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Irwin R. Kramer

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ARTICLES

THE BIRTH OF PRIVACY LAW: A CENTURY SINCE WARREN AND BRANDEIS

Irwin R. Kramer*

It was not a constitutional amendment, but it gave rise to certain constitutional rights. Nor was it a broad statutory scheme, but it gave rise to numerous statutes nationwide. In fact, it was not even embodied in case law, but it gave rise to a long line of cases that have formed the foundation of one of the most intriguing fields of law ever invented. The field is privacy law; the "inventors" were two young lawyers named Samuel D. Warren and Louis D. Brandeis; and "it" was a law review article penned by both men one full century ago.

In *The Right to Privacy*,¹ an article hailed as "perhaps the most influential law journal piece ever published,"² Warren and Brandeis vented their frustration with the intrusions into individual privacy by nineteenth century journalists armed with the latest technological innovations. With a firm command of English precedents and masterful logic, these commentators urged courts to combat this threat to individual privacy by adding a broad new right to the common law — the "right to be let alone" or "right to privacy."³ While courts had not previously given individuals such protection, and many jurists hesitated to accept these revolutionary views,⁴ numerous courts adopted Warren and Brandeis' reasoning and heeded their call for

* Attorney, Baltimore, Maryland. 1990-91 Harry A. Bigelow Teaching Fellow and Lecturer in Law, The University of Chicago School of Law. B.A., 1984, Towson State University; J.D., 1987, University of Maryland; LL.M., 1989, Columbia University. Copyright © 1990 by Irwin R. Kramer.

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

2. P. DIONISOPOULOS & C. DUCAT, *THE RIGHT TO PRIVACY* 20 (1976).

3. Warren and Brandeis, *supra* note 1, at 195.

4. See *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 539, 64 N.E. 442, 443 (1902) (expressing fear that adoption of Warren and Brandeis' proposals will result in absurd and illogical litigation). The New York Legislature overturned this case by statute. See, e.g., *Brinkley v. Casablancas*, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981) (citing N.Y. CIV. RIGHTS LAW § 51 (McKinney 1976)) (finding a model's privacy violated through unauthorized use of her photograph on posters).

expanded common law rights.⁵ One hundred years later, the right to privacy is firmly ingrained in the common law of most states and occupies a prominent place in American society and jurisprudence.⁶

With the rise of privacy law, the article that gave birth to it has also earned a prominent place in American legal literature and history. Even critics of Warren and Brandeis readily admit that *The Right to Privacy* may be the "most influential law review article of all,"⁷ and many prominent commentators credit the article as having done "nothing less than add a chapter to our law."⁸ To this day, Warren and Brandeis' article is constantly referred to as "the best example of the influence of law journals on the development of the law,"⁹ and courts still cite it as an authoritative source.¹⁰

This Article, the latest in a series of scholarly manuscripts inspired by Warren and Brandeis, reviews the state of the law before they published their landmark article,¹¹ the manner in which they plotted to change this law,¹² and the impact of their efforts in creating a field of law that continues to occupy courts and commentators with the same degree of vitality that existed when their article was first published in 1890.¹³ While this remarkable success has not gone uncriticized, and certain commentators believe that the time has come to abandon Warren and Brandeis' views,¹⁴ the right to

5. The first major court to adopt Warren and Brandeis' views was the Supreme Court of Georgia. See *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); see also *Atkinson v. John E. Doherty & Co.*, 121 Mich. 372, 80 N.W. 285 (1899) (acknowledging the right to privacy without applying it); *Schuyler v. Curtis*, 147 N.Y. 434, 42 N.E. 22 (1895) (finding that the unauthorized use of a portrait of a deceased woman did not violate a right to privacy).

6. See *infra* notes 104-09 and accompanying text.

7. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966).

8. Statement of Roscoe Pound to William Chilton in 1916, quoted in A. MASON, BRANDIS: A FREE MAN'S LIFE 70 (1946); Bloustein, *Privacy, Tort Law and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611, 612 (1968) (discussing "that unique law review article which launched a tort"); see also Adams, *The Right of Privacy, and its Relation to the Law of Libel*, 39 AM. L. REV. 37, 37 (1905) (touting the article as "one of the most brilliant excursions in the field of theoretical jurisprudence").

9. H. NELSON & D. TEETER, LAW OF MASS COMMUNICATIONS 162 (3d ed. 1978).

10. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 487 & n.16 (1975) (article has provided "powerful arguments" for a right to privacy); *Time, Inc. v. Hill*, 385 U.S. 374, 380 (1967) ("celebrated article" has provided theoretical basis for privacy statutes).

11. See *infra* notes 15-38 and accompanying text.

12. See *infra* notes 39-81 and accompanying text.

13. See *infra* notes 82-118 and accompanying text.

14. See *infra* notes 119-33 and accompanying text.

privacy may forever remain one of society's most valued individual protections.

I. PRIVACY PROTECTION BEFORE WARREN AND BRANDEIS

Although the law did provide some protection for privacy before Warren and Brandeis wrote their famous article, the protection consisted of limited legal theories whose shortcomings outweighed their usefulness. Rather than protecting individuals through legal doctrine specifically designed to safeguard their privacy interests, nineteenth century American courts and legislatures provided remedies for only a limited number of intrusions and left individuals with incomplete and inadequate protection.

The fourth amendment to the United States Constitution provided one such remedy. On the time-honored notion that "a man's house is his castle," the states added the fourth amendment in 1791 to preserve the "right of the people to be secure in their persons, houses, papers, and effects."¹⁵ While the United States Supreme Court touted this right as safeguarding "the sanctity of a man's home and the privacies of life,"¹⁶ this provision actually protected very few privacies. Far from establishing a constitutional right to privacy, the fourth amendment only prevented government officials from unlawfully intruding into the home or personal property, leaving private citizens free to invade the privacies of life at will.¹⁷ Consequently, the fourth amendment applied only to a small percentage of privacy invasions and did not secure an individual's "right to be let alone."

To remedy those invasions committed by private citizens, the best relief that nineteenth century courts could offer was an action for trespass.¹⁸ Although courts occasionally used this remedy to provide individuals with a

15. U.S. CONST. amend. IV. One commentator has written that the fourth amendment "is the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England." J. LANDYNSKY, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 19 (1966).

16. *Boyd v. United States*, 116 U.S. 616, 630 (1886) (upholding a state statute requiring production of evidence after service of notice on the basis that the Constitution forbids only unreasonable searches and seizures). Interpreting a parallel provision adopted by the State of Michigan, Judge Thomas Cooley, a leading constitutional scholar during Warren and Brandeis' time, viewed this right as "mak[ing] sacred the privacy of the citizen's dwelling and person." *Weimer v. Bunbury*, 30 Mich. 201, 208 (1874).

