The Right to Privacy in Nineteenth Century America

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On December 15, 1890, Samuel D. Warren and Louis D. Brandeis, two young Boston law partners, published an article in the *Harvard Law Review* entitled *The Right to Privacy.* In that article, they proposed a remedy for invasions of personal privacy by the press. More than ninety years later, protection of privacy has become a major concern of the law. Legal scholars have organized the extensive body of case law into a coherent common law of privacy; the Supreme Court has enshrined the right to privacy in the “penumbra” of the Bill of Rights; and Congress has enacted additional safeguards.

This increased recognition of a right to privacy has brought corresponding praise for Warren and Brandeis as the originators of a new legal right. At the same time, their contribution has been criticized as having lacked sufficient legal and factual basis for the right they are credited with launching. One recent commentator surveyed the English precedents cited in *The Right to Privacy* and concluded that “before 1890 no court had protected inviolate personality . . . or a right to privacy, independent of property rights.” A more fundamental critique of privacy law in general attempts to reduce this “new” right to its component interests and then to assess whether these interests deserve legal protection.
of privacy to be, for example, merely extensions of property and reputation, the reductionist approach suggests that what Warren and Brandeis invented did not constitute an independently protectible right.\footnote{See, e.g., Davis, supra note 10, at 7–12; Kalven, supra note 10, at 339–41.}

Both praise and criticism proceed on the assumption, shared by modern courts,\footnote{See, e.g., Flores v. Mosler Safe Co., 7 N.Y.2d 276, 280, 164 N.E.2d 853, 854–55, 196 N.Y.S.2d 975, 978 (1959); Nader v. General Motors Corp., 31 A.D.2d 392, 397, 298 N.Y.S.2d 137, 143 (1969) (Steuer, J., dissenting) (“Prior to 1890, if the phrase ‘right of privacy’ was used at all it represented, at least logically, an amorphous concept somewhat in the nature of ‘the pursuit of happiness’, something to which we had a right; but reducing that right to enforceable proportions was not even imagined.”), aff’d, 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970); Billings v. Atkinson, 489 S.W.2d 858, 859 (Tex. 1973).} commentators,\footnote{See, e.g., A. MILLER, THE ASSAULT ON PRIVACY 169 (1971) (“[A] right to privacy existed ... that was both traditional and customary.”); A. WESTIN, PRIVACY AND FREEDOM 330–38 (1967). Recently, historians have begun to concede the existence of some wider concern for privacy shortly before 1890. See M. KELLER, AFFAIRS OF STATE 519–21 (1977); G. WHITE, TORT LAW IN AMERICA 173 (1980).} and legal historians,\footnote{See, e.g., L. FRIEDMAN, A HISTORY OF AMERICAN LAW 548 (1973); O’Connor, The Right to Privacy in Historical Perspective, 53 Mass. L.Q. 101, 109–10 (1968).} that “courts had not prior to 1890 granted relief expressly for invasion of [a] right of privacy.”\footnote{See, e.g., Davis, supra note 10, at 7–12; Kalven, supra note 10, at 339–41.} Warren and Brandeis, however, deserve neither full credit nor blame for the law’s recognition of privacy as a protectible interest. They did not purport to add a novel right to the legal universe, but instead drew upon some of the established legal doctrines protecting personal privacy to propose an extension of remedies against the press.\footnote{Their article recognized that “the existing law afford[ed] a principle which may be invoked to protect the privacy of the individual from invasion.” Warren & Brandeis, supra note 1, at 206. The “next step” they proposed was a small but difficult one, extending this principle from its secure grounding to a direct confrontation with a robust “yellow press” that jealously guarded its first amendment privileges. Id. at 195; see Bloustein, Privacy, Tort Law, and the Constitution: Is Warren and Brandeis’ Tort Petty and Unconstitutional as Well?, 46 Tex. L. Rev. 611 (1968). The authors reasoned in part from contractual and equitable doctrines, Warren & Brandeis, supra note 1, at 207–13, but primarily from the law of intellectual property. Courts, in preventing the publication of private letters, see p. 1900 infra, had recognized a right to “inviolable personality” or had at least strayed so far from conventional notions of property that recognition of a property interest in personal information could logically follow. Id. at 204–05. But see p. 1904 infra.} Readers of their article in 1890 would
have recognized that the law already afforded many explicit protections against other invasions of privacy.\(^{17}\)

This Note examines the extent to which nineteenth century American courts and legislatures recognized privacy as an independent interest. Part I sets out the legal doctrines protecting the home and the privacy associated with it. Part II deals with the protection of confidential communication, which had much less to do with conventional notions of property than did the rights associated with the home. Part III describes how information about individuals, information that was not property at all, was protected by limiting access to public records and preventing unwanted publications. The picture that emerges by 1890 is one of ample and explicit protection of privacy in its own right.

I. PRIVATE PROPERTY

The legal maxim and popular proverb that "a man's house is his castle" had wide application in the nineteenth century.\(^{18}\) American courts administered criminal penalties\(^{19}\) and civil remedies to safeguard "the sanctity and inviolability of one's house,"\(^{20}\) the householder's right to "quiet and peaceable possession,"\(^{21}\) and the dwellinghouse as "the place of family re-

\(^{17}\) For contemporary reviews of the Warren and Brandeis article that make this point, see *The Right to Privacy*, 51 Nation 496 (1890); 17 Life 4 (1891) (brief commentary); 9 Scribner's Magazine 261 (1891) (same).


