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Privacy's Other Path: Recovering the Law of Confidentiality


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Privacy's Other Path: Recovering the Law of Confidentiality

NEIL M. RICHARDS* & DANIEL J. SOLOVE**

The familiar legend of privacy law holds that Samuel Warren and Louis Brandeis “invented” the right to privacy in 1890, and that William Prosser aided its development by recognizing four privacy torts in 1960. In this Article, Professors Richards and Solove contend that Warren, Brandeis, and Prosser did not invent privacy law, but took it down a new path. Well before 1890, a considerable body of Anglo-American law protected confidentiality, which safeguards the information people share with others. Warren, Brandeis, and later Prosser turned away from the law of confidentiality to create a new conception of privacy based on the individual’s “inviolate personality.” English law, however, rejected Warren and Brandeis’s conception of privacy and developed a conception of privacy as confidentiality from the same sources used by Warren and Brandeis. Today, in contrast to the individualistic conception of privacy in American law, the English law of confidence recognizes and enforces expectations of trust within relationships. Richards and Solove explore how and why privacy law developed so differently in America and England. Understanding the origins and developments of privacy law’s divergent paths reveals that each body of law’s conception of privacy has much to teach the other.

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INTRODUCTION

According to the oft-told legend, the right to privacy was born when Samuel Warren and Louis Brandeis penned *The Right to Privacy* in 1890.¹ Spanning just twenty-eight pages in the *Harvard Law Review*, the article identified privacy as an implicit concept running throughout Anglo-American common law. Commentators have hailed the article as the "most influential law review article of all"² and "one of the most brilliant excursions in the field of theoretical jurisprudence."³ Countless others have agreed.⁴ In addition to giving birth to four privacy torts, the article structured the conceptual landscape of privacy

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

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

3. Elbridge L. Adams, *The Right of Privacy, and Its Relation to the Law of Libel*, 39 AM. L. REV. 37, 37 (1905).

4. P. ALLAN DIONISPOULOS & CRAIG R. DUCAT, *THE RIGHT TO PRIVACY: ESSAYS AND CASES* 20 (1976) (*The Right to Privacy* is "perhaps the most influential law journal piece ever published"); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383 (1960) (*The Right to Privacy* is an "outstanding example of the influence of legal periodicals upon the American law").

more generally, shaping the development of statutory, constitutional, and other privacy protections.⁵

The conventional wisdom, shared by both admirers and critics alike, is that Warren and Brandeis constructed a right to privacy out of a very meager body of law. Indeed, Warren and Brandeis have been hailed as the “inventors” of the right to privacy.⁶ As Roscoe Pound noted, they did “nothing less than add a chapter to our law.”⁷ Before their article, the conventional wisdom goes, the law did little to establish a firm foundation for the protection of privacy. With brilliant maneuvering of limited precedent, Warren and Brandeis achieved the legal equivalent of pulling a rabbit out of a hat.⁸

The conventional wisdom, however, is wrong. In this Article, we argue that Warren and Brandeis did not invent the right to privacy from a negligible body of precedent but instead charted a new path for American privacy law. By 1890, a robust body of confidentiality law protecting private information from disclosure existed throughout the Anglo-American common law. Confidentiality focuses on relationships; it involves trusting others to refrain from revealing personal information to unauthorized individuals.⁹ Rather than protecting the information we hide away in secrecy, confidentiality protects the information we share with others based upon our expectations of trust and reliance in relationships. Building upon the confidentiality case of *Prince Albert v. Strange*,¹⁰ Warren and Brandeis pointed American common law in a new direction, toward a more general protection of “inviolable personality” against invasions by strangers. The celebrated torts scholar William Prosser cemented this change of

5. As one commentator has observed, Warren and Brandeis’s article “has attained what some might call legendary status” and has been a “seminal force in the development of a ‘right to privacy’ in American law.” Benjamin E. Bratman, *Brandeis and Warren’s The Right to Privacy and the Birth of the Right to Privacy*, 69 TENN. L. REV. 623, 624 (2002).

6. See, e.g., James H. Barron, *Warren and Brandeis, The Right to Privacy*, 4 *Harv. L. Rev.* 193 (1890); *Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875, 877 (1979) (there is “near unanimity among courts and commentators that the Warren-Brandeis conceptualization created the structural and jurisprudential foundation of the tort of invasion of privacy”); Ruth Gavison, *Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech*, 43 S.C. L. REV. 437, 438 (1992) (Warren and Brandeis “single-handedly created a tort”); Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703, 703–04 (1990).

7. ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN’S LIFE* 70 (1946) (quoting Roscoe Pound).

8. See, e.g., WALTER F. PRATT, *PRIVACY IN BRITAIN 19–37* (1979); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 966–72 (1964) (arguing that although Warren and Brandeis’s right to privacy expressly differentiated itself from existing doctrines such as defamation, property, and emotional distress, they actually “went very little beyond . . . giving ‘their right’ and ‘their interest’ a name and distinguishing it from other rights or interests. It is only in asides of characterization and passing attempts at finding a verbal equivalent of the principle of privacy that we may find any further clues to the interest or value they sought to protect”); Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 655 (1991); Walter F. Pratt, *The Warren and Brandeis Argument for a Right to Privacy*, 1975 PUB. L. 161.

9. See Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087, 1137–38 (2006); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 526–29 (2005).

10. (1848) 41 Eng. Rep. 1171 (Ch.).

direction in his 1960 article, *Privacy*,¹¹ and in the *Second Restatement of Torts*, for which he served as a reporter. Prosser not only established American privacy law as four related torts, but also minimized the importance of confidentiality as a concept in American law. By contrast, English law developed a flexible and powerful law of confidentiality from *Prince Albert v. Strange*, the very same case underpinning Warren and Brandeis's conception of privacy.

Thus far, the story of this fork in the path of privacy law has remained largely unexplored, yet it has had far-reaching effects on the law on both sides of the Atlantic. What the law of privacy protects and does not protect today traces back in large part to this critical divergence in the evolution of the common law of information disclosure. In America, four privacy torts emerged from Warren and Brandeis's article—public disclosure of private facts, intrusion upon seclusion, appropriation of name or likeness, and false light.¹² English courts repeatedly considered whether to adopt the four privacy torts spawned by Warren and Brandeis and consistently refused to do so.¹³ However, the English law of confidentiality has expanded to redress some (though not all) of the injuries protected by the Warren and Brandeis torts.

The law of confidentiality in England also has attributes that the American privacy torts lack. In America, the prevailing belief is that people assume the risk of betrayal when they share secrets with each other. But in England, spouses, ex-spouses, friends, and nearly anyone else can be liable for divulging confidences.¹⁴ As one English court noted, “when people kiss and later one of them tells, that second person is almost certainly breaking a confidential arrangement.”¹⁵ Confidentiality thus recognizes that nondisclosure expectations emerge not only from norms of individual dignity, but also from norms of relationships, trust, and reliance on promises. American privacy law has never fully embraced privacy within relationships; it typically views information exposed to others as no longer private. Although a tort remedying breach of confidence would emerge later on in American law, it developed slowly in comparison to the Warren and Brandeis privacy torts.

In this Article, we examine why American and English privacy law split apart in the twentieth century and analyze the consequences of this divergence on both sides of the Atlantic. Although there is some scholarship discussing the Warren and Brandeis article itself, the complete story of the development of the right to privacy in the common law has been neglected in the literature. By

11. Prosser, *supra* note 4.

12. *Id.* at 389.

13. *See, e.g.,* Kaye v. Robertson, [1991] F.S.R. 62, 66 (C.A.) (U.K.).

14. *See, e.g.,* Barrymore v. News Group Newspapers, [1997] F.S.R. 600 (Ch.) (U.K.) (lover liable for breach of confidence); Stephens v. Avery, (1988) 1 Ch. 449 (U.K.) (friend liable for breach of confidence); Argyll v. Argyll, (1967) 1 Ch. 302 (U.K.) (spouse liable for breach of confidence).

15. *Barrymore*, [1997] F.S.R. at 601.

revisiting the history, we reveal that the common law of privacy did not unfold according to one path, but two. While American privacy law has centered around the individual's inviolate personality, English privacy law has focused on social relationships. Each body of privacy law has attributes that the other lacks, and English and American conceptions of privacy have much to learn from each other.

Moreover, our findings complicate existing understandings of privacy law in the Western legal canon. In a recent article, James Whitman contrasts two "western cultures of privacy," an American tradition of liberty rooted in the protection of the home and a European tradition of dignity rooted in protection of feelings, which Warren and Brandeis's theory introduced into American law.¹⁶ Our examination of the history reveals that the law of privacy in the West is far more complex than a dichotomy between liberty and dignity. Confidentiality represents a third understanding of privacy, one with firm foundations in both American and English jurisprudence. For all their differences, conceptions of privacy based on liberty and dignity often have been highly individualistic. Confidentiality, in contrast, is a significantly different conception of privacy—one based on the protection of relationships.

In Part I, we debunk the myths surrounding the birth of the right to privacy by discussing the extensive law protecting privacy as confidentiality that existed prior to Warren and Brandeis's article. In Part II, we examine the divergent paths of privacy and confidentiality law in America and England in the aftermath of Warren and Brandeis's momentous article, and we discuss the profound consequences of these developments.

I. PRIVACY'S DEFINING MOMENT

According to the legend surrounding the Warren and Brandeis article, there was scant law on the books to protect privacy until Warren and Brandeis pieced together various fragments of law to create a robust right to privacy. This legend, however, is myth.

Warren and Brandeis did not give birth to the right to privacy; they shifted its conceptual underpinnings away from confidentiality and toward what they called "inviolable personality." By 1890, a rich body of law had developed to protect privacy as confidentiality. Its very existence at the time Warren and Brandeis wrote their article has been virtually ignored. Warren and Brandeis gave some recognition to this body of law, but their project attempted to steer the law toward protecting what they believed to be a broader conception of privacy. The then-flourishing law of confidentiality became stunted in its development. In this Part, we tell the story that has

16. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *YALE L.J.* 1151 (2004).

become obscured by the lore surrounding Warren and Brandeis's article.

A. THE RIGHT TO PRIVACY AND INVIOLEATE PERSONALITY

Samuel Warren and Louis Brandeis published their famous article, *The Right to Privacy*, in the *Harvard Law Review* in 1890. The two men had met at Harvard Law School. Brandeis was from Kentucky, the child of Jewish immigrants who prospered as the result of a Louisville grain business,¹⁷ while Warren came from a wealthy and prominent Boston family.¹⁸ They finished law school with Brandeis ranked first in the class and Warren second, and a few years later, they started a law firm together.¹⁹ Brandeis was one of the original founders of the *Harvard Law Review* in 1887, and he and Warren co-authored three articles in early volumes. *The Right to Privacy* was their third article, and it became the most famous product of their collaboration—hardly a surprise since their first two articles were about the obscure topic of pond law.²⁰ Their article would forever change the intellectual landscape of American privacy law.

Warren and Brandeis framed their article around the intersection of the news media and new technology. The newspaper industry was undergoing an amazing growth during the second half of the nineteenth century. Between 1850 and 1890, the number of newspapers increased from 100 to 900, and the number of readers grew from approximately 800,000 to more than 8 million.²¹ Warren and Brandeis complained that journalism had become sensationalistic and that the “press is overstepping in every direction the obvious bounds of propriety and 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.”²² Indeed, the private papers of the two men suggest that perceived press invasions into the “social privacy” of Brahmin families like the Warrens prompted Warren to enlist his friend Brandeis in the project.²³

Warren and Brandeis were particularly concerned about the new technology of “[i]nstantaneous photograph[y.]”²⁴ In 1884, the Eastman Kodak Company produced the “snap camera,” a small inexpensive camera that the general public could afford. Before the snap camera, cameras had been expensive and heavy; they had to be set up and people would have to pose to have pictures taken. The snap camera enabled people to take candid pictures and created a “craze” for

17. MASON, *supra* note 7, at 23–25; MELVIN I. UROFSKY, *LOUIS BRANDEIS AND THE PROGRESSIVE TRADITION* 2 (1981).

18. DON R. PEMBER, *PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT* 21 (1972).

19. *Id.* at 22.

20. See Samuel D. Warren & Louis D. Brandeis, *The Law of Ponds*, 3 HARV. L. REV. 1 (1889); Samuel D. Warren, Jr. & Louis D. Brandeis, *The Watuppa Pond Cases*, 2 HARV. L. REV. 195 (1888).

21. See GINI GRAHAM SCOTT, *MIND YOUR OWN BUSINESS: THE BATTLE FOR PERSONAL PRIVACY* 37–38 (1995).

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

23. See PEMBER, *supra* note 18, at 24–25.

24. *Id.* at 25.

amateur photography by thousands of people who had previously not been able to afford a camera.²⁵

These developments prompted Warren and Brandeis to search for a legal right to protect individual privacy. "It is our purpose," the authors wrote, "to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is."²⁶ Warren and Brandeis contended that the law currently did not provide sufficient protection to privacy, but they demonstrated how a right to privacy could be derived using common law reasoning.

In making this argument, Warren and Brandeis faced at least two practical and theoretical challenges. First, there was a paucity of legal support for their claims.²⁷ Although the law protected somewhat related concepts such as breach of confidence, trespass, and defamation, it did not protect against strangers taking unauthorized photographs or disclosing true private facts about a person. The second problem that Warren and Brandeis faced was remedial. Late nineteenth-century law was deeply reluctant to protect injury to emotions or feelings, preferring to grant remedies to more quantifiable harms, such as injury to one's property or physical person.²⁸ Warren and Brandeis attempted to solve each of these problems by creative readings of Judge Thomas Cooley's seminal torts treatise and the famous English case of *Prince Albert v. Strange*.

Warren and Brandeis famously asserted that the common law "secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."²⁹ This right "is merely an instance of the enforcement of the more general right of the individual to be let alone."³⁰ Warren and Brandeis adopted the "right to be let alone" language from Cooley's 1888 treatise *The Law of Torts*.³¹ Cooley was one of the leading jurists of his day,³² a justice of the Michigan Supreme Court

25. Robert E. Mensel, "Kodakers Lying in Wait": *Amateur Photography and the Right of Privacy in New York, 1885-1915*, 43 AM. Q. 24, 28 (1991).

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

27. See PRATT, *supra* note 8, at 19-37.

28. See e.g., G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 105-06 (expanded ed. 2003); Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 816 (1990); Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 140-41 (1992).

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

30. *Id.* at 205.

31. *Id.* at 195 & n.4 (citing THOMAS M. COOLEY, THE LAW OF TORTS 29 (2d ed. 1888)). The first edition of Cooley's torts treatise in 1880 also contained the phrase. See THOMAS M. COOLEY, THE LAW OF TORTS 29 (1st ed. 1880) [hereinafter COOLEY, LAW OF TORTS FIRST EDITION].

32. See STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM 102-05 (2000) (discussing Cooley's influence on constitutional theory); WHITE, *supra* note 28, at 115 (noting that Cooley was one of a handful of judges who contributed to the intellectual history of torts and that his torts treatise was "widely cited").

and the author of the principal treatises on constitutional law and torts.³³ Cooley's "right to be let alone" was merely a passing phrase in a discussion of why tort law protected against not only batteries but also assaults with no physical contact. Cooley noted that in assaults, victims suffered "a shock to the nerves, and the peace and quiet of the individual is disturbed for a period of greater or lesser duration."³⁴ Warren and Brandeis certainly found useful Cooley's recognition of mental injury as a basis for tort recovery, but Cooley's usage of "the right to be let alone" was fleeting and had no connection to privacy rights. By contrast, Cooley devoted an entire chapter of the same treatise to the law of "confidential relations," but Warren and Brandeis did not discuss it.³⁵

Warren and Brandeis also based much of their argument for a right to privacy upon *Prince Albert v. Strange*, an English case from 1848.³⁶ *Prince Albert* was a famous confidentiality and literary property case that Warren and Brandeis artfully (and perhaps disingenuously) recharacterized as a privacy case. The dispute arose when Queen Victoria and her husband Albert, the Prince Consort, sued in equity to prevent the exhibition by William Strange of etchings that the royal couple had made of their family. They intended the etchings to be shared only with their family and close friends. In addition to the etchings, the Royal Family sought to prevent the publication of a descriptive catalog of the exhibit. Strange apparently obtained the plates with which to make copies of the etchings from an assistant to the palace printer who had provided them to him "in violation of the confidence reposed in him."³⁷ In ruling for the Queen and the Prince, Vice Chancellor Bruce suggested in dictum that a catalog of the etchings could "shew the bent and turn of the mind, the feelings and taste of the artist."³⁸ Bruce went on to suggest that "[a] man may employ himself in private in a manner very harmless, but which, disclosed to society, may destroy the comfort of his life, or even his success in it."³⁹ On appeal, the Lord Chancellor agreed that Strange had no right to print and sell the etchings or the catalog. The Chancellor concluded that Prince Albert had a common law literary property right in the unpublished work—essentially, a common law copyright in unpublished works. The author had the right to keep his works from being published to protect his "private use and pleasure."⁴⁰

Building upon the dictum from Bruce's opinion below in *Prince Albert*, Warren and Brandeis argued that traditional intellectual property concepts came

33. See generally THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1st ed. 1868); COOLEY, LAW OF TORTS FIRST EDITION, *supra* note 31.

34. COOLEY, LAW OF TORTS FIRST EDITION, *supra* note 31, at 29.

35. *Id.* This body of law is discussed in greater detail in Part II. See *infra* notes 152–156 and accompanying text.

36. (1848) 41 Eng. Rep. 1171 (Ch.).

37. *Prince Albert v. Strange*, (1849) 64 Eng. Rep. 293, 295 (Ch.).

38. *Id.* at 312 (Bruce, V.C.).

39. *Id.*

40. *Prince Albert*, 41 Eng. Rep. at 1178.

close to protecting privacy, but were still too focused on remedying injuries to property such as lost profits. Concerned with finding a remedy for “mere injury to the feelings”⁴¹ caused by the publication of private facts about individuals, Warren and Brandeis posited that “the legal doctrines relating to infractions of what is commonly termed the common-law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy, which properly understood affords a remedy for the evils under consideration.”⁴² *Prince Albert* suggested that intellectual property law could afford a remedy of restricting publication in unpublished works. Warren and Brandeis took this facet of the opinion and used it to turn *Prince Albert* from an opinion protecting intellectual property rights to a case protecting individual feelings and emotions from the pain of unwanted publicity. The authors concluded that the “principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.”⁴³ They thus reasoned that the rights protected in *Prince Albert* were “part of the more general right to the immunity of the person—the right to one’s personality.”⁴⁴ Of course, this reading (much like Bruce’s dictum itself) had little support in the Anglo-American common law of literary property at the time.⁴⁵

In taking this creative reading of the case, Warren and Brandeis minimized the second basis for the judgment in *Prince Albert v. Strange*—breach of confidence. The Lord Chancellor’s opinion on appeal and the Vice Chancellor’s opinion below noted that confidentiality law provided an independent basis for granting the injunction against publication of the exhibit catalog. Because Victoria and Albert had circulated copies of the etchings only to a few friends, and had only sent copies outside such a circle to the printer for purpose of making these copies, the Lord Chancellor concluded that Strange’s possession “must have originated in a breach of trust, confidence, or contract,” most likely by a clerk to the royal printer.⁴⁶ Disclosure represented a breach of confidence because a clerk to trusted professionals like printers and merchants owed the same implied contractual duty as his master “that he will not make public that which he learns in the execution of his duty as clerk.”⁴⁷ Thus, the printer’s assistant had a duty to the Queen and the Prince to maintain the confidentiality of their etchings. The breach of this duty could be enforced against subsequent

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

42. *Id.* at 198.

43. *Id.* at 205.

44. *Id.* at 207.

45. See, e.g., PRATT, *supra* note 8, at 26–32; Post, *supra* note 8, at 658. Robert Post notes further that “even Brandeis himself appears later to have abandoned any pretension that common law copyright could be given the interpretation he and Warren advocated in their article.” *Id.* (quoting Brandeis’s dissent in *International News Service v. Associated Press*, 248 U.S. 215, 253–55 (1918)).

