# ABOUT NED

*Charles E. Colman*[*]

> The great peculiarity of the privacy cases is their predominant, though not exclusive, focus on sexuality — not 'sex' as such, of course, but sexuality in the broad sense of that term: the network of decisions and conduct relating to the conditions under which sex is permissible, the social institutions surrounding sexual relationships, and the procreative consequences of sex. Nothing in the privacy cases says that the doctrine must gravitate around sexuality. Nevertheless, it has.
>
> — Jed Rubenfeld, *The Right of Privacy*[1]

## I. TELLING STORIES

In December of 1890, the *Harvard Law Review* published an article, coauthored by Boston law firm partners Samuel Warren and Louis Brandeis, titled *The Right to Privacy*.[2] The piece reflected on the harms caused by gossip and press intrusions into people's private lives,[3] and argued that judges could (and should) make use of existing legal authority to recognize a new tort for the invasion of individual privacy.[4] One hundred and twenty-five years after its publication, *The Right to Privacy* enjoys a reputation as one of the most famous and influential law review articles ever written, having played a notable role in the Supreme Court's development of a constitutional right to personal autonomy.[5]

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[1] Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 744 (1989).

[2] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[3] *See id.* at 196 ("The press is overstepping in every direction the obvious bounds of propriety and of decency.").

[4] *See id.* at 198 ("The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.").

[5] For a range of views on the article's historical significance, reputation, and influence, see, for example, STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 138 (2011) (calling *The Right to Privacy* "the most well-known piece of legal scholarship in American history"); SAMANTHA BARBAS, LAWS OF IMAGE: PRIVACY AND PUBLICITY IN AMERICA 39 (2015) ("'The Right to Privacy' was dissected, discussed, and praised in popular and legal journals — remarkable for a law review article."); James H. Barron, *Warren and Brandeis,* The Right to Privacy, *4 Harv. L. Rev. 193 (1890): Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875 (1979) (discussing the "hallowed place" of the article "in both legal literature and history," *id.* at 876, while simultaneously positing a disconnect between the precise nature of the article's influence and possible authorial intent, *id.* at 880); William M. Beaney, *The Right to Privacy and American Law*, 31 L. & CONTEMP. PROBS. 253, 257, 258 (1966) (acknowledging that the "famous" article is the "usual starting point in any discussion of the growth of the legal concept of privacy" in the United States, *id.* at 257, but asserting that "[i]t

Because *The Right to Privacy* has loomed so large in the American legal consciousness for so long (and, no doubt, because it has been invoked in Supreme Court decisions on some of the most controversial issues of the past century[6]), many scholars have displayed curiosity about the article's backstory. Legal historian Stuart Banner summarizes the bulk of such scholarly musings thusly: "The traditional explanation of the origin of 'The Right to Privacy' emphasizes Warren's irritation with sensationalist press coverage of his daughter's wedding."[7] As Banner notes, this conventional account must be apocryphal, given that Warren's daughter was only six years old when her father took the lead on the 1890 article.[8]

Despite the chronological impossibility of this story, scholars echoed it for decades (likely due, in part, to its appearance in another influential law review article on privacy, written by Dean William Prosser in 1960[9]). Recently, however, more probing explanations of the article's origin have begun to appear. Several scholars, for example, have explored the role of newly affordable and portable photographic technology in the years leading up to the article's publication.[10]

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would be inaccurate to credit the tort concept of the Warren-Brandeis right to privacy with effecting any significant change in American life," *id.* at 258); William S. Gyves, Note, *The Right to Privacy One Hundred Years Later: New York Stands Firm as the World and Law Around It Change*, 64 ST. JOHN'S L. REV. 315, 316 n.2 (1990) ("The Warren and Brandeis collaboration is widely considered the most famous and influential law review article of all time.").

[6] *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 534 (2001); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 554 (1985); *see also* Griswold v. Connecticut, 381 U.S. 479, 510 n.1 (1965) (Black, J., dissenting).

[7] BANNER, *supra* note 5, at 138. Banner dismisses the notion that it is "necessary" to explore the "personal motive[s]" behind the writing of *The Right to Privacy*, declaring: "In the social circles in which Warren and Brandeis moved, few would have disagreed that the press was becoming too aggressive in invading personal privacy. Their legal argument was new, but in criticizing the press they were merely voicing conventional opinion." *Id.* at 138; *see also id.* at 318 n.18. There is room for debate on this point. *See* BARBAS, *supra* note 5, at 40–43. There is a great deal more room for disagreement about how to determine whether a given scholarly inquiry is "necessary." *See infra* p. 131.

[8] BANNER, *supra* note 5, at 138.

[9] William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383 (1960). Prosser's article is still frequently cited for that proposition. *See, e.g.*, Christine Hart, Note, Y.G. v. Jewish Hospital of St. Louis*: Breathing Life into the "Disclosure of Private Facts" Tort*, 35 ST. LOUIS U. L.J. 931, 933 (1991) (citing Prosser, *supra*); *see also* Beaney, *supra* note 5, at 257 (noting in 1966 that it was "frequently reported without much comment that the article was occasioned by the prying, gossipy accounts of the social activities of members of Warren's family in a Boston newspaper that specialized in such revelations").

[10] *See, e.g.*, Robert E. Mensel, *"Kodakers Lying in Wait": Amateur Photography and the Right of Privacy in New York, 1885–1915*, 43 AM. Q. 24 (1991); *see also* Samantha Barbas, *Saving Privacy from History*, 61 DEPAUL L. REV. 973, 973 (2012) ("Warren and Brandeis envisioned the 'right to privacy' as a means to address what were perceived as serious threats to privacy and identity posed by the new media of the day — yellow journalism, gossip columns, and kodak photography.").

Even so, "what truly provoked Warren, who is thought to be the moving force behind the article, has remained a mystery."[11] This statement by law and journalism scholar Amy Gajda in 2008 remains accurate today, despite Gajda's careful survey of "news coverage that might explain the authors' personal stake in the legal crusade they launched."[12] Gajda, for her part, concluded that "Samuel D. Warren bristled at the way the press reported on [the prominent political family into which he married] and that such coverage motivated the article."[13] Yet one cannot help but feel that important pieces of the puzzle are still missing.

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[11] Amy Gajda, *What If Samuel D. Warren Hadn't Married a Senator's Daughter?: Uncovering the Press Coverage that Led to "The Right to Privacy,"* 2008 MICH. ST. L. REV. 35, 37 (footnote omitted).

[12] *Id.* at 41.

[13] *Id.* at 40. *See* MARTIN GREEN, THE MOUNT VERNON STREET WARRENS: A BOSTON STORY, 1860–1910, at 105 (1989). Not surprisingly, given Brandeis's later stature, he has frequently — and likely inaccurately — been promoted to lead, or even sole, author by twentieth-century commentators. *See, e.g.*, BARBAS, *supra* note 5, at 36–37 (stating that although the article was "attributed to Warren and Brandeis," *id.* at 36, it was "written largely by Brandeis," *id.* at 37). For this proposition, Barbas cites Barron, who made this assertion in passing in a 1979 article, offering no substantive explanation for the statement. *See id.* at 225 n.68 (citing Barron, *supra* note 5, at 911). The assumption that Brandeis was the driving force behind *The Right to Privacy* has even prompted explanatory studies, like Barbas's, largely neglecting Warren — even as such studies note evidence suggesting that Warren was the article's primary author. *See, e.g.*, Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1310 (2010) ("Although privacy law scholars have long identified Brandeis as the father of American privacy law, Brandeis's personal feelings about tort privacy seem to have been deeply ambivalent. While he remained proud of his legal innovation in this area throughout his life, it does not appear to have been an issue he gave any significant attention to after 1890, other than in his dissent in *Olmstead v. United States* almost forty years later. The editor of his letters concluded that he 'did not really want to get involved' in Warren's project. In fact, even before the article was published, Brandeis privately expressed some misgivings about it. . . . Brandeis later confided in his official biographer Alpheus Mason that '[t]his, like so many of my public activities, I did not volunteer to do.'" (alteration in original) (footnotes omitted)); *see also id.* at 1311 ("Brandeis never drafted the [privacy] statute Warren suggested."). Richards's article nevertheless goes on to try to reconcile Brandeis's apparent "ambivalence" about privacy and free speech, concluding that Brandeis's views on privacy and speech must have changed over time. *See id.* at 1298. In my view, no such attempt at reconciliation is necessary; Brandeis's willingness to sign on to *The Right to Privacy*, like his coauthorship of two earlier *Harvard Law Review* articles more transparently motivated by the interests of the Warren family, Samuel D. Warren & Louis D. Brandeis, *The Law of Ponds*, 3 HARV. L. REV. 1 (1889), and Samuel D. Warren, Jr. & Louis D. Brandeis, *The Watuppa Pond Cases*, 2 HARV. L. REV. 195 (1888), can be most plausibly understood as a demonstration of continuing gratitude to the Warren family. A close family friend of the Warrens for decades, Louis Brandeis likely felt indebted to the family, and to Sam, in particular, for opening up a world of professional opportunities that might otherwise have been unavailable to Brandeis. *See* GREEN, *supra*, at 63, 65 (noting, inter alia, that Brandeis was, "in a way, a super-Warren," *id.* at 63, that "[i]t was through Sam that [Brandeis] met, for instance, Oliver Wendell Holmes" and that "it was Sam's contacts that brought the young partners their first opportunities," *id.* at 65). All of this, combined with Brandeis's familiarity with Sam's familial priorities and protective instincts, and his intimate knowledge of the idiosyncrasies of all of the Warren siblings, including Ned, make his deference to Sam concerning the content and publication of *The Right to Privacy* perfectly understandable — and consistent with his deference to the Warren family's agendas on other occasions.