\(^{19}\) On this basis, Sir William Blackstone justified the criminal punishment of burglary, arson, nuisance, and eavesdropping, as well as the rule that sheriffs or bailiffs could not break down doors for the execution of any civil process. 4 W. Blackstone, *Commentaries on the Laws of England* *223* (The law has "so particular and tender a regard to the immunity of a man's house that it stiles it his castle, and will never suffer it to be violated with impunity."). American courts echoed Blackstone's sentiments. See, e.g., Snydacker v. Brosse, 51 Ill. 357, 359–60 (1869) (no authority to break outer doors in the execution of civil process); Mitchell v. Commonwealth, 88 Ky. 349, 353, 11 S.W. 209, 210 (1889) (dictum) (severe punishment for crimes against the "peculiar sanctity" of the dwelling-house) (superseded on other grounds by Ky. R. Crim. Proc. 6.12, 6.16, see Luna v. Commonwealth, 571 S.W.2d 88 (Ky. Ct. App. 1977), remanded, 574 S.W.2d 227 (Ky. 1978)); Armour v. State, 22 Tenn. (3 Hum.) 379, 384 (1842).


pose." In particular, the law of trespass and the constitutional prohibition of unreasonable search and seizure were interpreted as safeguards of privacy interests against official and unofficial intrusion.

The ability to exclude others, a central feature of private property, was absolute when the family home was the property in question and domestic privacy the interest at stake. Even the property rights of others yielded before the household's "right of shutting his own door." Landlords entering to make repairs, owners of goods seeking to retrieve them, and creditors sending sheriffs to execute valid judgments could all be held liable for intrusion upon the repose and tranquillity of families within the dwellinghouse." Further, a Vermont court upheld a houseguest's "right of quiet occupancy and privacy" against the unwelcome intrusion of her host into the bedroom he had provided for her, and a Michigan court found a sacred "right of privacy" violated when a doctor brought an unqualified assistant into the bedchamber of a woman in childbirth. Whether the plaintiff was a property owner or a guest, and whether the defendant gained entry by force or by false pretenses, the trespass remedy protected domestic privacy. Moreover, damages in trespass were not limited to the plaintiff's pecuniary loss, but included, in the words of a New York court, compensation for "injury, insult, invasion of the privacy, and interference with the comfort of the plaintiff and his family."

22 Mitchell v. Commonwealth, 88 Ky. 349, 353, 11 S.W. 209, 210 (1889) (emphasis omitted) (superseded on other grounds by Ky. R. CRIM. PROC. 6.12, 6.16, see Luna v. Commonwealth, 571 S.W.2d 88 (Ky. Ct. App. 1977), remanded, 574 S.W.2d 227 (Ky. 1978)).

23 See 2 W. BLACKSTONE, supra note 19, at *2.

24 State v. Armfield, 9 N.C. (2 Hawks) 246, 247 (1822).


29 Newell v. Whitcher, 53 Vt. 589, 591 (1880). The concern of the court may have been to avenge the honor of a defenseless woman, but the language of privacy protection provided the legal rationale for recovery.


31 Ives v. Humphrey, 1 E.D. Smith 196, 201–02 (N.Y. Ct. C.P. 1851) (emphasis omitted).
Invasions of domestic privacy that fell short of physical trespass were dealt with by the criminal law. Eavesdropping, a common law crime noted by Blackstone, was prosecuted in America on the ground that “no man has a right . . . to pry into your secrecy in your own house.” Although never numerous, indictments for eavesdropping occurred throughout the nineteenth century under common law and statute. In addition, “peeping Toms” could be punished under state statutes and city ordinances. These sanctions against curious eyes and ears augmented the trespass remedy, giving householders a right to be free from unwanted observation from without. In 1892, trespass itself was extended to this type of conduct by the New York Court of Appeals. The court awarded damages for “loss of privacy” to a plaintiff whose rooms were exposed to observation when the defendant constructed an elevated train platform. By the late nineteenth century, the law had erected high walls around the family home by extending criminal penalties for and civil remedies against intrusion by strangers.

Official intrusions into the home were also narrowly restricted in the interest of privacy. In 1791, with colonial writs of assistance and general warrants an all-too-recent memory, the independent states added the fourth amendment to the federal Constitution, preserving the “right of the people to be secure in their persons, houses, papers, and effects” from warrantless search and seizure by agents of the new national government. Thomas Cooley, a leading constitutional authority, linked the fourth amendment to the common law principle that “a man’s house is his castle,” a guarantee of the citizen’s “immunity in his home against the prying eyes of the

32 4 W. BLACKSTONE, supra note 19, at *169 (defining the offense as “listen[ing] under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales”).
33 Commonwealth v. Lovett, 6 Pa. L.J.R. 226, 227 (1831); see id. at 228 (discussing Commonwealth v. Mengelt, unpublished Pennsylvania decision of 1818); State v. Pennington, 40 Tenn. (3 Head) 299 (1859); State v. Williams, 2 Tenn. (2 Overt.) 108 (1808).
34 See State v. Davis, 139 N.C. 547, 547–48, 51 S.E. 897, 897 (1905); N.Y. PEN. CODE § 436 (1881); Indicted for Eavesdropping, 9 CRIM. L. MAGAZINE 941 (1887).
35 City of Grand Rapids v. Williams, 112 Mich. 247, 250, 70 N.W. 547, 547–48 (1897) (violation of ordinance against “indecent, insulting, or immoral conduct”).
government." Each state adopted a parallel provision in its own constitution, and much early development of search and seizure doctrine took place in state courts. As a state judge, Cooley interpreted Michigan's search and seizure provision "to make sacred the privacy of the citizen's dwelling and person against everything but process issued upon a showing of legal cause for invading it."