46. *Prince Albert v. Strange*, (1848) 41 Eng. Rep. 1171, 1179 (Ch.).

47. *Id.* at 1179.

holders of the etchings and the plates used to make copies of them. Strange's catalog was made with the plates he obtained from a breach of confidence. Because the catalog could not have been produced without the plates, Strange was enjoined from distributing it under a breach of confidence theory.

Warren and Brandeis were well aware of the body of confidentiality law on the books in 1890. Although they noted that breach of confidence had been used in a number of English cases to protect private information from disclosure, they rejected this doctrine because it did not serve their purposes.⁴⁸ Then as now, confidentiality is about protecting information from disclosure in the context of relationships. But the injury which Warren and Brandeis were most concerned about—the publication of embarrassing facts about people by the press—did not involve the kind of relationships the law had to that point protected. Rather than protecting the reliance interest in nondisclosure of information in relationships, Warren and Brandeis sought a right against the world to protect hurt feelings.

For example, although one English case had found a breach of confidence where a photographer had used one of his female client's photographs as a Christmas card without her consent,⁴⁹ this holding did not extend to nonconsensual snap photography outside the context of a photographer-client relationship or, as Warren and Brandeis put it, the "granting [of] a remedy against a stranger."⁵⁰ Warren and Brandeis were not satisfied with confidentiality because they had in mind the candid photographer, a stranger who did not have a relationship with the subject of the photo. They observed that with earlier photographic technology, "one's picture could seldom be taken without his consciously 'sitting' for the purpose."⁵¹ Accordingly, photography required a relationship between photographer and subject. Warren and Brandeis argued that "since the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrines of contract and of trust are inadequate to support the required protection."⁵² Moreover, they presented the hypothetical situation of a person receiving a wrongly addressed letter and opening and reading it anyway. The authors observed: "Surely, [the recipient] has not made any contract; he has not accepted any trust."⁵³ Therefore, they concluded, the right to privacy does not arise "from contract or from special trust," but must be understood as a right "as against the world."⁵⁴ "The principle which protects personal writings and any other production of the intellect or of the emotions," they observed, "is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings,

48. See Warren & Brandeis, *supra* note 1, at 211–12.

49. *Pollard v. Photographic Co.*, (1888) 40 Ch.D. 345, 349 (U.K.).

50. Warren & Brandeis, *supra* note 1, at 211.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 213.

acts, and to personal relation, domestic or otherwise.”⁵⁵ This right, they asserted, applied not just to photographic portraiture but also to “pen portraiture, . . . a discussion by the press of one’s private affairs.” This passage was perhaps the most breathtaking moment of the article, when Warren and Brandeis dramatically expanded the foundation of the right of nondisclosure from one based on relationships to a general right against all not to have one’s private affairs discussed in public in any form.

Warren and Brandeis did not expressly reject breach of confidentiality as a remedy for invasions of privacy, but instead of developing this concept and line of cases, they shifted to a different path. They explained the goal of privacy protections not as enforcing the norms and morality of relationships but as protecting an “inviolable personality” and the feelings of the individual from injury.⁵⁶ Perhaps because they were focused primarily on the “ruthless publicity” of “a discussion by the press of one’s private affairs,”⁵⁷ Warren and Brandeis neglected to see that a lot of privacy invasions still involved relationships between people. They were certainly correct that confidentiality alone would not protect information from disclosure in many cases where it was warranted, but as we will demonstrate later on, they failed to appreciate the full power and potential of confidentiality.

B. CONFIDENTIALITY: THE RIGHT TO PRIVACY BEFORE ITS “BIRTH”

Scholars have largely ignored the existence of privacy law before Warren and Brandeis. In large part this is because of the conventional wisdom that Warren and Brandeis created the right to privacy. Nevertheless, as the preceding discussion suggests, a significant body of Anglo-American law protecting personal information from disclosure through confidentiality existed long before Warren and Brandeis published their article.

The concept of confidentiality as a value essential to a variety of personal relationships can be traced back to antiquity. For example, in the physician-patient context, the Hippocratic Oath, circa 400 B.C. states: “Whatever, in connection with my professional service, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret.”⁵⁸ Confidentiality (or “confidence” to use its earlier terminology) is a concept with ancient origins in the Anglo-American common law as well. F.W. Maitland, a leading early English legal historian, quoted an old sixteenth-century rhyme in his lectures on equity:

These three give place in court of conscience

55. *Id.*

56. *Id.* at 211.

57. *Id.* at 213–14.

58. DANIEL J. SOLOVE, MARC ROTENBERG & PAUL M. SCHWARZ, INFORMATION PRIVACY LAW 350 (2d ed. 2006) (quoting Hippocratic Oath).

Fraud, accident, and breach of confidence.⁵⁹

By the time Warren and Brandeis wrote, the law had recognized and protected confidentiality in a number of contexts. Although confidentiality was not considered to be a discrete area of law, Anglo-American statutory and common law protected confidentiality in many kinds of relationships and in various types of communications.

1. The Law of Confidential Relationships

a. Evidentiary Privileges. Among the oldest legal protections of confidentiality are evidentiary privileges, which enable one party to a relationship to prohibit the other party from revealing confidences in court. The attorney-client privilege, which dates back at least to 1577,⁶⁰ prevents attorneys from divulging in court information their clients provide to them during the course of legal representation. The privilege was justified not as protecting the client's individual rights and inviolate personality, but as ensuring the integrity of attorney-client relationships by promoting complete and candid communication.⁶¹ English law also developed privileges pertaining to spousal relations, under which spouses were prohibited from testifying against each other. Courts in the nineteenth century frequently alluded to the need to protect the confidential communications of the marital relationship.⁶²

The protections for confidential information provided by evidentiary privileges were recognized in early American cases as well. In the first quarter of the nineteenth century, state courts in the United States recognized England's attorney-client privilege and spousal privileges.⁶³ Thus in 1811, a Pennsylvania court declared:

The general rule is that every person not infamous or interested, is a competent witness. To this there have been exceptions, perhaps as ancient as the

59. F.W. MAITLAND, *EQUITY: TWO COURSES OF LECTURES* 7 (A.H. Chaylor & W.J. Whittaker eds., Fred. B. Rothman & Co. 1984) (1926); see also BRIAN C. REID, *CONFIDENTIALITY AND THE LAW* 1 (1986). The term "confidence" in the early cases meant something broader than the modern meaning of "confidentiality." "Confidence" meant trust and reliance, and it could be breached in a number of ways beyond the disclosure of confidential information, such as fraud and self-dealing. Nevertheless, the disclosure of confidential information constituted a large part of breaches of confidence.

60. *Berd v. Lovelace*, (1577) 21 Eng. Rep. 33 (ch.).

61. PRATT, *supra* note 8, at 42.

62. See, e.g., *Monroe v. Twistleton*, (1802) 170 Eng. Rep. 250, 251 ("[I]t shall never be endured that the confidence which the law has created while the parties remained in the most intimate of all relations, shall be broken whenever by the misconduct of one party . . . the relation shall have been dissolved."); see also PRATT, *supra* note 8, at 43-44.

63. *Developments in the Law—Privileged Communication*, 98 HARV. L. REV. 1450, 1458-60 (1985); see also Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1087 (1978) ("There appear to be no American cases on the attorney-client privilege until the 1820s.").

rule. Husband and wife shall not testify for or against each other. An attorney at law shall not betray the confidence of his client.⁶⁴

Most states did not recognize physician and clergymen privileges at early common law, although most states codified such privileges by statute during the middle portion of the nineteenth century.⁶⁵ Nevertheless, as an 1889 article in the *American Law Register* revealed, the protection through privilege law of “confidential communications” made to lawyers, doctors, and clergy was widespread in American law by the time Warren and Brandeis were writing their article.⁶⁶

b. Confidential Relations. Related to privileges were duties of nondisclosure imposed on a category of relationships known as “confidential relations.” These relationships were a forerunner of the modern body of law of fiduciaries. The law of confidential relations protected a variety of special relationships in which one party entrusted her interests to another. Because the party placing her trust and confidence in the other was extremely vulnerable to harm if the other party abused this trust, the law stepped in to protect this reliance.

Duties of nondisclosure attaching to special relationships were distinct from evidentiary privileges. Privileges merely prohibited a person from testifying about certain information in court, and the common law construed them narrowly because they ran directly counter to the truth-seeking function of the judicial process. By contrast, duties of nondisclosure attached to confidential relationships prohibited a person from divulging confidential information to any unauthorized person on pain of liability.⁶⁷

In *The Law of Torts*, Cooley devoted an entire chapter to wrongs committed in confidential relations. Cooley defined confidential relations as “relations formed by convention or by acquiescence, in which one party trusts his pecuniary or other interests to the fidelity and integrity of another, by whom, either alone, or in conjunction with himself, he expects them to be guarded and protected.”⁶⁸ Under such circumstances, equity intervened to protect the vulnerable party from abuse as a result of the power or influence imbalance in the relationship. Cooley observed that confidential relations exist between agent and principal, trustor and trustee, parent and child, and husband and wife,

64. *Steele v. Phoenix Ins. Co.*, 3 Binn. 306, 313 (Pa. 1811).

65. *Developments in the Law*, *supra* note 63, at 1457–58.

66. G.W. Field & John B. Uhle, *Privileged Communications*, 37 AM. L. REG. 1, 1 (1889). The use of the phrase “confidential communications” was widespread during this period. *See, e.g.*, 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW xlvii (1904) (listing the topic of “confidential communications” as an area of evidence law in his table of contents); *see also* 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 2285–87 (1904).

67. PRATT, *supra* note 8, at 44–48.

68. COOLEY, LAW OF TORTS FIRST EDITION, *supra* note 31, at 508.

among others.⁶⁹ Many of these relationships included duties of confidentiality. One of the most important duties of confidentiality was that between a lawyer and his client. Cooley argued that such a duty was crucial to optimally serving the client's needs:

So close is the confidence which this relation demands that the client is expected and invited by the law to lay open to his adviser all that he may know, believe or suspect—all, in fact, that may be in his mind—which it can possibly be important for the adviser to know in order to prepare him to render valuable services; and the confidence thus invited the law protects, and it will not permit the adviser to disclose what has been communicated to him, not even as a witness in judicial proceedings, without his employer's consent. Still less will the law justify him in a voluntary disclosure.⁷⁰

The law of confidential relations applied to specific relationships such as those enumerated by Cooley in his treatise. Nevertheless, this list was insufficient to protect instances of disclosure of confidential information in other relationships. In this context, English courts of equity filled the gap by fashioning an action for breach of confidence that could apply even where there was no attorney-client relationship or other “direct confidential relation,”⁷¹ such as the disclosure of personal or trade secrets. Legal remedies for divulging such confidential information began to emerge as early as the eighteenth century. In 1758, in *Duke of Queensberry v. Shebbeare*,⁷² the court held that equity could restrain the publication of a manuscript shared with another for any purposes except publication. Although the court did not talk in terms of breach of confidence, later authorities regard the case as an early example of the tort.⁷³ In 1820, Lord Eldon issued an injunction in *Yovatt v. Winyard*⁷⁴ protecting a “breach of trust and confidence,” where an employee stole secret veterinary medicine recipes and used them in his own business.⁷⁵

A few years later, in *Abernethy v. Hutchinson*,⁷⁶ the Court of Chancery enjoined the publisher of the British medical journal *Lancet* from publishing the transcripts of a series of lectures on surgery obtained from a medical student attending the lectures.⁷⁷ The Lord Chancellor held that the student who sold his notes engaged in either a “breach of trust” or a violation of an implied contract

69. *Id.* at 508–30. Other classes that he discusses in the chapter include scribes or draftsmen, individuals with mental incapacity, and individuals involved in illegal sexual relations. *Id.*

70. *Id.* at 527–28 (footnotes omitted) (emphasis added).

71. See *Ashburton v. Pape*, (1913) 2 Ch.D. 469, 471 (U.K.) (Cozens-Hardy, M.R.).

72. (1758) 28 Eng. Rep. 924, 924 (Ch.).

73. FRANCIS GURRY, BREACH OF CONFIDENCE 278 (1984).

74. (1820) 37 Eng. Rep. 425 (Ch.).

75. *Id.* at 426.

76. (1825) 26 Eng. Rep. 1313 (Ch.).

77. *Id.* at 1317.

arising out of his relationship to the lecturer.⁷⁸ In his *Commentaries on Equity Jurisprudence*, Joseph Story noted without expressly citing *Abernethy* that

where a person delivers scientific or literary oral lectures, it is not competent for any person, who is privileged to hear them, to publish the substance of them from his own notes; for the admission to hear such lectures is upon the implied confidence and contract, that the hearer will not use any means to injure, or to take away the exclusive right of the lecturer in his own lectures.⁷⁹

In the seminal 1851 case of *Morison v. Moat*,⁸⁰ the Court of Chancery held that it was a “breach of faith and of contract” for the son of one deceased business partner to use the other original partner’s medical formula for his own business.⁸¹ In so doing, the court made clear that breach of confidence was an equitable remedy separate from property rights; where the father had breached his duty of confidence not to tell the secret formula to the son, equitable principles barred the son from using the formula even where the legal remedies of property and contract were unavailing.⁸²

Two years before the publication of the Warren and Brandeis article, in *Pollard v. Photographic Co.*,⁸³ the Vice Chancellor enjoined a photographer from selling Christmas cards featuring a picture of a client based upon the “common law right of action against Defendant for his breach of contract and breach of faith.”⁸⁴ An injunction was warranted, the court concluded, because the photographer had abused the “power confidentially placed in his hands merely for the purpose of supplying the customer.”⁸⁵ The court relied upon two alternate theories—either that there was a confidentiality term implied in the contract between the photographer and his client, or that there was a general duty of confidence that bound the photographer by virtue of his relationship to his client.⁸⁶ The court declared:

Where a person obtains information in the course of a confidential employment, the law does not permit him to make any improper use of the information so obtained; and an injunction is granted, if necessary to restrain such use; as, for instance, to restrain a clerk from disclosing his master’s accounts,

78. *Id.* at 1316. The court did not talk in terms of breach of confidence (preferring the related term “breach of trust”) but the case (which was cited by Warren and Brandeis) has been interpreted by subsequent courts as a foundational breach of confidence case. *See* R.G. TOULSON & C.M. PHIPPS, CONFIDENTIALITY 6–7 (1996).

79. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA 264 (3d rev., corrected, and enlarged ed. 1843).

80. (1851) 68 Eng. Rep. 492 (Ch.).

81. *Id.* at 501.

82. *Id.* at 498.

83. (1888) 40 Ch.D. 345, 353.

84. *Id.* at 353.

85. *Id.* at 349.

86. *Id.* at 349–50.

or an attorney from making known his client's affairs, learned in the course of such employment.⁸⁷

Other nineteenth-century cases reached similar results.⁸⁸

The cases discussed above might be read as intellectual property cases, yet they were often based on two rationales—property and breach of confidence. Indeed, *Prince Albert v. Strange* followed the same pattern, as it was based both on property rights as well as the duties of confidentiality that the printer and his assistants owed to their royal clients.⁸⁹ These cases protect an equitable interest separate and apart from property, except perhaps property in the most vague and metaphorical sense. Indeed, the pre-Warren and Brandeis *Pollard* case explicitly rejected a hard property-only position, holding that “[t]he right to grant an injunction does not depend in any way on the existence of property.”⁹⁰ Moreover, as the leading English treatise on breach of confidence law notes, “[u]ndoubtedly most of the references in the cases to confidential information as property are metaphorical. The courts have frequently described a confider's rights as proprietary in contexts which make it clear that the description is merely a convenient term to apply to the confider's rights in contract and equity.”⁹¹ Furthermore, these English breach of confidence cases were also relied upon by American courts interpreting this area of the common law as protecting a broader interest than property.⁹² By the time of 1890, then, the English law of confidence was established as a coherent equitable cause of action that was quite distinct from the gloss that Warren and Brandeis placed upon it.

c. Blackmail Law. A related protection of confidential relationships emerged in blackmail law. Before 1890, blackmail law protected confidentiality by preventing servants, lovers, and others from revealing secrets about relationships with wealthy elites. In his study of blackmail, Angus McLaren notes that the term “blackmail” originated from Tudor times and was a general term for extortion.⁹³ Blackmail's more contemporary meaning—as prohibiting people from issuing threats to divulge secrets in return for hush money—developed in

87. *Id.* at 349.

88. *See, e.g.*, *Clague v. City Bank*, 8 La. 48, 50 (1835); *Lamb v. Evans*, (1893) 1 Ch. 218, 226; *Foster v. Bank of London*, (1862) 176 Eng. Rep. 96, 98; *Tipping v. Clarke*, (1843) 67 Eng. Rep. 157, 161 (Ch.); *Beeston v. Collyer*, (1827) 172 Eng. Rep. 276, 277. For a more detailed discussion of the English cases on this point, *see generally* David J. Seipp, *English Judicial Recognition of a Right to Privacy*, 3 O.J.L.S. 325, 342–45 (1983).

89. *See supra* notes 36–40 and accompanying text.

90. *Pollard*, 40 Ch.D. at 354.

91. GURRY, *supra* note 73, at 47.

92. *See, e.g.*, *Essex Trust Co. v. Enwright*, 102 N.E. 441, 442–43 (Mass. 1913); *Peabody v. Norfolk*, 98 Mass. 452 (1868); *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902) (Gray, J., dissenting); *Schuyler v. Curtis*, 15 N.Y.S. 787 (Sup. Ct. 1891); *Stevens & Co. v. Stiles*, 71 A. 802 (R.I. 1909); *Klug v. Sheriffs*, 109 N.W. 656 (Wis. 1906).

93. ANGUS McLAREN, *SEXUAL BLACKMAIL: A MODERN HISTORY* 12 (2002).

eighteenth-century England. McLaren observes: "Modern blackmail first emerged when criminals in the eighteenth century recognized that laws against sodomy provided them with the means by which they could extort money from those whom they could entrap."⁹⁴

Blackmail statutes emerged in the United States throughout the first half of the nineteenth century.⁹⁵ Lawrence Friedman notes that "about half of the states criminalized blackmail in situations where what the blackmailer threatened to expose was not only actual crimes, but also infirmities, immoral conduct, or other things that would expose the victim to ridicule or disgrace in society."⁹⁶ The law of blackmail developed substantially during the nineteenth century because people would transgress strict Victorian laws against vice in the shadows while carefully maintaining a veneer of respectability in public.⁹⁷ Blackmailers were generally in a very different social class from their victims. The blackmailers were often poor—they were prostitutes, servants, or others who engaged in illicit trysts with wealthy elites. Even when not involved in a sexual relationship, servants often had intimate knowledge of their employer's private affairs. This placed wealthy elites in a precarious and vulnerable position:

The courts had for centuries reassured [the wealthy] that their good names were protected by the laws on libel and slander. The publicity given to the emergence of the blackmailer raised the horrific possibility that the pillaging of the propertied could be carried out by those who threatened not to tell hurtful lies, but obscene truths.⁹⁸

McLaren observes that "[b]lackmail scandals exacerbated old fears the well-off had always had of being robbed by their staff."⁹⁹ Blackmail thus frequently served to ensure that the servants and illicit lovers of the affluent would maintain confidentiality and not exploit the secrets that they learned.

d. Government Records. In addition to the myriad legal protections of information shared between individuals in confidential relationships, United States law also protected the confidentiality of information people supplied to the government. During the nineteenth century, one of the most conspicuous instances of government information gathering occurred with the census. Throughout the century, successive censuses asked increasingly more numerous and more intrusive questions; some of which began to involve personal matters.¹⁰⁰ Com-

94. *Id.* at 3.

95. Lawrence M. Friedman, *Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History*, 30 *HOFSTRA L. REV.* 1093, 1111–12 (2002).

96. *Id.*

97. *Id.* at 1102.

98. McLAREN, *supra* note 93, at 28–29.

99. *Id.* at 80.