While no single account can ever tell "the whole story,"[14] there is an intriguing perspective on *The Right to Privacy* that has not yet been explored — even as it has practically begged for attention.[15] Resisting the urge to speculate on the reasons for the scholarly literature's silence on the particular narrative offered here,[16] I proceed to weave an "origin story" of *The Right to Privacy* of special resonance for me, in this personal, cultural, and jurisprudential moment.[17]

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*See, e.g.*, *id.* at 220 (discussing Brandeis's soft-pedaling, even *after* Sam's death in 1910, of his support of a progressive agenda, in the form of a minimum wage, to Sam's sister, Cornelia — who was inclined to oppose such regulation as "subversive to the ideas on which [she] was brought up"). At the same time, Brandeis was not so closely bound with Sam, let alone with Sam's younger brother, Ned, in the public consciousness as to suffer any devastating reputational injury if Ned's sexual orientation were later exposed in one of the many possible ways I explore below.

[14] Legal scholarship, perhaps influenced by the perceived institutional and behavioral dictates of the U.S. legal system, too often lays claim to exclusive and exhaustive explanations. Such scholarship frequently ignores that uncertainty is unavoidable in our complex world. We might benefit from (re)considering to what degree legal scholarship can serve as a corrective to the reductionism of litigation's winner-take-all ethos, rather than instinctively reproducing that ethos in academic pursuits. When it comes to historical projects, in particular, one must make peace with the fact that "the probable and the speculative will coexist." C.G. Bateman, *Method and Metaphysics: A Legal Historian's Canon*, 23 J. JURIS. 255, 278 n.90 (2014) (quoting G.R. ELTON, THE PRACTICE OF HISTORY 87 (1967)); *see also* HAYDEN WHITE, THE CONTENT OF THE FORM 10 (1987) ("Every narrative, however seemingly 'full,' is constructed on the basis of a set of events that might have been included but were left out . . . ."); Christopher Tomlins, *After Critical Legal History: Scope, Scale, Structure*, 8 ANN. REV. L. & SOC. SCI. 31 (2012) (offering an illuminating description of legal historians' varying approaches to indeterminacy over the past several decades).

[15] *See* ANGUS MCLAREN, SEXUAL BLACKMAIL: A MODERN HISTORY 59–62 (2002) (sandwiching mention of *The Right to Privacy* between descriptions of the common late-nineteenth-century practice of blackmailing gay men, but drawing no explicit connection between them).

[16] With that said, see *id.* at 293 n.62 (positing that the popular "appeal" of the conventional account of the article, hinging on "a gentleman's concern for a lady," lies in its "complement[ing] the stereotyped notion of the active male and the passive female"). Another possibility for the absence of any account focusing on Ned's gay brother, of course, is that "[t]he lives and achievements of the Warrens are almost unrecorded — a few 'footnotes to other people's biographies.'" William Bentinck-Smith, Book Review, 63 NEW ENG. Q. 685, 687 (1990) (reviewing GREEN, *supra* note 13). Only "'sparse and discreet' family letters, 'often exercises in concealment,' are what remain for private or intimate information." *Id.* at 686–87. Fortunately, the Warren about whom we arguably know the most — Sam's gay younger brother Ned — is a central focus of this essay. Yet even the "biography" partially authored by him during his lifetime and rewritten and/or expurgated by his friends after his death, provides precious little. *See id.* at 687 (citing OSBERT BURDETT & E.H. GODDARD, EDWARD PERRY WARREN: THE BIOGRAPHY OF A CONNOISSEUR (1941)). Thus, like Green in his writing of the family's biography, I will have to be "imaginative and industrious in seeking for traces of the Warrens and in telling their story." *Id.* I welcome this opportunity: legal scholarship could use a bit of imagination.

[17] *See* discussion *infra* Section V; *cf.* WHITE, *supra* note 14, at 10 (observing the apparent human "need or impulse to rank events with respect to their significance for the culture or group that is writing its own history"); ELIZABETH WILSON, CULTURAL PASSIONS: FANS, AESTHETES AND TAROT READERS 20 (2013) ("[A]ll academic research is a form of autobiography.") (quoting Georges Devereux). My approach here was certainly not crafted to avoid elective affinities: after all, this essay grew out of my research for an article, Charles E. Colman, *Design and*

## II. ABOUT SAM

The leading biography of the Warren family of nineteenth-century Beacon Hill, Boston, explains that Samuel Warren, Jr., had always been the striver of the brood. While the "children," as he called his four younger siblings — Henry (born 1854), Cornelia (born 1857), Edward (Ned) (born 1860), and Frederick (Fiske) (born 1862) — had each turned away from "high society" at a young age, Sam doggedly pursued membership in it.[18] Indeed, he achieved a foothold in that society by marrying into the prominent Bayard family, whose "old money" and political power helped to remedy Sam's insecurity about the Warrens' less established position.[19]

Sam's hunger for status served to fuel his academic and social success at Harvard College and Harvard Law School, his membership in and eventual leadership of important Boston clubs and cultural institutions, and, of course, his building of a successful law firm, Warren & Brandeis.[20] Yet, as Amy Gajda's survey of 1880s press coverage reveals, these achievements earned Sam a decidedly pale patch in the national spotlight. He was, it seems, perpetually in the background as his vivacious wife Mabel and the other Bayards glittered in the social and political limelight.[21]

The picture of Sam's relationship with his siblings is altogether different.[22] The Warren family, a reflection of "the maelstrom of historical forces in Boston at the end of the nineteenth century," was a group with more than its share of secrets and lies.[23] Sam's social and professional ascent (while ultimately less dramatic than he might have

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*Deviance: Patent as Symbol, Rhetoric as Metric — Part 1*, 55 JURIMETRICS 419 (2015), in which I examine the influence of gender and sexuality norms in the deep discourse of turn-of-the-century design-patent jurisprudence. While immersing myself in materials from and about the 1880s, I stumbled upon a sentence about Sam Warren's gay brother Ned; curiosity struck, and this essay followed.

[18] *See* GREEN, *supra* note 13, at xv, 38; DAVID SOX, BACHELORS OF ART: EDWARD PERRY WARREN & THE LEWES HOUSE BROTHERHOOD 10 (1991).

[19] *See* GREEN, *supra* note 13, at 38, 103–04. Though the Warren patriarch had accumulated substantial wealth by 1880, the family — or rather, Sam, the only member of his generation who apparently cared about such things — had not yet reached the inner circle of elite Boston society. *See* SOX, *supra* note 18, at 10–11.

[20] *See* GREEN, *supra* note 13, at 44–45; SOX, *supra* note 18, at 10–11. Realizing that Louis Brandeis was one of the great legal minds of their generation, Sam promised intellectual stimulation, social stature, and wealth to lure the future Supreme Court Justice back to Boston, from St. Louis, where Brandeis had moved after graduating from Harvard Law. *See* GREEN, *supra* note 13, at 63.

[21] Gajda, *supra* note 11, at 42 ("[I]t was Mabel Bayard who was newsworthy — a senator's daughter who lived in both Washington and Wilmington — not her intended husband, a lowly Boston lawyer.").

[22] *See* GREEN, *supra* note 13, at 48.

[23] Martin Green, Book Review, 66 NEW ENG. Q. 340, 341 (1993) (reviewing SOX, *supra* note 18).

hoped) increased the likelihood that the public would grow curious about the dirty laundry of these "barely compatible individualists — not easily compatible with other, milder people, let alone with each other."[24] In part because of this strife, Sam "remained a dutiful son" who was "sentimentally attached" to his siblings long after his marriage into the Bayard family."[25] That sense of duty only intensified after the family patriarch died in 1888;[26] thereafter, Sam "took the position of head of the [Warrens] very seriously."[27] This aspect of Sam's life, widely overlooked by legal scholars investigating the backstory of *The Right to Privacy*, is central to the narrative I offer below.

