

## A NOT QUITE CONTEMPORARY VIEW OF PRIVACY

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Oftentimes the way in which a writer defines a problem will give powerful clues as to how he thinks it is best solved. This Symposium, dedicated to the “First Amendment in Contemporary Society,” states the problem in what I think is the wrong way. The use of the term “contemporary” carries the not-too-subtle implication that the solutions that we need to respond to major problems of First Amendment law today are somehow qualitatively different from those applicable, for example, at the time of the Founding. There are, of course, many technological developments that can be easily invoked to support that position. But in general, whether one is an originalist or not, it is best to take such claims of theoretical novelty with a grain of salt.

I am generally predisposed to take this skeptical stance because my intellectual grounding, after these many years, is still in Roman law and English common law. My continued work<sup>1</sup> in these areas has led me to think that the opposite is often true—the solutions to the major problems of today can be found in the enduring principles of the past. Some years ago, I wrote an essay titled “The Static Conception of the Common Law,”<sup>2</sup> in which I took the position that the fundamental legal

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1. For a few examples of my continued work in these areas, see Richard A. Epstein, *For a Bramwell Revival*, 38 AM. J. LEG. HIST. 246 (1994); Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699 (1992); Richard A. Epstein, *Defenses and Subsequent Pleading in a System of Strict Liability*, 3 J. LEG. STUD. 165 (1974); Richard A. Epstein, *Intentional Harms*, 4 J. LEG. STUD. 391 (1975); Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973); Richard A. Epstein, *The Reflections and Responses of a Legal Contrarian*, 44 TULSA L. REV. 647 (2009); Richard A. Epstein, *The Roman Law of Cyberconversion*, 2005 MICH. ST. L. REV. 103; Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253 (1980).

2. See Richard A. Epstein, *The Static Conception of the Common Law*, *supra* note 1.

relations developed in early times concerning the acquisition of property, the law of tort, and the law of contract had great durability, such that many of the self-conscious changes in modern legal doctrine introduced judicial or legislative mischief by creating rules that, even by any modern standard of social welfare, worked less well than the Roman or common law rules they displaced.<sup>3</sup>

One such misguided reform was the doctrine of unconscionability as applied to contracts of sales and leases.<sup>4</sup> Another was the rule of occupier liability as applied to residential properties.<sup>5</sup> The very same risk of overzealous modernization also applies in modern constitutional law. For instance, the (relatively) narrow reading of the Commerce Clause that (roughly speaking) restricted its scope to interstate transactions was as sound in the New Deal Period as when it was first announced in *Gibbons v. Ogden*<sup>6</sup> in 1824. Modern technology has brought us automobiles, steamships, jet planes, telephones, and the internet, but the line between local and interstate commerce does not vary with the type of technology involved. Moving from an interstate journey into local commerce is the same over time, whether by horse-drawn carriage or taxi. So if there was no reason to junk the principle of enumerated powers in 1824, there was none in 1937 either.<sup>7</sup> In both cases, the central task of the federal government was to keep open the arteries of inter-

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3. *Id.* at 258–65 (discussing such changes of law in the doctrines of “Negligence and Strict Liability,” “Privity and Freedom of Contract,” “Assumption of Risk,” and “Landlord Tenant”).

4. For examples of these mistakes, see *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), and *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

5. See, e.g., *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968).

6. 22 U.S. (9 Wheat.) 1 (1824). Chief Justice Marshall announced this position: Comprehensive as the word “among” is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description.

*Id.* at 194–95.

7. See *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1 (1937); see also *Wickard v. Filburn*, 317 U.S. 111 (1942).

state commerce to facilitate competition among the states. The nationalization of commerce that leads to cartelization is as dangerous in the twenty-first century as it was at the time of the Founding.<sup>8</sup>

When I think of the term “contemporary,” therefore, I think of it in the same way that I did in 1960 when I took the standard first-year sequence in Contemporary Civilization at Columbia College.<sup>9</sup> As students, our study of contemporary work began with the writings of the Greek philosophers, where our responsibility was to figure out which of their arguments carried over to modern times, and which of them faltered. On this view, the great thoughts of the ancients are always contemporary, and anyone who cuts themselves off from earlier studies removes one of the pillars on which proper analysis rests.

### I. THE WARREN AND BRANDEIS SYNTHESIS

The proposition that the term “contemporary,” properly understood, includes the best of the past holds, I believe, across all fields of law. But regrettably this position is far too often neglected in favor of modern advances. For the purposes at hand, let us consider the law and privacy. It is instructive in this regard to begin with the most famous article on the subject, Samuel Warren and Louis Brandeis’s *The Right to Privacy*.<sup>10</sup> To get some sense of the sweep and grandeur that they brought to the subject (and for which they have been frequently and extravagantly praised),<sup>11</sup> it is worth quoting the opening passages:

That the individual shall have full protection in person and in property is a principle as old as the common law; but it

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8. See Richard A. Epstein, *The Cartelization of Commerce*, 22 HARV. J.L. & PUB. POL’Y 209 (1998).