100. See PRISCILLA M. REGAN, *LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY* 46 (1995).

pounding the invasiveness of the questioning, census forms were made available to the public.¹⁰¹ The census began to raise a considerable public outcry. One magazine quipped: “Be kind to the census man. . . . If you must kick him, kick him softly”¹⁰² To ameliorate people’s privacy concerns, the government began promising confidentiality. As early as 1840, census officials noted that some people might not candidly answer census questions “upon the ground of disinclination to expose their private affairs.”¹⁰³ Accordingly, sensitive data from the census would not be released in identifiable form and it was “inculcated upon the assistant that he consider all communications made to him in the performance of his duty, relative to the business of the people, as strictly confidential.”¹⁰⁴ In 1889, Congress enacted a law fining census officials \$500 for disclosing confidential information.¹⁰⁵

Confidentiality was also mandated for tax officials when they began collecting federal income taxes during the Civil War.¹⁰⁶ Tax fraud ultimately led the government to make returns available for press scrutiny, but this move “engendered sufficient hostility to kill the [wartime] tax and, later, to prevent any attempt to reinstitute it.”¹⁰⁷ Seipp observes: “[A]s more and more personal and financial information was required by expanding government enterprises, courts and legislatures demanded greater confidentiality from recordkeepers and attempted to limit the access of others to such information.”¹⁰⁸

2. The Law of Confidential Communications

Beyond protecting the exchange of information in professional and contractual relationships, the law also protected certain types of confidential communications between people in nearly all kinds of relationships. Protection was premised on one or both of two rationales. First, communicants were viewed as having a confidential relationship that prohibited either party from divulging their communications. Second, where communicants used a service like the post office or a telegraph company to deliver their communications, duties of confidentiality were placed upon those entities as well.

a. Letters and Literary Expression. By 1890, the law of postal confidentiality and literary property protected the confidentiality of letters. Since colonial times, the privacy of letters has depended on confidentiality. Early letters were

101. See DAVID J. SEIPP, *THE RIGHT TO PRIVACY IN AMERICAN HISTORY* 19 (1978), available at http://pirp.harvard.edu/pubs_pdf/seipp%5Cseipp-p78-3.pdf.

102. *Id.* at 46.

103. *Id.* at 21 (quoting Instructions to Marshals, Etc.—Census of 1840).

104. *Id.* (quoting Instructions to Marshals, Etc.—Census of 1840).

105. *Id.* at 51–52; see also Act of Mar. 1, 1889, ch. 319, §§ 8, 13, 25 Stat. 760, 763, 764.

106. SEIPP, *supra* note 101, at 50.

107. Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1906 (1981).

108. *Id.* at 1907.

very difficult to seal, and they would frequently be read by others.¹⁰⁹ Moreover, letter delivery often included delivery to taverns or coffee houses where the letters would be left in public for pickup.¹¹⁰ The American postal service, begun in colonial times, depended on its employees being trustworthy and not prying into letters. The 1710 Post Office Act of Parliament, applicable to both domestic and colonial post offices, mandated that “[n]o person or persons shall presume wittingly, willingly, or knowingly, to open detain, or delay, or cause, procure, permit, or suffer to be opened, detained or delayed, any letter or letters, packet or packets.”¹¹¹ Benjamin Franklin and William Hunter, who served as the deputy postmasters general for the colonies in the 1750s, made employees swear a similar oath not to open the mail.¹¹² In 1782, the Continental Congress passed a law to protect the confidentiality of letters.¹¹³ Congress enacted another law in 1825 to protect the confidentiality of letters by criminalizing taking “any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier.”¹¹⁴ And in 1877, in *Ex parte Jackson*,¹¹⁵ the Supreme Court concluded that the Fourth Amendment protected letters from government inspection without a warrant.¹¹⁶ The fact that people willingly gave the government their letters for delivery did not waive protection, as the government was expected to keep them confidential. As Anuj Desai has argued, this holding represented the embodiment of earlier notions of postal confidentiality into the very fabric of the Constitution.¹¹⁷

The legal protections regarding the confidentiality of letters in the postal system reflected cultural changes that came to regard the mails as “sacred.”¹¹⁸ While even George Washington had feared that the sentiments he expressed in letters about the new Constitution were not confidential, “for by passing through the post-office, they should become known to all the world,”¹¹⁹ by the end of the nineteenth century a remarkable transformation in social attitudes and law had taken place. As David Seipp explains, “[n]ineteenth century public opinion regarded the ‘sanctity of the mails’ as absolute in the same way it esteemed the

109. See DAVID FLAHERTY, *PRIVACY IN COLONIAL NEW ENGLAND* 118 (1972); ROBERT ELLIS SMITH, *BEN FRANKLIN'S WEB SITE: PRIVACY AND CURIOSITY FROM PLYMOUTH ROCK TO THE INTERNET* 24–26 (2000).

110. FLAHERTY, *supra* note 109, at 116; SEIPP, *supra* note 101, at 7–8.

111. SEIPP, *supra* note 101, at 9 (quoting 9 Anne cap. X, § 40).

112. See, e.g., REGAN, *supra* note 100, at 45; SEIPP, *supra* note 101, at 9; Anuj Desai, *The Birth of Communications Privacy*, 60 *STAN. L. REV.* (forthcoming 2007).

113. SMITH, *supra* note 109, at 50.

114. Act of Mar. 3, 1825, ch. 64, § 22, 4 Stat. 102 (codified as amended at 18 U.S.C. § 1702 (2000)) (language quoted is from 18 U.S.C. § 1702). This law is still valid today. See SMITH, *supra* note 109, at 51.

115. 96 U.S. 727 (1877).

116. *Id.* at 733.

117. Desai, *supra* note 112 (manuscript at 3–4, on file with authors).

118. See Note, *supra* note 107, at 1899.

119. SEIPP, *supra* note 101, at 11 (quoting Letter from George Washington to Marquis de Lafayette (Feb. 7, 1788), in 11 *WRITINGS* 218 (Worthington C. Ford ed., 1891)).

inviolability of the home.”¹²⁰ Improved confidentiality procedures in the Post Office and strong legal protections went hand in hand with an emerging attitude that the ideas and sentiments expressed in letters traveling through the postal system should remain inviolate, in language often tinged with overtly religious imagery. Thus, a Louisiana court could refer in 1811 to the law’s respect for “the sacredness of a man’s correspondence.”¹²¹

The “sacredness” of personal correspondence promoted by the postal system’s public law regime was buttressed by related private law doctrines protecting the unpublished expressions in letters from unwanted disclosure. A variety of state laws protected against “the violation of epistolary correspondence.”¹²² Such statutes reflected norms deeply woven into the common law. In *Pope v. Curl*,¹²³ a famous English case involving an attempt to publish letters from Jonathan Swift and Alexander Pope, Lord Hardwicke noted that for the recipient of the letter, “possibly the property of the paper may belong to him, but this does not give license to any person whatsoever to publish them to the world, for at most, the receiver has only a joint property with the writer.”¹²⁴ This doctrine was reaffirmed in *Gee v. Pritchard*,¹²⁵ in which Lord Eldon explained that the author of letters retained the right to forbid their publication by the recipient, although principally on a theory of property rights rather than privacy or confidence.¹²⁶ However, as Seipp notes in connection with these cases, “the grounds of property protection soon became a convenient fiction” serving a broader policy of protection for confidential communications.¹²⁷

Joseph Story’s nineteenth-century American interpretation of these English cases similarly asserted the sacredness of personal correspondence and the breadth with which property theory could be used to protect them in equity. Writing in his influential *Commentaries on Equity Jurisprudence* in 1843, Story agreed that the doctrine of *Pope* and *Gee* did not rest on “any notion, that the publication of letters would be painful to the feelings of the writer,” but rather on basic notions of property law by which the property in the expression remained with the sender subject only to the recipient’s right to read.¹²⁸ But Story noted that these protections extended beyond valuable compositions such as those by Swift and Pope to also cover “mere private letters on business, or on family concerns, or on matters of personal friendship, and not strictly falling within the line of literary compositions.”¹²⁹ He added that “the publication of

120. Note, *supra* note 107, at 1890.

121. *Denis v. LeClerc*, 1 Mart. (o.s.) 297, 313 (Orleans 1811); see also Note, *supra* note 107, at 1899 n.51 (collecting examples).

122. Note, *supra* note 107, at 1900.

123. (1741) 26 Eng. Rep. 608 (Ch.)

124. *Id.* at 608.

125. (1818) 36 Eng. Rep. 670 (Ch.).

126. *Id.* at 674–75, 678.

127. Seipp, *supra* note 88, at 337–38.

128. STORY, *supra* note 79, at 260.

129. *Id.* at 261.

such letters . . . is, perhaps one of the most odious breaches of private confidence, of social duty, and of honorable feelings, which can well be imagined.”¹³⁰ Story explained that letters contain intimate details that are “reposed in the bosoms of others under the deepest and most affecting confidence” and that “should for ever remain inviolable secrets.”¹³¹ Failing to protect confidentiality in letters would “compel every one, in self-defence, to write, even to his dearest friends, with the cold and formal severity with which he would write to his wariest opponents, or his most implacable enemies.”¹³² Accordingly, Story noted, except in cases where the production of letters was necessary in litigation of matters of “public justice,” equity could intervene to protect the letters “where publication would be a violation of a trust or confidence, founded in contract, or implied from circumstances.”¹³³ The property right of the sender of a letter thus dovetailed with established breach of confidence law to provide an actionable remedy in equity against unwanted disclosures.¹³⁴

Numerous American cases protected the confidentiality of private letters prior to 1890. For example, in *Dennis v. LeClerc*,¹³⁵ a newspaper editor sought to publish an improperly obtained letter from a sender to a female acquaintance. The court enjoined the publication of the letter, holding that the sender of a letter retained a qualified property right in the letter that allowed him to prevent its publication, copying, or even its use contrary to the presumed intention of the sender.¹³⁶ The court also discussed the wrongfulness of the “disclosure of the contents of a confidential communication,”¹³⁷ concluding that because the letter was written in “mystery and confidence” (a term of art in Louisiana law), “the defendant could not produce it to light without crime.”¹³⁸ Moreover, just as the defendant could not produce it to his associates, he could also not publish it in the press, due to the “sacredness” of the “confidential letter.”¹³⁹

The Georgia Supreme Court ruled in 1859 that publication of “confidential correspondence” from one member of a partnership to another after dissolution of the partnership was enjoined by a court sitting in equity.¹⁴⁰ That court understood the magnitude of the issue to be as follows:

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 262, 264.

134. *Cf.* SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE §253 (Simon Greenleaf Crosswell ed., 15th rev. ed. 1892) (evidence law also prohibited the revelation of private letters in court, especially those that might be “injurious to the feelings or interest of third persons”).

135. 1 Mart. (o.s.) 297 (Orleans 1811).

136. *Id.* at 299.

137. *Id.* at 309–10.

138. *Id.* at 312.

139. *Id.* at 313–15.

140. *Roberts v. McKee*, 29 Ga. 161 (1859).

To give publicity, wantonly, to confidential correspondence, meets with the prompt rebuke and merited condemnation of every one not lost to all honorable feeling. It is a death-blow to the best interests of civilized society itself, as well as to all the endearments of family and social intercourse. While all this is fully admitted, the issue to be met and decided is, are Courts of Equity clothed with power to interpose and grant relief in such cases?¹⁴¹

Answering this question in the affirmative, and relying heavily upon Story's equity treatise, the court concluded that the sender had a qualified property right in restraining publication of the letter "to promote confidence—the only solid foundation upon which society rests—by taking away the temptation to its betrayal."¹⁴² Many other state and federal cases protected the confidentiality of letters in the possession of recipients from publication or sale under property or overt confidence theories, but nevertheless stand for the broader proposition that the relationship between the sender and recipient of letters would be protected.¹⁴³

b. The Telegraph. The invention of the telegraph in 1844 raised new issues for the law of confidentiality. As Thomas Cooley put it, "[t]here are [] to every telegraphic despatch [sic] three parties—the sender, the receiver, and the telegraph company."¹⁴⁴ Employees of telegraph companies like Western Union had access to telegraph messages, raising concerns about confidentiality akin to those raised with the postal system over a century before. Throughout the second half of the nineteenth century, numerous laws arose to address the confidentiality of telegraphic communications.

In order to promote telegraphy as an effective and secure means of communications, telegraph companies were eager to assure their customers that their messages would be held in confidence. Telegraph companies prohibited employees from disclosing telegrams and often resisted attempts to subpoena telegrams.¹⁴⁵ One study even suggests that Western Union employees in the 1870s would burn a message rather than disclose it under compulsion,¹⁴⁶ and there is some evidence that individual employees resisted attempts to breach telegraphic

141. *Id.* at 163.

142. *Id.*

143. *See, e.g.,* Rice v. Williams, 32 F. 437, 439 (C.C.E.D. Wis. 1887) (sale of letters relating to medical afflictions was "grossly disreputable business"); Folsom v. Marsh, 9 F. Cas. 342, 345–47 (C.C.D. Mass. 1841) (No. 4901) (court of equity can restrain wrongful publication of private letters "as a breach of private confidence or contract"); Dock v. Dock, 36 A. 411, 412 (Pa. 1897) (writer of letters has a "special property" right allowing her to withhold their publication or use by one wrongfully in possession); Eyre v. Higbee, 22 How. Pr. 198 (N.Y. Sup. Ct. 1861) (personal and business letters in hands of executor are not assets subject to sale); Woolsey v. Judd, 11 How. Pr. 49 (N.Y. Sup. Ct. 1855) (protecting letters under a literary property theory with reference to confidentiality).

144. Thomas M. Cooley, *Inviolability of Telegraphic Correspondence*, 27 AM. L. REG. 65, 66 (1879).

145. Note, *supra* note 107, at 1901 & n.68 (citing WESTERN UNION TELEGRAPH CO., RULES, REGULATIONS, AND INSTRUCTIONS No. 128, at 55 (Cleveland, 1866)).

146. SMITH, *supra* note 109, at 67–68.

confidentiality in the face of legal process.¹⁴⁷

Telegraphic confidentiality may have been good business, but it was a practice that became increasingly mandated by law. According to one treatise on the law of telegraphs, two-thirds of states had by 1879 passed some sort of statute imposing a nondisclosure obligation on telegraph company employees in order to protect the “inviolability” of telegrams.¹⁴⁸ Many states also protected telegrams against wiretapping by the government.¹⁴⁹ Advocates of telegraphic inviolability went even further and argued that the contents of telegrams should be privileged and inadmissible in court,¹⁵⁰ although such arguments were largely unsuccessful.¹⁵¹ However, as a result of the arguments of advocates of telegraph confidentiality, courts rejected “dragnet” searches of telegraph records by requiring subpoenas for telegrams to specify the date and topic of any telegrams that were sought.¹⁵² Thus, by 1890 both public opinion and significant statutory law gave substantial protection to telegraphic confidentiality.

* * *

As the preceding discussion illustrates, Warren and Brandeis did not write on a nearly blank slate when they crafted their “right to privacy.” Instead of developing and expanding the robust law of confidentiality that already existed, Warren and Brandeis took American privacy law down a different path. Before the Warren and Brandeis article, English and American privacy law were on a similar trajectory, being built out of the same materials and concepts. American judges read English precedent and attempted to situate their rulings within the fabric of the common law. Afterwards, the paths diverged. The next Part explores the path Warren and Brandeis charted for American privacy law, and also the path not taken—that of developing the law of confidentiality. England took this alternative path, with some illuminating and fascinating results.

II. PRIVACY'S DIVERGENT PATHS

Throughout the twentieth century, American privacy law began to embrace Warren and Brandeis's right to privacy. In contrast, in England, the Warren and Brandeis article had a chilly reception and was rejected. Instead of creating a law of privacy, England developed a law of confidentiality, which was explicitly distinguished from privacy. Ironically, both the American law of privacy and the English law of confidentiality emerged from the same source—the *Prince Albert* case. In this Part, we compare the two divergent paths leading from *Prince Albert*.

147. See *Ex parte Brown*, 7 Mo. App. 484, 494 (App. Ct. 1879) (affirming contempt conviction against telegraph office manager who refused to comply with a third-party subpoena).

148. MORRIS GRAY, A TREATISE ON COMMUNICATION BY TELEGRAPH 212 & n.1, 213 & nn.1-3 (1879) (collecting statutes).

149. See Note, *supra* note 107, at 1901.

150. See *Ex Parte Brown*, 7 Mo. App. at 494-96 (Lewis, P.J., dissenting); Cooley, *supra* note 144, at 77.

151. GRAY, *supra* note 148, at 213-14.

152. Note, *supra* note 107, at 1902.

A. PRIVACY IN TWENTIETH-CENTURY AMERICA

1. Early Developments

In the twentieth century, privacy torts inspired by Warren and Brandeis's article slowly developed and proliferated in the United States. As early as 1891, a New York judge recognized the Warren and Brandeis right to privacy in *Schuyler v. Curtis*,¹⁵³ a case involving the erection of a statue of a deceased philanthropist.¹⁵⁴ The New York Court of Appeals reversed the decision, not because it rejected the right to privacy, but because it concluded that upon a person's death any right to privacy died with him.¹⁵⁵ In the lower state and federal courts, a handful of other early cases flirted with recognizing a right of privacy¹⁵⁶ and generated a flurry of scholarly commentary before the turn of the century.¹⁵⁷

The first state court of last resort to rule on the right to privacy was the New York Court of Appeals. In the famous 1902 case of *Roberson v. Rochester Folding Box Co.*,¹⁵⁸ the court squarely rejected the right to privacy. An advertisement for Franklin Mills Flour used a drawing of a young woman, Abigail Roberson, without her consent. The picture was a flattering one, but Roberson sued because she was "humiliated" by it and suffered mental distress as a result.¹⁵⁹ The court concluded that there was no precedent to recognize Warren and Brandeis's tort remedies for invasion of privacy, and that such a right was best left to the legislature to enact.¹⁶⁰ The *Roberson* case produced a wave of

153. 45 N.Y.S. 787 (Sup. Ct. 1891).

154. *Id.* at 788; *see also* Marks v. Jaffa, 26 N.Y.S. 908 (Sup. Ct. 1893) (finding violation of Warren and Brandeis's right to privacy where newspaper published picture of actor for purposes of testing his popularity).

155. *Schuyler v. Curtis*, 42 N.E. 22, 25–26 (N.Y. 1895).

156. *See* Corliss v. E.W. Walker Co., 57 F. 434, 435 (C.C.D. Mass. 1893) (refusing to enjoin biography of inventor on grounds he was public figure); Atkinson v. Doherty, 80 N.W. 285 (Mich. 1899) (rejecting privacy claim by widow of politician who objected to his likeness appearing on a cigar label on ground that public figures surrender privacy rights to the public); Murray v. Gast Lithographic & Engraving Co., 28 N.Y.S. 271 (Sup. Ct. 1894) (parents cannot enjoin unauthorized publication of pictures of their children).

157. *See generally* Herbert Spencer Hadley, *The Right to Privacy*, 3 N.W. L. REV. 1 (1894); Augustus Hand, *Schuyler Against Curtis and the Right to Privacy*, 36 AMER. L. REG. (n.s.) 745 (1897); John Gilmer Speed, *The Right to Privacy*, 163 N. AM. L. REV. 64 (1896); Recent Cases, *Untitled* (Atkinson v. Doherty), 5 VA. L. REG. 710 (1899); Guy Thompson, *The Right of Privacy as Recognized and Protected at Law and in Equity*, 47 CENTRAL L.J. 148 (1898); Note, *Development of the Law of Privacy*, 8 HARV. L. REV. 280 (1894); Comment, *Is This Libel?—More about Privacy*, 7 HARV. L. REV. 492 (1894); Case Comment, *A New Phase of the Right to Privacy*, 10 HARV. L. REV. 179 (1896); *The Right to Privacy*, 3 GREEN BAG 524 (1891); Comment, *The Right to Privacy*, 5 HARV. L. REV. 148 (1891); Case Comment, *The Right to Privacy*, 7 HARV. L. REV. 182 (1893); Case Comment, *The Right to Privacy*, 12 HARV. L. REV. 207 (1898); *The Right to Privacy*, 4 MADRAS L.J. 17 (1894), *reprinted in* 6 GREEN BAG 498 (1894); Comment, *The Right to Privacy—The Schuyler Injunction*, 9 HARV. L. REV. 354 (1895); Recent Cases, *Torts—Right to Privacy*, 13 HARV. L. REV. 415 (1900); Comment, *Untitled* (Marks v. Jaffa), 2 N.W. L. REV. 91 (1894).

