# Analysing the Birth of "The Right to Privacy" and the Process Behind its Legal Justification[1]

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In the year 1890, Samuel D. Warren and Louis D. Brandeis, both Boston-based lawyers, co-authored an article titled "The Right to Privacy."[2] This was, perhaps, the first time in the history of the common law that such a right was being formalised with an accompanied legal rationalisation. While notable legal scholars of the 20th century, the likes of Roscoe Pound, have credited the authors for "adding a chapter to [the] law"[3], the greater contribution is not, perhaps, "addition" but the successful derivation of a 'modern' right from existing principles of the archaic common law. The purpose of this analysis is *not* to discuss the impact of the conceptualisation of the Right but to decipher and trace the thought-process associated with the derivation of the said right, an explication of the said legal thought-process. The objective is to follow as to *how* the authors firstly, justify the inherent association of the said right with the common law and secondly, as to *why* the Right to Privacy, if it is in fact intrinsically and inherently associated with the common law, requires an explicit description and the special title of a 'Right'. These questions acquire a higher degree of importance in a 21st century setting because of the hyper-social nature of contemporary society, which values both privacy as well as the lack of it in certain domains, many of which are intangible realms like cyberspace. In such an environment, it is most relevant to recall how Brandeis and his co-author derived a modern right for a changing society from the elasticity of the common law − the repetition of which might just be the need of the hour.

The authors begin by emphasising the elastic nature of the common law, being flexible enough to meet the demands of a changing society. The evidence for this flexibility begins with how, from its very inception, the common law has protected the individual and his claim to property. However, the origin of this protection was in the form of providing a remedy for any *physical* harm to one's body or any *physical* violation to the dominion of one's land. These remedies were formalised to give birth to the ideas of "right to life" and "trespass" that on extrapolation, gives way to the "right to property." Likewise, the guarantee of "liberty" was the direct product of legal protection against *physical* restraint. The authors argue that these 'physical' forms of protection against bodily and tangible harm were expanded to accommodate less visible and more intellectual conceptions of the law such as the "right to *enjoy* life" beyond the archaic logic of a simple physical existence. The reasoning is furthered by the inclusion of intangibles within the sense of the term 'property'. Through the allusive discussion of patent rights that provide protection for the "products and processes of the mind"[4], the authors note that the term 'property' finds a more relevant meaning beyond physicality. The authors provide this background to exemplify how the law has transitioned from assuring physical wellbeing to also

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[1] This article is part of the Brandeis University Law Journal 2016 Special Volume, which is included in the "Louis D. Brandeis: An Inspiring Life" digital exhibition, an effort of the Brandeis Archives & Special Collections for the 100th anniversary celebration of Justice Brandeis's appointment to the Supreme Court.

[2] Warren, Samuel D., and Louis D. Brandeis. "The Right to Privacy". *Harvard Law Review* 4.5 (1890): 193–220. Web.

[3] Letter from Roscoe Pound to William Chilton (1916), quoted in A. Mason, *Brandeis: A Free Man's Life*, p.70 (1956)

[4] "The Right to Privacy". *Harvard Law Review* 4.5 (1890): 194

protecting, the less tangible, emotional wellbeing of an individual by merely recognising that "pain, pleasure and profit" are neither ruled by nor constrained to the physical realm.[5]