Boyd v. United States, one of the first Supreme Court decisions to interpret the fourth amendment, expressed a similar view of the purpose of this constitutional safeguard. Relying on the English precedent of Entick v. Carrington, the Court recognized an "indefeasible right of personal secu-


39 See, e.g., Larthet v. Forgay, 2 La. Ann. 524, 525-26 (1847) (constitutional protection of "the domestic repose of the citizen" permitted recovery for "injury to the plaintiff's feelings, and the disturbance of his family" caused by entrance without a valid warrant); Bell v. Clapp, 10 Johns. 263, 264-65 (N.Y. 1813). See generally A. Westin, supra note 14, at 333.

40 T. Cooley, A Treatise on the Constitutional Limitations 299-300 (Boston 1868). This language was adopted by a federal court in United States v. Three Tons of Coal, 28 F. Cas. 149, 151 (E.D. Wis. 1875). See also T. Lieber, On Civil Liberty and Self-Government 46 (Philadelphia 1853) (fourth amendment guarantee of "individual security" against "police government"); H. von Holst, The Constitutional Law of the United States of America 257 (A. Mason trans. 1897) (fourth amendment protection against "arbitrary acts of the public power"). Outside the ambit of criminal prosecution, protections of the castle were invoked against censustakers. Trials of the Census-Taker, N.Y. Times, July 19, 1875, at 4, col. 4. Members of Congress were even reluctant to permit entry into homes by the District of Columbia water board. See 10 Cong. Rec. 3170 (1880) (remarks of Sen. Ingalls).

41 Weimer v. Bunbury, 30 Mich. 201, 208 (1874).

42 116 U.S. 616 (1886) (holding unconstitutional a statute compelling production of private papers).

43 Boyd and Ex parte Jackson, 96 U.S. 727 (1878), discussed at pp. 1899-900 infra, provided the first substantial opportunities for the Court to develop a fourth amendment jurisprudence. See Note, Formalism, Legal Realism, and Constitutionally Protected Privacy under the Fourth and Fifth Amendments, 90 Harv. L. Rev. 945, 952 n.42 (1977).


45 19 How. St. Tr. 1029 (C.P. 1765).
rity, personal liberty and private property” against “all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life.”

Although judicial protection of privacy was substantial, resort to the courts was not the first line of defense for the homeowner faced with official or unofficial intrusion. The principal means of protecting privacy subsumed under the maxim “a man's house is his castle” was the willingness of nineteenth century Americans to resort to force — quite often deadly force — in the defense of their homes. The acquittal of one vehement householder in 1890 received national attention:

“A man's house is his castle”; in it he is supposed to be safe; privacy is sacred in the eyes of civilization, and no individual has the right to violate the privacy of another; ergo, has not the right to enter his house without his consent for any purpose whatsoever. . . . The courts have so decided, and a fresh decision by Judge Collins has brought to notice the danger of violation of the principle: “A man's house is his castle.” Officer John Mahoney went to the house of Thomas Bailey, and, without warrant, forcibly entered. Bailey shot him, as he had a perfect right to do, and the court acquitted him. Any citizen has a right to defend his privacy to whatever extent he may find necessary, save against recognized and accredited officers of the law with the official order of the community in the shape of a warrant to justify their intrusion.

Among the available legal remedies for invasion of domestic privacy must be counted the law's provision for this extraordinary measure of individual self-help. In court, defense of the castle may have had its limits, but in public opinion it was an absolute right.

46 116 U.S. at 630. Justice Bradley echoed the words of Joseph Story who, in his treatise on the Constitution, declared the fourth amendment's protections to be “indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property.” 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1895, at 748 (Boston 1833). For an adoption of Justice Story's extrajudicial pronouncement by a state court, see Larthet v. Forgay, 2 La. Ann. 524, 516 (1847).


48 A Man's House His Castle, 9 PUB. OPINION 342 (1890) (reprinted from Chicago Mail).
II. CONFIDENTIAL COMMUNICATIONS

Nineteenth century public opinion regarded the "sanctity of the mails" as absolute in the same way it esteemed the inviolability of the home. A special agent of the Post Office explained in 1855 that "[t]he laws of the land are intended not only to preserve the person and material property of every citizen sacred from intrusion, but to secure the privacy of his thoughts, so far as he sees fit to withhold them from others." Legal protection of private letters and other confidential communications from interception, publication, and forced disclosure depended on notions of personal privacy often unattached to any property interest.

