

Volume 41 | Issue 3

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1991

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## Recommended Citation

David W. Leebron, *The Right to Privacy's Place in the Intellectual History of Tort Law*, 41 Case W. Res. L. Rev. 769 (1991)  
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol41/iss3/11>

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# THE RIGHT TO PRIVACY'S PLACE IN THE INTELLECTUAL HISTORY OF TORT LAW

David W Leebron\*

FEW DOCTRINAL INNOVATIONS in the history of the common law can be precisely dated.<sup>1</sup> However, as suggested by this symposium, the right to privacy is commonly dated<sup>2</sup> to the publication of Warren and Brandeis's article, *The Right to Privacy*.<sup>3</sup> Yet one hundred years later there remain many questions regarding the legal status of privacy. What was the conceptual basis of the right to privacy? What was its theoretical and historical pedigree? And what was its destiny?

This essay seeks to provide an answer to some of these questions from one particular perspective, that of tort theory. After all, what presumably has made the article so influential, so deserving of a centenary, is that it created a new tort. For the most part, the papers presented on this occasion focus on the tort right of privacy. While it is true that the tort, or perhaps more accurately the group of privacy torts, has been almost invariably linked with the Warren and Brandeis article, that article has found no broader role in tort history or tort law and theory generally. Brandeis, un-

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\* Professor of Law, Columbia University School of Law. I am indebted to Louis Henkin, John Leubsdorf, Eben Moglen, and Henry Monaghan for particularly helpful conversations and comments. Participants in the *Case Western Reserve Law Review Symposium: The Right to Privacy One Hundred Years Later*, also provided valuable questions and comments on the initial draft. Joseph Jampietro provided extremely valuable research assistance.

1. One rare example may be the fall of the doctrine of privity. See Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 791 (1966) ("In the field of products liability, the date of the fall of the citadel of privity can be fixed with some certainty. It was May 9, 1960, when the Supreme Court of New Jersey announced the decision in *Henningsen v. Bloomfield Motors Inc.*").

2. Privacy has been dated from the Warren and Brandeis article nearly from its appearance. See, e.g., Larremore, *The Law of Privacy*, 12 COLUM. L. REV. 693 (1912) ("An article by [Warren and Brandeis] enjoys the unique distinction of having initiated and outlined a new field of jurisprudence.").

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

like Holmes and Cardozo, has not been given any place in the more general development of the law of torts. I want to celebrate this hundredth anniversary of the article by focusing on its foundation and not merely its conclusion.

This essay explores the theory of tort law implicit in the Warren and Brandeis article, its relation to the intellectual developments in the law at the time, and its subsequent influence on the law. To some extent, this is simply a matter of historical interest. Using the privacy article as a focal point, I will examine the competing conceptions of tort law that emerged during the formative years of tort theory in the late nineteenth century. But the interest in the theory behind the tort is more than historical. In the last few decades the article and its privacy right have come under sustained attack.<sup>4</sup> I suggest that part of its vulnerability lies in our failure to identify and address its underlying theory.

Part I briefly sketches the intellectual landscape of tort law in the United States prior to the Warren and Brandeis article. Part II explores the origins of the article and the conceptual approach to tort law (and the common law) on which it is based. Part III examines the immediate impact of the article and the nature of the theoretical disputes in which it became embedded. Part IV considers from a larger perspective the subsequent influence of the article, and in particular its influence on constitutional law. Finally, Part V reconsiders the implications of the tort theory on which the article is based.

## I. THE STATE OF TORT THEORY IN THE MID-NINETEENTH CENTURY

Prior to the middle of the century, tort law was conceived of and practiced as a collection of unrelated writs. The unraveling of the writ system culminated in midcentury procedural reforms, led by New York's adoption of the Field Code of Procedure.<sup>5</sup> In Holmes's view, the procedural reforms were an important impetus to new theoretical development: "[S]ince the ancient forms of action have disappeared, a broader treatment of the subject ought to

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4. See, e.g., Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 *LAW & CONTEMP. PROBS.* 326 (1966); Pratt, *The Warren and Brandeis Argument for a Right to Privacy*, 1975 *PUB. L.* 171; Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 *CORNELL L. REV.* 291 (1983).

5. See L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 340-43 (1973); G.E. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 8-12 (1980).

be possible. Ignorance is the best of law reformers. People are glad to discuss a question on general principles, when they have forgotten the special knowledge necessary for technical reasoning."<sup>6</sup>

Along with the collapse of the writ system came two important other developments. First was the rapid industrial development of the United States, and in particular the spread of railroads, which brought before the courts an ever-increasing number of accidental injuries. This accelerated the trend of the previous two centuries in which inadvertent injuries replaced intentional harms as the primary source of tort claims.<sup>7</sup> Actions for assault, battery, libel, and slander came to comprise only a minority of cases, while actions for trespass and trespass on the case ("case") were brought for the rising number of accidental harms caused by new inventions and the increase in commerce.

Accompanying this change in the nature of the injuries brought to the courts was the emergence of negligence as an all-encompassing principle of tort liability for accidents. While one may argue about the timing of, and reasons for, the development of negligence as the guiding principle of American tort law, there is little doubt that by the middle of the century many saw it as the underlying principle of much of tort law.<sup>8</sup> This rise of negligence in the nineteenth century has been discussed primarily in terms of

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6. O.W. HOLMES, *THE COMMON LAW* 78 (1881). Holmes was echoing a sentiment Addison expressed two decades earlier:

It is remarkable that the laws which regulate and control the conduct of mankind in the private relations of life, and define and ascertain their proprietary and personal rights, should form no part of ordinary education or learning; but they have hitherto been so blended with our artificial system of forms of action, and burthened with so many niceties and subtleties peculiar to our ancient technical and refined system of legal procedure and pleading, that the study of them has been rendered tedious and repulsive to all who do not intend to take to the law as a profession. Now, however, that forms of actions have been substantially abolished, and the abstrusities of our venerable and refined system of pleading and procedure have given way to a more liberal and enlightened system, the pathway to legal science and to the general attainment of a certain amount of useful legal knowledge has been rendered comparatively easy and inviting.

C.G. ADDISON, *WRONGS AND THEIR REMEDIES, BEING A TREATISE ON THE LAW OF TORTS* at vii (1860).

7. See generally Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 *LA. L. REV.* 1 (1970) (tracing tort law from its inception in feudal disputes through its break from criminal offenses to its adoption of negligence).

8. See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 89-99 (1977) (citing cases).

whether it replaced a strict liability standard and whether it represented a subsidy to American industry.<sup>9</sup> However, the shift to the negligence paradigm also represented a different way of thinking about the structure of tort law. Negligence, unlike the various intentional and strict liability torts that preceded it, was an all-encompassing theory of liability for damage. Liability was based on two propositions: the defendant had acted wrongfully and the plaintiff had suffered damage. The first and primary element of the plaintiff's case was that the defendant had indeed been negligent. Prior to this transformation, the plaintiff's prima facie case consisted of showing that some right protected by an established writ had been violated by the defendant. The defendant's conduct, if relevant, was available as an excuse or justification. There was little unity to tort law because the writs protecting various rights and interests shared no underlying relationship. The rise of negligence, and the increasing focus on the defendant's conduct as the first basis of liability, provided one possibility of a unifying theory of tort law.

Even by midcentury, however, tort law was not regarded as unified, conceptually or legally, and its emergence as a distinct and unified area occurred slowly in the second half of the nineteenth century. The first treatise on the subject appeared in the United States in 1859<sup>10</sup> and in England a year later.<sup>11</sup> As late as 1871, Holmes decreed that torts was "not a proper subject for a law book."<sup>12</sup> Two years later, Holmes made his first stab at a general theory of tort liability,<sup>13</sup> but it was not very influential. The

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9. Compare Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989) (asserting that negligence was adopted rather than strict liability in order to subsidize emerging industry), and Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981) (viewing tort law as a vehicle for industrial subsidy and economic efficiency), with L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985) (opposing the subsidy view of negligence), and M. HORWITZ, *supra* note 8, at 99 ("the rise of the negligence principle was only part of a more general attempt to limit the scope of the application of the principle of just compensation."), and Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951) (justifying trend toward strict liability as a loss spreading mechanism).

10. F. HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS* (1859); see G.E. WHITE, *supra* note 5, at 3 (discussing the development of Torts as an independent branch of law).

11. C.G. ADDISON, *supra* note 6 (the original treatise on Torts as published in England in 1860).

12. Holmes, Book Review, 5 AM. L. REV. 340, 341 (1871) (reviewing C.G. ADDISON, *THE LAW OF TORTS* (1870)).

13. Holmes, *The Theory of Torts*, 7 AM. L. REV. 652 (1873) (certain duties are always present and shape every individual's behavior).

first casebook on the subject, by James Barr Ames, appeared in 1874.<sup>14</sup> While the cases increasingly and explicitly addressed the principles of liability,<sup>15</sup> the law of torts was still in search of a theory when Holmes published *The Common Law* in 1881.

Holmes proposed an instrumentalist view<sup>16</sup> of tort law almost exclusively concerned with the effect of such law on the conduct of the defendant. The nature of the defendant's conduct constituted the organizing principle of tort law. Holmes's approach to tort law achieved rapid acceptance. From today's perspective, Holmes's conceptualization of tort law seems to have been written on an intellectual blank slate.<sup>17</sup> But for writers toward the end of the century, like Warren and Brandeis, it was not the only approach available. The general theory of torts was still very much up for discussion at the end of the century. In 1894 and 1895, for example, Wigmore published two essays setting forth a general theory of torts.<sup>18</sup> He noted at the outset:

Certainly the subject [of Torts] is in need of some accepted analysis, which shall at once co-ordinate our present knowledge and form the basis of future development. If we are ever to have, as Sir Frederick Pollock puts it, not books about specific Torts, but books about Tort in general, some further examina-

14. G.E. WHITE, *supra* note 5, at 3.

15. Among the most important cases in this regard was *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850), where Chief Justice Shaw drew a sharp distinction between the question of what writ (trespass or case) was proper and "whether in a given case, any action will lie." *Id.* at 295. Shaw approached the latter question in terms of general principles. Shaw was not the first to adopt a requirement of negligence for accidental harms, but was so celebrated by Holmes. See M. HORWITZ, *supra* note 8, at 90.

16. See R. SUMMERS, *INSTUMENTALISM AND AMERICAN LEGAL THOUGHT* 27 (1982).

17. Cf. D. Rosenberg, *Strict Liability in Holmes' General Theory of Torts* 1 (1990) (unpublished manuscript) ("Modern torts scholarship in America begins with the writings of Oliver Wendell Holmes, Jr.").

18. Wigmore, *A General Analysis of Tort-Relations*, 8 HARV. L. REV. 377 (1895) [hereinafter Wigmore, *Tort-Relations*]; Wigmore, *The Tripartite Division of Torts*, 8 HARV. L. REV. 200 (1894) [hereinafter Wigmore, *Tripartite Division*]. I do not examine Wigmore's thought in detail here, in part because his writings followed the publication of the Warren and Brandeis article. Wigmore's writings on torts, which include a fascinating two volume casebook (J. WIGMORE, *SELECT CASES ON THE LAW OF TORTS* (1912)) that in many ways is the forerunner of the modern casebook in its diversity of materials, notes, and problems, have received almost no attention in tort law history. His views, as conveyed in the early articles, seem to reflect an amalgam of the Holmes and Cooley approaches. Wigmore focuses both on what he refers to as the "Damage" and "Responsibility" elements. He also identifies a third element, which he terms "Excuse or Justification." See Wigmore, *Tort-Relations*, *supra* at 377. His discussion of the "Damage element" contains a great deal of "rights talk."

tion of fundamental ideas is desirable.<sup>19</sup>

Competing treatises and casebooks of the late nineteenth and even early twentieth centuries suggested vastly different approaches to the subject matter. In the following section I shall try to identify the theory of Warren and Brandeis, trace its intellectual origins, and contrast it with Holmes's approach.