The family's biographer notes that Sam's "expression of [his] sense of responsibility was often unwelcome" among his siblings, even as they relied on him, to varying degrees, to handle their financial and legal affairs.[28] While Sam did use his legal knowledge and fiduciary positions to exert a certain degree of control over his siblings, his overarching goal appears to have been the family's wellbeing and the preservation of its good name.[29] Indeed, Sam would continue "conscientiously representing [his siblings] in public matters" long after they had reached adulthood.[30] Certain siblings, however, presented greater "challenges" than others.

## III. ABOUT NED

A great deal of Sam's energy went into his relationship with his brother Ned. If it is indeed a blessing to "live in interesting times," then Edward Perry Warren was dangerously blessed: Ned (eight years Sam's junior) found himself entering adulthood and achieving an understanding of his same-sex attraction at the precise moment in Anglo-American history when scientists and the public first proclaimed and recognized the existence of men like Ned as a fixed and pathologized category of persons.[31]

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[24] GREEN, *supra* note 13, at 48.

[25] *Id.* at 44.

[26] *See id.* at 81.

[27] *Id.* at 44 (emphasis omitted); SOX, *supra* note 18, at 71 (discussing the centrality of "the family dignity" among Sam's priorities, as recited in a letter written by Ned on the heels of their mother's death in 1901).

[28] *See* GREEN, *supra* note 13, at 62.

[29] *Id.* at 44–45 (speculating that Sam's efforts might have been intended "to compensate and conciliate the rest of [the Warren siblings], for the various ways in which he irritated or offended"). According to the family's biographer, Sam was "easier . . . to be proud of than to live with." *Id.* at 44.

[30] *Id.* at 45.

[31] *See* ANGUS MCLAREN, THE TRIALS OF MASCULINITY: POLICING SEXUAL BOUNDARIES, 1870–1930, at 30 (1997).

A dominant "scientific" notion of homosexuality began to crystallize in the Anglo-American consciousness in the 1880s, and especially in the few years leading up to Sam's writing of *The Right to Privacy*.[32] Both the conceptualization of and terminology used to describe such "sexual deviants" ("pederasts," "inverts," etc.) sound foreign today,[33] though perhaps not as foreign as the broader cultural logic ascendant during that time period. For many white, middle-class Americans of the period, for whom evolutionary theory offered seemingly endless explanatory power[34] (including, and maybe especially, among the legal establishment[35]), same-sex intimacy was deeply linked with the notion of "degeneracy." This new "degeneracy" meant something more than the moral deterioration previously associated with episodic sodomy. It was intended to evoke the literal "devolution" of the "race," purportedly echoed and facilitated by the social "disorder" of the women's rights movement, a rapidly rising divorce rate, an increase in prostitution and venereal disease in urban areas, the imagined effects of large-scale immigration on the moral and physical well-being of American society, and a host of other destabilizing phenomena.[36]

The American public living in the large cities on the East Coast was thus alerted to a supposedly imminent descent into "sexual anarchy" during the same decade in which Ned Warren graduated from Harvard, went on to attend Oxford (where he would more enthusiastically and overtly embrace his sexuality and come to identify as a devout and vocal Platonic "aesthete"), received and quickly began spending an enormous annual stipend dispensed after his father's 1888 passing, and convened a group of like-minded gay men to live communally in a Sussex mansion dedicated to the appreciation of art and sensuality in the ancient Greek tradition.[37]

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[32] *See* ELAINE SHOWALTER, SEXUAL ANARCHY: GENDER AND CULTURE AT THE FIN DE SIÈCLE 14 (1990).

[33] The terms "homosexual," "gay," and "same-sex [attraction]" were not consistently used in the 1880s to describe men like Ned, or their sexual conduct; however, I will use such terms for the sake of convenience. My discussion here does not focus specifically on developments in lesbian sexology or public understandings thereof, both because they are less directly relevant to the Warren story and because the history and cultural dynamics thereof are arguably more complicated than in the context of gay men. *See* EVE KOSOFSKY SEDGWICK, BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSOCIAL DESIRE 3–5 (2015).

[34] *See generally* CYNTHIA EAGLE RUSSETT, SEXUAL SCIENCE: THE VICTORIAN CONSTRUCTION OF WOMANHOOD (1991).

[35] *See* GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970, at 245, 251 (1997).

[36] *See* GAIL BEDERMAN, MANLINESS & CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880–1917, at 174–87 (1995); PAUL BOYER, URBAN MASSES AND MORAL ORDER IN AMERICA, 1820–1920, at 123–29 (1978); Sally Ledger, *The New Woman and the Crisis of Victorianism*, *in* CULTURAL POLITICS AT THE FIN DE SIÈCLE 22, 22–23 (Sally Ledger & Scott McCracken eds., 1995).

[37] *See* GREEN, *supra* note 13, at 85–90.

Sam, as a cosmopolitan and highly educated professional, might well have foreseen the coming "homosexual panic" before most others experienced it firsthand.[38] Regardless, by the time Sam wrote *The Right to Privacy*, both the medical profession and the legal system had decisively pronounced judgment on sexual "deviants" like Ned[39]: "the new sexual types of the pederast and invert posed a serious sexual danger."[40] White, middle-class Anglo-American society was quickly learning to be hypervigilant for[41] — and was increasingly inclined to use the legal system against[42] — homosexual men in the very same years in which Ned was building an increasingly visible gay life for himself.

Sam took seriously his self-appointed role as the head of the family — and the politically savviest of the Warrens — to protect Ned, perhaps the most vulnerable of the Warren "children." This undertaking likely struck Sam as especially necessary, and difficult, because Ned's mannerisms, personal interactions, and intellectual and aesthetic interests would have marked him as a presumptive homosexual in the eyes of a growing portion of an increasingly suspicious Anglo-American public.

As Sam had witnessed for years, Ned never made much of an effort to present himself as "manly" in the way expected of mid-nineteenth-century Bostonian boys. Indeed, he had often "involuntarily [drawn] attention to himself" as gay.[43] Ned's sexual nonconformity would blos-

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[38] While "[a]lmost all the early works on the subject were French or German" — languages with which Sam would have been acquainted through his education, making it possible for him to gain "advance" access to such works — there was "increasing interest in . . . the United States from the mid-1880s." GRAHAM ROBB, STRANGERS: HOMOSEXUAL LOVE IN THE NINETEENTH CENTURY 52 (2003); *see also id.* at 53–57; COLIN SPENCER, HOMOSEXUALITY: A HISTORY 293 (1995) ("[Such] views did not take long to reach America.")

[39] *See* ROBB, *supra* note 38, at 54 ("By the end of the 1880s, the medical profession was supplying enough information [on 'sexual inversion'] of its own, packaged in [a new, often pseudoscientific] terminology, to do without outside help.")

[40] MCLAREN, *supra* note 31, at 30.

[41] *See* SPENCER, *supra* note 38, at 305 (noting that "the homophobia of [English] society" reached a "hysterical" level in the 1890s); *see also* RICHARD SENNETT, THE FALL OF PUBLIC MAN 164–74 (1974) (noting growing Anglo-American obsession in late-nineteenth-century society, including its detective literature, with the "phrenological" project of finding visual "clues" that might reveal a person's true nature).

[42] *See generally* Colman, *supra* note 17. As I explain in *Part I* of *Design and Deviance*, the reasons for this perception of danger were multifaceted and intertwined with other divisive discourses of the time period. The widespread revelation of "sexual inversion," along with anxiety-provoking developments in other sociocultural realms, conspired to produce what many Anglo-American historians have called a "homosexual panic." This panic played a key role in the passage of the 1885 English law under which famed playwright Oscar Wilde would, just a few years later, be prosecuted, convicted, and sentenced to hard labor for "gross indecency." *See infra* Section III, pp. 133–39.

[43] GREEN, *supra* note 13, at 42; *see also id.* at 40–42.

som, in the mid-1880s, into a multifaceted identity encapsulated in his self-identification as a "Uranian."

The Uranian label entailed not only same-sex attraction, but a comprehensive philosophy endorsed (albeit largely in private) by many gay men in Europe and the United States in the late nineteenth century.[44] First and foremost, the Uranian lifestyle meant (at least for Ned) a "homoeroticism [that] was an essential stimulus to everything of substance that he undertook."[45] Of great secondary importance, however, the Uranian outlook on life often went hand in hand with the tenets of "Aestheticism" — a philosophy directly in the American public eye (as newspaper coverage and satirical cartoons make clear) as early as 1882, when Oscar Wilde embarked on an epic speaking tour of the United States to champion the central Aesthetic tenet of "art for art's sake."[46]

As mainstream Anglo-American society would learn in the final decades of the century, many famous Aesthetes — and the artists they lauded, including John Keats, Lord Byron, and later, Lord Tennyson — shared an affinity for same-sex intimacy and admired its acceptance in the ancient world, especially Greece.[47] (Such beliefs ran directly contrary to late-nineteenth-century notions of "progress";[48] they often represented a near-sacrilegious rejection of the widespread ascendance of science over art.[49])

Ned had been, from a relatively young age, "an impassioned Hellenist who found in ancient Greece the philosophical moorings nec-

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[44] *See* SPENCER, *supra* note 38, at 306–07.

