SUFFOLK UNIVERSITY
LAW REVIEW

Volume XIII Summer, 1979 Number 4

WARREN AND BRANDEIS, *THE RIGHT TO PRIVACY*, 4 HARV. L. REV. 193 (1890): DEMYSTIFYING A LANDMARK CITATION

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A law review article written in 1890 by Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," has long epitomized the influence legal journals can have on the development of the common law. The traditional views of the reason for the article's publication hold that Warren, a prominent member of Boston society, could no longer tolerate the treatment by the Boston press of his family's personal and social affairs, and that he collaborated with Brandeis to create a common law cause of action to compensate victims of a new tort, the invasion of privacy. Expanding on earlier research into the quality of the Boston press of 1890, the author critically analyzes the traditional views of the article's origin, finding them exaggerated, tenuously related to fact, even apocryphal. He suggests instead that the hypersensitivity of Warren and ambivalent views of Brandeis toward the concept of privacy and the function of the press distorted their perceptions of press treatment of the Boston upper classes. In addition, he speculates that their narrow views of "newsworthiness" and their close affiliation with the intellectually overmoralistic Mugwump movement of the era caused them to form a fragile foundation on which to ground a new legal cause of action. The author concludes that the feeble and anachronistic bases for the writing of the article have contributed to the stunted growth of the tort of unwarranted public disclosure of private facts, and that the article, rather than deserving the high praise which subsequent scholars have bestowed, is a quaint example of misguided legal scholarship and is of limited utility to those seeking to respond to privacy problems today.

I. INTRODUCTION

Eighty-nine years ago, Samuel D. Warren and Louis D. Brandeis, in an attempt to articulate a concept of privacy as a legal interest deserving an independent tort remedy, collaborated on an article

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entitled "The Right to Privacy."[1] Since its publication in the December 15, 1890 issue of the *Harvard Law Review*, the piece has assumed a hallowed place in both legal literature and history. Subsequent legal scholars have referred to it with reverence: "perhaps the most influential law journal piece ever published";[2] "that unique law review article which launched a tort";[3] "the outstanding example of the influence of legal periodicals upon the American law."[4] Courts have frequently cited the work as an authoritative source.[5] Roscoe Pound described the article as having done " 'nothing less than add a chapter to our law.' "[6] Harry Kalven, although disputing the substantive validity of the Warren-Brandeis thesis, nonetheless considered the piece the "most influential law review article of all"[7] and suggested that the prestige of the Brandeis name and the eloquent emphasis on human sensibilities had lent the tort "class."[8]

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

[2] P. DIONISOPOULOS & C. DUCAT, THE RIGHT TO PRIVACY 20 (1976); *see* H. NELSON & D. TESTER, LAW OF MASS COMMUNICATIONS 162 (3d ed. 1978) (often named as "the best example of the influence of law journals on the development of the law"); Davis, *What Do We Mean By "Right to Privacy"?*, 4 S.D.L. REV. 1, 3 (1959) ("It is doubtful if any other law review article, before or since, has achieved greater fame or recognition.").

[3] Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611, 612 (1968).

[4] Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383 (1960).

[5] *See, e.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 87 & n.16 (1975) ("The Right to Privacy" is seminal article from which many powerful arguments in favor of protectible zone of privacy have developed); Time, Inc. v. Hill, 385 U.S. 374, 380 (1967) (citing "The Right to Privacy," "the celebrated article" that has provoked much commentary on privacy theory and provided legislatures with theoretical basis for privacy statutes); Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 653 (D.C. Cir. 1966) (cause of action created by historic Warren-Brandeis article imperative in modern society because privacy is imperiled "by a deplorable eruption of all manner of mechanical and electronic devices for snooping"). For a comprehensive compendium of decisions relying either explicitly or implicitly on "The Right to Privacy," see Prosser, *supra* note 4, at 384-88.

[6] Statement of Roscoe Pound to William Chilton in 1916, *quoted in* A. MASON, BRANDEIS: A FREE MAN'S LIFE 70 (1946).

[7] Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 327 (1966). Rather irreverently, Kalven found the tort proposed by Warren and Brandeis both petty and anachronistic. *Id.* at 329 & n.22.

[8] *Id.* at 328. Thirty-eight years later, Brandeis waxed eloquent once again in defense of the right of privacy—this time, however, in opposing governmental intrusions:

> 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 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.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). It was

Despite near unanimity among courts and commentators that the Warren-Brandeis conceptualization created the structural and jurisprudential foundation of the tort of invasion of privacy,[9] the article has become one of those landmark works frequently cited but seldom read. Even among those who have read the piece, there prevails a surprising amount of unquestioning acceptance of both the Warren-Brandeis statement of the problem and the historical roots of their argument.[10]

According to most assessments, the authors intended primarily to lay down legal principles to protect an individual's right of privacy against contemporary practitioners of late nineteenth-century "yellow journalism."[11] Appropriately, so it would seem, the article contains a scathing indictment of press intrusions into the private lives of ordinary citizens:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.[12]

In developing their critique of the allegedly debasing character of

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primarily upon these two eloquent defenses of privacy that Brandeis' reputation as an advocate of privacy was founded. *But see* notes 195-96, 199-203 *infra* and accompanying text (questioning Brandeis' early commitment to right to privacy).

[9] *See, e.g.*, DIONISOPOULOS & DUCAT, *supra* note 2, at 25 (courts and scholars in "continuous and overwhelming agreement"); Bloustein, *supra* note 3, at 611 (many courts and commentators agree that article is "the very fount of learning on the subject"); Prosser, *supra* note 4, at 384 (most writers have agreed with argument of "The Right to Privacy"). *But see* Davis, *supra* note 2, at 5 (Warren and Brandeis argued for broad protection of wide range of interests; courts either disagree with or are confused about substantive limitations of privacy right); Kalven, *supra* note 7, at 330-31 (Warren-Brandeis article created major ambiguities that continue to create problems for courts); *cf.* Pratt, *The Warren and Brandeis Argument for a Right to Privacy*, 1975 PUB. L. 161, 162 (thorough evaluation of British cases relied on by Warren and Brandeis reveals no precedent for right of privacy).

[10] *E.g.*, Kalven, *supra* note 7, at 392 n.22; text accompanying note 81 *infra*.

[11] *See* DIONISOPOULOS & DUCAT, *supra* note 2, at 20 (Warren-Brandeis essay sought to halt negative effect of "gossipy journalism" on quality of community life); NELSON & TEETER, *supra* note 2, at 162-63 (article aimed at newspaper press); Prosser, *supra* note 4, at 384 (authors proposed to provide remedy against growing journalistic abuses).

[12] Warren & Brandeis, *supra* note 1, at 196. Other intrusions concerned them: "Instantaneous photographs and newspapers enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the housetops.'" Warren & Brandeis, *supra* note 1, at 195.

gossip-mongering journalism, Warren and Brandeis posited a personal right to privacy, a right of an individual to be "let alone."[12] Relying largely on some early British cases,[14] they found the legal justification for their analysis in the common law of copyright, which was designed to protect artists and authors from the depiction and dissemination of their thoughts, sentiments and emotions without their consent.[15] As remedies, Warren and Brandeis proposed injunctive relief and damages.[16] They spelled out certain limitations on the right, including a privilege to publish matters "of public or general interest."[17]

Over the years, as more courts and legislatures have recognized the right of privacy, the concept has developed not as an all-encompassing interest or an independent right, but rather as a cluster of different interests in reputation, intangible property and emotional tranquility.[18] Prosser's explication, which has been incorporated into

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[12] Warren & Brandeis, *supra* note 1, at 195. The authors borrowed the phrase "the right to be let alone" from the eminent nineteenth-century legal scholar and jurist, Thomas Cooley. *See* T. COOLEY, THE LAW OF TORTS 29 (2d ed. 1888) (right to be let alone is a personal immunity). To Cooley, "this was no right to be equated with the inviolate personality posited by Warren and Brandeis: it was the right not to be the victim of assault or battery. . . . He was not urging the acceptance of a right to prevent publication of the details of entertaining done by Boston socialites." Pratt, *supra* note 9, at 163.

[14] Warren & Brandeis, *supra* note 1, at 198-204. For an analysis of the British cases, see Pratt, *supra* note 9, *passim*.

Warren and Brandeis attempted to prove their contention by almost exclusive reliance on the case of Prince Albert v. Strange, 2 DeGex & Sm. 652 (1849), which was somewhat of an aberration from other cases because of the involvement of the royal family.

[15] Unlike statutory copyright, which prior to January, 1978 took effect only after publication, common law copyright protected an author until the time of publication. The principle permitting an individual to prohibit publication of facts about himself was defined by the authors as part of the general right of inviolate personality, the right to be let alone and the right to privacy. Warren & Brandeis, *supra* note 1, at 195, 198, 205.

[16] Warren & Brandeis, *supra* note 1, at 219. The authors proposed a remedy for damages in all cases and injunctive relief "in perhaps a very limited class of cases." Warren & Brandeis, *supra* note 1, at 219. The difference in the remedies advanced appears implicitly to recognize a relationship between prior restraint and chilling effect, even though the authors paid little, if any, attention to first amendment problems.

[17] Warren & Brandeis, *supra* note 1, at 214. The other limitations included communications of private matters when publication would be privileged under the laws of libel and slander; oral publications not resulting in special damages; and publications made with the individual's consent or after he had published the facts himself. Truth of the published matter and absence of "malice" were, however, not defenses. Warren & Brandeis, *supra* note 1, at 214-19.

[18] *But see* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 1000, 1003 (1964) [hereinafter cited as *Answer to*

the *Restatement of Torts*, enumerates "four distinct torts": (1) intrusion upon the plaintiff's seclusion or solitude or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation for the defendant's advantage, usually commercial, of the plaintiff's name or likeness.[19]

Of these four separate strands of the general cause of action, the second, the public disclosure tort, appears to have been what Warren and Brandeis actually had in mind.[20] Yet nearly a century later, the central focus of their attack, the only truly unique area of the law of privacy,[21] remains the least developed part of the interest in privacy.[22]

Prosser] (although acknowledging influence of Prosser's fourfold approach, author suggests that "an interference with individuality, an interference with the right of the individual to do what he will" is element that links all tort cases involving invasion of privacy, which is one single tort, not four); *cf.* Davis, *supra* note 2, at 22-23 (privacy cases rest on either of two basic theories: infliction of mental anguish or expropriation of personality).

[19] *See* Prosser, *supra* note 4, at 389. Kalven and others have recognized that Prosser's "Privacy" article was a watershed in the developmental history of the tort. *See* Kalven, *supra* note 7, at 332 (safe prediction that fourfold view will come to dominate future thinking about right of privacy). Kalven could not state with certainty whether the Prosser article offered "a radical revision in analysis," or "simply new rhetoric." Kalven, *supra* note 7, at 332.

According to the *Restatement of Torts*, the right of privacy is invaded by: (a) unreasonable intrusion upon the seclusion of another; (b) appropriation of another's name or likeness; (c) unreasonable publicity given to another's private life; and (d) publicity that unreasonably places another in a false light before the public. RESTATEMENT (SECOND) OF TORTS §§ 652B-E, at 378-400 (1977).

[20] *See* Bloustein, *supra* note 3, at 616 (Warren-Brandeis tort based on published statements about private matters); Kalven, *supra* note 7, at 330 (Warren-Brandeis essay focused only on publication of true, but private details that caused emotional distress); Woito & McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185, 191 (1979) (public disclosure aspect was "major concern of Warren and Brandeis").

As it has developed, the public-disclosure-of-private-facts tort encompasses three elements: (1) the disclosure must be "public," *i.e.*, exposed to the public at large; (2) the facts disclosed must be "private," *i.e.*, not known beyond confidential relations; and (3) the facts disclosed must be offensive and objectionable to a reasonable man of ordinary sensibilities. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 810-11 (4th ed. 1971). The *Restatement* definition adds a newsworthy emphasis: "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." RESTATEMENT (SECOND) OF TORTS § 652D, at 383 (1977). *See generally* Karafiol, *The Right to Privacy and the* Sidis *Case*, 12 GA. L. REV. 513 *passim* (1978). According to Kalven, however, Warren and Brandeis never gave their tort a "legal profile" by outlining the elements of a prima facie case, nor did they prescribe a measure of damages or an underlying basis of liability. Kalven, *supra* note 7, at 333-35.

[21] Pember & Teeter, *Privacy and the Press Since* Time, Inc. v. Hill, 50 WASH. L. REV. 57, 61 (1974).

[22] *See* notes 23-35 *infra* and accompanying text (discussing reasons for lack of development of public disclosure tort).

Why is it that the single aspect of privacy of greatest concern to Warren and Brandeis, the right to keep private activities of private persons out of the newspaper, is precisely that aspect for which the fewest number of suits have been brought and for which the courts have been most hesitant to grant injunctive or compensatory relief?[22]

First, providing tort liability for the publication of true statements of fact seems inherently inconsistent with the free press guaranties of the first amendment.[24] Allowing individuals to recover against the press for the disclosure of private facts limns the classic confrontation between the societal interest in a free and untrammelled press on the one hand, and the individual interest in freedom and protection from nonconsensual and undesirable publicity on the other.[25] It is a conflict without a satisfactory accommodation.[26] Although some individuals have recovered for unwarranted and highly offensive press intrusions,[27] the courts to date have been far more sensitive to the guaran-

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[22] *See* D. PEMBER, PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT at x (1970) (plaintiffs suffering because of news coverage of their private lives rarely recover damages); *cf.* Warren & Brandeis, *supra* note 1, at 219 (recognizing that injunctions would issue only in rare cases).

[24] *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491, 496 (1975) (imposition of sanctions for publication of information contained in public records violates first amendment); *cf.* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (prior restraint presumed constitutionally invalid); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 720 (1931) (disapproving prior restraint; subsequent punishment in damages appropriate remedy).

[25] *See* PEMBER, *supra* note 23, at x-xi (privacy-press conflict a basic philosophical problem continually faced by courts); Beytagh, *Privacy and a Free Press: A Contemporary Conflict in Values*, 20 N.Y.L.F. 453, 456 (1975) (inconsistency of interests in press freedom and personal privacy breeds unavoidable "value conflict"); Bloustein, *supra* note 3, at 621 (public disclosure tort remedy subject to first amendment privilege to publish matters of general interest); Note, *An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases*, 124 U. PA. L. REV. 1385, 1387 (1976) [hereinafter cited as *First Amendment and Public Disclosure*] (development of explicit constitutional conflict between public disclosure and individual control of private facts and details). *See generally* Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 94 (1974); Nimmer, *The Right to Speak From* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 938, 967 (1968); Comment, *First Amendment Limitations on Public Disclosure Actions*, 45 U. CHI. L. REV. 180, 180-81 (1977).

[26] *See* Woito & McNulty, *supra* note 20, at 187 (proposing community decency standard "to restrict the seemingly limitless newsworthiness privilege" that disseminators of information now possess); *First Amendment and Public Disclosure*, *supra* note 25, at 1416 (proposing a court-defined, rather than press-defined, "legitimate public interest" test).

[27] *E.g.*, Daily Times Democrat v. Graham, 276 Ala. 380, 383, 162 So. 2d 474, 476 (1964); Barber v. Time, Inc., 348 Mo. 1199, 1208-09, 159 S.W.2d 291, 296 (1942).

ties of a free press, and more solicitous of the "newsworthy exception" than were Warren and Brandeis. In establishing ad hoc tests to balance the competing values of individual privacy and free press, courts have largely eschewed the narrow formulation of the two young lawyers. Interpreting the newsworthiness defense broadly,[28] they have tipped the scales heavily in favor of the press.[29]

Second, the damages remedy proposed by Warren and Brandeis in a sense inhibits the very individuals to be protected. The truly privacy-oriented person may be reluctant to expose himself to further invasions of his privacy by taking legal action.[30] Where potential

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[28] *See* Hull v. Curtis Publishing Co., 182 Pa. Super. Ct. 86, 101, 125 A.2d 644, 651 (1956) (right of privacy must be balanced against public interest in free speech).