## II. THE WARREN AND BRANDEIS THEORY OF TORTS

In this section, I turn from the general background to the more immediate origins of the Warren and Brandeis article, particularly in light of some discrepancies in the brief history provided by Dean Prosser in his 1960 article. Prosser, of course, famously identified the inspiration of the Warren and Brandeis article as the unwanted publicity given the wedding of Mr. Warren's daughter shortly before the article was written.<sup>20</sup> While often repeated,<sup>21</sup> this view has been effectively discredited.<sup>22</sup> Two other events of 1890, however, did play a role in motivating the article. One was the decision in June by the Supreme Court of New York in *Manola v Stevens*,<sup>23</sup> a case involving flash photographs taken of an actress appearing in a Broadway theater. The case was apparently regarded as sufficiently important and interesting to attract the attention of the *New York Times*.<sup>24</sup> Indeed, surreptitious photography and the unauthorized use of photographs seem to have been matters of widespread concern, not a peculiar fascination of Warren and Brandeis. Several months earlier a letter had appeared in *The Nation* under the heading *The*

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19. Wigmore, *Tripartite Division*, *supra* note 18, at 200.

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

21. See, e.g., Kalven, *supra* note 4, at 341 n.82 (the law of privacy "is a most marvelous tree to grow from the wedding of the daughter of Mr. Samuel D. Warren") (quoting Prosser, *Privacy*, 48 CALIF. L. REV. 383, 401 (1960)).

22. Barron, *Warren and Brandeis*, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); *Demystifying a Landmark Citation*, 13 SUFFOLK U.L. REV. 875, 891-94 (1979).

23. The case is not officially reported. It is discussed by Warren and Brandeis. See Warren & Brandeis, *supra* note 3, at 195 n.7. Prosser mistakenly implies that *Manola* arose after the article: "The article had little immediate effect upon the law. The first case to allow recovery upon the independent basis of the right of privacy was [*Manola v Stevens*]." Prosser, *supra* note 20, at 384-85.

24. N.Y. Times, June 15, 1890, at 2, col. 3 (report of original incident); N.Y. Times, June 18, 1890, at 3, col. 2 (injunction sought against use of photograph); N.Y. Times, June 21, 1890, at 2, col. 2 (injunction granted). The photograph was taken by a photographer for the manager of the theater company with which Manola was appearing. The manager wanted to use the picture in an advertisement for the show. N.Y. Times, June 15, 1890, at 2, col. 3.

*Photograph Nuisance.* The author, apparently a lawyer, suggested that the common law on rights in letters suggested a remedy for such abuses.<sup>25</sup>

The other 1890 event apparently motivating the article was the appearance, in July, of an article by E.L. Godkin in *Scribner's Magazine* entitled *The Rights of the Citizen—To His Own Reputation*. This was fourth in a series of articles entitled *The Rights of the Citizen*.<sup>26</sup> Most of Godkin's article concerned defamation, but it concluded with a discussion of privacy.

Closely allied to [a disposition to attack reputation], and in fact growing out of it, is the disposition to intrude on privacy. Privacy is a distinctly modern product, one of the luxuries of civilization, which is not only unsought for but unknown in primitive or barbarous societies.

The famous dictum of Coke, "A man's house is his castle," is but the expression in terms of politics of the value attached by the race to the power of drawing, each man for himself, the line between his life as an individual and his life as a citizen, or in other words, the power of deciding how much or how little the community shall see of him, or know of him, beyond what is necessary for the proper discharge of all his duties to his neighbors and to the state. 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*

25. *The Photograph Nuisance*, 50 NATION 153, 153-54 (1890):

I am not prepared to frame offhand a statute covering all cases, but I certainly believe that a statute could be forthwith passed making every one liable, criminally and in a heavy penalty, who either sells a photograph or photograph-plate, without the consent of the sitter; or publishes a photograph, without such consent, for advertising purposes. Such a statute would give the many the privacy desired, while at the same time it would permit the few who desire, for professional or other reasons, publicity, to effect that wish by special contract with photographers.

But, apart from this proposed remedy by statute, is there none at common law? I am told that eminent lawyers deny that a remedy exists. On the contrary, I believe that one does exist, and I base my belief on the legal principle applicable to the ordinary letter of correspondence.

26. *The Rights of the Citizen* was a series of five articles consisting of: Whitridge, *The Rights of the Citizen. I.—As a Householder*, 7 SCRIBNER'S MAG. 417 (1890); Stetson, *The Rights of the Citizen II.—As a User of the Public Streets*, 7 SCRIBNER'S MAG. 625 (1890); Low, *The Rights of the Citizen. III.—As a User of Public Conveyances*, 7 SCRIBNER'S MAG. 771 (1890); Godkin, *The Rights of the Citizen. IV.—To His Own Reputation*, 8 SCRIBNER'S MAG. 58 (1890); Norton, *The Rights of the Citizen. V.—To His Own Property*, 8 SCRIBNER'S MAG. 307 (1890).



*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.<sup>27</sup>

While Warren and Brandeis acknowledged the contribution of Godkin's article,<sup>28</sup> they did not note that Godkin had put forth the basic suggestion in an essay published a decade earlier.<sup>29</sup> That

27. Godkin, *supra* note 26, at 65 (emphasis added). Godkin, however, was less sanguine about the possibility for relief:

In truth, there is only one remedy for the violations of the right to privacy within the reach of the American public, and that is but an imperfect one. It is to be found in attaching social discredit to invasions of it on the part of conductors of the press. At present this check can hardly be said to exist. As long as the money-getting talent holds the field against all other competing talents, in the race for distinction of every kind, we shall probably not see any great change in the attitude of the press on this subject. The supremacy of the pecuniary reward over all other rewards, as an incentive to exertion, can hardly be permanent, but it is one of the phenomena of the present day, which cannot be overlooked in any discussion of the defences thrown by law or opinion around the reputation or privacy of individuals.

*Id.* at 67. On this last point, see the letter published at 49 NATION 173, 173 (1889): There is no sign of any change in journalism which tends to make legal restraint unnecessary. On the contrary, the changes are all in the other direction. The indifference to intellectual or moral influence, as compared to income, seems to grow. So does the tendency to seek topics of discussion in the personal or domestic life, and to eschew those of a more serious and general nature. Journalistic success is more and more measured in dollars and cents, and contempt for whatever interferes with this success is more and more openly avowed. This means that the power of the journal over the individual's comfort has increased, is increasing, and ought to be diminished.

28. Warren & Brandeis, *supra* note 3, at 195 n.7.

29. Godkin, *Libel and Its Legal Remedy*, 12 J. Soc. Sci. 69 (1880).

[I]t must also be said that respect has not increased for all that portion of the personality which is not physical or tangible, the tastes, habits, prejudices, sensitiveness, manners, relations with friends and family, and the like, about which the civilized man ordinarily dislikes to talk to strangers or have strangers talk, which are roughly described by the term "private life," and which, to every man who is worth much, make up by far the better part of his whole life. On this point something is undoubtedly to be learned from French jurisprudence, which puts it in every man's power to prevent utterly those explorations of his private life which have lately become the fashion with a certain portion of our press, and which, especially in cases of bereavement or misfortune, give so much pain, — often as exquisite pain as mortals know.

.There never was a time when people did not enjoy hearing about their neighbor the things which they knew he would not like to tell them. But as long as our law has a policy, as long as legislation aims to favor particular manners or customs from a regard to the general good, we must admit that nothing is better worthy of legal protection than private life, or, in other words, *the right of every man to keep his affairs to himself, and to decide for himself to what extent they shall be the subject of public observation.*

.The press has no longer anything to fear from legal restriction of any

1880 essay contained what may have been one of the earliest American uses of the term "right of privacy"

Prior to the Warren and Brandeis article, there was both substantial legal protection for privacy and a widespread recognition that some right of privacy existed.<sup>30</sup> A right of privacy in connection with property interests was recognized in at least two contexts. First, privacy was one of the interests recognized in connection with rights in land. For example, a landowner injured by the construction of an abutting railroad track was entitled to compensation for the loss of privacy.<sup>31</sup> Rights with respect to private letters were well established, although the decisions in this regard relied heavily on the recognition of a property interest.<sup>32</sup> Recognition of privacy, however, extended beyond these areas. In one well known 1881 case, the Michigan Supreme Court upheld a judgment against a physician and a friend accompanying the physician who witnessed the plaintiff giving birth.<sup>33</sup> In 1886 the Supreme

kind, as regards its influence or material prosperity; while the community has a good deal to fear from what may be called excessive publicity, or rather from the loss by individuals of the *right of privacy*.

*Id.* at 79-80, 82 (emphasis added), *partially quoted in Note, The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1909 (1981).

30. See Note, *supra* note 29; see also D. FLAHERTY, *PRIVACY IN COLONIAL NEW ENGLAND* 248 (1972); Barron, *supra* note 22, at 884-88.

31. See, e.g., *Ham v. Wisconsin, Iowa & Nebraska Ry. Co.*, 61 Iowa 716, 719, 17 N.W. 157, 158-59 (1883); *Moore v. New York Elevated Ry. Co.*, 130 N.Y. 523, 29 N.E. 997 (1892); see also *Ives v. Humphrey*, 1 E.D. Smith 196, 201-02 (N.Y.C.P. Ct. 1851) (compensating the victim of a trespass arising out of an unlawful repossession of chattels for damages sustained by the invasion of privacy).

32. Warren and Brandeis relied largely on the leading English cases, although they also cited the two leading American cases, *Woolsey v. Judd*, 4 Duer 379 (N.Y. Super. Ct. 1855), and *Folsom v. Marsh*, 9 F. Cas. 342 (C.C. Mass. 1841) (No. 4,901). Warren and Brandeis did not cite an interesting American case decided just three years before their article, *Rice v. Williams*, 32 F. 437 (E.D. Wis. 1887). This case may be the first mailing list case. It involved a suit on a contract for the sale of 60,000 letters that had been received by a company specializing in various "appliances for the cure of various ailments and disorders." *Id.* at 438. "The defendant's purpose in procuring the letters in question was to obtain the names and post-office addresses of the writers, so that he might send to them circulars advertising his remedies for the various diseases he professed to cure." *Id.* The seller of the letters was sued for \$500 remaining unpaid on the contract. The case is important because it recognized the privacy and property interests of the writers of the letters even though they were not parties to the suit, and gave effect to those interests in a proceeding at law rather than equity. See *id.*

33. *De May v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881). The court stated: The 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 abstain from its violation. In obtaining admission at such a time and under such circumstances without fully disclosing his true character, both parties were

Court invalidated the required production of private papers under the fourth and fifth amendments.<sup>34</sup> Indeed, given the existing recognition attached to privacy interests at the time, and the writings and judicial opinions that already addressed the subject, one might ask why the Warren and Brandeis article created such a stir.

Despite their reliance on the law of private letters, the Warren and Brandeis proposal was novel and important in insisting that the right of privacy was independent of any property right<sup>35</sup> and that the protection tort law extends to that right was independent of other recognized torts, such as defamation. Every case prior to 1890 that provided implicit or explicit protection of privacy had rested either on a well established property right or on the identification of a newer property right, such as the right of the sender of a letter or the collector of a group of paintings. Commentators on privacy had closely identified the protection of privacy with defamation. Warren and Brandeis, although extracting the general tort law principles on which they relied from both property cases and defamation, established the new right as distinct and deserving of protection independent of any property or reputational interest.