158. 64 N.E. 442 (N.Y. 1902).

159. *Id.* at 442.

160. *Id.* at 447–48.

public criticism. An editorial in the *New York Times* lambasted the decision.¹⁶¹ Commentary in law reviews largely sided with Roberson and decried the court's failure to redress her injury,¹⁶² although one of the judges who decided the *Roberson* case took the unusual step of defending the decision in the *Columbia Law Review*.¹⁶³ A year later, in 1903, the New York legislature responded to the case by enacting a statute allowing people to sue for invasion of privacy where their "name, portrait, or picture" was used without consent "for purposes of trade."¹⁶⁴

Two years later, the Georgia Supreme Court recognized in the common law a tort remedy for invasions of privacy. The case, *Pavesich v. New England Life Insurance Co.*,¹⁶⁵ involved a situation similar to that in *Roberson*—a man's image was used in an advertisement without his consent. The court concluded that a "right of privacy in matters purely private is . . . derived from natural law."¹⁶⁶

From its start in *Pavesich*, the new privacy tort began to slowly spread from jurisdiction to jurisdiction. The early privacy cases were in some disarray, with courts in various states embracing or rejecting rights to privacy in tort in a variety of commercial and personal contexts. The fact pattern of *Roberson* and *Pavesich* was common, with perhaps a majority of the early cases recognizing rights of privacy in the context of the unconsented use of photographs in advertising.¹⁶⁷ Nevertheless, as contemporary commentators recognized,¹⁶⁸ courts recognizing the right to privacy invariably did so under the auspices of the theory (if not the precise theory) laid out by Warren and Brandeis.¹⁶⁹ Over the

161. Editorial, N.Y. TIMES, Aug. 23, 1902, reprinted in Denis O'Brien, *The Right to Privacy*, 2 COLUM. L. REV. 437, 447 (1902) (declaring that *Roberson* "excited as much amazement among lawyers and jurists as among the promiscuous lay public").

162. See generally Alexander Armstrong, Jr., Note, *Injunction—Rights of Privacy—Enforcement in Equity*, 50 AM. L. REG. 669 (1902); Comment, *An Actionable Right to Privacy?*, 12 YALE L.J. 35, 36–37 (1902); Case Comment, *The Miscalled Right of Privacy*, 10 AM. LAWYER 293 (1902); Note, *Publication of Photograph as an Advertisement*, 2 COLUM. L. REV. 486 (1902); Note, *The Right of Privacy*, 64 ALB. L.J. 409 (1902); Note and Comment, *The Right of Privacy*, 3 MICH. L. REV. 559 (1904); Note, *Right of Privacy*, 12 VA. L. REG. 91 (1906); Book Review, *Right to Privacy*, 16 HARV. L. REV. 72 (1902).

163. O'Brien, *supra* note 161 at 437. O'Brien was not the only participant in *Roberson* who later sought to justify its outcome. For another defense, see articles by Elbridge L. Adams, counsel for the defendant: Elbridge L. Adams, *The Law of Privacy*, 175 N. AM. REV. 361 (1902); Elbridge L. Adams, *The Right of Privacy, and Its Relation to the Law of Libel*, 39 AM. L. REV. 37 (1905).

164. See, e.g., Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703, 717 (1990). The statute, which remains on the books today, is the New York Civil Rights Law §§ 50–51 (McKinney 1976 & Supp. 1990).

165. 50 S.E. 68 (Ga. 1905).

166. *Id.* at 70.

167. For a detailed account of the growth of privacy torts, see generally PEMBER, *supra* note 18.

168. See, e.g., Frederick Davis, *What Do We Mean by "Right to Privacy"?*, 4 S.D. L. REV. 1 (1959); Wilbur Larremore, *The Law of Privacy*, 12 COLUM. L. REV. 693, 697 (1912); Louis Nizer, *The Right of Privacy: A Half-Century's Developments*, 39 MICH. L. REV. 526 (1941); see also WILLIAM L. PROSSER, *HANDBOOK ON THE LAW OF TORTS* 636–37 (2d ed. 1955) [hereinafter PROSSER, *TORTS* SECOND EDITION] (collecting cases from this period adopting the Warren and Brandeis argument).

169. PEMBER, *supra* note 18, at 31, 57.

ensuing decades, an increasing number of states permitted redress for invasions of privacy. The *First Restatement of Torts*, published in 1939, had a brief section on privacy, which stated: “A person who unreasonably and seriously interferes with another’s interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.”¹⁷⁰ But the spread of the tort was slow in its first half-century, and as of 1940, only fifteen states had recognized it.¹⁷¹ During the 1940s and 1950s, many more jurisdictions began recognizing the right to privacy, with the result that by the late 1950s, most states had adopted a tort right of privacy in one form or another.¹⁷²

2. William Prosser and the Maturation of the Privacy Torts

The growing number of privacy cases attracted the attention of William Prosser, the leading American torts scholar of the mid-twentieth century. Prosser began the project of imposing some order on the hundreds of privacy cases that had been decided since 1890. He discussed privacy in all of the editions of his torts treatise, which were published in 1941, 1955, 1964, and 1971.¹⁷³ His most famous discussion of the topic was a 1960 article entitled *Privacy* published in the *California Law Review*.¹⁷⁴ In that article, Prosser noted that over 300 privacy cases had been decided since the Warren and Brandeis article, and that to date, there had been little “attempt to inquire what interests are we protecting, and against what conduct.”¹⁷⁵ He observed that the

law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, ‘to be let alone.’¹⁷⁶

Prosser identified the torts as follows:

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.

170. RESTATEMENT (FIRST) OF TORTS § 867 (1939).

171. PEMBER, *supra* note 18, at 95.

172. *Id.* at 146.

173. WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS (1st ed. 1941) [hereinafter PROSSER, TORTS FIRST EDITION]; PROSSER, TORTS SECOND EDITION, *supra* note 168; WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS (3d ed. 1964) [hereinafter PROSSER, TORTS THIRD EDITION]; WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS (4th ed. 1971) [hereinafter PROSSER, TORTS FOURTH EDITION].

174. Prosser, *supra* note 4.

175. *Id.* at 388.

176. *Id.* at 389.

4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.¹⁷⁷

In creating this taxonomy of the law of privacy, Prosser had a dramatic effect on the development of privacy law in America. But Prosser's influence did not only enhance the development of privacy law, it also led to some significant limitations.

On the surface, Prosser's project appeared to be descriptive, an attempt simply to catalog the existing cases. However, Prosser was deliberately shaping the law, and he understood that he was engaging in such an endeavor. Like many of his contemporaries, Prosser was a legal realist who believed that tort law was best understood to be a "common sense" balancing of social interests rather than a series of universal principles.¹⁷⁸ Nevertheless, unlike more extreme realists who doubted the value of legal doctrine, Prosser concentrated his talents on refining, clarifying, and ordering legal doctrine, since he believed that law worked best when rules were clear.¹⁷⁹ Prosser thus actively attempted to mold legal doctrine as he described it, something he did when recognizing the tort of intentional infliction of emotional distress, which, like privacy, rested upon a mental injury.¹⁸⁰ He used the same approach in his treatment of privacy.

In his speeches and the various editions of his treatise, casebook, and articles, Prosser approached the multitude of privacy decisions with a gradual but systematizing impulse. The 1941 edition of Prosser's widely read torts treatise gave privacy limited attention—just twelve pages in a chapter entitled "Miscellaneous."¹⁸¹ Prosser noted that the privacy cases decided by the various state courts fell into three rough categories: appropriation of one's name or likeness, intrusion into one's home or personal affairs, and public disclosure of one's private information.¹⁸² By 1953, though, Prosser concluded that there was a fourth privacy tort: the so-called "false light" tort redressing publicity that places the plaintiff in a false light in the public eye. In a lecture in February of that year at the University of Michigan, he suggested that although the boundaries of the privacy tort were "anything but well defined," the tort "appears in reality to be a complex of four more or less related wrongs."¹⁸³ He included false light in his 1955 treatise, where the topic of privacy finally received its own separate chapter.¹⁸⁴

Thus, by the time of his 1960 article, *Privacy*, Prosser had long been tracking the development of privacy law. In the article, Prosser described the four torts in

177. *Id.*

178. WHITE, *supra* note 28, at 102.

179. *Id.* at 157–58.

180. *Id.* at 102–06.

181. PROSSER, TORTS FIRST EDITION, *supra* note 173, at 1050–1062.

182. *Id.* at 1050.

183. WILLIAM L. PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 116–19 (1953).

184. PROSSER, TORTS SECOND EDITION, *supra* note 168.

great detail and charted their contours and limitations. Prosser was quite skeptical of the privacy torts; he noted that their development “has gone on without any plan, without much realization of what is happening or its significance, and without any consideration of its dangers.”¹⁸⁵ For Prosser, these dangers were quite extensive. The intrusion tort was essentially intentional infliction of emotional distress with fewer limits and no requirement of outrageousness,¹⁸⁶ while appropriation created a new and extensive regime of intellectual property under which every individual had a common law trademark in his name and likeness unfettered by any of the policy limitations placed on business marks.¹⁸⁷

Even more dangerous, he believed, were the torts of false light and public disclosure. Both torts, Prosser argued, moved into the field of defamation law, but did so by removing many of the careful limitations that the law had developed for libel and slander in order to protect freedom of speech and press. Gone, according to Prosser, were the defense of truth, the requirement of special damages for most types of statements affecting reputation, and the need “for any defamatory innuendo at all.”¹⁸⁸ Gone too was the procedural protection provided by defamation retraction statutes. But the greatest concern, he argued, was

the extent to which, under any test of ‘ordinary sensibilities,’ or the ‘mores’ of the community as to what is acceptable and proper, the courts, although cautiously and reluctantly, have accepted a power of censorship over what the public may be permitted to read, extending very much beyond that which they have always had under the law of defamation.¹⁸⁹

Prosser went on to observe that he would not view the development of the privacy torts as “wrong” but “that it is high time that we realize what we are doing, and give some consideration to the question of where, if anywhere, we are to call a halt.”¹⁹⁰ This last statement suggested that perhaps privacy had already gone too far.

Prosser’s influence over the privacy torts was further enhanced by his position as a reporter of the *Second Restatement of Torts*, which imported his four-part taxonomy of the privacy torts—a taxonomy that has been accepted by virtually all courts and commentators to the present day.¹⁹¹ The tort of intrusion upon seclusion provides a remedy when a person “intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private

185. Prosser, *supra* note 4, at 422.

186. *Id.*

187. *Id.* at 423.

188. *Id.* at 422.

189. *Id.* at 423.

190. *Id.*

191. *See, e.g.*, DANIEL J. SOLOVE, MARC ROTENBERG, & PAUL M. SCHWARTZ, *INFORMATION PRIVACY LAW* (2d ed. 2006); RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW: CASES AND MATERIALS* (2d ed. 2002).

affairs or concerns” in a manner that is “highly offensive to a reasonable person.”¹⁹² Under the public disclosure of private facts tort:

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.¹⁹³

The tort of false light provides a remedy against giving “publicity to a matter concerning another that places the other before the public in a false light” in a manner that is “highly offensive to a reasonable person.”¹⁹⁴ Finally, the tort of appropriation provides: “One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”¹⁹⁵

As G. Edward White argues, the “‘tort’ of privacy . . . was in some respects Prosser’s own invention: he gave privacy a doctrinal unity and continuity that it had not previously possessed.”¹⁹⁶ Recognition by Prosser gave the tort considerable legitimacy. His position as the leading treatise writer, scholar, and casebook author of his day, along with his position as a reporter of the *Restatement*, gave him a unique ability to affect the law at multiple levels. By restating the law of privacy into a complex of four concrete causes of action, Prosser simplified and restricted the case law, excluding related theories of relief from his taxonomy and thus from being associated with the concept of “privacy.” For example, although Prosser noted the great overlap between intrusion upon seclusion and intentional infliction of emotional distress, he opted not to include the latter tort under the rubric of privacy.¹⁹⁷

More importantly, Prosser excluded from his complex of privacy torts the emerging American tort of breach of confidentiality. By 1960, a small group of American cases had recognized a tort for breach of confidentiality¹⁹⁸ or found breaches of express or implied contracts against nondisclosure.¹⁹⁹ For example,

192. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

193. *Id.* § 652D.

194. *Id.* § 652E.

195. *Id.* § 652C.

196. WHITE, *supra* note 28, at 173.

197. PROSSER, TORTS SECOND EDITION, *supra* note 168, at 639 (noting that “[w]hen the ‘new tort’ of intentional infliction of mental suffering becomes fully developed and receives general recognition, the great majority of the privacy cases may very possibly be absorbed into it”).

198. *See, e.g.*, *Bazemore v. Savannah Hosp.*, 155 S.E. 194 (Ga. 1930) (breach of confidence for hospital to leak photo of a deformed child—decided on privacy grounds); *Douglas v. Stokes*, 149 S.W. 849 (Ky. 1912) (photographer breached implied contract when making extra copies of photos of father’s dead babies); *Smith v. Driscoll*, 162 P. 572 (Wash. 1917) (assuming doctors can be liable for breaching the confidences of their patients while testifying in court).

199. *See, e.g.*, *McCreery v. Miller’s Groceteria Co.*, 64 P.2d 803, 805 (Colo. 1937) (purchase of photograph by person photographed coupled with statement that no further sale of her photographs was to be permitted created express contract that further copies of photograph must not be sold).

in the 1920 case of *Simonsen v. Swenson*,²⁰⁰ the court held that because physicians were “bound” by “professional honor and the ethics of [their] high profession” to maintain patient confidentiality, a “wrongful breach of such confidence, and a betrayal of such trust, would give rise to a civil action for damages naturally flowing from such wrong.”²⁰¹ And in *Fitzsimmons v. Olinger Mortuary Ass’n*,²⁰² the court found a mortician’s publicity of his use of an airplane to move a casket violated an implied contract with the decedent’s widow where she had asked for no “undue publicity or notoriety.”²⁰³ As the court noted, “[i]f this not be true, there is nothing to prevent the embalming of a body and the parading of it through the city streets, exposed to the gaze of curious throngs, while a hired caller calls attention to it as an example of the undertaker’s skill.”²⁰⁴ Prosser, however, gave hardly any attention to the confidence cases in his article, and he did not consider them worthy of establishing a potential fifth privacy tort.²⁰⁵ Perhaps Prosser did not include breach of confidentiality because the cases did not cite Warren and Brandeis as their origin or because they were less numerous or more contractual than cases involving the privacy torts. The result was that the four torts Prosser identified became widely known as tort law’s way of protecting privacy. Breach of confidentiality was left out of the picture.

In the third edition of his torts treatise in 1964, Prosser only briefly mentioned a few breach of confidentiality tort cases, including *Simonsen*, but he did so only in passing in a discussion of the public disclosure tort.²⁰⁶ Likewise, in the fourth edition in 1971, the final edition before his death in 1972, Prosser cited *Simonsen* along with three other breach of confidentiality cases. He noted the general rule that the public disclosure tort was limited to instances when the information was disclosed widely to the public “unless there is some breach of contract, trust or confidential relation which will afford an independent basis for relief.”²⁰⁷ He said little else about the breach of confidentiality tort.

Whether intentionally or not, Prosser had the effect of halting the torts’ evolution.²⁰⁸ Despite the fact that the Warren and Brandeis article spawned four

200. 177 N.W. 831 (Neb. 1920).

201. *Id.* at 832.

202. 17 P.2d 535 (Colo. 1932).

203. *Id.* at 535.

204. *Id.* at 537 (implied contract violated where mortuary association publicized delivery of casket by aircraft against widow’s wishes).

205. *See* Prosser, *supra* note 4, at 393–94 (noting that the disclosure tort is not violated by communication to a small group of people rather than the public at large “unless there is some breach of contract, trust, or confidential relation which will afford an independent basis for relief”). Prosser also noted that the disclosure by an individual of information contained only in “confidential” government records such as tax records was “not open to public inspection” and could thus be the basis for a disclosure action. *See id.* at 395–96.

206. PROSSER, TORTS THIRD EDITION, *supra* note 173, at 807 & n.97.

207. *Id.* at 810 & n.84.

208. *See, e.g.*, Jonathan P. Graham, Note, *Privacy, Computers, and the Commercial Dissemination of Personal Information*, 65 TEX. L. REV. 1395, 1406 (1987) (“Dean Prosser’s categorization of privacy

torts in the seventy years since its publication, once Prosser identified the torts, no new privacy torts were created in the common law during the nearly fifty years thereafter. One exception is the right of publicity, a spinoff from appropriation that protects people's property rights in their name or likeness. The right of publicity first emerged in 1953, when Judge Jerome Frank held that "in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph."²⁰⁹ Appropriation remedies the mental distress caused by the improper exploitation of a person's name or likeness. In contrast, the right of publicity enables people (typically celebrities and other famous individuals) to recover the economic value of their personas when used commercially without their consent.²¹⁰ As one commentator summarizes, appropriation is "invaded by an injury to the psyche" whereas "the right of publicity is infringed by an injury to the pocket book."²¹¹ Prosser did not recognize an independent right of publicity, possibly because he understood appropriation as primarily about property rights rather than mental distress.²¹² Aside from the right of publicity, however, Prosser's formulations of the privacy torts ossified, and, to this day, they have not changed in any significant degree. Prosser's snapshot of the privacy torts in 1960 thus became a permanent image.

The Prosser formulations of the torts became entrenched in the law in part because he incorporated them into the *Second Restatement of Torts* when he was serving as reporter.²¹³ Most states currently follow the *Restatement's* formulations of the torts.²¹⁴ Prosser did not include the breach of confidentiality tort in the "invasion of privacy" section of the *Restatement*, which consisted solely of the four Warren and Brandeis privacy torts. In fact, breach of confidentiality did not appear in the *Restatement* at all. Through Prosser, Warren and Brandeis's turn from confidentiality became even more frozen into the law.

Following Prosser's article, the privacy torts continued to flourish, although along the lines that Prosser had plotted out for them. In 1971, in the fourth edition of his torts treatise Prosser declared that "[i]n one form or another, the right of privacy is by this time recognized and accepted in all but a very few

law into four torts, each with several indispensable elements has effectively frozen the development of privacy law despite the creation of new technologies that detrimentally affect individual privacy.").

209. *Haelan Labs. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

210. See Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225 (2005).

211. See J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 5:63 (2000); see also *id.* § 5:61.

212. See RESTATEMENT (SECOND) OF TORTS § 652C, cmt. a (1977) ("Although the protection of [one's] personal feelings against mental distress is an important factor leading to a recognition of the [appropriation tort], the right created by it is in the nature of a property right . . .").

213. Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887, 897 (2006). The privacy torts section of the Second Restatement was completed in 1967. See *id.* at 897 n.64. Prosser resigned from serving as reporter in 1970, and he died in 1972. The Second Restatement was finally published in 1977. *Id.*

214. *Id.* at 897.

jurisdictions.”²¹⁵ Today, virtually every state recognizes the Warren and Brandeis privacy torts in one form or another.²¹⁶ However, as Prosser had also outlined, the privacy torts came under increasing attack from the 1960s onwards for infringing upon free speech. Three of the four torts were addressed in Supreme Court cases. In 1967, in *Time, Inc. v. Hill*,²¹⁷ the Court held that the First Amendment required the actual malice standard to establish a false light claim.²¹⁸ The right of publicity tort was examined by the Court in 1977 in *Zacchini v. Scripps-Howard Broadcasting Co.*²¹⁹ The Court distinguished appropriation from false light, and the branch of the appropriation tort known as the “right of publicity” narrowly survived a First Amendment challenge.²²⁰

The public disclosure tort came to the Court’s attention in 1975 in *Cox Broadcasting v. Cohn*.²²¹ In *Cox Broadcasting*, the Court discussed the origins of the tort in Warren and Brandeis’s article and observed that “the century has experienced a strong tide running in favor of the so-called right of privacy.”²²² Basing its decision on the First Amendment, the Court held that despite the right to privacy’s “impressive credentials,” when “true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.”²²³ The Court declined to address “the broader question” that would implicate the constitutionality of the tort in all its applications—namely, “whether the State may ever define and protect an area of privacy free from unwanted publicity in the press.”²²⁴

Subsequent Supreme Court cases reiterated the *Cox* rule. In *Smith v. Daily Mail*,²²⁵ the Court held: “If a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”²²⁶ In *Florida Star v. B.J.F.*,²²⁷ the Court reiterated the rule in *Daily Mail* by concluding that the First Amendment prohibited liability when a newspaper published the name of a rape victim obtained from a police report.²²⁸

After *Florida Star*, commentators rushed to give the eulogy for the public

215. PROSSER, TORTS FOURTH EDITION, *supra* note 173, at 804.

216. *See, e.g.*, ROBERT M. O’NEIL, THE FIRST AMENDMENT AND CIVIL LIABILITY 77 (2001) (noting that only North Dakota and Wyoming fail to recognize any of the privacy torts in some form or another).