17. "[T]he Bill of Rights by its terms and necessary implications has been viewed only to limit the freedom of the government when dealing with individuals." NOWAK, ROTUNDA & YOUNG, *CONSTITUTIONAL LAW* § 12.1(a), at 421 (1986).

18. See Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1895 (1981).

"right of quiet occupancy and privacy"¹⁹ and purportedly to compensate plaintiffs for "injury, insult, [and] invasion of the privacy,"²⁰ the requirement that plaintiffs prove a physical intrusion upon their real property severely limited this remedy's usefulness.²¹ For nonphysical intrusions, such as eavesdropping, only criminal sanctions were available. Under both the common law²² and state statutes,²³ persons could face criminal prosecution for invading another's privacy without physically intruding upon the home. Nonetheless, prosecutors rarely sought indictments for eavesdropping and turned their attention instead to more heinous and violent crimes.²⁴ For this reason, the criminal law provided only a theoretical check on invasions of privacy which, in practice, left most individuals without any protection against such intrusions.

To rectify the lack of effective legal remedies, courts occasionally tried to compensate plaintiffs by taking existing legal doctrine to extremes. Perhaps recognizing the inadequacy of traditional trespass actions in addressing invasions of privacy, the New York Court of Appeals expanded the scope of this remedy and awarded damages to a plaintiff even though the defendant did not physically intrude upon the plaintiff's property.²⁵ In *Moore v. New York Elevated R.R. Co.*,²⁶ the plaintiff sued the defendant railroad company for erecting a train platform overlooking his home and property. While this platform did not physically trespass upon the plaintiff's property, the court observed that the defendant's patrons and employees "interfered with the privacy of the [plaintiff's] rooms, by looking in when standing on the platform and when coming down the stairs along the building."²⁷ Ignoring the

19. *Newell v. Witcher*, 53 Vt. 589, 591 (1880) (permitting a house guest to recover against her host for an unwelcome intrusion into the bedroom that her host had provided for her).

20. *Ives v. Humphrey*, 1 E.D. Smith 196, 201-02 (N.Y. Ct. C.P. 1851) (emphasis omitted).

21. "Unless it is with the possessor's permission or is excused as privileged, any knowing entry upon the possessor's land is wrongful: it is a trespass." R. CUNNINGHAM, W. STOEBCUK & D. WHITMAN, *THE LAW OF PROPERTY* § 7.1, at 411 (1984).

22. Sir William Blackstone described the English common law crime of eavesdropping as "listen[ing] under walls or windows or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales." 4 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 168 (Tucker ed. 1803).

23. See Note, *supra* note 18, at 1896 & n.34 (citing, *inter alia*, N.Y. PENAL CODE § 436 (1881)); *Grand Rapids v. Williams*, 122 Mich. 247, 250, 70 N.W. 547, 547-48 (1897) (punishing a "peeping Tom" for violating an ordinance prohibiting "indecent, insulting, or immoral conduct").

24. Note, *supra* note 18, at 1896 (criminal indictments were "never numerous").

25. *Moore v. New York Elevated R.R. Co.*, 130 N.Y. 523, 29 N.E. 997 (1892).

26. *Id.*

27. *Id.* at 528, 29 N.E. at 998.

fundamental elements of a trespass action, the court simply stated that "[n]o reason appears why the defendants [sic] should not be responsible for the consequences of the loss of privacy thus occasioned so far as it depreciated the rental value of the rooms in the plaintiff's building."²⁸ Accordingly, the court permitted the plaintiff to maintain an action for this depreciation. Yet, because the court proceeded on a trespass theory of recovery, it did not address the availability of damages for the emotional distress occasioned by the loss of privacy and, thus, was not able to fully compensate the plaintiff for the privacy invasion.²⁹ Consequently, the extension of trespass remedies to invasions of privacy did not solve the problems of aggrieved plaintiffs.

In another noteworthy attempt to expand existing legal doctrine to compensate for the lack of effective remedies, courts frequently stretched libel law to redress the privacy invasions of an overzealous press. Prior to the adoption of the Warren and Brandeis proposal, individuals subject to disclosures of true, but offensive, private facts had no cause of action available. To fill this gap in the law with libel remedies, nineteenth century courts strained to overcome a very significant obstacle: Under libel law, the truth of a report, no matter how offensive it may be, is an absolute defense.³⁰ Courts, wishing to redress privacy invasions, often frustrated this defense by requiring that reporters print the "whole truth" with uncompromising precision.³¹ If a publication contained even the slightest inaccuracy, plaintiffs could recover damages for emotional distress and for reputational injury.³² Thus, as long as a newspaper story contained some inaccuracies or omissions, nineteenth century courts relied on these flaws as a pretext to redress invasions of privacy.

Although this tactic provided some compensation to aggrieved individuals, this questionable solution was far from ideal. In addition to distorting libel law beyond recognition, libel suits proved to be an unsatisfactory means of redressing privacy invasions. In practice, libel actions only exacerbated the plaintiff's injury through highly publicized trials that focused upon the truth or falsity of a damaging disclosure.³³ Furthermore, those courts that

28. *Id.*

29. *Id.*

30. PROSSER, HANDBOOK OF THE LAW OF TORTS § 116, at 796-97 (4th ed. 1971).

31. See, e.g., *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, 354, 43 N.W. 431, 437 (1889) (reversing a directed verdict for the defendant who published a report of the plaintiff's arrest, but failed to report the subsequent withdrawal of charges); *Sharpe v. Stephenson*, 34 N.C. (12 Ired.) 348, 350 (1851) (ruling against a defendant whose report of adultery erred as to the time and place in which the act was committed).

32. *Adams v. Smith*, 58 Ill. 417 (1871).

33. Note, *supra* note 18, at 1908 (citing Godkin, *Libel and Its Legal Remedy*, 12 J. Soc. Sci. 69, 80, 82 (1880)).

wished to use libel law to compensate aggrieved plaintiffs could not do so if the accuracy of the publication was beyond question. This limitation became increasingly troublesome in cases of new invasions of privacy that arose from late nineteenth century technological innovations. For example, the advent of instant photography greatly increased the press' ability to invade privacy. By taking candid photographs without the subject's knowledge or consent, and printing these pictures in newspapers, members of the press found a new way to invade privacy without libelling the subject.³⁴ Consequently, even the most expanded application of the principles of libel law provided inadequate protection.