[29] *See* Sidis v. F.R. Publishing Corp., 34 F. Supp. 19, 25 (S.D.N.Y. 1938) (strong presumption favoring first amendment free press guaranties), *aff'd*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

Warren and Brandeis, although not addressing first amendment concerns, did recognize a privilege for the press to publish matters "of public or general interest," analogous to the press privilege in the law of defamation. Warren & Brandeis, *supra* note 1, at 214. Early courts adopted this exception, affording protection to the press based on state law, rather than on the first amendment, and permitted the press a great deal of latitude to determine the scope of the term, "in the public interest." *See* Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 312, 95 P.2d 491, 496 (1939) (by defining what is in public interest in vague terms, court leaves determination of what is news to press); Jones v. Herald Post Co., 230 Ky. 227, 229, 18 S.W.2d 972, 973 (1929) (woman's attempt to repel attackers sufficiently newsworthy to permit front page coverage with photographs of her and deceased husband's body); *cf.* Beytagh, *supra* note 25, at 455 n.9 (scope of public interest exception "has grown greatly over the years, far beyond what the authors presumably had in mind"). With the increased interest in first amendment protections during the post-World War II era, commentators began to offer justifications for press invasions of the right of privacy on the basis of constitutional guaranties, rather than state law privileges. *See First Amendment and Public Disclosure*, *supra* note 25, at 1387 (conflict framed in terms of right of state to protect individuals from public disclosure and first amendment rights of press). Apparently, however, until 1973 no defendant had ever raised the first amendment as a defense in a public disclosure case, Note, *Privacy in the First Amendment*, 82 YALE L.J. 1462, 1469 n.36 (1973), and the United States Supreme Court first addressed the issue in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). In *Cox* the Court framed its holding narrowly, stating that the first amendment, operating through the fourteenth, prohibits a civil action for invasion of privacy based on the dissemination of information obtained from official public records. *Id.* at 494-95.

[30] Godkin, *The Right to Privacy*, 51 THE NATION 496 (Dec. 25, 1890). In his review of the Warren-Brandeis article, E.L. Godkin likened the remedy to the hair-of-the-dog treatment for hangovers:

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

Id.; *cf.* Kalven, *supra* note 7, at 338 (persons whom privacy tort remedy was designed to protect will be least likely to seek damages). *But cf.* A. WESTIN, PRIVACY AND

plaintiffs lack the will to proceed, the remedy falls into disuse and loses its effectiveness, and the protected right becomes more vulnerable to further infringements by the press.[31]

Third, the original articulation and definition of the remediable wrong may have been inaccurate or incomplete, and as a result the cause of action has had difficulty withstanding the scrutiny of courts and commentators.[32] One commentator has even suggested that the right of privacy, as conceived by Warren and Brandeis, is "a sociological notion and not a jural concept at all," and that at best it is a derivative interest, to be protected only when more fundamental interests are also infringed.[33] Another has noted that "[t]he simplest and most direct explanation is that Warren and Brandeis were wrong and that their argument was not supported by their own evidence."[34] Furthermore, except in the most egregious cases, the particular tort formulated by Warren and Brandeis results in insubstantial pecuniary injury, and therefore few plaintiffs recover.[35]

FREEDOM 347 (1967) (victim of press invasion of privacy likely to use lawsuit to tell his side or to protest in public).

[31] Godkin, *supra* note 30, at 496. Kalven would agree, and would probably add that the remedy would lose credibility as well, because "those who will come forward with privacy claims will very often have shabby, unseemly grievances and an interest in exploitation." Kalven, *supra* note 7, at 338.

[32] *See* Kalven, *supra* note 7, at 329 (article reads like brief and is founded on incomplete argument); *cf.* PEMBER, *supra* note 23, at 42 (argument requires acceptance of broad assumptions and logical leaps from settled to proposed law). Pember points out that the logical leaps demanded by Warren and Brandeis, from the law of contract and literary property to the law of inviolate personality, have never been taken by the British courts, upon whose decisions in contract and copyright law Warren and Brandeis largely relied. PEMBER, *supra* note 23, at 57. *But see* Bloustein, *supra* note 3, at 615 (suggesting that the Warren-Brandeis proposal is no more incomplete or unclear than are other theories of liability).

[33] Davis, *supra* note 2, at 19. Although Warren and Brandeis argued by analogy from the law of intellectual property, where the harm is expropriation of property rights, and from the law of libel, where the damage is to reputation, the legal injury they saw resulting from invasions of privacy was mental or emotional distress. Warren & Brandeis, *supra* note 1, at 213. Plaintiffs seeking compensatory damages for such injury, by itself, have not been successful because of judicial apprehension about feigned or speculative awards. *See* PROSSER, *supra* note 20, § 12, at 49-62 (reluctance to grant independent legal protection to interest in peace of mind, even as against intentional invasions); PROSSER, *supra* note 20, § 54, at 327 (reluctance more pronounced when invasion is negligent). Consequently, because the Warren-Brandeis public disclosure tort is so closely related to the tort of infliction of emotional distress, the privacy plaintiffs have, in general, been unsuccessful. Bloustein suggested that Warren and Brandeis intended to create a remedy for something much broader: "I take the principle of 'inviolate personality' to posit the individual's independence, dignity and integrity; it defines man's essence as a unique and self-determining being." *Answer to Prosser*, *supra* note 18, at 971.

[34] Pratt, *supra* note 9, at 162.

[35] Davis, *supra* note 2, at 19.

This third weakness in the Warren-Brandeis argument for judicial redress of the injury caused by public disclosure of private facts raises an intriguing question about the objective reality of the late nineteenth-century press intrusions which allegedly prompted publication of the article: were these invasions of privacy as injurious as Warren and Brandeis described them, or did the eloquence of their prose lead them to overstate the problem?[32] According to most legal scholars who have addressed the subject, "The Right to Privacy" was a direct response to the continually unfair and indiscreet press treatment of the social activities of Samuel Warren and his proper Bostonian family.[33] For nearly ninety years legal scholars have accepted the Warren-Brandeis description of the contemporary press problem largely without question and have given the distinct impression that under the public disclosure tort, Warren would have had a legitimate cause of action against the Boston press of 1890.[34]

In a path-breaking treatment of the law of privacy, the mass media and the first amendment, however, Don Pember has charged that many of the ideas articulated in the "Right to Privacy" argument "have become locked in molded phrases and have never undergone the scrutiny of the doubting scholar."[35] In particular, Pember found the Boston press of 1890 less than totally unscrupulous and posited a causal relationship between the general unwillingness of the judiciary over the years to embrace the Warren-Brandeis proposal for a public disclosure tort remedy and the "absence of the kind of journalistic excesses which they described."[36] Pember's challenge to the traditional assumptions underlying the article in 1970, however, has been

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[32] "Anyone who reads this seminal article must marvel at *its sensibility to subtle wrongs*, its array of legal learning, its philosophic sweep, and its literary distinction." Bloustein, *supra* note 3, at 612-13 (emphasis added). Warren and Brandeis failed, however, to document a single instance of press excess.

[33] *E.g.*, DIONISOPOULOS & DUCAT, *supra* note 2, at 20; A. MILLER, THE ASSAULT ON PRIVACY: COMPUTORS, DATA BANKS, AND DOSSIERS 185-86 (1971); NELSON & TEETER, *supra* note 2, at 162-63; PEMBER, *supra* note 23, at 25; R. SMITH, PRIVACY: HOW TO PROTECT WHAT'S LEFT OF IT 3 (1979); Abrams, *The Press, Privacy and the Constitution*, N.Y. Times, Aug. 21, 1977, § 6 (Magazine), at 12, col. 4; Kalven, *supra* note 7, at 329.

[34] *Cf.* Bloustein, *supra* note 3, at 619 (public disclosure tort affords effective remedy to redress harm done by mass publicity). *But see* Kalven, *supra* note 7, at 333-34 (under either outrageous conduct or reasonable man standards, Warren's "petty grievance" probably deserves no redress).

[35] PEMBER, *supra* note 23, at 33.

> Most of the few attempts to examine closely the Warren-Brandeis proposal came before 1910, and since then many of the assertions and assumptions presented by the authors have taken on the status of fact, if not revealed truth. As a result, most contemporary writers who deal with the subject of privacy base their historical treatment on what Warren and Brandeis wrote nearly eighty-two years ago.

PEMBER, *supra* note 23, at 33-34.

[36] PEMBER, *supra* note 23, at 41.

largely ignored by subsequent commentators.

This article examines the setting in which "The Right to Privacy" was written, reviews some of the major theories behind the impetus for the article and analyzes the validity of these explanations. It is a modest attempt to set the record straight.

At the outset it is important to point out the difficulties facing a contemporary writer who tries to evaluate, through the eyes of a hypothetical nineteenth-century reasonable man, the press-privacy conflict in Boston eighty-nine years ago. Over time social mores, values and bounds of propriety change. Nevertheless, with that qualification in mind, this article seeks to advance two propositions. First, Warren and Brandeis gave an inaccurate and overstated picture of the problem, and subsequent legal scholars have carried this fundamental distortion of the Boston press to dramatic heights. Second, closer inspection of the sterling reputations of Warren and Brandeis as privacy avatars may reveal tarnishes previously hidden or overlooked. While their names will undoubtedly be forever linked to the establishment of a legal right of privacy, the substance of this link deserves critical scrutiny. Although the two men are regarded as fathers of the right of privacy, their paternity may well be in name only.

II. Historical Setting: Concern for Privacy and Criticism of the Press

A. *Privacy: Not a New Issue*

Despite the praise bestowed on Warren and Brandeis for the originality of their thought, neither their belief in the importance of the right to privacy nor their attack on press irresponsibility was original to them. The significant contribution of Warren and Brandeis was that, by drawing on what they believed to be implicit in the common law, they were the first legal scholars to synthesize a specific legal right and to propose a tort remedy for invasion of that right.

Concern for a right of privacy clearly did not blossom fully developed in the winter of 1890. Psychologists, sociologists and historians maintain that privacy has been of fundamental interest to all communities and a concern in the United States since colonial days.[11]

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[11] Privacy is a concept that involves an unavoidable balancing of values. As Westin has noted:

> [E]ach individual must, within the larger context of his culture, his status, and his personal situation, make a continuous adjustment between his needs for solitude and companionship; for intimacy and general social intercourse; for anonymity and responsible participation in society; for reserve and disclosure. A free society leaves this choice to the individual, for this is the core of the "right of individual privacy"—the right of the individual to decide for himself, with only extraordinary exceptions in the interests of society, when and on what terms his

Legal recognition of a right of privacy had developed slowly as a derivative right, protected indirectly by prosecution of trespassers and defamers, by limitations on search and seizure, and by protection of privileged marital communications.[41] Nevertheless, a few courts had at least implicitly entertained what might be considered a direct privacy action even before Warren and Brandeis articulated privacy as an independent tort. Twenty-four years before the Georgia supreme court expressly recognized a distinct right of privacy in 1905,[42] the Michigan supreme court had affirmed the award of damages to the mother of a newborn child against her doctor, who took with him into the expectant mother's bedroom an untrained, unmarried assistant, whom the parents believed to be a trained medical assistant.[43] The court based its decision not on the theory of trespass, but on the ground that the doctor had invaded the plaintiff's privacy.[45] Childbirth is a sacred moment, explained the Michigan court, and "[t]he plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it . . . ."[46] In the summer of 1890, less than six months before the Warren-Brandeis article, the New York supreme court enjoined a stage production manager from using a flash picture of opera star Marion Manola wearing tights, taken without her permission for pro-

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acts should be revealed to the general public.

WESTIN, *supra* note 30, at 42.

Efforts to balance these sometimes clashing values had been made in America since colonial times, "when a right to privacy existed . . . that was both traditional and customary." D. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND 248 (1967). One historian, however, has stated flatly that at least in the seventeenth century, no such concept of privacy existed. *See* O'Connor, *The Right to Privacy in Historical Perspective*, 53 MASS. L.Q. 101, 102 (1968) (concept of privacy not found in English common law, or in Biblical law of Puritans, "nor in the curious mixture of both traditions which became common during the colonial period in Massachusetts"). O'Connor also failed to find the concept of privacy expressed in the Constitution and found little evidence of it in the nineteenth century. If it existed at all, the notion of privacy was accepted simply as a given, because the homogeneity and rural nature of American society offered little stimulus or opportunity for invasions of privacy. *Id.* at 103-04.

[41] *See generally* PRIVACY: A SELECTED BIBLIOGRAPHY AND TOPICAL INDEX OF SOCIAL SCIENCE MATERIALS *passim* (H. Latin comp. 1976) (collecting sources); WESTIN, *supra* note 30, at 330-38 (discussing gradual development of privacy law in eighteenth- and nineteenth-century America).

[42] *See* Pavesich v. New England Life Ins. Co., 122 Ga. 190, 219, 50 S.E. 68, 80 (1905) (use without consent of photographic likeness of plaintiff for advertising purposes held to constitute serious invasion of right of privacy).

[43] De May v. Roberts, 46 Mich. 160, 166, 9 N.W. 146, 149 (1881).

[45] *Id.* at 165-66, 9 N.W. at 149; *see* PEMBER, *supra* note 23, at 56 (recovery in *De May* not grounded on trespass or other tort).

[46] 46 Mich. at 165, 9 N.W. at 149.

motional purposes during a performance of the production of "Castles in the Air."[47]

Although Warren and Brandeis were the first scholars successfully to synthesize a common law concept of privacy and to propose a legal remedy, two years before the Warren-Brandeis article, Judge Thomas M. Cooley, in the second edition of his treatise on the law of torts, used the phrase, "the right to be let alone," as a working definition of privacy.[48] The periodical *Century* in July of 1890 editorialized in support of laws that would better protect "private rights and public morals."[49] Moreover, in the same month, E.L. Godkin, the prestigious editor of *The Nation*, reviewed the problem in *Scribner's Magazine*, laying the conceptual groundwork for the Warren-Brandeis article.[50]

As part of a series of articles on various rights of citizens, Godkin's piece in *Scribner's* focused primarily on the benefits which could be derived by both individuals and society from state protection of the interest in good reputation.[51] Godkin wrote that society owed most of its protection from political and social chaos, and most of its moral rectitude, to the desire of men to seek social approbation and, conversely, to avoid the stigma of social reprobation.[52] Thus, Godkin maintained that it was critically important for the state to provide every safeguard to protect the good reputations of its citizens.[53]

Unfortunately, Godkin continued, the widespread disposition of the press to attack reputation and the concomitant public disposition

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[47] N.Y. Times, June 15, 1890, at 2, col. 3. The *Manola v. Stevens* decision was not officially reported, PEMBER, *supra* note 23, at 56. The *New York Times*, however, published three separate accounts of the proceedings in June, 1890. N.Y. Times, June 15, 1890, at 2, col. 3; *id.*, June 18, 1890, at 3, col. 2; *id.*, June 21, 1890, at 2, col. 2.

[48] COOLEY, *supra* note 13, at 29.

> Cooley discussed the idea under the heading "Personal Immunity" and suggested that the "right to one's person may be said to be a right of complete immunity: to be let alone." Cooley's phrase has been used frequently by authors to describe the right of privacy . . . [H]owever, the modern right of privacy embraces both more and less than the simple concept of being "let alone."

PEMBER, *supra* note 23, at 4 n.*; *see* Pratt, *supra* note 9, at 163 (defining Cooley's phrase, "right to be let alone").

[49] 40 CENTURY 313, 315 (July 1890).

[50] Godkin, *The Rights of the Citizen, IV.—To His Own Reputation*, 8 SCRIBNER'S MAGAZINE 58 (July 1890) [hereinafter cited as *Rights of the Citizen*].