In order to create a new tort, one needs a theory of tort law. Unfortunately, Warren and Brandeis mainly provide only indirect clues as to their underlying theory. In what follows, I will try to tease out of the article and its origins the underlying tort theory. Perhaps a good place to begin is the title, *The Right to Privacy*<sup>36</sup>. Thus we start with the realization that the conceptual basis of the article is rights, as well as this particular right. The article could have been titled *Legal Protection of Privacy, Invasion of Privacy*,

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guilty of deceit, and the wrong thus done entitles the injured party to recover damages afterwards sustained, from shame and mortification upon discovering the true character of the defendants.

Where a wrong has been done another, the law gives a remedy. *Id.* at 165-66, 9 N.W. at 149. The report of the case does not make clear exactly what the plaintiff's cause of action was: trespass, deceit, or some other tort. Warren and Brandeis did not cite the case.

34. *Boyd v. United States*, 116 U.S. 616 (1886). Surprisingly, Warren and Brandeis made no reference to this decision.

35. In his brilliant analysis presented for this symposium, Professor Post elaborates on important theoretical aspects of this distinction. See Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647 (1991).

36. Warren & Brandeis, *supra* note 3, at 193. No significance should be attached to the use of the preposition "to" rather than "of." Warren and Brandeis themselves used them interchangeably. *E.g.*, *id.* at 219 ("invasion of the right of privacy").

or some variant of these.<sup>37</sup> But the title, and much of the article, is couched in the language of rights. Brandeis conceived of rights as the subject of tort law. Edward Bloustein was incorrect in writing "Warren and Brandeis who are credited with 'discovering' privacy thought of it almost exclusively as a tort remedy."<sup>38</sup> What they discovered, if anything, was a right, and they explored in their article the contours of a tort remedy for violations of that general right.

With this beginning in mind, consider the development of their argument. The article begins with a statement of the dynamic nature of rights: "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society."<sup>39</sup> The next several lines establish the intimate connection between tort law and civil rights:

[I]n very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle.<sup>40</sup>

Brandeis draws no clear distinction between rights against the government and rights against other citizens. Life, liberty, and property need to be protected against all invasions, and the prevailing conceptions of life, liberty, and property need to be adapted (and presumptively extended) to changing times. Today, this language is unusual in discourse concerning tort law. Indeed, if we were to encounter today an article entitled *The Right to Privacy*, or indeed to the right to almost anything, we would probably assume that the subject was in general terms the rights of the individual against the state.<sup>41</sup> Part of the legacy of Warren and Brandeis is that the privacy tort is virtually the only tort spoken of

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37. For example, Dean Pound used *Interests in Personality*. Pound, *Interests in Personality*, 28 HARV. L. REV. 343 (1915).

38. Bloustein, *Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 964 (1964).

39. Warren & Brandeis, *supra* note 3, at 193.

40. *Id.*

41. See, e.g., Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (examining the prevailing judicial approach to the right of privacy based on fundamental rights and personhood and presenting an alternative view that looks to what the law requires affirmatively rather than what it prohibits).

and written about in terms of a right rather than the more familiar tort references to conduct of the defendant or damages suffered by the plaintiff.<sup>42</sup> Moreover, it is virtually the only context in which the same term is employed to describe the interest protected by tort law and constitutional law

That Brandeis conceived of privacy as a basic right, and not merely a tort, is borne out by his famous 1928 dissent in *Olmstead v United States*.<sup>43</sup> Some of Brandeis's language in *Olmstead* not only echoes the 1890 article but directly quotes it, though without citation:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.<sup>44</sup>

It is an essential part of the article's argument that the right is universal, in order to distinguish the narrow basis on which the cited cases rested:

We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property

The principle which protects personal writings and any other production of the intellect or of the emotions, is the right to privacy<sup>45</sup>

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42. As an example, the tort of false imprisonment is rarely linked directly to the right to liberty it protects. Even torts for damage to property interests are not discussed in terms of the right to property. Professor LeBel, in his response to this article, develops an insightful distinction between tort law and damages on the one hand, and constitutional law and rights on the other. Professor LeBel's suggestion that the remedy may define how the law is conceptualized is important and worth pursuing, but I do not do so here. See LeBel, *Rights-Talk and Torts-Talk: A Commentary on the Road Not Taken in the Intellectual History of Tort Law*, 41 CASE W. RES. L. REV. 811 (1991).

43. 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting). Indeed, Brandeis's identification with the right of privacy comes from this dissent as well as from the 1890 article.

44. *Id.* at 478 (Brandeis, J., dissenting). The phrases directly quoted are "man's spiritual nature, of his feelings and his intellect," and "that only a part of the pain, pleasure" Warren & Brandeis, *supra* note 3, at 193, 195.

45. Warren & Brandeis, *supra* note 3, at 213.

The importance of rights analysis in the Warren and Brandeis approach to tort law is also apparent in the reliance on Cooley for the "right to be let alone."<sup>46</sup> While the privacy article mis-cited Cooley,<sup>47</sup> its approach is quite consistent with Cooley's. Indeed, there is every textual indication, apart from the mere reference to the right to be let alone, that Warren and Brandeis's approach was heavily influenced by Cooley's *Treatise on the Law of Torts*.

The notion of rights is suffused through Cooley's book. According to the preface, the purpose of the book was "to set forth with reasonable clearness the general principles under which tangible and intangible rights may be claimed, and their disturbance remedied in the law"<sup>48</sup> Following a brief discussion of the "General Nature of Legal Wrongs," aimed primarily at distinguishing tort from contract and moral from legal wrong, Cooley proceeded to "Defining Rights." Many of the chapters are specifically couched in terms of rights, including chapters on "General Classification of Legal Rights," "Injuries to Family Rights," "Wrongs in Respect to Civil and Political Rights," "Invasion of Rights in Real Property," and "Injuries to Incorporeal Rights."<sup>49</sup> As with Brandeis, Cooley did not distinguish between rights against the government and tort rights. Instead, in a section on "Civil Liberty," he rejected Austin's definition limiting rights to liberties granted by a sovereign to its own subjects and defined civil liberty instead as "that condition in which rights are established and protected by means of such limitations and restraints upon the action of individual members of the political society as are needed to prevent what would be injurious to other individuals or prejudicial to the general welfare."<sup>50</sup> "Political liberty," on the other hand, was limited to the "effectual participation of the people in the making of the laws."<sup>51</sup>

Cooley clearly illustrates the close relationship, perhaps the

46. *Id.* at 195 n.4 (citing T. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888)).

47. Cooley uses the term solely in connection with a discussion of battery and assault. T. COOLEY, *supra* note 46, at 29.

48. T. COOLEY, A TREATISE ON THE LAW OF TORTS, preface (1879). The preface was repeated in the second edition, the edition cited by Warren and Brandeis. The preface to the second edition indicated that the text of the book was "substantially unchanged" from the first. All subsequent citations in this article are to the second edition.

49. T. COOLEY, *supra* note 46, at 29.

50. *Id.* at 10.

51. *Id.*

identity, between rights protected by tort law and by constitutional or other public law in his chapter on civil and political rights.<sup>52</sup> To some extent these were largely rights that tended to be invaded by the state or an actor clothed with state authority. In the latter case, a tort suit might lie but for some power or immunity that the law conferred upon the state actor. The constitutional provisions, in turn, often limited or removed that immunity. Thus, for example, an officer executing a warrant is not a trespasser if he fairly executes the terms of the warrant, but an unlawful search and seizure is regarded as an "aggravated trespass."<sup>53</sup>

The conceptual emphasis on rights in tort law was initially widespread, but not universal. The first treatise on torts, by Hilliard in 1859, was less pronounced in its emphasis on rights but in substance took a similar approach. To some extent this approach is also reflected in the early casebooks. The first English treatise, by Addison, appeared in 1860. While the preface of that treatise noted that "[e]very invasion of a legal right, such as the right of property, or the rights incident to the possession of property, or the right of personal security, constitutes a Tort,"<sup>54</sup> and emphasized the notion of rights, the book's organizational principle was difficult to discern. Later editions of the Addison treatise, however, strongly reflect a rights-based approach to torts.<sup>55</sup> Ames's 1874 *Cases on Torts*, which Brandeis probably used as a student at Harvard, is organized according to specific torts, and thus largely the interest involved.<sup>56</sup> Some later casebooks and treatises reflected increased emphasis on more general "Principles of Liability"<sup>57</sup>

In starkest contrast to the rights-based approach of Cooley

52. *Id.* at 325-54.

53. *Id.* at 294-95. For an illustration, see *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

54. C.G. ADDISON, *WRONGS AND THEIR REMEDIES, BEING A TREATISE ON THE LAW OF TORTS* at iii (1860).

55. See, e.g., H. SMITH, *ADDISON ON TORTS* (6th ed. 1887). The book began with a general chapter on "The Nature of Torts," and included sections on "Rights" (divided into private rights and public rights), "Conflict of Rights," and "Infringement of Rights"

56. Ames's selection of cases persists to some extent. The first two cases in R. EPSTEIN, *CASES AND MATERIALS ON TORTS* (5th ed. 1990), are also the first two in Ames's book.

57. See, e.g., F BURDICK, *CASES ON TORTS* (1895) (second chapter entitled "Principles of Liability"); F POLLOCK, *THE LAW OF TORTS* (1887) (second chapter entitled "Principles of Liability").

and Brandeis is the work of Holmes. For Holmes, “[t]he business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not.”<sup>58</sup> In Holmes’s view, the central focus of tort law was the conduct of the defendant; his analysis is completely oriented toward the defendant. In the two lengthy chapters of *The Common Law* devoted to tort law, Holmes mentions rights only a few times. The first time is largely to disparage the notion:

The arguments for the doctrine [that a man acts at his peril] are, for the most part, drawn from precedent, but it is sometimes supposed to be defensible as theoretically sound. Every man, it is said, has an absolute right to his person, and so forth, free from detriment at the hands of his neighbors.<sup>59</sup>

Holmes rejects any emphasis on rights because rights-based thinking would appear to lead to liability without fault.<sup>60</sup> Holmes seems slightly more comfortable with rights in the context of property,<sup>61</sup> and in his tort chapters mentions rights<sup>62</sup> in connection with tres-

58. O.W. HOLMES, *supra* note 6, at 79.

59. *Id.* at 84.

60. The relationship between rights-based analysis and strict liability is well illustrated in the opinion of Baron Bramwell in *Fletcher v. Rylands*, 13 L.T.R. 121 (Ex. 1865) (Bramwell, B., dissenting), *rev'd*, 1 L.R.-Ex. 265 (Ex. Ch. 1866), *aff'd*, 3 L.R.-E & I. App. 330 (H.L. 1868).

The plaintiff’s right then has been infringed; the defendants in causing water to flow to the plaintiff have done that which they had no right to do; what difference in point of law does it make that they have done it unwittingly? I think none, and consequently that the action is maintainable. The plaintiff’s case is, you have violated my rights, you have done what you had no right to do, and have done me damage. If the plaintiff has the right I mention, the action is maintainable. If he has it not, it is because his right is only to have his mines free from foreign water by the act of those who know what they are doing. I think this is not-so. I know no case of a right so limited. As a rule the knowledge or ignorance of the damage done is immaterial.