217. 385 U.S. 374 (1967).

218. *Id.* at 387–88 (“[T]he constitutional protections for speech and press preclude the application of the New York [privacy] statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.”).

219. 433 U.S. 562 (1977).

220. *Id.* at 573, 578–79.

221. 420 U.S. 469 (1975).

222. *Id.* at 488.

223. *Id.* at 489, 496.

224. *Id.* at 491.

225. 443 U.S. 97 (1979).

226. *Id.* at 103.

227. 491 U.S. 524 (1989).

228. *Id.* at 533–37.

disclosure tort. One commentator observed: "Given the narrow class of information that fulfills the *Florida Star* requirements, the tort can no longer be an effective tool for protecting individual privacy."²²⁹ Another legal scholar wrote: "The Court paid lip service to the possibility that a private-fact plaintiff may recover in some cases, but its decisions leave little hope for vindication of such a plaintiff's rights."²³⁰

The apocalyptic declarations about the public disclosure tort were probably inspired by Justice White's dissent that the Court's decision would "obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts."²³¹ But these statements were significant exaggerations, as the Supreme Court repeatedly reiterated that its holding was very narrow. In fact, the privacy torts by and large survived the First Amendment challenges and remain viable torts, even though they are infrequently invoked.²³² Nevertheless, a number of commentators view the privacy torts as not very successful because it is very difficult for plaintiffs to prevail under them.²³³ And the privacy torts have struggled when addressing emerging privacy problems in the Information Age, such as the collection, use, and disclosure of personal data by businesses.²³⁴

Despite these limitations, the impact of Warren, Brandeis, and Prosser on American privacy law should not be minimized. The privacy torts are recognized in nearly every state, and Warren and Brandeis influenced the growth of a tremendous body of law beyond torts. Their conception of privacy as protecting the dignity of the individual has formed the backbone of privacy law in the United States. As David Leebron notes, Warren and Brandeis spoke of privacy

229. Jacqueline K. Rolfs, *The Florida Star v. B.J.F.: The Beginning of the End for the Tort of Public Disclosure*, 1990 WIS. L. REV. 1107, 1128.

230. Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1207 (1990).

231. *Florida Star*, 491 U.S. at 550 (White, J., dissenting).

232. Cf. Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 988–89 (2003) (arguing that the Court has constitutionalized the newsworthiness test, requiring heightened scrutiny for restrictions on disclosures of public concern but expressly leaving open the question about the level of scrutiny for restrictions on disclosures of private concern).

233. See, e.g., Lawrence M. Friedman, *Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History*, 30 HOFSTRA L. REV. 1093, 1125 (2002) ("In hindsight, it looks as if the Warren and Brandeis idea of privacy—protection from the despicable nosiness of the media—never got much past the starting post; and is now effectively dead."); Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2388 (1996) (describing the invasion of privacy tort as "alive, but on life support"); Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA L. REV. 289, 289–90 (2002) ("If privacy law were a stock, its performance over the last century would not be deemed impressive."). But see John A. Jurata, Jr., Comment, *The Tort That Refuses To Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489, 490 (1999) (claiming the invasion of privacy tort "may be on the verge of a significant comeback").

234. See generally DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* (2004); Richards, *supra* note 9; Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393 (2001).

as a general legal right, not merely as a tort law protection.²³⁵ Indeed, Warren and Brandeis mentioned other remedies to protect the right to privacy—criminal law and injunctive relief.²³⁶ In 1891, just a year after the Warren and Brandeis article was published, the “right to be let alone” found its way into constitutional law. The Supreme Court held in *Union Pacific Railway Co. v. Botsford*,²³⁷ that a court could not compel a plaintiff in a civil suit to undergo a surgical examination: “As well said by Judge Cooley: ‘The right to one’s person may be said to be a right of complete immunity; to be let alone.’”²³⁸

In 1928, Brandeis incorporated the “right to be let alone” into Fourth Amendment law when, sitting as a Supreme Court Justice, he dissented in *Olmstead v. United States*.²³⁹ Sternly disagreeing with the Court’s conclusion that wiretapping was not a Fourth Amendment violation, Brandeis wrote that the “makers of our Constitution . . . conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”²⁴⁰ Brandeis further stated that to protect the right to be let alone, “every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.”²⁴¹ Modern Fourth Amendment law has since drawn heavily from Brandeis’s ideas, and *Olmstead* has long since been overruled.

Moreover, both *Botsford* and Brandeis’s views of Fourth Amendment privacy were later used by the Court to help fashion the constitutional “right to privacy.” In *Griswold v. Connecticut*²⁴² and *Roe v. Wade*,²⁴³ the Court relied on the ideas first articulated in Warren and Brandeis’s article to articulate the scope of the constitutional protection of privacy rights. Warren and Brandeis’s conception of privacy thus did not just influence the privacy torts; it also had a wide-ranging effect on the law of privacy more generally.²⁴⁴

3. The Breach of Confidentiality Tort

Slighted by Warren and Brandeis and virtually ignored by Prosser, confidentiality had a stunted development in the United States during the twentieth century, and it still has not fully penetrated into the culture of American privacy law. In the United States, the breach of confidentiality tort has grown up in the shadow of the Warren and Brandeis torts. Not only did Prosser overlook breach of confidentiality, but also in many privacy cases, breach of confidentiality

235. David W. Leebron, *The Right to Privacy’s Place in the Intellectual History of Tort Law*, 41 CASE W. RES. L. REV. 769, 807 (1991).

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

237. 141 U.S. 250 (1891).

238. *Id.* at 251 (quoting COOLEY, LAW OF TORTS FIRST EDITION, *supra* note 31, at 29).

239. 277 U.S. 438 (1928), *overruled in part by* Katz v. United States, 389 U.S. 347 (1967).

240. *Olmstead*, 277 U.S. at 478 (Brandeis, J. dissenting).

241. *Id.*

242. 381 U.S. 479, 484–86 (1965).

243. 410 U.S. 113, 152 (1973).

244. See Richards, *supra* note 9, at 1104–07.

could have been an option but often was not explored. Breach of confidentiality remained ignored and underdeveloped while the Warren and Brandeis torts enjoyed the spotlight. Although the tort of breach of confidence has seen some development in recent decades, it remains in a relatively obscure and frequently overlooked corner of American tort law.

Only in the past few decades has the breach of confidentiality tort begun to take on more prominence. In 1982, Alan Vickery suggested in a student note that remains the leading scholarly work on the tort that “courts are just beginning to formulate an adequate common law remedy for unconsented disclosures of personal information in breach of confidence.”²⁴⁵ A 1992 comment by Michael Harvey argued that the “breach of confidence tort has experienced a recent reemergence in American common law.”²⁴⁶

A plaintiff can establish a breach of confidence action by proving the existence and breach of a duty of confidentiality. Courts have found the existence of such a duty by looking to the nature of the relationship between the parties, by reference to the law of fiduciaries, or by finding an implied contract of confidentiality.²⁴⁷ Most commonly, the breach of confidentiality tort applies to physicians.²⁴⁸ Courts have also applied it to banks,²⁴⁹ hospitals,²⁵⁰ insurance companies,²⁵¹ psychiatrists,²⁵² social workers,²⁵³ accountants,²⁵⁴ school offi-

245. Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1426 (1982).

246. G. Michael Harvey, Comment, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385, 2396 (1992).

247. Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1, 20–25 (1995).

248. See *Alberts v. Devine*, 479 N.E.2d 113, 120 (Mass. 1985) (“We hold today that a duty of confidentiality arises from the physician-patient relationship and that a violation of that duty, resulting in damages, gives rise to an action sounding in tort against the physician.”).

249. See *Peterson v. Idaho First Nat’l Bank*, 367 P.2d 284, 290 (Idaho 1961) (“It is implicit in the contract of the bank with its customer or depositor that no information may be disclosed by the bank or its employees concerning the customer’s or depositor’s account, and that, unless authorized by law or by the customer or depositor, the bank must be held liable for breach of the implied contract.”).

250. See *Biddle v. Warren Gen. Hosp.*, 715 N.E.2d 518, 523 (Ohio 1999) (“[A]n independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship.”).

251. See *Ingram v. Mut. of Omaha Ins. Co.*, 170 F. Supp. 2d 907, 911 (W.D. Mo. 2001) (“When in possession of medical records shielded by the physician-patient privilege, an insurance company has a special confidential relationship with its insured—a fiduciary relationship—and from that relationship flows a duty to protect those medical records from unauthorized disclosure.”).

252. See *Saur v. Probes*, 476 N.W.2d 496, 498 (Mich. Ct. App. 1991) (“The first issue presented is whether a cause of action exists for a psychiatrist’s disclosure of privileged communications. We hold that such a cause of action does exist.”).

253. See *Harley v. Druzba*, 169 A.D.2d 1001, 1002 (N.Y. App. Div. 1991) (“[C]ommunications to be fostered in the social worker/client relationship are confidential and . . . plaintiff is entitled to invoke the privilege of professional confidence, a breach of which is actionable as a tort even though it arises from a contractual relationship.”).

254. See *Wagenheim v. Alexander Grant & Co.*, 482 N.E.2d 955, 961 (Ohio Ct. App. 1983) (“It is implied in every contractual relationship between an accountant and his client that a general duty exists

cial,²⁵⁵ attorneys,²⁵⁶ and employees.²⁵⁷ Some courts have held that liability under the breach of confidentiality tort also extends to “a third party who induces a breach of a trustee’s duty of loyalty, or participates in such a breach, or knowingly accepts any benefit from such a breach.”²⁵⁸

According to David Elder, the “clear modern consensus of the case law” is to recognize the breach of confidentiality tort.²⁵⁹ Despite the development and growth of the breach of confidentiality tort on the American side of the Atlantic, the American tort remains much less developed than its English cousin. As one commentator observed:

The paucity of breach of confidence cases was probably due to the rise of the private-facts tort following Samuel Warren and Louis Brandeis’s seminal 1890 *Harvard Law Review* article Most jurisdictions accepted Warren and Brandeis’s argument alleging the inherent superiority of the “broader” right to privacy approach to privacy protection, and the breach of confidence cause of action fell into a period of dormancy.²⁶⁰

The American breach of confidentiality tort has yet to come close to reaching its fullest potential. The tort still applies only to a limited set of relationships, with most cases involving the patient-physician relationship. Moreover, third-party liability for inducing or benefiting from breaches of confidentiality has only been recognized in a few cases. Having only recently gained momentum, the breach of confidentiality tort often has not been raised in many cases where it might have relevance.²⁶¹

B. PRIVACY IN TWENTIETH-CENTURY BRITAIN

The story of privacy in Britain serves as an interesting contrast to the American experience. English law, like American law, also developed a law of “private” information. As in America, this English strand of the common law also traces its origins back to *Prince Albert v. Strange*. Yet where American law,

not to make extra-judicial disclosures of information acquired in the course of their professional relationship, and that a breach of that duty by an accountant may give rise to a cause of action.”)

255. See *Blair v. Union Free Sch. Dist.*, 324 N.Y.S.2d 222, 228 (N.Y. D. Ct. 1971) (“Although the relationship of a student and a student’s family with a school and its professional employees probably does not constitute a fiduciary relationship, it is certainly a special or confidential relationship.”).

256. See *Rich v. N.Y. Cent. & Hudson River R.R. Co.*, 87 N.Y. 382, 390 (1882) (“When such duty grows out of relations of trust and confidence, as that of the agent to his principal or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract.”).

257. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 516 (4th Cir. 1999) (“[T]he tort [breach of duty of loyalty] applies when the employee breaches her employer’s confidences.”).

258. *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F. Supp. 793, 803 (N.D. Ohio 1965); see also *Biddle v. Warren Gen. Hosp.*, 715 N.E.2d 518 (Ohio 1999).

259. DAVID A. ELDER, *PRIVACY TORTS* § 5:2 (2006) (writing in the context of physician and therapist confidentiality duties).

260. Harvey, *supra* note 246, at 2398–99.

261. We discuss some examples in Part II.C, *infra*.

guided by Warren and Brandeis, focused on the intellectual property part of the opinion, English law has focused on the breach of confidence part. English courts flatly rejected Warren and Brandeis's right to privacy, and created a separate body of law they referred to as "confidence" or "confidentiality." As one leading English study of the law of confidence puts it, an obligation of confidentiality will attach "whenever information is imparted, either explicitly or implicitly, for a limited purpose. . . . The obligation of confidence thus formed extends not only to those confidants who have received confidential information . . . but also to any third parties to whom the confidant discloses the information in breach of his obligation."²⁶²

The English law of confidence is quite different from the American law of privacy. Consider the case of *Barrymore v. News Group Newspapers, Ltd.*²⁶³ Actor Michael Barrymore had a homosexual affair with Paul Wincott, who worked for a company Barrymore jointly owned with his wife. Wincott provided details of the affair to a newspaper, including letters written by Barrymore. The court held that there was a breach of confidence: "[W]hen people enter into a personal relationship of this nature, they do not do so for the purpose of it subsequently being published in *The Sun*, or any other newspaper. The information about the relationship is for the relationship and not for a wider purpose."²⁶⁴

The case of *Stephens v. Avery*²⁶⁵ provides another illustration of the English approach. In a case that received widespread publicity in Britain, one Mr. Telling murdered his wife after he found her in bed with another woman.²⁶⁶ The plaintiff, Rosemary Stephens, confided in a close friend, Anne Avery, that she was the then-unknown woman having the sexual relationship with Mrs. Telling. Stephens expressly told Avery that the information was being disclosed in confidence. Avery then told this fact to a newspaper which published the information in an article entitled "Rosemary's Story." The court concluded that Avery breached a duty of confidentiality by telling the newspaper.²⁶⁷ The court rejected the argument that information loses its confidential nature because a few others might know about it. If information is "communicated to the world," it is no longer confidential, but "this will not necessarily be the case if the information has previously only been disclosed to a limited part of [the] public."²⁶⁸

The results in these cases would very likely be different under American

262. GURRY, *supra* note 73, at 4.

263. [1997] F.S.R. 600 (Ch.) (U.K.).

264. *Id.* at 602.

265. [1988] F.S.R. 510. For additional facts, see also JOSHUA ROZENBERG, *PRIVACY AND THE PRESS* (2004).

266. *Stephens*, [1988] F.S.R. at 510.

267. *Id.* at 518.

268. *Id.* at 516 (quoting *Attorney General v. Guardian Newspapers Ltd. (No. 2)*, (1998) 2 W.L.R. 805, 868).

privacy law. Courts might dismiss the cases, either concluding that the information was not private since others knew about it or finding that the information was “of legitimate concern to the public.”²⁶⁹ Beyond the privacy torts, the American breach of confidentiality tort would have difficulty because only a few courts have held that it can make third parties liable for knowingly using information obtained via a breach. Moreover, the American tort currently has been applied only to a limited set of relationships; courts have not yet extended the tort to friends or lovers. In contrast, English law is much more open-ended in the relationships it protects. As the court in *Stephens* stated:

Although the relationship between the parties is often important in cases where it is said there is an implied as opposed to an express obligation of confidence, the relationship between the parties is not the determining factor. It is the acceptance of the information on the basis that it will be kept secret that affects the conscience of the recipient of the information.²⁷⁰

Thus, English common law developed a law of confidence which differs significantly from the American privacy torts. This section traces how and why English law took such a divergent path.

1. Origins and Development

In England, *Prince Albert v. Strange* is considered to be a primary foundation for the breach of confidence tort. Although breach of confidence cases existed before,²⁷¹ *Prince Albert* became the clearest and most well-known precedent for the establishment of the tort, in part because of its famous plaintiffs and interesting facts,²⁷² but also because of its legal importance in establishing that breach of confidence can be actionable even to third parties.²⁷³ After *Prince Albert*, the next major development in the breach of confidence tort occurred just before the First World War. In 1913, in *Ashburton v. Pape*,²⁷⁴ Edward Pape sought to use letters between his creditor Lord Ashburn and the Lord’s solicitor in a bankruptcy proceeding. The Master of the Rolls enjoined the use of the letters because Pape had tricked the solicitor’s clerk into giving him the letters.²⁷⁵ The court reasoned that the duty of confidence which ran between

269. RESTATEMENT (SECOND) OF TORTS § 652D (1977). If a disclosure is of legitimate concern to the public, then a plaintiff cannot prevail under the public disclosure tort.

270. *Stephens*, [1988] F.S.R. at 517.

271. See *supra* notes 71–88 and accompanying text.

272. REID, *supra* note 59, at 9.

273. See GURRY, *supra* note 73, at 20–21, 48–50; THE LAW OF PRIVACY AND THE MEDIA 6–7 (Michael Tugendhat & Ian Christie eds., 2003); TOULSON & PHIPPS, *supra* note 78, at 9; LORD CHANCELLOR’S OFFICE, SCOTTISH OFFICE, REPORT OF THE COMMITTEE ON PRIVACY, 1972, Cmnd. 5012, at 296 [hereinafter “Younger Report”] (final report of the “Younger Commission” established by the Labour government in 1970 to study whether Parliament should take legislative action on privacy).

274. (1913) 2 Ch.D. 469 (C.A.) (U.K.).

275. *Id.* at 472–73.

lawyer and clerk could equitably be extended to the wrongdoer Pape who was aware of the confidential nature of the communications.²⁷⁶ As another of the judges who heard the case put it, such a ruling was fully consistent with the Court of Chancery's practice "for many years . . . to restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged."²⁷⁷

Breach of confidence was cemented as a common law action by the seminal 1948 case of *Saltman Engineering Co. v. Campbell Engineering Co.*²⁷⁸ The court held in that case that "the obligation to respect confidence is not limited to cases where the parties are in contractual relationship."²⁷⁹ *Saltman* established breach of confidence as a tort remedy separate and apart from contract.²⁸⁰ This conclusion was affirmed for personal confidences as well in *Argyll v. Argyll*,²⁸¹ in which the court clarified that breach of confidence was a remedy in personal matters, not just commercial ones. There, the court enjoined the Duke of Argyll from disclosing to reporters his wife's secrets.²⁸² It reasoned that "there could hardly be anything more intimate or confidential than is involved in [a marital] relationship."²⁸³

The English tort of breach of confidence crystallized in the 1969 case of *Coco v. Clark*.²⁸⁴ *Coco* was an action by the inventor of a moped engine against a moped manufacturer to enjoin the manufacturer's use of design ideas communicated by the inventor in unsuccessful contract negotiations between the parties. Although *Coco* involved a commercial confidence (or what American law would call a trade secret), it has formed the comprehensive basis under English law for the analysis of personal as well as commercial confidences.²⁸⁵ Under the *Coco v. Clark* formulation for the breach of confidence tort, plaintiffs must satisfy three elements. First, the information must have "the necessary quality of confidence about it."²⁸⁶ Second, the information "must have been imparted in circumstances importing an obligation of confidence."²⁸⁷ And third, there must be an "unauthorised use of that information to the detriment of the party

276. *Id.*

277. *Id.* at 475 (opinion of Swinfen-Eady, L.J.).

278. (1963) 3 All E.R. 413 (1948) (U.K.).

279. *Id.* at 414.