[51] *Id.* at 59-61. Godkin considered social reputation to be "the very first form of individual property, the earliest of individual belongings." *Id.* at 58. He suggested that the benefits to society from the concern over good reputation included the maintenance of general good conduct, matrimonial fidelity, and commercial and financial stability. *Id.* at 59-60. The individual with a good reputation derives comfort from the knowledge that he is well-regarded and is able to command deference to his opinions and advice, thereby exercising power and influence and enjoying a good credit rating. *Id.* at 60-61.

[52] *Id.* at 59.

[53] *Id.* at 62.

to revel in scandal and gossip combined to undercut the attempts of juries[54] and legislators to distinguish unprivileged libel from nonlibelous or privileged statements, and to punish its purveyors.[55] In articulating a fundamental right of privacy, Godkin laid much of the foundation for the argument advanced in "The Right to Privacy":

> 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 [an individual's] 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.[56]

Godkin then identified the two principal enemies of privacy as public curiosity and a particular class of newspapers that "has converted curiosity into what economists call an effectual demand, and gossip into a marketable commodity."[57] Somewhat ruefully, however, Godkin concluded that the "one remedy for the violations of the right to privacy within the reach of the American public, . . . attaching social discredit to invasions of it on the part of conductors of the press," was simply not then practicable.[58] Godkin believed that because of the prevalent late nineteenth-century view of wealth as a sign of success, the public would exert little social or economic pressure on journalistic invaders of privacy who were succeeding handsomely in selling gossip-mongering newspapers.[59]

Elbridge Adams, writing in a 1905 article in the *American Law Review*, suggested that the Godkin article was probably the stimulus for, if not the direct source of, the Warren-Brandeis piece.[60] Praising the Warren-Brandeis article as "one of the most brilliant excursions in the field of theoretical jurisprudence," Adams addressed Godkin's reservations and concluded that "[t]he difficulty which seemed insurmountable to the journalist, presented itself with all the attractiveness of a problem to be resolved in the crucible of the common

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[54] Although the state, either through the common law or by legislation, had established a system to protect reputation and to punish defamers, it relied on the common man to make the system work: "The juries are to-day the true and untrammelled protectors of private reputation and, it may be said also, the true censors of the press. It is they who really decide what may and may not be written or said about a man's reputation." *Id.*

[55] *Id.* at 62-65.

[56] *Id.* at 65.

[57] *Id.* at 66; *see* note 12 *supra* and accompanying text (quoting from "The Right to Privacy").

[58] *Rights of the Citizen*, *supra* note 50, at 67.

[59] *Rights of the Citizen*, *supra* note 50, at 67.

[60] Adams, *The Right to Privacy, and its Relation to the Law of Libel*, 39 AM. L. REV. 37, 37 (1905).

law, to two lawyers of the city of Boston."[61]

Brandeis was so pleased by Adams's warm words of praise that he borrowed a copy of that volume of the *American Law Review* from Boston's Social Law Library and mailed it to Warren.[62] Although the young authors had twice made selective references to Godkin's *Scribner's* piece in their article,[63] Brandeis felt obliged to write a note to Warren stating "[m]y own recollection is that it was not Godkin's article but a specific suggestion of yours, as well as your deepseated abhorrence of the invasions of social privacy, which led to our taking up the inquiry."[64] In his reply Warren wrote in part, "You are right of course about the genesis of the article."[65]

B. *Press Criticism: A Growing Trend*

The pointed and vigorous tone of the antipress diatribe which highlights the early pages of "The Right to Privacy"[66] has long led commentators to conclude that Warren and Brandeis were writing from personal experience. As victims of press intrusions, they were apparently taking the lead in striking back boldly in the name of all decent citizens similarly victimized.[67] Yet, neither concern for legal recogni-

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[61] *Id.* Apparently, Adams was unaware that Godkin was also a lawyer. Warren and Brandeis, however, noted that fact in a footnote. *See* Warren & Brandeis, *supra* note 1, at 195 n.6. Adams also appears to have overlooked Godkin's review of "The Right to Privacy," 51 THE NATION 496 (Dec. 25, 1890), where Godkin was not only unpersuaded by the argument of the young lawyers for a tort remedy but also further refined his reservations. Godkin remained unconvinced that a remedy was practicable because the victims would be disinclined to seek further publicity, *see* note 30 *supra* and accompanying text (Godkin likened remedy to hair-of-the-dog treatment for hangover), and because the public would tend "either to resent attempts at privacy, either of mind or body, or turn them into ridicule." 51 THE NATION at 497.

[62] *See* Letter from Louis D. Brandeis to Samuel D. Warren (Apr. 8, 1905), *reprinted in* 1 LETTERS OF LOUIS D. BRANDEIS (1870-1907): URBAN REFORMER 302-03 (M. Urofsky & D. Levy eds. 1971) [hereinafter cited as BRANDEIS LETTERS].

[63] Warren & Brandeis, *supra* note 1, at 195 & n.6, 217 & n.4.

[64] Letter from Louis D. Brandeis to Samuel D. Warren (Apr. 8, 1905), *reprinted in* 1 BRANDEIS LETTERS, *supra* note 62, at 303.

[65] Letter from Samuel D. Warren to Louis D. Brandeis (Apr. 10, 1905), *reprinted in* 1 BRANDEIS LETTERS, *supra* note 62, at 303 n.3.

[66] *See* Warren & Brandeis, *supra* note 1, at 195-96 (power of press magnifies impact of what is otherwise idle gossip).

[67] *E.g.*, PEMBER, *supra* note 23, at 25; Kalven, *supra* note 7, at 329 n.22; Prosser, *supra* note 4, at 383. Newspaper reporting was not the only purported source of privacy invasions. The increasing publication of photographs also disturbed Warren and Brandeis. According to a Brandeis biographer,

> Sam was married to Mabel Bayard, daughter of the ambassador to Great Britain, and editors thought his affairs belonged in the public eye, and in the camera's eye. He was outraged when photographers invaded his babies' privacy and snapped perambulator pictures. Instead of turning to the courts for redress he turned to Louis.

tion of a right of privacy nor criticism of the press for its privacy invasions originated in the Warren-Brandeis article. As the Godkin article demonstrates,[68] significant criticism of the irresponsible excesses of the American press had been published before the Warren-Brandeis article appeared in the *Harvard Law Review*.

A great number of interrelated factors—social, political, economic, technological, and cultural—combined to create the upheavals and rapid development of American society in the nineteenth century. To a large extent, many of these same factors affected the newspaper industry.[69] In the 1830's, the development of a penny press aimed at wider circulations prompted competitive publishers to abandon the narrow focus on commercial news and politics, and to present a wide variety of local news and features which would be of interest to the growing number of literate Americans.[70] This new emphasis clearly paid off: between 1850 and 1890 newspaper circulation increased by over one thousand percent.[71]

The Industrial Revolution also had a great impact on the press. In an effort to increase demand for products, the new industries advertised heavily in newspapers. Mass production innovations in paper

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A. LIEF, BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL 51 (1971); *see* note 12 *supra* (polemic against photographers). For a recent treatment of this issue, see generally Lacy, Photography v. Privacy, Freedom of Information Center Report No. 374 (July 1977).

Although Warren and Brandeis made no reference to the potential dangers of governmental snooping and privacy intrusions, the issue of government data-gathering practices and the information sought by the 1890 decennial census takers were the subject of attack in early 1890. For example, the *Boston Globe* editorialized in May of that year:

> The biggest interviewing enterprise of the century begins next week, when Uncle Samuel's census takers will swarm forth and pump us all dry. The census taker of 1890 has a prodigious nose, and he is authorized to poke into everybody's business with a vengeance. . . . There never was such a Paul Pry sent out by the government before. . . . The question arises—Has an American freeman any private rights and privileges which his government is bound to respect? It seems not.

Boston Globe, May 20, 1890, *quoted in* PEMBER, *supra* note 23, at 33.

[68] *See Rights of the Citizen*, *supra* note 50, at 63-64, 66-67 (newspaper libel and invasions of privacy).

[69] *See generally* S. KOBRE, FOUNDATIONS OF AMERICAN JOURNALISM 220-41 (1958) (discussing advancement of American society which created favorable atmosphere for growth of newspaper industry).

[70] For discussions of the development of the penny press and of some of its more famous purveyors, see E. EMERY, THE PRESS AND AMERICA 165-86 (3d ed. 1972); R. RUTLAND, THE NEWSMONGERS 138-61 (1973); J. TEBBEL, THE COMPACT HISTORY OF THE AMERICAN NEWSPAPER 93-124 (rev. ed. 1969). *See also* M. SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 12-40 (1978) (critical review of press historians).

[71] PEMBER, *supra* note 23, at 10.

manufacturing and the printing industry and other inventions such as typewriters, telephones, and incandescent lamps, markedly improved the process of news gathering, processing and dissemination.[72] Similarly, as the nation grew from a relatively homogeneous, small-town, agricultural society into a heterogeneous, urban, industrial one,[73] different groups became eager to learn about the lives and habits of fellow citizens:

> Curiosity, fascination, repugnance, fear, sympathy, greed, hostility, love, hate, and the thousand-and-one other conflicting emotions which affect people living in close association with one another—especially people of different races, creeds, nationalities, and economic levels—created a desire to know more and more about the intimate details of the lives, the actions, the habits, the customs, the thoughts, and the activities of those about them.[74]

Late nineteenth-century editors and publishers responded to these needs by developing a popular and profitable mix of soft feature stories, sports, crime, entertainment, and human interest reports.[75] In addition to constituting sources of information, newspapers came to serve an important socializing function for the new urban immigrants.[76]

What one historian has termed "the lusty new journalism" was not without its critics, however, especially those who contended that the new journalism found success at the cost of invading individual rights of privacy.[77] Contemporary periodicals decried the increase in

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[72] *See* EMERY, *supra* note 70, at 337-44 (revolution in printing techniques increased mass appeal); KOBRE, *supra* note 69, at 237-39 (effect of new printing presses, stereotypes and paper-making machines on mass publications); PEMBER, *supra* note 23, at 11-12 (effect of products of Industrial Revolution on newspaper press); RUTLAND, *supra* note 70, at 253-55 (impact of mechanical improvements on quality of newspapers).

[73] Professor Henry Steele Commager aptly described the two Americas that existed in 1890:

> On the one side lies an America predominantly agricultural; concerned with domestic problems; conforming, intellectually at least, to the political, economic, and moral principles inherited from the seventeenth and eighteenth centuries . . . . On the other side lies the modern America, predominantly urban and industrial; . . . experiencing profound changes in population, social institutions, economy, and technology; and trying to accommodate its traditional institutions and habits of thought to conditions new and in part alien.

H. COMMAGER, THE AMERICAN MIND 41 (1950).

[74] O'Connor, *supra* note 41, at 109.

[75] PEMBER, *supra* note 23, at 13; *see* KOBRE, *supra* note 69, at 260-65 (describing *New York Herald*'s offerings of diverse features of current interest).

[76] PEMBER, *supra* note 23, at 12-13; *cf.* KOBRE, *supra* note 69, at 248 (press acts as contact agent, bringing together diverse metropolitan forces).

[77] *See* EMERY, *supra* note 70, at 695 (press criticism widespread during times of change, such as 1830's and 1890's, when penny press and new journalism developed); O'Connor, *supra* note 41, at 109 (publishers violated privacy in order to titillate public

"newsmongering," the growing tendency to merchandise "trivialities and personalities."[78] Reviewing the national press between 1872 and 1892, Mott has noted that "the prevalence of gossip and scandal stories, in which innocent persons were frequently dragged into columns of newspapers, produced a kind of 'keyhole journalism' . . . ; yet it was a part of the formula upon which the great circulations of the period were based."[79] Although Pember's research indicated that " 'keyhole journalism' and sex and scandal were the exception rather than the rule," he acknowledged that criticism of the press "was prevalent during the ten years preceding 1890."[80]

III. Theories on the Roots of "The Right to Privacy"

Although there is little doubt that the contemporary press provoked Warren and Brandeis to write "The Right to Privacy," it is not clear what was the specific motivating factor. Several theories have been proffered, but none has achieved a consensus among legal scholars. Basically, each theory falls into one of two categories. The first category suggests that Samuel Warren and his family were targets of overzealous press coverage and that a specific incident, or a series of incidents culminating in 1890, triggered the decision to publish the article. The second group takes no position on whether Warren was a target, but rather emphasizes the notion that Warren and Brandeis could no longer tolerate the general condition of the "new journalism," and attempted to reverse the gossip-mongering trend by proposing a deterrent tort action. The remainder of this article will evaluate the strengths and weaknesses of these theories.

A. *The Myth of the Indignant Father*

One of the most widespread and colorful explanations of the genesis of "The Right to Privacy," the indignant father theory, derives from the belief that Warren or Brandeis, or both, had themselves been victims of press gossip-mongering. As Harry Kalven wrote, "It is now well known that the impetus for the article came from Warren's irritation over the way the press covered the wedding of his daughter in 1890."[81] Kalven, a respected torts scholar, appears to have been

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and reap profits); Speech of President Grover Cleveland, *quoted in* Pember, *supra* note 23, at 16 (newspapers " 'violate every instinct of American manliness, and in ghoulish glee desecrate every sacred relation of private life' ").

[78] Camp, *Journalists and Newsmongers*, 40 Century Magazine 313, 315 (July 1890).

[79] F. Mott, American Journalism 444 (1941).

[80] Pember, *supra* note 23, at 17.

[81] Kalven, *supra* note 7, at 329 n.22. Morris Ernst and Alan Schwartz suggest without further explanation that Warren and Brandeis decided to do something about the problem some years before 1890, but the publication date was 1890. M. Ernst & A. Schwartz, Privacy: The Right to be Let Alone 45 (1968). "The reader should remem-

greatly influenced in his analysis by Dean Prosser, the preeminent authority in the field. In what is regarded as the definitive description of the tort of invasion of privacy,[51] Prosser depicted the setting surrounding the genesis of the article:

> [In the year] 1890 Mrs. Samuel D. Warren, a young matron of Boston, which is a large city in Massachusetts, held at her home a series of social entertainments on an elaborate scale. She was the daughter of Senator Bayard of Delaware, and her husband was a wealthy young paper manufacturer, who only the year before had given up the practice of law to devote himself to an inherited business. Socially Mrs. Warren was among the élite [*sic*]; and the newspapers of Boston, and in particular the *Saturday Evening Gazette*, which specialized in "blue blood" items, covered her parties in highly personal and embarrassing detail. It was the era of "yellow journalism," when the press had begun to resort to excesses in the way of prying that have become more or less commonplace today; and Boston was perhaps, of all of the cities in the country, the one in which a lady and a gentleman kept their names and their personal affairs out of the papers. *The matter came to a head when the newspapers had a field day on the occasion of the wedding of a daughter, and Mr. Warren became annoyed.* It was an annoyance for which the press, the advertisers and the entertainment industry of America were to pay dearly over the next seventy years.[52]

For more than forty pages, Prosser discussed the development of the privacy tort, its analytical components, ramifications and limitations, and then concluded his critical review:

> All this is a most marvelous tree to grow from the wedding of the daughter of Mr. Samuel D. Warren. One is tempted to surmise that she must have been a very beautiful girl. Resembling, perhaps, that fabulous creature, the daughter of a Mr. Very, a confectioner in Regent Street, who was so wondrous fair that her presence in the shop caused three or four hundred people to assemble every day in the street before the window to look at her, so that her father was forced to send her out of town, and counsel was led to inquire whether she might not be indicted as a public nuisance. This was the face that launched a thousand lawsuits.[53]

It is a delightful image. Warren's daughter, so it seems, is prepared to rival Very's daughter as the loveliest creature in all of torts literature. Although Prosser's description of the apparent stimulus for the article's publication makes for amusing reading, it is quite inaccur-

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ber, or be reminded, that two remarkable legal minds were occupied over a period of six years in arranging the words that convey the ideas that constitute this argument." *Id.* at 47.

[51] Prosser, *supra* note 4, at 383.

[52] Prosser, *supra* note 4, at 383 (emphasis added).

