

Introduction

The one duty we owe to history is to rewrite it.

Oscar Wilde, ‘The Critic as Artist’, 1890

The idea for this book arose out of a puzzle. When did the right to privacy emerge as a social, cultural and ultimately legal idea?¹ An obvious answer was Samuel Warren and Louis Brandeis’s famous article on ‘The Right to Privacy’ in volume four of the *Harvard Law Review* (1890). But I was never entirely convinced that the right to privacy was invented by these two Bostonians in 1890. They helpfully elucidated the right to privacy as a right to be ‘let alone’ (205) and identified it as a universal value which law should support. They also contemplated a new way to deal with it as a matter of law, through a specific privacy tort. However, they did not suggest that they were engaging in invention of some new right. Their argument was rather that the right to privacy was the inevitable conclusion of the law’s development in response to the pressures of an ‘intense intellectual and emotional’ modern life (195). And they noted that there were seeds already for the development in the current state of Anglo-American law, especially in the protection accorded to ‘thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts’ in some important cases of the nineteenth century (205). In later chapters of this book, I contend that these seeds provide the closest thing we have to an identifiable ‘beginning’ to the right to privacy recognised and supported by law.

Emerging Ideas

Yet first we need to consider some earlier precursors. One, curiously not noted by Warren and Brandeis, was the eighteenth-century English case

¹ My interest is the emergence of the social, cultural and legal idea of the right to privacy, not the idea of privacy, or private life, as such. As Étienne Picard notes in ‘The Right to Privacy in French Law’, in Basil Markesinis (1999, 49), formulation of ‘the right to privacy’ came into use long after the idea emerged of a private life. As to the latter, see Ariès and Duby (1985–1987).

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of *Entick v Carrington* (1765). This case of improper search and seizure is now widely seen as prefiguring the right to privacy in the common law world.² Yet privacy was not adverted to by the plaintiff, John Entick, writer for *The Monitor*, who found his home entered and papers ransacked by the King's men searching for evidence that might be used in seditious proceedings without a proper warrant. Moreover, in the judgment of Lord Camden, the case was dealt with as a matter of trespass apart from brief reference made to the cherished character of private papers. In *Boyd v United States* (1886) it was said that *Entick v Carrington* stood for 'the sanctities of a man's home and the privacies of life' (630), referencing it also as the basis of the American Constitution's Fourth Amendment. But William Blackstone in his *Commentaries on the Laws of England* (1765–1769) did not identify the case with any emerging right to privacy, implying rather that it could be subsumed under a more general statement about the law's 'particular and tender . . . regard to the immunity of a man's house' (iv, 233). The Fourth Amendment in its inception can similarly be understood as reflecting 'the significance of property rights in search-and-seizure analysis', as Scalia J put it in *United States v Jones* (2012, 929). Indeed, it is hard to imagine the right to privacy as a general concern of the Constitution's framers who identified freedom of speech and the press as their preoccupation in the First Amendment, without making the obvious qualification *there* as to privacy. Even so, the Fourth Amendment and its constitutive case of *Entick v Carrington* provided a preface of sorts to the right to privacy identified by Warren and Brandeis in 1890. And the authors' broad language of a right to be 'let alone' allowed for the right to privacy's later development as a bulwark against state intrusion into the home under the *aegis* of the American Constitution – beginning with *Olmstead v United States* (1928), where Brandeis, by then a justice of the Supreme Court, referred to the right as giving '[p]rotection against such invasion of "the sanctity of a man's home and the privacies of life"', a protection provided for in the Fourth Amendment 'by specific language' (473).