9. For the readings assigned in this course, see COLUMBIA UNIV., MAN IN CONTEMPORARY SOCIETY: SOURCE BOOK PREPARED BY THE CONTEMPORARY CIVILIZATION STAFF OF COLUMBIA COLLEGE (1955).

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

11. See, e.g., Dean Andrew Mazzone, Louis D. Brandeis: A Life, *By Melvin I. Urofsky* (Pantheon Books, 2009); 976 Pages, 93 MASS. L. REV. 411 (2011) (book review) (acclaiming *The Right to Privacy* as “one of the most singularly influential law review articles of all time.”).

has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the “right to life” served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man’s spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term “property” has grown to comprise every form of possession—intangible, as well as tangible.

Thus, with the recognition of the legal value of sensations, the protection against actual bodily injury was extended to prohibit mere attempts to do such injury; that is, the putting another in fear of such injury. From the action of battery grew that of assault. Much later there came a qualified protection of the individual against offensive noises and odors, against dust and smoke, and excessive vibration. The law of nuisance was developed. So regard for human emotions soon extended the scope of personal immunity beyond the body of the individual. His reputation, the standing among his fellow-men, was considered, and the law of slander and libel arose.<sup>12</sup>

One seductive feature of this article is how it indulges in what I like to call “imagined history.” Warren and Brandeis write very much in a whiggish tradition, which is characterized by a view “that holds that history follows a path of inevitable progression and improvement and which judges the past in light of the present.”<sup>13</sup> The passage quoted from Warren and Brandeis portrays just this historical arc. This vision of history allows for no false steps, no backward movements, no unex-

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12. See Warren & Brandeis, *supra* note 10, at 193–94 (internal citations omitted).

13. *Whiggish*, Merriam-Webster Online Dictionary 2017, <https://www.merriam-webster.com/dictionary/Whiggish> [<https://perma.cc/7VNS-KB58>] (last visited Aug. 12, 2017).

pected ambiguities, and no corrupting influences. There is just an inexorable progression in which the law “grows” so that gaps left by an earlier generation are filled by the far-sighted innovations of the next. Privacy, which had had an imperfect and unrealized history up to 1890, is next on the runway for full legal protection as an apparently worthy successor to all the previous notable advances.<sup>14</sup>

It is important to note how Warren and Brandeis set up this system. Their perspective contains no room for any kind of moral skepticism. Instead, the world begins with this large truth: the protection of person and property has been timeless. The article reinforces that impression by mentioning not a single date on which any particular doctrine began, and by giving no details about or how, when, or why any particular doctrine developed. Everything is written in such a grand, magisterial fashion—careful to proclaim only universal truths—as if, as long as nothing is specified, the account cannot be wrong. But let the reader try to figure out exactly what the critical arguments are and how they develop, and the story gets a lot muddier, making it that much harder to anticipate the next major step.

It is therefore necessary to unpack some of this inexorable progression. What I plan to do, therefore, is draw from my Roman and medieval background to explain which legal transitions make sense, and which do not. The point of the exercise is to see what can be learned about the right of privacy by a closer examination of the various transitions between earlier states of the law. At this point, the first analytical mistake of Warren and Brandeis is that they start from an implicit assumption that it is always easy, if not inevitable, to expand the set of rights without adverse social consequences. But they never confront the *quid pro quo* that is implicit when rights are expanded: exactly what correlative duties are imposed on various individuals and why. On that crucial question, Warren and Brandeis are silent.

In this discussion, I do share with Warren and Brandeis the useful assumption that we are talking about general rules, so that we do not have to worry, at least initially, about special-

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14. See Warren & Brandeis, *supra* note 10, at 193–94.

ized relationships such as those between a doctor and a patient, or a seller and a buyer, which in practice often fall on the contract side of the tort-contract line.<sup>15</sup> This point is of great importance because, under any general rule, all individuals have both rights against others and correlative duties to them. Once it is recognized that individuals are necessarily *both* bound and benefited, then the articulation of the correct set of rights is harder to come by, given the constant trade-offs that have to be made with each new adjustment to the underlying rules. What any individual gains in the role of a future claimant is offset by what that person loses in the role of a future defendant. For the system to work well, the recognition of a particular claim against others must produce a net benefit for all individuals. And where it does not, then the net advantage lies in increasing the freedom of action that all persons enjoy in their role as future defendants.

Of course there are variations among persons, which is why the usual construct of Adam Smith's ideal observer<sup>16</sup> or John Rawls' veil of ignorance<sup>17</sup> takes over as the analytical framework in which libertarian (and other) approaches to rights are generated. The analysis tends to ignore fine differences that cannot be measured, concentrating instead on persons located toward the middle of the distribution, which is why terms like "reasonable person" or "reasonable expectations" exert such a powerful hold within this framework. They are a way of eliminating troublesome idiosyncratic variations from the basic calculation, at least on the initial cut, leaving open the possibility that any pesky variations can be brought into the system later when the time comes to flesh out its details.