[53] Prosser, *supra* note 4, at 423.

ate. According to a genealogical study of the Warren family,[83] newspaper accounts of the time[84] and *Who Was Who in America*,[85] Samuel Dennis Warren was married for the first and only time on January 25, 1883.[86] His first daughter was born on April 9, 1884.[87] Even assuming that Mrs. Warren was pregnant at the time of the wedding ceremony, the girl would have been no more than seven-years old when Warren and Brandeis wrote the article.[88]

Nevertheless, there was at least one Warren-related wedding described in the Boston press in 1890, that of Samuel Warren's cousin Katherine Clarke to a Mr. Watson. In the "Table Gossip" section of the *Boston Globe* of Sunday, June 8, 1890, the following item appeared:

> One of the prettiest of the mid-week weddings was that of Miss Katherine H. Clarke and Mr. Watson at Trinity at high noon. Flowers and potted plants made the spacious chancel a bright background for the sweet-faced bride in her white gown and floating veil. John Codman, Jr., was best man and the ushers were such well-known society men as Mr. Harry Grant, Mr. Chester Parker, Mr. W.H. Dabney, Curtis Guild, Jr., Mr. Arthur Perrin, Mr. James W. Bowen and Mr. Henry G. Nichols, all the groom's fellow-members of the Puritan Club. *Mr. and Mrs. S.D. Warren, relatives of the bride, gave a handsome wedding breakfast after the ceremony at their house on Commonwealth av.* Mr. and Mrs. Watson, after the wedding journey, will spend the season at Nahant.[89]

Was this news account the source of Warren's annoyance with the press? Or was it the account that appeared in the June 7, 1890 issue of the *Saturday Evening Gazette*, the only other paper known to have covered the event, and the paper which according to Brandeis' biographer, Alpheus Mason, covered Mrs. Warren's parties in highly personal and embarrassing detail?[90] The *Gazette* reported:

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[83] C. HUNTINGTON, THE WARREN-CLARKE GENEALOGY: A RECORD OF PERSONS RELATED WITHIN THE SIXTH DEGREE TO THE CHILDREN OF SAMUEL DENNIS WARREN AND SUSAN CORNELIA CLARKE 169 (1894).

[84] N.Y. Times, Jan. 26, 1883, at 1, col. 2.

[85] 1 WHO WAS WHO IN AMERICA 1303 (1st ed. 1943).

[86] *Id.*

[87] HUNTINGTON, *supra* note 85, at 169.

[88] In fact, during their marriage Warren and his wife had six children. The eldest, Mabel Bayard Warren, was born on April 9, 1884. She married Joseph Gardner Bradley on November 4, 1905, nearly fifteen years after the publication of "The Right to Privacy." M. BRADLEY, SAMUEL DENNIS WARREN 9 (1956); PEMBER, *supra* note 23, at 24. The Warrens' second child, Samuel Dennis, III, was born on November 24, 1885 and married on June 11, 1909. Katherine Lee Bayard, the third child, was born on April 6, 1889 and married on April 6, 1911, more than a year after Warren's death. The other three children were all born after the article was published. BRADLEY, *supra* at 9.

[89] Boston Globe, June 8, 1890, at 13, col. 4 (emphasis added).

[90] MASON, *supra* note 6, at 70; *see* notes 117-20 *infra* and accompanying text (setting

> Mr. and Mrs. Samuel D. Warren, the former a cousin of the bride, gave a breakfast for the bridal party and a few immediate relatives after the Clarke-Watson wedding, at noon on Wednesday, at their home, number 155 Commonwealth Avenue, which was transformed into a veritable floral bower for the occasion. Mr. John Codman, 2nd, the best man and the corps of ushers, Messrs. Curtis Guild, Jr., James L. Warrick, Henry G. Nichols, Chester Parker, William H. Dabney, Arthur Perrin, William R. Thayer, Henry Grant, Daniel Winslow, and James W. Bowen were in attendance. There were no bridesmaids but there were scores of pretty girls in the assembly at the church to atone for the lack, if there was, and the bride herself made a beautiful picture as she came down the aisle to the fine music which it seems Mr. J.C.D. Parker alone can command at the Trinity Organ.[83]

Is this the "field day" that Prosser reported the press had? Is the public disclosure that there were "no bridesmaids" the embarrassing incident that "launched a thousand lawsuits?" Or was the disclosure of Warren's name itself, in print, the allegedly indefensible intrusion into the private lives of society members?[84]

These reports do not differ from dozens of other wedding items which had appeared in Boston newspapers for decades. Indeed, in all these cases the principals probably consented to the coverage of the events. As the *Gazette* noted in a January 25, 1890 social note, "[I]t would be impossible for Jenkins in his accounts of weddings to give [the] particulars and details he does without the help of the parties most directly concerned. And yet these same ungrateful people always revile Jenkins."[85] If not because of the coverage of the weddings of his daughter or his wife's cousin, why was Warren upset with the Boston press?

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out Mason's charge that *Gazette* was paper which, by covering in "lurid detail" Warren family activities, prompted writing of "The Right to Privacy").

[83] Saturday Evening Gazette, June 7, 1890, at [3], col. 1 (Sun. ed. June 8, 1890).

[84] According to one source, at least, it would appear not. In a critical and somewhat biased study of newspapers representing "the new journalism," Oscar Garrison Villard, a descendant of William Lloyd Garrison and an advocate of the old-style journalism personified by E.L. Godkin and others, discussed the development of the Boston press. O. VILLARD, SOME NEWSPAPERS AND NEWSPAPER-MEN 95-118 (1923). Villard attributed the decline of the Boston press to General Charles H. Taylor, who took over the *Globe* in 1877. Villard scornfully suggested that Taylor's formula for success included two components: making sure that (1) every reader saw his name in print at least once a year, and (2) the paper never printed anything offensive about any reader. *Id.* at 98-99; *see* L. BEEBE, BOSTON AND THE BOSTON LEGEND 191 (1935) (*Globe* made practice of printing names). According to Villard, certainly no supporter of the *Globe*'s formula, the *Globe*'s sin was merely its innocent pandering to Bostonian parochialism. VILLARD, *supra* at 96. Furthermore, Taylor insisted "that no 'story' should appear in the *Globe* whose writer could not shake hands the next day with the man about whom he had written." VILLARD, *supra* at 99.

[85] Saturday Evening Gazette, Jan. 25, 1890, at [4], col. 6. (Sun. ed. Jan. 26, 1890).

B. *The Boston Press in 1890*

Ten years ago, Pember attempted to assess the quality of the Boston press in 1890 in order to ascertain whether the newspapers were as contemptible as Warren and Brandeis had described them. Of the eight daily papers, Pember was able to examine only the four available today on microfilm: the *Journal*, the *Daily Advertiser*, the *Globe*, and the *Evening Transcript*.[96] Although finding "instances of poor journalism, bad taste, some sensationalism, and even gossip," Pember felt that the Warren and Brandeis characterization was greatly overstated.[97]

Pember observed that the Boston press at the end of the nineteenth century "seems to present a paradoxical image."[98] On the one hand, he found instances where some of the daily papers apparently cared little for individual rights of privacy.[99] On the other hand, he and other researchers have concluded that not only was the Boston press of 1890 less sensational than its counterparts in such other urban centers as New York, but also that to a remarkable extent the 1880's and 1890's represented the golden age of Boston journalism. Emery has referred to Boston's "quiet journalism,"[100] and Mott has noted that Boston "was not as lively a newspaper city as any one of half a dozen others."[101] Four years before the Warren and Brandeis article, Edwin Bacon, the managing editor of the *Boston Daily Advertiser*, wrote that "Boston has reason to plume herself a trifle on the cleanliness and tone of her periodical literature."[102] Reflecting on more than fifty years of Boston press history, *Boston Transcript* editor Joseph E. Chamberlin wrote in 1930 that "the eighties represented the best achievement of the journalism of the nineteenth century. That achievement was less strenuous, less voluminous, but rather more intellectual, than the current production of the twentieth century."[103] Godkin, ever the watchdog of newspaper quality, took no specific notice of Boston press problems until 1892.[104] Furthermore, Oscar

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[96] PEMBER, *supra* note 23, at 39.

[97] PEMBER, *supra* note 23, at 40. The newspapers in 1890 devoted much space to crime and disaster news, frequently printing the graphic details of trial testimony and accident accounts. At the same time, however, they featured serialized fiction of such contemporary authors as Jules Verne and C. Rider Haggard, as well as lengthy, thoughtful editorials. PEMBER, *supra* note 23, at 36.

[98] PEMBER, *supra* note 23, at 39.

[99] PEMBER, *supra* note 23, at 37.

[100] EMERY, *supra* note 70, at 293.

[101] MOTT, *supra* note 79, at 452.

[102] E. BACON, DICTIONARY OF BOSTON (1886), *quoted in* J. CHAMBERLIN, THE BOSTON TRANSCRIPT 159 (1930).

[103] CHAMBERLIN, *supra* note 102, at 158.

[104] Godkin, *The Boston Press*, 54 THE NATION 206 (Mar. 17, 1892) [hereinafter cited as *Boston Press*].

Villard, writing in 1923, noted that "[a]bout thirty years ago the Hub rejoiced in some excellent and most intelligent journals."[103]

A fair evaluation of this evidence demonstrates that the Boston press in 1890 was not as bad as Warren and Brandeis charged. Quite clearly, the authors' assertions that "the details of sexual relations are spread broadcast in the columns of the daily papers"[104] and "column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle,"[107] were overstatements. Although gossip columns existed and indeed flourished, they were trivial by modern standards, and in most cases the principals involved consented to the coverage.[108] Furthermore, there is little reason to conclude that the accounts had the effect, as Warren and Brandeis contended, of usurping "the place of interest in brains capable of other things" or of destroying "robustness of thought," "delicacy of feeling," or flourishing of enthusiasm.[109]

Similarly, the impressions given by Prosser and others of the daily press coverage of the social activities of the Warren family in general and their parties in particular, appear to have been overstated. References to the family were virtually nonexistent, let alone lurid. The names of Samuel D. Warren, Jr., and his wife, Mabel, rarely appeared on the long lists of social notables in attendance at various weddings, parties, dances, and other social activities. Press historians describe the *Boston Globe* as the most sensational paper in the city.[110] Nevertheless, Pember, in his search through all 1890 Boston daily papers available on microfilm, found the only mention of the Warren family in the *Globe* report on the Clarke-Watson wedding reception.[111]

In concluding his study of the Boston press, Pember has written that "[a]ll the material necessary to make a comprehensive evaluation of the Boston press in 1890 has not been examined," and that "until all the source material can be examined . . . a comprehensive

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[103] VILLARD, *supra* note 94, at 97.

[104] Warren & Brandeis, *supra* note 1, at 196.

[107] Warren & Brandeis, *supra* note 1, at 196.

[108] *See* text accompanying note 95 *supra* (gossip columnists had consent of hosts to attend activities and report on them).

[109] Warren & Brandeis, *supra* note 1, at 196. It is remarkable that in the entire article, Warren and Brandeis cite not a single specific example of press invasions of privacy. The *Manola* case they described as "notorious," yet the victim was a well-known theatrical performer, photographed in costume. *See* note 47 *supra* and accompanying text (discussing *Manola* case).

[110] *See, e.g.*, VILLARD, *supra* note 94, at 100 (*Globe* was once "yellowest" of Boston dailies).

[111] *See* PEMBER, *supra* note 23, at 39. An unsystematic sampling by this author of editions of the *Globe* prior to 1890 revealed no references to any parties of the Warrens.

appraisal [of the Warren-Brandeis thesis] will not be possible."[112] Noting that his research was limited to the four papers available on microfilm, Pember surmised that "these might represent the four best newspapers, as libraries are prone to collect only good examples of an era's culture."[113] Although copies of the four other Boston dailies—the *Herald, Evening Record, Post* and *Traveler*, which are not preserved on microfilm, are incomplete and not readily available, Pember observed that secondary sources suggest that the nonmicrofilmed dailies were not significantly more sensational, snooping, or irresponsible than those stored on microfilm.[114] Nevertheless, Pember suggested that the papers he examined, and the other nonmicrofilmed dailies, may not have been typical of those singled out for attack by Warren and Brandeis.[115] Referring to Mason's description of the *Saturday Evening Gazette* "as being particularly offensive," Pember speculated that "[i]t could also be true that Warren and Brandeis directed their criticism at the weekly press—the *Saturday Evening Gazette*, for example . . . . I attempted to locate copies of that newspaper, but they are almost nonexistent today."[116]

C. *Saturday Evening Gazette*

The principal accuser of the *Saturday Evening Gazette* is Brandeis biographer Alpheus Thomas Mason. In *Brandeis: A Free Man's Life*, Mason wrote:

> Quite characteristically, for Brandeis, this study grew out of a specific situation. On January 25, 1883, Warren had married Miss Mabel Bayard, daughter of Senator Thomas Francis Bayard, Sr. They set up housekeeping in Boston's exclusive Back Bay section and began to entertain elaborately. The *Saturday Evening Gazette*, which specialized in "blue blood items," naturally reported their activities in lurid detail. This annoyed Warren, who took the matter up with Brandeis.[117]

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[112] PEMBER, *supra* note 23, at 41-42.

[113] PEMBER, *supra* note 23, at 274 n.12. Pember drew an analogy to current library attitudes toward newspapers such as the *New York Times* and the *Washington Post*, which are preserved, and the Hearst papers, the underground press, and the sensational weeklies such as the *National Enquirer*, which are rarely preserved. PEMBER, *supra* note 23, at 274 n.12.

[114] PEMBER, *supra* note 23, at 274 n.12; *see* CHAMBERLIN, *supra* note 102, at 158-59 (describing other dailies in favorable terms); MOTT, *supra* note 79, at 453 ("In general, Boston was . . . comparatively free of the more shocking sensationalism in its newspapers"); VILLARD, *supra* note 94, at 97 (circa 1893, *Herald* was "independent, honest, and above board"; *Post* was "a fine Mugwumpian morning paper"; *Advertiser* "personified Republican dignity, respectability, and conservatism, with the *Record* not far behind"; *Traveler* "too, once had its day").

[115] PEMBER, *supra* note 23, at 40.

[116] PEMBER, *supra* note 23, at 40-41.

[117] MASON, *supra* note 6, at 70. It is interesting that Mason wrote admiringly about

Mason's portrayal of the *Gazette* and its activities appears never to have been challenged.[118] To the contrary, Prosser gave added currency to the *Gazette*'s alleged reputation for offensiveness,[119] and another Brandeis biographer, A.L. Todd, without mentioning the *Gazette* by name, embellished the Mason tale as follows: "Sam had transmitted to Brandeis his indignation against a *sensational weekly paper* that had spread out in its columns details of Warren's personal and social life. The material Warren resented catered solely to the prurient interest of the readers; it had no genuine public value."[120] Was the *Gazette* really as offensive as these writers claimed? Did it actually make a practice of disclosing embarrassing private facts about the Warren family? If not, was there some other reason why the paper had come to be regarded with such apparent scorn? In an effort to evaluate the validity of the Mason and Todd indictments, and to examine the heretofore unexamined Boston weekly press, I analyzed issues of the *Saturday Evening Gazette* from January, 1883 to January, 1891.[121] The following discussion attempts to present the *Saturday Evening Gazette* of the 1880's as others saw it, as it saw itself, and as it is revealed in its own pages.

At the time the Warren-Brandeis article was published, the *Gazette* was in its seventy-eighth year. Its format was decidedly undramatic: four oversized pages,[122] each page nine columns wide, dotted with small headlines and line upon line of small, hard-to-read print. Hard news, public policy analysis, art and literary reviews occupied more than fifty percent of the weekly space. Advertising comprised about twenty-five percent, and the rest of the paper consisted primarily of social gossip and other items of social interest.