The increasing number of invasions of privacy by the press and "[w]idespread public dissatisfaction with the lack of effective legal recourse led to many demands for improved remedies."³⁵ In many cases, whether involving the press or not, individuals were not willing to wait for legal remedies and, instead, redressed invasions in their own ways. "The principal means of protecting privacy . . . was the willingness of nineteenth century Americans to resort to force—quite often deadly force—in the defense of their homes."³⁶ According to a popular opinion expressed during the same year that Warren and Brandeis published their article, "[a]ny citizen has a right to defend his privacy to whatever extent he may find necessary, save against recognized and accredited officers of the law with the official order of the community in the shape of a warrant to justify their intrusion."³⁷ Unfortunately, the mere fact that individuals found it necessary to use deadly force to defend their privacy strongly underscored the inadequacy of existing legal protection and created a compelling need for new legal theories designed to afford such protection.³⁸

34. See A. WESTIN, *PRIVACY AND FREEDOM* 172 (1967).

35. Note, *supra* note 18, at 1909 (citing, *inter alia*, Bascom, *Public Press and Personal Rights*, 4 EDUC. 604, 604-05 (1884) ("new defenses should be set up in behalf of the individual" against "the omnipresent press"); Field, *The Newspaper Press and the Law of Libel*, 3 INT'L REV. 479, 484-86 (1876); Godkin, *Libel and Its Legal Remedy*, 12 J. SOC. SCI. 69, 80, 82 (1880)).

36. Note, *supra* note 18, at 1898.

37. *Id.* at 1898 & n.48 (quoting *A Man's House His Castle*, 9 PUB. OPINION 342 (1890) (expressing the view that individuals have a "perfect right" to use deadly force where privacy is threatened)).

38. While nineteenth century courts seldom spoke in terms of protecting an individual's privacy, one rare case actually awarded damages on the ground that the defendants invaded the plaintiff's "right to privacy." In *De May v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881), the Supreme Court of Michigan affirmed an award of damages against a physician who needlessly brought an untrained, unmarried assistant into the plaintiff's bedroom to observe her childbirth. *Id.* at 166, 9 N.W. at 146. Reasoning that childbirth is a "sacred" occasion, the Court held that "[t]he plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its

II. WARREN AND BRANDEIS' APPROACH TO PRIVACY LAW

Like the public at large, Warren and Brandeis were dissatisfied with the lack of effective legal remedies available to those who found their privacy invaded, particularly those victimized by an overzealous and increasingly invasive press. Unlike many members of the public, however, Warren and Brandeis did not resort to force to redress such invasions; they used a far more potent weapon—the law review article.³⁹

According to Dean William Prosser, Warren's personal dissatisfaction with abusive journalistic tactics prompted this "outstanding example of the influence of legal periodicals upon the American law."⁴⁰ As members of Boston's social elite, Warren and his family frequently had to contend with gossip columns that reported the affairs and social events of prominent citizens in "highly personal and embarrassing detail."⁴¹ "The matter came to a head when the newspapers had a field day on the occasion of the wedding of a daughter, and Mr. Warren became annoyed."⁴² Observing that "the press, the advertisers and the entertainment industry of America were to pay dearly" for this annoyance,⁴³ Dean Prosser glibly remarked that Warren's newlywed daughter had a "face that launched a thousand lawsuits."⁴⁴

Though this legend has recently been discredited,⁴⁵ and no one is quite sure what inspired Warren and Brandeis to write their article,⁴⁶ Warren and Brandeis' dissatisfaction with abusive press tactics, expanded gossip columns, and the "yellow journalism" of the late 1800's was readily apparent.⁴⁷

violation." *Id.* at 165-66, 9 N.W. at 149. Despite the novelty of this holding, the *De May* case received little attention when decided and had no impact in establishing a general right to privacy.

39. See generally Warren & Brandeis, *supra* note 1.

40. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383 (1960).

41. *Id.*

42. *Id.* (citing A. MASON, *BRANDEIS, A FREE MAN'S LIFE* 70 (1946)); see also Kalven, *supra* note 7, at 329 n.22 ("It is now well known that the impetus for the article came from Warren's irritation over the way the press covered the wedding of his daughter in 1890.").

43. Prosser, *supra* note 40, at 383.

44. *Id.* at 423.

45. Relying on a genealogical study of the Warren family and other published records, James Barron has determined that Warren's first daughter was not born until April 9, 1884. Barron, *Warren and Brandeis, The Right to Privacy*, 4 *Harv. L. Rev.* 193 (1890): *Demystifying a Landmark Citation*, 13 *SUFFOLK U.L. REV.* 875, 893 (1979). "Even assuming that Mrs. Warren was pregnant at the time of the wedding ceremony, the girl would have been no more than seven-years old when Warren and Brandeis wrote the article." *Id.* (footnote omitted).

46. *Id.* at 921. After discussing several theories on what prompted Warren and Brandeis to write their article, Barron was unable to "demystify" completely this landmark citation, concluding that there is "no clearcut answer" to questions regarding the genesis of this article. *Id.*

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

In one of the most scathing indictments of the press ever written, Warren and Brandeis vented their frustration with members of the fourth estate:

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. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.⁴⁸

By referring to "modern enterprise and invention," Warren and Brandeis blamed this disturbing trend on late nineteenth century technological advances that were beginning to foster more intrusive press tactics at the expense of individual privacy.⁴⁹ Specifically, Warren and Brandeis observed that "[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"⁵⁰ To confront this threat, these authors proposed that the common law expand to meet the growing needs of society and afford individuals what Judge Thomas Cooley dubbed a right "to be let alone."⁵¹

In advocating a right to be let alone, or a "right to privacy," Warren and Brandeis relied primarily on English precedents to demonstrate that courts have long protected privacy under the guise of seemingly remote legal theories. These theories were based upon the laws of intellectual property and of contract.

48. *Id.* at 196.

49. *Id.*

50. *Id.* at 195.

51. *Id.* Judge Cooley first used this phrase in his popular treatise on tort law. See T. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888). Ironically, while his terminology has become synonymous with a right to privacy, Judge Cooley used this term to encompass the individual's right to be free from *physical* attack. *Id.* at 24, 29 (discussing "the right to immunity from attacks and injuries").