Although a letter was considered the property of the sender while in transit, unauthorized opening and reading of its contents was neither theft nor damage to property. Congress nevertheless made interception intended "to pry into another's business or secrets" a criminal offense. Whether this or any other prohibition prevented the federal government, acting officially, from opening sealed letters in the custody of its post office was unsettled until 1878. In Ex parte Jackson, the Supreme Court held that a statute banning lottery information from the mails could not be enforced by federal officers' opening letters and sealed packages, unless upon the authority of

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49 See, e.g., F. CURRIER, POSTAL COMMUNICATION, PAST AND PRESENT 3-4 (1894) (quoting remarks of Ralph Waldo Emerson); 1 F. LIEBER, supra note 40, at 109 ("the sacredness of epistolary communion"); Lotteries and Letters, N.Y. Times, Mar. 23, 1858, at 4, col. 3.

50 J. HOLBROOK, TEN YEARS AMONG THE MAIL BAGS xviii (Philadelphia 1855).

51 Act of Mar. 3, 1825, ch. 64, § 22, 4 Stat. 102 (penalty against any person opening letters en route) (believed to have been drafted chiefly by Daniel Webster, see 5 CONG. REC. 444 (1877) (remarks of Sen. Conkling)); see Act of Feb. 20, 1792, ch. 7, § 16, 1 Stat. 232 (penalty against postal employees who "unlawfully" opened, delayed, or detained the mails). Similar provisions had been enacted by the Continental Congress, 21 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 671 (W. Ford ed. 1782). For state cases involving accusations of letter opening, see Hillhouse v. Peck, 2 Stew. & P. 395, 395 (Ala. 1832); McCuen v. Ludlum, 17 N.J. L. 12 (1839).

52 See D. WELLS, THE RELATION OF THE GOVERNMENT TO THE TELEGRAPH 49-50 (1873). In the 19th century, the government itself opened private correspondence only on rare occasions and for specific purposes: (1) the protection of military secrets, see J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 500 (1926); cf. 5 CONG. REC. 350 (1870) (remarks of Rep. Kasson) (the degree of wartime censorship was later minimized); (2) the prevention of fraud, see Ex parte Jackson, 96 U.S. 777 (1878); Lotteries and Letters, N.Y. Times, Mar. 23, 1858, at 4, col. 3; (3) the eradication of obscene literature, see Act of Mar. 3, 1865, ch. 89, § 16, 13 Stat. 504; CONG. GLOBE, 38th Cong., 2d Sess. 660-62 (1865) (debate); Suppression of Obscene Literature, N.Y. Times, July 3, 1873, at 8, col. 2.

53 96 U.S. 727 (1878).
a warrant issued in compliance with the fourth amendment. The constitutional guaranty," wrote Justice Field, "of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be." This decision, coupled with a statutory mandate that postal officials not detain or delay letters, ensured virtually absolute protection against official tampering.

The privacy of letters once delivered was protected by state law. Criminal penalties for "the violation of epistolary correspondence" were proposed and enacted in some jurisdictions. In addition, courts of equity would issue injunctions to prevent publication of private letters contrary to the sender's wishes. Despite some early doubts, American courts, led by Justice Joseph Story, refused to limit this relief to letters of "literary merit" in which the sender might have a pecuniary or proprietary interest.

When produced in court, letters again received special treatment. According to one description of late nineteenth century practice, letters were handed quietly to the judge, who read them privately and without disclosure to the parties or to the jury, "unless they be of that nature falling within the restrictions of the law which commits them to the record as evidence in the case." What was not relevant or material,


55 96 U.S. at 733.


57 See U.S. POST OFFICE DEPT., POSTAL LAWS AND REGULATIONS § 506 (1887) ("the absolute sanctity of the seal" could not be broken, even to furnish evidence of criminal matters).

58 Edward Livingston, an early reformer and codifier of the criminal law, proposed fines and imprisonment for unauthorized opening, malicious publication, and taking of private letters. Draft Code of Crimes and Punishments art. 621 (1824), reprinted in 2 E. LIVINGSTON, COMPLETE WORKS 166 (1873); see id. at 322.

59 See, e.g., CAL. PEN. CODE § 618 (1872).

60 See Hoyt v. Mackenzie, 3 Barb. Ch. 320, 324–25 (N.Y. Ch. 1848); Wetmore v. Scovell, 3 Edw. Ch. 515, 527–28 (N.Y. Ch. 1842).


63 5 CONG. REC. 444 (1877) (remarks of Sen. Conkling).
and especially what might be "injurious to the feelings or interest of third persons," was left unrevealed.64

The telegraph posed additional problems of privacy protection because messages were necessarily read by the operators who sent and received them. Wiretapping, a practice learned by military telegraphers during the Civil War,65 was made a crime in some states;66 elsewhere it was effectively prohibited by laws against interference with telegraph company property.67 Disclosure by employees, including operators and those with access to messages retained in office files, was prohibited by company rules68 and by statute in nearly every state.69 According to one early judicial interpretation, these laws were intended "to prevent the betrayal of private affairs . . . for the promotion of private gain or the gratification of idle gossip."70

Whether such statutes also prevented government investigators from demanding the production of telegrams was much debated.71 Western Union firmly opposed and resisted legislative as well as judicial subpoenas,72 and newspapers characterized congressional dragnet subpoenas of telegraph office files as "unconstitutional and indecent."73 Debate over the privacy of the telegraph reached its height in the aftermath of