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the importance to Brandeis of facts as the starting point for law. He quoted from an early Brandeis memorandum of maxims: "Know thoroughly each fact. Don't believe client witnesses. Examine documents."; and from a reporter's interview with Brandeis, "It has been one of the rules of my life . . . that no one shall ever trip me on a question of fact." MASON, *supra* note 6, at 69. Mason cited as an instance of Brandeis' ability to handle facts the publication of "The Right to Privacy." MASON, *supra* note 6, at 70. It seems that both Brandeis and Mason may have been in less than "total" control of facts in this case.

[118] Pember's thorough research turned up no indication that legal or journalistic scholars have ever analyzed the *Gazette* to evaluate its impact on Warren and Brandeis. PEMBER, *supra* note 23, at 41.

[119] *See* Prosser, *supra* note 4, at 383 (*Gazette* covered Mrs. Warren's parties in "highly personal and embarrassing detail").

[120] A. TODD, JUSTICE ON TRIAL 43 (1964) (emphasis added).

[121] The *Saturday Evening Gazette* is not available today on microfilm. The most complete collection of past issues is stored at the New England Depository, Allston, Massachusetts. Scattered issues are also available at the Massachusetts Historical Society in Boston and the Antiquarian Society in Worcester.

[122] The format was 36 by 28 inches, in contrast the 23 by 14 inch format of today's *New York Times*.

The *Gazette*'s competitors, far from looking down on it as a social-snooping sensationalist journal, regarded the *Gazette* as a respected weekly periodical. Encomiums written by other papers as part of the general practice of recognizing and honoring the anniversaries of competitors, reveal the estimable position of the *Gazette*:

> The *Gazette* has won for itself an enviable position among Boston journals, and its numerous attractive features have made it almost indispensable to every household. In all its varied departments comprising the discussion of current topics, literary, dramatic and music criticism, correspondence, social gossip and miscellaneous reading it uniformly displays first class ability, culture and a keen appreciation of the wants of the community it so intelligently serves.[123]

> The *Boston Saturday Evening Gazette* is a splendid picture of journalism. Its Col. Henry Parker has made a paper full of personality, yet utterly devoid of pettiness. The *Gazette's* art and literary departments are unsurpassed in the whole country. Its editorials are on the same plane.[124]

The *Gazette* described itself as "peculiarly a Boston paper, the leading family weekly journal of the city with a circulation largely among the most intelligent and influential classes of readers."[125] The paper took great pride in its "fearless and candid system of musical, dramatic, and art criticism . . . and its like disposition in the discussion of public affairs in its editorial column."[126] It defined its political position as "staunchly Republican in principle, but it has never failed to call to account those mentors of its own party who have not been faithful to their trusts, and to commend what was good in the action of its political opponents."[127]

The *Gazette* was conscious of its responsibilities both to the public and to private individuals, and attempted to formulate a fair and consistent policy of balancing competing interests, while carrying out its professional obligation to report the news. "To tell the truth" was

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[123] Boston Post, Jan. 5, 1890, *reprinted in* Saturday Evening Gazette, Jan. 11, 1890, at [2], col. 5 (Sun. ed. Jan. 12, 1890).

[124] Pilot, Jan. 4, 1890, *reprinted in* Saturday Evening Gazette, Jan. 11, 1890, at [2], col. 5 (Sun. ed. Jan. 12, 1890).

> *The Saturday Evening Gazette* is the queen of society newspapers. It is printed for a special class of patrons, and it is admirably edited. Its "Out and About" columns everybody in society wishes to read. Its musical and dramatic departments are conducted with great ability. Its editorials are sensible and strong. It can be said with perfect truth that in its lines it is unequalled in the country.

Boston Herald, Jan. 1, 1890, *reprinted in* Saturday Evening Gazette, Jan. 11, 1890, at [2], col. 5 (Sun. ed. Jan. 12, 1890).

[125] Saturday Evening Gazette, Dec. 14, 1889, at [2], col. 6 (Sun. ed. Dec. 15, 1890).

[126] *Id.*

[127] *Id.*, June 21, 1890, at [2], col. 1 (Sun. ed. June 22, 1890).

an operative part of the *Gazette*'s credo. It editorialized strongly in support of *Harper's Weekly* for printing "a prompt, frank and unequivocal apology for printing an article which reflected injuriously on a Mr. John M. Forbes of Boston."[128] "Infallibility is not attainable even in journalism," the paper noted, "but sincerity and fairness [should] be the ruling and guiding principles."[129]

The *Gazette* stated forcefully that "attacks on private character are inexcusable."[130] Accordingly, the paper editorialized in favor of strong libel laws, even though "shyster lawyers who make it their business to annoy respectable newspapers by bringing imaginary suits for libel"[131] disturbed the editors. Although it recognized the need to protect the dignity of private citizens, the *Gazette* was unsympathetic to public figures who criticized press intrusions into their private lives. The paper understood that "a newspaper is a great power,"[132] and it concurred with the *New York Herald* which had proclaimed that "the exposure of public wrongs is the highest duty of a newspaper."[133] Although the paper urged editorially that attacks on former Democratic presidential candidate Samuel J. Tilden should cease because he had retired from public life,[134] the *Gazette* directed these words to public figures still active: "Public men who complain of the abuse of the power of the press have usually deserved its censure."[135] More pointedly, the *Gazette* remarked,

> In an age when interviewing has developed a taste for more personal details and scandal to which unscrupulous journalism does not hesitate to pardon, protesters forget the universal and instinctive interest which attaches to the personality of eminent men. Tell the truth, treat it with sympathy, intelligence and proportion. Dr. [Benjamin] Franklin, for instance, would not forfeit his great and just fame if some passages of his life were told instead of just being whispered.[136]

Notwithstanding the paper's apparently serious and responsible approach to coverage of political and cultural affairs, the charges that the *Gazette* was a journalistic invader of privacy were leveled at its reporting of social events. The paper devoted about five columns in each edition to an "Out and About" column which reported on the social affairs of Boston's elite. The miscellany of "Out and About"

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[128] *Id.*, Oct. 27, 1888, at [4], col. 5 (Sun. ed. Oct. 28, 1888).
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*, June 22, 1890, at [1], col. 3.
[134] *Id.*, June 14, 1884, at [2], col. 2 (Sun. ed. June 15, 1884).
[135] *Id.*, Mar. 24, 1883, at [1], col. 9.
[136] *Id.*, Aug. 9, 1884, at [4], cols. 2-3 (Sun. ed. Aug. 10, 1884).

was frequently supplemented by reports with such titles as "Marblehead Murmurs," "Nahant Breezes," "Newport Gossip," "Cohasset Causerie," and "Sounds from Salem." Most of the social items, however, were usually bland announcements, press releases as it were, supplied by the individuals themselves. For example:

> Mr. Charles White, 213 Commonwealth Avenue, gave a yellow dinner Saturday. Primroses, genestra, jonquils (all yellow) decorated the table.[137]

> Miss Susan Hale returned yesterday from her Chicago trip and a visit to Mr. Church, the artist, and Mrs. Church, at the their beautiful home on the Hudson. Miss Hale will pass some time at the Thorndike.[138]

> The Misses Stackpole have closed their cottage at York Harbor and returned to their winter residence in Roxbury.[139]

The *Gazette* also published such observations as "in some of the finest houses in Newport, there is a great deal of misery,"[140] "portentous clouds are said to be gathering at the Atlantic House, Nantasket,"[141] and "clergymen opposed to round dances on moral grounds now preach against tobogganing as improper for young girls. Oh, if they would only preach against expectorating in public, eating potatoes with a knife, tucking a napkin under chin, and asking for a second helping of soup."[142]

These reports usually did not disclose the names of the principals involved. Nevertheless, gossip about identifiable persons was not foreign to the pages of the *Gazette,* as for example, the item in the "Washington Whispers" column: "It was Miss Grant, though, who among others, popped corn and ate baked apples with the second Comptroller and Congressman Ned Burnett the other afternoon in their bachelor quarters";[143] and the item in "Out and About": "Private letters say that American Duchess of Marlborough is ill and low spirited. She has gone into mourning for her father the Crown Prince and will not be to any festivities at Blenheim Palace this Christmas."[144]

The *Gazette* lamented the "ridiculousness of publishing time after time" the long lists of hosts, hostesses, and guests at the various balls and receptions, but it never discontinued the practice. As the paper noted in a June 22, 1890 editorial:

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[137] *Id.*, Feb. 4, 1888, at [3], col. 1 (Sun. ed. Feb. 5, 1888).
[138] *Id.*, Dec. 8, 1888, at [2], col. 8 (Sun. ed. Dec. 9, 1888).
[139] *Id.*, Sept. 13, 1890, at [3], col. 2 (Sun. ed. Sept. 14, 1888).
[140] *Id.*, Sept. 20, 1890, at [1], col. 5.
[141] *Id.*
[142] *Id.*, Jan. 21, 1888, at [3], col. 4 (Sun. ed. Jan. 2., 1888).
[143] *Id.*, at [2], col. 4 (Sun. ed. Jan. 22, 1888).
[144] *Id.*, Dec. 8, 1888, at [1], col. 5.

> For the past 20 years under its present management, the *Gazette* has kept a constant eye to the growth of Boston and the demands of a steadily increasing circle of readers. The "Out and About" columns were a startling innovation, which was received doubtfully at first with many wise shakes of the head by the older patrons of the *Gazette*; but the rapidity with which its population grew showed its wisdom and justified its introduction. That it has been imitated in journalistic circles where it was once greeted only with sneers is a sufficient indication that *it supplied a public want* that was not generally realized in the newspaper world when it came into existence.[146]

The paper in general does not seem to have been, from an objective viewpoint, so lacking in taste that its coverage should have provoked such a violent attack as that by Warren and Brandeis, nor should it have engendered so deep-seated an abhorrence in a man of normal sensibilities.[147] The more accepted theory is that rather than the journalistic style of the *Gazette* in general, the coverage of Warren and his family and their private and social affairs triggered the writing of "The Right to Privacy."

D. *The Gazette and the Warren Family*

To test the Prosser-Mason hypothesis, I examined virtually all copies of the *Saturday Evening Gazette* from January, 1883, the month in which the Warrens were married, through January, 1891, the month following publication of "The Right to Privacy," specifically for references to the family of Samuel D. Warren, Jr. Given the intensity of the allegations against the *Gazette*, it is ironic that the *Gazette* printed as little as it did about the Warren family.

Warren's father, Samuel Dennis Warren, Sr., despite all his civic activities,[147] either was not considered exceptionally newsworthy, or was quite adept in avoiding publicity. Except for the inclusion of his name in a list of Republican Party Mugwumps in 1884, press references to him were sparse and terse.[148] Shortly before his death,[149] the

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[146] *Id.*, June 21, 1890, at [2], col. 1 (Sun. ed. June 22, 1890) (emphasis added).

[147] Ironically, the language of the *Gazette* editorials resembles closely the Warren and Brandeis discussion of the public figure and newsworthy exemptions to the right of privacy. *Cf.* Warren & Brandeis, *supra* note 1, at 214-16 (right to privacy does not prevent publication of matter of public or general interest).

[147] Samuel Dennis Warren, Sr., was a trustee of Williams College from 1870 to 1876. At his death in 1888, he was a director of the First National Bank and the Provident Institution of Savings; a trustee of the Massachusetts General Hospital, the McLean Asylum for the Insane, the Adams Nervine Asylum, the Boston Art Museum, and Bradford Academy; and a corporation member of the American Board for Foreign Missions. HUNTINGTON, *supra* note 85, at 169.

[148] *See, e.g.*, Saturday Evening Gazette Mar. 3, 1883, at 3, col. 4 (Sun. ed. Mar. 4, 1883) ("Mr. and Mrs. S.D. Warren and Miss Warren who sailed for Liverpool last week will pass the summer abroad."); *id.*, July 19, 1884, at [2], col. 9 (Sun. ed. July 20, 1884) ("Mr. S.D. Warren is at Saratoga.").

[149] Warren, Sr., died in 1888. HUNTINGTON, *supra* note 85, at 169.

Gazette reported that "Mr. Samuel D. Warren, Sr. is still very ill at his house on Mt. Vernon Street and we regret to learn that his recovery is doubtful."[150] Although the paper neither reported nor editorialized upon his death or his funeral, it did print in its "Saturday Clubs" column of May 20, 1888 a resolution passed by the Commonwealth Club. The resolution officially mourned "with unfeigned sorrow the decease of our late associate, Mr. Samuel D. Warren, a valued and genial friend, an upright and sagacious businessman, and a philanthropist and exemplary citizen whose prominence as a manufacturer and whose unostentatious help to worthy institutions and causes will be widely missed in our community."[151]

Reports on Warren's mother were similarly unsensational and brief: "More than 600 persons attended Mr. Fred Archer's organ recital . . . in the New Old South Church on Thursday. Among them were Mrs. S.R. Warren [*sic*] and Miss Warren. . . .";[152] "Mrs. S.D. Warren, no. 67 Mt. Vernon Street and her daughter Miss Cornelia Warren started on a trip to Mexico Monday";[153] "Mrs. Samuel D. Warren and family, of Mt. Vernon Street, will pass the summer at Mattapoisset."[154] Warren's mother appears not to have avoided press coverage and upon occasion may well have invited it. In 1890, for example, Mrs. Warren, then widowed, was among the patrons of a series of educational "Talks to the Ladies," the second of which she held at her home. The *Gazette* reported the event, noting where it was held and that "after the talk an opportunity was given the ladies present to join a society to assist working girls in procuring rooms and board at a low rate. Much good has already been accomplished."[155]

During this period the names of both Warren and his wife Mabel were virtually absent from the pages of the *Saturday Evening Gazette*. Indeed, a review of more than eight years revealed that the only Warren party upon which the *Gazette* reported was the wedding reception held for Warren's cousin.[156]

Unless the mere public mention of their names in print was considered to constitute an unwarranted invasion of privacy,[157] the Warrens' social privacy does not appear to have been seriously violated by the

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[150] Saturday Evening Gazette, May 5, 1888, at [3], col. 4 (Sun. ed. May 6, 1888).

[151] *Id.*, May 19, 1888, at [3], col. 6 (Sun. ed. May 20, 1888).

[152] *Id.*, Mar. 24, 1888, at [3], col. 4 (Sun. ed. Mar. 25, 1888).

[153] *Id.*, Mar. 16, 1889, at [2], col. 8 (Sun. ed. Mar. 17, 1889).

[154] *Id.*, Apr. 7, 1888, at [3], col. 2 (Sun. ed. Apr. 8, 1888).

[155] *Id.* Feb. 1, 1890, at [3], col. 6 (Sun. ed. Feb. 2, 1890).

[156] *See* text accompanying note 93 *supra* (*Gazette*'s coverage of wedding of Warren's cousin).

[157] *See* A. LIEF, BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL 51 (2d ed. 1964) (Warren resented mention of family name in newspaper gossip columns).

Gazette, or at least not sufficiently to provoke so strong a counterattack by the young authors.[158] Nevertheless, one must remember that observers have found "[t]he social reticence of the Proper Bostonian" to be "almost purposeful."[159] According to Cleveland Amory, "Boston's First Families operate in exact reversal of the Hollywood idea of publicity, and from their own social standpoint have been equally successful."[160] The notion of their newsworthiness extended only to those events and activities that they specifically chose to make public. Proper Bostonians did not want to be the subjects of any reports they could not control.

If the biographers have correctly singled out the *Saturday Evening Gazette* as particularly offensive to Samuel Warren, Jr., it does not appear that such a conclusion is based on any embarrassing disclosure of private facts concerning Warren or his immediate family. One of Warren's relatives, however, did come under frequent editorial attack from the *Gazette*, at times with so sardonic a tone that it is unlikely that Warren read the accounts with equanimity. The *Gazette* directed a pointed assault on the most public member of Warren's family, his father-in-law, United States Senator Thomas F. Bayard of Delaware.[161]

Bayard was a presidential candidate in 1880 and 1884, but lost the Democratic nomination partly because of Northerners' resentment of his unwillingness to take a hard line against the South, both during and after the Civil War.[162] If members of his own party were suspi-

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[158] Ironically, the most "gossipy" account of a Warren social gathering during this period appeared not in the Boston press, but in a letter from Louis D. Brandeis to his family:

> The dinner at the Warrens' Monday a week ago was really pleasant; there were a few young people there and we amused ourselves in the most Unbostonian manner, . . . It was 11:15 P.M. when we went home. You will smile at these provincial hours; but I was really shocked at their lateness.