280. See REID, *supra* note 59, at 12–13; TOULSON & PHIPPS, *supra* note 78, at 16–17.

281. [1967] Ch. 302 (U.K.).

282. *Argyll v. Argyll* [1967] Ch. 302 (1964). The actual confidences enjoined related to what a divorce judge had earlier called "disgusting sexual activities to gratify a debased sexual appetite," referring to her "infamous sexual liason with a man, generally believed to have been Douglas Fairbanks, Jr., who was photographed 'headless.'" ROZENBERG, *supra* note 265, at 10.

283. *Argyll*, [1967] Ch. at 322.

284. *Coco v. A.N. Clark (Eng'rs) Ltd.*, [1969] R.P.C. 41 (U.K.).

285. See, e.g., ROZENBERG, *supra* note 265, at 8–9; THE LAW OF PRIVACY AND THE MEDIA, *supra* note 273, at 202; Venable v. News Group Newspapers Ltd., [2001] Fam. 430, 447–48.

286. *Coco*, [1969] R.P.C. at 47 (opinion of Megarry, J.).

287. *Id.*

communicating it.”²⁸⁸

Subsequent cases have fleshed out each of the *Coco* factors in some detail. With respect to the first factor of “quality of confidence,” four categories of information have been protected as confidential.²⁸⁹ Three of these categories—personal confidences, trade secrets, and artistic and literary confidences—track the earlier cases fairly well, with the fourth category, government confidences, being a new but fairly limited category.²⁹⁰ Trade secrets and artistic confidences have developed along a similar path to the earlier cases discussed above.²⁹¹ The only test established for confidences has been a negative one—that the information at issue be neither trivial nor in the public domain.²⁹² Information held to have the “quality of confidence” about it has included information about health and medical treatment, information about a person’s sex life or other intimate relationships, financial information, photographs taken at “private” events, information relating to private letter or telephone communications, the contents of personal diaries, information about involvement in crime, and information relating to children.²⁹³ Moreover, in cases which have held that a “quality of confidence” exists, factors relevant to this finding have included the presence of a contract calling for confidentiality, the intimate or private nature of the information, actions taken by the confider or confidant suggesting the existence of confidentiality, and the foreseeable damage caused by disclosure of the

288. *Id.*

289. GURRY, *supra* note 73, at 89; THE LAW OF PRIVACY AND THE MEDIA, *supra* note 273, at 205.

290. *See, e.g.*, Attorney Gen. v. Jonathan Cape Ltd. (1976) 1 Q.B. 752, 769–70 (opinion of Widgery, C.J.) (“[W]hen a Cabinet Minister receives information in confidence the improper publication of such information can be restrained by the court, and his obligation is not merely to observe a gentleman’s agreement to refrain from publication.”); *see also* THE LAW OF PRIVACY AND THE MEDIA, *supra* note 273, at 208–13 (noting that the law of confidence applies differently to government secrets because the government must show that disclosure of a secret would be detrimental to the public interest, whereas in private cases the party seeking disclosure must show that disclosure would be beneficial to the public interest); ROZENBERG, *supra* note 265, at 9–10, 210–216 (noting that the law of confidence applies to the publication of government secrets learned in confidence).

291. The doctrine of confidence in trade secrets protects economic rights and interests. Determining what constitutes protected information is highly contextual, but has previously included customer lists, technical secrets, production methods, financial secrets, prices paid, and business and trading information. The underlying rationale for the doctrine is recognition of the need for secrecy for innovation and progress, but is balanced against public policy concerns of contract and competition. THE LAW OF PRIVACY AND THE MEDIA, *supra* note 273, at 206–08. The more limited doctrine covering artistic and literary confidences also protects economic rights and interests, but has been limited drastically by the law of copyright. Literary and artistic confidences have involved etchings, private letters, plots and ideas for television and stage, political diaries, and drawings. Because of the diversity of possible types of information involved in these cases, the remedy will generally track the nature of the interest so that commercial interests may result in damages while privacy interests may require an injunction. *Id.* at 228.

292. *See* Gavin Phillipson, *Transforming Breach of Confidence? Towards a Common Law Right of Privacy Under the Human Rights Act*, 66 M.L.R. 726, 732 (2003).

293. *See* THE LAW OF PRIVACY AND THE MEDIA, *supra* note 273, at 213–28; REID, *supra* note 59, at 142–54; TOULSON & PHIPPS, *supra* note 78, at 38–55, 145–94.

information.²⁹⁴

The second *Coco* factor, the imparting of the information under “circumstances importing an obligation of confidence,” goes to the nature of the relationship that is allegedly confidential. An obligation of confidence is generally created whenever information is given from one person to another for a limited purpose.²⁹⁵ In addition, third parties who obtain information from a source who has breached confidentiality can also be liable for using the information. As long as the third party knows that information she has received is in confidence, she is bound by the confidence even if she received the material innocently.²⁹⁶ English courts have protected a variety of relationships as involving an obligation of confidence.²⁹⁷ In addition to express contracts of confidentiality and the categories of trade secrets and marital confidences already discussed, other relationships given an obligation of confidence have included a wide variety of personal and professional relationships, including lawyer-client,²⁹⁸ patient-doctor,²⁹⁹ employer-employee,³⁰⁰ customer-banker,³⁰¹ accountant-

294. See THE LAW OF PRIVACY AND THE MEDIA, *supra* note 273, at 228–39; REID, *supra* note 59, at 30–48; TOULSON & PHIPPS, *supra* note 78, at 19–22, 26–31.

295. GURRY, *supra* note 73, at 4.

296. *Id.*; see also Fraser v. Evans, (1969) 1 Q.B. 349, 361 (C.A.) (opinion of Denning, M.R.); Schering Chems. Ltd. v. Falkman Ltd., [1982] Q.B. 1 (C.A.).

297. See generally, GURRY, *supra* note 73, at 122–76; THE LAW OF PRIVACY AND THE MEDIA, *supra* note 273, at 248–65; TOULSON & PHIPPS, *supra* note 78, at 145–92.

298. See B. v. Auckland Dist. Law Soc’y, (2003) 2 A.C. 736, 757 (U.K.); R. (Morgan Grenfell & Co.) v. Special Comm’r of Income Tax, (2003) 1 A.C. 563 (U.K.); see also GURRY, *supra* note 73, at 149–56; TOULSON & PHIPPS, *supra* note 78, at 183–93.

299. See, e.g., Campbell v. MGN Ltd., (2004) 2 A.C. 457, 499 (U.K.) (opinion of Baroness Hale); Lady Archer v. Williams, [2003] EWHC (QB) 1670 (U.K.) (holding that medical information is confidential); R. v. Dep’t of Health, [2001] F.S.R. 8 (C.A.) (U.K.) (holding that pharmacists owe a duty of confidentiality to those to whom they dispense medication); W. v. Egdell, [1990] Ch. 359 (U.K.) (physician’s duty); see also GURRY, *supra* note 73, at 148–49; THE LAW OF PRIVACY AND THE MEDIA, *supra* note 273, at 214–15; REID, *supra* note 59, at 145–47; TOULSON & PHIPPS, *supra* note 78, at 145–56.

300. See, e.g., Faccenda Chicken Ltd. v. Fowler, [1987] Ch. 117 (U.K.) (holding that the scope of employment duties or information determines the scope of confidence); Thomas Marshall (Exports) Ltd. v. Guinle, [1979] Ch. 227 (U.K.) (recognizing employer-employee confidentiality as well as contract-based duty); Printers & Furnishers Ltd. v. Holloway, [1965] W.L.R. 239 (U.K.) (recognizing employer-employee confidentiality as well as contract-based duty); Amber Size & Chemical Co. Ltd. v. Menzel, (1913) 2 Ch. 239 (U.K.) (recognizing a duty of confidentiality in employment); see also GURRY, *supra* note 73, at 179–224; TOULSON & PHIPPS, *supra* note 78, at 171–78.

301. See Tournier v. Nat’l & Provincial Union Bank of Eng., (1924) 1 K.B. 461 (C.A.); see also Turner v. Royal Bank Scot., [2001] EWCA (Civ) 64 (recognizing the existence of a bank’s duty of confidentiality known as the “Tournier Rules” although ruling for the bank-defendant); Christofi v. Barclays Bank Plc., (1999) 4 All E.R. 437 (reaffirming the “Tournier Rules” although ultimately ruling for the defendant-bank because of a statutory right to information); Barclays Bank Plc. v. Taylor, [1989] 1 W.L.R. 1066 (C.A.) (U.K.) (reaffirming banker-customer confidentiality).

client,³⁰² fiduciary-beneficiary,³⁰³ arbitrator/mediator-litigant,³⁰⁴ government ministers with the government,³⁰⁵ and cases of artistic or literary confidence.³⁰⁶ Courts have not limited the tort to specific categories of relationships. Beyond marital relationships, for example, courts have extended the tort to lovers and friends.³⁰⁷

The third *Coco* factor requires that there be a “detrimental use” of the confidential information.³⁰⁸ At one level, some sort of injury is generally required before equity would get involved, but subsequent courts have been relatively reluctant both to define the requisite level of injury required and even to state with certainty whether detriment is required as an absolute matter in all cases.³⁰⁹ Moreover, it may well be, as one case suggested, that the very breach of a confidence is inherently detrimental, regardless of any proof of damages.³¹⁰

Even if the three *Coco* factors are satisfied, the mere existence of a confi-

302. See *Parry-Jones v. Law Soc’y*, [1969] 1 Ch. 1 (C.A.) (U.K.) (holding that professional practitioners such as accountants must hold information in confidence); *Evitt v. Price*, (1827) 57 Eng. Rep. 659.

303. See *Yates Circuit Foil Co. v. Electrofoils Ltd.*, [1976] Ch. 345, 394 (U.K.) (Whitford, J.) (noting that a fiduciary relationship is relevant to determining the existence of a duty of confidentiality); *Phipps v. Boardman* (1967) 2 A.C. 46 (U.K.) (holding that solicitor to trustees who profited from information learned in the relationship was a breach of confidence); see also GURRY, *supra* note 73, at 158–62.

304. See *Dolling-Baker v. Merrett*, [1990] W.L.R. 1205 (C.A.) (U.K.) (holding that parties to arbitration are under a duty of confidentiality); *Theodoropoulos v. Theodoropoulos*, (1963) 2 All E.R. 772 (U.K.) (holding that for mediation of husband and wife reconciliation all parties were bound by duty of confidentiality).

305. See cases cited *supra* note 290.

306. See *supra* note 37 and accompanying text; *Prince of Wales v. Associated Newspapers*, [2006] EWHC (Ch) 522 (U.K.) (granting summary judgment on theories of breach of confidence and copyright against a newspaper for publication of a private journal that had been leaked by a private secretary); *Ashdown v. Tel. Group Ltd.*, [2001] Ch. 685 (U.K.) (applying confidence law to protect political diary); *Times Newspapers Ltd. v. Mirror Group Newspapers Ltd.*, [1993] EMLR 443 (U.K.) (applying confidence law to protect political diary); *Talbot v. Gen. Television Corp.*, [1981] R.P.C. 1 (U.K.) (applying confidence law to an idea for a television series); *Floydd v. Cheney*, (1970) 1 All E.R. 446 (defendant enjoined from misusing architectural drawings); *Pollard v. Photographic Co.*, (1888) 40 Ch.D. 345, 349 (U.K.) (defendant enjoined from commercially using a portrait taken of plaintiff); *Tuck & Sons v. Priestler*, (1887) 19 Q.B.D. 629 (U.K.) (court enjoined defendant from printing copies for own use of a drawing the plaintiff gave to be copied); *Gilbert v. Star Newspaper Co.*, (1894) 11 T.L.R. 4 (U.K.) (recognizing confidence as grounds to restrain publication of the plot of an unreleased play); *Abernethy v. Hutchinson*, (1825) 3 L.J. Ch. 209 (U.K.) (holding that publicly delivered lectures could not be published); *Thompson v. Stanhope*, (1774) 27 Eng. Rep. 476 (recognizing confidentiality of private correspondence); see also THE LAW OF PRIVACY AND THE MEDIA, *supra* note 273, at 225, 228.

307. See *Stephens v. Avery*, (1988) 1 Ch. 449 (U.K.) (friend liable for breach of confidence); *Barrimore v. News Group Newspapers*, [1997] F.S.R. 600 (U.K.) (lover liable for breach of confidence). See generally GURRY, *supra* note 73, at 143.

308. *Coco v. A.N. Clark (Eng’rs) Ltd.*, [1969] R.P.C. 41, 47–48 (U.K.).

309. GURRY, *supra* note 73, at 407; THE LAW OF PRIVACY AND THE MEDIA, *supra* note 273, at 264–65 (collecting cases); TOULSON & PHIPPS, *supra* note 78, at 70–73.

310. *Attorney Gen. v. Guardian Newspapers*, (1990) 1 A.C. 109, 265 (opinion of Lord Keith); cf. *Moorgate Tobacco Co. v. Philip Morris Ltd.*, (1984) 156 C.L.R. 414, 438 (Australian case cited with approval in TOULSON & PHIPPS, *supra* note 78, at 71).

dence does not mean that courts will protect it under all circumstances.³¹¹ English courts have recognized a number of exceptions to an enforceable confidence, such as consent, information that is trivial or in the public domain, and information that is in the public interest.³¹² Two of these exceptions are particularly relevant here. First, confidences contrary to the “public interest,” such as those used for tortious or criminal purposes, will not be enforced.³¹³ Thus, in *Campbell v. Frisbee*,³¹⁴ supermodel Naomi Campbell was able to enforce an obligation of confidence against her assistant Vanessa Frisbee regarding information about Campbell’s personal life that Frisbee learned in the course of her employment, but the obligation did not extend to information regarding a violent assault that Campbell allegedly made on her employee.³¹⁵ More generally, English courts have repeatedly made clear that a person cannot be made “the confidant of a crime or fraud.”³¹⁶

Second, information in the public domain does not generally qualify for protection as a confidence.³¹⁷ The determination of whether something is in the public domain, however, is a question of degree and “is not to be defeated simply by proving that there are other people in the world who know the facts in question.”³¹⁸ Because a confidence is by definition a sharing of information, there will always be other people who are aware of the information, and the question is not whether others are aware of the information but rather whether so many people are aware of it that it can no longer be said to be a confidence.³¹⁹ As one court noted, “information only ceases to be capable of protection as confidential when it is in fact known to a substantial number of people.”³²⁰

Moreover, English confidence law also protects collections of data even where the individual pieces of data are each drawn from the public domain. As the court put it in *Coco v. Clark*:

Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidence: for something new and confidential may have been brought into being by the application of the

311. GURRY, *supra* note 73, at 5.

312. TOULSON & PHIPPS, *supra* note 78, at 41.

313. GURRY, *supra* note 73, at 6.

314. [2002] EWCA (Civ) 1374 (U.K.).

315. *Id.*; see also GURRY, *supra* note 73, at 6.

316. *Gartside v. Outram*, (1857) 26 L.J. Ch. (n.s.) 113, 114; *accord* *Attorney Gen. v. Guardian Newspapers*, (1990) 1 A.C. 109, 282–283; *Lion Labs. Ltd. v. Evans*, [1985] Q.B. 526, 550 (C.A.) (U.K.); *Beloff v. Pressdram Ltd.* (1973) 1 All E.R. 241, 260 (U.K.).

317. See generally *Guardian Newspapers*, (1990) 1 A.C. at 282 (opinion of Lord Goff); *THE LAW OF PRIVACY AND THE MEDIA*, *supra* note 273, at 239–41; TOULSON & PHIPPS, *supra* note 78, at 44–45.

318. *Franchi v. Franchi*, [1967] R.P.C. 149, 152 (U.K.).

319. See *THE LAW OF PRIVACY AND THE MEDIA*, *supra* note 273, at 239–41; Phillipson, *supra* note 292, at 736.

320. *Stephens v. Avery*, [1988] Ch. 449, 454 (U.K.).

skill and ingenuity of the human brain. Novelty depends upon the thing itself and not upon the quality of its constituent parts.³²¹

As developed under the *Coco* test, English confidence law evolved into a robust and flexible body of law protecting personal and commercial information from disclosure under a conceptually distinct theory from the one undergirding American privacy law. Rather than information nondisclosure rules justified to protect the feelings and inviolate personalities of plaintiffs, English law justified nondisclosure in terms of the trust and reliance in relationships. English law as it stood in the late 1990s thus protected against betrayal by confidants rather than embarrassment by strangers. Yet the two separate paths of privacy would once again begin to converge.

2. The Human Rights Act and the Move Toward “Privacy”

By the late 1990s, the English law of confidence had a very broad scope that was gradually expanding. Courts had stretched the idea of an obligation of confidence quite far, interpreting it to include cases where there was not even any communication between the plaintiff and the recipient of the information, such as secret photography or wiretapping.³²² And third parties have long had obligations of confidence imposed upon them when they knowingly received confidential material from the confidant, even where there was no relationship between the third party and the confider.³²³ Therefore, in many situations, the law of confidence could be extended to parties outside the relationship in which the confidence was initially made. While not as unshackled as a more general law of privacy might be, the law of confidence had the ability to cover a wide range of cases.

This flexibility in confidence law was paralleled by a steadfast insistence by courts and Parliament that English law not recognize a general right to privacy along American lines. For almost a century, some English commentators had called for the establishment of a Warren-and-Brandeis-style privacy tort to supplement breach of confidence. But despite the urging of judges,³²⁴ commen-

321. *Coco v. Clark*, [1969] R.P.C. 41, 47 (U.K.); see also THE LAW OF PRIVACY AND THE MEDIA, *supra* note 273, at 207.

322. See Phillipson, *supra* note 292, at 743 & n.133 (collecting cases).

323. See *Ashburton v. Pape*, (1913) 2 Ch.D. 469, 472 (opinion of Cozens-Hardy, M.R.); GURRY, *supra* note 73, at 269–71.

324. See *Douglas v. Hello! Ltd.*, [2001] Q.B. 967, 997 (opinion of Sedley, J.) (“[W]e have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy.”); *Schering Chems. Ltd. v. Falkman Ltd.*, [1982] Q.B. 1, 21 (opinion of Denning, J.) (“Whilst freedom of expression is a fundamental human right, so also is the right of privacy. Everyone has the right to respect for his private life and his correspondence: article 8 of the European Convention.”); see also Stephen Sedley, *Towards a Right to Privacy*, LONDON REV. OF BOOKS, June 8, 2006, at 20 (lamenting that the House of Lords turned down “a paradigmatic opportunity to acknowledge a true privacy right” when it denied recovery in *Wainwright v. Home Office*, [2001] EWCA (Civ) 2081).

tators,³²⁵ and law commissions³²⁶ for stronger protections for confidentiality or an express right of privacy, Parliament consistently refused to create a statutory tort.

Courts also consistently refused to recognize an American-style tort in the common law. The most famous judicial rejection of privacy occurred in the case of *Kaye v. Robertson* in 1991.³²⁷ The court refused to prevent the publication of an interview and photographs of a celebrity recovering in his hospital room from a brain injury. The court noted that the plaintiff suffered “a monstrous invasion of his privacy” and that “[i]f ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties.”³²⁸ However, the court concluded, “[i]t is this invasion of his privacy which underlies the plaintiff’s complaint. Yet it alone, however gross, does not entitle him to relief in English law.”³²⁹ By contrast, this fact pattern has traditionally been an easy case for American privacy law to protect.³³⁰

The *Kaye* principle persisted until recently, a fact best illustrated by the recent case of *Wainwright v. Home Office*.³³¹ In January 1997, when Mary Wainwright and her handicapped son Alan Wainwright were visiting a prison, they were illegally strip-searched by guards looking for drugs. The Wainwrights brought an action against the government for, among other things, battery and trespass to the person. The trial judge granted their claims, holding that the tort of trespass to the person protected a common law right of privacy. The government appealed the judgment of trespass, and the Court of Appeal reversed, holding that the English common law did not include a stand-alone right of privacy.³³² The sole remedy for the indignities suffered in this case was the claim of battery, which protects merely physical and not dignitary injuries. This conclu-

325. See, e.g., Gerald Dworkin, Notes of Cases, *Privacy and the Press*, 24 M.L.R. 185 (1961); Brian Neill, *The Protection of Privacy*, 25 M.L.R. 393 (1962); Seipp, *supra* note 88; Percy H. Winfield, *Privacy*, 47 L.Q.R. 23 (1931); T. L. Yang, *Privacy: A Comparative Study of English and American Law*, 15 INT’L & COMP. L.Q. 175 (1966). Numerous commentators have also opposed the creation of an American-style right of privacy on a variety of grounds. See, e.g., PRATT, *supra* note 8; ROZENBERG, *supra* note 265; see also RAYMOND WACKS, *PRIVACY AND PRESS FREEDOM* (1995); Raymond Wacks, *The Poverty of “Privacy,”* 96 L.Q.R. 73 (1980).