Warren and Brandeis's opening gambit draws its power because it takes a strong leaf from the libertarian playbook, which, normatively, still offers the best approach for under-

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15. *Id.* at 197 (explaining their general approach as considering "whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is").

16. See ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (A. Miller et al. eds., 1971); Roderick Firth, *Ethical Absolutism and the Ideal Observer*, 12 *PHIL. PHENOMENOLOGICAL RES.* 317, 345 (1952).

17. See JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard Univ. Press rev. ed. 1999).

standing individual rights in ordinary two-party interactions. The universal protection of person and property puts a perimeter of rights around all individuals that no other person is allowed to breach, except in conditions of necessity. The cases that Warren and Brandeis put forward fit well within this framework. Thus the initial protection against the use of force—*vi et armis*—confronts all individuals with the stark choice: would you rather have the right to commit random violence against others, or give up that right in order to be protected against the violence of others? The reason why *vi et armis* is so powerful is that the question answers itself, and it does so with the same clarity today that it did so many years ago.

In good whiggish form, Warren and Brandeis then declaim that the protection against assault—the offer of force against the person—came later. Historically that is not true; the action for assault in *I. de S. & Wife v. W. de S.*<sup>18</sup> shows this tort dates at the latest from 1348. Indeed, there is absolutely nothing in that brief opinion that suggests that the action for assault was the slightest bit novel at the time. The inevitable progression that Warren and Brandeis seek to narrate—from protection against mere battery to protection against battery and assault—turns the ebbs and flows of history into something of a morality play. But a moment's reflection should make it clear that it is virtually impossible to think of a world in which protection is given against the use of force, but none is supplied against the threat of force. The same social forces that lead us to protect against both today worked equally well many years ago.

With a tort like nuisance, the situation is a little bit more complex. In one sense the tort is an obvious outgrowth of the tort of trespass, and there is little doubt that, at least in cases of substantial nuisances, we know the answer to this question: would you subject yourself to the stench of others so long as you could do the same to them? Very few people will answer that basic question in the affirmative. Nonetheless, nuisances are much more complicated than simple trespasses. In so many

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18. See YB Liber Assisarum, 22 Edw. 3, fol. 99, pl. 60 (1348 or 1349), [https://www.bu.edu/phpbin/lawyearbooks/page.php?volume=5&first\\_page=109&last\\_page=109&id=11809](https://www.bu.edu/phpbin/lawyearbooks/page.php?volume=5&first_page=109&last_page=109&id=11809) [<http://perma.cc/63TF-V8NM>]. For an English translation of this case, see VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 37–38 (12th ed. 2010).



cases both sides are better off with a “live-and-let-live” rule whereby low-level nuisances on both sides are ignored, precisely because all individuals value their freedom of action more than they value the right to be free of such trivial insults. Baron Bramwell articulated the logic in favor of this position in the famous 1862 decision of *Bamford v. Turnley*,<sup>19</sup> which hits at the appropriate theme:

It is as much for the advantage of one owner as of another for the very nuisance the one complains of, as the result of the ordinary use of his neighbour’s land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live.<sup>20</sup>

There is thus every reason to believe that this line works as a useful first approximation on the kinds of nuisances that are tolerated and those that are not. And this balance is far more common with nuisance than it is with trespass to land, where the privileges are much more circumscribed. Yet in dealing with casual physical contact between persons on public streets, the same live-and-let-live rule that dominates nuisances has a precise analogue. There are no lawsuits when people accidentally jostle each other; an “excuse me” is usually quite sufficient. On the other hand, if the harm is deliberate or serious injury ensues, then the rights of action will come quickly. Yet once again there is no need for some elaborate theory of social evolution to explain these refinements. It is part of the everyday morality that lies at the root of so much of the basic norms of common law, making the whiggish notion of benevolent evolution unnecessary. There is no need for triumphant evolution if we are already there.

The same logic applies to the tort of defamation, which also fits squarely within the libertarian framework. In the basic case, *A* makes a false statement about *B* to *C*, who in turn refuses either to do business with or associate with *B*.<sup>21</sup> The interest here

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19. *Bamford v. Turnley* (1862) 122 Eng. Rep. 25.

20. *Id.* at 33.

