineteenth century sensationalist press.²⁴

In contrast, Brandeis was something of an outsider.²⁵ He was the son of Jewish immigrants from Bohemia who, after settling in Louisville, Kentucky, had suffered financial reverses just prior to Louis Brandeis' entry into the Harvard Law School. As a southerner, a man of limited financial means, and a Jew, Brandeis brought a certain amount of objectivity and a more democratic approach to the argument for the right to privacy. Of course, Brandeis also possessed a remarkable creative intelligence which caused Chief Justice Gray of the Supreme Judicial Court of Massachusetts to describe him as "the most ingenious and most original lawyer I ever met."²⁶ In 1879, Brandeis himself mused about "the almost ridiculous pleasure which the discovery or invention of a legal theory gives me."²⁷ His first prominent invention was the right to privacy.

Precisely why Warren and Brandeis chose to write about the right to privacy may never be fully known. According to Mason, Brandeis somewhat wryly commented on the privacy article many years after its publication, observing, "[t]his, like so many of my public activities, I

21. A. MASON, *supra* note 2, at 68.

22. Freund, *Privacy: One Concept or Many*, in NOMOS XIII: PRIVACY 182, 184 (Pennock & Chapman eds. 1971).

23. A. MASON, *supra* note 2, at 650 n.23.

24. *Id.* at 47, 56, 70. See also Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383-84, 423 (1960).

25. Brandeis' biographer, Mason, goes to some pains to point out and repeatedly underscore that during this early period of his professional life, Brandeis was not only accepted but much admired and sought out by Boston society as a brilliant young legal scholar. A MASON, *supra* note 2, at 61-91. Nevertheless, he came from a background far different from that of the Boston Brahmin, Samuel Warren.

26. A. MASON, *supra* note 2, at 61.

27. *Id.* at 59.

did not volunteer to do.”²⁸ In an exchange of correspondence fifteen years after *The Right to Privacy* was published, Warren and Brandeis agreed that it was “a specific suggestion of [Warren’s], as well as [Warren’s] deep-seated abhorrence of the invasions of social privacy, which led to our taking up the inquiry.”²⁹ The immediate catalyst for the article was apparently Warren’s pique at finding intimate details of the Warren family’s home life spread out on the society pages of such newspapers as *The Saturday Evening Gazette*.³⁰

But the authors almost certainly had other motives as well. It is likely that they desired to circulate the firm name, “Warren & Brandeis,” as widely as possible. In addition, at least one of Brandeis’ motives for writing the article may have been his desire to produce novel and interesting copy for the *Harvard Law Review*, then in its fourth year of publication. Among the attractions that brought Brandeis from Louisville to Boston in 1879 was the possibility of assuming the editorship of a legal periodical.³¹ Brandeis aided in the founding of the *Harvard Law Review* in 1887 and became a trustee and the first treasurer of the *Review*. Since Warren and Brandeis had contributed an article to the second and third volumes of the *Harvard Law Review*,³² it appears that Brandeis was interested in providing provocative copy for this fledgling publication.

The popular intellectual press immediately greeted Warren’s and Brandeis’ concept of the right to privacy as an idea whose time had come. The *Atlantic Monthly* commented:

Surely it is impossible that the law, which we are accustomed to regard as an agency for protecting our lives and our pockets, with a perfect disregard of feelings, should stoop to concern itself with the privacy of the individual; and yet nothing less than this appears to be the conclusion of a learned and interesting article in a recent number of the *Harvard Law Review*, entitled *The Right to Privacy*.

It seems that the great doctrine of Development rules not only in biology and theology, but in the law as well; so that whenever, in the long process of civilization, man generates a capacity for being made miserable by his fellows in some new way, the law, after a decent

28. *Id.* at 70.

29. Letter from Brandeis to Warren (April 8, 1905). Warren agreed: “You are right of course about the genesis of the article.” Letter from Warren to Brandeis (April 10, 1905). Both letters are quoted in 1 LETTERS OF LOUIS D. BRANDEIS, 1870-1907: URBAN REFORMER 303 (Urofsky & Levy eds. 1971).

30. A. MASON, *supra* note 2, at 70. Prosser’s suggestion that it was the marriage of Sam Warren’s daughter which precipitated the article appears to have been a product of Prosser’s imagination, since Sam Warren had been married for only seven years at the time the article was written. See Prosser, *supra* note 24, at 423.

31. A. MASON, *supra* note 2, at 54.

32. Warren & Brandeis, *The Law of Ponds*, 3 HARV. L. REV. 1 (1889); Warren & Brandeis, *The Watuppa Pond Cases*, 2 HARV. L. REV. 195 (1888).

interval, steps in to protect him.³³

There was, in short, a sense of general agreement that the time and place were ripe for the invention of a legal theory for enforcement of the right to privacy.³⁴

By 1890, the United States had witnessed enormous increases in population, primarily as the result of immigration.³⁵ The east coast of the United States was becoming ever more densely urbanized. In the hundred years from 1790, when the Bureau of the Census began keeping records, to 1890, the population of the United States had grown from four million to sixty-three million people. The population of urban areas had grown by more than a hundredfold.³⁶ In the decades between the end of the Civil War and 1890, more than eight million people had immigrated to the United States.³⁷ The North American continent was beginning to fill up. In 1890, the very year in which Warren and Brandeis invented the right to privacy, the Superintendent of the Census declared that the frontier was officially closed.³⁸ Social commentators, such as E.L. Godkin, typically remarked that "local life is now much less isolated than it used to be," and decried crowded living conditions in the cities as a major factor leading to growing interference with individual privacy.³⁹ Warren and Brandeis pointed to "[t]he intensity and complexity of life, attendant upon advancing civilization,"⁴⁰ as among the major causes of growing interference with the right to privacy.

In addition, technological progress during the post-Civil War decades had brought to Boston and the rest of the United States "countless, little-noticed revolutions" in the form of a variety of inventions which made the personal lives and personalities of individuals increasingly accessible to large numbers of others, irrespective of acquaintance, social or economic class, or the customary constraints of propriety.⁴¹ Bell invented the telephone in Boston; the first commercial

33. *The Right To Be Let Alone*, 67 ATLANTIC MONTHLY 428-29 (1891).

34. See *The Defense of Privacy*, 66 THE SPECTATOR 200 (February 7, 1891), which noted: Cultivated Americans begin so keenly to hate the system of excessive publicity, which they themselves have been mainly instrumental in producing, that they are discussing ways and means of restricting it by legal penalties. The *Harvard Law Review* is even inclined to hold, though not, we imagine, with any great certainty, that the existing law of Massachusetts, which is in substance English law, would, if fairly interpreted, afford a means of punishing intrusions on private life.

See *Comment*, 3 THE GREEN BAG 524, 525 (1891).

35. O. HANDLIN, *IMMIGRATION AS A FACTOR IN AMERICAN HISTORY* 1 (1959).

36. U.S. CENSUS BUREAU, *STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT* 11-12 (1965).

37. O. HANDLIN, *OUT OF MANY: A STUDY GUIDE TO CULTURAL PLURALISM IN THE UNITED STATES* 9 (1964).

38. F. TURNER, *THE FRONTIER IN AMERICAN HISTORY* 1 (1947).

39. Godkin, *supra* note 12, at 62.

40. Warren & Brandeis, *supra* note 1, at 196.

41. D. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* at xiii (1973).

telephone exchange opened there in 1877, while Warren and Brandeis were students at the Harvard Law School.⁴² By 1890 there were also telegraphs, fairly inexpensive portable cameras, sound recording devices, and better and cheaper methods of making window glass.⁴³ Warren and Brandeis recognized that these advances in technology, coupled with intensified newspaper enterprise, increased the vulnerability of individuals to having their actions, words, images, and personalities communicated without their consent beyond the protected circle of family and chosen friends. In *The Right to Privacy*, Warren and Brandeis echoed the general concern of their contemporaries that "recent inventions and business methods" such as "instantaneous photographs and newspaper enterprise . . . and numerous mechanical devices" threatened to collect and disseminate personal information about individuals to the world at large.⁴⁴ It was their declared intention to outline a "principle which may be invoked to protect the privacy of the individual" against this burgeoning technology—"from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds."⁴⁵ That principle was the right to privacy.

NEWSPAPERIZATION

Henry James coined the term "newspaperization" to describe the main problem Warren and Brandeis designed their theory of the right to privacy to solve.⁴⁶ In *The Right to Privacy*, Warren and Brandeis specifically addressed the evils of unwanted newspaper publicity:

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.⁴⁷

The dismay of Samuel Warren and his family at finding their personal lives minutely detailed in the society columns of such scandal sheets as the *Saturday Evening Gazette* was just one example of the more general

42. J. BROOKS, *TELEPHONE: THE FIRST HUNDRED YEARS* 59-101 *passim* (1976).

43. D. BOORSTIN, *supra* note 41, at 343-44, 374, 387-88, 390-91.

44. Warren & Brandeis, *supra* note 1, at 195.

45. *Id.* at 206.

46. H. JAMES, *Preface to THE REVERBERATOR, MADAME DE MAUVES; A PASSIONATE PILGRIM AND OTHER TALES* xiv (1950).

47. Warren & Brandeis, *supra* note 1, at 196.

contemporary social problem for which Warren and Brandeis designed the right to privacy as a legal solution.

Ironically it was a newspaperman, E.L. Godkin, who appears to have set the stage for Warren's and Brandeis' invention of a legal concept of a right to privacy. Just six months before Warren and Brandeis published *The Right to Privacy*, Godkin had published an article on the same subject in *Scribner's Magazine*.⁴⁸ Although Warren and Brandeis later expressly disavowed the suggestion that the Godkin article had caused them to write about the right to privacy,⁴⁹ Godkin's influence on Warren and Brandeis is apparent in numerous ways. One of the most striking features shared by the two articles is the sweeping panorama of the historical development of human sensitivity, culminating in the right to privacy.⁵⁰ Even some of Brandeis' famed rhetoric about the threats which newspapers pose to individual privacy appears to have been inspired by Godkin's article.⁵¹ But the newspaperman Godkin was unable to suggest any realistic way for an individual to protect his or her privacy. Aside from commenting that "there is certain peculiar fitness in protecting reputation or privacy against libel or intrusion by the cudgel or the horsewhip,"⁵² Godkin could suggest

48. Godkin, *supra* note 12.

49. In response to Elbridge Adams' suggestion in *The Right of Privacy and its Relation to the Law of Libel*, 30 AM. L. REV. 37, 37 (1905), that the Godkin article had caused Warren and Brandeis to write *The Right to Privacy*, Brandeis commented, "[m]y own recollection is that it was not Godkin's article" but Warren's suggestion "which led to our taking up the inquiry [into privacy]." Letter to Sam Warren from Louis Brandeis (April 8, 1905), reprinted in LETTERS OF LOUIS D. BRANDEIS, *supra* note 29, at 303.

50. See Warren & Brandeis, *supra* note 1, at 193-95; Godkin, *supra* note 12, at 59.

51. Compare, for example, Warren's and Brandeis' statement of the newspaperization problem quoted in the text accompanying note 47 *supra*, with Godkin's earlier statement of the same problem:

Privacy is a distinctly modern product. . . .

The advent of the newspapers, or rather of a particular class of newspapers, has made a great change. It has converted curiosity into what economists call an effectual demand, and gossip into a marketable commodity. The old Paul Pry whom our fathers despised and caricatured, and who was roundly kicked and cuffed on the stage for his indiscretions, has become a great wholesale dealer in an article of merchandise for which he finds a ready sale, and by which he frequently makes a fortune. In other words, gossip about private individuals is now printed, and makes its victim, with all his perfections on his head, known hundreds of thousands of miles away from his place of abode; and, what is worst of all, brings to his knowledge exactly what is said about him, with all its details.