According to Warren and Brandeis, English common law copyright cases were "but instances and applications of a general right to privacy, which properly understood afford a remedy for the evils under consideration."⁵² Unlike statutory copyright provisions, designed to compensate authors for economic losses caused by the unauthorized copying of their published works, the common law provided authors with the right to keep their works private; that is, to refrain from publishing altogether.⁵³ Because common law copyright protection did not depend upon the value of the work, or even upon the particular medium in which the author's thoughts were expressed, Warren and Brandeis questioned whether this protection truly constituted a tangible property right.⁵⁴ "The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality."⁵⁵

Warren and Brandeis derived support for this conclusion from *Prince Albert v. Strange*.⁵⁶ In this case, Prince Albert sought to enjoin Strange from exhibiting unpublished etchings produced by himself and Queen Victoria. These royal plaintiffs made these etchings for their own pleasure, and while they had given individual copies to friends, Prince Albert and Queen Victoria had no intention of publishing them.⁵⁷ After obtaining copies without authorization, Strange not only planned to feature the etchings in a public exhibition, he also planned to publish a catalogue describing each work in detail.⁵⁸

Although copyright law typically protects only the *expression* of an artist's or author's ideas (i.e., the etchings themselves) and not the *facts* or *ideas* expressed (i.e., a factual description of the etchings),⁵⁹ the Vice-Chancellor

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

53. Under common law copyright, an author has absolute control over the "act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all. The statutory right is of no value, *unless* there is a publication; the common-law right is lost *as soon as* there is a publication." *Id.* at 200 (footnote omitted) (emphasis in original).

54. *Id.* at 205 (footnote omitted).

55. *Id.* (footnote omitted).

56. 2 De G. & Sm. 652, 64 Eng. Rep. 293 (1848)(V.C.), *aff'd*, 1 Mac. & G. 25, 41 Eng. Rep. 1171 (1848)(Ch.).

57. According to the complaint, Prince Albert and Queen Victoria made these etchings "for their amusement, . . . being principally subjects of private and domestic interest to themselves, and of which etchings they had made impressions for their own use, and not for publication." *Id.* at 652, 64 Eng. Rep. at 293.

58. *Id.* at 653-54, 64 Eng. Rep. at 294.

59. See M. NIMMER, NIMMER ON COPYRIGHT § 2.03[D], at 2-34 (1989); A. LATMAN, R. GORMAN & J. GINSBURG, COPYRIGHT FOR THE NINETIES 30 (1989) ("A copyright extends neither to systems explained in a work, nor to discrete facts contained within a work."). This

did not heed this limitation. Instead, he held that "the common-law rule prohibited not merely the reproduction of the etchings . . . but also 'the publishing . . . , though not by copy or resemblance, a description of them, whether more or less limited or summary, whether in the form of a catalogue or otherwise.'"⁶⁰ Because the court protected the artists' thoughts and sentiments, independent of the tangible expression of these ideas, Warren and Brandeis read between the lines of this opinion and concluded that the court had protected much more than their intellectual property—it had protected the privacy of the artists' innermost thoughts.⁶¹

In Warren and Brandeis' opinion, copyright law was not the only tool that courts used to protect privacy. Frequently, courts redressed invasions of privacy by implying terms in a contract and finding a breach of trust.⁶² Thus, in affirming the Vice-Chancellor's decision in *Prince Albert v. Strange*,⁶³ the appellate court stated that an injunction prohibiting exhibition of the royal etchings was not only justified under common law copyright,⁶⁴ but was also appropriate considering that Strange had acquired these etchings through an apparent breach of trust by one of the plaintiffs' employees.⁶⁵

The English courts took a similar approach in *Abernethy v. Hutchinson*,⁶⁶ a case that Warren and Brandeis cited prominently. In *Abernethy*, a well

distinction is commonly referred to as the "idea/expression" or "fact/expression" dichotomy of copyright law. *Id.*

60. Warren & Brandeis, *supra* note 1, at 202 (quoting *Prince Albert*, 2 De.G. & Sm. at 697, 64 Eng. Rep. at 312).

61. *Id.* at 204-05. Consistent with Warren and Brandeis' interpretation, the Vice-Chancellor certainly appeared to have privacy on his mind in rendering this decision:

I think . . . not only that the Defendant here is unlawfully invading the Plaintiff's right, but also that the invasion is of such a kind and affects such property as to entitle the Plaintiff to the preventive remedy of an injunction; and if not the more, yet certainly not the less, because it is an intrusion—an unbecoming and unseemly intrusion—an intrusion not alone in breach of conventional rules, but offensive to that inbred sense of propriety natural to every man—if intrusion, indeed, fitly describes *a sordid spying into the privacy of domestic life*—into the home (a word hitherto sacred among us), the home of a family whose life and conduct form an acknowledged title, though not their only unquestionable title, to the most marked respect in this country.

Prince Albert, 2 De G. & Sm. at 698, 64 Eng. Rep. at 313 (emphasis added). Critics of Warren and Brandeis suggest that these authors were mistaken to rely on *Prince Albert* as that case may represent a rare departure from the limitations of copyright law in order to maintain the privacy of the Royal Family. See, e.g., Pratt, *The Warren and Brandeis Argument for a Right to Privacy*, 1975 PUB. L. 161, 166 (*Prince Albert* "was somewhat of an aberration from other cases because of the involvement of the Royal Family.").

62. Warren & Brandeis, *supra* note 1, at 207-10.

63. 1 Mac. & G. 25, 41 Eng. Rep. 1171 (1849)(Ch.).

64. *Id.* at 42-44, 41 Eng. Rep. at 1178.

65. *Id.* at 44-45, 41 Eng. Rep. at 1178-79.

66. 1 H. & Tw. 28, 47 Eng. Rep. 1313 (1825).

known surgeon sought to enjoin his medical students from publishing a series of lectures delivered in his classroom.⁶⁷ Because the surgeon delivered these lectures orally and had not committed them to writing,⁶⁸ the court refused to enjoin the students' planned publication on the basis of copyright law.⁶⁹ Despite the apparent unavailability of copyright remedies, the court nonetheless granted the injunction on the ground that the students had breached an implied confidence to their teacher.⁷⁰ In the court's view, these students had permission to attend the plaintiff's lectures "only for the purposes of their own information, and could not publish for profit that which they had not obtained the right of selling."⁷¹

Similarly, in *Pollard v. Photographic Co.*,⁷² the court enjoined a photographer from publishing the picture of a woman who agreed to have her photograph taken, but did not agree to have it published. Though deciding partially on intellectual property grounds, the court held that such a publication would breach an implied contract between the photographer and his subject not to publish the picture without the subject's consent.⁷³

After reviewing these cases, and the manner in which English courts extended copyright law and implied contracts to protect privacy, Warren and Brandeis observed that this legal fiction was "nothing more nor less than a judicial declaration that public morality, private justice, and general convenience demand the recognition of such a rule, and that the publication under similar circumstances would be considered an intolerable abuse."⁷⁴ While Warren and Brandeis read each decision as implicitly resting on privacy grounds, they feared that if courts continued to resort to legal fictions they would be unable to protect privacy adequately in light of modern technology. Illustrating this fear, these authors emphasized that the new age of candid photography enabled total strangers to invade privacy surreptitiously under circumstances in which courts could not apply copyright law, or im-

67. *Id.* at 28-33, 47 Eng. Rep. at 1313-15.