21. See RESTATEMENT (SECOND) OF TORTS § 559 (AM. LAW INST. 1977) (“A communication is defamatory if it tends so to harm the reputation of another as to



is not physical, but for these purposes it does not matter. Defamation picks up on the second half of the libertarian prohibition against force and fraud, and does so in a context where the risk is very great. If *A* lies to your face, you have simple means of self-help, namely, a healthy dose of skepticism. But if *A* lies to a third person, that third person does not have your interest at heart, and could easily decide that it is better to take her business somewhere else than take the risk that these statements are true. So the tort in fact has a very early origin,<sup>22</sup> far earlier than any tort of privacy, and for good reason. The law of defamation is much older than the law of privacy precisely because those false statements about another individual could lead to their political demise, their lawful execution, or their murder. So defamation was well understood in very early times as a very serious offense.<sup>23</sup>

Needless to say, here too there are complications. Thus, a general false statement to the world in the form of group defamation is in general not actionable, for the reason that people have enough general information to discount the false statements instead.<sup>24</sup> The point here is not that the statements are harmless; they are often anything but. Rather, the point is that forceful social counter-speech is cheaper and does not raise the dangerous specter of trying to reargue political differences in a legal forum.

It should be noted that the same approach applies in each of these cases. The typical case of the wrong is established, and then the same question is brought to bear to define exceptions to the rule—do you gain more as a plaintiff than you would lose as a defendant? The common cases give generally clear answers, enabling us to live with the inevitable ambiguities presented by difficult, but usually infrequent, litigation.

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lower him in the estimation of the community or to deter third parties from associating or dealing with him.”).

22. See Van Vechten Veeder, *The History and Theory of the Law and Defamation*, 3 COLUM. L. REV. 546, 547 (1903).

23. See R.C. Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 100 (1949).

24. See, e.g., Khalid Abdullah Tariq Al Mansour Faissal Fahd Al Talal v. Fanning, 506 F. Supp. 186, 187 (N.D. Cal. 1980) (“If the court were to permit an action to lie for the defamation of such a multitudinous group we would render meaningless the rights guaranteed by the First Amendment to explore issues of public import.”).

## II. THE COUNTER-REVOLUTION IN PRIVACY

So how does this program play out in connection with the right to privacy championed by Warren and Brandeis? The answer is that the whiggish progression is far from inevitable. Indeed, in the case which they address—prying reporters giving lurid accounts of celebrity events—Warren and Brandeis were stopped in their tracks by what came to be known as the newsworthiness privilege that essentially swallowed the tort.

One early case that announced this position was *Sidis v F.R. Publishing Corp.*<sup>25</sup> On facts that could hardly be more favorable to the plaintiff, a one-time mathematical prodigy who became something of an eccentric had his every foible—including his collection of streetcar transfers—mercilessly dissected in an unsigned *New Yorker* story probably written by the talented humorist James Thurber.<sup>26</sup> There was no pressing event that triggered the story, but it appealed to the morbid curiosity of many. This was surely the ideal case in which to declare a general right to be let alone. Nonetheless, the newsworthiness privilege, adopted in opposition to the “eminent opinion” of Warren and Brandeis, upended the central claim of privacy put forward by these Boston Brahmins:

Regrettably or not, the misfortunes and frailties of neighbors and ‘public figures’ are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.<sup>27</sup>

And many other cases follow in the same vein.<sup>28</sup> Indeed, the stable synthesis appears to be reached in Section 652D of the Restatement (Second) of Torts:

**§ 652D. PUBLICITY GIVEN TO PRIVATE LIFE**

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

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25. *Sidis v. F.R. Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940).

26. See DANIEL J. SOLOVE ET AL., *PRIVACY, INFORMATION, TECHNOLOGY* 6 (2006).

27. *Sidis*, 113 F.2d at 809.

28. See, e.g., *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993).

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.<sup>29</sup>

It seems that the two qualifications typically swallow the rule. The public has a legitimate concern in just about everything, and there are few statements that are highly offensive to the reasonable person. So long as someone is or (as in *Sidis*) has been a public figure, the scope of the tort is quite narrow. Nor is there any reason to regret the result, for the trade-off would be enormous. To protect the expanded notion of privacy, it would be necessary to give a very limited protection to freedom of speech about matters of public interest and concern. Indeed, the broad phrase that marks the Warren and Brandeis article, "the right to enjoy life, and the right to be let alone," could be construed to impose enormous correlative duties on others. Does "the right to be let alone" mean that everyone else is required to step aside so that Warren and Brandeis can enjoy life in the closeted environment to which they wish to become accustomed? Without constraint, such a statement would surely impose impossible correlative duties. Indeed, it is precisely this overbreadth that makes the narrower common law proposition that one cannot trespass or defame the more attractive, even if imperfect, alternative, because the correlative duties are appropriately limited.

Similarly, the right to be let alone cannot mean that no one is entitled to comment on a wedding, even after a public announcement of the event. It is not plausible to let any individual exert such powerful control over the speech or thought of others. No one really thinks that the claim goes this far, which is why the general claim of Warren and Brandeis has never been accepted. The path of progress inevitably contains some unanticipated bends in the road.