Godkin, *supra* note 12, at 65-66. Compare also Godkin's claim that the right to privacy is a natural right:

The right to decide how much knowledge of this personal thought and feeling, and how much knowledge, therefore, of his tastes, and habits, of his own private doings and affairs, and those of his family living under his roof, the public at large shall have, is as much one of his natural rights as his right to decide how he shall eat and drink, what he shall wear, and in what manner he shall pass his leisure hours.

Id. at 65, with Warren's and Brandeis' assertion: "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others." Warren & Brandeis, *supra* note 1, at 198.

52. Godkin, *supra* note 12, at 61.

"only one remedy for the violation of the right to privacy"; that was "attaching social discredit to invasions of it on the part of conductors of the press."⁵³ Warren and Brandeis argued that the common law afforded better means to vindicate the right to privacy against newspaperization through legal enforcement of the right to privacy.

During the 1880's, disgust at excessive newspaper discussion of private matters had grown into a sense of outrage at yellow journalism's encroachments on the private lives of individuals. The writings of Henry James perhaps best illustrate this social phenomenon.⁵⁴ In *The Reverberator*, published in 1888, James created the paradigm of the type of predatory newspaper reporter whose activities prompted Warren and Brandeis to design the right to privacy just two years later:

The society-news of every quarter of the globe, furnished by the prominent members themselves—oh they can be fixed, you'll see!—from day to day and from hour to hour and served up hot at every breakfast table in the United States: that's what the American people are going to have . . . I'm going for the inside view, the choice bits, the chronicle intime, as they say here; what the people wants just what ain't told, and I'm going to tell it. Oh they're bound to have the plums! That's about played out, anyway, the idea of sticking up a sign of "private" and "hands off" and "no thoroughfare" and thinking you can keep the place to yourself. You ain't going to be able any longer to monopolize any fact of general interest, and it ain't going to be possible to keep out anywhere the light of the press. Now what I'm going to do is to set up the biggest lamp yet made and make it shine all over the place. We'll see who's private then, and whose hands are off, and who'll frustrate the People—the People that wants to know. That's a sign of the American People that they do want to know, and it's the sign of George P. Flack . . . that he's going to help them.⁵⁵

Warren's and Brandeis' express purpose in inventing the right to pri-

53. *Id.* at 67.

54. *E.g.*, H. JAMES, *THE BOSTONIANS* (1886 ed.). In this novel, James caricatured a Boston society newspaper reporter:

For this ingenuous son of his age all distinction between the person and the artist had ceased to exist; the writer was personal, the person food for newsboys, and everything and every one were every one's business. All things, with him, referred themselves to print, and print meant simply infinite reporting, a promptitude of announcement, abusive when necessary, or even when not, about his fellow citizens. He poured contumely on their private life, on their personal appearance, with the best conscience in the world.

Id. at 122-23. James also provided a short vignette of the kind of newspaper prying which so annoyed Warren and Brandeis: After a small luncheon where a young woman "discoursed to a dozen matrons and spinsters, selected by her hostess with infinite consideration and many spiritual scruples," a newspaper account of this private luncheon, "presumably from the hand of [a newspaper reporter], who naturally had not been present, appeared with extraordinary promptness in an evening-paper." *Id.* at 126.

55. H. JAMES, *THE REVERBERATOR* 62 (Chas. Scribner's Son ed. 1908).

vacy was the vindication of individual sensibility against precisely these activities and attitudes.

During the closing decades of the nineteenth century an affirmative desire for publicity on the part of some all-too-willing subjects of newspaper accounts compounded the newspaperization problem.⁵⁶ Warren and Brandeis viewed this unnatural appetite for publicity as one of the most pernicious aspects of the "lowering of social standards" which press invasions of privacy caused.⁵⁷ Shortly after *The Right to Privacy* was published, Brandeis wrote to Alice Goldmark, whom he later married:

Our hope is to make people see that invasions of privacy are not necessarily bourne—and then make them ashamed of the pleasure they take in subjecting themselves to such invasions. . . .

The most perhaps that we can accomplish is to start a back-fire, as the woodsmen or the praiemen do.⁵⁸

In *The Right to Privacy*, Warren and Brandeis warned of the "be-littl[ing] and pervert[ing]" influence of newspaperization, "dwarfing the thoughts and aspirations of a people."⁵⁹ Newspaperization tended to create a distorted appetite for more newspaper publicity, which in turn tended to legitimize newspaperization itself, thereby making it even more difficult for individuals of more refined sensibilities to protect their privacy.

Concern about the evils caused by the newspaperization of private life was by no means new in the 1880's and 1890's. Earlier in the nineteenth century, James Fenimore Cooper had been among the best known and most persistent critics of press intrusions on the private

56. In 1888, THE SPECTATOR had addressed this problem of publicity-seekers:

It is quite obvious that many men, and not a few women, are not half-satisfied unless they form the subjects of paragraphs in the papers, of articles in *Truth*, of rejoinders in the *World*, of sketches in *Vanity Fair*, of caricatures in *Punch*, of mysterious allusions anywhere, and that this has gone so far, that some journalists regard with a sort of benevolent self-satisfaction their adroitness in lifting the veil of anonymity which the etiquette of journalism has hitherto drawn over private life, and almost credit themselves with philanthropy for liberating a few human beings from the misfortune of common privacy.

The wish of private persons to be talked about and thought about and written about by people who have no solid facts on which to base their estimate of them, and who must make them the centres of mere gossip, if they make a fuss about them at all, is a diseased wish which has a solely corrupting tendency. Moreover, that kind of self-consciousness is purely intoxicating, and, what is worse, inspires an ever deeper and deeper passion for the intoxicating draught. Publicity without public duty and without conferring on the public any power to verify the discharge of duty by the person thus made spuriously public, is one of the most heady and poisonous of the ingredients of private life.

The Taste for Privacy and Publicity, 61 THE SPECTATOR 782 (1888). See Godkin, *supra* note 12, at 66-67; Godkin, *The Right to Privacy*, 51 NATION 496 (1891).

57. Warren & Brandeis, *supra* note 1, at 196.

58. Letter from Louis Brandeis to Alice Goldmark (December 28, 1890), quoted in LETTERS OF LOUIS B. BRANDEIS, *supra* note 29, at 97.

59. Warren & Brandeis, *supra* note 1, at 196.

lives and sensibilities of individuals: "If newspapers are useful in overthrowing tyrants it is only to establish a tyranny of their own. The press tyrannizes over public men, letters, the arts, the stage, and even over private life."⁶⁰ Cooper's personal anger at what he considered to be the outrageous impertinence of the Whig newspapers, which had published accounts of his private activities, vented itself not only in his writings⁶¹ but also in a tangled web of legal actions against a number of newspapers.⁶² Curiously, one type of legal action used by Cooper to vindicate his right to privacy against newspaperization was no longer available to victims of accurate newspaperization by Warren's and Brandeis' era. This legal action was known as criminal libel, a controversial branch of the law of defamation which by 1890 had virtually withered away as a viable protection for individual privacy.⁶³

The original conception of criminal libel as applied in the courts of the United States in cases such as Cooper's derived from Blackstone's classic description in his *Commentaries on the Laws of England*:

Of a nature very similar to challenges are *libels*, *libelli famosi*, which, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency; but, in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule. The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed

60. J. COOPER, *THE AMERICAN DEMOCRAT* 183 (Penguin ed. 1969) (first published 1838).

61. *E.g.*, J. COOPER, *HOME AS FOUND* 66, 179, 208-11 (1838), in which Cooper mercilessly caricatured Steadfast Dodge as a typical corrupt newspaper editor; and J. COOPER, *THE AMERICAN DEMOCRAT*, *supra* note 60, at 183. Cooper published both in a single year, 1838.

62. *See, e.g.*, *Stone v. Cooper*, 2 Denio 293 (N.Y. Ct. of Err. 1845); *Cooper v. Greeley & McElrath*, 1 Denio, 347 (N.Y. Sup. Ct. 1845); *People v. Webb*, 1 Hill 178 (N.Y. 1841) (a criminal libel action); *Cooper v. Barber*, 24 Wend. 105 (N.Y. Sup. Ct. 1840).

63. *See* FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT 117-37 (H. Nelson ed. 1967). *See also* L. LEVY, *THE LEGACY OF SUPPRESSION* 19, 182-88, 257-58 (1960); Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 *STAN. L. REV.* 789, 789-805 (1964); Rosenberg, *The New Law of Political Libel: A Historical Perspective*, 28 *RUTGERS L. REV.* 1141, 1142-52 (1975). Although the right of privacy bears certain similarities to the earlier law of criminal libel in that both share the purpose of discouraging publication of true information which offends the subject of that information, the two legal theories also differ in a number of important respects. Criminal libel was expressly a government prosecution aimed at preserving the legitimacy of persons in political authority, as well as at preventing public disorder attendant upon self-help revenge for the publication of embarrassing true information. In contrast, Warren's and Brandeis' right to privacy was a private cause of action, aimed not at preserving political authority or preventing breaches of the peace, but at allowing each individual, whether or not in political office, to bring an action for damages to vindicate his or her internal feelings, "his estimate of himself." Based on the more general right of each individual "to be let alone," tort actions for interference with the right to privacy were designed to vindicate the individual's control over the exposure to others of his or her own "inviolable personality." Warren & Brandeis, *supra* note 1, at 197, 205. Nevertheless, the law of criminal libel represented an earlier, related reflection in the legal system of a perceived need for legal sanctions against the publication of true information about private lives and personal relations to individuals.

. . . . It is immaterial with respect to the essence of a libel, whether the matter of it be true or false, since the provocation, and not the falsity, is the thing to be punished criminally.⁶⁴

Not only in colonial America,⁶⁵ but even after the ratification of the first amendment to the United States Constitution and inclusion of similar provisions in the various state constitutions,⁶⁶ this law of criminal libel retained remarkable vitality, particularly in the state courts.⁶⁷

During the nineteenth century, whether these criminal libel actions violated constitutional guarantees of freedom of the press remained a clouded issue, in part because of the unresolved controversy over the Sedition Act of 1789.⁶⁸ The Jeffersonians attacked the Sedition Act, a federal statute embodying a modified version of common law criminal libel, as a patently unconstitutional example of Federalist oppression. But the Sedition Act expired under its own terms in 1801 before the courts could make a definitive ruling on its constitutionality. Fifty

64. W. BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 150-52 (1765) (reprinted 1966) (footnotes omitted).

65. In *The Creation of the American Republic: 1776-1787*, Gordon Wood explains the rather quixotic application of criminal libel law in the Revolutionary War era:

In minds of most Whigs in 1776 individual rights, even the basic civil liberties (such as freedom of the press) that we consider so crucial, possessed little of their modern theoretical relevance when set against the will of the people. This is why, for example, throughout the eighteenth century the Americans could contend for the broadest freedom of speech against the magistracy, while at the same time punishing with a severe strictness any seditious libels against the representatives of the people in the colonial assemblies. Anyone who tried to speak against the interests of the people "should be held in execration . . . Every word, that tends to weaken the hands of the people is a crime of devilish dye; indeed, it is the unpardonable Sin in politics." Thus it was "no Loss of Liberty, that court-minions can complain of, when they are silenced. No man has a right to say a word, which may lame the liberties of his country." It was conceivable to protect the common law liberties of the people themselves. "For who could be more free than the People who representatively exercise supreme Power over themselves?"

