Touro Law Review

Volume 33
Number 1 *Symposium: Louis D. Brandeis - An Interdisciplinary Retrospective*

Article 10

2017

Privacy and Conformity: Rethinking "The Right Most Valued by Civilized Men"

Susan E. Gallagher

PRIVACY AND CONFORMITY: RETHINKING "THE RIGHT MOST VALUED BY CIVILIZED MEN"

*Susan E. Gallagher**

I. INTRODUCTION

In December 1890, soon after *The Right to Privacy*,[1] which Louis D. Brandeis penned with his former law partner Samuel D. Warren, appeared in the *Harvard Law Review*, Brandeis wrote to his fiancée, Alice Goldmark:

> Of course you are right about Privacy and Public Opinion. All law is a dead letter without public opinion behind it. But law and public opinion interact—and they are both capable of being made. . . . Our hope is to make people see that invasions of privacy are not necessarily borne—and then make them ashamed of the pleasure they take in subjecting themselves to such invasions. . . .
>
> The most perhaps that we can accomplish is to start a backfire, as the woodsmen or the prairie men do.[2]

Given Brandeis' comments on privacy and public opinion, it seems safe to surmise that Goldmark had remarked on the public's seemingly insatiable appetite for gossip; implying, perhaps, that a relatively cerebral article such as *The Right to Privacy* could not

*Susan E. Gallagher is an associate professor of political science at the University of Massachusetts Lowell.

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

[2] Letter from Louis D. Brandeis to Alice Goldmark (Dec. 28, 1890), *in* 1 LETTERS OF LOUIS D. BRANDEIS 97 (Melvin I. Urofsky & David W. Levy eds., 1971) [hereinafter 1 LETTERS].

make much headway against the ever more intrusive and powerful forces of yellow journalism. Brandeis' reply is instructive, in part because his notion of setting *a backfire* indicates that he had no idea that the essay would transform American legal history,[3] but also because it highlights his hope that *The Right to Privacy* might dampen popular demand for salacious news by filling its readers with shame.[4]

In attempting to turn privacy invaders to objects of public scorn, Brandeis took a well-worn path in late nineteenth-century social discourse. This approach had been adopted most famously in the 1870s by abolitionist minister Henry Ward Beecher,[5] who became the focus of an unprecedented torrent of national news coverage after he was accused of having had an affair with Elizabeth Tilton, a member of his Brooklyn congregation.[6] Brandeis and Warren's grievances against the scandal can be traced back to Beecher's repeated condemnations of tellers of *family secrets*,[7] which illuminates *The Right to Privacy* on several fronts. In the first place, it explains why the article was presented and received as a long-awaited solution to a widely recognized problem rather than, as more recent scholars have viewed it, a novel chapter in American law.[8] To

---

[3] Just days after the essay was published, *To-Day*, a popular periodical, called readers' attention to *The Right to Privacy* and conveyed to its readers that:

> A remarkable article, with the above title, by Messrs. S. D. Warren and L. D. Brandeis, appears in the *Harvard Law Review* for December. The subject is of such interest and importance that we attempt a summary, giving as far as possible the exact words of the authors; but this will be a poor substitute for the original, which is enriched by a wealth of citations and illustrations rare in a magazine article.

The Right to Privacy, TO-DAY, Dec. 25, 1890 at 91; *see also* Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW AND CONTEMP. PROBS. 326, 327 (1966) (criticizing but also characterizing *The Right to Privacy* as the "most influential law review article of all"); *see also* Hillary Rodham Clinton, Address on Privacy Policy at the 2006 Democratic National Convention (June 16, 2006) (video available on the American Constitution Society for Law and Policy website) (recalling her law school days and sharing, "The first thing we learned about the right to privacy was that it sprung from the mind of Louis Brandeis, beginning with a law review article in the 1890s").

[4] Letter from Louis D. Brandeis to Alice Goldmark (Dec. 28, 1890), *in* 1 LETTERS, *supra* note 2, at 97.