A similar comment can be made about the constitutional developments in France following the French Revolution. Again, these have been identified as an important early step towards a right to privacy, for instance in James Whitman's influential article on 'Two Western Cultures of Privacy' (2004, 1171ff). But in their original inception, the step actually taken was rather tentative. The right to privacy did not feature in the 'Rights of Man

² Including recently in Sir Michael Tugendhat's important book, *Liberty Intact* (2016), published just as this book was going to press. See also earlier Kenneth Keith (2006, 232–237).

and Citizen' of 1789 which, like the US Constitution's First Amendment, rather emphasised the right to freedom of speech and the press as a basic principle of a democracy. It temporarily appeared in the Constitution of 1791,³ but by 1793, that Constitution was superseded by another Constitution which avoided reference to the right (although it did refer to the inviolability of the home) and in Constitutions of 1795 and 1799, the latter position was confirmed. In fact, the main legal protections of privacy in France surfaced in the nineteenth century and outside the rubric of the Constitution. In particular, there were the press laws which, although primarily concerned with freedom of speech, introduced a qualification for privacy from 1868,⁴ a development noted by Warren and Brandeis (214, n 1). In addition, there were a number of privacy cases, often involving photographic portraits, from about the late 1850s, a notable example being *Félix c O'Connell* (1858) featuring the celebrity actress 'Rachel' on her deathbed in 1858. These cases helped to establish France as a centre of an emerging privacy jurisprudence in the second Empire, loosely tied to the provisions of the *Code civil* – a position later to be formalised with the explicit identification of a right to privacy in Article 9 in 1970 and a Constitutional principle in the mid-1990s (see Picard, 1999, 51–52). The French jurisprudence of the nineteenth century can be compared with the Anglo-American cases noted by Warren and Brandeis, although it is hard to identify them with the beginning of the right to privacy, coming as they did several decades after the first English cases to accord protection specifically to privacy.

Early Nineteenth-century Cases

The most famous of the English privacy cases of the nineteenth century was the mid-century case of *Prince Albert v Strange* (1849a and 1849b). Warren and Brandeis noted this as the leading case to date in the protection of 'thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts' (205). For many, it is still regarded as a 'seminal case' in the modern English law of privacy, as Lord Hoffmann characterised it in *Campbell v MGN Ltd* (2004, 471). Its facts were already quite modern. Works of a private character (in this case domestic

³ The *Constitution de 1791* in Article 17 of Chapter 5 stated that '*Les calomnies et injures contre quelques personnes que ce soit relatives aux actions de leur vie privée, seront punies sur leur poursuite*' ('calumnies and insults against persons relative to their private life shall be punished').

⁴ As to an earlier proposal made in 1822, which failed to pass: see Perrault-Charmantier (1930, 56), noted also in Lipstein and Gutteridge (circa 1939) cited in Mitchell (2015, 334, 348).

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etchings) had been made by the young protagonists for personal enjoyment and circulation to a limited number of friends. Somehow these had been leaked into the hands of a third party (William Strange) through the agency of the journalist (Jasper Judge). They proposed an exhibition complete with a descriptive catalogue, leading to proceedings in the Court of Chancery for an injunction, which was granted and upheld on appeal in 1849. Later on, in a further twist, one of Queen Victoria's etchings was published with her consent in *The Strand Magazine* of January 1891 under her name. And the same image featured in a small collection of royal etchings sent to the National Gallery of Victoria in Australia as part of a colonial travelling exhibition (Vaughan, 2011). Even at the time of the proceedings, there was talk of a possible exhibition of etchings for some worthy cause, which the royals might agree to, as another reason for the granting of an injunction. Yet despite these different and apparently contradictory arguments, and the fact that the case was framed in terms of an author's property right in an unpublished work and alternatively an equitable action for breach of confidence, there is much to support its reading as a case essentially about the 'right' to 'privacy', as Lord Cottenham said (1849b, 26). Even so, the idea that this was a radical judgment was disclaimed by the Lord Chancellor, who began by stating that the facts of the case 'clearly fall within the established principles' (1849b, 18–19). If this statement is to be taken seriously, we need to go back a step to consider the earlier cases relied on in *Prince Albert v Strange*.