68. *Id.* at 29, 47 Eng. Rep. at 1313.

69. *Id.* at 40-41, 47 Eng. Rep. at 1318.

70. *Id.* at 39-41, 47 Eng. Rep. at 1317-18.

71. *Id.* at 40, 47 Eng. Rep. at 1317.

72. 40 Ch. D. 345 (1888).

73. *Id.* at 353. Warren and Brandeis also discussed the case of *Tuck v. Priest*, 19 Q.B.D. 639 (1887), where the court held a printer liable for breaching an implied contract by making and selling unauthorized reproductions of a picture that a customer left for copying. Warren & Brandeis, *supra* note 1, at 208.

74. Warren & Brandeis, *supra* note 1, at 210. These authors cited additional examples of such judicial manipulation from cases protecting property in the contents of letters and enjoining the publication of trade secrets. *Id.* at 211-12.

ply a term in a contract, to find a breach of contract or trust.⁷⁵ For this reason, Warren and Brandeis urged courts to discard such legal fictions and to protect privacy directly by providing tort remedies for its unwarranted invasion.⁷⁶

Warren and Brandeis did not believe that providing the necessary protection required courts to resort to "judicial legislation."⁷⁷ Rather, they maintained that courts need only apply the same privacy principles that they had long recognized under the guise of alternate theories and legal fictions.⁷⁸ "The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise."⁷⁹

While advocating both monetary and injunctive relief for violations of the right to privacy, Warren and Brandeis did not regard this right as absolute.⁸⁰ Wishing to minimize intrusions on freedom of the press, these commentators proposed four limitations on the right to privacy:

1. The right to privacy does not prohibit any publication of matter which is of public or general interest.

...

2. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.

...

75. In these cases, where no relationships are formed between photographers and their subjects, Warren and Brandeis acknowledged the uselessness of implied contract theories:

While, for instance, the state of the photographic art was such that one's picture could seldom be taken without consciously "sitting" for the purpose, the law of contract or of trust might afford the prudent man sufficient safeguards against the improper circulation of his portrait; but since the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrines of contract and of trust are inadequate to support the required protection . . .

Id. at 211.

76. *Id.*

77. *Id.* at 213 n.1.

78. *Id.* at 213.

79. *Id.* (footnote omitted).

80. *Id.* at 219. Warren and Brandeis proposed that unwarranted invasions of privacy be compensated with damages "in all cases" and that injunctive relief be made available in "a very limited class of cases." *Id.* (footnotes omitted). They also suggested that criminal penalties be imposed, but acknowledged that legislators must enact appropriate legislation for this purpose. *Id.*

3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.

...

4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent.⁸¹

By limiting the right in this manner, Warren and Brandeis hoped to protect an individual's privacy while safeguarding legitimate interests in the information at issue and in a free press. Presumably, Warren and Brandeis also hoped to improve the chances that the right to privacy would be recognized by courts who might otherwise be concerned that the commentators' proposals went a bit too far.

III. WARREN AND BRANDEIS' IMPACT — A PRIVACY LAW REVOLUTION

While a few courts initially accepted Warren and Brandeis' ideas and entertained actions for invasions of privacy,⁸² the first major case to address their proposals did so in a manner that undoubtedly disappointed both men. In *Roberson v. Rochester Folding Box Co.*,⁸³ the New York Court of Appeals considered the claims of a woman whose privacy was allegedly invaded when defendants used her portrait without her consent to advertise flour. The plaintiff asserted the ideas of Warren and Brandeis as a basis for recovery.⁸⁴ In rejecting her claims, the *Roberson* majority severely criticized War-

81. *Id.* at 214, 216-18. In an effort to distinguish their tort from actions based on libel law, Warren and Brandeis stressed that traditional libel defenses would not apply where the press violates the right to privacy. Accordingly, the publisher of private facts cannot assert either the truth of the matter disclosed or the absence of malice in defending against privacy claims. *Id.*

82. See, e.g., *Corliss v. E.W. Walker Co.*, 64 F. 280 (C.C.D. Mass. 1894) (holding that a public figure, unlike a private individual, may not prohibit the publication of his portrait); *Mackenzie v. Soden Mineral Springs Co.*, 18 N.Y.S. 240 (Sup. Ct. 1891) (enjoining defendant from the unauthorized use of a physician's signature, or copy thereof, in advertising a medicine); *Marks v. Jaffa*, 6 Misc. 290, 26 N.Y.S. 908 (Super. Ct. N.Y. City 1893) ("The action may seem novel, but there can be no question about the plaintiff's right to relief . . ."). One early court, however, the Supreme Court of Michigan in *Atkinson v. John E. Doherty & Co.*, 121 Mich. 372, 80 N.W. 285 (1899), sharply criticized the Warren and Brandeis article and concluded that "authoritative decisions which support the theory advocated are wanting." *Id.* at 375, 80 N.W. at 286. Although that court took pains to "sympathize" with the plaintiff, it rejected the plaintiff's privacy claim on the ground that "it is one of the ills that, under the law, cannot be redressed." *Id.* at 384, 80 N.W. at 289.

83. 171 N.Y. 538, 64 N.E. 442 (1902).

84. *Id.* at 544, 64 N.E. at 443 (citing Warren & Brandeis, *supra* note 1).

ren and Brandeis' article and warned that the right advocated in this manuscript would invite "litigation bordering upon the absurd."⁸⁵

Rather than heeding Warren and Brandeis' call for courts to provide new remedies for invasions of privacy, the *Roberson* court refused to depart from traditional doctrine. After reviewing the cases cited by Warren and Brandeis, the court found their interpretations and arguments to be utterly lacking in precedent.⁸⁶ The court concluded that "the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided."⁸⁷ According to the *Roberson* majority, a right to privacy would also do violence to the judicial system by plaguing courts with an explosion of ludicrous lawsuits:

If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations or habits. And, were the right of privacy once legally asserted, it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely let alone.⁸⁸

Without appearing to encourage it, the court suggested that this right could only be established through legislation specifically prohibiting invasions of privacy.⁸⁹ "In such event no embarrassment would result to the general body of the law, for the rule would be applicable only to cases provided for by the statute."⁹⁰

85. *Id.* at 545, 64 N.E. at 443.

86. *Id.* at 543, 64 N.E. at 443.

87. *Id.* at 546, 64 N.E. at 447.

88. *Id.* at 544-45, 64 N.E. at 443.

89. *Id.* at 545, 64 N.E. at 443.