G. WOOD, CREATION OF THE AMERICAN REPUBLIC: 1776-1787 at 63 (1969) (footnotes omitted).

66. The first amendment and similar provisions in state constitutions were apparently originally intended to embody the Blackstonian notion that freedom of the press means freedom from prior restraints, not freedom from liability for what has already been printed. See L. LEVY, *supra* note 63, at 183-88. The correspondence between John Adams and Massachusetts Chief Justice William Cushing in 1789, published in 27 MASS. L. QUAR. 12 (1942), substantiates this point.

It is interesting to note that, not content with damages or even criminal penalties for past publications which interfered with the right to privacy, Warren and Brandeis also argued for the prior restraint of injunctive relief, without so much as a reference to traditional guarantees of freedom of the press. They did specifically stipulate that in cases involving oral publications where no special damages could be shown there should be no legal liability for interference with the right to privacy "in the interest of free speech." Warren & Brandeis, *supra* note 1, at 217. They never directly addressed, however, the issue of the other relevant first amendment freedom, freedom of the press. Indirectly, their first proviso that "the right to privacy does not prohibit any publication of matter which is of public or general interest," *id.* at 214, would, as a practical matter, give the news media some breathing room. This proviso is reflected in the newsworthiness privilege currently applied as a limitation on damage actions both for invasions of privacy and for defamation. See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448, 454-55 (1976); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967); *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128 (9th Cir. 1975).

67. Rosenberg, *supra* note 63, at 1143-46, 1148, 1152.

68. 1 Stat. 596. The Sedition Act differed from Blackstonian criminal libel in that it provided for jury determination of law and fact and expressly provided for truth as an affirmative defense. See W. CROSSKEY, 2 POLITICS AND THE CONSTITUTION 767 (1953); L. LEVY, *supra* note 63, at 258-59, 292-93; J. SMITH, FREEDOM'S FETTERS 129-30 (1956).

years later, Joseph Story expressed confidence in the constitutionality of the Sedition Act.⁶⁹ At midcentury, most jurists appear to have been, like Story, reasonably comfortable with the constitutionality of the federal Sedition Act in particular, and criminal libel in general.

Well into the nineteenth century, before statutory and common law acceptance of truth as a defense in defamation actions, criminal libel prosecutions for the publication of true private information flourished in the state courts.⁷⁰ Perhaps the most famous of these state criminal libel actions was *People v. Crosswell*,⁷¹ brought by the State of New York to vindicate the reputation of President Thomas Jefferson. In deciding the appeal, Chancellor Kent held as a matter of common law that proof of the truth of the libel alleged in that case ought to be received as evidence tending to disprove the malicious intent necessary for a finding of criminal liability by the jury.⁷² Kent's opinion is particularly interesting in relation to Warren's and Brandeis' later invention

69. [The Sedition Act's] constitutionality was deliberately affirmed by the courts of law, and in a report made by a committee of congress. It was denied by a considerable number of the states, but affirmed by a majority. . . .

[In a footnote to the text]

It is well known, that the opinions then deliberately given by many professional men, and judges, and legislatures, in favor of the constitutionality of the law, have never been retracted.

J. STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 606 (2d ed. 1851). It was not until over a century later in *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), that the United States Supreme Court declared that the Sedition Act was unconstitutional.

70. See, e.g., *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304 (1826), in which the court foreshadowed Warren's and Brandeis' concern about violations of individual privacy:

No state of society would be more deplorable than that which would admit an indiscriminate right in every citizen to arraign the conduct of every other, before the public, in newspapers, handbills or other modes of publication, not only for crimes, but for faults, foibles, deformities of mind or person, even admitting all such allegations to be true. When the accusation is made by public bodies or officers whose duty it is by law to detect and prosecute offenses, the charge and the investigation are submitted to, and no spirit of revenge is produced; but if private intermeddlers, assuming the character of reformers, should have the right to become public accusers, and when called to account, to defend themselves by breaking into the circle of friends, families, children and domestics, to prove the existence of errors or faults which may have been overlooked or forgiven where they were most injurious, the man who is thus accused without lawful process might be expected to avenge himself by unlawful means, and duels or assassinations would be the common occurrences of the times. Instances are recollected where violence, and even death, has ensued from such proceedings. It was with a wise regard to these evils, that the common law has put a check upon the licentiousness of the press, and the expression of opinion by writing, painting, etc., when the effect and object is to blacken the character of any one, or to disturb his comfort, the public good not being the end and purpose of such publication, or if that is professed, the public peace requiring a different mode of accusation.

Id. at 312-13 (emphasis in original). For the Massachusetts court in 1826 criminal libel was a clearly available legal remedy for the very type of injuries Warren and Brandeis found 65 years later to be unprotected except by the right to privacy.

71. 3 Johns. Cas. 336 (N.Y. 1804). An equally divided court refused to order a new trial to consider evidence on the defense of truth; but before the case was submitted for judgment, the New York legislature passed a statute establishing a statutory truth defense in criminal libel actions. 1805 N.Y. Sess. Laws, ch. 90, § 2. As a result, the court ordered a new trial. 3 Johns. Cas. at 362, 413.

72. 3 Johns. Cas. at 377-79.

of the right to privacy, because Kent insisted that "falsehood" was a "material ingredient [only] in a *public* libel."⁷³ In *private* libels, the cases involving private individuals, which were Warren's and Brandeis' primary concern, Kent insisted that "this doctrine [of truth as a defense] will not go to tolerate libels upon *private* character, . . . or to justify exposing to the public eye one's personal defects or misfortunes."⁷⁴ When James Fenimore Cooper went to court to vindicate his right to privacy against newspaper publicity in the 1830's and 1840's, he naturally used this law of criminal libel.⁷⁵

Even in civil libel actions brought by individuals to recover damages, the truth of the information disseminated was not a good defense during much of the nineteenth century. As late as 1869, in an article cited by Warren and Brandeis regarding the unauthorized circulation of photographs, Judge Jameson suggested that, based in part on an analogy to common law copyright,⁷⁶ civil damages ought to be awarded for the publication of true likenesses under the law of libel:

As furnishing a cause of action in suits for damages, but one or two cases occur to me. One would be, when a photograph clandestinely taken, and representing its original in a ridiculous light, or publishing his personal defects, should be uttered maliciously, to his damage. Such a picture would doubtless be a libel in all our states, and particularly in those in which the old maxim, "The greater the truth, the greater the libel," is still in force.⁷⁷

Gradually during the course of the nineteenth century, the various states accepted the defense of truth in both civil and criminal libel cases.⁷⁸ As a result, by the time Warren and Brandeis wrote about the right to privacy in 1890 they could accurately assert that publication of true information was no longer actionable under the law of defamation.⁷⁹ As a result, by 1890 there was a vacuum, a type of injurious

73. *Id.* at 379.

74. *Id.* at 378 (emphasis supplied). Although not in the context of the truth defense, the modern law of both privacy and defamation draws a similar distinction between "public figures" and ordinary individuals. See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448, 453-55 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-45 (1974); *Time, Inc. v. Hill*, 385 U.S. 374, 387-91 (1967). See Rosenberg, *supra* note 63, for a thorough discussion of the historical development of political libel.

75. E.g., *People v. Webb*, 1 Hill 178 (N.Y. 1841). The United States Supreme Court finally declared a state criminal libel statute unconstitutional in *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

76. Warren and Brandeis suggested a similar analogy. Warren & Brandeis, *supra* note 1, at 198-200. For a similar modern case, see *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 425 (1977).

77. Jameson, *The Legal Relations of Photographs*, 8 AMER. LAW. REG. 1, 8 (1869).

78. The intricate historical interplay of statutory and case law regarding the defense of truth in civil and criminal defamation actions in the various states is thoroughly explored in Franklin, *supra* note 63. See also Rosenberg, *supra* note 63, at 1142-52.

79. Warren & Brandeis, *supra* note 1, at 218. Warren and Brandeis were undoubtedly influenced by Justice Morton's opinion for the Supreme Judicial Court of Massachusetts in *Perry v. Porter*, 124 Mass. 338 (1878), decided in April of the year Warren and Brandeis graduated from

conduct (unconsented publication of true personal information) for which the law provided no remedy. Warren and Brandeis designed the right to privacy to fill this vacuum by providing legal grounds for individuals victimized by the unconsented publication of true personal information to sue the publishers.⁸⁰

Although the right to privacy shared with criminal libel and civil defamation a concern about harm caused by newspaper publicity, Warren and Brandeis did not conceive of the right to privacy as a reincarnation of criminal libel designed to protect the public order from harmful newspaper publicity.⁸¹ Nor did they conceive of the right to privacy as an extension of the civil law of defamation designed to protect the individual's reputation from false publicity.⁸² Rather they invented a new concept which would protect a different and otherwise unprotected legal interest—the individual's control over his or her own personality.

This distinctive legal interest was, Warren and Brandeis argued, an important aspect of the individual's basic right to life itself. But it was not grounds to enforce an absolute ban on all newspaper publicity about all individual's private lives. In fact, Warren and Brandeis expressly called for what they termed "an elasticity," or sliding-scale, imposition of liability for invasion of privacy:

To publish of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly, is an unwarranted, if not an unexampled, infringement of his rights, while to state and comment on the same characteristics found in a would-be congressman could not be regarded as beyond the pale of propriety. . . . Some things all men alike are entitled to keep from popular

the Harvard Law School. The court interpreted Massachusetts statutory law: "The provisions that the truth may be given in evidence, and if proved shall be a sufficient justification, undoubtedly were intended to apply to civil and criminal proceedings." *Id.* at 341-42.

80. In modern tort law, invasion of privacy is customarily distinguished from defamation in that the latter refers only to publication of false assertions about an individual. Professor Freund, *supra* note 22, at 188, suggests a number of reasons for the non-incorporation of the right to privacy into the law of defamation. Probably the most important of these reasons is the preservation of the defense of truth in defamation actions.

81. Warren and Brandeis did, however, suggest that a separate and distinct criminal invasion of privacy statute might be enacted. Warren & Brandeis, *supra* note 1, at 219.

82. Indeed, Warren and Brandeis took great pains to underscore several distinctions between the right to privacy and the law of defamation. In addition to noting that the law of libel and slander applied "merely to prevent *inaccurate* portrayal of private life," Warren and Brandeis emphasized that there were even more fundamental differences between defamation law and the right to privacy. *Id.* at 218 (emphasis supplied).

Libel and slander actions are "in their nature material rather than spiritual" actions vindicating the right to privacy. *Id.* at 197. In addition, Warren and Brandeis insisted that "[t]he principle on which the law of defamation rests, covers . . . a radically different class of effects from" those covered by the right to privacy. *Id.* Defamation "deals only with damage to reputation, with the injury done to the individual in his external relations with the community, by lowering him in the estimation of his fellows." *Id.* Warren and Brandeis contrasted this external focus of defamation with the right to privacy's interior focus on "the effect of the publication upon [the individual's] estimate of himself and upon his own feelings." *Id.*

curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation.⁸³

The right to privacy was, they argued, an already existing common law principle which provided a proper basis for recognizing in each individual not absolute dominion, but some measure of control over the extent to which newspapers and others disseminated personal information about that individual.

THE PRIVATE-PUBLIC DISTINCTION

In inventing a legal theory for protecting the right to privacy, Warren and Brandeis presupposed that there was something ascertainably "private" to protect from being made "public."⁸⁴ In fact, they appear to have envisaged a private sphere of personal matters almost literally and physically set off from matters of public concern. They even described interferences with the right to privacy in spacial terms: Newspapers were "overstepping the obvious bounds of propriety and of decency,"⁸⁵ into the private lives of individuals; such "intrusion upon the domestic circle" threatened to make the Biblical "prediction that what is whispered in the closet shall be proclaimed from the house-tops" a reality.⁸⁶ The right to privacy's function was to prevent the public from encroaching on and eventually swallowing up private matters. At stake, Warren and Brandeis argued, was not just the private-public distinction itself, but the very personality and innermost feelings of the individual.