326. Younger Report, *supra* note 273; LAW COMMISSION OF ENGLAND AND WALES, *BREACH OF CONFIDENCE*, 1981, Cmnd. 8388 [hereinafter *LAW COMMISSION REPORT*].

327. [1991] F.S.R. 62 (C.A.) (U.K.).

328. *Id.* at 70.

329. *Id.*

330. See Prosser, *supra* note 4, at 392 (“[W]hen [a plaintiff] is confined to a hospital bed . . . the making of a photograph without his consent is an invasion of a private right, of which he is entitled to complain.”); *Barber v. Time, Inc.*, 159 S.W.2d 291, 295 (1942) (photograph of woman in hospital room used to illustrate an article about her condition was actionable as invasion of privacy).

331. [2001] EWCA (Civ) 2081, [2003] All E.R. 943 (U.K.).

332. See *id.* at 57 (opinion of Mummery L.J.) (“This claim fails as there is no tort of invasion of privacy. Instead there are torts protecting a person’s interests in the privacy of his body, his home, and his personal property. There is also available the equitable doctrine of breach of confidence for the protection of personal information, private communications and correspondence.”).

sion was affirmed by the House of Lords.³³³

A variety of reasons have been suggested for England's unwillingness to protect "privacy," including an English reluctance to entrust something as important as privacy to public authorities,³³⁴ the power of the media lobby before Parliament,³³⁵ and the reluctance of Parliament to pass such a law for other political considerations.³³⁶ The leading study of privacy in Britain suggests that a large part of the answer lies in the distinctive British appreciation for privacy that inheres in the national character and thus paradoxically requires less protection through formal legal rules.³³⁷ Whatever the reason, despite the large number of privacy bills and proposals before Parliament since the 1930s, the legislature declined to enact a privacy law.³³⁸

English law has recently made greater strides toward recognizing an American-style right to privacy. Yet, ironically, this state of affairs has come not from American legal influences but as a result of British legal involvement with Europe. In 1998, Parliament passed the landmark Human Rights Act (HRA),³³⁹ which came into effect in 2000. The HRA effectively incorporated a Bill of Rights into English law by requiring that English courts protect the rights guaranteed by the Council of Europe's European Convention on Human Rights (ECHR). Two provisions of the ECHR have proven significant for English confidentiality law. Article 8 provides that "[e]veryone has the right to respect for his private and family life, his home and correspondence."³⁴⁰ Article 10 provides that "[e]veryone has the right to freedom of expression."³⁴¹ The passage of the HRA has spawned a flurry of cases involving celebrities suing the media. Although the law remains in a state of flux, English courts responded to Article 8 not by endorsing a new action for privacy, but by further stretching the law of confidence. English law responded to Article 10 by holding that freedom of speech was a factor to be considered in the public interest exception to the tort.³⁴²

One of the earliest post-HRA cases was brought in November 2000, the same month that the HRA came into effect, by actors Michael Douglas and Catherine

333. *Wainwright v. Home Office*, [2003] UKHL 53, [2004] A.C. 406 (U.K.).

334. PRATT, *supra* note 8, at 206.

335. Gerald Dworkin, *The Younger Committee Report on Privacy*, 36 M.L.R. 399, 399 (1973).

336. Sedley, *supra* note 324, at 21.

337. PRATT, *supra* note 8, at 16, 206–07.

338. One exception to this trend is the Data Protection Act of 1998, which gives effect to the EU Data Protection Directive of 1995, Directive 95/46 EC of the European Parliament and the Council. The Data Protection Act prohibits the wrongful processing of personal data. Although the Data Protection Act has been interpreted as providing privacy protection to individuals, especially against the media, it has not proven as popular with litigants as the post-HRA breach of confidence tort. For a discussion of the relationship between breach of confidence and the English Data Protection Act, see generally HELEN FENWICK & GAVIN PHILLIPSON, *MEDIA FREEDOM UNDER THE HUMAN RIGHTS ACT* (2006).

339. Human Rights Act, 1998, c. 42.

340. European Convention on Human Rights, § 1, art. 8, Nov. 4, 1950.

341. *Id.* § 1, art. 10.

342. See Sedley, *supra* note 324, at 20.

Zeta-Jones, seeking an emergency injunction against *Hello!* magazine in order to protect the exclusive right they had granted to *OK!* magazine to publish photographs of their wedding.³⁴³ Although wedding guests had been told not to take any photographs, a photographer eluded security measures and posed as a guest in a tuxedo to secretly take nine pictures for *Hello!* magazine. The trial court granted the injunction. The Court of Appeal vacated the injunction as unduly restricting freedom of expression, but held that the celebrity plaintiffs could pursue a claim for damages.³⁴⁴ Lord Justice Brooke reasoned that “it would certainly be arguable, if the appropriate facts were established at trial, that ‘unauthorised’ images were taken on this private occasion by someone in breach of his or her duty of confidence, and that they therefore constituted ‘confidential information.’”³⁴⁵ Lord Justice Sedley went further, making the case for a right to privacy grounded in existing confidentiality law under post-HRA English law. He noted that “courts have done what they can, using such legal tools as were on hand, to stop the more outrageous invasions of individuals’ privacy; but they have felt unable to articulate their measures as a discrete principle of law.”³⁴⁶ With the flourish of a pun, he added, “Nevertheless, we have reached a point at which it can be said with confidence that the law recognizes and will appropriately protect a right of personal privacy.”³⁴⁷ Sedley went on to argue that privacy recognizes “that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives.”³⁴⁸ He concluded that the law should no longer have to “construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.”³⁴⁹

The *Douglas* case returned to the trial court and in 2003 *Hello!* magazine was found liable in damages.³⁵⁰ Unlike the right to privacy theory sketched out by Lord Justice Sedley in the Court of Appeal, Justice Lindsay based his judgment on breach of confidence.³⁵¹ In the opinion of the court, all three of the *Coco* factors were satisfied—there was a quality of confidence because the information about the wedding was inaccessible, there was an obligation of confidence because the guests knew or should have known of the wishes of the bridal couple not to have photos taken, and there was detriment because the couple suffered both emotional and financial distress from the publication of the

343. *Douglas v. Hello! Ltd*, [2001] Q.B. 967 (2000) (U.K.) [hereinafter *Douglas I*].

344. *Id.*

345. *Id.* at 984 (opinion of Brooke, L.J.).

346. *Id.* at 997 (opinion of Sedley, L.J.).

347. *Id.*

348. *Id.* at 1001.

349. *Id.*

350. *Douglas v. Hello! Ltd*, [2003] EWHC (Ch) 786, [182]–[186], [227], (2003) 3 All E.R. 996 [hereinafter *Douglas II*].

351. *Id.*

photographs.³⁵² Although the court noted that the breach of confidence analysis was affected by the passage of the HRA, it stated that there was still no free-standing privacy tort under English law.³⁵³ Balancing the protection of Article 8 privacy through breach of confidence doctrine against the Article 10 guarantee of a free press, the court held that *Hello!* magazine was not insulated from liability by its status as part of the press because the pictures were taken in violation of the relevant press code of professional ethics, they were taken by an impostor posing as a guest via subterfuge, and there was no public interest in the publication of the pictures, notwithstanding the fact that *Hello!* readers wanted desperately to see them.³⁵⁴

Perhaps the leading case on post-HRA English privacy and confidence law is that captioned as *A v. B Plc.*³⁵⁵ Garry Flitcroft (A), a Premiership footballer of limited fame, had extramarital affairs with two women, C and D. He sought and obtained an interim injunction preventing the *People* newspaper (B) from publishing stories by C and D about his affairs. The injunction was set aside by the Court of Appeal, in which Lord Woolf, the Lord Chief Justice, sat with two other judges.³⁵⁶ In his opinion for the Court, Lord Woolf attempted to bring some order to the confusion surrounding the intersection between HRA privacy and traditional breach of confidence law. At the outset, he declared that such cases should appropriately be resolved through the existing doctrinal mechanism of breach of confidence, and that the creation of a new privacy tort would be unnecessary.³⁵⁷ Nevertheless, given the number of post-HRA lawsuits, Lord Woolf attempted to provide some “guidelines” to trial courts dealing with such cases in the future. Lord Woolf explained that although courts should safeguard privacy through confidentiality, they must be wary of enjoining the press because of the importance of protecting freedom of the press. Even in the absence of a public interest in the news article, injunctions against the press in the name of privacy must be “justified.”³⁵⁸

Nevertheless, the opinion significantly broadened the scope of the breach of confidence tort to include American-style privacy actions, holding that

the need for the existence of a confidential relationship should not give rise to problems as to the law. . . . A duty of confidence will arise whenever the party

352. *Id.* at 1045, 1053–54.

353. *Id.* at 1061–62.

354. *Id.* at 1055.

355. [2002] EWCA (Civ) 337, [2003] Q.B. 195 (U.K.).

356. *Id.* at 218.

357. *Id.* at 205–06 (“It is most unlikely that any purpose will be served by a judge seeking to decide whether there exists a new cause of action in tort which protects privacy. In the great majority of situations, if not all situations, where the protection of privacy is justified . . . an action for breach of confidence now will, where this is appropriate, provide the necessary protection.”).

358. *Id.*

subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected³⁵⁹

Lord Woolf noted that the free speech rights of the party who wants to gossip must be balanced against the privacy interests of the party who wants to restrain the disclosure. The type of relationship at issue would determine the appropriate balance between privacy and speech. Finally, Lord Woolf cautioned that public figures should expect lesser-judicially-enforced privacy³⁶⁰ and that the courts should not attempt to act as “censors or arbiters of taste.”³⁶¹

Applying these general principles, Lord Woolf concluded A was not entitled to an injunction. Since A was a “well known premiership football player,” there was at least a “modicum of public interest” in his off-the-field activities.³⁶² Second, A’s non-marital relationship with C and D would not enjoy the same level of protection as a marital relationship: “[T]here is a significant difference in our judgment between the confidentiality which attaches to what is intended to be a permanent relationship and that which attaches to the category of relationships which A was involved with here.”³⁶³ Nevertheless, the court concluded that the relationships involved in the case reached the “outer limits of relationships which require the protection of law.”³⁶⁴ Balancing the lessened value of confidentiality in this relationship against freedom of the press, the court concluded that granting an injunction “would be an unjustified interference with freedom of the press.”³⁶⁵

A third leading post-HRA case implicating privacy in the guise of confidence is *Campbell v. MGN Ltd.*³⁶⁶ Supermodel Naomi Campbell was photographed leaving a Narcotics Anonymous meeting, and the photos were used in a tabloid account of her drug addiction, her attendance at the meeting, and some of the details about the meetings.³⁶⁷ In ruling that Campbell was entitled to an injunction, the Law Lords concluded that there is no free-standing right of privacy in English law but that the HRA requires the expansion of breach of confidence law to include invasions of privacy.³⁶⁸

Campbell, A v. B Plc, and *Douglas* are the leading, but by no means the only, post-HRA cases that suggest the movement of English confidence law towards recognizing a right to privacy in virtually all but name. The captions of other

359. *Id.* at 207.

360. *Id.* at 208.

361. *Id.* at 209.

362. *Id.* at 217 (“Footballers are role models for young people and undesirable behaviour on their part can set an unfortunate example. . . . [T]he fact is that someone holding his position was inevitably a figure in whom a section of the public and the media would be interested.”).

363. *Id.* at 216.

364. *Id.* at 217.

365. *Id.*

366. [2002] EWCA (Civ) 1373, [2003] Q.B. 633 (U.K.).

367. *Id.* at 650.

368. *Id.* at 661; *see also* Sedley, *supra* note 324, at 4.

cases read like a “who’s who” of modern British celebrity.³⁶⁹ Some of the fact patterns of these cases—photographs of the interior of a home, and the reports of domestic details—bear a striking similarity to the paradigmatic cases foreseen by Warren and Brandeis over a century ago.³⁷⁰ These cases are significant not only because they signify the possible broadening of the common law breach of confidence tort, but also because they demonstrate that the new English privacy cases are grappling with the same tension between the disclosure of private facts and freedom of expression that have plagued analogous actions in the United States.

Thus, the English law of confidence seems to be in the midst of a transmogrification, as the passage of the HRA has caused that venerable tort to give birth to an implicit new law of privacy. As Raymond Wacks notes, under current English law,

[i]t is unnecessary to show a pre-existing relationship of confidence where private information is involved. A duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected.³⁷¹

Likewise, Joshua Rozenberg observes: “The need for a formal relationship between two parties has become attenuated almost to the point of non-existence.”³⁷² These changes in the law of confidence have led another to declare that “[t]he time has come to say openly that there is a right to privacy in English Law.”³⁷³ Nevertheless, despite muddying the conceptual waters, English courts are enlarging the already expansive breach of confidence tort to encompass many of the harms redressed by the American right to privacy.

The English experience is instructive, for it demonstrates how the concept of confidentiality can develop into a powerful protection of personal information.

369. In addition to the reported case denying radio and television presenter Jamie Theakston’s attempt to prevent publication of reports of his activities in a brothel, see *Theakston v. MGN, Ltd.*, [2002] EWHC (QB) 137, [H2], a number of unreported cases have involved lawsuits by: Victoria “Posh Spice” Beckham to keep nude photographs of herself out of the newspapers, see Phillipson, *supra* note 292, at 722–27; Posh and her husband David Beckham to prevent photographs of their mansion “Beckingham Palace” from being published, *Beckham v. MGN*, June 28, 2001 (Eady, J) (unreported), *cited in* Phillipson, *supra* note 292, at 727; ROZENBERG, *supra* note 265, at 26; Cherie Blair to prevent the publication of the “details of her domestic arrangements,” *Blair v. Associated Newspapers*, No. HQ0001236, (unreported), *cited in* Phillipson, *supra* note 292, at 727; and radio disc jockey Sara Cox to prevent the publication of nude sunbathing pictures of her and her husband on their honeymoon, *Roy Greenslade, Sara Cox Wins Key Human Rights Ruling Against Press*, *THE GUARDIAN* (LONDON), June 7, 2003, at 1.

370. See cases cited *supra* note 369.

371. Raymond Wacks, “Private Facts”: *Is Naomi Campbell a Good Model?*, 1 SCRIPT-ed 420, 426 (2004), available at <http://www.law.ed.ac.uk/ahrc/script-ed/issue3/wacks.asp>.

372. ROZENBERG, *supra* note 265, at 15.

373. James Strachan & Rabinder Singh, *The Right to Privacy in English Law*, 2002 EUR. HUM. RTS. L. REV. 129, 161.

Warren and Brandeis rejected confidentiality as too restrictive and narrow a basis for protecting privacy, but they did not envision just how flexibly the concept could be used.

C. CONTRASTING CONCEPTIONS OF PRIVACY

Examining the paths of the common law of privacy on both sides of the Atlantic reveals at least three critical differences in theory and practice. First, there is a profound contrast between the underlying conceptions of privacy in American and English tort law. These contrasting conceptions of privacy result in the law asking very different questions and in producing significantly distinct results. Second, a number of the doctrinal limitations that have restrained the privacy torts—including the publicity and newsworthiness elements—are inapplicable to actions for breach of confidentiality. Third, the First Amendment critiques that have limited the privacy torts in the United States would have much less force when applied to breaches of confidentiality. In this section, we explore these conceptual and practical differences between the two common law conceptions of privacy.

1. Conceptual Differences

Most fundamentally, the conceptions of privacy underlying English and American privacy tort law are radically different. Warren and Brandeis's conception of privacy is highly individualistic. Their central phrase to describe the right to privacy—the right to be let alone—emphasizes the isolated individual and her ability to shut out invaders.³⁷⁴ To be fair, Warren and Brandeis recognized the negative social effects of the rampant rise in gossip,³⁷⁵ but they based the right to privacy on protecting the *individual* and not social relationships. They gave short shrift to the extent to which personal information arises within human interaction and is transmitted between people with various expectations of confidentiality.

Today, many conceptions of privacy in American law are defined in very individualistic terms.³⁷⁶ One court declared: “Privacy is inherently personal. The right to privacy recognizes the sovereignty of the individual.”³⁷⁷ Prosser's *Second Restatement of Torts* provides similarly that “[t]he right protected by the

374. See SOLOVE, *supra* note 234, at 93–97.

375. Gavison, *supra* note 6, at 441.

376. A group of scholars has begun to attack the individualistic conception of privacy, arguing that privacy is “constitutive” of society. See, e.g., Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1428 (2000); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 959 (1989) (privacy “safeguards rule of civility that in some significant measure constitute both individuals and community”); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1613 (1999); Spiros Simitis, *Reviewing Privacy in an Information Society*, 135 U. PA. L. REV. 707, 709 (1987) (“[P]rivacy considerations no longer arise out of particular individual problems; rather, they express conflicts affecting everyone.”); Solove, *supra* note 9, at 488.

377. *Smith v. City of Artesia*, 772 P.2d 373, 376 (N.M. Ct. App. 1989).

action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded.”³⁷⁸ Thomas Emerson argues: “Generally speaking, the concept of a right to privacy attempts to draw a line between the individual and the collective, between self and society.”³⁷⁹ Edward Bloustein, a leading defender of the privacy torts, argued that individual dignity was the unifying theme behind the privacy torts.³⁸⁰

In contrast to Warren and Brandeis’s individualistic conception of privacy, the English law of confidentiality focuses on relationships rather than individuals. Far from a right to be let alone, confidentiality focuses on the norms of trust within relationships. Indeed, most of our personal information is known by other people, such as doctors, spouses, children, and friends, as well as institutions, such as ISPs, banks, merchants, insurance companies, phone companies, and other businesses. We need to share our secrets with select others, and when we tell others a secret, we still consider it to be a secret. We confide in others, we trust them with information that can make us vulnerable, and we expect them not to betray us. These norms are missing from the Warren and Brandeis conception of privacy.

The key conceptual difference between the breach of confidence tort and public disclosure of private facts tort is the nature of what is protected. The public disclosure tort focuses on the nature of the information being made public. By contrast, the focus of the tort of breach of confidentiality is on the nature of the relationship. As one scholar has put it, “while the private-facts tort focuses on the nature of the information published, the breach of confidence action focuses on the parties’ obligations to each other.”³⁸¹ In many public disclosure cases, courts have struggled in recognizing that information shared with other people can still be private.³⁸² “Privacy” has often been understood to mean total secrecy.³⁸³ Confidentiality is more nuanced, as it involves the sharing of information with others and the norms by which people within relationships handle each other’s personal information.

In applying the American privacy torts, many courts find that information is not private because it is shared with others or exposed in some way to the

378. RESTATEMENT (SECOND) OF TORTS § 652I cmt. a (1977).

379. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 545 (1970).

380. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964).

381. Gilles, *supra* note 247, at 10; *see also* Peter A. Winn, *Confidentiality in Cyberspace: The HIPAA Privacy Rules and the Common Law*, 33 RUTGERS L.J. 617, 652–58 (2002) (contrasting breach of confidentiality with public disclosure).

382. American Courts have reached highly inconsistent results about this issue. *Compare* *Duran v. Detroit News, Inc.*, 504 N.W.2d 715 (Mich. Ct. App. 1993) (telling a few people extinguishes privacy claim), *with* *Times Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556 (Ct. App. 1988) (telling a few people “does not render private information public”). For an innovative analysis of this issue from a social networks theory perspective, *see* Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005).