Three of these cases are worth noting in charting the path towards the right to privacy. The first is *Southey v Sherwood* (1817), where the Poet Laureate Robert Southey sought an injunction to stop publication under his name of his dramatic poem *Wat Tyler*, written in his radical youth and shown privately to friends in 1794 but thought too dangerous to publish at the height of the Treason Trials. There was little suggestion of privacy as a concern here, but the furore that followed *Wat Tyler*'s publication led others watching on to fear for the safety of themselves and others who may find their personal secrets revealed in the current political and social climate. In *Gee v Pritchard* (1818), just one year later, privacy was expressly a motivating factor behind the plaintiff's attempt to obtain an injunction against publication of letters written to her late husband's natural son when they were on terms of friendship, some being of 'a private and confidential nature' and some relating to the defendant's 'personal conduct and morals in life' and containing words of advice (404). Her lawyer, Sir Samuel Romilly (who had represented Sherwood, Neely and Jones in their case with Southey the previous year), talked of the 'welfare of society' in holding that personal letters

‘cannot be published without [the writer’s] consent, unless the purposes of justice, civil or criminal, require the publication’ (418). And Lord Eldon LC granted the injunction denied in Southey’s case, assuaging the ‘wounded feelings’ of the plaintiff (126). In the third case, *Wyatt v Wilson* (1820), the artist Matthew Cotes Wyatt sought an injunction against the radical bookseller Effingham Wilson’s circulation and sales of engraved prints of King George III attributed to the artist Henry Meyer. Wyatt claimed the prints were based on his own fanciful drawing and prints of the ill and secluded King, which he had put into circulation but then withdrawn from publication, relying on his copyright under the Engraving Copyright Acts (1735 and 1766). Here, it was the Lord Chancellor who reportedly invoked the image of a diary kept by the King’s physician that ‘this Court would not in the King’s lifetime, have permitted him to print or publish’ (cited in *Prince Albert v Strange*, 1849b, 25).

Thus, over the course of three judgments all rendered by Lord Eldon, that powerful, conservative and cautiously creative judicial figure of the latter Georgian period (see Melikan, 1999), we see an increasing attention given to privacy.⁵ What prompted the change in legal sentiment in these cases which eventually became the basis of the right to privacy in *Prince Albert v Strange*? A particular aim of this book is to explore the changing landscape of free speech and privacy in the transition from Georgian to Victorian England, and to locate the social and philosophical as well as legal reasons for the turn towards privacy that was apparently then taking place.

Reasons for the Change

In the chapters that follow, I highlight a number of factors. One, I suggest, was the growing desire on the part of some influential people to see increased restraints on the reporting practices of pamphleteers, book publishers and newspaper men (and women), who were also undergoing their own processes of becoming respectable (see Boyce *et al.*, 1978). Another was a developing interest in various spheres in the relationship between emotions and human health and welfare (see Dixon, 2003). Especially significant here were the romantics, the self-proclaimed ‘out-riders, heralds and witnesses of social change’ (Williams, 1989, 49). Their

⁵ These were not the only important cases – others include *Abernethy v Hutchinson* (1825), where the plaintiff’s professional interests in controlling the publication of his lectures were dealt with under breach of confidence, paving the way for a more direct treatment of privacy interests under breach of confidence in *Prince Albert’s* case – a development already hinted at by Lord Eldon in *Gee v Pritchard*.