### III. PRIVACY THE HARD WAY—BY ANALOGICAL EXTENSION

Yet at this point, the hard work comes in. Surely the concept of a right to privacy has some purchase to it that is not fully captured in the law of trespass, assault, and defamation. The question is how to isolate that key component in a way that

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29. RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

runs more narrowly than the unspecified correlative duties in Warren and Brandeis's formulation.

A. *Contract: Confidentiality and Disclosure*

One way to understand the reach of the doctrine is to switch from tort to contract and to think of the importance that confidentiality agreements have in all areas of life. Thus, to take the simplest situation, if I tell you something in confidence, you are not free to disregard that restriction on the further distribution of that information. There may, of course, be situations in which it is imperative that you disclose the information—it could be the knowledge that would prevent the commission of a crime or save a person in distress. But these counterexamples do not establish the proposition that there is no duty of confidentiality. Instead, they fold this particular branch of law into the general theory of contract law, where nonperformance of the duty is *prima facie* evidence of breach subject to excuses and justifications that would be worked out in this branch of contract law as in all others.

Of course, the situation can become more complex as the contractual terms concerning disclosure become more refined. I may disclose some information to you for certain purposes and not for others, and it would be a breach of promise to make an unauthorized use. However, these limitations are difficult to enforce, so the initial promise of confidentiality may be coupled with various monitoring obligations to assure the promisee that the information is used solely in the permitted fashion. This rule—allowing the use of information subject to confidentiality restraints—applies to everything from medical records, to trade secrets, to legal advice, to national security, and beyond. Similarly, information may be released to one person with an eye towards future sharing of information with third parties, often under further limits and duties of confidentiality. For instance, the company that receives a valuable customer list may be allowed to use it only a limited number of times—and that list may well be salted with fake names to allow its owner to detect overuse. Or the law firm that gets information from its client may well be able to show it, or some portion of it, to secretarial and computer staff or expert witnesses.

At this point, the rules for the use and transfer of information start to resemble, in broad form, the parallel rules that are used

to deal with the bailment of chattels or the leasing of real property. And these arrangements are not subject to objections that parallel those to the right to be left alone with one caveat: the enforcement regime is more complex because information is partible, and thus can be retained and shared at the same time, complicating the remedial system that needs to be established. For example, the sale of a customer list from *A* to a competitor *B* might carry with it the covenant that *A* cannot resort to that list after the sale, or sell it a second time to anyone else.

These difficulties become still greater when someone receives information that he knows is not intended for him. Given that knowledge, the rule is that he cannot look at the information at all, but should, if possible return it unopened.<sup>30</sup> Similarly, if it is read by mistake, then whatever information was collected should be disregarded, unless there is some justification for keeping it. This issue becomes acute when newspapers and other media outlets receive information that they know is stolen from some private or governmental source. The received wisdom often lets the third party publish this information with impunity.<sup>31</sup> But this creates a rule for information that is obtained in bad faith—that is, with knowledge that it is stolen—that is at odds with the general rule that offers no protection to any person who receives property in bad faith, and which has been extended to apply to tippees in insider trading cases.

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30. With these comments, I disagree with the comments of Steven Coll on the responsibilities of journalists who receive stolen information:

Generally, when you come up to the threshold of a risky decision, everybody's in the room. If it's a healthy organization, the editor makes the final decision. And I would say, in general, unless it is an urgent matter of public interest or something deep at the heart of the mission, the decision will be just seven-eighths of what it is that it looks like you could defend.

Steven Coll, Dean & Henry R. Luce Professor of Journalism, Columbia Journalism Sch., Privacy and Freedom of the Press Panel at the Thirty-Sixth Annual Federalist Society National Student Symposium on Law and Public Policy (Mar. 15, 2017), available at <http://www.fed-soc.org/multimedia/detail/privacy-and-freedom-of-the-press-event-audiovideo> [https://perma.cc/9G62-FZJG] (last visited Aug. 15, 2017).

31. See, e.g., *Pearson v. Dodd*, 410 F.2d 701, 705–06 (D.C. Cir. 1969) (holding that when a plaintiff claims that private information concerning himself has been published, the question of whether that information is genuinely private or is of public interest should not turn on the manner in which it has been obtained); see also *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

This constructive trust relationship is routinely imposed on third parties who receive chattels or land that they know to be, or of which they have constructive knowledge is, owned by someone else. There is no implication that they have voluntarily assumed any fiduciary duties to the true owner of the property. Quite the opposite: it is well known that they have no such intentions at all. But the obligation of a fiduciary is to preserve the asset value for the beneficiary. That same duty should be imposed under a theory of unjust enrichment against any party who is in possession of stolen information that he knows is not his. Hence the constructive trust is imposed to force him to act *as if* he were a trustee, which means that he must make restitution of the monies received (and any gains derived from their use) to their rightful owner.<sup>32</sup>