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64 Id; 1 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253 (Boston 1842) (emphasis omitted).
66 See, e.g., CAL. PEN. CODE § 640 (1872); 1895 Ill. LAWS 157.
68 See, e.g., WESTERN UNION TELEGRAPH CO., RULES, REGULATIONS, AND INSTRUCTIONS no. 128, at 55 (Cleveland 1866).
69 Statutes are cited in M. GRAY, A TREATISE ON COMMUNICATION BY TELEGRAPH § 120, at 213 nn.1–3 (1885); Hitchcock, supra note 38, at 114–19.
71 As an emergency war measure in 1861, President Lincoln’s War Office seized files of telegrams in all the major cities. See A. HARLOW, OLD WIRES AND NEW WAVES 264–65 (1936); 1 W. PLUM, THE MILITARY TELEGRAPH DURING THE CIVIL WAR IN THE UNITED STATES 69 (1882); cf. D. BATES, LINCOLN IN THE TELEGRAPH OFFICE 235–36 (1907) (privacy protest of a New York City office manager in 1864).
72 After the war, the Reconstruction Congress took the initiative, issuing dragnet subpoenas of telegraph company files to fuel its investigative activities. See, e.g., CONG. GLOBE, 40th Cong., 2d Sess. supp., at 89–92 (1868) (impeachment trial of Andrew Johnson); 4 CONG. REC. pt. 7, at 216 (1876) (impeachment trial of William Belknap).
73 In 1873, Western Union ordered employees not to comply with subpoenas for telegraph messages in the company’s possession. Exec. Order No. 147 (1873), reprinted in 5 CONG. REC. 453 (1877).
the contested presidential election of 1876. Judge Cooley again took a strongly protective stance, favoring judicial recognition of the absolute "inviolability" of telegraphic correspondence. Western Union pressed for specific legislation affording telegrams the same protection as letters in the mail. Ultimately the issue was settled by the courts, which required that subpoenas specify the date and subject of the particular telegrams sought. Dragnet searches of the files, whether by legislative or by judicial authority, would no longer be tolerated.

Other private conversations and sensitive items of personal information were also protected from disclosure in courtroom testimony and in official records of legal proceedings. The common law rule of evidence that excluded spousal testimony and confidential communications between husband and wife, though rooted in antiquated notions of the couple's single legal identity, acquired a new justification in the nineteenth century: preserving "the sacred privacy of domestic life."
Courts went far to avoid "embarrassing questions" that would "tear...away the veil, which hides from public gaze the sacred confidences which subsist between husband and wife." The value of confidentiality was emphasized again in the common law privilege for attorney-client communications and in nineteenth century extension of similar protection to disclosures from patient to doctor and from penitent to priest.

Nineteenth century jurisprudence also recognized a privacy component in the fifth amendment safeguard against self-incrimination. Until the close of the century, "incrimination" was read broadly to include "infamy and disgrace" in addition to liability to criminal prosecution. One purpose of the amendment, it was argued, was to avoid "compel[ling] a man who has fought his way from obscurity to dignity and honor to reveal crimes of which he had repented and of which the world was ignorant." It prevented the compulsory production of personal papers and permitted defendants to refuse to act, speak, or wear clothing for purposes of courtroom identification.

Further constitutional underpinning for the privacy of communications was sought by nineteenth century jurists in the

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82 Owen v. State, 78 Ala. 425, 429-30 (1885); see Kelley v. Proctor, 41 N.H. 139, 141, 144 (1860).
83See, e.g., Denver Tramway Co. v. Owens, 20 Colo. 107, 36 P. 848 (1894); Wheeler v. Hill, 16 Me. 329, 333 (1839); Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 422 (1833).
85 See 1 E. Livingston, supra note 58, at 467-68.
86 The connection was recognized in a case involving the marital privilege: "It would be as wrong to make them reveal their private conversations, as admissions against interest, as it would be to charge them with their thoughts." Sumner v. Cooke, 51 Ala. 521, 521 (1874).
89 Boyd v. United States, 116 U.S. 616 (1886) (holding unconstitutional a statute compelling production of private papers).
90 See, e.g., Cooper v. State, 86 Ala. 610, 611-12, 6 So. 110, 111 (1888), overruled, Hubbard v. State, 283 Ala. 183, 115 So. 2d 261 (1968), vacated on other grounds, 408 U.S. 934 (1972); People v. McCoy, 45 How. Pr. 216, 217 (N.Y. Sup. Ct. 1873); Stokes v. State, 64 Tenn. 619, 621 (1879).
“freedom of communion” guaranteed by the first amendment. The “chilling effect” of public disclosure on private expression was best explained by Justice Story. The publication of private letters strikes at the root of all that free and mutual interchange of advice, opinions, and sentiments, between relatives and friends, and correspondents, which is so essential to the well-being of society, and to the spirit of a liberal courtesy and refinement. It may involve whole families in great distress, from the public display of facts and circumstances, which were reposed in the bosoms of others under the deepest and most affecting confidence, that they should forever remain inviolable secrets. It may do more; and 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.