The authors further extend their reasoning by stating that the law grants recognition to other forms of human emotion and sensation by prohibiting even "attempts to do [...] injury."[6] Meaning to say, the law made it illegal to even subject an individual to the sensation of 'fear' associated with injuries such as battery or trespass. A threat unto itself is a deplorable action and sometimes, as deplorable as the injury that gives the threat credibility. The legal recognition of human sensation is further qualified by the conceptualisation of the laws of nuisance and other laws such as the ones against offensive noise and odour. Brandeis and his co-author use this transition as evidence to portray how the law is trending towards securing the emotional wellbeing of the individual above and beyond the physical protection it already guarantees. The authors mention the development of the laws on defamation, libel and slander as illustrations for how the law recognises the importance of an individual's dignity and standing in society. Brandeis and Warren further mention the "right to be let alone"[7], as defined by Judge Thomas Cooley, in reference to capturing pictures of private individuals without their express permission. The 'right to be let alone' is morphed into what the authors define as the 'right to privacy', which at the time, according to them, desperately required the shelter of the common law. The authors trace the origins of the abovementioned rights and laws as a form of evidence to demonstrate that the right to privacy is, in fact, the logical extension of an already established and accepted trend that is unique to the common law, growing to meet the needs of an ever-changing society.

The question still arises, what was so distinct about the period that it prompted Brandeis and Warren to formulate an explicit 'right to privacy', as an extrapolation from the 'right to be let alone'? *Prima facie*, the justification that the authors provide alludes to the development of novel "inventions and [modern] business methods."[8] The authors mention the use of unauthorised "instantaneous photographs" by newspaper houses as a potent threat, posing to destroy the sanctity of private life by stealing the veil of the domestic setting. Attributable to the press, the authors mention the prevailing fear as, "what is whispered in the closet shall be proclaimed from the house-tops."[9] There were other empirical concerns that were emerging from the judicial system. In a case that the authors mention but do not reference in detail, a Broadway actor complains against a photographer for taking a picture of her wearing tights during a theatre performance. She petitioned the Supreme Court of New York to grant her relief by way of an *ex parte* injunction, disallowing the photographer(s) from making use of the photograph. The Court granted the relief requested.[10] The judiciary did show willingness to accord the enshrinement of such a right as the right to privacy but the requisite academic effort to actually synthesise the idea came from Brandeis and Warren who saw the Right as a necessity for civilised existence.

In their article, the authors frequently identify the menacing nature of the press and the damage it can cause to private citizens in the continuance of their domesticity. Brandeis and Warren observe the print media's tendency to profit off gossip, compromising − what they believe everyone has a claim to − the right to privacy. The authors note that, "[t]o occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion

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[5] *Ibid.* 195
[6] *Ibid.* 193
[7] Cooley, Thomas McIntyre. *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract*. 2nd ed. Littleton, CO: F.B. Rothman p.29, 1993. Print.
[8] "The Right to Privacy". *Harvard Law Review* 4.5 (1890): 195
[9] *Ibid.*
[10] *Ibid.*, Times, N.Y. "Manola Gets an Injunction." *N.Y. Times* [New York] 18 June 1890: 2. Web...

upon the domestic circle."[11] A brief analysis of the extract reveals the origins of, perhaps, the first rudimentary definition of privacy and a basic description of its subsequent violation. The authors define privacy as, that which is meant for the domestic circle; any published information that could only be acquired by having unauthorised access to the domestic circle is seen to be a violation of that right to privacy. Brandeis and Warren condemn the press' scornful lust for gossip concerning sexual relations and other private information that, according to them, should never have reached the public's gaze in the very first place. The authors thoroughly criticise the press for its admonishable behaviour that seems to have overstepped the boundaries of decency and propriety.[12] However, the press is in itself an element and product of society, providing a service that has popular demand. Their scornful lust for the acquisition and delivery of gossip is balanced by the reader's thirst for consumption. Although brief, Brandeis and Warren do account for the consumption of gossip on part of the private citizen. As a sad reflection on human nature, the reason why the press indulges in the distribution and sale of gossip is the same reason why the Arabs distribute and sell oil. There is a large societal demand for seemingly scandalous and private information. "Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality."[13] The bitter truth is that a large portion of society, at Brandeis' time, and presumably, even now, would prefer to derive entertainment at the cost of another's privacy while cherishing and guarding one's own right to it. Recognising this "weak side of human nature,"[14] Brandeis and Warren promulgate the right to privacy as not only a means to protect the individual's domestic sanctity but to also further the law's role as a civilising force. The right to privacy and its enshrinement into the common law must not just be observed as a micro phenomenon benefiting the individual and his/her domesticity but should also be seen as a corrective macro phenomenon improving the general standards of morality of a given society.