[5] *See generally* J.E.P. DOYLE, PLYMOUTH CHURCH AND ITS PASTOR OR HENRY WARD BEECHER AND HIS ACCUSERS (Hartford, The Park Publ'g Co. 1874).

[6] *Id.* at 46-77.

[7] Thomas Sproull & John W. Sproull, *Tittle Tattle*, 7 THE REFORMED PRESBYTERIAN AND COVENANTER 279, 279–80 (1869).

[8] *See, e.g.*, Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 3

be sure, Brandeis and Warren addressed innovations in communications technology in a way that would not have made sense twenty years earlier.[9] At the same time, however, their critique of newspaper reporting on sexual crimes and indiscretions affirmed a conviction that Beecher and other social observers had voiced for decades, which was that the harm inflicted by the public revelation of sexual misconduct was so great that information about such matters should always be suppressed.[10]

The Right to Privacy also harkens back to the Beecher scandal in its connection with, what twentieth-century radicals derided as *Comstockery*,[11] a decades-long campaign to cleanse American society of any visible sign of sexual activity.[12] The movement drew its name and most of its energy from Anthony Comstock, who launched his long career as America's censor-in-chief by hounding Victoria Woodhull, the notorious proponent of free love who set Beecher's travails in motion by publicly accusing him of adultery.[13] In a highly ironic twist in this paradoxical history, Woodhull defended her revelation of Beecher's personal affairs as a major step toward the realization of a complete and authentic right to privacy, a world in which both men and women would be free to love whomever they might choose without fear of intervention by any external authority.[14]

The stark contrast between Woodhull's expansive vision of personal autonomy and Brandeis and Warren's preoccupation with the protection of men's public image allows us to understand more clearly the tangled evolution of ideas about privacy since the turn of the nineteenth-century. Here, after exploring how the Beecher scandal inspired a perceived need to silence public discussion of sexual misconduct, then considering how this repressive impulse

(1979).

[9] *Id.* at 8.

[10] *Id.* at 8-11.

[11] John R. Corvell, *Comstockery*, 1 MOTHER EARTH 30, 30 (1906).

[12] *Id.* at 30-33.

[13] *See, e.g.*, AMANDA FRISKEN, VICTORIA WOODHULL'S SEXUAL REVOLUTION: POLITICAL THEATER AND THE POPULAR PRESS IN NINETEENTH-CENTURY AMERICA 14 (2004) [hereinafter FRISKEN, SEXUAL REVOULTION] (providing insight into social and cultural forces that combined to enable Woodhull to capitalize on her role in the Beecher scandal).

[14] Author Janna Malamud Smith was, I think, the first commentator to recognize Woodhull's conception of the right to privacy as a significant aspect of her contribution to American social thought. *See* JANNA MALAMUD SMITH, PRIVATE MATTERS: IN DEFENSE OF THE PERSONAL LIFE Ch. 4 (Seal Press eds., 1997).

shaped Brandeis and Warren's critique of the overly "enterprising press," I will end with a brief reflection on the impact of *The Right to Privacy* on prevailing approaches to the public/private dichotomy in American society.[15]

II. PRIVACY AND THE BEECHER-TILTON SCANDAL

During the second half of the nineteenth century, as improvements in communications technology made it harder to control the dissemination of personal information, ministers, advice-book writers, and other dispensers of moral instruction increasingly identified privacy as a sacred right. In 1866, for instance, Henry Ward Beecher, one of the most popular preachers of the age, proclaimed from his Brooklyn pulpit, "The private rights of a public man should be guarded as sacredly as the altar of a temple."[16] And while all men should be required to practice "good morals," Beecher sermonized, "There ought to be but one key to a man's privacy, and that in his own hands; but the devil has given everybody a key to it, and everybody goes in and out, and filches whatever he pleases."[17]