[45] Thomas K. Hubbard, *Ned Warren's Passion: The Life and Work of a Uranian Connoisseur*, 22 ARION 145, 146 (2015) (reviewing THE COLLECTED WORKS & COMMISSIONED BIOGRAPHY OF EDWARD PERRY WARREN (Michael Matthew Kaylor ed., 2013)).

[46] Colman, *supra* note 17, at 445; *see id.* at 443–56. Ned was enchanted by Wilde and his views, much to Sam's chagrin; indeed, Sam tried to dissuade Ned from going to New York to meet Wilde, even though the poet had met with countless luminaries during his trip to the United States. *See* SOX, *supra* note 18, at 13. This, too, suggests early concern on Sam's part about dangers that Ned might face because of his sexuality.

[47] *See* CHARLES UPCHURCH, BEFORE WILDE: SEX BETWEEN MEN IN BRITAIN'S AGE OF REFORM 51–52 (2009).

[48] As Ned's longtime friend, the writer George Santayana, would later explain in a lecture-essay:

> Science was a mighty word [in late nineteenth-century Boston]. The great future of industry loomed vaguely but magnificently before you, and any ulterior rebellion against it . . . was put aside as unthinkable. Unthinkable was a favorite word in those days. Wealth and Morality dominated the scene from their granite pedestals, like ponderous Victorian statutes . . . .

GREEN, *supra* note 13, at 76 (second omission in original) (quoting George Santayana, *Glimpses of Old Boston* (1932), *reprinted in* GEORGE SANTAYANA'S AMERICA 37, 39 (James Ballowe ed., 1967)).

[49] *Id.* ("These were the idols the aesthetes meant to pull down as they purified the temple of the mind.").

essary to make sense of his own unconventional sexuality."[50] (Further, since his time at Harvard College, he had been drawn to the homoerotic poetry of Shelley, Wilde, and especially Swinburne.) Sam, of course, was acquainted with his brother's interests and would have grown increasingly alarmed as popular associations between those interests and "homosexuality" emerged onto the cultural landscape in the 1880s. As early as 1881, for example, a popular Gilbert & Sullivan operetta called *Patience* linked the Classics, the Aesthetes, and same-sex passion: one character, a "Wildean aesthete" named Bunthorne, sang about thinly veiled same-sex tendencies in lyrics concerning "an attachment *à la* Plato."[51]

The dangers for Ned would grow significantly over the course of the 1880s, even as — and perhaps especially because — he fled to England seeking the life he imagined. Historian Alison Hennegan recounts the most worrisome legal development of the time period for men engaged in same-sex intimacy:

> The provisions of [England's] 1885 Criminal Law Amendment Act, with its utter indifference to the public or private nature of sexual exchanges between men, removed at a stroke the traditional equation of private space with safe space. From [that point] on, homosexual domesticity [became] a source of danger. Shared lives leave physical traces — letters, diaries, pictures or photographs, gifts of books (or cigarette cases) with loving inscriptions — all these are perilous. They are the proof, the evidence (both these words now appropriately carrying heavy legal overtones) of a living relationship. Any of the above, left carelessly lying about, and seen by hostile eyes, imperil their owner, sender, or giver.[52]

In the years following the passage of this law, popularly known as the Labouchère Amendment, the risks for Ned would only grow.[53] The two-year period between the death of the Warren family patriarch in 1888 and Sam's publication of *The Right to Privacy* brought a quick succession of potentially dangerous developments. Newly flush, Ned began to use his newly available yearly stipend from the family trust[54] to travel extensively[55] — primarily to regions that had become strongly

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[50] Hubbard, *supra* note 45, at 146.

[51] ROBB, *supra* note 38, at 105; *see also id.* at 147 (concerning "tell-tale" references to "Plato" or "Socrates" in gay correspondence of the time period).

[52] Alison Hennegan, *Hea[r]th and Home: Wilde Domestic Space*, 27 SIGNS 881, 887 (2002) (footnote omitted).

[53] *See, e.g.*, SHOWALTER, *supra* note 32, at 106 ("Homosexuality was . . . a topic of considerable scientific and legal interest in 1886."); *see also id.* at 107 (arguing that Robert Louis Stevenson's 1886 novel, *The Strange Case of Dr. Jekyll and Mr. Hyde*, is essentially "a case study of male hysteria" and "can most persuasively be read as a fable of fin-de-siècle homosexual panic").

[54] GREEN, *supra* note 13, at 88.

[55] Hubbard, *supra* note 45, at 150.

associated with homosexuality.[56] Moreover, Ned threw his efforts into collecting Greek vases and similar antiquities, many featuring explicit homosexual imagery — and proceeded to initiate correspondence on the subject with the Boston Museum in July 1890.[57] Probably most worrisome, from Sam's perspective, was Ned's 1889 discovery and April 1890 lease of a grand estate in Sussex, named Lewes House, which Ned converted into a sort of Uranian Neverland populated by Aesthetes and their guests.[58]

It is difficult to say exactly how much Sam knew about Ned's plans for Lewes House, but it seems that the rest of the Warren family began to harbor (well-founded) suspicions about Ned's same-sex attraction much earlier, probably during — if not before — the years he spent at Oxford in the mid-1880s, and certainly after Ned met his eventual long-time companion, John Marshall, while still in school there.[59] Indeed, Ned repeatedly took Marshall to meet and spend time with the family, and it became clear fairly quickly that the two were something akin to what we might call "partners" today.[60]

In any event, Sam would certainly have known that Lewes House was a large property requiring maintenance — and thus vulnerable to the potentially prying eyes of domestic employees. Sam surely knew of Ned's plans to fill the house with expensive Greek art; from the moment Ned began to draw on the family trust in 1888, there were recurring arguments between Sam and Ned over the latter's expenditures on Greek art — much of which would likely have been deemed "obscene" by the average viewer.[61] Perhaps most importantly, Sam had reason to believe that Ned himself might be careless about the public's discovery of his sexuality[62] and/or

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[56] GREEN, *supra* note 13, at 114, 125.

[57] *Id.* at 125. One can imagine Sam's concern about such correspondence, especially given that Ned would donate many valuable Greek antiquities to American museums "not so much for the few who would love them, he said, as *against* the many who would not." *Id.* at 107.

[58] *See* NICHOLAS C. EDSALL, TOWARD STONEWALL: HOMOSEXUALITY AND SOCIETY IN THE MODERN WESTERN WORLD 188 (2003) ("[T]he sheltered, all-male setting of an Oxford college suited Warren perfectly, and he spent much of his later life attempting to replicate a like environment for himself and his friends."); GREEN, *supra* note 13, at 112, 117–19.

[59] *See* GREEN, *supra* note 13, at 95–97.

[60] *Id.* at 40–43, 90, 95–97, 112–13, 129, 134.

[61] *Id.* at 117, 125.

[62] Ned, who recognized his own lack of perceptiveness as to the emotional states of other people, was likely unaware of the full force of the gathering cultural storm. He did not read the daily news, rarely interacted with people outside his social network at Oxford and, later, Lewes House, and made repeated impulsive decisions with apparent disregard for likely public reaction. *See id.* at 121 (on Ned's lack of interest in politics); *id.* at 116 (news); *id.* at 117 (indifference to society); *id.* at 119 (lack of correspondence with outsiders). *But see id.* at 114 ("There was an atmosphere of secrecy, an anxiety about security, concerning many things at Lewes House."); *id.* at 119 (describing Warren as "very secretive" and "always locking things up" at Lewes House).

what went on at Lewes House[63] — a concern that was increasingly warranted.[64]

In short, Sam would have understood, in the years leading up to his writing of *The Right to Privacy*, that Ned's ostentatious, homosocial, upper-class life of leisure carried on among a colorful group of artists and other bachelors would have made Ned an attractive and easy target for anyone with a personal, political, or financial axe to grind.[65] Indeed, in certain respects, Sam might have better understood the sociocultural landscape and political dynamics bearing on Ned's well-being — even from across the Atlantic — than did his younger brother.[66] What was a self-appointed guardian to do?[67]

## IV. PROSECUTIONS AND PREVENTION

The law took note of the cultural developments discussed above. Indeed, Oscar Wilde's 1895 prosecution for "gross indecency" made so dramatic an impression on the Anglo-American public in large part because it was the highest-profile legal intervention into same-sex relations of the nineteenth century. (Historian Alan Sinfield describes the conviction as a moment in which "the entire, vaguely disconcerting nexus of effeminacy, leisure, idleness, immorality, luxury, insouciance, decadence and aestheticism" was transformed into "a brilliantly precise

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[63] Though it is unclear to what degree Sam would have known this, many guests at Lewes House would be young men of working-class backgrounds, of the sort that upper-class "pederasts" were increasingly accused of luring into a life of deviance. UPCHURCH, *supra* note 47, at 189; *see also* SPENCER, *supra* note 38, at 281.