The authors' primary source of stimulus for the derivation of such a right appears to be the loss of face and dishonour that the publicity of private information causes. However, they realise that the laws of libel and slander do cover such injuries and provide appropriate and approximate remedies in the forms of civil and criminal penalties. As a means of distinguishing these existing laws from the right to privacy, the authors indulge in an examination of the laws associated with defamation and the rationale behind their enshrinement. Brandeis and Warren find that the laws concerning libel and slander, defamation in general, protect the individual's standing in relations and dealings with the exterior world. The honour and respect commanded by the individual aid him/her in the accumulation of wealth and prosperity. Any unjust and unwarranted harm done to an individual's societal standing that allows for prosperity and success is seen to be unlawful because it unfairly inhibits a person from a chance at a quality life. Therefore, Brandeis and Warren essentially reason that the existent laws of the time protected the material aspect of human life, paying little to no attention to the emotional and spiritual suffering that the loss of dignity entails. The authors first establish the legal trend of extending material protection to cover spiritual elements of life and then argue that the spiritual equivalent of the material law of defamation is, in fact, the right to privacy. Therefore, logically, it is within the ambit of the common law to grant legitimacy to the natural outcome of an established trend − the recognition of the right to privacy.

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[11] "The Right to Privacy". *Harvard Law Review* 4.5 (1890): 196
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*

The authors reason by yet another common law analogy that involves the common-law right over intellectual and artistic property and how that right, in essence, confirms the legitimacy of the right to privacy, if analysed in the spirit of the common law. Brandeis and Warren observe that the common law provides proprietary protection to artistic and intellectual creation. This protection is independent of the quality or nature of the protected material. It is immaterial if the work is a word or an essay, if it is mere ink on paper or a painting, all that matters is the right of the creator over the status of that which has been created. The common law gives to the creator the right to decide the extent to which he/she would like to expose his/her work to the outside world. As a form of corroborative evidence, the authors quote the dissenting opinion of Sir Joseph Yates from an English Judgement, *Millar vs. Taylor* (1769). The relevance of the dissent is that Sir Yates declared that the common law gives to each individual the right to decide the forum for the expression of his/her thoughts, words and actions.[15] Therefore by extension, it is the right of the creator to decide the level of privacy and publicity associated with the exposure of his/her creation. This proprietary protection is further qualified by the authors through another common-law practice wherein a person is protected from expressing his feelings under duress, by way of force or through compulsion, with the exception of being on the stand in a court of law.[16] In other words, the individual has the power to decide where, when and before who he/she wants to express his/her thoughts and sentiments, providing evidence of a rudimentary application of the right to privacy.

The authors also analyse the rationale behind as to why this *apparent* spirit of the right to privacy (without using those words) is granted in cases of artistic and intellectual work, even when the judges of the time considered the nature of the work to be irrelevant in the determination of those rights. Brandeis and Warren realise that proprietary over such works is akin to the ownership of property. The common-law provides such protection because creation has value and not because the creator has a sentimental attachment to his/her work. There is yet again the fundamental question of having a corporeal rationale behind a law and the lack of prescribing a remedy for a sentimental injury. The authors note that the law of property protects against unjust enrichment by prohibiting unauthorised use of artistic and intellectual work. However, if the individual places worth over a creation, the worth of the creation is only as strong as its legal recognition. In other words, the material evaluation of privacy is indefinable and by extension, the value of the peace of mind derived from the maintenance of one's privacy is imperceptible. Consequently, privacy and private information might not find protection from public gaze under the narrow definition of the term 'property.' Meaning to say, there is no method of transferring a sentimental injury to the objectivity of a material remedy and therefore, there is no means of measuring the injury itself, at least through the narrow definition of the term 'property.' However, in another English case, *Prince Albert vs. Strange* (1849), the authors cite a distinction that the High Court of Chancery draws between property and "that which is exclusiv[e]."[17] As the judge in *Prince Albert*, Lord Cottenham observed that a man "is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his."[18] Although similar to the understanding of the term 'property', "that which is exclusive" is broader and contains even those elements that are seemingly ordinary, elements that have limited material value in the eyes of the law but sentimental value in the eyes of the proprietor. The authors also