The same logic applies with equal force to journalists in the insider trading context.<sup>33</sup> In dealing with information known to be stolen, there should be an obligation not to use it, the temptation will be otherwise, and the hard question is whether there is some privilege that allows for the free or limited use of that information. In my view, no media outlet should take it upon itself to use the stolen information as it sees fit. The rule should apply to information that one likes, as well as to information that one does not like. It makes no sense to allow the obligation to vary with the perception that a newspaper editor has of its salience to public debate. Such a standard could lead to inconsistent judgments between different media outlets at one time and the same media outlet over time. Far better is a hard-and-fast rule that no private recipient of stolen information, in or outside the press, should arrogate unto itself the decision of whether or not to publish a story based on that information. Instead, that information should be kept unopened and unread until some independent public official, whether an administrator or a court, passes on whether it could be used or disclosed. There are hard questions about when some public interest priv-

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32. Richard A. Epstein, *Returning to the Common-law Principles of Insider Trading After Newman v. United States*, 125 YALE L.J. 1482, 1506 (2016). See also *United States v. O'Hagan*, 521 U.S. 642 (1997), which I discuss at length.

33. See generally *Carpenter v. United States*, 484 U.S. 19 (1987) (discussing the misappropriation of insider information by a journalist from his newspaper supported conviction for participation in an insider trading scheme).

ilege should attach. But I shall not attempt to answer those questions here, except to note that while these issues require the closest attention, they do not give rise to the same kind of extravagant claims that can stem from the “right to be left alone.”

*B. Tort: Trespass, Assault, and Defamation*

The question of extension is not limited to movement on the contract side. There is also the question of the extent to which the traditional categories of tort law could be tweaked in way that extends their range to cover privacy.<sup>34</sup> In this regard, there are three categories worthy of note: trespass, intrusion upon seclusion, and defamation.<sup>35</sup>

*1. Trespass*

The tort of trespass requires some contact with the person or some entry upon his property.<sup>36</sup> But the relationship between trespass and invasion of privacy is complex, as there are many trespasses that are not invasions of privacy and many invasions of privacy that are not trespasses. Thus when someone takes a shortcut across another person’s field, there is a trespass but no invasion of privacy if his intention is merely to reach the other side. Yet when someone shines a searchlight into a window while standing on a public street, there is an invasion of privacy, but not a trespass. There are also cases in which there is a trespass incident to the invasion of the privacy, as when someone stands on the property of another and then uses a searchlight to examine what is going on inside a closed house.

The physical trespass is an insecure peg on which to hang any liability for the information uncovered by these activities. No one has ever been able to come up with a compelling account that distinguishes the case just given from one in which

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34. See RESTATEMENT (SECOND) OF TORTS § 652A cmt. b (AM. LAW INST. 1977) (“[T]he invasion of the right of privacy has been a complex of four distinct wrongs, whose only relation to one another is that each involves interference with the interest of the individual in leading . . . a secluded and private life, free from the prying eyes, ears and publications of others.”).

35. See *id.* § 652A (listing the four specific torts grounded in the right of privacy).

36. See, e.g., *id.* § 158 (defining trespass of land); § 217 (defining trespass to chattel).



the person steps back a few feet to a public street and uses a stronger searchlight to discover the same information. And what is true with respect to visual searches applies to aural searches as well. The person who overhears a conversation by entering a room is not materially different from one who steps on to the public street or hangs from the eaves to recover that same information. The tort law on the invasion of privacy recognizes the closeness of the two situations.<sup>37</sup> Much of the complex Fourth Amendment law speaks of a reasonable expectation of privacy,<sup>38</sup> rejecting, for example, the government's claim that placing a tap on the outside of a public telephone booth did not amount to a search or seizure because the electronic device did not commit a common law trespass in virtue of the fact that the tap "did not happen to penetrate the wall of the booth."<sup>39</sup>

The expectation in this case is clear, and the argument is not circular in my view. The purpose of reasonable expectations is to figure out how to maximize the net gains from various interactions between large numbers of strangers. A rule that requires one not to eavesdrop reduces the need for individuals to take self-help protections. But it does not spare them from the loss of informational privacy if they speak loudly in public places. Here the phone booth signals the request for privacy that can be easily honored by not peeking in. The test for what is a search is the same for government officials as it is for private people, and both should understand this drill well enough to maintain the correct distance. The same rule applies, for example, to dinner conversations at restaurants; potential eavesdroppers are not allowed to crane their necks to hear private conversations, and the parties know to speak quietly to limit the risk of being overheard.<sup>40</sup> Obviously, where the information

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37. See *Roach v. Harper*, 105 S.E.2d 564, 568 (W. Va. 1958) (finding liable a landlord who set up a listening device in a tenant's apartment and listened from his own apartment).

38. See *Katz v. United States*, 389 U.S. 347, 351 (1967) (noting that what one "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected").

39. *Id.* at 353.

40. See, e.g., A. M. Swarthout, Annotation, *Eavesdropping as Violating Right of Privacy*, 11 A.L.R. 3d 1296, 2 (2017) (listing "ample authority to support the conclusion that conduct which amounts to 'eavesdropping[]' . . . may, under the

is highly sensitive, it becomes too risky to speak about it in any public place. But a telephone booth should be immune from prying.