[64] *See* GREEN, *supra* note 13, at 114–15. Ned vacillated between lashing out at American people and institutions of which he disapproved and zealously guarding his privacy, even to the point of "hypersensitiv[ity] in resenting intrusions on his privacy." *Id.* at 107. He "hated newspapers and reporters." *Id.*

[65] *Id.* at 117. *See generally* MCLAREN, *supra* note 15.

[66] GREEN, *supra* note 13, at 212 ("Ned observed in his autobiography, with apparent complacency, that he was generally known, or supposed, to be unaware of what other people were thinking."); *id.* at 117 ("No woman entered [Lewes House] except as a servant, and the town was quite mystified by the establishment — or so the establishment complacently supposed."). The absence of female figures in this time period, the beginning of "fin-de-siècle homosexual panic," SHOWALTER, *supra* note 32, at 107, was something of which people took notice. *Cf. id.* at 107–09 (noting that reviewers of Robert Louis Stevenson's novel *The Strange Case of Dr. Jekyll and Mr. Hyde* — a story with the many strong homosexual undertones identified by Showalter — was criticized by various reviewers on the basis that "no woman's name occurs in the book, no romance is even suggested in it," and/or that the author "is a boy who has no mind to play with girls," *id.* at 108).

[67] Sam's concerns would have been especially acute given that this was happening at a cultural moment when "radical, feminist, and working-class critiques of upper-class masculinity [had become] strongest" and when an unprecedented proliferation of sexual scandals was fueled by anger "directed at an upper class that made its own rules and [had long been] allowed to evade the laws that constrained" the members of an increasingly vocal majority. UPCHURCH, *supra* note 47, at 53.

image" in the Anglo-American cultural imagination.[68]) But while the Wilde trials were unprecedented in public impact,[69] the law had certainly been deployed against gay men before.[70]

Of particular note for my narrative of *The Right to Privacy*, the late 1880s saw a dramatic rise in criminal prosecutions of "sexually deviant" men from "respectable" families. As historian Charles Upchurch notes, the Anglo-American homosexual "scandal trials of the late nineteenth century . . . marked a new way of politicizing sex between men" — facilitated by the interrelated developments of the "working class [beginning] to read newspapers en masse" and the emergence of "the 'new journalism' of the later nineteenth century [that] changed the rules for reporting sex between men."[71]

Sam Warren, a worldly and well-informed professional involved in a wide range of public affairs, would have been well informed about the various homosexual scandals of the 1880s, particularly in light of Sam's suspicions about Ned's sexuality. These episodes would have been especially alarming for Sam after Ned's return to Boston in 1887–1888, by which point the Aesthete's Uranian outlook on life had become emphatic and all-encompassing.[72]

On the heels of Ned's visit to Boston — during which any number of conversations about Ned's private life might have occurred — Sam would learn of the so-called "Cleveland Street Scandal" of 1889–1890, a series of "sensational trials" concerning "upper-class men paying for sex with telegraph delivery boys."[73] This might well have been the final nudge necessary for Sam to decide he would take some sort of action.[74] The status-obsessed man of the political and business world

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[68] ALAN SINFIELD, THE WILDE CENTURY: EFFEMINACY, OSCAR WILDE, AND THE QUEER MOMENT 3 (1994).

[69] *See generally* Colman, *supra* note 17, at 443–56.

[70] *See* JONATHAN DOLLIMORE, SEXUAL DISSIDENCE: AUGUSTINE TO WILDE, FREUD TO FOUCAULT 67 (1991) ("In fact, the transition [in the popular conception of those acting on same-sex attraction from morally lapsed 'sodomite' to intrinsically pathological 'homosexual'] was more complicated than [much scholarly work] allows, occurring over a greater period of time, and even then (and still now) with cultural and class distinctions. But it is true that, by the time of Wilde, homosexuality could be regarded as rooted in a person's identity and as pathologically pervading all aspects of his being.").

[71] UPCHURCH, *supra* note 47, at 130.

[72] The discontent Ned felt during this period was one he could not keep to himself, writing, for example, to his companion John Marshall: "Here with cold winds and snow, the traditions of Puritanism, the ugliness of the men and the absence of aesthetic sympathy, all Greece is frozen out." Hubbard, *supra* note 45, at 150.

[73] UPCHURCH, *supra* note 47, at 1; *see also* SPENCER, *supra* note 38, at 278–80.

[74] This scandal would later be explicitly linked with Wilde, and thus Aestheticism. Upon Wilde's 1890 publication of *The Picture of Dorian Gray*, *The Scots Observer* would declare that Wilde had written the novel "for 'outlawed noblemen and telegraph boys' — a blatant allusion to the Cleveland Street scandal." ROBB, *supra* note 38, at 105. Ned was persistently secretive with Sam about many aspects of his life, and Sam might well have thought that Ned was the sort of

understood the growing potency of rumors about his brother[75] — rumors that, if investigated or leveraged by the wrong person,[76] could cause immeasurable harm not only to Ned, but to the entire Warren family.[77]

In reading *The Right to Privacy* against the backdrop sketched above, many of the article's otherwise prosaic passages gain a new resonance. I urge the reader to carefully parse the complete text of the article and reach her own conclusions, even as I highlight and flesh out a handful of excerpts here:

> [While public figures], in varying degrees, have renounced the right to live their lives screened from public observation[,] . . . [p]eculiarities of manner and person [of] the ordinary individual should be free from comment . . . .[78]

As noted above, most accounts of *The Right to Privacy* focus on Sam's purported ire at press intrusions into the lives of the socially and politically prominent Bayards.[79] Sam's experience as a new member of that family after his 1882 marriage to Mabel Bayard might well have opened his eyes to the power of the press; that experience does not, however, correspond to any significant degree with the concerns expressed in the 1890 article about the privacy of those who — unlike the Bayards — had *not* "renounced the right to live their lives screened from public observation."

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity . . . .[80]

Ned had essentially retreated from the world by 1890, finding Boston (and cities in general) both distasteful and anxiety inducing. As anyone meeting him would immediate gather, his anxiety was one of the

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moneyed gentleman who patronized establishments like the Cleveland Street brothel. Further, it was during that period that Ned wrote his first gay love story, *A Tale of Pausanian Love* (not published for another forty years). GREEN, *supra* note 13, at 97. One can only guess as to whether Sam perhaps stumbled across an errant page or partial draft somewhere in the family's Mount Vernon Street mansion; in any event, Ned's dedication to his secret literary project would surely have been discussed by the members of the family at some point, if only in euphemistic terms.

[75] *See id.* at 115 ("According to Boston rumour, [English barrister Matthew] Prichard had been 'picked up' by Warren in Rome, having had to leave England because of the Wilde scandal.").

[76] *Cf., e.g.*, SPENCER, *supra* note 38, at 282 ("If I catch you again with [Oscar Wilde] I will make a public scandal in a way you little dream of." (quoting a letter to Bosie Douglas from Bosie's father, the Marquess of Queensberry)).

[77] *See, e.g.*, UPCHURCH, *supra* note 47, at 203 ("Symonds's family also worked to ensure that all copies of the first edition of [his co-authored treatise] *Sexual Inversion*, bearing Symonds's name, were withdrawn from publication in order to protect the family's reputation.").

[78] Warren & Brandeis, *supra* note 2, at 215.

[79] *See supra* p. 130.