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[15] Yates, Sir Joseph. (Dissenting Opinion) *Millar vs. Taylor*. Court of the King's Bench, England. 1769. Web.
[16] "The Right to Privacy". *Harvard Law Review* 4.5 (1890): 201
[17] Lord Cottenham. *Prince Albert vs. Strange*. High Court of the Chancery, England. 1849. Web.
[18] *Ibid.*

quote Lord Cottenham as having said, "privacy is the right invaded"[19] in relation to the actions of the defendants. However, Lord Cottenham's views were limited to the context in which he spoke and the case in question involved royalty, the consort of Queen Victoria herself. In matters involving the crown and royalty, discretion is assumed to be a duty more than an attribute associated to the crown's claim to privacy. Nevertheless, Lord Cottenham accorded privacy the status of a right and that unto itself is a significant contribution to the authors' cause.

The authors do, however, highlight an inconsistency between the law's treatment of artistic-intellectual material and its treatment of private-domestic material. The claim that ordinary domestic information and material do not have value in comparison to artistic-intellectual works, and therefore, not akin to the status of property, is, perhaps, true at a superficial qualitative level. However, at the level of reality, even that which is ordinary and domestic acquires a value when it is published by profiteers of gossip. In one sense, if exclusivity is a protected attribute for seemingly ordinary information and if that information is accessed without consent for the purpose of enrichment, then is it not true that the act of enrichment without consent is unjust and that which has been used to derive such enrichment, akin to property? The question is, what will fill the legal void between seemingly unjust enrichment and the desire for its prohibition by those who are *sentimentally* injured (as opposed to a material injury)? The unequivocal answer that the authors provide is the right to privacy. The authors recognise that both the profiteers of gossip as well as the ones being injured by its publicity give value to private-domestic information but the law fails to recognise that worth, blinded by the ordinary face value. It is also important to recognise that the injury is sentimental and spiritual but not indefinable. However, the material measurement of the injury is only realisable after it has been committed. While private information is definitely distinct from intellectual property, there is enough practical similarity to accord privacy the same-level of protection as that accorded to property. Therefore, the authors note, "[t]he 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."[20]

The authors promulgate the right to privacy as an existent notion within the common law and prove its existence through analogy. The first pillar that the authors establish is the accommodating elastic nature of the common law, which appears to show a trend in the direction of preserving the spirituality of its subjects. That trend is extended to include privacy, the deprivation of which causes spiritual-sentimental distress and therefore, requiring the shelter and recognition of the common law. The authors further show that the laws of libel, slander and defamation in general, provide remedies for the injuries associated with the invasion of privacy. They draw parallels between the ownership of property and the exclusivity of private information, while testing their practical similarities and proving their legal disparities. The law's role as a civilising force, assuring the social advancement of mankind is also underscored. While the authors do successfully piece together the various elements of the common law that give the right to privacy the legitimacy and force of the law, they also realise that all these elements would have to operate in unison for a just outcome. This realisation provided the authors the impetus to distinguish the right to privacy from those principles that share its spirit, at least in part. It is in the privacy of our homes and walls that we find the courage to express and be our true selves, the comfort to nurse our sorrows and the freedom to explore and exercise our unique

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[19] "The Right to Privacy". *Harvard Law Review* 4.5 (1890): 205
[20] *Ibid.*

spirituality. The deprivation of those joys may occur but it will be because of Brandeis and Warren that such injustices will not stand the scrutiny of the law.

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