A commentary on "Tale-bearers," usually attributed to Beecher, which was repeatedly reprinted during the late 1860s and early 1870s, illustrates how respect for the right to privacy rose to the top of the lists of virtues that moralists liked to recite to their fellow citizens:

> TITTLE TATTLE.
>
> Henry Ward Beecher has said many good things, but nothing that commends itself more to all honorable people than the following:
>
> The disposition to pry into the privacy of domestic life is, unfortunately, very common, and is always dishonorable. The appetite for such knowledge is to be regarded as morbid, and the indulgence of it disgraceful. A family has a sacred right to privacy. . . . To betray the secrets of the household is

[15] Warren & Brandeis, *supra* note 1, at 206.
[16] HENRY WARD BEECHER & GEORGE DAVID EVANS, ONE THOUSAND GEMS 79 (London, Hodder & Stoughton eds., 1872).
[17] *Id.*

> not only an odious immorality, but it is a sin and a shame to be on good terms with those who are known to commit such outrages. They put themselves out of the pale of decent society. They should be treated as moral outlaws.[18]

Beecher's condemnation of those who invade domestic privacy as *moral outlaws* was typical of the period, but it is ironic that these remarks first appeared in 1869, two years before his name became synonymous with scandal in what was breathlessly described as "The Greatest Social Drama of Modern Times."[19] Victoria Woodhull, who was dubbed *Mrs. Satan*[20] after she went about the country lecturing on the joy of free love, set the stage for the scandal by committing precisely the sin that Beecher had so severely censured.[21] In a letter to the *New York Times*, she castigated critics of her free love philosophy for their hypocrisy, and then she alluded to "a public teacher of eminence, who lives in concubinage with the wife of another public teacher of almost equal eminence."[22] Readers who had heard the persistent rumors of *irregularities* at Beecher's church might have guessed the identity of Woodhull's target.[23] J.E.P. Doyle, who compiled an exhaustive account of the saga in 1874, wrote, "Nobody, however, placed much reliance on the 'slanders,' as they were very generally designated, until in the issue of *Woodhull and Claflin's Weekly*, of November 2d, 1872, there were explicit and detailed charges made."[24]

Woodhull had long surpassed the bounds of social propriety when she ignited the first national media frenzy after publicly accusing Beecher of having engaged in an adulterous affair with Elizabeth Tilton, the wife of his long-time friend, Theodore Tilton.[25]

---

[18] Sproull & Sproull, *supra* note 7, at 279.

[19] LEON OLIVER, THE GREAT SENSATION: A FULL, COMPLETE AND RELIABLE HISTORY OF THE BEECHER-TILTON-WOODHULL SCANDAL 165 (Beverly Co., Publishers eds., 1873).

[20] Thomas Nast, *Get Thee Behind Me, (Mrs.) Satan!*, HARPER'S WEEKLY (Feb. 17, 1872), http://www.harpweek.com/09cartoon/BrowseByDateCartoon.asp?Month=February&Date=17.

[21] *Id.*

[22] Victoria Woodhull, Letter to the Editor, *Mrs. Woodhull and Her Critics*, N.Y. TIMES, May 20, 1871, at 5.

[23] DOYLE, *supra* note 5, at 13.

[24] DOYLE, *supra* note 5, at 13.

[25] *See* CHARLES SUTTON, The New York Tombs; its Secrets and its Mysteries 511-12 (James B. Mix & Samuel Anderson Mackeever eds., San Francisco, A. Roman & Co. 1874); *see*

Soon after Woodhull and her sister, Tennessee (also known as Tennie C.) Claflin, arrived in New York City in 1868, they were widely derided in the press when, with the help of Cornelius Vanderbilt, they became the first women to establish and run a stock brokerage company.[26] Two years later, the sisters created another sensation when they used the proceeds of their business to fund *Woodhull & Claflin's Weekly*, a platform for the promotion of socialism, woman suffrage, spiritualism, free love, and, in 1872, Woodhull's run for the presidency of the United States.[27]