[80] Warren & Brandeis, *supra* note 2, at 196.

defining characteristics of his personality. The condition that chronically plagued his health from 1885 onward would soon be "medically diagnosed" as "neurasthenia," a condition that was commonly linked, in the popular imagination, with sexual "deviance."[81]

Such connections received a "scientific" imprimatur from the leading 1880s treatise on "sexual inverts," Richard von Krafft-Ebing's *Psychopathia Sexualis*.[82] In the 1889 edition of Krafft-Ebing's book, for instance, the author devotes special attention to a case study purportedly illustrating the "defective organization of the highest cerebral centres" of "an abnormal and defective person"[83] who identified as an "aesthete" and reportedly wished to spend his session with Krafft-Ebing discussing painting and poetry.[84] The man under examination was described as having a "shy, effeminate manner" and nervous disposition.[85]

> To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers.[86]

In this early passage in *The Right to Privacy*, Warren expresses concern about the exposure of "the details of sexual relations" — immediately after noting a court case that involved nothing of the sort. Rather, as Warren briefly recounts, there had been "a somewhat notorious case brought . . . in New York a few months ago [that had] directly involved the consideration of the right [of a photographer] of circulating portraits."[87] Yet, as Warren points out, the law concerning the rights and duties associated with commissioned photography was essentially settled.[88]

The New York case Warren cites, then, sticks out as something of a non sequitur to the rhetoric surrounding it. That rhetoric resonates to a far greater degree with a subject Sam could not realistically address in a public forum, for reasons of social convention: the atmosphere of widespread anxiety about sexual "deviants" in the late 1880s. As noted above, the late nineteenth century bore witness to several "infamous

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[81] *See* BEDERMAN, *supra* note 36, at 14.

[82] R. VON KRAFFT-EBING, PSYCHOPATHIA SEXUALIS (Charles Gilbert Chaddock trans., 1894). Although it was written in German and only translated into English in 1892, Sam Warren would have been familiar with its findings as summarized in various media — if not the text of the actual book itself. German, like French — the latter of which appeared in large, untranslated blocks of text in *The Right to Privacy*, *see, e.g.*, Warren & Brandeis, *supra* note 2, at 214 n.1, 215 n.1, 216 n.1, 218 n.1 — was often required of the sort of men who matriculated at Harvard in the late nineteenth century.

[83] KRAFFT-EBING, supra note 82, at 308.

[84] *Id.* at 307; *see* UPCHURCH, *supra* note 47, at 198–99.

[85] KRAFFT-EBING, supra note 82, at 307.

[86] Warren & Brandeis, *supra* note 2, at 196.

[87] *Id.* at 195–96 (footnote omitted) (citing Manola v. Stevens, an unreported 1890 case in New York Supreme Court, *see Manola v. Stevens*, N.Y. TIMES, June 21, 1890, at 2).

[88] *See id.* at 208–10.

trials" of gay men, which invariably received a "sustained level" of public attention.[89] Such attention was driven by news coverage "much more sensational and readily accessible"[90] than that of even a few decades earlier, when newspapers had shown reluctance to "mix up the name of a highly respectable individual with so atrocious an accusation."[91] In the new cultural landscape, Sam correctly understood, Ned's private life might, through a single slip-up or personal falling-out — something Sam might accurately have deemed a reasonable possibility — become very public, very quickly.

> 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 [by drawing attention to] the misfortunes and frailties of our neighbors.[92]

In light of the risks identified above, Sam uses this passage as a clever way to turn the tables against those who might be inclined to expose Ned's status as a sexual "invert," recharacterizing the would-be invader of privacy as the figure who has inverted the natural state of things, by prioritizing private sexual practices over more important political matters. He further characterizes anyone seeking to expose such traits as, essentially, a bully, preying on the "misfortunes and frailties" of others — a line of rhetoric that could be found in the portion of medical discourse advocating for treatment, not criminal punishment, of homosexuals.

> [N]umerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the housetops."[93]

> [But the] design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will.[94]

As mentioned above, the late nineteenth century saw an "increased frequency of application of the law" to same-sex intimacy; this was facilitated by changes to extortion law that "allow[ed] men to bring their

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[89] UPCHURCH, *supra* note 47, at 5.

[90] *Id.* at 4.

[91] *Id.* at 133 (quoting newspaper coverage). Further, by the time the "homosexual panic" hit Anglo-American culture in the 1880s, the techniques that many judges had once used to help members of the moneyed classes minimize potentially ruinous publicity had ceased in the face of widespread public interest and moral outrage. *See id.* at 109.

[92] Warren & Brandeis, *supra* note 2, at 196.

[93] *Id.* at 195.

[94] *Id.* at 214–15.

social betters into court on their word alone."[95] Even more instrumental to this development was Labouchère's "famous amendment" to English criminal law in 1885, expressly extending severe penalties for same-sex intimacy "in public *or* private,"[96] and, further, eliminating the evidentiary requirement that a nonparticipating party to an unlawful same-sex encounter give testimony in order for the state to secure a conviction.[97] Such legal "reform," fueled by the newly emphatic social stigma associated with homosexuality, earned the 1885 Labouchère Amendment an ominous nickname: the "Blackmailer's Charter."[98]

Ned's wealth and increasingly ostentatious displays of his ideology and sexuality made him an appealing target for potential blackmail, prosecution, or both. Such campaigns often rested on "intimate letters," a recurring theme in the actual or barely averted gay scandals of the late nineteenth century.[99] It often happened that incriminating materials fell into the wrong hands[100] — and, to the extent one could not enjoin their use, could prove devastating to their authors.

This backdrop provides an intuitive way to make sense of Sam Warren's near-obsessive focus in *The Right to Privacy* on the principle of "limited publication" — the right to prevent others from publishing material from letters to lists, whether or not independently protectable under intellectual property law.[101] Persecution of homosexuals during this time period was especially likely where there was a "paper trail," making Ned more vulnerable than the average nineteenth-century gay man because of his extensive, if largely unpublished, writing.[102]

Ned's immediate audience was apparently "like-minded friends who shared his own aesthetic leanings and erotic tastes . . . ."[103] (Indeed, confidential circulation of often-allusive works was a common practice among nineteenth-century gays and lesbians with literary — if

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[95] UPCHURCH, *supra* note 47, at 15.

[96] Criminal Law Amendment Act 1885, 48 & 49 Vict. c. 69, § 11 (emphasis added).

[97] UPCHURCH, *supra* note 47, at 93.

[98] Joseph Bristow, *Symonds's History, Ellis's Heredity:* Sexual Inversion, *in* SEXOLOGY IN CULTURE: LABELLING BODIES AND DESIRES 79, 91 (Lucy Bland & Laura Doan eds., 1998).

[99] "[I]n the summer of 1894 some passionate letters from Wilde to [Alfred] Bosie [Douglas] came into [Bosie's father's, the Marquess of Queensberry's] hands," triggering the chain of events that would lead to Wilde's downfall. Circumstances like these were all too common, even with the discretion that many gay men and lesbians used in their written correspondence. SPENCER, *supra* note 38, at 283; *see also id.* at 281 ("Douglas was being blackmailed because of an indiscreet letter he had written").

[100] *See, e.g.*, Hubbard, *supra* note 45, at 147 ("[Ned] had obsessive crushes on other boys at his grammar school, including an older, more athletic boy upon whose house he surreptitiously spied, retrieving his papers from the wastebasket [only to be caught by] the family's French maid . . . .").

[101] Warren & Brandeis, *supra* note 2, at 211–12.

[102] *See supra* notes 16 and 74; *see also* Bentinck-Smith, *supra* note 16, at 687 (discussing "the three volumes of Ned Warren's magnum opus, *A Defence of Uranian Love* ([written in 1887 and published in] 1928), as well as lesser works").

[103] Hubbard, *supra* note 45, at 157.

only epistolary — inclinations.[104]) Yet Ned also wished for his poetry to be read, especially in the 1880s and 1890s, before his interests shifted markedly from the literary arts to the visual realm. During his period of productivity as a poet, from 1882 — when he was still living in Boston and attending Harvard College — to 1902, he would use the pseudonym "Arthur Lyon Raile" — a convention he observed for "any publications of a homoerotic character."[105] Of course, few writers of any era have managed to keep their *noms de plume* secret for long, especially when attached to high-profile and controversial works. Although Ned's work would never achieve a substantial readership, Sam had good reason to be concerned about the possible use of Ned's poetry — whether published or unpublished — against him. *The Right to Privacy* attempts to address this concern.

Sam's idiosyncratic invocation of legal authority, especially on the issue of "limited publication," makes his focus on this narrow issue all the more striking. In advancing the proposition, for example, that "[t]he common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others,"[106] Sam cites the then-century-old case *Millar v. Taylor*[107] — and the dissenting judge's opinion therein, no less.[108] His use of this hoary British case was of a piece with the general legal methodology of the argument, which relied almost exclusively on English case law and treatises (even on many issues where American case law and treatises provided ample guidance) along with several untranslated excerpts from French law.[109]

It is possible that this was merely part of Warren's argumentative strategy (some scholars have argued that "the hierarchical nature of British society has resulted in greater respect for privacy not only in governmental affairs but in society at large"[110]) though such an argument makes for a somewhat disingenuous legal argument, obscuring the "fairly radical" character of Warren's position under *American* law.[111] That Sam's argument was more tenuous than he suggested, and so reliant on English precedent even where American precedent

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[104] ROBB, *supra* note 38, at 136 ("Texts that did appear in their author's lifetime were often privately printed for a handful of friends . . . ."). Perhaps Ned and his Uranian friends simply wrote poetry "as a form of sublimation," putting it in print "for themselves and for each other, to share their poetry and their obsession with like-minded men." SPENCER, *supra* note 38, at 307.