This aspect of Warren's and Brandeis' argument reflected a long-standing assumption on the part of social, political, and legal commentators that there was a clear line of demarcation between the private and the public. For them, what was private related solely to the individual. What was public related to the community or society at large. This sharp distinction between a category of things private and a category of things public had been part of Anglo-American social and intellectual tradition in colonial America⁸⁷ and well into the nineteenth

83. *Id.* at 215-16.

84. *Id.* at 198-99. In discussing legal enforcement of the right to privacy, this private-public distinction can become something of a semantic puzzle. Interferences with individual privacy can be "private" interferences (*i.e.*, by other individuals) or "public" interferences (*i.e.*, by the government). Warren and Brandeis contemplated both types. *Id.* at 220. Likewise, enforcement of an individual's right to privacy can be vindicated through "private" actions brought by the individual (*e.g.*, in tort) or through "public" actions brought by the government (*e.g.*, criminal prosecutions). Warren and Brandeis argued for both means of enforcement. *Id.* at 219.

85. *Id.* at 196.

86. *Id.* at 195-96.

87. In his comparative study of privacy in colonial New England, David Flaherty concluded, "[t]he New England Colonists' desire for personal privacy was not a novel demand in the New World but a part of their traditional English heritage. The residents of colonial New England

century. For example, in 1838 James Fenimore Cooper described "[t]he duties of station," or the roles of individuals, as "divided into those of political or public station, and those of social, or private station. They are not necessarily connected, and shall be considered separately."⁸⁸

Eighteenth and early nineteenth century legal scholars such as Blackstone⁸⁹ and Kent⁹⁰ also assumed such a clear distinction between private and public categories of law. In his *Commentaries on the Laws of England*, first published in 1765, Blackstone divided the law along private-public lines: "Wrongs also are divisible into first, *private wrongs*, which, being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and secondly, *public wrongs*, which, being a breach of general and public rights, affect the whole community, and are called crimes and misdemeanors."⁹¹ Blackstone's division was commonplace among American legal commentators who routinely designated as "private" matters associated with the individual.⁹² They carefully separated such private matters from public matters, which related to the government or to the wider community. The law treated each of these categories separately.

By the middle of the nineteenth century the precise nature of and criteria for this distinction between private and public legal categories appears to have become a matter of doubt, or at least debate. In England, John Austin devoted one of his *Lectures on Jurisprudence* to the subject "Law, Public and Private."⁹³ Specifically approving Blackstone's private-public categorization,⁹⁴ Austin discussed at length the Roman law distinction between *jus publicum* and *jus privatum*, which he said was "the model or pattern upon which the modern distinctions into public and private law have all of them been formed."⁹⁵ He also pointed out that the civilians and German legal writers similarly insisted on differentiating between private and public law. But Austin

valued privacy." D. FLAHERTY, *PRIVACY IN COLONIAL NEW ENGLAND* 242 (1972). From the architecture, literature, legislation, religious and social customs, public records, and contemporary accounts of life in the New England colonies, Flaherty demonstrates that the North American colonists were in fact concerned about keeping certain aspects of their lives private, *i.e.*, away from the eyes, ears, and minds of the rest of society. *Id.* at 5-9, 248.

88. J. COOPER, *supra* note 60, at 140.

89. 1 W. BLACKSTONE, *supra* note 64, at 118.

90. J. KENT, *COMMENTARIES ON AMERICAN LAW* (1826).

91. 1 W. BLACKSTONE, *supra* note 64, at 118 (emphasis in original).

92. *See, e.g.*, Thomas Cooley's designation of "private wrongs" as those "specially and peculiarly injurious to an individual." T. COOLEY, *supra* note 13, at 7.

93. J. AUSTIN, *LECTURES ON JURISPRUDENCE* 770-87 (3d ed. 1869) (Robert Campbell, ed., based on notes taken by John Stewart Mill). Austin was primarily concerned about the conundrum of where to place "public law," relating to the sovereign and his political subordinates, in the organically related whole of the corpus juris. He argued that the "public law" should be a subcategory under the law of persons. *Id.* at 771.

94. *Id.* at 777.

95. *Id.*

complained that mid-nineteenth century English jurisprudence failed to define clearly the criteria for distinguishing between public law and private law: "Every part of the law is in a certain sense public and every part of it is in a certain sense private also. . . . Nothing can be more varying than the views taken by some modern writers of the distinction between public and private law."⁹⁶ The Warren and Brandeis argument for the right to privacy thus reflected a long jurisprudential tradition which distinguished private from public on the basis of whether the individual or the society at large were involved. Moreover, their argument also reflected a more recently perceived uncertainty about how to separate private from public.

Legal writers were not the only nineteenth century commentators on the precariousness of the private-public distinction whose views are reflected in Warren's and Brandeis' argument for the right to privacy. As early as 1838 James Fenimore Cooper complained, "[t]here is getting to be so much public right, that private right is overshadowed and lost."⁹⁷ In arguing for a sharp delineation between the duties of public station and the duties of private station, Cooper denounced as "another form of oppression practiced by the public, [the public's] arrogating to itself a right to inquire into, and to decide on the private acts of individuals, beyond the cognizance of the laws."⁹⁸ Later in the nineteenth century, Henry James dramatized the social and psychological dangers posed when publicity threatens to swallow up individual privacy. In the five years immediately preceding the Warren and Brandeis article, Henry James published two controversial novels, *The Bostonians*⁹⁹ and *The Reverberator*,¹⁰⁰ both of which focused on the ways in which pub-

96. *Id.* at 776, 780.

97. J. COOPER, *supra* note 60, at 229.

98. *Id.* at 198.

99. *THE BOSTONIANS*, *supra* note 54, even began with the presentation of two contrasting views of privacy: The Bostonian lady was concerned about an "organized privacy . . . so many objects that spoke of habits and tastes." *Id.* at 16. On the other hand, "privacy," for the young lawyer from Mississippi, "consisted entirely in what he called 'laying off.'" *Id.* at 18. Announcing that he was focusing his sharp novelist's eye on the intimate details of the "interiors" of his characters, James portrayed in vivid detail the warping influence of publicity. *Id.* at 16. For example, when the young male lawyer proposed to the female inspirational speaker, he told her that until the *Rational Review* agreed to publish one of his essays, "It didn't seem to me at all clear that there was a place for me in the world." *Id.* at 380. Once he was to be published, the lawyer suddenly became ready to enter into the private world of matrimony. In an example of James' masterful use of the double entendre, the lawyer commented to the woman speaker regarding his about-to-be published essay, "[t]his will seem pitiful to you no doubt, who publish yourself." *Id.* at 379. James presented the inspirational speaker as almost literally publishing herself, as if she were a newspaper article, by making public speeches about her personal views of women's rights. In the end, the lawyer literally took her away from the public, in the form of a large, impatient audience, into the privacy of marriage.

100. *THE REVERBERATOR*, *supra* note 55, was a short novel based on actual observation in Europe. It was a story of classic Jamesian confrontation between American innocence and Old World experience. A naive, young American woman was accepted into the private lives of European society. She then inadvertently caused the most private details of these private lives to be published in an American newspaper, thereby deeply offending the sensibilities of a European

licity could infect and even destroy the intimacies of private life.

Many causes undoubtedly contributed to the late nineteenth century's concern about the breakdown of the private-public distinction.¹⁰¹ Warren and Brandeis specifically mentioned technological progress—"modern enterprise and invention"¹⁰²—as well as the pressures of "advancing civilization."¹⁰³ But there were, in addition, a variety of less tangible causes, including the series of religious revival movements which, as they repeatedly swept across nineteenth century America, gathered up private and public life together in great waves of religious "enthusiasm."¹⁰⁴ As the inner and the outer person, the law and religion, the public and the private all began to be postulated as parts of a world dominated by publicly proclaimed, all-embracing, spiritual belief, jurists and novelists alike began to complain that this kind of public morality was threatening to obliterate the private life of the individual.¹⁰⁵ By the 1890's these forces, together with the rise of an ever more widely distributed sensationalist press, and compounded by population increases and technological inventions, threatened the public-private distinction with obliteration. The private realm of the indi-

family, the Proberts. James took pains to set off the Proberts' "worship of privacy and good manners," against the young American's delight at the thought of appearing in the newspapers. *Id.* at 127, 203. The article, which to the young American was "scanty,—it was 'skimpy'," was, to the ultra-privacy-sensitive Proberts, "two horrible columns of vulgar lies and scandal about our family, . . . about all our affairs," a veritable "flood of impudence" which wreaked havoc on their sensibilities. *Id.* at 142, 165, 197. Old Mr. Probert "seemed ten years older" after the newspaper revelations of details of his family's private life. *Id.* at 148. James even described the Proberts' consideration of legal vindication of their privacy under that "Loi Relative a la Presse, 11 Mai 1868" which Warren and Brandeis cite as precedent for the right to privacy. Warren & Brandeis, *supra* note 1, at 214, n.1.

101. For expression of this concern, see *The Test for Privacy and Publicity*, *supra* note 56; Godkin, *supra* note 12. In *The Rise of Silas Lapham* William Dean Howells presented as among the fatal flaws of the nouveau riche entrepreneur, Silas Lapham's virtually complete failure to distinguish between his public and his private life. For example, Lapham proudly boasted to a newspaper reporter that he named his most deluxe line of paints "Persis" after his wife, and brought it out on her birthday. W. HOWELLS, *THE RISE OF SILAS LAPHAM* (1885).

102. Warren & Brandeis, *supra* note 1, at 196.

103. *Id.*

104. Perry Miller describes the nature of such revivals:

According to Colton, the Revival had gotten so far out of hand that . . . churches had become plague spots of "meddling, tattling, slander, scandal." . . . As Samuel Chapin said in 1829, "the instructor in jurisprudence teaches his pupils not merely rules of procedure but the basic principle that civil society is an ordinance of heaven . . ." it is not a combination simply for the protection of life and property; but it is an association for moral improvement.

P. MILLER, *THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 29, 190 (1965).

105. Cooper, among others, explicitly attributed the loss of "private right" in the United States in part to "the religious discipline that so much influenced the colonists. . . . In communities in which private acts became the subject of public parochial investigation, it followed as a natural consequence, that men lived under the constant corrective of public opinion, however narrow, provincial, or prejudiced." J. COOPER, *supra* note 60, at 229-30. Cooper saw the privacy problem in the late 1830's as in part the result of totalitarian religious fanaticism and in part the natural consequence of the democratic insistence on the overriding rule and rights of the majority, *i.e.*, the public, over the individual. *Id.* at 129-31, 229-30.

vidual literally appeared to be in danger of being swallowed up by the public.

At a time when the conventional line between what was public and what was private appeared to be wavering and uncertain, Warren and Brandeis suggested a simple solution. Since what was private was characterized by its close connection with the individual, it was, they argued, peculiarly appropriate for the individual to decide which matters relating to that individual would be considered private and which were in the public domain.¹⁰⁶ The right to privacy simply offered legal enforcement for such individual decisions regarding the communication of information about that individual's private life.

Warren and Brandeis insisted that the courts already had long experience in enforcing such individual decisions separating public from private matters.¹⁰⁷ In support of this assertion they cited cases from a bewildering variety of traditional legal areas, such as property, nuisance, defamation, common law copyright, the equitable right to prevent publication of the contents of letters, contracts, trusts, the law of trade secrets, and common law protection against eavesdropping. They concluded that, "[t]he cases referred to above show that the common law has for a century and a half protected privacy in certain cases, and to grant the further protection now suggested would be merely another application of an existing rule."¹⁰⁸ They conceded that this right to privacy was not an absolute right. Rather it operated as a presumption of individual self-determination. Each individual should decide for himself or herself which aspects of his or her personal life would be private, kept away from the public concerns of the wider community, and the law should enforce that decision unless there was a good reason not to do so.