Letter from Louis D. Brandeis to Amy Brandeis Wehle (Nov. 25, 1889), *reprinted in* 1 BRANDEIS LETTERS, *supra* note 62, at 59.

[159] C. AMORY, THE PROPER BOSTONIANS 353 (1947).

[160] *Id.*

[161] Thomas Francis Bayard (Oct. 29, 1828-Sept. 28, 1888), a descendant of an old and prominent Delaware family, was apparently a bookish gentlemen of strong principles and quiet tastes. He practiced law in Delaware from 1851 to 1869, and was United States District Attorney for Delaware in 1853 to 1854. In 1869, as a Democrat, he was elected to his first term as United States Senator for the State of Delaware. *See generally* E. SPENCER, AN OUTLINE OF THE PUBLIC LIFE AND SERVICES OF THOMAS F. BAYARD 1-25 (1880) (ancestry and early career).

[162] Shortly after the outbreak of the Civil War in 1861, in an address to the Dover Peace Convention, Bayard had urged Delaware not to secede from the Union. *Id.* at 16-17. Nevertheless, he also had urged that those states that had decided to secede be permitted to do so peacefully. *Id.* at 17. During the war Bayard strongly supported the Union cause, but during Reconstruction he refused to join those who wanted to treat the Confederate states as conquered provinces. *Id.* at 82-83. In the Senate Bayard

cious of what they believed was Bayard's sympathy toward the South, Radical Republicans regarded his conciliatory attitude as tantamount to treason. The *Saturday Evening Gazette* was preeminently a Republican newspaper.

In June, 1884 the *Gazette* strongly expressed its reservations concerning the qualifications of James Blaine to be the Republican Party's standard-bearer. On June 15 the paper acknowledged that "the Democrats are not without creditable candidates for the presidency, under whose administration there would be general confidence on the part of the country," and "Mr. Bayard of Delaware is eminently one of these."[163] As such influential Boston Republicans as Charles Francis Adams, Jr., Richard Henry Dana, Robert Treat Paine and Winslow Warren, however, became "righteously independent" Mugwumps and deserted their party in protest to the "tainted Republicanism" of Blaine,[164] the *Gazette* reasserted its Republican principles, proclaiming: "Individuals mean nothing, party principles mean everything in . . . [the] contest presently engaged. The real contest is between the virtues of Republicanism and the vices of Democracy."[165]

It would not be long before the *Gazette* would wave the "bloody shirt" at Bayard. In speculating on whom the Democrats would select at their convention in Chicago, the paper commented, "Mr. Bayard . . . would be a most creditable candidate, but in view of his record in connection with the war, the party does not dare take him."[166] After Grover Cleveland won both the nomination and the election and appointed Bayard his Secretary of State, however, the *Gazette* came down hardest on Mabel Warren's father. Where once its only critical coverage had been a political tweaking of the Delaware Senator for having "neglected to pay his respects to [Massachusetts Democratic] Governor Butler" on a visit to Boston,[167] the *Gazette* now criticized him and his performance unmercifully, best illustrated by the following editorial account of his last days in office:

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steadfastly held to the position that measures designed to curtail the civil liberties of Southerners would ultimately undermine civil liberties in all states, and more than once he spoke eloquently against Reconstruction enactments. *See* C. TANSILL, THE CONGRESSIONAL CAREER OF THOMAS FRANCIS BAYARD 46-52 (1946) (opposition of Bayard to congressional restrictions on southern states).

[163] Saturday Evening Gazette, June 15, 1884, at [2], col. 3 (Sun. ed. June 16, 1884).

[164] *See* G. BLODGETT, THE GENTLE REFORMERS: MASSACHUSETTS DEMOCRATS IN THE CLEVELAND ERA 15-29 (1966) (discussion of prominent Massachusetts Republicans leading Mugwump movement).

[165] Saturday Evening Gazette, Sept. 13, 1884, at [2], col. 1 (Sun. ed. Sept. 14, 1884).

[166] *Id.*, July 5, 1884, at [2], col. 3 (Sun. ed. July 6, 1884).

[167] *Id.*, Mar. 24, 1883, at [2], col. 8 (Sun. ed. Mar. 25, 1883).

> Stolidly fatuous Mr. Bayard has sacrificed Consul-General Sewall, and has thus crowned his small career as Secretary of State with its smallest and most contemptible act. Happily he has but a few days more in which to strut about like a pompous turkey-cock with wings drooping in defiance at the smaller denizens of the political farmyard while his angry gobble-gobble strikes terror to their private souls. Secretary Bayard will go into private life unwept, unhonored, and unsung, and it is to be sincerely hoped that he may be kept there for good and all.[108]

The *Gazette* did not stop there. Two weeks later, in a piece entitled "A Final Word," it launched a caustic attack on Bayard and his part in the Cleveland administration:

> Mr. Bayard meant to be diplomatic in the way that many fools mean to be wise,—he had the intention, but lacked the capacity. Practically, most of the things he did were badly done, and most of the things he failed to do were badly undone. He is the typical figure of an administration that won its position through accident and lost it through stupidity; that confounded politics with angling and wisdom with bluster. Through some pathological peculiarity of human nature, Mr. Bayard always contrived to put himself on the wrong side and wasted time in the attempt to prove that wrong was right . . . . But it is impossible to rise to the height of anger toward him; he is so meekly and so mildly jubilant over his imagined success and so sweetly unconscious of his failings that it would be cruel to disturb his equanimity. But inexorable fate has doomed him to congenial obscurity, and he will retire into private life with the fame of the abnormal political imbecility he has manifested through his whole term of office. As he retires from the public state he deserves some applause, not for what he has done, but for what he is about to do. With him, too, vanishes the opossum administration of which he was the shining light. . . . There are to be but nine days more of Cleveland imbecility, and this is a blessing for which we can all be grateful.[109]

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[108] *Id.*, Feb. 9, 1889, at [2], col. 2 (Sun. ed. Feb. 10, 1889).

[109] *Id.*, Feb. 23, 1889, at [2], cols. 2-3 (Sun. ed. Feb. 24, 1889). Warren and Brandeis recognized a public figure exception to the right of privacy, Warren & Brandeis, *supra* note 1, at 214, nevertheless, in its treatment of Bayard, the *Gazette* undoubtedly provoked Warren's disdain in the following denunciation of Bayard's public performance.

> There is something finely humorous in Secretary Bayard's self-confidence. He carries his big head with such delightful complacency that one almost wishes that its contents were normally proportioned to its circumference. . . . But if, [in the Cleveland administration] where so much was ridiculous, a choice could be made, we should select the Secretary of State's Department as an example where "how not to do it" was carried to the highest stage of perfection. Mr. Bayard bullied little nations with the bravery of a mastiff worrying a kitten; but he allowed himself to be browbeaten by big nations with a smiling unconsciousness that bordered closely on sublimity. His boast is that he preserved peace with all nations; but this is a boast that can be made by the cowed as well as the brave

The scathing attacks in 1889 by the *Gazette* on the statesman from Delaware may well have angered Samuel Warren. These attacks, however, were directed not at the social affairs of a private individual, but rather at the public acts of a political figure. As such, they would not have been protected even under the proposal outlined in "The Right to Privacy."[170] Therefore, if neither the *Gazette* nor the other Boston newspapers treated the private affairs of the Warren family in an offensive manner, and if Warren had been a man of normal sensibilities able to tolerate even the harsh remarks about his father-in-law, it is difficult to understand the reasons for Warren's deep-seated abhorrence of the contemporary press. On the other hand, a closer look at Warren himself may reveal that he was not a man of ordinary sensibilities, the evidence of which may help to explain his apparent need to strike back at the press by proposing a legal remedy for what he considered an invasion of privacy.

E. *Warren and Brandeis: Hypersensitive and Ambivalent*

Although the names of Warren and Brandeis will be forever linked to the recognition of a legal right to privacy, the substance and depth of their commitment to the issue has seldom been questioned. Their reputations as privacy avatars, legal scholars earnestly and steadfastly constructing the fountainhead of a fundamental American right, are exaggerated. The unromantic reality appears to be that the origin of the Warren-Brandeis article lies to a great extent in the hypersensitivity of the patrician lawyer-merchant and the verbal facility and ideological ambivalance of his friend and former law partner.

A major element of the tort of invasion of privacy by public disclosure of private facts is that the matter disclosed be objectionable to a reasonable person of ordinary sensibilities.[171] This requirement,

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man. Mr. Bayard preserved peace with the submissive opossum's indifference to the blows showered upon it. The opossum, though it is not averse to live game, never bites when attacked; it feeds on the small and meekly yields itself up to the large. Mr. Bayard's conduct in office has been that of the opossum in every respect. His diplomacy was original in that it was remarkable for the entire absence of diplomacy. He leaped about like a fencer without a sword, striking attitudes and making lunges, without frightening anybody. With his imaginary sword, he attempted to ward off the real blows aimed at him, his adversary with an inferential "Ah Would you? I had you there."

Saturday Evening Gazette, Feb. 23, 1889, at [2], cols 2-3 (Sun. ed. Feb. 24, 1889).

[170] *See* Warren & Brandeis, *supra* note 1, at 214-16 (matters relating to or bearing upon acts done in public capacity may be published)

[171] PROSSER, *supra* note 20, § 117, at 811.

The law is not for protection of the hypersensitive, and all of us must, to some reasonable extent, lead lives exposed to the public gaze. . . . The ordinary reasonable man does not take offense at mention in a newspaper of the fact that he

which is consistent with similar requirements in other areas of tort law, would preclude recovery by an overly sensitive plaintiff alleging damage to psyche or reputation from a public disclosure tolerable by an average person. Historical analysis of some of the personality traits of Samuel Dennis Warren, Jr., suggests the conclusion that he was hypersensitive, and that this psychological vulnerability may have distorted his perception of the "excesses of the press."

Samuel D. Warren, Jr., was descended from a prominent Massachusetts family. His father, Samuel D. Warren, Sr., dropped out of preparatory school in 1832 at the age of fifteen because student life did not agree with his health.[172] This decision did not, however, impede his business career. By middle age, Samuel Warren, Sr., had established a successful and growing paper-milling business.[173] He was especially active in civic affairs and was involved in Republican Party politics in Massachusetts until 1884, when, finding it impossible to support James Blaine for President, he joined other Republican Mugwumps in backing the Democratic candidate, Grover Cleveland.[174] According to a privately printed family genealogy, the elder Warren had a "broad mind, . . . unusual sagacity, and . . . an affectionate disposition. . . . He possessed in rare degree the faculty of winning the favorable regard of people of all classes by his genial manner, his unfailing humor, and his versatility in adapting himself to others."[175]

In contrast, Samuel Dennis Warren, Jr., was more scholarly and far less gregarious than his father. Reviewing his boyhood, his sister Cornelia wrote, "Sam, the eldest, who was much away at boarding school . . . was not usually counted as one of the children."[176] As a child, young Warren heard stories from his father about public attitudes "that a paper mill community was necessarily of a low moral tone" and "that there was something inherently demoralizing about the business."[177] He apparently showed no great desire to follow in his father's professional footsteps; yet before he entered Harvard, Warren

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has returned home from a visit, or gone camping in the woods, or given a party at his house for his friends.

PROSSER, *supra* note 20, § 117, at 811.

[172] HUNTINGTON, *supra* note 85, at 169.

[173] HUNTINGTON, *supra* note 85, at 169. After working for a Boston paper company for some years, Warren purchased a paper mill in Maine. He later bought out the Boston company, in which he had become a partner, reorganized it as Warren & Company, and later acquired other paper companies in New England. HUNTINGTON, *supra* note 85, at 169.

[174] HUNTINGTON, *supra* note 85, at 169.

[175] HUNTINGTON, *supra* note 85, at 169.

[176] BRADLEY, *supra* note 90, at 2.

[177] BRADLEY, *supra* note 90, at 2.

had to spend nearly two years in his father's Maine house learning the family business.[178]

The study of the law was important to Warren. He graduated from Harvard Law School second in his class behind Brandeis, and he enthusiastically used his family contacts to set up a profitable law practice.[179] When his father died unexpectedly in 1888, Samuel Warren, Jr., felt compelled to give up his share of the budding partnership with Brandeis to take control of the Warren family interests.[180] Years later, a friend commented that giving up the law was an especially "great sacrifice, for he loved and was peculiarly fitted for law."[181]

Descriptions indicate that Warren was basically very shy and withdrawn. So much did associates regard him as an "idealist" and "perfectionist" that one might reasonably question the extent to which his observations of newspaper coverage would satisfy the reasonable man test. One friend found his apparently supercilious attitude disconcerting: "The pursuit of perfection by one unsparing of effort is sometimes uncomfortable to those content with lesser aims. It is annoying when you have reached the pinnacle towards which you have been painfully climbing to have still higher summits pointed out as worthy of endeavor. This kind of discomfort Warren sometimes caused to his fellow-workers."[182]

According to a memorial sketch prepared by friends, Warren

> loved children and was always at ease with them. He loved the sea, the open country, the woods, and he loved the free life of the sailor and woodsman. Among his sincerest mourners were the guide with whom he had camped in winter in the wilds of New Brunswick, and the old negro, Stephen, who cared for his dogs in North Carolina, tramped the plantation with him, and who always found in him a considerate and sympathetic friend.[183]

The tribute continued, emphasizing the private nature of the man who "had a great heart, not worn upon his sleeve, but closely holding and sheltering a host of friends."[184] Club life, especially that in the Dedham Polo Club he had founded, was particularly important to Warren because "in this intimate circle Warren lost the shyness and

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[178] Warren worked in his father's business from 1869 to 1871. He entered Harvard in the fall of 1871. BRADLEY, *supra* note 90, at 5.

[179] MASON, *supra* note 6, at 54, 56.

[180] BRADLEY, *supra* note 90, at 7; MASON, *supra* note 6, at 68.

[181] A. Cabot, Sketch of Samuel Dennis Warren (presented at the annual meeting of the Tavern Club of Boston, May 9, 1910), *reprinted in* BRADLEY, *supra* note 90, at 11.

[182] *Id.*, BRADLEY, *supra* note 90, at 13.

[183] *Id.*, BRADLEY, *supra* note 90, at 13-14.

[184] *Id.*, BRADLEY, *supra* note 90, at 15.

diffidence which sometimes stood between him and the world at large and became a boy among boys."[155]

Warren's perception of the press may have been influenced by his sensitive nature.[156] What may have further distorted this perception, however, was an unwillingness to concede that he, and others like him, were in many ways "public figures," in that they regularly engaged in a variety of political and community activities.[157] With Brandeis, Warren participated in organized efforts designed to influence matters of local public policy.[158] In politics, Warren was an independent Democrat and worked in the presidential campaigns of his father-in-law.[159] That Warren was in the public eye invited papers to write about him; that he refused to concede the privilege of the press to write about individuals in positions of prominence diminished his capacity to view the press objectively. Warren's acute sensitivity to press coverage is said to have ultimately contributed to his death. According to one biographer, Warren's untimely death at age fifty-eight was brought about by the painful and bitterly contested trial to determine his father's estate, during which time "Sam's sensitive fibre was torn by the publicity."[160]

If Warren was unduly sensitive to privacy concerns, Brandeis was surprisingly ambivalent. Contrary to the myth of his eager dedication to the right-of-privacy project, Brandeis seems to have been neither particularly enthusiastic about the subject nor solicitous of the quality of the landmark article itself. Years later Brandeis reflected on his participation in the piece, saying, " 'This, like so many of my public activities, I did not volunteer to do.' "[161] Indeed, Brandeis appears to have written the article primarily as a favor to Warren, who had assisted Brandeis both at Harvard Law School[162] and in practice.[163]

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[155] *Id.*, BRADLEY, *supra* note 90, at 15.