13 L.T.R. 121, 124 (Ex. 1865) (Bramwell, B., dissenting), *rev'd*, 1 L.R.-Ex. 265, 277 (Ex. Ch. 1866) (approving of Bramwell’s opinion without discussing its reasoning), *aff'd sub nom.* *Rylands v. Fletcher*, 3 L.R.-E. & I. App. 330 (H.L. 1868). A later illustration of the potential conflict between rights-based thinking and negligence liability is found in *LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul Ry.*, 232 U.S. 340 (1914). Justice McKenna, writing for the majority, wrote: “The legal conception of property is of rights. When you attempt to limit them by wrongs, you venture a solecism. If you declare a right is subject to a wrong you confound the meaning of both.” *Id.* at 350. Holmes, concurring, rejected this analysis, finding that the right to recover for injury against the negligent railroad was conditioned upon the plaintiff stacking his flax a reasonable distance from the tracks. *Id.* at 352-53 (Holmes, J., concurring).

61. Holmes uses rights terminology extensively in his chapter on possession. O.W. HOLMES, *supra* note 6, at 206-46.

62. Holmes mentions rights once more, and only incidentally, in connection with his



pass to personal property and conversion:

But the question whether the defendant has subsequently paid over the proceeds of the sale of a chattel to a third person, cannot affect the rights of the true owner of the chattel. In the supposed case of an auctioneer, for instance, if he had paid the true owner, it would have been an answer to his bailor's claim. If he has paid his bailor instead, he has paid one whom he was not bound to pay, and no general principle requires that this should be held to divest the plaintiff's right.<sup>63</sup>

Holmes initiated the modern approach to tort law,<sup>64</sup> namely analysis primarily based on the theory of defendant's liability:

As the law, on the one hand, allows certain harms to be inflicted irrespective of the moral condition of him who inflicts them, so, at the other extreme it may on grounds of policy throw the absolute risk of certain transactions on the person engaging in them.

Most liabilities in tort lie between these two extremes, and are founded on the infliction of harm which the defendant had a reasonable opportunity to avoid at the time of the acts or omissions which were its proximate cause.

Apart from the extremes just mentioned, it is now easy to see how the point at which a man's conduct begins to be at his own peril is generally fixed. When the principle is understood on which that point is determined by the law of torts, we possess a common ground of classification, and a key to the whole subject, so far as tradition has not swerved the law from a consistent theory<sup>65</sup>

The approach emphasizing the basis of liability was adopted in the most influential treatise on torts, by Pollock, which first appeared in 1887<sup>66</sup> Pollock prefaced his treatise with an open letter to Holmes in which he made clear his personal and intellectual debt to him:

My claim to your [Holmes's] goodwill, however, does not rest on these grounds [his experience at Harvard] alone. I claim it because the purpose of this book is to show that there really is a Law of Torts, not merely a number of rules of law about vari-

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discussion of malicious prosecution. *Id.* at 140-42. He also mentions the absence of right in a trespasser, once again incidentally. *Id.* at 153.

63. *Id.* at 98-99. Holmes returns briefly to the issue of bailment. *Id.* at 120-21.

64. See J. FLEMING, *THE LAW OF TORTS* 14 (6th ed. 1983); D. Rosenberg, *supra* note 17, at 1.

65. O.W. HOLMES, *supra* note 6, at 145-46.

66. F. POLLOCK, *supra* note 57.

ous kinds of torts — that his is a true living branch of the Common Law, not a collection of heterogeneous instances. In such a cause I make bold to count on your sympathy, though I will not presume your final opinion. You will recognize in my armoury some weapons of your own forging, and if they are ineffective, I must have handled them worse than I am willing, in any reasonable terms of humility, to suppose.<sup>67</sup>

Pollock distinguished “three main divisions of the law of torts,” wrongs that are “wilful or wanton,” wrongs “unconnected with moral blame,” and wrongs of “imprudence or omission.”<sup>68</sup> As with Holmes, negligence loomed large in Pollock’s conceptualization of tort law,<sup>69</sup> while the notion of rights, and rights language, played little part.

In short, at the time of the Warren and Brandeis article two quite different conceptual structures of tort law had emerged. One, perhaps best identified with Cooley, was rights based. This approach may also be said to be plaintiff oriented in that it focuses, in the first instance, on whether the plaintiff had a right and the injury to that right.<sup>70</sup> The other approach, identified with Holmes and Pollock, was structured around the “principles of liability” and thus was primarily oriented to the nature of the defendant’s conduct.<sup>71</sup> There can be little doubt that Warren and

67. *Id.* at vii.

68. *Id.* at 5-9; *see id.* at 19. Pollock expressed considerable skepticism at the second, “absolute liability,” category. He seemed to regard much of it as a historical anomaly descended from the writ system and eventually appeared to limit it to the protection of property. Thus at a later point he drew a slightly different tripartite division: “The three main heads of duty with which the law of torts is concerned—namely, to abstain from wilful injury, to respect the property of others, and to use due diligence to avoid causing harm to others—are all alike of a comprehensive nature.” *Id.* at 22.

69. *See, e.g., id.* at 22.

70. Professor Wigmore follows in this vein. *See* Wigmore, *Tripartite Division*, *supra* note 18.

71. One might question whether it matters that the focus is on the plaintiff’s rights or the defendant’s duties. *See* Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 28-37 (1913) (discussing right and duty as correlative); *see also* LeBel, *supra* note 42, at 814-15. Holmes, at least, seemed to think the question important and emphasized that duties should be the primary focus of analysis:

Legal duties are logically antecedent to legal rights. What may be their relation to moral rights if there are any, and whether moral rights are not in like manner logically the offspring of moral duties, are questions which do not concern us here.

The business of the jurist is to make known the content of the law; that is, to work upon it from within, or logically arranging and distributing it, in order, from its *summum genus* to its *infirma species*, so far as practicable. Legal duties then come before legal rights. [A] right corresponding to the burden

is not a necessary or universal correlative. Again, a large part of the advan-

Brandeis adopted the rights-based paradigm.

The recognition that the subject and conceptual focus of tort law is rights, however, only gets one so far.<sup>72</sup> There is a need to determine first the nature of rights, at least in the context of the common law tort system, and second, the substance or content of the rights protected by that system. It is beyond the scope of this inquiry to engage in a serious analysis of the nature and role of rights in the legal system.<sup>73</sup> Warren and Brandeis do not address these important questions explicitly, but do provide indications of three attributes of rights: they are antimajoritarian, dynamic, and not absolute.

In a liberal democratic society, rights tend by nature to be antimajoritarian. This is another source of distinction between Holmes and Brandeis. Holmes was a committed majoritarian; the majority was given the power to work its will on the law, and judges in particular should not engage in antimajoritarian exercises. In contrast, there is much that is deeply antimajoritarian about Brandeis's approach. Thus it is not a sufficient answer to them, as it probably would have been for Holmes, that the public desired (as reflected in its purchase of the newspapers infringing the alleged right) the conduct Brandeis condemns. It is exactly against this type of majoritarian conduct that the rights of the minority, albeit in this case a singularly well-to-do and powerful minority, needed protection.

There is indeed a strongly paternalistic element in the Warren and Brandeis article. Part of the argument seems to derive from the desire to protect men and women from their baser instincts and tastes:

Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to

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tages enjoyed by one who has a right are not created by the law.  
O.W. HOLMES, *supra* note 6, at 219-20.

72. Professor LeBel seems to be suggesting that talk of rights does not lead anywhere at all. LeBel, *supra* note 42, at 814. He is certainly right that one needs to look at both the broader context of tort law and at whether it really matters whether we take a "rights based" or "reasonableness" approach. Nonetheless, I think it important, at least as an initial matter, to identify differences in conceptual framework and discourse.

73. There is an expansive literature on this subject by both legal academics and philosophers. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); J. THOMPSON, *THE REALM OF RIGHTS* (1990); Hohfeld, *supra* note 71.

its circulation, results in a lowering of social standards and of morality. Even gossip, apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance.<sup>74</sup>

In one important area, the Warren and Brandeis article reflects the strong influence of Holmes: its dynamic approach to law, and tort law in particular. The Warren and Brandeis article not only advocates a specific right but also says much about the nature of law, specifically the approach to tort law. The article is prefaced with a quote from Justice Willes in *Millar v Taylor*, "It could be done only on principles of private justice, moral fitness, and public convenience, which when applied to a new subject, make common law without a precedent; much more when received and approved by usage."<sup>75</sup> Brandeis goes on to praise "the beautiful capacity for growth which characterizes the common law [and] enabled the judges to afford the requisite protection, without the interposition of the legislature."<sup>76</sup> Although not cited by them, Warren and Brandeis were no doubt familiar with a section in Cooley's treatise on "Growth of Rights."<sup>77</sup> Cooley strongly endorsed judicial activism in recognizing new rights as required by changing circumstances.<sup>78</sup> Cooley gave lip service to the notion that

"Where cases are new in their *principle*, it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to

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74. Warren & Brandeis, *supra* note 3, at 196.

75. 4 Burr. 2303, 2312, 98 Eng. Rep. 201, 206 (K.B. 1769), *quoted in* Warren & Brandeis, *supra* note 3, at 193.

76. Warren & Brandeis, *supra* note 3, at 195.

77. T. COOLEY, *supra* note 46, at 11-19.

78. "[E]very recognition by the law of a new right, is likely to raise questions of its adjustment to, and its harmony with, existing rights previously enjoyed by others." *Id.* at 1-2. Cooley also presciently foreshadowed Holmes's suggestion that the progress of society results in new rights, and in particular increased recognition of intangible and intellectual rights. *Id.* at 2.

courts of justice to apply the principle."<sup>79</sup>

This explains why Warren and Brandeis expressed their task in the following manner: "It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is."<sup>80</sup> Thus the absence of precedent would not have been deeply troubling to Brandeis. As outlined by Brandeis at the beginning of the article, the entire history of tort law had been an evolution in the definition and protection of individual rights.

This, however, left Brandeis's theory of tort law at a potentially uncomfortable intersection between rights-based thinking and dynamic legal growth. What were the sources and justification of tort law rights? Rights have an almost inherently historical flavor to them; they are justified largely by appellation to an event, real or fictional, in the past. Traditionally, rights might be derived from natural law, found in historical precedent, or found in positive law.<sup>81</sup> The right to privacy, unlike many of the tort law rights before it, could not easily be justified on any of these bases.

There are several indications that Warren and Brandeis's right to privacy has strong natural law origins, although there is certainly nothing explicit to this effect in the article. First, as noted above, the Godkin article explicitly identified privacy as a

79. *Id.* at 16 (quoting *Pasley v. Freeman*, 3 T.R. 51, 63, 100 Eng. Rep. 450, 456 (K.B. 1789) (Ashurst, J.)).

80. Warren & Brandeis, *supra* note 3, at 197. "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

" *Id.* at 213. The footnote at the end of this paragraph addressed at some length the question of "judicial legislation." Warren and Brandeis first argued that the "application of an existing principle to a new state of facts is not judicial legislation. It is not the application of an existing principle to new cases, but the introduction of a new principle, which is properly termed judicial legislation." *Id.* at 213 n.1. Then, however, they argued that judges were entitled to engage in some forms of legislation:

But even the fact that a certain decision would involve judicial legislation should not be taken as conclusive against the propriety of making it. This power has been constantly exercised by our judges, when applying to a new subject principles of private justice, moral fitness, and public convenience. Indeed, the elasticity of our law, its adaptability to new conditions, the capacity for growth, which has enabled it to meet the wants of an ever changing society and to apply immediate relief for every recognized wrong, have been its greatest boast.

*Id.*

81. *Cf.* T. COOLEY, *supra* note 46, at 11 ("In most countries rights, in their origin, are traditionary rather than statutory.").