INDIVIDUALISM

With its emphasis on the prerogatives of the individual as against those of the wider community, the right to privacy was an unmistakable part of the long tradition of American individualism. Simply on a

106. Warren & Brandeis, *supra* note 1, at 198-99 & n.2.

107. *Id.* at 198-99. The most important of the cases relied upon by Warren and Brandeis as already vindicating this private-public distinction was *Prince Albert v. Strange*, 41 Eng. Rep. 1171 (Ch. 1849). This English case involved an injunction against the publication of certain etchings made by the Prince Consort and Queen Victoria for the royal family and their friends. At trial, Vice-Chancellor Bruce suggested propriety as the legally enforceable line of demarcation between what is properly private and what is properly public; he enforced this distinction as a property right. *Prince Albert v. Strange*, 2 DeGrex & Sm. 652, 697 (1849) (opinion of Knight Bruce, V.C. at trial). What Warren and Brandeis did in their article three decades later was to draw out of this and the many other cases they cited a legal dividing line between what is properly private and what can be made public—the principle of the individual's "inviolable personality," the right to decide for oneself. Warren & Brandeis, *supra* note 1, at 205.

108. Warren & Brandeis, *supra* note 1, at 213 n.1.

linguistic level, "individual" runs like a *leit motif* throughout the Warren and Brandeis article. *The Right to Privacy* opens with the individual in central focus: "That the *individual* shall have full protection in person and in property is a principle as old as the common law."¹⁰⁹ It similarly concludes by focusing on an image of the embattled individual and warning: "Still, the protection of society must come mainly through a recognition of the rights of the *individual*."¹¹⁰ In between, the article develops Warren's and Brandeis' basic premise that "[t]he common law secures to each individual the right to determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."¹¹¹ Deeply rooted in the nineteenth century's classical liberal tradition of individual rights,¹¹² Warren and Brandeis saw the individual as the basic unit of society. They shared Thomas Cooley's conviction that "[t]he maximum of a benefit of which government is capable is attained when individual rights are clearly and accurately defined by impartial laws, which impose on no one any greater restraint than is found essential for securing equivalent rights to all others."¹¹³

The relationships between Warren's and Brandeis' right to privacy and individualism are complicated by their conception of the right to privacy as both an important attribute of, as well as a vital protection for, individualism. It is useful to examine these two aspects separately. As an essential attribute of individualism, the right to privacy was for Warren and Brandeis simply part of what it meant to be an individual. To state this relationship in another way, individualism was defined in part by individual self-control, which included the individual's capacity to keep some matters "private," *i.e.*, under the individual's own control, beyond the reach of the rest of the community.¹¹⁴ To the extent that such private matters as a person's "thoughts, sentiments and emotions . . . personal appearance, sayings, acts, and . . . personal relation[s], domestic or otherwise," were taken from the individual's control and

109. *Id.* at 193 (emphasis supplied).

110. *Id.* at 219-20 (emphasis supplied).

111. *Id.* at 198.

112. Many of these late nineteenth century views about individual rights reflected the popular arguments of the influential British philosopher John Stuart Mill. For example, the notion of an individual's right to be let alone echoes the first maxim of Mill's essay *On Liberty*: "that the individual is not accountable to society for his actions, insofar as these concern the interests of no person but himself. . . . Over himself, over his own body and mind, the individual is sovereign." J. MILL, *ON LIBERTY* 10, 95 (Appleton-Century-Crofts ed. 1947) (1st ed. 1859).

113. T. COOLEY, *supra* note 12, at 6. See also J. STORY, *supra* note 69, at 600 *passim*.

114. Some specific examples of what Warren and Brandeis considered to be private matters include "details of sexual relations" and such a "domestic occurrence" as a man's recording "in a letter to his son, or in his diary, that he did not dine with his wife on a certain day." Warren & Brandeis, *supra* note 1, at 196, 201. They also argued that "to publish of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly" would be an infringement of his right to privacy. *Id.* at 215.

involuntarily given over to society (as by newspaper publication), that person's individualism was diminished.¹¹⁵

This aspect of Warren's and Brandeis' conception of the right to privacy as an essential attribute of individualism reaches back to the tradition of natural, inherent individual rights predating and superior to the legal and political system. Two hundred years earlier, Locke had postulated that the "lives, liberties and estates" of individuals were, as a matter of fundamental natural law, a private preserve, almost literally walled off from public interference.¹¹⁶ Within this private domain, each individual retained absolute rights against outside interferences. A century later, Blackstone reflected this natural rights tradition when he declared that there is a "*residuum* of natural liberty," which includes certain "absolute *rights* of individuals . . . such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it."¹¹⁷

Warren and Brandeis conceived the right of privacy as one of these natural, fundamental rights which made up part of an individual's basic individualism. But the right to privacy also had another aspect. It had a practical operative function as legal protection for the individualism of which it was a part. Warren and Brandeis argued that the legal right of privacy afforded a theoretical basis for securing a variety of legal remedies (including tort damages, injunctive relief, and statutory criminal prosecutions) which would punish and/or prevent interferences with an individual's control over personal information.¹¹⁸ The relationship between the right to privacy as a means for practical legal enforcement of individual control over personal information and

115. *Id.* at 198, 213. This belief that control over personal information was an essential attribute of individual personality, what we would today call individuality, appears to have been widely shared at the time the Warren and Brandeis article was written. An interesting example of this concern is found in an editorial in the *Andover Review*: "The plea made in excuse for such revelations [of diaries and private correspondence] is that the public has a right to all available knowledge of the man, . . . But not to such knowledge as desecrates the personality . . ." *The Confidence of the Dead*, 3 *ANDOVER REVIEW* 275, 278 (1885).

116. J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 71 *passim* (Liberal Arts Press ed. 1952) (1st ed. 1690).

117. 1 W. BLACKSTONE, *supra* note 64, at 119, 125 (emphasis in original). According to Blackstone, these "absolute rights which were vested in [individuals] by the immutable laws of nature," were divided into rights of "personal security," "personal liberty," and "property." *Id.* at 124-34. The "right of personal security" involved "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." *Id.* at 125. This is the right which Cooley denominated the "right to be let alone," which in turn formed part of the basis for Warren's and Brandeis' right to privacy. The right of "personal liberty" involved "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." *Id.* at 130. The right of "property" involved "the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." *Id.* at 134. The Declaration of Independence and the fifth and fourteenth amendments to the United States Constitution echoed similar natural rights postulates.

118. Warren & Brandeis, *supra* note 1, at 219.

the right to privacy as descriptive of an inherent part of individualism was expressly circular; the right to privacy was both means and end. Warren and Brandeis justified legal enforcement of the right to privacy on the basis that one of the natural attributes of being an individual was the ability to control the extent to which one's thoughts, sentiments, emotions and the like are communicated to others.¹¹⁹ At the same time, legal enforcement of the right to privacy also operated as a practical means by which an individual could exercise his or her inherent right of individual self-determination.¹²⁰

A related, additional, interdependent duality built into Warren's and Brandeis' conception of the right to privacy is illuminated by the modern analytic distinction between individuals' positive freedom-to and negative freedom-from.¹²¹ Expressly related to the individual's "right to be let alone," the right to privacy involved the exercise of a kind of negative freedom from outside interference.¹²² In particular, Warren and Brandeis were concerned about freedom from a specific type of interference: not physical interference, but psychological or "spiritual" interference with individual personality caused by the unconsented to collection and publication of personal information. However, this negative freedom aspect of the right to privacy was not simply an end in itself. It was also a means by which the individual could foster and maintain another, positive freedom aspect of the right to privacy: the individual's capacity affirmatively to control his or her own life and personality, in part by controlling information about his or her private life.¹²³ Warren and Brandeis argued that legal enforcement of the right to privacy reinforced the individual's positive "power to fix the limits of the publicity which shall be given" to that individual's personal attributes and attitudes.¹²⁴ This positive freedom assertion of the right to privacy was, they argued, essential to that aspect of individualism which involved the individual's affirmative capacity for self-determination, autonomy, and human dignity. Having the right to privacy was, they argued, a necessary precondition for "robustness of thought and delicacy of feeling . . . enthusiasm . . . generous impulse,"¹²⁵ or in larger terms, "the conduct of a noble life."¹²⁶ Legal enforcement of the right to privacy was ultimately valuable and impor-

119. *Id.* at 214.

120. *Id.* at 219-20.

121. See I. BERLIN, *supra* note 9, at 7-19.

122. Warren & Brandeis, *supra* note 1, at 195.

123. See Bloustein, *Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 1000-07 (1964); Fried, *supra* note 9, at 482-86; Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1414-16 *passim* (1974).

124. Warren & Brandeis, *supra* note 1, at 198.

125. *Id.* at 196.

126. *Id.* at 207.

tant to Warren and Brandeis because it empowered the individual positively to assert control over his or her own personality, to share it with others as the individual chose.¹²⁷

Warren's and Brandeis' insistence on self-determination as an exercise of and means to attain and to protect individual freedom reflected the traditional American emphasis on spiritual independence and self-reliance associated with Emerson, Thoreau, Dickenson, and many other nineteenth century American writers. Theirs was a social and psychological tradition concerned about introspection and solitude, as well as interpersonal relationships. Viewed by its inventors as an important safeguard for the individual's control over his or her spiritual development and intimate relationships with others, the right to privacy fits within this tradition and perhaps only makes sense within that context.

Emphasis on the need to cultivate and to protect individual spiritual life reached back at least as far as the establishment of the North American colonies, settled mostly by Protestants asserting private, individual judgment in such matters as conscience, religion, life-style, and the like.¹²⁸ The notion that the basic integrity of the individual required a private sphere in which the individual would be let alone by the public was a classic literary and philosophical theme in America throughout the nineteenth century. The most influential exponent of this aspect of nineteenth century American individualism was Ralph Waldo Emerson, who had a particularly strong influence on Brandeis as a young man.¹²⁹ Emerson's view of individualism insisted on the integrity and self-definition of each individual.¹³⁰ In order to achieve

127. See Fried, *supra* note 9, at 483.

128. Bernard Bailyn explained that pre-revolutionary Americans tended to see a two-sided world "divided into distinct, contrasting and inately antagonistic spheres: the [public] sphere of power and the [private] sphere of [individual] liberty or right. The one was brutal, ceaselessly active and heedless; the other was delicate, passive and sensitive." B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 57-58 (1967). Warren and Brandeis designed the right to privacy to protect this latter, private sphere of individual liberty from being submerged by the realm of public power.

129. According to Mason, during Brandeis' years as a student at the Harvard Law School (1875-1878) Emerson was Brandeis' favorite author. A. MASON, *supra* note 2, at 39. Among the numerous passages from Emerson's writings in Brandeis' notebook were such aphorisms as, "[i]t is easy in the world to live after the world's opinion; it is easy in solitude to live after our own; but the great man is he who in the midst of a crowd keeps with perfect sweetness the independence of solitude." *Id.* at 38-39. This passage clearly foreshadows Brandeis' emphasis on "social privacy" in his later article with his law partner, Sam Warren. See also LETTERS OF LOUIS D. BRANDEIS, *supra* note 29, at 303.

130. In his famous Phi Beta Kappa address on "The American Scholar," in 1837, Emerson commented:

[A] sign of our times, also marked with an analogous political movement, is the new importance given to the single person. Everything that tends to insulate the individual—to surround him with barriers of natural respect, so that each man shall feel the world is his, and man shall treat with man as a sovereign state with a sovereign state—tends to true union as well as greatness.

and to maintain individual integrity, Emerson suggested self-cultivation of individualism through being "self-relying and self-directed."¹³¹ Half a century later, Warren and Brandeis added to self-reliance the legal enforcement of the right to privacy, as both a protection for and an exercise of Emersonian individualism.