## 2. *Assault*

Expanding from the core case of assault, the modern law speaks about the tort of “intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.”<sup>41</sup> The word “intrusion” is softer than the term “invasion,” and “seclusion or solitude” cover more than threats to bodily integrity brought about by an offer of force, which is the essence of an assault.<sup>42</sup> But how far beyond the core cases do these terms go? The answer is not very much. On the one hand, it seems clear that there is an intrusion on seclusion by shadowing people on the public street,<sup>43</sup> or by hounding them on those same streets, where there is a lurking risk of some physical contact and a constant sense of intimidation, as happened with Jacqueline Kennedy Onassis.<sup>44</sup> On the other hand, the tort of intrusion does not go so far as to cover cases in which a person’s house is photographed as part of the general project of Google Maps.<sup>45</sup> These distinctions seem perfectly sensible, but there is no way in which the right “to be left alone” can capture the relevant distinctions because of this now familiar methodological flaw: it does not take into account the interests of freedom of motion and observation on the other side. What is needed in all these cases is a balance of interests, and that is the one inquiry that is

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proper circumstances, constitute such an invasion of the victim’s privacy that he can maintain a civil action against the eavesdropper.”)

41. *Troncalli v. Jones*, 514 S.E.2d 478, 482 (Ga. Ct. App. 1999).

42. See RESTATEMENT (SECOND) OF TORTS § 21 (AM. LAW INST. 1977) (including putting one “in apprehension” of contact as part of the definition of assault).

43. See *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 771 (N.Y. 1970) (“[I]t is manifest that the mere observation of the plaintiff in a public place does not amount to an invasion of his privacy. But, under certain circumstances, surveillance may be so ‘overzealous’ as to render it actionable.”).

44. See *Galella v. Onassis*, 487 F.2d 986, 992 (2d. Cir. 1973) (providing examples of Galella’s unlawful conduct).

45. See *Boring v. Google Inc.*, 362 Fed. App’x 273, 279 (3d Cir. 2010), *cert. denied*, 562 U.S. 836 (2010) (“[W]hat really seems to be at the heart of the complaint is not Google’s fleeting presence in the driveway, but the photographic image captured at that time. The existence of that image, though, does not in itself rise to the level of an intrusion that could reasonably be called highly offensive.”)

not made in the Warren-and-Brandeis analysis. The Restatement (Second) of Torts tries to draw the appropriate line:

**§652B. INTRUSION UPON SECLUSION**

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.<sup>46</sup>

The parallels to Section 652D, dealing with the revelation of highly sensitive information, are close.<sup>47</sup> In this context as well, use of the words “highly offensive” is meant to take out the acute uneasiness that is commonplace with various forms of asocial behavior, and the term “reasonable” is intended to rule out the reactions of those persons who are peculiarly sensitive.<sup>48</sup> There are always marginal cases, but this set of accommodations seems to have lasted for a long time. I see no reason why any contemporary issue should lead to a reconsideration of this basic point.

### 3. Defamation

The next area of tort is defamation. The modern tort of placing individuals in a false light stems from the law of defamation and is therefore subject to the same types of limitation.<sup>49</sup> For example, in the context of public figures, actual malice is required.<sup>50</sup> Indeed, the insertion of the “highly offensive” requirement in this area seems inappropriate given that the dam-

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46. RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

47. *See id.* § 652D (“One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person . . .”).

48. *See id.* cmt. c (explaining that because of the words “highly offensive” and “reasonable man,” even “minor and moderate annoyance . . . is not sufficient to give [a person] a cause of action under the rule stated in this Section”).

49. *See id.* § 652E cmt. b (“In many cases to which the rule stated here applies, the publicity given to the plaintiff is defamatory, so that he would have an action for libel or slander . . .”).

50. *See id.* cmt. d (explaining the holding of *New York Times Co. v. Sullivan* “was later extended to public figures”).

age in question is to reputation rather than to hurt feelings.<sup>51</sup> It is not surprising, therefore, that after one splashy debut in *Time, Inc. v. Hill*,<sup>52</sup> the tort has largely vanished because it does not have much territory of its own to cover.<sup>53</sup>

### C. Commercial Appropriation

One area of growth in privacy law that was not appreciated at all by Warren and Brandeis involves those cases in which the gist of the claim against the plaintiff is for the defendant's commercial misappropriation of the name and likeness of the plaintiff.<sup>54</sup> The origins of this tort are murky but stem from the decision of the New York Court of Appeals in the 1902 case of *Robertson v. Rochester Folding Box Co.*<sup>55</sup> In *Robertson*, the plaintiff, a religious woman, objected to the use of her image on a lithographic print, circulated widely in warehouses and saloons, which portrayed her as the "Flour of the Family," in a commercial for Franklin Mills Flour.<sup>56</sup> The primary claim was for defamation, on the ground that the picture made it appear to her circle of friends and social acquaintances that she would stoop to such vulgar activities.<sup>57</sup> In my view, that claim is still good

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51. See *id.* cmt. c ("The plaintiff's privacy is not invaded when the unimportant false statements are made, even when they are made deliberately. It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man . . .").