“natural right.”<sup>82</sup> Second, Cooley, upon whom Warren and Brandeis relied for “the right to be let alone,” is generally recognized as one of the leading natural law proponents of the nineteenth century,<sup>83</sup> although his views are in fact more complex.<sup>84</sup> Indeed, his *A Treatise on the Law of Torts* contains passages that can be understood as criticizing natural rights in favor of a more positivist approach to rights.<sup>85</sup> Finally, the dictum of Justice Willes in *Millar* has some natural law overtones.<sup>86</sup> It is, however, Justice Aston’s opinion in *Millar* that contains, at considerable length, the natural law basis of the decision.<sup>87</sup>

These are admittedly slender reeds on which to base a conclusion that Warren and Brandeis regarded their right of privacy as being derived from natural law.<sup>88</sup> Nonetheless, it is of some

82. See *supra* text accompanying note 27.

83. See B. WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW 291-92 (1931); Harding, *The Ghost of Herbert Spencer: A Darwinian Concept of Law*, in ORIGINS OF THE NATURAL LAW TRADITION 81-84 (A. Harding ed. 1954).

84. Harding describes Cooley’s work as “an assertion of the rationalist Natural Rights doctrine in a matrix of Benthamite utilitarianism, but with a strong overtone of Spencerism becoming evident in discussions of economic interests.” Harding, *supra* note 83, at 83-84.

85. T. COOLEY, *supra* note 46, at 5-6 & n.2 (defining rights as conferred and protected exclusively by law).

86. Justice Willes argued, “It is certainly not agreeable to natural justice, that a stranger should reap the beneficial pecuniary produce of another man’s work. *Jure naturae aequum est, neminem cum alterius detrimento et injuria fieri locupletiores.*” *Millar*, 4 Burr. at 2334, 98 Eng. Rep. at 218.

87. See *id.* at 2335-54, 98 Eng. Rep. at 218-29.

88. Furthermore, it is unclear that at the time there was any alternative theory of rights that was not positivist. The identification of the rights-based approach with natural law thinking is suggested by the response of American courts to *Rylands v. Fletcher*, 3 L.R.-E & I. App. 330 (H.L. 1868), in such cases as *Brown v. Collins*, 53 N.H. 442 (1873) and *Losee v. Buchanan*, 51 N.Y. 476 (1873). In the former case, the court rejected *Rylands* in part on the suggestion that “natural uses” were primitive uses:

[I]f there is a legal principle that makes a man liable for the natural consequences of the escape of things which he brings on his land, the application of such a principle cannot be limited to those things: it must be applied to all his acts that disturb the original order of creation; or, at least, to all things which he undertakes to possess or control anywhere, and which were not used and enjoyed in what is called the natural or primitive condition of mankind, whatever that may have been. This is going back a long way for legal rights. The distinction made by Lord Cairns [in] *Rylands v. Fletcher* between a natural and non-natural use of land is not established in law. [I]t would recognize the peculiar rights of savage life in a wilderness, ignore the rights growing out of a civilized state of society, and make a distinction not warranted by the enlightened spirit of the common law. It is impossible that legal principle can throw so serious an obstacle in the way of progress and improvement. Natural rights are, in general, legal rights; and the rights of civilization are, in a legal

significance that they appeared to be influenced by natural law thinkers and, as set forth below, that the right of privacy was first judicially endorsed in opinions based largely on natural law. But even if Warren and Brandeis would have identified privacy as a natural right, it is not clear that this is a useful description. Natural law jurisprudence encompasses many different legal theories; indeed it has been described as including all legal theories other than those grouped under positivism.<sup>89</sup> The natural law that leads to recognition of a right to privacy is certainly not the natural law of Thomas Aquinas or John Locke. Locke's theory of natural law looked back to the presocietal state of nature for those rights that persons did not surrender upon joining civil society. That seems an unlikely source for a dynamic approach to rights, and a right of privacy in particular.<sup>90</sup> Other theories of natural law stressed the universal aspect of certain principles of justice. But the approach of Warren and Brandeis suggests a much more relativistic notion of rights. The growth of rights along with changes in society implies that rights are relative to time; there is no reason to think they would not be relative to place as well. This relativism also suggests that the concept of natural rights as inherent in human nature and dignity was also not the basis of the right to privacy recognized by Warren and Brandeis and the courts.

However, Warren and Brandeis did have some basis in positive law, in the form of precedent, for the right, and their methodology provides a key to their theory. Their basic approach was to identify rights on the basis of the conceptual and functional unity of the common law. They, along with Holmes, rejected the notion that torts was simply a collection of unrelated causes of action. But unlike Holmes and Austin, who found unity by focusing on

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sense, as natural as any others.

*Brown*, 53 N.H. at 448. In *Loosee*, the court was more straightforward about its rejection of natural rights: "By becoming a member of civilized society, I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender by every other man of the same rights, and the security, advantage and protection which the laws give me." *Loosee*, 51 N.Y. at 484.

89. Under this approach, utilitarianism becomes a branch of natural law. Similarly, the paradigm of "reasonableness" can be thought of as the modern natural law. See Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 *YALE L.J.* 617 (1916).

90. Cf. Posner, *Privacy, Secrecy, and Reputation*, 28 *BUFFALO L. REV.* 1, 3 (1979) ("the concept of privacy is a Western cultural artifact. The idea that it might be pleasant to be off the public stage was hardly meaningful in a society in which physical privacy was essentially nonexistent—was not only prohibitively costly, but also extremely dangerous."). But see A. WESTIN, *PRIVACY AND FREEDOM* 8-23 (1967).

the liability-causing conduct of the defendant, Warren and Brandeis found unity in the rights tort law protected. It was, almost, an attempt to discover the unwritten constitution, or more properly bill of rights, of tort law. Once these rights were discovered in the fabric of the common law, they, like clauses of the Constitution, were to be interpreted in accordance with the needs of modern society. Positive law, in the form of precedent, became the path to natural law.

In this sense, Warren and Brandeis's approach might be consistent with a number of natural law approaches. For example, "the right to be let alone" might be regarded either as universal, that is inherent in the nature and dignity of humanity, or as one of the rights of the state of nature that survived the social compact. This right exists in all times and in all places, but it must be interpreted in accordance with the circumstances and needs of the particular society and time. Ultimately one needs, as with a constitution, a theory of interpretation to move from the basic universal rights to such articulated rights. Whether this approach to tort law can usefully be characterized as natural law or natural rights may well depend on the methodology of interpretation adopted. In any event, the rights-based approach to tort law offers an alternative to Holmesian instrumentalism.

This is certainly not to deny that other philosophical elements may be present in the Warren and Brandeis article. To some extent, Brandeis's tort law rights seem to have evolved in the service of utilitarianism:

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition.<sup>91</sup>

Thus, the dynamism of rights arguably reflects changing preferences. References to "public convenience"<sup>92</sup> might also be interpreted in a utilitarian light, although the references followed "private justice" and "moral fitness" in the standard litany. Nonetheless, it seems quite unlikely that Brandeis subscribed to a deeply utilitarian view. First, utilitarian rights, if they are indeed

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91. Warren & Brandeis, *supra* note 3, at 195.

92. See *Millar*, 4 Burr. at 2312, 98 Eng. Rep. at 206.



rights, are more ephemeral than the rights Brandeis and his predecessors likely had in mind. Second, Brandeis seems to reject the idea of consumer sovereignty, a usual part of the utilitarian approach. The right of privacy clearly is not intended merely to reflect society as it is. Rather, it is a right that is part of society as it should be and that is necessary to achieve the good society. Not surprisingly, Brandeis is more utopian than utilitarian.

### III. IMMEDIATE RECEPTION AND POST-1890 TORT THEORY

I turn now to examine whether the reception of the article sheds light on its place in the theoretical development of tort law. Reaction to the article was almost immediate.<sup>93</sup> Before the end of the century, the right to privacy was discussed in a dozen law journals.<sup>94</sup> Notices of the article also appeared in *The Nation*<sup>95</sup>

93. I take issue with Prosser's statement that "The article had little immediate effect upon the law." Prosser, *supra* note 20, at 384. As discussed below, the first decision in *Schuyler v. Curtis* was issued only nine months after the article appeared and the judge there relied heavily on the article in granting injunctive relief. 15 N.Y.S. 787, 788 (Sup. Ct. 1891). Nearly five years later, the relief was denied by the Court of Appeals on the grounds that the right, if any, did not survive the plaintiff, *Schuyler v. Curtis* 147 N.Y. 434, 447, 42 N.E. 22, 25 (1895), but that decision was widely regarded as expressing sympathy for the existence of the right. Similarly, the lower courts in *Roberson v. Rochester Folding Box Co.*, endorsed the right to privacy and granted injunctive relief. 32 Misc. 344, 346-47, 351 (N.Y. Sup. Ct. 1900). By the time the New York Court of Appeals rejected the right in 1902, *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 63 N.E. 442 (1902), a number of courts had endorsed the right or held only that it did not apply where the person depicted was deceased or a public figure. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 213-19, 50 S.E. 68, 78-79 (1905). *Pavesich* was decided only three years after *Roberson*, and the cases thereafter split as the courts chose to follow one or the other. See Prosser, *supra* note 20, at 385-86.

94. Hadley, *The Right to Privacy*, 3 NORTHWESTERN L. REV. 1 (1894); Hand, *Schuyler against Curtis and the Right to Privacy*, 45 [O.S.] AMER. L. REG. 745 (1897); Thompson, *The Right of Privacy as Recognized and Protected at Law and in Equity*, 47 CENTRAL L.J. 148 (1898); *The Right to Privacy*, 4 MADRAS L.J. 17 (1894), reprinted in 6 GREEN BAG 498 (1894); *The Right to Privacy*, 3 GREEN BAG 524 (1891); Note, *Development of the Law of Privacy*, 8 HARV. L. REV. 280 (1894); Comment, *The Right to Privacy—The Schuyler Injunction*, 9 HARV. L. REV. 354 (1895); Comment, *Is this Libel?—More about Privacy*, 7 HARV. L. REV. 492 (1894); Comment, *The Right to Privacy*, 5 HARV. L. REV. 148 (1891).

95. *The Right to Privacy*, 51 NATION 496 (1890). While the notice praised the criticism Warren and Brandeis had levied on the practices of the press, it concluded "but strong as are the arguments of our authors in support of the power of the courts to interfere, we doubt very much whether, even if they were successful in securing such interference, it would have any serious effect on the evil to be remedied, and this for two reasons." *Id.* First, individuals concerned about their privacy would hardly be inclined to file a complaint and expose themselves to greater publicity and intrusions. *Id.* Second, the public would not support such proceedings, for the public at large decried attempts at privacy and exclusiveness. *Id.* at 496-97.

and in *Scribner's*.<sup>96</sup> Regardless of the magnitude of the article's influence, few law review articles before or since have elicited as swift a response.