383. *See* SOLOVE, *supra* note 234, at 42–44.

public.³⁸⁴ For example, in *Nader v. General Motors Corp.*,³⁸⁵ the court concluded that information “already known to others could hardly be regarded as private” and that if a person shares information with others, “he would necessarily assume the risk that a friend or acquaintance in whom he had confided might breach the confidence.”³⁸⁶ Confidentiality stands directly at odds with the notion that when people share information with others they necessarily assume the risk of betrayal. The very purpose of confidentiality law is to recognize and enforce expectations of trust.

2. Doctrinal Differences

In some circumstances, English breach of confidence law protects personal information in ways that resemble the American right to privacy. Confidentiality and privacy protect related interests, and there is substantial overlap between them. But there are significant doctrinal differences between breach of confidence and the privacy torts that can have a real impact on the outcomes of cases.³⁸⁷ First, the American privacy torts have often struggled when applied to the disclosure of personal data by businesses. Several privacy torts—intrusion upon seclusion, public disclosure, and false light—require that the information being publicized must be “highly offensive to a reasonable person.”³⁸⁸ Many disclosures of personal information do not meet this high hurdle. This is especially true with disclosures of personal data by companies, since the revelation of information about one’s home address, finances, and shopping habits might not strike many as deeply embarrassing or humiliating.³⁸⁹ The breach of confidentiality tort does not contain a “highly offensive” requirement, as it views the injury not exclusively in terms of the humiliation caused by the revelation of information but also in terms of the violation of trust between the parties. As one court explained, whereas the public disclosure tort “focuses on the *content*, rather than the *source* of the information,” the breach of confidentiality tort focuses on the source and protects confidential information “without regard to the degree of its offensiveness.”³⁹⁰

Second, the element of “publicity” provides an additional restriction on the public disclosure tort that the breach of confidentiality tort lacks. In order for a public disclosure to be actionable, the disclosure must be widespread. As the Restatement commentary declares, “it is not an invasion of the right of privacy . . . to communicate a fact concerning the plaintiff’s private life to a single

384. See Solove, *supra* note 9, at 534.

385. 255 N.E.2d 765 (N.Y. 1970).

386. *Id.* at 770.

387. For a discussion of some of these distinctions, see GURRY, *supra* note 73, at 14; TOULSON AND PHIPPS, *supra* note 78, at 112–16; WACKS, *supra* note 325, at 57–59 (1995).

388. RESTATEMENT (SECOND) OF TORTS §§ 652B, 652D, 652E (1977).

389. See SOLOVE, *supra* note 234, at 60.

390. *McCormick v. England*, 494 S.E.2d 431, 438 (S.C. Ct. App. 1997).

person or even to a small group of persons.”³⁹¹ In contrast, a person can be liable for breach of confidentiality even when information is spread only to a few others.

Third, the public disclosure tort is also restricted by the newsworthiness test—the information cannot be of “legitimate concern to the public.”³⁹² The newsworthiness test has led to many courts extinguishing public disclosure cases. Courts have struggled greatly in applying the newsworthiness test, with many courts simply deferring to the media’s judgment, all but precluding a plaintiff from ever making a successful claim.³⁹³ Other courts look to the “customs and conventions of the community” and only conclude that information is not newsworthy if it consists of “morbid and sensational prying into private lives for its own sake.”³⁹⁴ In addition to the public disclosure tort, the tort of appropriation has a newsworthiness test of sorts; if a person’s name or likeness is used to illustrate an “article on a matter of public interest” then there is no appropriation, even if the photo does not involve the actual people involved in the matter.³⁹⁵ There is no such limitation on the breach of confidentiality tort.

Although presumably applicable to the use and disclosure of personal information by businesses, the breach of confidentiality tort has rarely been invoked in this context. It is difficult to know why the tort has not been pled, but one suspects that the immaturity of the confidentiality tort in America coupled with the fame of the privacy torts is largely to blame. Nevertheless, in leading privacy cases, confidentiality has often not been invoked where it would have been helpful. For example, confidentiality was not pleaded in the *Nader* case, even though the plaintiff was suing on a theory that the defendant, General Motors, was asking his acquaintances details about him.³⁹⁶ Similarly, the privacy torts, and not breach of confidentiality, were asserted in *Dwyer v. American Express Co.*,³⁹⁷ where American Express peddled information about its cardholders’ shopping habits to merchants. The court rejected an intrusion upon seclusion claim because the cardholders “voluntarily” gave their information to

391. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977). The requirement of widespread disclosure is also part of the false light tort. *Id.* § 652E.

392. *Id.* § 652D.

393. For example, one court held: “[W]hat is newsworthy is primarily a function of the publisher, not the courts.” *Heath v. Playboy Enters., Inc.*, 732 F. Supp. 1145, 1149 (S.D. Fla. 1990); *see also* *Wagner v. Fawcett Publ’ns*, 307 F.2d 409, 410–11 (7th Cir. 1962); *Jenkins v. Dell Publ’g Co.*, 251 F.2d 447, 451–52 (3d Cir. 1958). For a general discussion and critique of deference to the press, see Solove, *supra* note 232, at 1001–08.

394. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977).

395. *Finger v. Omni Publ’ns Int’l Ltd.*, 566 N.E.2d 141, 141–42 (N.Y. 1990); *see also* *Arrington v. N.Y. Times*, 434 N.E.2d 1319, 1332 (N.Y. 1982); *Delan ex rel Delan v. CBS, Inc.*, 458 N.Y.S.2d 608, 613 (App. Div. 1983).

396. *See* *Nader v. Gen. Motors Corp.*, 298 N.Y.S.2d 137, 138 (App. Div. 1969); *Nader v. Gen. Motors Corp.*, 292 N.Y.S.2d 514, 515–16 (Sup. Ct. 1968).

397. 652 N.E.2d 1351, 1353 (Ill. App. Ct. 1995).

American Express.³⁹⁸ The court also rejected an appropriation claim because “an individual name has value only when it is associated with one of defendants’ lists.”³⁹⁹ In a breach of confidentiality action, whether the information was voluntarily given to American Express would not be a dispositive factor. Nor would the monetary value of the information be a critical element. Breach of confidentiality would look to the expectations created in the relationship between American Express and its cardholders. And of course, the confidentiality of financial relationships like banker-client has been recognized for some time.⁴⁰⁰

Cases where companies violate their privacy policies could also potentially benefit from breach of confidentiality claims. Consider, for example, two cases involving Northwest Airlines after a number of carriers disclosed passenger data in violation of their privacy policies to the federal government after the September 11th attacks. In *In re Northwest Airlines Privacy Litigation*,⁴⁰¹ the court rejected an intrusion upon seclusion claim by a group of passengers because the passengers “voluntarily provided their personal information to Northwest” and because “the disclosure here was not to the public at large, but rather was to a government agency.”⁴⁰² In *Dyer v. Northwest Airlines Corp.*,⁴⁰³ the court rejected a breach of contract claim because “broad statements of company policy do not generally give rise to contract claims” and the passengers failed to prove damages.⁴⁰⁴ Disclosing the passenger information is arguably a breach of confidentiality regardless of whether the privacy policy amounts to a contract. The widespread disclosure requirement of the disclosure tort would not apply. And because the theory of liability is different, the theory of damages would also differ. Instead of contract damages, which compensate primarily for financial losses, the remedy for breach of confidentiality would compensate for any kind of harm resulting from the breach of trust.⁴⁰⁵

Of course, breach of confidence—even in England in the post-HRA period—is not a super-tort. Breach of confidence will not prevail in every case where the Warren and Brandeis privacy torts fail. Nor should it. Because

398. *Id.* at 1354.

399. *Id.* at 1356. Another court reached a similar holding with regard to appropriation for a magazine that sold its subscribers’ names to a direct mailing company. *See Shibley v. Time*, 341 N.E.2d 337, 340 (Ohio Ct. App. 1975).

400. *Peterson v. Idaho First Nat’l Bank*, 367 P.2d 284, 290 (Idaho 1961).

401. 2004 WL 1278459 (D. Minn. 2004).

402. *Id.* at *5.

403. 334 F. Supp. 2d 1196 (D.N.D. 2004).

404. *Id.* at 1200.

405. Although contract damages generally compensate for economic losses, in special cases they can sometimes encompass emotional distress. *See* E. ALLEN FARNSWORTH, ON CONTRACTS §§ 12.1, 12.9, 12.17 (3d ed. 1999). The Restatement of Contracts provides that recovery for emotional distress is possible if the “breach is of such a kind that serious emotional disturbance was a particularly likely result.” RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981). In contrast, damages for breach of confidentiality include a wide variety of harms, including emotional distress, reputational damage, and more. *See* DAVID A. ELDER, PRIVACY TORTS § 5.2 (2001).

confidentiality requires the existence of a relationship to which it is reasonable to impose duties of confidence, it will not apply in many cases where the American privacy torts might. As Warren and Brandeis themselves recognized over a century ago, breach of confidence is a poor cause of action to assert against strangers who take and publish nonconsensual photographs of people. An action for breach of confidence protects information given by the confider to the confidant, but not information communicated outside that relationship. Thus, a third party can freely disclose private facts about a person as long as the third party did not learn the information from a confidant. Although confidentiality can be stretched to include protections against the use of surveillance devices by third parties,⁴⁰⁶ such protections come much more naturally to the American legal conception of privacy.⁴⁰⁷ But in contexts where a confidential relationship might exist, breach of confidence asks different and germane questions about whether duties of nondisclosure might be appropriate, an inquiry that the American conception of privacy law has often failed to make.

3. The First Amendment Critique

Finally, the First Amendment might apply differently to the breach of confidentiality tort than it does to the disclosure tort. First Amendment law treats with suspicion broad claims against personally offensive speech that are enforceable against the world, and holds a special solicitude for press defendants. Viewed in this light, it is not surprising that Warren-and-Brandeis-style privacy claims brought against the press to remedy hurt feelings have encountered the First Amendment with mixed results.⁴⁰⁸ The *Florida Star* case supplies a useful example. In that case, a newspaper that published the name of a rape victim discovered in the public records was immunized from liability by the First Amendment. The reporter copied down the inadvertently unredacted name in a report in the police records room despite knowing that she was not supposed to do so, and despite sitting near signs “making it clear that the names of rape victims were not matters of public record, and were not to be published.”⁴⁰⁹ In a narrow and fact-specific ruling, the Supreme Court held that three factors were dispositive. First, the fact that the government disclosed the name to the reporter (albeit inadvertently) meant that the newspaper had lawfully obtained the

406. See, e.g., *Hellewell v. Chief Constable of Derbyshire*, (1995) 4 All E.R. 473 (when telephoto lenses are used to look into a home, “the law [of confidence] would protect what might reasonably be called a right of privacy”); *Shelley Films Ltd. v. Rex Features Ltd.*, [1994] E.M.L.R. 134 (Ch.) (enjoining as a breach of confidence the use of a photo of a costume taken secretly by a photographer who entered a film studio without permission); see also cases cited *infra*, notes 409–424.

407. See LAW COMMISSION REPORT, *supra* note 326, at 117–18 (discussing surreptitious surveillance devices and noting that “to give a remedy merely because information is acquired by one of these means would amount to the creation of a right of privacy” and stating that “the creation of a general right to privacy is beyond the scope of even an expanded law of breach of confidence”).

408. See *supra* notes 217–234.

409. *Florida Star v. B.J.F.*, 491 U.S. 524, 546 (White, J., dissenting).

information.⁴¹⁰ Second, because the cause of action against the press took “the extraordinary measure of punishing truthful publication in the name of privacy,” strict scrutiny applied.⁴¹¹ In such a posture, the state interests in protecting the privacy and security of the victim were insufficient where the state had failed to use the less restrictive alternative of not inadvertently leaking the information. Third, the court noted some technical problems in the way that the Florida law was drafted.⁴¹²

Looking at the *Florida Star* case from a confidentiality perspective is instructive. The statute in *Florida Star* provided individual compensation for the emotional injury stemming from press publication of truthful information. It did not operate from a relational perspective, enforcing duties of confidentiality imposed upon reporters as a condition of access to the police files. Indeed, the Supreme Court seems to have implied that the very reason the newspaper prevailed was due to the *government's* breach of confidentiality with respect to the name. Thus, the statute was doomed under strict scrutiny because the government's breach of confidentiality rendered the reporter's acquisition of the name lawful, whereas preventing such breaches in the first place would have been a substantially less restrictive means to protect the information. Thus, even *Florida Star*, arguably the most press-protective Supreme Court case dealing with privacy torts and the First Amendment, appears to leave room for confidentiality.⁴¹³ In a subsequent case, *Los Angeles Police Department v. United Reporting Publishing Corp.*,⁴¹⁴ the Court held that if the government is not constitutionally required to make certain information publicly accessible, the government may impose conditions on those desiring to access it.⁴¹⁵ There is nothing to bar confidentiality from being one of these conditions. Moreover, in *Seattle Times Co. v. Rhinehart*,⁴¹⁶ the Court held that protective orders, which mandate confidentiality of information received in discovery, do “not offend the First Amendment.”⁴¹⁷

There is additional support for the proposition that existing First Amendment law is far more comfortable with enforcing nondisclosure rules in the context of relationships, even those involving the press.⁴¹⁸ For example, in *Cohen v. Cowles Media Co.*,⁴¹⁹ the Supreme Court concluded that a reporter's promise to

410. *Id.* at 536–37.

411. *Id.* at 537, 540.

412. *Id.* at 540.

413. See Daniel J. Solove, *Access and Aggregation*, 86 MINN. L. REV. 1137, 1212 (2002) (arguing that under the First Amendment, “[g]overnments can make a public record available *on the condition that* certain information is not disclosed or used in a certain manner”) (emphasis in original).

414. 528 U.S. 32 (1999).

415. *Id.* at 40.

416. 467 U.S. 20 (1984).

417. *Id.* at 37.

418. See Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1194–1207 (2005).

419. 501 U.S. 663 (1991).

maintain the confidentiality of a source could be enforced without running afoul of the First Amendment: “[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”⁴²⁰ Perhaps as a result, scholars who have asserted First Amendment concerns with the public disclosure tort have conceded that confidentiality might not have similar problems.⁴²¹ For example, Eugene Volokh argues that enforcing contractual promises of confidentiality is “defensible under free speech doctrine.”⁴²² Andrew McClurg observes: “If one accepts the proposition that a party to an intimate relationship impliedly agrees not to breach the other party’s confidence by publishing private, embarrassing information about them via an instrument of mass communication, the speech restriction is one that is self-imposed, rather than state-imposed.”⁴²³

Mapping the contours of information nondisclosure rules and the First Amendment is a difficult task, and we do not mean to suggest that confidentiality solves all of these problems. For example, even if the government can solve the *Florida Star* problem by conditioning press access to certain sensitive police files on an express or implied agreement of confidentiality, other problems might remain such as the effect on public access to information should such agreements become ubiquitous and be applied to other areas. Nevertheless, confidentiality law holds out the potential to be more harmonious with modern First Amendment jurisprudence than the Warren and Brandeis torts.

* * *

The breach of confidentiality tort in America in many respects resembles the traditional English tort. It has similar elements, and it has been recognized to apply to third parties who induce or benefit from the breach. Yet despite its significant power, as demonstrated by English law, the American breach of confidentiality tort often fails to make an appearance in privacy cases even when it seems to be highly applicable. It has largely remained dormant and untapped, yet it has the same early foundation in the common law as the English tort.

More broadly, since American privacy law often remains focused around individualistic conceptions of privacy, it has not fully embraced protecting confidentiality in relationships. In many other contexts, such as trade secrets and business confidences, American law readily provides remedies against unwar-

420. *Id.* at 669.

421. See Randall Z. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change*, 80 CAL. L. REV. 1133, 1174 (1992) (“[W]e [should] look to the concept of breach of confidence to provide legally enforceable protection from dissemination of identified types of personal information.”); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 363 (1983) (“[M]ore thought should also be given to increasing use of legal sanctions for the violation of special confidential relationships.”).

422. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implication of a Right To Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1057 (2000).

423. McClurg, *supra* note 213, at 938.

ranted breaches of trust.⁴²⁴ But in the domain of privacy, American law has not progressed nearly as far as English law in recognizing and protecting trust in relationships. An increased recognition of a confidentiality-based conception of privacy might also have significant implications in other areas of American privacy law that developed under the influence of Warren and Brandeis.

CONCLUSION: THE PROMISE OF CONFIDENTIALITY

This Article has explored ways in which confidentiality experienced a late and limited development in American law but flourished in England. We have argued that the particular social problem that Warren and Brandeis were confronting led them to abandon confidence as a useful concept, despite its deeper legal pedigree than a right to privacy. Prosser further exiled confidentiality from privacy when he excluded it in his formulation of tort privacy. As a result, confidentiality had a stunted growth in America as it developed in the shadow of the Warren and Brandeis right to privacy.

In contrast to the rather meagerly developed breach of confidentiality tort in America, the English tort is quite expansive and is enlarging its territory. Even before the HRA, the English tort was much broader in scope and much more mature than the American breach of confidentiality tort. Unlike the American tort, which thus far has been limited to particular relationships, the English tort has a more open-ended applicability based upon the expectations of the parties in any given relationship. Moreover, although the American tort has third party liability, it has only been used in a few cases. In contrast, the English tort has a more clearly established principle of third party liability. And English courts are quite willing to infer breaches of confidence when information has been leaked to the media. In short, the English law of confidence is far more muscular and developed than the American confidentiality tort.

It is impossible to know precisely what would have happened had Warren and Brandeis embraced confidentiality. Would American law have developed similarly to English law? How broad would the American law of confidentiality have been had Warren and Brandeis chosen to infuse it with their genius and creativity? How would other bodies of privacy law have been influenced, such as constitutional law and statutory law? We can only speculate about how the American law of privacy might have turned out differently.

English law serves as a useful example of an alternative way that the common law can conceptualize and regulate unwarranted disclosures of personal information. Specifically, one of the lessons that American privacy law

424. For example, the Uniform Trade Secrets Act, adopted by over forty states, protects trade secrets against misappropriation under a theory related to breach of confidence. *See* Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241, 247 (1998); Sharon K. Sandeen, *Relative Privacy: What Privacy Advocates Can Learn From Trade Secret Law*, 2006 MICH. ST. L. REV. 667, 687. This should be no surprise since trade secret law is itself a common law cousin to confidentiality, and in the English common law it is the most common of the four sources of liability under the breach of confidence tort. *See* GURRY, *supra* note 73.

can draw from the English law of confidence is that not all information disclosed to others enters the public domain and thereby loses legal protection.⁴²⁵ English law recognizes intermediate states between being completely private (known only to one person) and completely public (in the public domain). This is in sharp contrast to American privacy law, which has frequently tended to view the private and the public as binary opposites.⁴²⁶ Moreover, because confidentiality involves enforcing explicit or implicit promises, it does not have the same First Amendment implications as the public disclosure tort. The broader lesson to be drawn from the divergent paths of privacy law in America and England is that *both* American-style privacy and English-style confidence protect valuable and related interests. As we both have argued elsewhere, privacy cannot be reduced to a singular essence; it is a multiplicity of different yet related things that has room for both Warren-and-Brandeis-style privacy and English-style confidence.⁴²⁷ Confidentiality is thus a key dimension of privacy; it cannot be excised from privacy nor can it serve as the sum and substance of privacy either. Because they protect distinct dimensions of the ways in which unwanted disclosures of personal information can be harmful, both confidence and American-style privacy are worth protecting. Recent developments in the law on both sides of the Atlantic suggest that both American and English law are coming to this realization. English law seems to be moving towards encompassing privacy at the same time that the American confidentiality tort is maturing. English law can learn much from the American privacy torts; and American law has much to learn from the English confidentiality tort. Perhaps with greater recognition, confidentiality will finally take its place alongside the Warren and Brandeis privacy torts, and the concept of confidentiality will become better integrated into the legal and conceptual landscape of American privacy.

425. Phillipson, *supra* note 292, at 736.

426. See Solove, *supra* note 413, at 1177 (“The law often treats information in [a] black-and-white-manner; either it is wholly private or wholly public.”).

427. See *e.g.*, Richards, *supra* note 9, at 1121; Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1099 (2002); Solove, *supra* note 9, at 481–82 (2006).