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poetic and other communications were designed to bring forth, as Wordsworth said, a ‘greater knowledge of human nature, and a more comprehensive soul’ (1802, xxviii). Not to be forgotten, also, were the romantics’ contemporaries and sometime sympathisers, Jeremy Bentham and his circle (see Canuel, 2011). These utilitarians directed their considerable energies and talents to reforming the law away from its entrenched traditionalism, as reflected by Blackstone’s *Commentaries*, and in a direction more conducive of individual freedom and general happiness – and with some success. Powerful advocates of free speech, they came to acknowledge privacy as also worth protecting from the eyes and ears (and mouths) of what Bentham termed ‘the Public Opinion Tribunal’ (1822, 290), adding that there were certain matters ‘in which the public has no interest’ (1825, 80).⁶ The fact that Bentham’s friend and acolyte Samuel Romilly should make an argument for privacy as a matter of the ‘welfare of society’ in *Gee v Pritchard*, before a Lord Chancellor who would take the matter further in his comments in *Wyatt v Wilson*, was part of a drift towards liberal-utilitarian ways of thinking over the nineteenth century. A high point may have been John Stuart Mill’s articulation of a liberal-utilitarian theory in support of private life in his 1859 essay ‘On Liberty’. But the backdrop was concessions already made in favour of privacy by the older romantics and utilitarians whom Mill admired and whose legacy he continued and extended, along with changes taking place under a succession of judges in reforming the ‘yoke ... of the law’ (see Mill, 1833, 19–20).

Later Developments

Nevertheless, the discussion cannot stop with *Prince Albert v Strange* or even ‘On Liberty’. Nor can it be limited to England (or more broadly Britain). As already intimated in my brief account above, there were important legal and intellectual developments later in the century occurring mostly outside that jurisdiction. These contributed also to Warren and Brandeis’s final articulation of ‘the right to privacy’ in 1890 as more than simply an Anglo-American idea. A second aim of the book is therefore to trace these later developments, their various connection

⁶ Bentham’s concerns with privacy are less obvious perhaps when it came to his advocacy of the ‘panopticon’, or ‘inspection house’: for privacy seemed to have little to do with Bentham’s plan for penitentiaries. Even so, when extending his plan to other institutions, such as hospitals, Bentham’s modifications suggest some sensitivity to privacy – as with his statement that ‘[c]urtains, instead of grating, would give the patients, when they thought fit, the option of being seen’: Bowring (1843, 61).

points in a period marked by ‘endless border-crossing’ (Williams, 1989, 50) and a general cross-fertilisation of identities and ideas, culminating in a distinctly cosmopolitan understanding of the right to privacy around the end of the century.

And there were many connection points. One was clearly the nineteenth-century phenomenon of celebrity (see Berenson and Giloi, 2010), a feature both the English case of *Prince Albert v Strange* and the French privacy cases represented by *Félix c O’Connell*. For it is clear that both the British royals and ‘Rachel’, as famous for her striking appearance and flamboyant affairs as her dramatic performances, were celebrities in their own worlds and thus obvious targets for a public curiosity about every detail of their private lives. Another was the circulation of images, featuring in these and other cases. Photography was a particular impetus for legal developments from around the 1850s, when advances in the technology transformed portrait-making into a ‘portraituremania’ (Bajac, 2002, ch 3), but etching and engraving was there before and continued alongside. Not surprisingly, there were concerns and occasional scandals about the uses made of particular images, especially involving women. They were less perhaps on the British side, where images of celebrity figures from Queen Victoria to Lillie Langtry, as well as a range of ordinary people, proliferated in newspapers, magazines and advertising posters with little complaint. In France, by contrast, public fascination with celebrity coupled with a strong sense of honour made an ideal climate for the formulation of a dignitarian right to privacy, reflecting the idea of ‘the most intimate sentiments and the most respectable aspects of human nature and domestic piety’ in cases following *Félix c O’Connell* (62). But even in the English case of *Pollard v Photographic Company* (1888), where the complaint was a photographer’s breach of the implied terms of his contract with his attractive client when he included her photograph in a Christmas card in his window, with breach of confidence also found, it seems there was a small sense of dignity in the comment of North J that Mrs Pollard had suffered ‘sentimental grievances’ on discovering the association of her image with a card displayed in a shop (352). So it was not just a matter of holding the photographer to the terms of his contract in a market-oriented English society: dignity had a role to play as well.