The law’s protection of confidential communications from interception, publication, and compulsory disclosure served to preserve the privacy without which free interchange was considered impossible.

III. PERSONAL INFORMATION

“Mind your own business” was an eleventh commandment in nineteenth century America. Toward the end of the century, however, more and more of people’s personal “business” found its way into public records and into the gossip columns of an enterprising “yellow press.” Although common law doctrines protecting property and reputation often failed to prevent unwanted disclosure, personal information did not go unprotected. Courts and legislatures both restricted access to information that individuals were required to supply to the government and applied broad civil and criminal libel remedies against the press.

The first United States census in 1790 sought little more than the constitutionally required enumeration of persons, slave and free. Decade by decade, the scope of inquiry

91 Hitchcock, supra note 38, at 139. See also 1 F. LIEBER, supra note 40, at 109.
92 2 J. STORY, supra note 61, § 946.
93 See A. TAYLOR & B. WHITING, supra note 18, at 49. See also B. WHITING, supra note 18, at 51.
95 U.S. CONST. art. 1, § 2, cl. 3. Even so, the first enumeration was opposed on privacy grounds. 1 ANNALS OF CONG. 1107-08 (J. Gales ed. 1790) (remarks of Reps. Livermore and Page); see Merriam, THE EVOLUTION OF AMERICAN CENSUS-TAKING, 65 CENTURY 831, 834 (1903).
increased to encompass physical and mental defects, national origin, literacy, value of real property, and a number of other details.96 Citizens' concerns about the privacy of their returns increased apace,97 and, beginning in 1840, instructions to census takers ordered that individual returns be treated as confidential.98 Congressman James A. Garfield, the principal advocate of a statutory penalty for disclosure of census data, feared that "[t]he citizen is not adequately protected from the danger, or rather the apprehension, that his private affairs, the secrets of his family and his business, will be disclosed to his neighbors" or, at the central office, be "made the quarry of bookmakers and pamphleteers."99 In 1889, a penalty for such disclosure was enacted.100

Even with guarantees of confidentiality, there were subjects about which Americans felt the government had no right to ask. For example, new questions about secret diseases and home mortgages were added to the census schedule in 1890, arousing a storm of public protest that such questions were impertinent, illegal, and unconstitutional.101 Lawyers as eminent as David Dudley Field took to the national press, advising citizens not to answer.102 The Superintendent of the Census prudently determined not to prosecute those who followed such advice,103 but a large number refused to give any census

96 See C. Wright & W. Hunt, The History and Growth of the United States Census 85 (1900).
98 See C. Wright & W. Hunt, supra note 96, at 145, 150; Davis, Confidentiality and the Census, 1790–1929, in U.S. DEPT OF HEALTH, EDUCATION & WELFARE, RECORDS, COMPUTES, AND THE RIGHTS OF CITIZENS 178, 187 (1973). In 1870 the instructions read: "No graver offense can be committed by Assistant Marshals than to divulge information acquired in the discharge of their duty. All disclosures should be treated as strictly confidential .... The Department is determined to protect the citizen in all his rights in the present Census." CENSUS OFFICE, DEPT OF THE INTERIOR, INSTRUCTIONS TO ASSISTANT MARSHALS 7 (1870).
100 Act of Mar. 1, 1880, ch. 319, §§ 8, 13, 25 Stat. 760 ($500 fine for enumerators); see Davis, supra note 98, at 178. For an investigation of offenses under the Act, see H.R. REP. NO. 1933, 52d Cong., 1St Sess. 122, 125 (1892).
101 See, e.g., 21 CONG. REC. 5158 (1890) (resolution introduced by Rep. McAdoo).
102 Letter from David Dudley Field (May 29, 1890), in 70 Frank Leslie's Illustrated Newspaper 395 (1890); see Atlanta Const., May 30, 1890, at 4, cols. 1–2; New Orleans Daily Picayune, June 5, 1890, at 4, col. 4; N.Y. Times, May 26, 1890, at 4, col. 3.
103 See Boston Evening Transcript, June 2, 1890, at 4, col. 1; Wash. Post, May 28, 1890, at 4, col. 4. The penalty for refusing to answer was upheld by the courts. United States v. Moriarity, 106 F. 886, 891–92 (C.C.S.D.N.Y. 1901); United States
information whatsoever. For the time being, the federal government had reached the limit of its inquiry; hidden diseases and debts joined political party and religious affiliation as subjects effectively barred from direct inquiry.

"[T]he 'natural and inalienable right' of everybody to keep his affairs to himself" was also asserted in opposition to other recordkeeping enterprises begun in the late nineteenth century. Records of individual financial affairs, required for collection of the Civil War income tax, were initially kept confidential, but so much revenue was lost through fraud and evasion that later legislation threw open the assessors' returns to the newspapers. This public disclosure engendered sufficient hostility to kill the tax and, later, to prevent any attempt to reinstitute it. Local records of land titles were open for inspection, but many state courts required that those inspecting titles have an "interest" in the particular piece of property. Inquiries motivated by "idle curiosity" were


104 See Chicago Tribune, June 4, 1890, at 1, col. 5; N.Y. Times, June 1, 1890, at 12, cols. 1-2.

105 On nineteenth century American sensitivity about medical examination, see Union Pac. Ry. v. Botsford, 141 U.S. 250, 252 (1891) (compulsory surgical examination invades "inviolability of the person").