The Emersonian tradition of individualism relied heavily on "solitude" as essential for cultivation of individualism; Emerson rarely mentioned privacy. Warren and Brandeis, however, called for both "solitude *and* privacy" as "essential to the individual."¹³² The relationship between solitude and privacy is important in clearly understanding Warren's and Brandeis' original conception of the right to privacy. For Warren and Brandeis solitude and privacy were related, but not identical, qualities of individualism. Solitude described the individual's state of being either voluntarily or involuntarily alone, without the presence of other individuals. Privacy was often a more social state in which the individual was with only those other persons whom that individual had voluntarily chosen.¹³³ Only if the individual chose to be

R. EMERSON, *The American Scholar*, in *NATURE ADDRESSES AND LECTURES* 112-13 (Riverside ed. 1890). Toward the end of the address Emerson asked rhetorically.

Is it not the chief disgrace in the world, not to be an unit;—not to be reckoned one character;—not to yield that peculiar fruit which each man was created to bear, but to be reckoned in the gross, in the hundred or the thousand, of the party, the section, to which we belong . . . ?

Id. at 114.

131. *Id.* at 101-02. Emerson further elaborated on this recommendation in his essay on self-reliance in 1841: "Society everywhere is in conspiracy against the manhood of every one of its members. . . . What I must do is all that concerns me, not what the people think. . . . Insist on yourself; never imitate. . . . Nothing can bring you peace but yourself." R. EMERSON, *Self-Reliance*, in *ESSAYS* 35, 38, 60-61, 62 (Apollo ed. 1961).

132. Warren & Brandeis, *supra* note 1, at 196. This association of privacy with solitude echoed a convention reaching back at least to the establishment of the colonies. For example, in his essay *Some Fruits of Solitude*, widely circulated in the American colonies beginning in the 1690's, William Penn had included:

"Privacy"

325. Remember the Proverb, Bene Qui Latuit, Bene Vixit, They are happy that live retiredly.

326. If this be true, princes and their grantees, of all men, are the unhappiest; for they live least alone

Quoted in Flaherty, supra note 87, at 13. By the time of the American Revolution, solitude had become associated not only with privacy but with American independence itself. On a monument to the repeal of the Stamp Act in 1776 appeared these words: "FAIR LIBERTY thou lovely Goddess here. Have we not woo'd thee, won thee long . . . and led thee smiling to this SOLITUDE." "A view of the Obelisk Erected Under Liberty Tree in Boston on the Rejoicings for the Repeal of the Stamp Act," line engraving by Paul Revere (1766), in the archives of the Boston Athenaeum.

133. Dickinson expressed this distinction between solitude and privacy poetically:

There is a solitude of space
A solitude of sea
A solitude of death, but these
Society shall be
compared with that profounder site
That polar privacy
A soul admitted to itself—
Finite infinity.

THE COMPLETE POEMS OF EMILY DICKINSON 691 (Johnson ed. 1960) (1st ed. 1914). In this poem

with no other persons would privacy and solitude coincide. Emily Dickenson captured this crucial element of individual choice in a poem published in Boston just a month before Warren and Brandeis published *The Right to Privacy*:

The soul selects her own society
Then shuts the door;
On her divine majority
Obtrude no more.¹³⁴

Insistence on the unfettered discretion of each individual to choose his or her own circle of intimacy and then to close the door to outside interference was precisely the essence of Warren's and Brandeis' conception of the right to privacy.¹³⁵

Warren and Brandeis recognized that the individual choice to share one's personality only with selected other individuals could be exercised by following the example of Thoreau¹³⁶ who went out to Walden Pond, a "vast range and circuit, some square miles of unfrequented forest, for my privacy, abandoned to me by men."¹³⁷ Walden afforded Thoreau a vital opportunity to discover and to cultivate his own individuality away from the reports and opinions of the rest of society. As an additional and more practical alternative to Thoreau's voluntary solitude, Warren and Brandeis suggested that the legal right to privacy was a means to protect individualism against "the complexity of life, attendant upon advancing civilization."¹³⁸ This right to privacy had the added advantage of allowing the individual to protect his or her "inviolable personality" while continuing to live in society. In *Society and Solitude* Emerson had warned, "[s]olitude is impracticable, and society fatal."¹³⁹ What was needed was a pragmatic balance. Twenty years later, Warren and Brandeis argued that the right to pri-

Dickenson's view appears to be that an individual had solitude when he or she was alone; but privacy was achieved only when the individual had voluntarily excluded all individuals except herself or himself. Warren's and Brandeis' view of social privacy was wider in that it assumed that individuals would choose to include selected others. Warren & Brandeis, *supra* note 1, at 196, 201, 207, 213.

134. POEMS BY EMILY DICKENSON (1890), *quoted in* EMILY DICKENSON 17-18 (J.M. Brinnen ed. 1960).

135. Warren & Brandeis, *supra* note 1, at 220. The poet and the legal writers even shared the common metaphor of the individual protecting the private sphere by shutting the door against intrusion. The critical factor for both the poet and the lawyers was individual choice whether and on what terms to allow access to individual and personal information.

136. Thoreau created the image which has come virtually to stand for individualism: "If a man does not keep pace with his companions, perhaps it is because he hears a different drummer. Let him step to the music which he hears, however measured or far away." H. THOREAU, WALDEN 215 (Norton Critical ed. 1966). In a sense, what Warren and Brandeis did in their 1890 law review article was to outline some legal remedies which would vindicate the right of each individual marcher to follow his different drummer in privacy, untrammelled by societal comment.

137. H. THOREAU, *supra* note 136, at 87.

138. Warren & Brandeis, *supra* note 1, at 196. Brandeis later termed this protection for individualism "social privacy." LETTERS OF LOUIS D. BRANDEIS, *supra* note 29, at 303.

139. R. EMERSON, SOCIETY AND SOLITUDE 20 (Riverside ed. 1870).

vacy afforded just such a balance between society and solitude, by affording individuals the means to control themselves and the communication of their personal lives and attributes to the rest of society without seceding from that society.

LIMITED GOVERNMENT

Although it was almost forty years before Brandeis discussed in detail the operation of the right to privacy to protect the individual from the "constituted authority" of the government,¹⁴⁰ his original conception of the right to privacy clearly contemplated such an application. Indeed, Warren and Brandeis extrapolated from what they assumed were already accepted privacy protections against interference by the government, the legitimacy of enforcing the right to privacy against interferences by newspaper reporters and other nongovernmental purveyors of personal information: "The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?"¹⁴¹ Warren and Brandeis saw the right to privacy as facing in two directions to ward off both governmental and nongovernmental interferences with the individual's decisions about what aspects of his or her personality would be made public or kept private.

Warren's and Brandeis' vision of a two-sided legal protection for the individual's private sphere reflected the views of most nineteenth century legal writers. For example, in 1826 Chancellor Kent had described the right to personal security as protecting the individual both from the government and from other individuals.¹⁴² In discussing the law of "unlawful searches, etc." in his *Treatise on the Law of Torts*, Thomas Cooley typically insisted that the individual had a right to protection against both governmental and nongovernmental invasions of privacy:

In their origin these provisions had in view the mischiefs of such oppressive action by the government or its officers, as the seizing of

140. *Olmstead v. United States*, 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting).

141. Warren & Brandeis, *supra* note 1, at 220.

142. Kent wrote:

While the personal security of every citizen is protected from lawless violence by the arm of government and the terrors of the penal code, and while it is equally guarded from unjust and tyrannical proceedings on the part of the government itself, by the provisions to which we have referred, every person is also entitled to the preventive arm of the magistrate, as a further protection from threatened or impending danger; and, on reasonable cause being shown, he may require his adversary to be bound to keep the peace.

J. KENT, 2 COMMENTARIES ON AMERICAN LAW 15-16 (12th ed. O.W. Holmes, Jr. ed. 1873) (1st ed. 1826).

papers to obtain the evidence of intended crimes; but their protection goes much beyond such cases; it justly assumes that a man may have secrets of business, of friendship, or of more tender sentiments, to which his books, papers, or letters may bear testimony, but with which the public have no concern; that he may even have secrets of shame which are so exclusively his own concern that others have no right to pry into or to discuss them.¹⁴³

Aside from such general comments, for the most part nineteenth century legal scholars tended to discuss separately, often in separate treatises,¹⁴⁴ the operation of the right to privacy against governmental interferences on the one hand, and against non-governmental interferences on the other.

Up until Warren and Brandeis published *The Right to Privacy*, most of the legal discussion had focused on the individual's right to privacy as a limitation on governmental interferences with individual freedom. At the time the Constitution was adopted, Hamiltonian notions of limited government held that there was no need to expressly forbid governmental invasions of individual rights such as privacy, because the government had not been given the power to invade individual privacy.¹⁴⁵ During the first half of the nineteenth century, legal writers generally relied on these notions of inherent limitations on government power as the primary protection against governmental invasions of individual privacy.¹⁴⁶ By midcentury, however, writers had begun to devote substantial portions of their constitutional law treatises to the Bill of Rights' specific protections for individual privacy.¹⁴⁷ For example, in his *Treatise on Constitutional Limitations*, Cooley focused

143. T. COOLEY, *supra* note 13, at 294. In his treatise on constitutional limitations, Cooley similarly argued that the individual's right to privacy against government interference could be extrapolated from the general right of "every man under the protection of the law [to] close the door of his habitation, and defend his privacy in it . . . against private individuals." T. COOLEY, *A TREATISE ON CONSTITUTIONAL LIMITATIONS* 210 (1868).

144. See, e.g., T. COOLEY, *supra* notes 12 & 13; J. STORY, *supra* note 69.

145. In the *Federalist Papers* Alexander Hamilton expressed the widely shared notion that individuals' rights were independent of the Constitution under which "in strictness the people surrender nothing; and as they retain everything they have no need of particular reservations" of private rights. THE FEDERALIST No. 84 at 439 (A. Hamilton) (Everyman's Library ed. 1971).

146. Typically, these writers would only secondarily refer to the various more specific limitations on government imposed by the Bill of Rights, almost as if these guarantees were fail-safe protections. For example, Justice Joseph Story leaned heavily on Hamiltonian notions of a government of express, limited powers:

In our country, in strictness, the people surrender nothing; and as they retain every thing, they have no need of particular reservations. "We, the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America"—is a better recognition of popular rights, than volumes of those aphorisms which make a principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics, than in a constitution of government.

J. STORY, *supra* note 69, at 585 (citing THE FEDERALIST No. 84) (footnotes omitted) (emphasis in original).

147. See, e.g., F. LIEBER, ON CIVIL LIBERTY AND SELF GOVERNMENT (1853); 2 J. KENT, *supra* note 142.

specifically on third, fourth, and fifth amendment protections for individual privacy.¹⁴⁸ He even suggested a privacy hinge joining the fourth and fifth amendments: "it is not allowable to invade one's privacy for the sole purpose of obtaining evidence against him."¹⁴⁹

In 1888, just two years before Warren and Brandeis published *The Right to Privacy*, the United States Supreme Court expressly adopted Cooley's analysis of direct fourth and fifth amendment protections against governmental invasions of individual privacy. In *Boyd v. United States*,¹⁵⁰ Judge Bradley ruled:

[T]he very essence of constitutional liberty and security [is affected by] all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . .¹⁵¹

Although Warren and Brandeis did not directly refer to *Boyd v. United States*, their argument presupposed *Boyd*'s ruling that the government was constrained to respect "the sanctity of a man's home and the privacies of life."¹⁵² They simply argued that nongovernmental interferences such as the "idle or prurient curiosity" of other persons, especially the newspapers, are similarly proscribed.¹⁵³ What the law protected in both types of cases was the "general right to privacy" which embodied each individual's "right of determining, ordinarily, to

148. T. COOLEY, *supra* note 143, at 578.

149. *Id.* at 305. Cooley explored at some length the meaning of and relationship between fourth and fifth amendment protections:

it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons; and all this under the direction of a mere ministerial officer, who brings with him such assistants as he pleases, and who will select them more often with reference to physical strength and courage than to their sensitive regard to the rights and feelings of others.