Seemingly incapable of practicing the silence and secrecy that Beecher upheld as essential, Woodhull avidly pursued her presidential ambitions even though her background and beliefs, along with her age and her gender, deprived her of any chance of success.[28] Having grown up in poverty, she married Canning Woodhull, an abusive alcoholic, in 1853, at the age of fourteen.[29] During and after her first marriage, Victoria Woodhull supported herself by telling fortunes and dispensing magnetic healing with her sister.[30] She married Colonel James Blood, a fellow spiritualist, in St. Louis in 1866, after her first husband became incapable of providing for her and their two children.[31] The misery of her first marriage did not stop her from taking Canning Woodhull into her Brooklyn home when his addictions overwhelmed him, an arrangement that shocked New York society, but apparently did not bother Blood.[32]

Woodhull's contemporaries, like historians to follow, generally assumed that she had divulged what she knew about Beecher's affair with Elizabeth Tilton as a way to lash out at critics of her free love philosophy.[33] Whatever role resentment may have

---

also Amanda Frisken, *Sex in Politics: Victoria Woodhull as an American Public Woman, 1870-1876*, 12 J. OF WOMEN'S HIST. 89, 91-92 (2000) [hereinafter Frisken, *Sex in Politics*].

[26] SUTTON, *supra* note 25, at 506-08.

[27] Frisken, *Sex in Politics*, *supra* note 25, at 91, 93-95, 101.

[28] Frisken, *Sex in Politics*, *supra* note 25, at 89-90, 96, 100-03.

[29] FRISKEN, SEXUAL REVOLUTION, *supra* note 13, at 7; IRVING WALLACE, THE SQUARE PEGS: SOME AMERICANS WHO DARED TO BE DIFFERENT 108 (1957).

[30] FRISKEN, SEXUAL REVOLUTION, *supra* note 13, at 8; Nicole Evelina, *Victoria Woodhull's First Husband: Canning Woodhull*, NICOLE EVELINA: STORIES OF STRONG WOMEN FROM HIST. & TODAY (May 18, 2015), https://nicoleevelina.com/2015/05/18/victoria-woodhulls-first-husband-canning-woodhull/.

[31] FRISKEN, SEXUAL REVOLUTION, *supra* note 13, at 8; Evelina, *supra* note 30.

[32] FRISKEN, SEXUAL REVOLUTION, *supra* note 13, at 7-8; WALLACE, *supra* note 29, at 120-21; Evelina, *supra* note 30.

[33] OLIVER, *supra* note 19, at 145; *Victoria Woodhull – Speaking out for Free Love; Going to*

played in her motives, she framed the exposure as a revolutionary step towards the realization of an absolute right to privacy.[34] "I believe," she declared in a carefully crafted interview that was published in her newspaper, "in the right of privacy, in the sanctity of individual relations. It is nobody's business but their own, in the absolute view, what Mr. Beecher and Mrs. Tilton have done, or may choose at any time to do, as between themselves."[35] Woodhull was, nevertheless, morally obliged to reveal the affair because she could find no other way to force the minister to shake off his shroud of sexual secrecy and join her in spreading the "gospel of freedom":

> [I]t is the paradox of my position that, believing in the right of privacy and in the perfect right of Mr. BEECHER socially, morally and divinely to have sought the embraces of Mrs. TILTON or of any other woman or women whom he loved and who loved him . . . I still invade the most secret and sacred affairs of his life, and drag them to the light . . . . the leaders of progress are . . . storming the last fortress of bigotry and error. Somebody must be hurled forward into the gap. I have the power, I think, to compel MR. BEECHER to . . . do the duty for humanity from which he shrinks.[36]

According to Woodhull, personal relations ought to be exempt from public disclosure because we all should be free to love whomever we are divinely inspired to choose without regard to social strictures or legal contracts and not, as Beecher would have it, because such revelations ruin reputations.[37] So long as emblematic figures such as Beecher allowed themselves to be trammeled by social convention, she argued, the "sacred interests of humanity" in the free communication of love would be constantly undermined.[38] From this premise, she justified her violation of Beecher's privacy as a short-term skirmish in the long-term war to establish individual

---

Jail, VIRAL HIST. (Mar. 21, 2011), http://www.viralhistory.com/ (enter "Victoria Woodhull" into the search box).