[156] *See* LIEF, *supra* note 157, at 51 (Warren's sensitive nature resented mere mention of family in newspaper society columns); LIEF, *supra* note 157, at 179 (during six-year trial of Warren's father's estate, Warren's "sensitive fibre was torn by the publicity").

[157] Warren was elected president of the Board of Trustees of the Museum of Fine Arts, chairman of the Boston Art Commission, and a trustee of the Massachusetts General Hospital. BRADLEY, *supra* note 90, at 12.

[158] *See* MASON, *supra* note 6, at 88-93 (Warren and Brandeis involved themselves in public issues).

[159] *See* TANSILL, *supra* note 162, at 265-67 (Warren and other Massachusetts supporters of Bayard's presidential campaign).

[160] LIEF, *supra* note 157, at 179. Some writers have suggested that press accounts of the socially prominent constituted more than mere idle gossip or pandering to mass curiosity. It should be remembered that Warren was a "conservative traditionalist among the patricians" and a member of the Boston merchantile establishment. WESTIN, *supra* note 30, at 348.

[161] *Quoted in* MASON, *supra* note 6, at 70.

[162] While studying at Harvard Law School in 1876, Brandeis developed eye strain. LIEF, *supra* note 157, at 22; MASON, *supra* note 6, at 46. His physician later diagnosed

Perhaps because of the eloquent dissent protesting governmental use of wiretaps in *Olmstead v. United States*,[184] commentators have noted that the concepts first articulated in "The Right to Privacy" "were to remain a life-long concern of [Brandeis]."[185] If, however, privacy issues were truly a life-long concern, this preoccupation seems to have escaped Mason, who in a biography which received the cooperation of Brandeis, discussed his interest in privacy only in terms of the *Harvard Law Review* article and the *Olmstead* dissent, in fewer than four pages of the seven-hundred-page biography.[186]

Although Brandeis was the principal author of the law review article, he was not particularly satisfied with its execution. Shortly before publication he wrote to his fiancee, Alice Goldmark, "The proofs have come of the article on 'Privacy'. . . . I have not looked over all of it yet, but the little I read did not strike me as being as good as I had thought it was."[187] Nor did Brandeis view the article as especially important or far reaching in its potential impact. Again writing to his fiancee shortly after its publication, he admitted that the scope of the article was modest:

> Of course you are right about Privacy and Public Opinion. All law is a dead letter without public opinion behind it. . . . Our hope is to make people see that invasions of privacy are not necessarily borne—and then

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the problem as a muscular disorder which necessitated that he cease reading for a time. LIEF, *supra* note 157, at 22; MASON, *supra* note 6, at 46. Samuel Warren took on the bulk of the task of reading the law to Brandeis, thereby deepening a friendship which was to remain firm until Warren's death in 1910. MASON, *supra* note 6, at 46-47.

[183] In May, 1879 Warren invited Brandeis to join him in establishing a partnership, based in the beginning on Warren family social and business contacts. Brandeis hesitated at first, waiting for the results of an "examination of the prospects of a young law firm and more particularly your [Warren's] own prospects of securing business through your social and financial position." Letter of Louis D. Brandeis to Samuel D. Warren (May 30, 1879), *reprinted in* 1 BRANDEIS LETTERS, *supra* note 62, at 35. Finally satisfied, Brandeis returned to Boston and, according to Auerbach, became "the prototypical lawyer on the make: searching for the proper partner, joining the proper clubs, fashioning a proper firm, and jealously guarding professional prerogatives." J. AUERBACH, UNEQUAL JUSTICE 68 (1976). Here Warren's contacts were of inestimable value to Brandeis, paving the way to acceptance among Boston's social, economic and political elite. Despite Brandeis' claim that "whatever I have achieved, or may achieve is my own—pure and simple—unassisted by the fortuitous circumstance of family influence or social position," Letter of Louis D. Brandeis to Charles Nagel (July 12, 1879), *reprinted in* 1 BRANDEIS LETTERS, *supra* note 62, at 37, he undoubtedly benefited from his friendship with Samuel Warren and the opportunities created by the Warren family influence.

[184] 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *see* note 8 *supra* (quoting from Brandeis' dissent in *Olmstead*).

[185] 1 BRANDEIS LETTERS, *supra* note 62, at 101 n.6.

[186] MASON, *supra* note 6, at 70, 567-69.

[187] Letter from Louis D. Brandeis to Alice Goldmark (Nov. 29, 1890), *reprinted in* 1 BRANDEIS LETTERS, *supra* note 62, at 94-95.

> make them ashamed of the pleasure they take in subjecting themselves to such invasions. Of course, many like Poo Bah desire to be insulted—"court" the insult—as if it were an investigation. The most perhaps that we can accomplish is to start a backfire, as the woodsmen or the prairie men do.[198]

In a letter written to his fiancee two months after publication of the article, he expressed with some intensity a broad-based reaction to the right to privacy which he had articulated in the December, 1890 piece:

> Lots of things which are worth doing have occurred to me as I sit calmly here. And among others to write an article on "The Duty of Publicity"—a sort of companion piece to the last one that *would really interest me more.* You know I have talked to you about the wickedness of people shielding wrongdoers & passing them off (or at least allowing them to pass themselves off) as honest men. Some instances of that have presented themselves within a few days which have fired my imagination.
>
> *If the broad light of day could be let in upon men's actions, it would purify them as the sun disinfects.*
>
> You see my idea; I leave you to straighten out and complete that sentence.[199]

Although the thoughts expressed in these words reveal an understanding of the inherent conflict between privacy and publicity, they also suggest an implicit uncertainty concerning how the balance between the competing needs should be struck.[200]

In acknowledging that "[i]t would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law, but for this, legislation would be required,"[201] the authors of "The Right to Privacy" proposed a statute to protect against privacy invasions.[202] Brandeis, however, apparently did not share

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[198] Letter from Louis D. Brandeis to Alice Goldmark (Dec. 28, 1890), *reprinted in* 1 BRANDEIS LETTERS, *supra* note 62, at 97.

[199] Letter from Louis D. Brandeis to Alice Goldmark (Feb. 26, 1891), *reprinted in* 1 BRANDEIS LETTERS, *supra* note 62, at 100 (emphasis added).

[200] Several years later, Brandeis returned to the "Duty of Publicity" theme in advocating public disclosure of corporate financial arrangements: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light, the most efficient policeman." L. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 62 (1st ed. 1914). The United States Court of Appeals for the Fifth Circuit recently wrote that "Justice Brandeis has been quoted over a 38 year period by parties on both sides of this [privacy] question." Planie v. Gonzalez, 575 F.2d 1119, 1127 n.13 (5th Cir. 1978).

[201] Warren & Brandeis, *supra* note 1, at 219.

[202] Warren & Brandeis, *supra* note 1, at 219 n.3. One of Brandeis' law associates, William H. Dunbar, actually drafted the legislation, which provided as follows:

> SECTION 1. Whoever publishes in any newspaper, journal, magazine, or other periodical publication any statement concerning the private life or affairs of an-

Warren's enthusiasm for such legislation. Years after the publication of the article, Warren tried to prevail on his friend to push for the approval of the proposed statute in the Massachusetts General Court, or to draft some other piece of criminal legislation designed to deter violation of individual privacy by newspapers. In April, 1905 Warren wrote to Brandeis, acknowledging that privacy legislation was "a matter of extreme difficulty," but

> [d]ifficulties, of course, do not stand in our way, and I should like very much to have you draw such a statute as would meet the chief invasions of privacy, without covering more ground than considered public opinion would sustain. No greater service could be rendered the community than the adoption of a well-considered law on this subject.[93]

Brandeis, however, never drafted any proposal.

Auerbach has aptly characterized Brandeis as caught amid a larger conflict between countervailing forces on different sides of a historical watershed:

> Brandeis remains an elusive figure because his passion for personal privacy still makes access to the inner man difficult. Yet there is sufficient evidence to conclude that ambivalence toward modern America pervaded his life and career. It has been suggested that Brandeis, whose distinguished public career fell entirely in the twentieth century, possessed "one of the finest minds of the nineteenth century". . . . Bran-

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other, after being requested in writing by such other person not to publish such statement or any statement concerning him, shall be punished by imprisonment in the State prison not exceeding five years, or by imprisonment in the jail not exceeding two years, or by fine not exceeding one thousand dollars; provided, that no statement concerning the conduct of any person in, or the qualifications of any person for, a public office or position which such person holds, has held, or is seeking to obtain, or for which such person is at the time of such publication a candidate, or for which he or she is then suggested as a candidate, and no statement of or concerning the acts of any person in his or her business, profession, or calling, and no statement concerning any person in relation to a position, profession, business, or calling, bringing such person prominently before the public, or in relation to the qualifications for such a position, business, profession, or calling of any person prominent or seeking prominence before the public, and no statement relating to any act done by any person in a public place, nor any other statement of matter which is of public and general interest, shall be deemed a statement concerning the private life or affairs of such person within the meaning of this act.

SECT[ION] 2. It shall not be a defence to any criminal prosecution brought under section 1 of this act that the statement complained of is true, or that such statement was published without a malicious intention; but no person shall be liable to punishment for any statement published under such circumstances that if it were defamatory the publication thereof would be privileged.

Warren & Brandeis, *supra* note 1, at 219 n.3.

[93] Letter from Samuel D. Warren, Jr., to Louis D. Brandeis (Apr. 10, 1905), *reprinted in* 1 BRANDEIS LETTERS, *supra* note 62, at 341 n.3.

deis labored incessantly to reconcile an older morality with novel conditions. In the end, ambivalence triumphed.[204]

F. *Patrician Values, Mugwumpery, and Changing Definitions of "Newsworthy"*

Stanford law professor Marc Franklin has written that "[t]here is good reason to suspect that although it was stimulated by a specific incident . . . , the Warren-Brandeis article echoed the prevalent desire of social leaders to elevate the moral standards of the masses."[205] In support of his argument he noted that Andrew Carnegie's *The Gospel of Wealth*, which stressed the moral elevation of the poor as an obligation of the wealthy, first appeared in 1889. Franklin suggested that before writing their law review article the young authors had probably read Carnegie's book.[206] Furthermore, Franklin suggested that the rich-man's-burden approach reflected aptly the authors' personal identifications: Warren's inherited and Brandeis' acquired.[207]

The validity of this unalloyed social-uplift motivation theory, however, is questionable. Surely, if Warren and Brandeis were concerned about the role of the press in shaping public opinion on the issue of individual privacy, they might have made some affirmative suggestions, even in footnotes, as to how newspapers could serve a positive function, or have prepared some companion piece to that end.[208] Instead, the tone of the authors toward the press was virtually all negative. Westin has offered a less altruistic appraisal of the reasons for the attack on the press: "[T]he movement begun by the Godkin and Warren-Brandeis essays was essentially a protest by spokesmen for patrician values against the rise of the political and cultural values of 'mass society.' "[209] The motivation, therefore, was protection of

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[204] AUERBACH, *supra* note 193, at 67.

[205] Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107, 112 n.28 (1963).

[206] *Id.*

[207] *Id.*

[208] *See* PEMBER, *supra* note 23, at 23 (if authors hoped to improve press standards, they should have focused on constructive suggestions).

[209] WESTIN, *supra* note 30, at 348. Interestingly, Westin places Warren and Brandeis on opposite "ideological sides of the patrician protest":

> Conservative traditionalists among the patricians, such as Samuel Warren and Brooks Adams, fused concern over the immunities of high society with anger at press muckraking of political and social scandals, though this was one instrument which brought the widespread business and governmental corruption of the era under minimum public controls. Liberals among the patricians, such as Godkin and Brandeis, joined a concern over the privacy of the socially prominent with a fear that the artistically sensitive or intellectually unpopular would be harmed by press intrusions—long a minority position in dominant American culture.

WESTIN, *supra* note 30, at 348.

patrician values and nothing more.[210]

Instead of merely viewing the article as altruisticly didactic or selfishly motivated, it is perhaps useful to regard it as a representative illustration of the Mugwump thought of that period.[211] Indeed, in exploring the roots of the article, it would be a serious omission to overlook its context in intellectual history.

Both Warren and Brandeis were associated with the Mugwump movement of the 1880's, and the message and tone of their article is similar to the self-righteous moralism expressed by contemporary Mugwumps.[212] Although the characterization of Mugwumpery as "a kind of sickly, sentimental Sunday School, 'goody-two-shoes' party which appears desirous of ruling the world not as God has made it but as they would have it,"[213] is hyperbolic, it is not without its kernel of truth. Indeed, Mugwumpery has most frequently been portrayed as an elitist mode of thought and action in which upper-class members of the old Brahmin gentry were motivated by fears of social and economic displacement into supporting independent politics and conservative reforms.

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[210] Pember also suggests that selfishness rather than altruism motivated the authors:

> While the article did reflect a certain concern for the reading habits of the community, the likelihood that this was the motive for its publication is slim. The Warren-Brandeis proposal was essentially a rich man's plea to the press to stop its gossiping and snooping, not an argument for an improvement of general journalistic standards.

PEMBER, *supra* note 23, at 23.

[211] For background on the Mugwump movement and mind, see generally BLODGETT, *supra* note 164; R. HOFSTADTER, THE AGE OF REFORM (1955); A. MANN, YANKEE REFORMERS IN THE URBAN AGE (1954). Although Mugwumps are narrowly characterized as Republicans who, in protest against the "tainted Republicanism" of James Blaine, deserted their party to support Democrat Grover Cleveland in the 1884 election, they are more broadly a generation of politically independent men dismayed and displaced by the "status revolution" which transformed America in the late nineteenth century. Although the movement was national in scope and was not absolutely an upper-class effort, the "Mugwump type," as Hofstadter notes, "flourished . . . most conspicuously about Boston, a center of seasoned wealth and seasoned conscience, where some of the most noteworthy names in Massachusetts were among them. . . ." HOFSTADTER, *supra* at 139.

[212] Brandeis joined the Mugwumps in 1884, and Warren's father was active in the party. MASON, *supra* note 6, at 88. As Brandeis wrote regarding Carl Shurz, "acknowledged mentor" and "father confessor" of Boston Mugwumps, BLODGETT, *supra* note 164, at 7, 31, "[h]e has affected me, as many times before, and as no other moral teacher ever has." Letter from Louis D. Brandeis to Alice Goldmark (Oct. 20, 1890), *reprinted in* 1 BRANDEIS LETTERS, *supra* note 62, at 93. Mugwumps "all shared in some degree a conviction common to the educated mind of their day: a certainty of moral as well as intellectual superiority over the surrounding populace." BLODGETT, *supra* note 164, at 21.

[213] Statement of Senator Zebulon Vance of North Carolina, *quoted in* A. Proctor, Patterns of Diversity Among Massachusetts Mugwumps of 1884, at 25 (1977) (unpublished doctoral dissertation on file at University of Michigan).

Finding it difficult to come to grips with the reality of the burgeoning urbanized, industrialized America, Mugwumps longed for the idealized days of the early nineteenth century.[214] As Blodgett has noted,

> [W]hat finally justified the Mugwump to himself, and justifies an enduring place for him in the history of his era, was his insistence on his own autonomy. . . . The Mugwump sought always to keep open ground between himself and the freshly organized, swiftly enveloping urban society that threatened to destroy the personal freedom he valued so mightily.[215]

It is therefore fair to say that while attempting in "The Right to Privacy" to establish a legal principle to protect individual privacy from what they considered to be the debilitating effects of gossip, Warren and Brandeis were also struggling to defend a traditional, narrow, "patrician" perception of what was "news," what was of public interest and therefore publishable. After painting a dramatically bleak portrait of the Boston newspapers of the day and proposing the new tort remedy,[216] Warren and Brandeis concluded by proposing certain new limitations on the remedy.[217] The major limitation on the new right, prohibiting the publication of matter not of general or public interest, would also implicitly delineate what was newsworthy.[218] Because publication of any matter not in the public interest would potentially subject a newspaper to liability, Warren and Brandeis would by inference consider such a matter nonnewsworthy.