90. *Id.*

Reacting to a storm of public protest over this decision,⁹¹ the New York Legislature passed two such statutes the following year.⁹² These statutes, which remain on the books in amended form,⁹³ made it both a tort and a misdemeanor for any person, firm, or corporation to use another's name, portrait, or picture for commercial purposes without the subject's consent.⁹⁴ While these provisions are frequently invoked to protect individual privacy, "[t]he right of privacy under the New York Statute is more restricted than that right in states where it has been recognized without legislation."⁹⁵

Three years after *Roberson*, the Supreme Court of Georgia became the first high court to recognize a common law right of privacy when it refused to follow the New York Court of Appeals and unanimously endorsed the views of Warren and Brandeis.⁹⁶ In *Pavesich v. New England Life Ins. Co.*,⁹⁷

91. Not surprisingly, the *Roberson* court's refusal to depart from existing law did not meet with the approval of a public that hungered for increased privacy protection. Ironically, one of the most scathing attacks on this decision was waged by a member of the press and published in the *New York Times*. Shortly after the court released its opinion, the *New York Times* sent out the following call for legislative action:

[T]he highest legal authority in the greatest State in the Union assures us that [invasions of privacy] are outrages for which the law provides no remedy. So much the worse for the law, say all the decent people. If there be . . . no law now to cover these savage and horrible practices, practices incompatible with the claims of the community in which they are allowed to be committed with impunity to be called a civilized community, then the decent people will say that it is high time that there were such a law . . . and the Court of Appeals will not be left to shadowy analogies and precedents for its conclusion that these outrages are legally unpreventable and unpunishable. It will have the advantage of a clear and explicit statute to construe.

N.Y. Times, Aug. 23, 1902, at 8, col. 3. This editorial prompted a member of the *Roberson* majority, Judge Denis O'Brien, to take the unprecedented step of defending his decision in a law review article. See O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902). In that article, Judge O'Brien defended the court's decision to adhere to established precedent rather than "embark[ing] in the business of making new law to suit a particular case It is easy enough to wander away from beaten paths that are safe, but it is not always so easy to return." *Id.* at 448. Judge O'Brien also urged the New York Legislature to refrain from making new law in this area. According to Judge O'Brien, "The right of privacy, so called, represents an attractive idea to the moralist and social reformer, but to the lawmaker, who seeks to embody the right in a statute, the subject is surrounded with some serious difficulties." *Id.* at 445.

92. 1903 N.Y. Laws ch. 132, §§ 1-2. The New York Court of Appeals held these statutes constitutional in *Rhodes v. Sperry & Hutchinson Co.*, 193 N.Y. 223, 85 N.E. 1097 (1908), *aff'd*, 220 U.S. 502 (1911).

93. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976 & Supp. 1990).

94. *Id.*

95. *Manger v. Kree Institute of Electrolysis, Inc.*, 233 F.2d 5, 8 n.3a (2d Cir. 1956) (citing *Nizer, The Right of Privacy*, 39 MICH. L. REV. 526, 538-39 (1941)). According to some commentators, however, this restriction has not posed a practical problem for most plaintiffs and, in most cases, the rights provided by the New York statutes are "quite consistent with the common law as it has been worked out in other states." Prosser, *supra* note 40, at 385-86.

96. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

97. *Id.*

the court ruled in favor of a plaintiff who claimed that the defendant insurance company violated his right to privacy when it used his name, portrait, and a fictitious testimonial in its newspaper advertisement without his consent.⁹⁸

Unlike the *Roberson* majority, the lack of precedent underlying the right to privacy did not disturb the *Pavesich* court. The court was far more uncomfortable with the traditional practices of judges whose unwavering reliance on precedent prevented them from formulating new legal remedies for new situations.⁹⁹ In fact, the court sharply criticized the *Roberson* decision as "the result of an unconscious yielding to the feeling of conservatism which naturally arises in the mind of a judge who faces a proposition which is novel."¹⁰⁰ In the *Pavesich* court's view, "this conservatism should not go to the extent of refusing to recognize a right which the instincts of nature prove to exist, and, which nothing in judicial decision, legal history, or writings upon the law can be called to demonstrate its nonexistence as a legal right."¹⁰¹ Accordingly, the court recognized a right to privacy "derived from natural law"¹⁰² and boldly predicted that such a right would become firmly entrenched in American jurisprudence:

So thoroughly satisfied are we that the law recognizes, within proper limits, as a legal right, the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come that the American bar will marvel that a contrary view was even entertained by judges of eminence and ability¹⁰³

The popularity of the *Pavesich* decision helped to establish this prediction as a self-fulfilling prophecy. By 1939, so many courts had followed *Pavesich*'s lead that the American Law Institute codified the right of privacy in the *Restatement of Torts*.¹⁰⁴ The *Restatement* provided that "[a] person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."¹⁰⁵ As more courts entertained privacy suits, the right of pri-

98. *Id.* at 192, 213-16, 50 S.E. at 69, 78-79.

99. *Id.* at 211-13, 50 S.E. at 77-78.

100. *Id.* at 213, 50 S.E. at 78.

101. *Id.*

102. *Id.* at 197, 50 S.E. at 70.

103. *Id.* at 220, 50 S.E. at 80-81.

104. RESTATEMENT OF TORTS § 867 (1939).

105. *Id.* Comment d to this provision emphasizes that "liability exists only if the defendant's conduct was such that he should have realized that it would be offensive to persons of

vacy evolved into four separate torts that the American Law Institute added to the *Restatement (Second) of Torts* in 1977: (1) "unreasonable intrusion upon the seclusion of another"; (2) "appropriation of the other's name or likeness"; (3) "unreasonable publicity given to the other's private life"; and (4) "publicity that unreasonably places the other in a false light before the public."¹⁰⁶ Today, most courts recognize all four of these torts,¹⁰⁷ and as the *Pavesich* court predicted, the right to privacy has earned a prominent place in American jurisprudence.¹⁰⁸

Though this right to privacy has become "plainly rooted in the traditions and significant concerns of our society,"¹⁰⁹ its importance continues to grow. With the continuing development of what Warren and Brandeis called "modern enterprise and invention,"¹¹⁰ the continuing expansion of privacy rights may be more important than ever. Indeed, computer age technology threatens privacy in ways that Warren and Brandeis could not possibly have imagined. Far more than the newspaper gossip trade that concerned these authors, these innovations have created an "information economy," in which entire industries are founded upon the compilation, purchase, and sale of personal information.¹¹¹ "For example, modern information gathering

ordinary sensibilities." The drafters of this provision specifically listed the facts in *Roberson* as an example of such conduct. *Id.* comment d, Illustration 4.

106. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

107. Comment, *Intrusions Upon Informational Seclusion in the Computer Age*, 17 J. MARSHALL L. REV. 831, 835 (1984) (the four torts are "generally accepted by the courts"). After *Pavesich*, "virtually every state, by either judicial decision or statute, has created protection for the right to privacy." Note, *Privacy, Computers, and the Commercial Dissemination of Personal Information*, 65 TEX. L. REV. 1395, 1405 (1987) (footnote omitted).

108. While the United States Supreme Court has recognized privacy rights of a constitutional magnitude in a variety of contexts, see, e.g., *Roe v. Wade*, 410 U.S. 113, 152-56 (1973) (recognizing control over one's body as a privacy right); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (protecting the sanctity of a home); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (protecting privacy in marital relationship), the circuit courts are split over whether a broad constitutional right to informational privacy exists. Compare *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981) (constitutional right to privacy exists), *United States v. Westinghouse Electric Corp.*, 638 F.2d 570 (3d Cir. 1980) (same), and *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978) (same), cert. denied 439 U.S. 1129 (1979) with *J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981) (Supreme Court has not recognized constitutional right to informational privacy). Despite this disagreement, the Supreme Court's recent treatment of the conflict between privacy rights and the first amendment strongly suggests that a general right to informational privacy has yet to attain constitutional status. Kramer, *The Full-Court Press: Sacrificing Vital Privacy Interests on the Altar of First Amendment Rhetoric*, 8 CARDOZO ARTS & ENT. L.J. 113, 117 n.22 (1989).

109. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

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

111. Lautsch, *Computers, Communications and the Wealth of Nations: Some Theoretical and Policy Considerations About an Information Economy*, 4 COMPUTER/LAW J. 101, 101-02 (1983).

and retrieval techniques enable organizations to build up not only files, but mosaics of, persons' characteristics, derived from records of purchases, relocations, tax information, and so on."¹¹²

Unlike the gossip columns of the late 1800's, this information is not discarded with the daily paper. Rather, it is stored in insatiable electronic databanks where it may be retrieved years later at the press of a button. As a result, many individuals become trapped in an "information prison."¹¹³ Unable to escape the damaging consequences of their own personal history, these individuals may never recapture the privacy destroyed by the unforgiving memory of the computer.¹¹⁴

Because this technology has grown with incredible speed,¹¹⁵ privacy law has had difficulty keeping pace with these changes, and many commentators have complained that the law no longer provides adequate protection against the intrusions of the Computer Age.¹¹⁶ Echoing the words of Warren and Brandeis, these modern-day privacy proponents once again call for courts to expand the law to meet new threats to privacy posed by technological innovations. "Just as the genesis of the privacy tort was in technological and social changes in the last years of the nineteenth century, so too in the last years of the twentieth century should we recognize that further changes necessitate expansion of the law."¹¹⁷

112. *Id.* at 116. Our computerized economy has also aroused the concern of Professor Arthur Miller who observed that

each time a citizen files a tax return, applies for life insurance or a credit card, seeks government benefits, or interviews for a job, a dossier is opened under his name and his informational profile is sketched. It has now reached the point at which whenever we travel on a commercial airline, reserve a room at one of the national hotel chains, or rent a car we are likely to leave distinctive electronic tracks in the memory of a computer—tracks that can tell a great deal about our activities, habits, and associations when collected and analyzed.

Miller, *The Dossier Society*, 1971 U. ILL. L.F. 154, 155.

113. Solomon, *Personal Privacy and the "1984" Syndrome*, 7 W. NEW ENG. L. REV. 753, 755 (1985).

114. *Id.* ("People tend to forget and forgive, computers do not.").

115. Comment, *supra* note 107, at 836 n.39.

116. See, e.g., Lautsch, *supra* note 111, at 119; Note, *supra* note 107, at 1396 ("Privacy law has failed to respond, as it has in the past, to technological changes that influence the degree of privacy to which we are accustomed."). Because many of the intrusions of computer technology involve the *private* transfer of personal information, existing remedies designed to redress the *public* disclosure of this information have not been effective in deterring such invasions. "Were Warren and Brandeis writing today they surely would be distressed at the courts' reluctance to recognize that an individual has an interest in preventing the dissemination of personal information to anonymous entities that make important decisions about that individual." *Id.* at 1418.

117. Note, *supra* note 107, at 1418.

In this respect, many of Warren and Brandeis' words remain as vital to-day as when they first published their article in 1890. To quote these commentators, "numerous mechanical [and electronic] devices [still] threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"¹¹⁸ As this technology expands, twentieth century commentators confront this threat by repeating Warren and Brandeis' call for courts to expand the common law by providing increased protection for privacy. Consequently, even after a century of rapid development, the law of privacy stands as a prime example of the adage that "the more things change, the more they stay the same."

IV. WARREN AND BRANDEIS CRITICIZED

Although the Warren and Brandeis article remains a cause célèbre for privacy proponents, its widespread acceptance has not pleased everyone. As one commentator stated, many of Warren and Brandeis' proposals "have become locked in molded phrases and have never undergone the scrutiny of the doubting scholar."¹¹⁹ In recent years, however, many doubting scholars have emerged to scrutinize all aspects of this celebrated article.

One of the earliest and most prominent of these scholars, Professor Harry Kalven, believed that Warren and Brandeis were simply wrong to advocate a tort remedy for the public disclosure of private facts.¹²⁰ In his view, the lure of "the great Brandeis trade mark, excitement over the law at a point of growth, and appreciation of privacy as a key value have combined to dull the normal critical sense of judges and commentators and have caused them not to see the pettiness of the tort they have sponsored."¹²¹ Professor Kalven also charged that the Warren and Brandeis "article reads . . . much like a

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

119. D. PEMBER, *PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT* 33 (1972).

120. Kalven, *supra* note 7, at 327. While Dean Prosser divided the right of privacy into four distinct torts which were added to the Second Restatement, Prosser, *supra* note 40, at 389; see *supra* note 99 and accompanying text, commentators generally agree that Warren and Brandeis were primarily concerned with the tort of public disclosure of private facts. Bloustein, *supra* note 8, at 611; Kalven, *supra* note 6, at 333.