Indeed, dignity was becoming a focus not just of the reasoning of these cases but also in the broader philosophical arguments about the ideal nature of law – something that Mill especially might have appreciated, given his tendency to cite Kantian dignitarian ideas as consistent with his liberal utilitarianism.⁷ The idea that law should reflect dignitarian values

⁷ This can be seen at several points in Mill’s writing. In ‘On Liberty’ (1859), for instance, Mill states (at 209) that ‘duty to oneself, when it means anything more than prudence,

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fuelled a wave of German scholarship in the lead-up to the *Bürgerliches Gesetzbuch* (or BGB) of 1896. And, even before the BGB came into force in 1900, a number of German cases, typically involving the use of images, were premised on ‘insult’ to dignity (see Kohler, 1903), suggesting that considerations of dignity featured in German law long before its inclusion as a constitutional right in Article 1 of the post-war Basic Law (*Grundgesetz*) of the Federal Republic of Germany (1949). There is much to be said for Whitman’s suggestion that the German scholarship provided the intellectual basis of the argument for the right to privacy propounded by Samuel Warren and Louis Brandeis in 1890. For instance, we can compare their reasoning with that of Rudolf von Jhering in *Der Kampf ums Recht* (1872), a neat little book that ran into multiple editions in Germany, and that was translated into English as *The Struggle of Law* by John Lalor of the Chicago Bar in 1879, with a second edition in 1915, making this a very popular German text in *fin-de-siecle* America (see Zweigert and Siehr, 1971, 223–225). Von Jhering’s book was quite likely read by Brandeis, who grew up in a family closely connected to its Bohemian roots and attended school in Germany. Or, at least he read German writers who expressed similar ideas.⁸ And von Jhering’s argument that German law should develop to reflect and respond to the ‘idealism’ of ‘the man who looks upon himself as his own end, and esteems all else lightly when he is attacked in his personality’ (94), using a Kantian-Hegelian dignitarian rhetoric, has parallels with Warren and Brandeis’s argument that tort law in modern America should respond to human spiritual needs by providing stronger and more direct support for the right to privacy, characterised as a right of ‘inviolable personality’ (1890, 205).

Yet Warren and Brandeis added something to von Jhering’s argument, in the same way that von Jhering, writing in the 1870s, added to the arguments of the English utilitarians earlier in the century. Specifically, they located the modern right to privacy in a contemporary American experience of snapshot photography following the recent release of George Eastman’s popular Kodak camera in 1888, and a rising tabloid

means self-respect or self-development, and for none of these is any one accountable to his fellow-creatures’. Similarly, in ‘Utilitarianism’ (1861), he suggested that Kant’s positing of a universal rational moral principle, from which Kant draws his idea of human beings as ends in themselves and not means to others’ ends (see Paton, 1948, 91) implicitly reflected a concern with utilitarianism: for ‘[t]o give any meaning to Kant’s principle, the sense put upon it must be, that we ought to shape our conduct by a rule which all rational beings might adopt *with benefit to their collective interest*’ (1861, 308, emphasis in the original).

⁸ In fact, Warren and Brandeis referenced a more mainstream text: see ‘The Right to Privacy’ (1890, 198, n 1), citing Carl Salkowski’s *Institutes and History of Roman Private Law: with Catena of Texts (Lehrbuch der Institutionen und der Geschichte des Römischen Privatrechts)* (1886).

press feeding off and fuelling a public appetite for salacious gossip – an experience of the power of the spectacle not altogether different from other places except that it was perhaps more extreme.⁹ Their examples featured the recent case of *Manola v Stevens* (1890), a subject of much discussion in the American press, of an actress in the music theatre who objected to the circulation of snapped photographs showing her performing in tights procured by way of a publicity stunt on the part of the theatre. Manola's argument that a professional female artist of appropriate 'modesty' should not have to be so publicly embarrassed (*New York Times*, 1890) suggests a broader reach for the right to privacy than von Jhering might have contemplated when he talked of 'the idealism' of 'the man who looks upon himself as his own end' in Germany two decades earlier. As Warren and Brandeis pointed out, in a modern age of 'instantaneous photographs and newspaper enterprise', *everyone* might be affected by the prospect that 'what is whispered in the closet shall be proclaimed from the house-tops' (195), and, so they argued, the right to privacy should be seen as a shared concern through the whole of society.