106 The Way It Ought Not to Be Collected, 9 NATION 453, 453 (1869).

107 Charitable organizations began to keep central records of their recipients in what was called from the outset a "confidential exchange." F. BRUNO, TRENDS IN SOCIAL WORK, 1874-1956, at 105 (1957). Even prison officials opposed "marking men" by copious records, lest "our penal institutions would become nothing more than Pinkerton detectives." NATIONAL PRISON ASS'N, PROCEEDINGS OF THE ANNUAL CONGRESS, 1890, at 65 (1891). The communications of an early credit reporting agency were found "grossly libellous" in Muetze v. Tuteur, 77 Wis. 236, 244, 246, 46 N.W. 123, 125, 126 (1890), overruled on other grounds, Judevine v. Benzies-Montanye Fuel & Warehouse Co., 222 Wis. 512, 269 N.W. 295 (1936), overruled on other grounds, Martin v. Outboard Marine Corp., 15 Wis. 2d 452, 113 N.W.2d 135 (1962).


109 See id. at 74-75; The Way It Ought Not to Be Collected, 9 NATION 453 (1869).

110 See CONG. GLOBE, 41st Cong., 2d Sess. 2937 (1870) (remarks of Rep. Wood) ("[T]he tax "authorizes the assessor to intrude into the household, the private business affairs, the domestic relations of every individual."); id. at 3994-95 (remarks of Reps. Kelley and Butler); id. at 4031-32 (remarks of Rep. Davis); Howe, supra note 108, at 75.

not permitted,112 lest inspection, copying, and possible later publication "make unnecessarily public men's private affairs, which the law, for the purposes of fairness, requires them to put upon record."113 Thus, as 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.

The law of libel governed disclosure of information about individuals to the public at large. In theory, invasion of privacy by the press could be distinguished from defamation; in a civil action for libel, the truth of the matter published was a complete defense,114 but the sting of an invasion of privacy was precisely that the personal information published was true.115 In practice, however, courts effectively extended the civil libel remedy to substantially true accounts by insisting on the exact truth of every detail of information published116 and on publication of the "whole truth."117 The damages a successful plaintiff recovered could include compensation for emotional distress as well as for loss of reputation.118 As long as a newspaper account contained some inaccuracies or omissions, both loss of privacy and loss of reputation could be remedied by a libel suit.

Nineteenth century Americans fiercely resented attack and exposure by the press. A publication so outrageous or offensive that it incited breaches of the peace could be prosecuted

114 See 3 W. BLACKSTONE, supra note 19, at *126; W. PROSSER, supra note 13, § 116, at 796-97.
115 But see Gavison, Privacy and the Limits of Law, 89 YALE L.J. 421, 431-32 & n.33 (1980).
117 See, e.g., McAllister v. Detroit Free Press Co., 76 Mich. 338, 354, 43 N.W. 431, 437 (1889) (highly colorful report of an arrest held libelous when the suspect had been discharged before it was published). In reaching its conclusion the Michigan Supreme Court added:

[T]he reporter of a newspaper has no more right to collect the stories on the street, or even to gather information from policemen or magistrates out of court, about a citizen, and to his detriment, and publish such stories and information as facts in a newspaper, than has a person not connected with a newspaper to whisper from ear to ear the gossip and scandal of the street.

Id. at 356, 43 N.W. at 437.
118 See Adams v. Smith, 58 Ill. 417 (1871); cf. Terwilliger v. Wands, 17 N.Y. 54 (1858) (damage other than mental distress required).
as a criminal libel.\textsuperscript{119} The truth of the matter published was no bar to such prosecution; indeed, the maxim was “the greater the truth, the greater the libel.”\textsuperscript{120} At first, criminal prosecutions for this offense did not even allow evidence of the truth to be offered.\textsuperscript{121} Even when the states by statute and constitutional provision allowed such evidence to be given,\textsuperscript{122} truth was still not a complete defense unless published “with good motives and for justifiable ends.”\textsuperscript{123} “Indeed,” said a Louisiana court, permitting truth as an absolute defense “would be a barbarous doctrine which would grant to the evil-disposed the liberty of ransacking the lives of others to drag forth and expose follies, faults or crimes long since forgotten, and perhaps expiated by years of remorse and sincere re-form.”\textsuperscript{124}

Although available to victims of privacy invasion, libel remedies often were inadequate; libel suits compounded unwanted publicity and focused the trial on the issue of truth or falsity of a damaging disclosure.\textsuperscript{125} Libel doctrines also did not reach new invasions of privacy made possible by advances in photography in the late 19th century’s, such as the taking of “can-