121. Kalven, *supra* note 7, at 328 (footnote omitted). Before Professor Kalven, the only commentator to challenge publicly Warren and Brandeis was Professor Frederick Davis. Professor Davis argued "that the concept of a right of privacy was never required in the first place, and that its whole history is an illustration of how well-meaning but impatient academicians can upset the normal development of the law by pushing it too hard." Davis, *What Do We Mean By "Right to Privacy"?*, 4 S.D.L. REV. 1, 23 (1959).

brief and rests on an incomplete argument" relying upon the wrong precedent and stretching it beyond its logical scope.¹²²

While Professor Kalven credited Warren and Brandeis with lending their tort "class," he sharply criticized them for failing to lend it a "legal profile."¹²³ In particular, Warren and Brandeis made no effort to identify the *prima facie* elements of the tort, gave no guidance for measuring damages, and failed to articulate the degree of fault, if any, required to hold defendants liable.¹²⁴ Not only has the lack of a legal profile left courts with little concrete guidance in deciding invasion of privacy cases, Professor Kalven complained that the resulting ambiguities have also encouraged plaintiffs to file trivial nuisance suits designed to extort lucrative settlements.¹²⁵ By contrast, individuals truly harmed by invasions of privacy would rarely, if ever, subject themselves to the invasive and embarrassing publicity that often surrounds litigation.¹²⁶ Consequently, Professor Kalven concluded that "the achievement of the new tort remedy has been primarily to breed nuisance claims" and that Warren and Brandeis' remedy has given little practical protection to real victims of privacy invasions.¹²⁷

Yet, Warren and Brandeis' critics generally agree that the greatest shortcoming of this remedy involves its apparent conflict with another important protection—freedom of the press. By allowing individuals to recover against members of the press for disclosing true statements of fact, the right to privacy may impinge on the press' first amendment right to print such statements. This is particularly true when the press reports newsworthy facts of legitimate public interest.

122. Kalven, *supra* note 7, at 329-30. Another critic who examined their use of precedent boldly proclaimed "that Warren and Brandeis were wrong and that their argument was not supported by their own evidence." Pratt, *supra* note 61, at 162.

123. Kalven, *supra* note 7, at 328, 333.

124. *Id.* at 333-35.

125. *Id.* at 337-39. "The lack of legal profile for the tort makes any sort of unconsented-to reference to the plaintiff look colorable, and there is the threat of indeterminate damages" that provides a great incentive for those wishing to file nuisance suits. *Id.* at 339.

126. *Id.* at 338. In Professor Kalven's words, "the victims on whose behalf the privacy tort remedy was designed will not in the real world elect to use it and . . . those who will come forward with privacy claims will very often have shabby, unseemly grievances and an interest in exploitation." *Id.* One of the first commentaries ever written about the Warren and Brandeis article predicted the reluctance of individuals to sue for legitimate invasions of privacy:

[T]he man who feels outraged by publicity will, in order to stop or punish it, have to expose himself to a great deal more publicity. In order to bring his persecutors to justice, he will have to go through a process which will result in an exposure of his private affairs tenfold greater than that originally made by the offending article.

Godkin, *The Right to Privacy*, 51 THE NATION 496 (1890).

127. Kalven, *supra* note 7, at 339. For a thoughtful response to Professor Kalven, see Bloustein, *supra* note 8.

While Warren and Brandeis recognized this problem and emphasized that the "right to privacy does not prohibit any publication of matter which is of public or general interest,"¹²⁸ their critics have defined the "public interest" so broadly that this newsworthiness exception may literally swallow the rule. Adopting "the simple contention that whatever is in the news media is by definition newsworthy,"¹²⁹ Professor Kalven questioned whether the press' "claim of privilege is not so overpowering as virtually to swallow the tort."¹³⁰

Another prominent commentator answered this question in favor of the press in a sharp critique that advocated the total elimination of this tort.¹³¹ According to Professor Diane Zimmerman, proponents of Warren and Brandeis' privacy tort "have often underplayed its serious constitutional problems and have overlooked the fact that genuine social values are served by encouraging a free exchange of personal information."¹³² After examining what she believes are insurmountable constitutional problems, Professor Zimmerman could not reconcile Warren and Brandeis' views with existing first amendment rights and urged courts to abandon the tort of invasion of privacy: "[A]fter nearly a century of experience, . . . it is probably time to admit defeat, give up the efforts at resuscitation, and lay the noble experiment in the instant creation of common law to a well-deserved rest."¹³³

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

129. Kalven, *supra* note 7, at 336.

130. *Id.*

131. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983).

132. *Id.* at 294.

133. *Id.* at 365. A recent line of Supreme Court cases has led some observers to conclude that the Court may indeed be laying Warren and Brandeis' privacy tort to rest. In the last fifteen years, the Court has repeatedly afforded the press a first amendment privilege to publish private facts without regard for the vital privacy interests sacrificed in the process. *See, e.g.*, *Florida Star v. B.J.F.*, 109 S. Ct. 2603 (1989) (rape victim's name disclosed); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (juvenile delinquent's name published); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (confidential investigation of judge revealed); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (juvenile delinquent's name published); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (rape victim's name broadcast). The Court's seeming disregard for plaintiffs' privacy has led one dissenting justice to conclude that his brethren have accepted an "invitation . . . to obliterate one of the most note-worthy legal inventions of the 20th-Century: the tort of the publication of private facts." *Florida Star*, 109 S. Ct. at 2618 (White, J., dissenting) (citing W. PROSSER, J. WADE & V. SCHWARTZ, TORTS 951-52 (8th ed. 1988)). Despite this solemn appraisal, the Court has yet to announce the elimination of this tort and, considering its remarkable stamina over the last century, rumors of its demise may be greatly exaggerated. For an article criticizing the Court's resolutions of conflicts between privacy and the press, see Kramer, *supra* note 108.

V. CONCLUSION

As privacy law celebrates its one hundredth birthday, this fascinating field shows few signs of aging. Although certain critics would give it a "well-deserved rest," the field of privacy law remains as fresh and dynamic after one century as the technological innovations that have sparked its continuing development. While privacy protections continue to evolve, the right first advocated by Warren and Brandeis has earned a prominent place in American jurisprudence and is now regarded as one of society's most fundamental values.

Privacy law also occupies a prominent place in legal scholarship and continues to provoke thoughtful commentary and sharp criticism from many of the foremost legal minds of our time.¹³⁴ Many of these commentators have joined Warren and Brandeis in promoting the right to privacy. As Dean Prosser aptly observed in his famous treatise on tort law, "no other tort has received such an outpouring of comment in advocacy of its bare existence."¹³⁵ Although not all commentators are persuaded by Warren and Brandeis' proposals, and some have seriously questioned their validity,¹³⁶ few scholars can help but admire the incredible impact of two young lawyers who, in a single law review article published a century ago, created an entire field of law that may continue to intrigue courts and commentators for centuries to come.

134. See, e.g., Miller, *Press Versus Privacy*, 16 GONZ. L. REV. 843 (1981); Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329 (1979); E. BLOUSTEIN, *INDIVIDUAL AND GROUP PRIVACY* (1978); Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977); Fried, *Privacy*, 77 YALE L.J. 475 (1968); Prosser, *supra* note 40.

135. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 117, at 850 (5th ed. 1984).

136. See *supra* notes 119-33 and accompanying text.