In short, my point is that, through Warren and Brandeis, the ideas of earlier thinkers such as Bentham, Mill and von Jhering were extended further in ways that their originators might not have contemplated, but might eventually have approved.¹⁰ Thus, the right to privacy, which was earlier treated as largely a bourgeois right, could now be aspired to by everyman and everywoman under the popularising effect of Warren and Brandeis's opinion piece, which swiftly became the talking point of writers, judges and legislators, as well as other more mainstream commentators in the United States and other parts of the world. Even if what ultimately emerged was a rather qualified right to privacy in the United States itself, directed especially at the state and commercial interests rather than the press (which by the 1960s claimed a powerful constitutional privilege in the First Amendment), within its scope it reflected the idea put forward by

⁹ And for Oscar Wilde's take on the matter in England, as someone already the subject of public gossip and press attention after the publication of *The Picture of Dorian Gray* in 1890, before his trials to come in 1895, see his 'Soul of Man under Socialism' (1891). In striking similar terms to Warren and Brandeis, Wilde talks of '[t]he tyranny that [journalism] proposes to exercise over people's private lives' and the public's 'insatiable curiosity to know everything, except what is worth knowing' (259).

¹⁰ Bentham already was very eclectic, and I doubt that Mill and von Jhering would have resisted these more progressive ideas. Although Mill suggested in 'On Liberty' that the principle of liberty was for the benefit of societies which had reached a certain level of development rather than falling within 'those backward states of society' (135–136), he was a noted feminist and socialist by the time he died, who also spearheaded a public campaign against colonial human rights abuses in Jamaica (Mill, 1870, 174–176). And von Jhering, an early comparative lawyer, argued that the law is 'a magnificent business of exchange that embraces every side of human existence' (see quoted in Smith, 1927, 122).

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Warren and Brandeis that the right to be let alone was one that every human being should be able to share. It was an important intellectual step that helped to make possible the idea of a universal human right to privacy in the twentieth century, offering a way of responding to what the sociologist Georg Simmel in 1903 described as ‘[t]he deepest problems of modern life’, flowing from the intrusions of society on the individual (409), and reflected in its status as one of an agreed list of international human rights in the post-war Universal Declaration of Human Rights in 1948. By now, quite clearly, the right to privacy has transcended its more restricted beginnings to become a general right of ‘protection from others (*the public*); of lack of accountability to “them” and relatedly ‘of the valued intimacy of *family* and friends’ (Williams, 1976, 204).

Looking Forward

Whether the development can continue into the twenty-first century is a question I come back to at the end of the book. With some of the most anxious common human concerns centred on issues such as ubiquitous surveillance, online tracking and profiling, breakdowns of data security systems, eternal archiving and uncontrolled proliferations of images through social networks, the idea of a ‘right to privacy’ might seem to be rather antiquated, limited and inadequate. After all, it might quite reasonably be said, we live in a very different time now from the one in which traditional privacy cases emerged with claims centred on the rights of individuals not to have aspects of their private lives exposed to unwanted social attention.

On the other hand, there are plenty of modern parallels still with older cases, even if the distinctions between the individual’s public and private existence may now seem more blurred and the world more interconnected and intrusive. Thus still worth remembering is another time when, responding to a sense of individuality in tension with sociality, the idea of privacy emerged as something that individuals (and sometimes groups) might choose for themselves and claim from law. The right to privacy will hopefully contribute something to the matrix of arguments in modern cases which are, to an extent, also concerned with basic human interests in personality. And if privacy is not the only concern and the law is not only or mainly framed in such terms, how different is that from what we have seen before?

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