With the exception of indicating that those who hold or who are candidates for public office might have to tolerate closer personal scrutiny than the rest of the population, however, the authors made no attempt to define substantively what in practice constitutes "public or general interest."[219] Although publication of matter outside the public or general interest would presumably subject the press to tort liability, the authors neglected to define the scope or otherwise

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[214] BLODGETT, *supra* note 164, at 32. Mugwumps felt that they "were being overshadowed and edged aside in the making of basic political and economic decisions. . . . They no longer called the tune, no longer commanded their old deference. They were expropriated, not so much economically as morally. . . . They were less important and they knew it." HOFSTADTER, *supra* note 211, at 137, 140. As Proctor explained: "The mugwumps were, at base, moralists, their speeches continually reiterated the belief that morality must be at the heart of American politics. They lectured their audiences on the value of electing moral leaders to government and purging the political process of its evil qualities . . . ." Proctor, *supra* note 213, at 292.

[215] BLODGETT, *supra* note 164, at 46.

[216] Warren & Brandeis, *supra* note 1, at 196-97.

[217] Warren & Brandeis, *supra* note 1, at 214-19.

[218] Warren & Brandeis, *supra* note 1, at 214-16.

[219] Warren & Brandeis, *supra* note 1, at 215.

to explain where to draw the public-private line.[220] Appearing at one point to recognize the somewhat tautological nature of their argument, Warren and Brandeis stated:

> Any rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case,—a necessity which unfortunately renders such a doctrine not only more difficult of application, but also to a certain extent uncertain in its operation and easily rendered abortive.[221]

The difficulty that Warren and Brandeis encountered in formulating a definition of matters of public interest, or news, is not surprising. In light of the rapid social and economic changes of the late nineteenth century, the concept of "newsworthiness" was ill-defined and undergoing a transformation. Nevertheless, other scholars and journalists strove to define "newsworthy." During the summer of 1890, Eugene M. Camp of *Century Magazine* published the results of a survey of journalists and editors that he had conducted in order to ascertain how they defined "the commodity in which they deal."[222] The consensus reflected the view that *"[n]ews is an unpublished event of present interest."*[223] Camp ultimately adopted a flexible "community standards" definition, subject to change as the interests of the public changed. Newspaper editors were to weigh the news:

> Events which are printed are those which the editor believes to be of the greatest interest . . . ; and the lengths and positions . . . illustrate the

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[220] Warren & Brandeis, *supra* note 1, at 215. In fact Warren and Brandeis rejected any specific test and offered a rather obvious and unhelpful example of what could and could not be printed:

> Some further discrimination is necessary, therefore, than to class facts or deeds as public or private according to a standard to be applied to the fact or deed *per se*. To publish of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly, is an unwarranted, if not an unexampled, infringement of his rights, while to state and comment on the same characteristics found in a would-be congressman could not be regarded as beyond the pale of propriety.

Warren & Brandeis, *supra* note 1, at 215.

[221] Warren & Brandeis, *supra* note 1, at 215-16. They did concede, however, that "it is only the more flagrant breaches of decency and propriety that could in practice be reached, and it is not perhaps desirable even to attempt to repress everything which the nicest taste and keenest sense of the respect due to private life would condemn." Warren & Brandeis, *supra* note 1, at 216.

[222] Camp, *What's the News?*, 40 CENTURY MAGAZINE 260, 260 (1890).

[223] *Id.* Camp elaborated:

> It is an event, rather than a fact or circumstance, because it contains the element of happening. It is unpublished, in the sense that it is unknown to the readers of the newspapers whose editor contemplates its publication. It is of present interest—present, because it changes existing conditions or impressions; and of interest, because it affects either the heart or the pocket-book of humanity.

Id.

> editor's notion of the public's estimate of their varying values as news. While the editor edits the newspaper, the public edits the editor; hence it follows that the public, so greatly given to grimaces over the perusal of its follies, possesses full power to season its news to its own taste.[224]

Although Warren and Brandeis never explicitly defined matters of legitimate interest to the community, they gave the strong impression that Camp's definition of news was too broad and that editors should largely limit news to the disinterested reporting of public speeches, public records and different positions advocated in public debates. It seems that the two authors might have preferred the newspapers of eighteenth-century America, which were intensely political in their content and directed toward the small literate elite in the community. The patrician view held that news considered worthy of print was made by public figures, not by ordinary people.[225] Newspapers existed to serve the ends of public policy, not to cater to the mass tastes of the general public.[226]

Over the years, however, the newsworthiness defense has been broadened to cover not just political leaders and candidates, but also people who through their chosen work voluntarily invite public praise, criticism and comment.[227] The defense has also been extended to bar recovery by plaintiffs who are involuntarily thrust into the public eye as long as they are objects of legitimate public interest.[228] Moreover, legitimate public interest tends to be measured by what empirically does interest rather than by what normatively should interest the public. Furthermore, courts have been unwilling to make a distinction between news as information and news as entertainment.[229] The stunted development of the public disclosure tort remedy may indicate that both judicial and public views of the role of the press and the community standards definition of newsworthy have over the years differed markedly from the patrician view advocated by Warren and Brandeis.

G. *Roots of the Article: A Speculation on the Dunbar Connection*

Quite clearly Warren and Brandeis preferred the traditional style of journalism. The conclusion that this preference, combined with disdain for non-issue-oriented publications, weighed to a considera-

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[224] *Id.*

[225] Warren & Brandeis, *supra* note 1, at 214-15.

[226] *See* Camp, *supra* note 78, at 314 (news, like electricity or steam, is force to be used to do good for society).

[227] *See* RESTATEMENT (SECOND) OF TORTS § 652D, Comment e, at 389 (1977) (voluntary public figures cannot complain of unfavorable publicity).

[228] *Id.*, Comment f, at 389.

[229] *Id.*, Comment g, at 390.

ble extent in the decision to publish "The Right to Privacy" is compelling. Although Warren and Brandeis were unwilling to accord much credit to Godkin and his July, 1890 article for its impact on their decision to write,[230] the similarities between his piece and "The Right to Privacy" support the argument that they shared his journalistic views and hoped to use the proposed tort remedy as a sword to fend off the purveyors of the "new journalism."[231]

Furthermore, a peculiar and previously unexplored connection that adds to the plausibility of this conclusion is the association of William H. Dunbar with the law firm of Warren & Brandeis.[232] In their discussion of possible legislative remedies for press invasions of privacy, the authors noted that Dunbar, identified only as a member of the Boston Bar, had drafted the model legislation which appeared in a footnote at the conclusion of the article.[233] What makes the Dunbar connection significant is that he was the son of Charles Franklin Dunbar, who from 1859 to 1869 was part owner and editor of the *Boston Daily Advertiser*,[234] the oldest of the dailies and the city's prime source for business and financial news.[235]

Charles Dunbar and the *Advertiser* were Boston's leading examples of the traditional, personal style of journalism.[236] As Harvard College President Charles William Eliot stated in 1900, Dunbar's *Advertiser* "became by common consent the leading paper in Boston and no

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[230] *See* Letter from Louis D. Brandeis to Samuel D. Warren (Apr. 8, 1905), *reprinted in* 1 BRANDEIS LETTERS, *supra* note 62, at 302-03 (discounting Godkin's article as impetus for "The Right to Privacy"). In their article the authors mentioned only that "the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer." Warren & Brandeis, *supra* note 1, at 195. *See* notes 64-65 *supra* and accompanying text (quoting authors' correspondence concerning origins of article).

[231] Ernst and Schwartz have written that in Godkin's article, "[T]he word privacy appears in contexts that cause one to wonder if he [Godkin] and Warren and Brandeis were not in cahoots." ERNST & SCHWARTZ, *supra* note 81, at 49. In fact, Godkin played a significant role in the Mugwump movement with which Warren and Brandeis were associated. Blodgett has written that to Boston Mugwumps, "Godkin's *Nation* was their bible." BLODGETT, *supra* note 164, at 31.

[232] Brandeis' biographer, Alpheus P. Mason, has described Dunbar as a brilliant colleague whose work was greatly respected by the senior partners. MASON, *supra* note 6, at 82. Dunbar was instrumental in upgrading the positions of the associates in the firm, and in 1897, succeeded in changing the name of the firm to Brandeis, Dunbar & Nutter. MASON, *supra* note 6, at 85.

[233] Warren & Brandeis, *supra* note 1, at 219; *see* note 202 *supra* (transcription of proposed legislation).

[234] 5 DICTIONARY OF AMERICAN BIOGRAPHY 504 (A. Johnson & D. Malone eds. 1930) [hereinafter cited as AMERICAN BIOGRAPHY].

[235] *See* 2 METROPOLITAN BOSTON: A MODERN HISTORY 509 (A. Langtry ed. 1929) [hereinafter cited as METROPOLITAN BOSTON] (*Advertiser* first of major Boston dailies).

[236] *See generally* MOTT, *supra* note 79, at 444-45 ("personal journalism" was marked by leading editors emphasizing their own personalities in papers).

newspaper since has exercised the same influence on this community."[237] "It was a mark of respectability to have the paper on the doorstep in the morning," wrote one historian. "Through a long period it was written for and sold to the educated and fastidious classes. One knew every day just what to expect from it. The makeup rarely changed."[238] According to E.P. Mitchell, editor in chief of the *New York Sun*, who had apprenticed at the *Advertiser*,

> We used to believe that the regulations governing the use of English in the *Daily Advertiser* had been drawn up originally by the faculty of Harvard University in solemn conclave and that the professors met from time to time to devise new refinements of speech and to investigate the fidelity of our observance.[239]

The *Advertiser* was regarded as the exponent of the old-time conservatism and social propriety of the city.[240] Dunbar preferred to write about finance, war loans, the banking arts, the suspension of specie payments, and general economics.[241] During Dunbar's editorship, observers praised the paper for editorials both vigorous and free from rancour.[242]

Toward the last quarter of the century, however, the *Advertiser* fell behind in the scramble for popular favor. "In a changing world it made few changes. Gradually it lost what had seemed an unbreakable hold on the affections of its constitutency . . . [which] had tolerated the big clumsy blanket sheet with its interminable columns."[243] The development of the society-oriented *Gazette* and the growth of the more sensational dailies such as the *Globe* and the *Journal* cut into the circulation of the *Advertiser*. When Dunbar sold his financial interest and resigned as editor of the *Advertiser* in 1869, reportedly because of poor health,[244] the *Advertiser* had already begun to decline. Historian Frank Mott has noted that from 1872 to 1892 the *Daily Advertiser* circulation was reduced to a "faithful following of less than 18,000," and it was deemed to be "clearly moribound."[245] Even

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[237] Charles W. Eliot, Memorial Address before Massachusetts Historical Society (1900), *quoted in* 2 METROPOLITAN BOSTON, *supra* note 235, at 513.

[238] 2 METROPOLITAN BOSTON, *supra* note 235, at 509.

[239] E. MITCHELL, MEMOIRS OF AN EDITOR 74 (1924).

[240] *Id.* at 75; 2 METROPOLITAN BOSTON, *supra* note 235, at 510.

[241] 2 METROPOLITAN BOSTON, *supra* note 235, at 513. After his resignation from the *Advertiser*, Dunbar was appointed to the faculty at Harvard, where he became a distinguished political economist. 2 METROPOLITAN BOSTON, *supra* note 235, at 513.

[242] 2 METROPOLITAN BOSTON, *supra* note 235, at 510.

[243] 2 METROPOLITAN BOSTON, *supra* note 235, at 510.

[244] 5 AMERICAN BIOGRAPHY, *supra* note 234, at 504.

[245] MOTT, *supra* note 79, at 452. By the mid-eighties, the *Daily Advertiser* "had entered a somewhat long period of deliquescence." CHAMBERLIN, *supra* note 102, at 158. The *Advertiser* was also listed as one of the leading cosmopolitan Mugwump newspapers. Proctor, *supra* note 213, at 32.

the addition of an evening edition in 1884 failed to regenerate the old *Advertiser*.[246]

Brandeis and Warren belonged to the *Advertiser*'s "faithful following."[247] It is therefore unlikely that the plight of Charles Dunbar's newspaper escaped their attention, and this clear illustration of the public's changing journalistic tastes may have contributed to their negative attitude toward the more popular Boston newspapers. Furthermore, it is likely that the demise of his father's once flourishing journal, as a result of the efforts of less discreet newspaper entrepreneurs, may have motivated William Dunbar to propose the strict antipress legislation.[248]

IV. Conclusion

This evaluation of the possible reasons that motivated the publication of the landmark article yields no clearcut answer to the question: why did Warren and Brandeis really decide to write "The Right to Privacy?"

The Prosser and Mason theories that Warren was the victim of press excesses are simply not borne out by close examination of the accused newspapers. Franklin's rich-man's-burden theory lacks substance because the tone of the article betrays little interest in improving the masses. Westin's "patrician" theory has merit, but it seems incomplete. If the explanation that the article was written because Warren overreacted to the mere mention of his family's name in print is too trivial to entertain seriously, then the most plausible reason seems to be that the article reflects Mugwump thought of the late nineteenth century. Surely Mugwumpery provides an additional link between Godkin and Warren and Brandeis. In perceiving the role of newspapers to be the reporting of matters of narrowly defined public interests, and regarding the more general coverage of the activities of individuals to be both offensive and insulting, Warren and Brandeis (and Godkin) were clinging to a minority view of newsworthiness, even as defined by their own contemporaries. Warren's acute sensitivity and Brandeis' eloquent ambivalence heightened the atmosphere in which this quaint and anachronistic article was written. Thirty-nine years after the Warren-Brandeis article appeared, an-

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[246] *See* Emery, *supra* note 70, at 293 (*Advertiser* established its evening edition, the *Record*, in 1884).

[247] When Brandeis decided to join publicly with the Mugwumps in 1884, he chose the *Advertiser* as the vehicle for publishing the announcement. Mason, *supra* note 6, at 88.

[248] Mason portrayed Dunbar as "a highly sensitive person." Mason, *supra* note 6, at 82. In addition to persuading Brandeis and Warren of the merits of the restrictive legislation, Dunbar may also have been the driving force behind the attack on the press and the recognition of the independent right of privacy.

other *Harvard Law Review* contributor asked whether their "brilliant essay has been as fruitful in its actual results in case law as in its contribution to legal analysis."[219] His answer was inconclusive. Eighty-nine years after the original publication, however, it is fair to conclude that it has not.

Although the article has deserved historical value, it has had only a limited impact on the substantive development of "public disclosure" privacy law. To the extent this area of the law has developed, it has done so in ways clearly outside of the original framework, in ways in which Warren and Brandeis probably never anticipated. One of the enduring ironies of the Warren-Brandeis legacy is that the principal thrust of the article, their articulation of a legal basis for protecting individuals from press invasions into their personal affairs, is perhaps the least-developed area of the entire body of privacy law. The "public interest" and "newsworthy" exceptions have all but swallowed up the public disclosure strand of the tort of invasion of privacy. To the extent that this is true, perhaps all that is left is the self-regulating awareness of many publishers, editors and reporters that, because individuals can bring legal actions for the publication of offensive, truthful reports, discretion dictates the use of utmost caution when entering gray areas.

At a symposium on privacy a decade ago, Clark Havighurst noted that the Warren-Brandeis article was "something of a lawyer's catharsis rather than objective scholarship or judicial craftsmanship, and the law has never absorbed the privacy concept comfortably or made it altogether its own."[220] Perhaps some of the reason lies in the limitations of the roots of the article itself.

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[219] 43 HARV. L. REV. 297, 297 (1929).

[220] Havighurst, Symposium, *Privacy—Foreword*, 31 LAW & CONTEMP. PROB. 251, 251 (1966).