### A. Judicial Response

The first judicial reliance on Warren and Brandeis was probably in the September 1891 decision by the Supreme Court (the intermediate appellate court) of New York in *Schuyler v Curtis*.<sup>97</sup> This case involved a suit by the relatives of Mrs. Schuyler, a deceased philanthropist, to enjoin the defendant from displaying a bust of Mrs. Schuyler together with one of Susan B. Anthony at the 1893 Columbian Exposition to be held in Chicago. The court first determined that injunctive relief was available even if no property right was at stake and damages could not be recovered in an action at law. It then addressed the question of whether recognizing an action would be against public policy. In addressing this issue, and whether Mrs. Schuyler was a public figure, the court determined that there was a right to privacy. After an extended excerpt from the article, the opinion concluded "[t]hese [cases] and the celebrated English Case of Prince Albert vs. Strange are a clear recognition (as shown by the article in the 'Harvard Law Review', supra) of the principle that the right to which protection is given is the right of privacy."<sup>98</sup> An 1893 decision in the Superior Court of New York City granting an injunction against

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96. *Point of View*, 9 SCRIBNER'S MAG. 261 (1891). The notice put the right to privacy in terms of the political debates of the day:

In the great future battle of the world between the two systems of Socialism and Individualism, one of the vital points of difference is to be *privacy*; and it is important to note that it is between individualism and socialism that the point of difference lies, and that privacy is not by any means an attribute of aristocracy as opposed to democracy. The Western citizen who raised the curtain of the new-comer's shanty and desired to know "what was going on so darned private in here," was the typical socialist, not the typical democrat. But the contrary view is so commonly accepted that it is pleasant to see the first thoughtful article on the legal rights a man has to privacy, in the columns of any American periodical. The thesis of a man's right to his personality, as well as his person, his property, and his reputation, is well maintained in an exhaustive sketch of the law on this point, printed in the December number of the *Harvard Law Review*.

The penultimate sentence in the quoted excerpt is somewhat odd in view of the fact that Godkin's article had appeared just six months earlier in *Scribner's*. See Godkin, *supra* note 26.

97. 15 N.Y.S. 787 (Sup. Ct. 1891), *aff'd*, 19 N.Y.S. 264 (1892), *aff'd*, 24 N.Y.S. 509 (1893), *aff'd without opinion*, 24 N.Y.S. 512 (1893), *rev'd*, 147 N.Y. 434, 42 N.E. 22 (1895).

98. 15 N.Y.S. at 789.

the use of an actor's name and picture relied upon the Supreme Court's decision in *Schuyler* and cited both the Warren and Brandeis article and the Godkin piece.<sup>99</sup> But in 1895 the court of appeals reversed the decision in *Schuyler* on the basis that whatever right of privacy existed did not survive a person's death.<sup>100</sup>

The issue returned to the New York courts in *Roberson v Rochester Folding Box Co.*<sup>101</sup> This was the famous "Flour of the Family" case in which the defendant flour manufacturer used a photograph or likeness of the plaintiff in posters advertising its flour. In the supreme court,<sup>102</sup> Judge Rumsey addressed both the question of whether novel rights could be recognized and whether equitable relief was available. On the latter question, like the lower court in *Schuyler* and some early commentators, expressly rejected the view "that only rights of property are to be protected in equity"<sup>103</sup> Here again the association of the right with natural law was evident. Citing Justice Story's *Equity Jurisprudence*, the court set out the rules for finding rights:

When a case not affected by any statute arises in any of our courts of justice, the first question is whether there is any clear and unequivocal principle of the common law which directly and immediately govern it and fixes the rights of the parties. If there be no such principle, the next question is whether there is any principle of the common law which, by analogy or parity of reasoning, ought to govern it. If neither of these sources furnishes a positive solution of the controversy, resort is next had (as in a case confessedly new) to the principles of natural justice; which constitute the basis of much of the common law; and if these principles can be ascertained to apply in a full and determinate manner to all the circumstances, they are adopted, and decide the rights of the parties.<sup>104</sup>

Despite this open-ended authority for the courts to define common law rights, the court followed the Warren and Brandeis methodology of divining rights from diverse common law precedent and

99. *Marks v. Jaffa*, 6 Misc. 290, 26 N.Y.S. 908 (Super. Ct. 1893).

100. *Schuyler v. Curtis*, 147 N.Y. 434, 447, 42 N.E. 22, 25 (1895) ("Whatever right of privacy Mrs. Schuyler had died with her.").

101. 64 App. Div. 30, 71 N.Y.S. 876 (1900), *rev'd*, 171 N.Y. 538, 64 N.E. 442 (1902).

102. 64 App. Div. 30, 71 N.Y.S. 876 (1900).

103. *Id.* at 34, 71 N.Y.S. at 879 (citing *Pollard v. Photographic Co.*, 40 Ch. D. 345 (1888)).

104. *Id.* at 32, 71 N.Y.S. at 877-78 (quoting *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 241 (1872)).

such broad rights as the "right to be let alone" and the "right of personal immunity"<sup>105</sup> While the decision does not cite the Warren and Brandeis article, the other citations in the opinion virtually compel the conclusion that the judge was familiar with it. The court, like Warren and Brandeis, moved from the physical protection of the person to protection against threats and injuries to reputation. Unlike Warren and Brandeis, great reliance was placed on the relationship to defamation:

The effect of [the defendant's] act is to subject this woman to humiliation and bring her good name into disrepute to such an extent that she has been made sick and compelled to take to her bed. Undoubtedly, if this had been the result of any act which the law regards as a libel or because of a threat of physical violence sufficient to constitute an assault, the plaintiff would have a right of action to recover the damages which naturally flowed from such an act. The cause of action in such a case arises from the fact that the defendant has violated the right of personal immunity, the right not to be interfered with to his damage or danger or discomfort. I can see no distinction in principle between an act which, without threatening physical harm, injures the plaintiff's reputation by words spoken in respect of it, and the like act, which injures her feelings, and diminishes the respect with which she is held in the community, by saying or doing something in regard to her which tends to bring her into unnecessary and unwarrantable notice.<sup>106</sup>

The court found nothing in the Court of Appeals' *Schuyler* decision to deny the existence of the right to privacy; indeed the judge thought "it is easily inferable from the opinion [in *Schuyler*] that there is such a right which may be enforced in a proper case."<sup>107</sup>

The New York Court of Appeals decision in *Roberson*<sup>108</sup> was thus the first indication that New York did not recognize a right of privacy<sup>109</sup> Although the Court of Appeals did expressly reject

105. *Id.* at 33, 71 N.Y.S. at 878-79.

106. *Id.* at 33-34, 71 N.Y.S. at 879.

107. *Id.* at 39, 71 N.Y.S. at 883.

108. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).

109. In commenting on the court of appeals decision in *Schuyler*, Augustus Hand wrote:

The state of the law then seems to be this: The Supreme Court of New York has asserted the existence of a right to privacy in three well considered opinions. Judge Gray has strongly reaffirmed the existence of such a right in his dissenting opinion in the Court of Appeals and the majority in the Court of Appeals, while refusing to pass upon the general principle which the plaintiff in that suit sought to maintain, has in no wise, either directly or by implication,

any right of privacy at law, most of the decision and the dissent addressed the question of whether invasion of the right to privacy could be addressed in equity.<sup>110</sup> In the view of the majority, equity relief depended to some extent on the existence of a property right, as opposed to a personal right and, in any event, was only available where supported by sufficient precedent.<sup>111</sup> The former point illustrates the importance of Warren and Brandeis's separation of privacy from property interests. The majority opinion reflects the formalist approach for which late nineteenth century jurisprudence has been so heavily criticized.<sup>112</sup>

The New York Court of Appeals was closely divided, four to three, and the dissenting opinion by Justice Gray focused on the special role of equity in enforcing natural justice:

The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone. Cooley, Torts, p. 29 The principle is fundamental and essential in organized society that every one, in exercising a personal right and in the use of his property, shall respect the rights and properties of others. When, as here, there is an alleged invasion of some personal right, or privilege, the absence of exact precedent and the fact that early commentators upon the common law have no discussion upon the subject are of no material importance in awarding equitable relief. In the social evolution, with the march of the arts and sciences and in the resultant effects upon organized society, it is quite intelligible that new conditions must arise in personal relations, which the rules of the common law, cast in the rigid mold of an earlier social status, were not designed to meet. It would be a reproach to equitable jurisprudence, if equity were powerless to extend the application of the principles of common law, or of natural justice, in remedying a wrong, which, in the progress of civilization, has been made possible as the result of new social, or com-

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denied the existence of a right to privacy.

Hand, *supra* note 94, at 751.

110. Indeed, the case's headnotes were confined to the subject of injunction. *See Roberson*, 171 N.Y. at 538-39, 64 N.E. at 442.

111. The court recognized that equity jurisdiction had once been broader but claimed it had narrowed as precedents were established. *Id.* at 546, 64 N.E. at 444.

112. *See, e.g.*, G. GILMORE, *THE AGES OF AMERICAN LAW* 41-67 (1977); Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

mercial conditions. Sir Henry Maine has observed of equity, that it is an agency "by which law is brought into harmony with society" It supplements the deficiencies of the common law, by applying, where otherwise there would be a wrong, those principles of natural justice, which are analogous to settled principles of the common law It would be a justifiable exercise of power, whether the principle of interference be rested upon analogy to some established common-law principle, or whether it is one of natural justice.<sup>113</sup>

As is well known, criticism of the *Roberson* decision was swift and furious. A comment in the *Yale Law Journal* proclaimed:

The very existence of the courts can be defended only by their ability to uphold rights and relieve wrongs. If the great principles of natural justice upon which our law is founded are not in themselves broad enough to permit the courts to adapt themselves to new conditions and grant relief against injuries made possible by the inventions and changing conditions of society, then it is a signal reproach to our jurisprudence.<sup>114</sup>

The first decision by the highest court of a state to squarely adopt the right of privacy was *Pavesich v New England Life Insurance Co.*<sup>115</sup> Here the plaintiff's picture was published in an advertisement for life insurance. The decision of the Georgia Supreme Court was unanimous and emphasized the natural law origins of the right of privacy:

The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law.

.The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in this state by the constitutions of the United States and of the state of Georgia, in those provisions which declare that no person shall be deprived of lib-

113. *Roberson*, 171 N.Y. at 561-63, 64 N.E. at 449-450 (Gray, J., dissenting).

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

115. 122 Ga. 190, 50 S.E. 68 (1905).

erty except by due process of law. The conclusion reached by us seems to be so thoroughly in accord with natural justice, with the principles of the law of every civilized nation, and especially with the elastic principles of the common law, and so thoroughly in harmony with those principles as molded under the influence of American institutions <sup>116</sup>

The decision in *Pavesich* indicates the starkly different judgments a natural law theorist might make in considering the effect of the Constitution, at least with respect to a tort based on a natural right. The court emphasized that this right, like the protection under the fourth amendment, was not created by the Constitution but instead "is an ancient right, which, on account of its gross violation at different times, was preserved from such attacks in the future by being made the subject of constitutional provisions."<sup>117</sup> Regarding the conflict between privacy and freedom of speech, the court noted, "Each is a natural right, each exists, and each must be recognized and enforced with due respect for the other."<sup>118</sup> Thus the debate about privacy became largely a debate about the role of natural law, and natural justice and rights, in torts jurisprudence, and more particularly the role of equity in enforcing new rights. These themes were also reflected in the early response of commentators.

### B. Legal Commentary

As noted above, the new right quickly captured the interest of the legal press, which for the most part responded favorably. The *Harvard Law Review* in particular kept tabs on what it apparently regarded as its progeny.<sup>119</sup> In a note published in March of 1894,<sup>120</sup> the *Harvard Law Review* criticized the English court's

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116. *Id.* at 194, 197, 218-19, 50 S.E. at 69-70, 71, 80. The natural rights approach of this decision was also identified in Haines, *supra* note 89, at 635-36; see C. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 211 n.1 (1930).

117. 122 Ga. at 198, 50 S.E. at 71.

118. *Id.* at 202, 50 S.E. at 73.