Id. at 375. Echoes of this statement reappear in *Boyd v. United States*, 116 U.S. 616, 630 (1886), and in *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting). In a footnote, Cooley went on to explain, "[t]he fourth amendment to the Constitution of the United States, found also in many State constitutions, would clearly preclude the seizure of one's papers in order to obtain evidence against him; and the spirit of the fifth amendment—that no person shall be compelled in a criminal case to give evidence against himself—would also forbid such seizure."

T. COOLEY, *supra* note 143, at 374 n.4.

150. *Boyd v. United States*, 116 U.S. 616, 630 (1886). In this case, the Court held unconstitutional a federal statute which required the production of private books and papers in civil cases involving disputed custom duties, on pain of forfeiture of the goods in question. In 1976, the United States Supreme Court declared that *Boyd* has "not stood the test of time." *Fisher v. United States*, 425 U.S. 391, 407 (1976).

151. *Boyd v. United States*, 116 U.S. 616, 630 (1886). In his opinion for the Court, Justice Bradley expressly adopted Cooley's view of fourth and fifth amendment protections against governmental invasions of individual privacy, just as Warren and Brandeis later adopted Cooley's notion of the "right to be let alone." *Id.* at 630.

152. *Id.*

153. Warren & Brandeis, *supra* note 1, at 220.

what extent his thoughts, sentiments, and emotions shall be communicated to others."¹⁵⁴

NEITHER LAISSEZ-FAIRE NOR ELITISM

Warren's and Brandeis' right to privacy was not, of course, the only fruit of nineteenth century American individualism. For example, both the elitist doctrines of social Darwinism and the *laissez faire* doctrines of economic substantive due process had already developed out of the tradition of American individualism by the time Warren and Brandeis wrote about the right to privacy in 1890. Comparison of Warren's and Brandeis' original conception of the right to privacy with the two contemporaneous doctrines of *laissez faire* and elitism helps more clearly to define Warren's and Brandeis' concept by illuminating a number of implications and applications which Warren and Brandeis never intended the right to privacy to have.

The *laissez faire* doctrine of economic substantive due process construed the due process clauses of the fifth and fourteenth amendments as protections for economic enterprise from interference by government regulations. It did so in the name of individualism—in particular, individual rights to liberty and property. In the very year Warren and Brandeis published their argument for the right to privacy, the United States Supreme Court adopted this doctrine in *Chicago, Milwaukee & St. Paul Railway v. Minnesota*.¹⁵⁵ Earlier, there had been a number of influential state court rulings which adopted the language of individualism in imposing this *laissez faire* doctrine.¹⁵⁶ Both Cooley and Tiedeman, two of the most influential constitutional scholars in the post-Civil War period, included in their treatises on the limitations of government power similar justifications of economic substantive due

154. *Id.* at 198.

155. 134 U.S. 418 (1890).

156. For example, in 1885 the New York Court of Appeals had struck down a law prohibiting the manufacture of cigars in tenement houses as violating due process guarantees of liberty and property precisely because such a regulation interfered with individualism:

[Such regulation] interferes with the profitable and free use of his property by the owner or lessee of a tenement-house who is a cigar-maker, and trammels him in the application of his industry and the disposition of his labor, and thus, in a strictly legitimate sense, it arbitrarily deprives him of his property and some portion of his personal liberty.

In re Jacobs, 98 N.Y. 120, 127 (N.Y. Ct. App. 1885). Similarly, in 1886 the Pennsylvania Supreme Court had held unconstitutional a statute requiring certain companies to pay cash wages, instead of rights to purchase at company stores, as an infringement of the employee's basic individualism:

[I]t is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States.

He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from doing so is an infringement of his constitutional privileges, and consequently vicious and void.

Godcharles & Co. v. Wigeman, 113 Pa. 431, 437 (1886).

process as a necessary protection for individualism.¹⁵⁷

These and other proponents of economic substantive due process were concerned about the individual's right affirmatively and publicly to assert himself through economic activities. They saw governmental regulation of such activities as unconstitutional interference with individual rights to liberty and property. Based on the theories of classical *laissez-faire* economics¹⁵⁸ and the elitist doctrines of the social Darwinists, discussed below, economic substantive due process viewed the individual as aggressive and self-seeking, locked in fierce competition for material survival with other economically motivated individuals. This economic competition among individuals was, accordingly, viewed as serving both the interests of surviving individuals and the greatest good of the society as a whole.

Warren and Brandeis were certainly well aware of economic substantive due process, since they more or less specialized in commercial and regulatory law;¹⁵⁹ but they carefully designed the right to privacy to have a completely different focus. In the first place, Warren and Brandeis deliberately grounded the right to privacy in the right to life. As noted above, they explicitly rejected any association of the right to privacy with rights to liberty or property.¹⁶⁰ Instead of being concerned about the individual's external possessions and economic and political activities, Warren and Brandeis deliberately turned inward to focus on each individual's need to protect his or her internal, spiritual existence, his or her feelings, thoughts, and sentiments. Unlike the competitive, materialistic premises of nineteenth century economic substantive due process, the basis of Warren's and Brandeis' argument for the right to privacy was the psychological or spiritual need of each individual for control over his or her own life and personal information about it. In proselytizing for the right to privacy, Warren and Brandeis were consciously the disciples of Emerson, not of Adam Smith.

In arguing for the right to privacy of "all persons, whatsoever; [*sic*] their position or station,"¹⁶¹ Warren and Brandeis were also emphatically not the apostles of Herbert Spencer or Charles Sumner, the most prominent proponents of social Darwinism.¹⁶² The social Darwinists espoused an openly elitist ideology which insisted on the wisdom and

157. See T. COOLEY, *supra* note 143, at 353-57; see generally C. TIEDMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (1886).

158. See generally A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

159. A. MASON, *supra* note 2, at 61-62, 86-88.

160. See text & notes 16-20 *supra*.

161. Warren & Brandeis, *supra* note 1, at 214.

162. See generally R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT (1955); H. SPENCER, SOCIAL STATICS (1864); C. SUMNER, WHAT SOCIAL CLASSES OWE TO EACH OTHER (1883).

necessity of protecting the prerogatives of the few naturally "fittest" individuals. It was the mission of these naturally fittest individuals to "improve the human species," not only by competing and surviving, but by exploiting the presumably less-fit masses of natural non-survivors. The social Darwinists assumed that each individual was a self-seeking economic unit literally competing for survival against the rest of humanity; their paradigm was the naturally superior capitalist entrepreneur, who needed elbow room to acquire his goods and exercise his economic power untrammelled by governmental regulation.¹⁶³ On the other end of the social and economic scale, less naturally favored individuals also were entitled to similar non-interference with their less-favored endeavors, such as selling their labor for whatever price it would bring.

These doctrines of social Darwinism were part of a more long-standing anti-democratic tendency to distrust the majority and to fear the masses of ordinary people. In *The Ideological Origins of the American Revolution*, Bernard Bailyn pointed out that "at the time of the American Revolution 'democracy'—a word which denoted the lowest order of society as well as the form of government in which the commons ruled—was generally associated with the threat of civil disorder and the early assumption of power by a dictator."¹⁶⁴ In a sermon "On

163. Social Darwinism was of course closely related to *laissez-faire* economics and the development of substantive due process. In his famous dissent in *Lochner v. New York*, Justice Holmes specifically criticized the absorption of social Darwinist doctrine into constitutional due process guarantees. Holmes described social Darwinism as "an economic theory which a large part of the country does not entertain The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 74 (1905). Holmes felt compelled to remind the Court that "[a] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez-faire*." *Id.* at 75.

164. B. BAILYN, *supra* note 128, at 282. Although there had never been an official aristocracy or nobility in the United States even in the Revolutionary War era, Americans tended to assume a social hierarchy:

Americans of 1760 continued to assume, as had their predecessors for generations before, that a healthy society was a hierarchial society, in which it was natural for some to be rich and some poor, some honored and some obscure, some powerful and some weak. And it was believed that superiority was unitary, that the attributes of the favored—wealth, wisdom, power—had a natural affinity to each other, and hence that political leadership would naturally rest in the hands of the social leaders. Movement, of course, there would be: some would fall and some would rise; but manifest, external differences among men, reflecting the principle of hierarchical order, were necessary and proper, and would remain; they were intrinsic to the nature of things.

Id. at 302-03. At the time of the American Revolution, even Thomas Paine's *Common Sense* was highly controversial among both Tories and Whigs because it called for equality of democratic representation and a unicameral legislature. For example, John Adams declared himself to be vehemently opposed to Paine's plan of government because it was "so democratical, without any restraint or even an attempt at any equilibrium or counterpoise, that it must produce confusion and every evil work." *Id.* at 288-89. The framework of the Constitution expressed special concern about the difficult problem of how to organize a government in a society where "no distinction of rank existed . . . and none were entitled to any rights but such as were common to all." *Id.* at 284. The results of this concern were, of course, a number of political compromises, including a bicameral legislature, with an elite Senate and a more democratic, popularly elected, House of Representatives; and the electoral college, which insulated the election of the President and Vice

Civil Liberty, Passive Obedience, and Nonresistance" in 1775, Jonathan Boucher lamented that "the tendency of man in the mass" is ever "to be presumptuous and self-willed, always disposed and ready to despise dominion, and to speak evil of dignities."¹⁶⁵ James Fenimore Cooper wholeheartedly agreed.¹⁶⁶ Asserting that he "believe[d] himself to be as good a democrat as there is in America," Cooper warned that "tyranny can only come from the public, in a democracy, since individuals are powerless, possessing no more rights than it pleases the community to leave in their hands."¹⁶⁷ He assailed as "another form of oppression practiced by the public" the public's "arrogating to itself a right to inquire into, and to decide on the private acts of individuals, beyond the cognizance of the laws."¹⁶⁸ Public inquiry and comment on the private affairs of such gentlemen as himself was simply envious persecution of superior individuals by their inferiors, which promoted mediocrity.¹⁶⁹

Even legal writers such as the civil libertarian Francis Lieber, writing in the middle of the nineteenth century, noted that "liberty as applied to political man, practically means, in the main, protection or checks against undue interference" from, among others, "the masses."¹⁷⁰ The constitutional scholar, Christopher Tiedman, echoed this fear of the masses overwhelming the individual in the introduction to his influential *Treatise on The Limitations of Police Power in the United States*. In the face of "the great army of discontents and their apparent power," Tiedman declared, "the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man, the absolutism of the democratic majority."¹⁷¹ In writing about life in the post-Civil-War

President from the dangers of direct election by the unreliable masses of ordinary citizens. See U.S. CONST. art. I, §§ 2, 3; art. II, § 1.

165. Boucher, ON CIVIL LIBERTY, PASSIVE OBEDIENCE, AND NONRESISTANCE (1797), quoted in B. BAILYN, *supra* note 128, at 317. Speaking evil (or even good) of dignities was the very essence of the privacy problem as many elitists, such as Godkin, saw it. But Warren's and Brandeis' conception of the right to privacy was far more democratic.