[105] Hubbard, *supra* note 45, at 151.

[106] Warren & Brandeis, *supra* note 2, at 198.

[107] 98 Eng. Rep. 201 (1769).

[108] Warren & Brandeis, *supra* note 2, at 198 n.2 (citing *Millar*, 98 Eng. Rep. at 242 (Yates, J., dissenting)).

[109] *See supra* note 82.

[110] Beaney, *supra* note 5, at 258 n.18 (citing EDWARD A. SHILS, THE TORMENT OF SECRECY (1956)).

[111] *See* Richards, *supra* note 13, at 1303.

existed, suggests (1) that he was willing to potentially compromise his professional credibility or reputation for careful legal analysis, only bolstering the likelihood that he had a personal stake in the matter to counterbalance these risks; and/or (2) that he was writing, at least in part, with an eye to the country that had become Ned's primary home and potential location of victimization (and where, just as importantly, ideas espoused by the intellectuals and professionals of *Boston*, perhaps to the exclusion of other American cities, did wield some influence on the direction of elite thinking[112]).

> The allowance of [certain defamation-related] damages would seem to be a recognition that the invasion upon the honor of the family is an injury to the parent's person . . . .[113]

I conclude my quoting of *The Right to Privacy* with this passage — though I might include many others that will likely jump out at the interested reader, equipped with knowledge about Ned — because it represents one of the relatively few instances of what might be called distancing language ("would seem to be a recognition") in Warren's otherwise forceful and often-unqualified rhetoric. Whereas, throughout most of the article, Warren is unabashedly direct in stating his views, about the importance of privacy and the harms arising from its violation, he suddenly becomes guarded when the subject of injury to familial honor arises. This was perhaps one of his few attempts to depersonalize an article in which, for a reader familiar with Ned's idiosyncrasies, much of the rhetoric employed by Sam to make his argument might seem quite painfully "on the nose."

One possibility is that Sam's awkward specificity represented mere clumsiness and/or a lack of objectivity in a piece apparently never edited by Brandeis (who Sam himself had long acknowledged was the "brains" of the team) because of the future Justice's general indifference to the article. Alternatively, the article's superficially artless particularity might have been a savvy, strategic shot across the bow to the many Bostonians already in the know, to varying degrees, about Ned.[114] (Indeed, one wonders if Sam's comment, early in the article, that "no generous impulse can survive under [gossip's] blighting influ-

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[112] *See* SOX, *supra* note 18, at 13 (quoting an Oscar Wilde lecture describing Boston as "the only city in America which influenced thought in Europe").

[113] Warren & Brandeis, *supra* note 2, at 194 n.5.

[114] *See* GREEN, *supra* note 13, at 41 (discussing derision directed at Ned by other Boston children for being a "sissy" and, later, for his sexual "abnormality"); *see also* Hubbard, *supra* note 45, at 147 ("In grammar school [Ned] was ridiculed for wearing his sister's tasseled boots and had few friends, save for a rather effeminate boy he called 'Lucy.'") It seems likely, too, that Ned might also have made overtures to other undergraduates at Harvard, based on his later comments like the following: "My friends [at Harvard] were affectionate, but their affection did not pass beyond a certain point, or had not as yet." *Id.* at 148. "One may surmise that [Ned] hoped to find something in the Oxford experience that he had sought in vain at Harvard." *Id.*

ence"[115] was a warning to Bostonians that the Warren family's philanthropic pursuits throughout the region might quickly cease if any of its members, especially its least public and most vulnerable, were targeted.) Or perhaps Sam was trying to split the difference, using examples and language that would evoke Ned for those already familiar with his proclivities — while seizing on popular sentiment, recent litigation, and purported coauthorship ("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 . . . ."[116]) so that the argument would seem both generalizable and compelling to readers who had no particular familiarity with the Warren family.

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Of course, even if fraternal loyalty did factor into Sam's decision to pursue the project of *The Right to Privacy*, he naturally had his own, more selfish interests in helping Ned to avoid public "disgrace." The consequences of having a family member exposed as a "sodomite" extended beyond shame, in the narrow sense some might (sadly) still be able to relate to today.[117] Such a revelation might suggest that an entire family's blood was "tainted" — at least according to *Psychopathia Sexualis*, which declared: "In almost all cases where an examination of the physical and mental peculiarities of the ancestors and blood relations has been possible, neuroses, psychoses, degenerative signs etc have been found in the families."[118] Perhaps for this reason, one scholar has written: "at any moment in the 19th century someone, somewhere, was burning the papers of a homosexual relative."[119]

To be sure, nothing I write here forecloses the possibility that Sam's experiences as a new member of the Warren-Bayard family informed or even partly motivated his writing of *The Right to Privacy*. Indeed, to the extent that homosexuality was widely described as a "hereditary taint,"[120] it might well have damaged the reputation of the politically prominent Warren-Bayard family — and cast a shadow of suspicion on Sam's children with Mabel — if Ned's "secret" had gotten out.

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115 Warren & Brandeis, *supra* note 2, at 196.

116 *Id.* at 197.

117 *Cf.* SPENCER, *supra* note 38, at 282 ("In spring 1894, Queensberry wrote to his son [Bosie Douglas] begging him to stop seeing Wilde: 'It must either cease or I will disown you and stop all money supplies.'").

118 *Id.* at 293 (quoting KRAFFT-EBING, *supra* note 82, at 226).

119 ROBB, *supra* note 38, at 137.

120 UPCHURCH, *supra* note 47, at 198.

## V. EPILOGUE

If my account of Sam's motivations for writing *The Right to Privacy* is plausible, then the article would seem to acquire a new and special resonance on its 125th anniversary. The rhetoric and reasoning in the piece can be traced,[121] link by link, albeit with important modifications along the way, to Supreme Court decisions that cumulatively es-

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[121] *See* HUW BEVERLEY-SMITH, THE COMMERCIAL APPROPRIATION OF PERSONALITY 150 n.29 (2002) ("Although Prosser stated that the [Warren & Brandeis] article had little immediate effect on the law, [David] Leebron has persuasively shown that the article's impact in academic circles, and in the courts, was immediate and significant." (citations omitted) (citing Prosser, *supra* note 9, at 5; David W. Leebron, *The Right to Privacy's Place in the Intellectual History of Tort Law*, 41 CASE W. RES. L. REV. 769, 792–94 (1991)). Scholarly approval of this view of the article as "catalytic" is substantial. *See, e.g.*, Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1044–45 (2009) (arguing that "when recognition of privacy as a legally protectable interest was only fledgling," *id.* at 1044, Warren's "landmark article" called for robust tort protection, *id.* at 1045); *id.* at 1045–46 ("In the years following publication of *The Right to Privacy*, . . . courts considered more explicitly whether to give privacy more direct and substantial protection."); W.A. Parent, *Recent Work on the Concept of Privacy*, 20 AM. PHIL. Q. 341, 341 (1983) (tracing post-1960 legal articulations of "privacy," which grew out of an earlier "definition of privacy as a condition of being let alone [that had] dominated privacy jurisprudence" and was "explained largely by the extraordinary influence of the Warren and Brandeis essay"). Judge Cooley's notion of "the right to be let alone" has featured prominently in privacy jurisprudence, but arguably because of the Warren and Brandeis article's elaboration on it. *See, e.g.*, Schuyler v. Curtis, 15 N.Y.S. 787, 788 (Sup. Ct. 1891) ("It is true that there is no reported decision which goes to this extent in maintaining the right of privacy, and in that respect this is a novel case. But the gradual extension of the law in the direction of affording the most complete redress for injury to individual rights makes this an easy step from reported decisions much similar in principle. In a recent article of the Harvard Law Review, entitled 'The Right to Privacy,' we find an able summary of the extension and development of the law of individual rights, which well deserves and will repay the perusal of every lawyer. Among other things it says: '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, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection without the interposition of the legislature. Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the 'right to be let alone.'" (citation omitted) (quoting Warren & Brandeis, *supra* note 2, at 195)), *aff'd*, 19 N.Y.S. 264 (Gen. Term 1892). Perhaps notably, Judge Cooley's invocation of the legal import of being "let alone" appears in no published Supreme Court decision until the year after the Warren and Brandeis article featured Cooley's notion so prominently. *See* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("As well said by Judge Cooley: 'The right to one's person may be said to be a right of complete immunity; to be let alone.' Cooley on Torts, 29."). By the 1960s, the phrase appears to have been more closely associated with Brandeis — and, to a lesser degree, Warren — than with Judge Cooley. *See, e.g.*, Erwin N. Griswold, *The Right to Be Let Alone*, 55 NW. U. L. REV. 216, 216 (1960) ("It is in this setting that I want to place 'the right to be let alone.' It is quite true that this phrase cannot be found in the Constitution. But it is implicit in many of the provisions of the Constitution and in the philosophic background out of which the Constitution was formulated. Probably the most familiar statement is that of Justice Brandeis in his dissent in the *Olmstead* case . . . .").