119. See Note, *supra* note 94; *Recent Cases, Torts—Right to Privacy*, 13 HARV. L. REV. 415 (1900); Case Comment, *The Right to Privacy*, 12 HARV. L. REV. 207 (1898); Case Comment, *A New Phase of the Right to Privacy*, 10 HARV. L. REV. 179 (1896); Case Comment, *The Right to Privacy—The Schuyler Injunction*, 9 HARV. L. REV. 354 (1895); Case Comment, *Development of the Law of Privacy*, 8 HARV. L. REV. 280 (1894); *Recent Cases*, 7 HARV. L. REV. 185 (1893); Case Comment, *The Right to Privacy*, 7 HARV. L. REV. 182 (1893); Case Comment, *The Right to Privacy*, 5 HARV. L. REV. 148 (1891).

120. Note, *supra* note 94.

decision in *Monson v Tussaud*<sup>121</sup> for treating as a libel case one that really involved the right of privacy. That case appeared to be the impetus for an article in *The Green Bag*.<sup>122</sup> This article lavished praise on Warren and Brandeis's article, and the authors unequivocally concluded "we can feel no doubt as to the recognition of the right [to privacy] itself."<sup>123</sup>

The leading early criticism of Warren and Brandeis appeared in October 1894 in the *Northwestern Law Review*.<sup>124</sup> The author, Herbert Spencer Hadley, identified three decisions that have recognized a right to privacy, and claims they "seem to rest almost entirely upon the authority of the *Harvard Law Review* article."<sup>125</sup> Hadley made several criticisms. First, he noted that if Warren and Brandeis's proposed limitations and defenses were accepted, "the 'right' would be so completely pruned away that the shadow remaining would hardly furnish sufficient substance to interest the ordinary man or woman."<sup>126</sup> Yet the existing law of defamation and right of free speech would not permit any lesser restrictions on the proposed tort. Mostly, Hadley argued that the precedent cited did not support the recognition of the right, coupling this with an argument about the nature and evolution of the common law. Hadley argued that while equity had emerged as a "softening, broadening influence" on the common law, "based upon general principles of justice,"<sup>127</sup> the need for certainty and definiteness in the law had "resulted in the end in the establishment of a system of [equity] jurisprudence confined within limits only a little less rigid and based upon principles only a little less definite than was the case with the common law."<sup>128</sup> In short, eq-

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121. 10 T.L.R. 227 (1894).

122. *The Right to Privacy*, 4 MADRAS L.J. 17, *supra* note 94.

123. *Id.* at 501.

124. Hadley, *supra* note 94.

125. *Id.* at 13.

126. *Id.* at 3.

127. *Id.* at 4-5.

128. *Id.* at 6.

That our law is a system that grows and develops in response to the demands of advancing civilization, is due to the fact that new occasions and new circumstances arise which come within the principles upon which our laws were founded; not because new principles and new rights are created to afford that protection or redress which seems to be required. Once cast aside the fundamental principle of English law—precedent—and make the administration of justice depend upon the conscience and sense of "equity" of the judge who hears the case, and there will be banished from our laws that certainty and definiteness on which are builded the property rights of the people.



uity had been transformed from a natural law based system to one based on positive law. This argument was one of the approaches adopted by the majority in *Roberson*.

Hadley made an additional point about equity, that it was connected primarily with the interest in property. "[I]t is true that equity has a jurisdiction separate and distinct from legal rights, but that independent jurisdiction is not based upon considerations of conscience and a sense of moral fitness, but upon principles of justice connected with the ownership and enjoyment of property."<sup>129</sup> Finally, Hadley argued that the right of privacy is in essence a claim for mental anguish, which the law does not recognize as an independent ground for damages. He concludes:

These contentions are tacitly admitted in the *Harvard Law Review* article, but the contention is still made that on ground of propriety and moral fitness the privacy of one [sic] personality should be protected. This contention must rest upon the assumption that equity is a shifting, ambulatory system of jurisprudence which is to be exercised in any case where the relief asked for seems to meet to the conscience of the Chancellor. That equity is not such a system it is submitted has been clearly shown.<sup>130</sup>

An 1898 article further confirmed the identification of privacy with natural law jurisprudence. Its author declared:

We contend that it is one of the rights of life, and that, in this sense, it is a natural or absolute right. By natural rights, we do not mean those that belonged to man in a state of nature and which, because of their fundamental character, were retained by him when he became a member of society. This theory of a state of nature in which men existed has degenerated and become scarcely a fancy; such a state never did nor ever can exist. But when we speak of natural rights we refer to those which universal experience has designated as essential and has agreed should be conceded to man, as a member of society, by the State, denominated by governments, and guarded by courts.<sup>131</sup>

Acceptance of the new tort, at least in the form offered by Warren and Brandeis, required first, a dynamic evolutionary view of the common law (including the recognition of rights), and second,

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*Id.* at 20-21.

129. *Id.* at 7.

130. *Id.* at 8-9.

131. Thompson, *supra* note 94, at 149.

a notion that the purpose of tort law was to recognize rights and provide remedies for injuries to them.<sup>132</sup> While some courts and commentators rejected the tort because their view of the common law was more static, others rejected it because they did not accept a rights-based notion of tort law. In the view of the latter, tort was about the deficient conduct of the injurer, or the damages suffered.

Much of the early debate centered on whether equity relief was appropriate. It is difficult to say whether this debate was related in some way to other questions arising at the time regarding the granting of injunctions by courts. Perhaps most important of these was the growing use of labor injunctions. Similarly, some of the hostility to natural law and natural rights certainly came from progressives who opposed the use of such rights in invalidating progressive and redistributive legislative action.<sup>133</sup> Brandeis's own views on these matters are well known. Whether recognition of a right to privacy had an antiprogressive element is less clear.

In conclusion, Warren and Brandeis's article was part of a rights-based conceptual approach to tort law that arose in the mid-nineteenth century and remained as an alternative to the Holmesian paradigms through the early part of this century. Some of the early references to the right to privacy, the sources relied on by Warren and Brandeis, and its initial reception by courts and commentators, suggest that this right was regarded as a natural right derived from principles of natural law. However, the approach to natural law and the common law was dynamic, responsive to changing times and circumstances. In practical terms, recognition of the right to privacy was caught up in two other, although not unrelated, legal controversies of the late nineteenth and early twentieth centuries. Both concerned the nature of equitable remedies. First, there was some question whether equitable relief could be obtained to protect rights that were not property based. In the view of some courts, Warren and Brandeis's separation of the right to privacy from any interest in property compelled the conclusion that equitable remedies were not availa-

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132. This conception is very pronounced in *Cooley*: "Every government must concern itself with the definition of rights and the providing of adequate security for their enjoyment. If a government is properly and justly administered, this will be its chief business; and this in its true sense constitutes civil liberty." T. COOLEY, *supra* note 46, at 5.

133. Natural law and natural rights have ebbed and flowed in American political, social, and legal thought. For one interesting account, see D. RODGERS, *CONTESTED TRUTHS* 45-79 (1987).

ble. A second issue was the open-ended natural justice orientation of equity. Some courts and commentators, while recognizing that equity jurisprudence had once been of this nature, found that by the end of the nineteenth century it was as precedent bound as law.<sup>134</sup>

#### IV THE CROSSOVER

Warren and Brandeis first identified a right and then determined what tort remedy should be made available. Tort law, in their view as well as in the view of Cooley and others, was the general law of remedies for invasion of rights. While this right was considered completely separate from the right protected by defamation, Warren and Brandeis nevertheless relied extensively on the law of defamation in determining the scope of the remedy. Yet the right identified was not simply a tort law right, it was a general right to be protected by the law against all who would invade it.

Brandeis's right-based vision of tort law is in one way reflected in the subsequent influence of the article. It is among the very few "crossover" articles, that is an article in the private law area, in particular tort law, that has had influence in the interpretation, indeed one might argue the creation, of constitutional rights. The article is frequently cited in the constitutional context; that is, in connection with some constitutional right of privacy. And while one might claim that the right of privacy as protected by tort law has amounted to little over the last one hundred years, this could hardly be said of the constitutional right. What remains surprising is that the constitutional right, as well as the tort right, traces part of its lineage to the 1890 article.<sup>135</sup>

It may be useful in connection with this point to briefly describe the use of the article in opinions of the Supreme Court of the United States. It was first cited in 1941 in Justice Murphy's dissenting opinion in *Goldman v United States*,<sup>136</sup> where the issue was whether the fourth amendment protected against the use of a detectaphone. Justice Murphy saw the tort and the fourth amend-

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134. See M. HORWITZ, *supra* note 8, at 265.

135. But see *Patriarca v. FBI*, 630 F. Supp. 993, 1001 (D.R.I. 1886) ("There is no historical relationship between the privacy protected by the Fourth Amendment and the tort action for private invasions of privacy.").

136. 316 U.S. 129 (1941).

ment as different protections of the same right.<sup>137</sup>

The next citation, also in dissent, came in *Poe v Ullman*.<sup>138</sup> Justice Douglas, disagreeing with the majority's finding that the case was not justiciable, noted that the asserted right of privacy (in this case against the state's enforcement of a prohibition of contraceptives) "was not drawn from the blue" and that "The right to be let alone had many common-law overtones," citing, among others, Warren and Brandeis.<sup>139</sup> Justice Douglas reiterated this point in a concurring opinion two years later in *Gibson v Florida Legislative Investigation Committee*,<sup>140</sup> writing that "[a] part of the philosophical basis for this right [of privacy against government intrusion] has its roots in the common law," again citing Warren and Brandeis.<sup>141</sup> During the same term, Justice Brennan also relied on the Warren and Brandeis article and the common law of privacy in his dissent in *Lopez v United States*.<sup>142</sup> That case raised the question of whether a government agent who secretly records a conversation with the defendant violates the defendant's fourth amendment rights. Brennan argued that the right of privacy embraced "a concept of liberty of one's communications," and justified the argument historically by citing Warren and Brandeis's statement that an individual "'generally retains the power to fix the limits of the publicity which shall be given'"

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137. Justice Murphy wrote:

One of the great boons secured to the inhabitants of this country by the Bill of Rights is the right of personal privacy guaranteed by the Fourth Amendment. In numerous ways the law protects the individual against unwarranted intrusions by others into his private affairs. [citing "Brandeis & Warren, 'The Right to Privacy,' 4 Harv. L. Rev. 193 (1890)"]. It compensates him for trespass on his property or against his person. It prohibits the publication against his will of his thoughts, sentiments, and emotions, regardless of whether those are expressed in words, painting, sculpture, music, or in other modes. [citing *id.* at 198-99] It may prohibit the use of his photograph for commercial purposes without his consent. [citing *Pavesich* and similar cases]. These are restrictions on the activities of private persons. But the Fourth Amendment puts a restraint on the arm of the Government itself, and prevents it from invading the sanctity of a man's home or his private quarters except under safeguards calculated to prevent oppression and abuse of authority.

*Id.* at 136-37 (Murphy, J., dissenting).

138. 367 U.S. 497 (1961).

139. *Id.* at 152 (Douglas, J., dissenting).

140. 372 U.S. 539 (1963).

141. *Id.* at 569 n.7 (Douglas, J., concurring) (citing Warren & Brandeis, *supra* note 3, at 196).