\begin{footnotes}
\item[119] See State v. Burnham, 9 N.H. 34, 42 (1837).
\item[120] See, e.g., id. at 41; People v. Croswell, 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804). See generally “The Greater the Truth, the Greater the Libel”, 26 CAN. L. TIMES 394, 394–95 (1906).
\item[124] State v. Bienvenu, 36 La. Ann. 378, 382 (1884); see Delaware State Fire & Marine Ins. Co. v. Crosdale, 11 Del. (6 Houst.) 181, 194–95 (Super. Ct. 1880) (“[I]t would be a gross abuse of the constitutional privilege of printing upon any subject, to drag before the public the private character of a person, for the malicious purpose of injuring or destroying it.” (emphasis omitted)); Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 312 (1826) (“No state of society would be more deplorable than that which would admit an indiscriminate right in every citizen to arraign the conduct of every other, before the public, in newspapers, handbills or other modes of publication, not only for crimes, but for faults, foibles, deformities of mind or person, even admitting all such allegations to be true.”).
\item[125] See Godkin, Libel and Its Legal Remedy, 12 J. SOC. SCI. 69, 80, 82 (1880).
\end{footnotes}
did” photographs without the subject’s knowledge\textsuperscript{126} and subsequent printing of these photos in newspapers.\textsuperscript{127} Widespread public dissatisfaction with the lack of effective legal recourse led to many demands for improved remedies.\textsuperscript{128} Just as “[n]ew conditions both of law and customs were called for as safeguards against the collisions of railroads,” wrote a university president in 1884, it was time that “new defenses should be set up in behalf of the individual” against “the omnipresent press.”\textsuperscript{129}

IV. CONCLUSION

Newspaper disclosures of personal information were not the only invasions of privacy to be remedied by nineteenth century American law, nor the first to receive the law’s attention. When Warren and Brandeis wrote in 1890, restraint of the press was among the least developed areas of privacy protection. The principle they invoked had been expressed by E.L. Godkin in 1880:

[N]othing is better worthy of legal protection than private life, or, in other words, the right of every man to keep his affairs to himself, and to decide for himself to what extent they shall be the subject of public observation and discussion. . . . The press has no longer anything to fear from legal restriction of any kind, as regards its influence or material prosperity; while the community has a good deal to fear from what may be called excessive publicity, or rather from the loss by individuals of the right of privacy.\textsuperscript{130}

\textsuperscript{126} See A. Westin, supra note 14, at 172, 338; Speed, The Right of Privacy, 163 N. Am. Rev. 64, 73 (1890); The Kodak Fiend, Boston Evening Transcript, June 2, 1890, at 6, col. 4.

\textsuperscript{127} See Manola v. Stevens, N.Y. Times, June 21, 1890, at 2, col. 2 (N.Y. Sup. Ct. June 20, 1890); Photographed in Tights, N.Y. Times, June 15, 1890, at 2, col. 3; Manola Gets an Injunction, N.Y. Times, June 18, 1890, at 3, col. 2. See also Moore v. Rugg, 44 Minn. 28, 46 N.W. 141 (1890) ("highly improper" use of photograph held breach of implied contract by photographer); The Photographic Nuisance, 50 Nation 154 (1890) (anticipates the Warren-Brandeis proposal); Liberty vs. License, N.Y. Tribune, Jan. 26, 1890, at 6, col. 4 (verbal description as invasive as photographic depiction).

\textsuperscript{128} See, e.g., Bascom, Public Press and Personal Rights, 4 Educ. 604, 604–05 (1884); Field, The Newspaper Press and the Law of Libel, 5 Int’l Rev. 479, 484–86 (1876); Godkin, supra note 125, at 80, 82; Godkin, The Rights of the Citizen. — IV. — To His Own Reputation, 8 Scribner’s Magazine 58, 62–63, 67 (1890); Proffatt, The Law of Newspaper Libel, 131 N. Am. Rev. 109, 110, 121–22 (1880); The Law of Libel, 48 Nation 173 (1889).

\textsuperscript{129} Bascom, supra note 128, at 604–05.

\textsuperscript{130} Godkin, supra note 125, at 80, 82.
Doctrines already well established protected personal privacy more directly, so that no reporter could intrude upon the domestic castle, read private letters, or obtain individual census data. In an effort to improve the legal remedy for publication of private matters, Warren and Brandeis needed to set against the newspapers' jealously guarded first amendment rights a countervailing right on the part of individuals, an explicit "right to privacy." 131

Did the many legal protections afforded to private property, confidential communications, and personal information testify to the existence of a "right to privacy"? Certainly, nineteenth century Americans thought so. Legal and popular writers frequently invoked a right to privacy, 132 even a constitutional right to privacy, 133 before Warren and Brandeis adopted the phrase. Courts and legislatures explicitly recognized that privacy was a legally protected interest. 134 The *Harvard Law Review* article by Warren and Brandeis, which has been credited with so much, must be read against this existing background of common law, constitutional, and statutory protection.

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131 See note 16 *supra*.
132 See, e.g., M. Gray, *supra* note 69, at 217; Godkin, *supra* note 125, at 82; *The Way It Ought Not to Be Collected*, 9 *NATION* 453 (1869); Boston Sunday Globe, May 25, 1890, at 1, cols. 6-8.
133 See, e.g., J. Bonham, *Railway Secrecy and Trusts* 38, 41 (1890); *Book Review*, 9 *PUB. OPINION* 45 (1890).
134 See O. Handlin & M. Handlin, *The Dimensions of Liberty* 60 (1961) (the right "was respected in advance of any direct protection"); A. Westin, *supra* note 14, at 330-38; G. White, *supra* note 14, at 175 ("Privacy became a significant value in American society, beginning in the latter part of the nineteenth century.").