52. 385 U.S. 374 (1967).

53. See Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 CASE W. RES. L. REV. 885, 888-90 (1991) (explaining modern dissatisfaction with a cause of action for false light and a return to defamation); see also Diane L. Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 366-67 (1989) (discussing how false light was expected to supplant defamation as a cause of action, but the opposite has occurred).

54. See Daniel Gervais & Martin L. Holmes, *Fame, Property, and Identity: The Purpose and Scope of the Right of Publicity*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 1, 186 (2016) ("It was not clear at first whether the right to privacy would include a cause of action for the commercial misappropriation of a person's name or likeness.").

55. 64 N.E. 442 (N.Y. 1902).

56. See *id.* at 442.

57. See *id.* at 442-43. ("[H]er grievance is that a good portrait of her, and, therefore, one easily recognized, has been used to attract attention toward the paper upon which defendant mill company's advertisements appear. Such publicity, which some find agreeable, is to plaintiff very distasteful . . .").

today. But in rejecting that claim, Judge Parker ridiculed the position of Warren and Brandeis by noting:

The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise. While most persons would much prefer to have a good likeness of themselves appear in a responsible periodical or leading newspaper rather than upon an advertising card or sheet, the doctrine which the courts are asked to create for this case would apply as well to the one publication as to the other.<sup>58</sup>

It is with the last qualification that Judge Parker gives up the game. The social interest is not of equal power in the two cases. For purposes of general social discourse, the dissemination of public information is far more important than the use of a person's likeness in an advertisement. It should be possible to allow general conversation to take place while letting individuals decide for themselves whether to participate in the advertisement market and (if so) with whom and on what terms.

The establishment of a property interest in name and likeness is an enormous commercial boom, for reasons that largely escaped Warren and Brandeis. Giving persons control over their name and likeness allows for the creation of an active market in advertisements wherein the owner of each name or likeness gets to coordinate different uses so as to form a coherent whole or "brand," which would never happen if anyone could use anyone else's name or image for commercial purposes. Hence, the accommodation reached in the New York Civil Rights Law contains a durable solution when it provides:

**§ 50. RIGHT OF PRIVACY**

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or pic-

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58. *Id.* at 443.

ture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.<sup>59</sup>

A remedial provision then folds in the usual rules on damages, injunctions and fines.<sup>60</sup> There are, of course, complex cases: name and likeness can and should be extended to such fanciful depictions of people with robots.<sup>61</sup> It could be argued that the provision should be continued after people have died on the grounds that the need for coherent advertisement remains, but the point is much disputed.<sup>62</sup> Yet for these purposes, the incremental approach seems to work well, given the relative stability of this body of law in the years since the protection of name and likeness first emerged.

#### IV. CONCLUSION

Let me briefly conclude on the note with which I began. It is important to understand the limitations of looking at a subject through a breathless contemporary lens. There is no doubt that major technological innovation will always spark a rethinking of how property rights and tort liability should be organized. There is no need to develop sensible rules dealing with upper airspace until the airplane indicates that the *ad coelum* rule has costs that are not incurred when that space is incapable of commercial exploitation. There is no need to develop an elaborate law of copyright until copying becomes cheap enough that it is worthwhile to steal someone else's literary or visual works. And the law of patent only becomes important when the mass production of various goods and services becomes possible. In all of these cases, the argument is never that these advances should be ignored. Rather, it is that the best way in which to deal with these new areas of law is to find the *minimum* extent to which the modification of existing rules and practices elimi-

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59. N.Y. CIV. RIGHTS LAW § 50 (McKinney 1992 & Supp. 2003).

60. *Id.* § 51.

61. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992).

62. *Compare* *Factors Etc. Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978) (allowing the right to descend), *with* *Memphis Dev. Found. v. Factors Etc.*, 616 F.2d 956 (6th Cir. 1980) (rejecting the right to descend).

nates the difficulties that the new circumstances raise.<sup>63</sup> In effect, the constructive use of the past becomes an indispensable tool for successful innovation in the future. That was the lesson that I took from my Contemporary Civilizations course at Columbia, and I think that it works well in all areas of intellectual endeavor.

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63. For my defense of this approach in connection with intellectual property, see Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455 (2010); Richard A. Epstein, *What Is So Special About Intangible Property? The Case for Intelligent Carryovers*, in COMPETITION POLICY AND PATENT LAW UNDER UNCERTAINTY: REGULATING INNOVATION 42 (Geoffrey A. Manne & Joshua D. Wright eds., 2011).



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