142. 373 U.S. 427 (1963) (Brennan, J., dissenting).

to one's thoughts, sentiments, and emotions.<sup>143</sup>

The first decision of the Supreme Court to explicitly recognize a right of privacy outside the fourth amendment protection against warrantless searches was *Griswold v Connecticut*.<sup>144</sup> Neither the Court's opinion by Justice Douglas nor any of the three concurring opinions related that right to the Warren and Brandeis tort. However, Justice Black, in a footnote to his dissent, attacked the majority for elevating common law rights to constitutional status. After noting the natural law justifications offered in *Pavesich*,<sup>145</sup> Justice Black commented:

Observing that "the right of privacy presses for recognition here," today this Court, which I did not understand to have power to sit as a court of common law, now appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a constitutional rule which prevents state legislatures from passing any law deemed by this Court to interfere with "privacy."<sup>146</sup>

In *Katz v United States*,<sup>147</sup> however, Justice Stewart turned the argument around in analyzing the fourth amendment wiretap case that overruled *Olmstead v United States*.<sup>148</sup> He relied exclusively on the contours of the fourth amendment, noting that "a person's general right of privacy is, like the protection of his property and of his very life, left largely to the individual states."<sup>149</sup>

For the most part, prior to 1967 Warren and Brandeis and the common law tort of privacy were identified with the constitutional protection given individual privacy in several contexts. To one degree or another, these privacy decisions sketched a relation between public law and private law privacy protection. As suggested above, this use of the privacy right was consistent with the Cooley/Brandeis conception of rights and the nature of tort law. In *Time, Inc. v Hill*,<sup>150</sup> however, the Warren and Brandeis privacy right was seen as conflicting with the *constitutional* right to

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143. *Id.* at 450 (Brennan, J., dissenting) (quoting Warren & Brandeis, *supra* note 3, at 198).

144. 381 U.S. 479 (1965).

145. *See supra* text accompanying notes 115-18.

146. *Griswold*, 381 U.S. at 510 n.1 (Black, J., dissenting).

147. 389 U.S. 347 (1967).

148. 277 U.S. 438 (1928).

149. *Katz*, 389 U.S. at 350-51.

150. 385 U.S. 374 (1967).

freedom of the press.<sup>151</sup> Justice Brennan, writing for the court, seemed to have forgotten the relationship between the tort and constitutional rights of privacy on which he had relied in *Lopez*.<sup>152</sup> The court for the first time applied the *New York Times Co. v. Sullivan*<sup>153</sup> standard to a private individual and held "that the constitutional protections for speech and press preclude the application of the New York [privacy statute] to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."<sup>154</sup>

Justice Fortas strongly disagreed with the balance struck so heavily in favor of the speech right against the privacy right:

There are great and important values in our society, none of which is greater than those reflected in the First Amendment, but which are also fundamental and entitled to this Court's careful respect and protection. Among these is the right to privacy, which has been eloquently extolled by scholars and members of this Court. Judge Cooley long ago referred to this right as the right "to be let alone." In 1890, Warren and Brandeis published their famous article "The Right to Privacy" A distinct right of privacy is now recognized in at least 35 states It is, simply stated, the right to be let alone; to live one's life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of community living under a government of law. As Mr. Justice Brandeis said in his famous dissent in *Olmstead v. United States*, the right of privacy is "the most comprehensive of rights and the right most valued by civilized men."

This Court has repeatedly recognized this principle. As early as 1886, in *Boyd v. United States* this Court held that the doctrines of the Fourth and Fifth amendments "apply to all invasions on the part of the government its employees of the sanctity of a man's home and the privacies of life"

Then, in the landmark case of *Mapp v. Ohio* this Court referred to "the right to privacy," "no less important than any other right carefully and particularly reserved to the

151. From very early in the history of the privacy tort, the lower courts had raised constitutional concerns. See, e.g., *id.* at 380-91 (exploring the historical development of privacy torts).

152. See *supra* text accompanying notes 142-43; cf. *Time v. Hill*, 385 U.S. at 416 (Fortas, J., dissenting) ("The Court today does not repeat the ringing words of so many of its members on so many occasions in exaltation of the right of privacy.").

153. 376 U.S. 254 (1964).

154. *Time v. Hill*, 385 U.S. at 387-88.

people," as "basic to a free society."<sup>155</sup>

I do not want to quarrel here with the constitutional status of the various aspects of the right of privacy. But I think there is little doubt that Justice Fortas's view best reflects the Warren and Brandeis conception of the privacy right. As a historical matter, it is odd that the right of privacy, set forth by Warren and Brandeis in the context of recognizing tort remedies, found its way to a constitutional status except when it was opposed by other constitutional rights.

The tension between the constitutional status attached to some privacy interests and the comparatively slight weight accorded to privacy interests in the tort context may explain the near disappearance of citations by the Supreme Court to Warren and Brandeis outside the tort context since *Time v Hill*. Some lower courts, however, continue to identify Warren and Brandeis with the constitutional right of privacy.<sup>156</sup> Other courts draw a sharp distinction between the constitutional and tort rights.<sup>157</sup>

Part of the problem is that the Court has yet to articulate the role of common law rights in constitutional jurisprudence—at least when it comes to conflicts between such rights and better-established constitutional rights. At issue in our conceptualization of tort law—whether it is part of the law of individual rights—is the relationship between tort law and constitutional law. Should important common law rights also enjoy constitutional protection? Must common law tort rights yield to constitutional rights? Warren and Brandeis, and judicial decisions like *Pavesich*, arguably incorporate more an eighteenth century vision of common and constitutional law. Under this view, the Constitution is not a

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155. *Id.* at 412-13 (Fortas, J., dissenting) (footnotes and citations omitted).

156. See, e.g., *United States v. Bazzano*, 712 F.2d 846 (3d Cir. 1983) (Gibbons, J., dissenting) (citing Warren and Brandeis in support of excluding evidence obtained in violation of the fourth amendment); *Plante v. Gonzalez*, 575 F.2d 1119, 1127 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979) (noting that with respect to the fourteenth amendment due process clause a right to privacy in academic discussion dates back to Warren and Brandeis); *In re Agosto*, 553 F. Supp. 1298 (D. Nev. 1983) (Warren and Brandeis cited in family right to privacy context); *Foe v. Vanderhoof*, 389 F. Supp. 947, 951 (D. Colo. 1975) (constitutional privacy right derives from "inviolate personality" notion, citing Warren and Brandeis); *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis.) (citing Warren and Brandeis regarding penumbral privacy), appeal dismissed, 400 U.S. 1 (1970).

157. See, e.g., *Patriarca v. FBI*, 630 F. Supp. 993, 1001 (D.R.I.) (rejecting equation of privacy right under tort law with fourth amendment rights), *rev'd*, 820 F.2d 1342 (1st Cir. 1986), *modified*, 820 F.2d 1354 (1st Cir. 1987); *Travers v. Paton*, 261 F. Supp. 110, 113-15 (D. Conn. 1966) (tort-based privacy issue not covered by 42 U.S.C. § 1983 (1988) action alleging violation of constitutional rights).

source of rights, but an explicit restriction on the limitations of rights that the government may adopt.<sup>158</sup> The rights of tort law and the rights of constitutional law, here, have the same source. They are closely related, complementary areas of the law, both serving to protect the civil liberties of individuals. For better or worse, this is not the vision of tort law—or its relationship to constitutional law—that has prevailed.

## V THE RIGHT TO PRIVACY AND MODERN TORT THEORY

Few torts have developed as diverse offspring as the invasion of the right of privacy. Seventy years after Warren and Brandeis, William Prosser sought to bring order to the “‘haystack in a hurricane’”<sup>159</sup> that privacy law had arguably become. Prosser identified four distinct torts: intrusion upon seclusion or solitude, public disclosure of private facts, false light in the public eye, and appropriation (“exploitation of attributes of the plaintiff’s identity”).<sup>160</sup> Prosser and others have suggested that Warren and Brandeis really only had the second tort, public disclosure of private facts, in mind.<sup>161</sup>

This evaluation fundamentally misses the conceptual approach to tort law advanced by Warren and Brandeis in finding a right to privacy and elaborating some aspects of that right. As argued above, they did not identify a new tort, but rather a new right that ought to be protected by tort law. That new right in turn was derived from an old right, perhaps a natural right, namely the right to be let alone. In light of these origins, it would have been surprising if the tort protection given to privacy remained confined within the narrow bounds of public disclosure. The very theory of torts upon which privacy was based implied its fluidity.

I have sought in the preceding sections to show how Warren and Brandeis viewed tort law as the law defining and protecting rights, and how this view was at odds with other conceptions of tort law that emerged at the end of the nineteenth century and eventually prevailed. Holmes’s defendant-based instrumentalist vi-

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158. See Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1 (1968).

159. Prosser, *supra* note 20, at 407 (quoting *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 485 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956)).

160. *Id.* at 389, 401.

161. See, e.g., Kalven, *supra* note 4, at 330; Prosser, *supra* note 20, at 392.



sion provided the conceptual foundation of tort law well into the twentieth century. Strict liability largely gave way to negligence, even in such bastions of rights-based thinking as property.<sup>162</sup> The common law, and most particularly the law of torts, became the domain of reasonableness rather than rights.<sup>163</sup> Intentional torts, once the focus of torts, receded to near irrelevance. Indeed, despite occasional manifestations of life, intentional torts have remained in a formal structure much like the writ system from which they are descended.<sup>164</sup>

This in essence has been the fate of privacy. Promulgated as part of a jurisprudence of rights, with strong natural law overtones, the privacy tort had no intellectual place in modern tort law. Rights now belong to the language of public law discourse rather than private law discourse. Prosser's 1960 article stands as the modern source of the privacy tort. Prosser's analysis is a return to the essentials of the writ system that continue to characterize the law of intentional torts. Each tort is identified with the interest it seeks to protect, the elements of a cause of action, and the defenses available. While there may be common principles, these play little role in adjudication.

But thinking about invasion of privacy as just one more intentional tort dooms most of it in the face of constitutional challenges. Where the tort cause of action is perceived to conflict with the freedom of speech or press, courts in effect weigh the constitutional right against the mere tort claim for damages or injunctive relief. Put in these terms, it is a balance that indeed seems skewed, and one wonders whether the tort can survive at all.<sup>165</sup>

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162. The persistence of rights-based thinking in the property area, which characterized even the work of Holmes and Pollock, is one reason that injury to property was one of the last areas of tort law to succumb to the negligence regime. See *supra* text accompanying notes 58-71.

163. Cf. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985) (comparison of common law thinking—which promotes “flat” thinking—and civil law thinking—which promotes “structured” thinking). In view of Fletcher's analysis, it is not surprising Warren and Brandeis placed considerable emphasis on some civil law protections for privacy.

164. This is reflected in the marginalization of intentional torts in most law school torts courses. Where they are covered, the emphasis tends to be on the nature of the intent requirement and defenses available. Little attention is paid to the broad spectrum of rights or interests protected by intentional torts.

165. This seems nearly the case in the Supreme Court's most recent pronouncement on the subject, *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (first amendment prevents recovery against newspaper that negligently publishes rape victim's name). However, in cases where there is no constitutional right asserted, the Court appears to value the right to

Recast as the right of privacy versus the right of speech, the question becomes more difficult. A full acceptance of the privacy tort would require a fundamental conceptual change in tort law, and probably constitutional law as well.

I leave for another day the normative questions about rights-based thinking in tort law. Does it matter whether we focus on rights or interests or harms, and if it does matter, is a rights-based approach to tort law more or less desirable? In one aspect, late twentieth century tort law has returned to the Warren and Brandeis view, namely in its primary focus on the plaintiff. But now it is a focus on compensation. For most of this century, that is how we have perceived the central tension in tort law, as a congruence or tension between the plaintiff-oriented goal of compensation and the defendant-oriented goal of deterrence. In many ways, the emphasis on compensation has only served to further belittle tort law. Rather than being the law of rights, it is simply about money. The overwhelming remedy sought in tort law is money damages; in constitutional law it is injunctive and declaratory relief. What we mostly want to know about a tort law decision is whether or not the plaintiff won and how much money he or she received. What we want to know from a constitutional decision is what our rights are. Warren and Brandeis, strongly influenced by Cooley, thought that was the question for torts. They may have been wrong, but the path they started down needs further exploration.

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privacy highly. *See* Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