tablished a constitutional right to personal autonomy.[122] Initially, the article's influence was felt primarily in state court decisions concerning invasions of privacy by private parties; however, it would secure a place in constitutional jurisprudence when, in 1928, then-Justice Brandeis penned a powerful dissent echoing key principles of *The Right to Privacy* in the Fourth Amendment case of *Olmstead v. United States*.[123] Brandeis's reasoning in *Olmstead*, along with the article itself, would be invoked by the Supreme Court in important criminal procedure decisions over the next few decades.[124] But the notion

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[122] *See* Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 718–19 (2010) ("Part I [of this piece] briefly chronicles the history of the right [to privacy], from Samuel Warren's and Louis Brandeis's celebrated recognition of the privacy tort in 1890, to Justice Douglas's opinion in *Griswold v. Connecticut*, through its judicial invocations in *Griswold*'s progeny and *Bowers* [*v. Hardwick*], and at last to its conspicuous absence in cases like *Lawrence* [*v. Texas*] and *Gonzales v. Carhart*. This Part argues that the gradual transformation of the right to make fundamental personal decisions from an aspect of privacy emerging from the penumbrae of the Bill of Rights into an aspect of constitutional liberty and equality protected by the Due Process Clause is now complete." (footnotes omitted)); Richards, *supra* note 13, at 1296 ("Brandeis is also famous (though less so) for his *Olmstead* dissent — a document which introduced modern concepts of privacy into constitutional law, and ultimately led not only to the 'reasonable expectation of privacy' test that governs Fourth Amendment law, but also shaped the constitutional right to privacy recognized in *Griswold v. Connecticut* and *Roe v. Wade*." (footnotes omitted)); *see also* FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE (2009) (examining, inter alia, Justice Kennedy's importation of rhetoric and doctrine from, and arguable recasting of, "privacy" cases into "liberty" cases). For an out of date, but nuanced and insightful, examination of the relationship between "privacy," the "right to be left alone," "personhood" (arguably analogous to, and perhaps originating with, Warren and Brandeis's notion of "inviolate personality"), and "personal autonomy," see Rubenfeld, *supra* note 1, at 752 ("It is worth recalling . . . that Brandeis and Warren traced their tort law right of privacy to an analogous but now archaic term: the individual's 'inviolate personality.' Whatever its genesis, 'personhood' has so invaded privacy doctrine that it now regularly is seen either as the value underlying the right or as a synonym for the right itself." (footnotes omitted)).

[123] 277 U.S. 438 (1928). For a decision illustrating and explicitly reflecting on the influence of the article on tort law, see *Cason v. Baskin*, 20 So. 2d 243, 248 (Fla. 1944) (en banc) ("Thus Messrs. Warren and Brandeis endeavored to demonstrate, and quite successfully, that the right of privacy was inherent in the common law and had been protected, as shown by a number of English cases, under the guise of property rights, etc., and that the time had come for a recognition of this right of privacy as an independent right of the individual. [Laurence H.] Eldredge in his very interesting and recent book on 'Modern Tort Problems,' at page 77, says that Warren and Brandeis defined the right of privacy, in substance, to be 'the right to be let alone, the right to live in a community without being held up to the public gaze if you don't want to be held up to the public gaze.'"); *id.* at 250 ("The common law has shown an amazing vitality and capacity for growth and development. This is so largely because the great fundamental object and principle of the common law was the protection of the individual in the enjoyment of all his inherent and essential rights and to afford him a legal remedy for their invasion. In the early days the rights insisted upon by litigants were largely physical, for the protection of the individual's body from harm and his property from being taken or damaged by others. Later on this principle was applied so as to enable recovery of damages for mental suffering occasioned by physical injuries, and this principle was later given a wider application, as shown in the article written by Warren and Brandeis, as well as in the [Georgia and Oregon Supreme Court] cases we have just above cited.").

[124] *See* Katz v. United States, 389 U.S. 347, 350 n.6 (1967) (citing *The Right to Privacy* to underscore the importance of "the protection of a person's *general* right to privacy — his right to be

of privacy would not remain confined to the realm of government investigations.

Starting in the 1960s — perhaps spurred by the acute threat McCarthyism had posed to individual liberty — academic and judicial rhetoric embraced an increasingly robust notion of "the right to privacy." The principle made the decisive leap beyond criminal procedure in the 1965 case of *Griswold v. Connecticut*,[125] where a majority of the Supreme Court (whose Justices cited *Olmstead* and even *The Right to Privacy*, specifically[126]) found a constitutional right to contraception for married couples in the penumbras of various constitutional amendments touching on privacy concerns.[127] The expansive understanding of "privacy" articulated in *Griswold* would be invoked and extended to unmarried individuals seeking to invalidate a governmental ban on contraception, in *Eisenstadt v. Baird*[128] (in a majority decision grounded in important part on the Equal Protection Clause[129]). The *Griswold* ruling and its progeny would later be richly (if controversially) interpreted through the lens of liberty-as-self-determination, by a three-Justice plurality whose decision carried the day in *Planned*

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let alone by other people," *id.* at 350); Watkins v. United States, 354 U.S. 178, 198–99 (1957) ("We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly.").

125 381 U.S. 479 (1965).

126 *See id.* at 494 (Goldberg, J., concurring) (citing *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)); *id.* at 510 n.1 (Black, J., dissenting) ("The phrase 'right to privacy' appears first to have gained currency from an article written by Messrs. Warren and (later Mr. Justice) Brandeis in 1890 which urged that States should give some form of tort relief to persons whose private affairs were exploited by others. Largely as a result of this article, some States have passed statutes creating such a cause of action, and in others state courts have done the same thing by exercising their powers as courts of common law. . . . 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.'" (second omission in original) (citation omitted)).

127 *Id.* at 484–85 (majority opinion).

128 405 U.S. 438 (1972).

129 *Id.* at 453 ("If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

*Parenthood of Southeastern Pennsylvania v. Casey*.[130] Core passages and principles from those cases would soon take center stage in the landmark gay-rights decisions of *Lawrence v. Texas*,[131] *United States v. Windsor*,[132] and, in the 125th year after the publication of *The Right to Privacy*, *Obergefell v. Hodges*,[133] where the Supreme Court recognized a fundamental constitutional right to marry someone of the same sex.[134]

It is here that the story I have told about two brothers, each traditionally relegated to the "footnotes" of history,[135] takes on special resonance. For a desire on Sam's part to protect his gay brother, if indeed a motivating factor in the authorship of *The Right to Privacy*, would mean that a piece published in an effort to preserve the autonomy of one gay man was, in a circuitous but nonetheless concrete way, a 125-year-old precursor of a Supreme Court ruling securing the protection of a crucial right for every gay American.

There are many things about the United States in the twenty-first century that Ned would surely dislike — some with good reason, some due to aspects of Ned's own worldview that appear as distastefully antiquated as the widespread prejudice Ned sought to escape by moving abroad and creating a gay community at Lewes House. But one hopes that, if Ned were alive today, in this post-*Obergefell* world, he would at least entertain the possibility of building a life for himself in his home country. He would still face prejudice, to be sure, but he would also see the law's respect for the most important relationship in his life.

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[130] 505 U.S. 833 (1992); *see id.* at 851 ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."). Justice Blackmun's partial concurrence in *Casey* underscored the import of earlier case law, including the Supreme Court's 1891 invocation of the "right to be let alone" likely prompted by the Warren and Brandeis article. *See id.* at 926–27 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("The Court today reaffirms the long recognized rights of privacy and bodily integrity. As early as 1891, the Court held, '[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others. . . .' Throughout this century, this Court also has held that the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as procreation, childrearing, marriage, and contraceptive choice. These cases embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government." (omission in original) (citations omitted) (quoting Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891), then citing *Casey*, 505 U.S. at 847–49, and then citing *Eisenstadt*, 405 U.S. at 453)).

[131] 539 U.S. 558 (2003).

[132] 133 S. Ct. 2675 (2013).

[133] 135 S. Ct. 2584 (2015).

[134] *Id.* at 2608.

[135] Bentinck-Smith, *supra* note 16, at 687.

And, remarkably, that respect might well be, in some nonquantifiable but eminently meaningful way, due to his brother's article — an article that, in the poetic mirror of historical imagination, can be read and appreciated as a piece about Ned.