166. Cooper believed that "in all communities, the better opinion, whether as relates to moral or scientific truths, tastes, manners and facts, is necessarily in keeping of the few; the great majority of mankind being precluded by their opportunities from reaching so high in the mental scale." J. COOPER, *supra* note 60, at 185. Cooper defended privacy as a privilege of the gentleman in a democratic society:

The social duties of a gentleman are of a high order. The class to which he belongs is the natural repository of the manners, tastes, tone, and, to a certain extent, of the principles of a country . . . the indulgence of his very luxuries encourages the skill that contributes to the comforts of the lowest.

Id. at 147-48.

167. *Id.* at 70, 196.

168. *Id.* at 198, 229.

169. *Id.* at 129-31.

170. F. LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 53 (1853).

171. C. TIEDMAN, *supra* note 157, at vii.

United States, both Henry Adams¹⁷² and Henry James¹⁷³ echoed this fear of the masses.

At the time Warren and Brandeis wrote about the right to privacy, there was among many Americans a real apprehension, which intensified with the nation's increasing population toward the end of the nineteenth century, that individualism itself, as well as the privileges of the elite, might be crushed by unrestrained democracy.¹⁷⁴ It is remarkable that Warren's and Brandeis' article omits even the slightest hint of this virtual paranoia of the masses which was rampant, particularly among upperclass Americans, during the closing decades of the nineteenth century.

Warren's and Brandeis' deliberate avoidance of this elitist ideology is brought into sharp relief when compared with the notion of the right to privacy espoused by E.L. Godkin, whose own article *The Rights of the Citizen*, had helped to set the stage for Warren's and Brandeis' invention of the right to privacy. Like a number of modern critics of the right to privacy,¹⁷⁵ Godkin insisted that "'privacy' has a different meaning to different classes or categories of persons, it is, for instance, one thing to a man who has always lived in his own house, and another to a man who has always lived in a boardinghouse."¹⁷⁶ Godkin even predicted a poor reception for the right to privacy by the masses:

172. H. ADAMS, *DEMOCRACY* 96-97 (1880).

173. H. JAMES, *supra* note 54. In the climactic scene, when the heroine was faced with the choice between the private life of marriage and her public career as an inspirational speaker about women's rights, James created a frightening image of the masses as the adversary of private life in her suitor's "vision of wresting her from the mighty multitude":

He had a throb of uneasiness at his private purpose of balking it of its entertainment, its victim—a glimpse of the ferocity that lurks in a disappointed mob.

"Not for worlds, not for millions, shall you give yourself to that roaring crowd. Don't ask me to care for them, or for any one! What do they care for you but to gape and grin and babble? You are mine, you are not theirs."

Id. at 431-41. Again and again James evoked the noise of an almost bestial crowd waiting for her to speak: "A general hubbub rose from the floor and the galleries of the hall—the sound of several thousand people stamping their feet and rapping with their umbrellas and sticks." *Id.* at 449. For James, the masses were loud and unruly, predatory and dangerous both to individual personality and to private happiness.

174. *E.g.*, C. TIEDEMAN, *supra* note 157, at vi-viii; H. ADAMS, *supra* note 172, at 96-97 *passim*.

175. *E.g.*, Kalven, *Privacy and Tort Law—Were Warren and Brandeis Wrong?*, 21 *LAW & CONTEMP. PROB.* 326 (1966); Miller, *Privacy in the Corporate State: A Constitutional Value of Dwindling Significance*, 22 *J. PUB. L.* 3 (1973). See also Rehnquist, *Is an Expanded Right to Privacy Consistent with Effective Law Enforcement?* 23 *KAN. L. REV.* 1 (1974).

176. Godkin, *The Right to Privacy*, *supra* note 56, at 497. Earlier Godkin had carefully noted:

Of course, the importance attached to this privacy varies in individuals. Intrusion on it afflicts or annoys different persons in different degrees. It annoys women more than men, and some men very much more than others. To some persons it causes exquisite pain to have their private life laid bare to the world . . . [They] are the element in society which most contributes to its moral and intellectual growth and that which the state is more interested in cherishing and protecting . . . [Dignity] is not one of the incidents of life in a camp, or a barrack, or in a man-of-war, or in a tenement-house, or a caravan.

Godkin, *supra* note 12, at 65-66.

In all the democratic societies today the public is disposed either to resent attempts at privacy, either of mind and body, or turn them into ridicule. There is nothing democratic societies dislike so much today as anything which looks like what is called "exclusiveness" and all regard for or precautions about privacy are apt to be considered signs of exclusiveness.¹⁷⁷

Godkin's repeated insistence on the right to privacy as an exclusive prerogative of the social and economic elite may explain Warren's and Brandeis' unwillingness to credit the social Darwinist, Godkin, as the catalyst for their own consciously egalitarian article.

In any event, Warren and Brandeis expressly turned their backs on the elitism of Godkin and the social Darwinists when they declared that the right to privacy was designed "to protect all persons, whatsoever; [*sic*] their position or station from having matters which they may properly prefer to keep private, made public against their will."¹⁷⁸ The details of *The Right to Privacy* provide further evidence that this was a conscious choice. For example, Warren and Brandeis refer specifically to the potential application of the right to privacy to vindicate the feelings of the far from upper-class actress, Marion Manola, who objected to having her photograph taken "surreptitiously and without her consent" while she was appearing in tights on the stage of the Broadway Theater in New York.¹⁷⁹ Moreover, Warren and Brandeis couched their argument for the right to privacy in painstakingly general terms, "a people," "community," "neighbors," "brains capable of other things," which avoid all reference to specific social or economic status.¹⁸⁰ Neither the "ignorant and thoughtless" who mistake the relative importance of personal gossip, nor "the individual" who suffers "mental pain and distress" from "invasion upon his privacy" are anywhere identified by social or economic class.¹⁸¹ Warren and Brandeis even chose a closing image—the individual wielding the right to privacy as a weapon, like a man protecting his home against idle prurient curiosity seeking to intrude on him through the back door¹⁸²—which powerfully alluded to the familiar legal maxim regarding the innate rights of even "the poorest man."¹⁸³

177. Godkin, *The Right to Privacy*, *supra* note 56, at 497. This differential sensitivity to invasions of privacy was the pivotal issue in Henry James' *The Reverberator*, in which the high sensibilities of the aristocratic Proberts, "decent quiet people who only want to be left alone," were played off against the bourgeoisie attitudes of the Dawsons, who thought it would be fun to be in the newspapers.

178. Warren & Brandeis, *supra* note 1, at 214-15.

179. *Id.* at 195 n.7.

180. *Id.* at 207 *passim*. Compare Godkin's notion of privacy discussed at notes 175-77 *supra*.

181. Warren & Brandeis, *supra* note 1, at 196 *passim*.

182. *Id.* at 220.

183. See T. COOLEY, *supra* note 143, at 367 n.4, citing William Pitt's famous speech before Parliament in 1763.

Although they were writing at a time when the privileged elite in America were becoming increasingly concerned about protecting their privacy from invasion by the growing numbers and varieties of people with whom they had to rub shoulders,¹⁸⁴ Warren and Brandeis argued that the right to privacy was a basic right of all individuals, whatever their social or economic status. They invented a legal theory for a right to privacy which was an emphatically egalitarian legal protection for the individual personalities of all type of people, rich and poor, immigrant and Brahmin.

CONCLUSION

Although Warren and Brandeis would undoubtedly have been amazed at the multiplicity of current applications of the right to privacy, they predicted that anticipating just how the right to privacy would be applied in actual cases would be "a difficult task."¹⁸⁵ Emphasizing that the right to privacy should not operate as an all-encompassing absolute right of individuals somehow unilaterally to secede from the communities in which they lived, Warren and Brandeis pointed out that there would be circumstances in which "the dignity and convenience of the individual must yield to the demands of the public welfare or of private justice" for personal information.¹⁸⁶ "Any rule of liability" for interference with the right to privacy, they insisted, "must have in it an elasticity which shall take account of the varying circumstances of each case."¹⁸⁷

Nevertheless, Warren and Brandeis did suggest some "general rules" for imposing legal liability for interference with the right to privacy.¹⁸⁸ The legal remedies for which they argued were to apply only to a fairly narrow category of cases which met two criteria: (1) where "matters which [individuals] may properly prefer to keep private [had been] made public against their will,"¹⁸⁹ and (2) where such unconsented publication was "beyond the pale of propriety."¹⁹⁰ Warren and Brandeis acknowledged that "it is only the more flagrant breaches of decency and propriety that could in practice be reached."¹⁹¹ Decency

184. See O. HANDLIN, *supra* note 35, at 3. Being the son of immigrant parents, it is perhaps not surprising that Brandeis avoided direct comment on recent population increases through immigration. It is noteworthy, however, that Warren and Brandeis scrupulously eschewed Godkin's term "masses" in favor of the more amiable-sounding "community" and "fellow-citizens." Warren & Brandeis, *supra* note 1, at 196, 215.

185. Warren & Brandeis, *supra* note 1, at 214.

186. *Id.*

187. *Id.* at 215.

188. *Id.* at 214-15.

189. *Id.*

190. *Id.* at 215.

191. *Id.* at 216.

and propriety were, as they well knew, a matter of "taste" and subject to widely varying opinion.¹⁹² What the right to privacy required was that the individual should have some ability to enforce his or her decisions as to what personal information should remain private: "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."¹⁹³ Warren and Brandeis thus conceived of the right to privacy as a kind of presumption of individual control over personal information.

In actual practice, Warren and Brandeis understood that this presumption of individual control over personal information would be hedged about by limitations on the imposition of legal liability. They envisaged two general types of limitations. First, the right to privacy would apply only in cases involving truly private information:

to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn; . . . the right to privacy ceases upon the publication of the facts by the individual or with his consent.¹⁹⁴

Second, in some cases the right to privacy would have to yield to countervailing interests in making the admittedly private information public. In this regard, Warren and Brandeis pointed to three types of cases: cases involving "publication of matter which is of public or general interest";¹⁹⁵ cases involving publication under such circumstances as judicial or legislative proceedings, which would render it "a privileged communication according to the law of slander and libel";¹⁹⁶ and cases involving publication where "the interest of free speech" is involved, as in cases of oral publications resulting in no special damages.¹⁹⁷ Aside from these limitations, there should be strict liability for interference with individual decisions to communicate or not to communicate personal information. No actual, physical, or monetary damage needed to be shown, since the injury redressed in vindicating the right to privacy was "the effect of the publication upon [the individual's] estimate of himself and upon his own feelings."¹⁹⁸ Precisely how such damages were to be measured was apparently to be left to the jury in each case.

Warren and Brandeis invented the right to privacy in the context

192. *Id.*

193. *Id.* at 198.

194. *Id.* at 215, 218.

195. *Id.* at 214.

196. *Id.* at 216-17.

197. *Id.* at 217. As noted above, Warren and Brandeis discussed a specific limitation on the application of the right to privacy deriving from freedom of speech, but omitted any mention of freedom of the press.

198. *Id.* at 197.

of late nineteenth century America as a legal means of protecting and encouraging individual decisions whether, when, and how to share their personalities with others. Believing that the government was already constrained to respect this right to privacy, Warren and Brandeis wanted newspapers and other gossipmongers to do the same. It was, they felt, particularly fitting and necessary for the law to recognize and to encourage respect for each individual's right to privacy. After all, encouraging such respect for privacy reinforced that mutual respect essential to bind together a community of free and self-determined individuals. Emerson had suggested, "[e]verything that tends to insulate the individual—to surround him with barriers of natural respect, so that each man shall feel the world is his, and man shall treat with man as a sovereign state with a sovereign state—tends to true union as well as greatness."¹⁹⁹ Warren's and Brandeis' right to privacy was a practical embodiment of that Emersonian ideal.

199. Emerson, *supra* note 130, at 112-13.