[34] OLIVER, *supra* note 19, at 144-45.

[35] OLIVER, *supra* note 19, at 144.

[36] DOYLE, *supra* note 5, at 39.

[37] DOYLE, *supra* note 5, at 14-15.

[38] DOYLE, *supra* note 5, at 15.

sovereignty as the governing principle of both public and private life.[39]

> I hold that the so-called morality of society is a complicated mass of sheer impertinence and a scandal on the civilization of this advanced century, that the system of social espionage under which we live is damnable, and that the very first axiom of a true morality, is for people to mind their own business, and learn to respect, religiously, the social freedom and the sacred social privacy of all others.[40]

Although Woodhull claimed "legitimate generalship" in her call for Beecher to take an honest stand against "social espionage," he declined the challenge.[41] Instead, throughout the "Beecher-Tilton War," as he was exonerated by a board of inquiry at Plymouth Church, acquitted of "criminal intimacy" in a Brooklyn court, and subjected to an unprecedented torrent of national reporting on his formerly private life, he steadfastly denied the charges.[42]

Meanwhile, Woodhull was repeatedly arrested at the behest of Anthony Comstock, the hyper-vigilant head of the New York Society for the Suppression of Vice.[43] In the midst of the Beecher scandal, as he was pursuing Woodhull on obscenity charges based in part on her exposure of Beecher in her paper, Comstock found time to travel to Washington, where he successfully lobbied Congress to pass what became known as the *Comstock Law*, an "Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use."[44] His battle with Woodhull was subsequently eclipsed by his campaign to prevent Margaret Sanger from

---

[39] DOYLE, *supra* note 5, at 39.
[40] DOYLE, *supra* note 5, at 39 (emphasis omitted).
[41] DOYLE, *supra* note 5, at 38-39.
[42] *See* Kathleen Hall, *The Henry Ward Beecher Adultery Trial (1874): Selected Links*, U. OF MO.-KAN. CITY, http://law2.umkc.edu/faculty/projects/ftrials/Beecherlinks.html (last visited Jan. 11, 2017); Lindsay Turley, *The Beecher-Tilton Affair*, MCNY BLOG: NEW YORK STORIES (Oct. 23, 2012), https://blog.mcny.org/2012/10/23/the-beecher-tilton-affair/; *see generally* J. H. PAXON, THE GREAT BROOKLYN ROMANCE. ALL THE DOCUMENTS IN THE FAMOUS BEECHER-TILTON CASE, UNABRIDGED (1874).
[43] Helen Lefkowitz Horowitz, *Victoria Woodhull, Anthony Comstock, and Conflict over Sex in the United States in the 1870s*, 87 THE J. OF AM. HIST. 403, 419 (2000).
[44] Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, ch. 258, 17 Stat. 599 (1873).

circulating information and materials related to birth control.[45] However, he started his long career by crusading against publications such as *Woodhull and Claflin's Weekly* for what Brandeis and Warren would later denounce as "overstepping in every direction the obvious bounds of propriety and of decency."[46] From Comstock's standpoint, Woodhull's revelations about Beecher threatened social order because they portended a world in which, to quote *The Right to Privacy*,

> Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.[47]

Although Woodhull and Claflin ultimately beat the charges, her portrait of herself and her sister as martyrs to the march of social progress failed to attract much public sympathy.[48] Indeed, her brazen rejection of social convention helped to assure the ascendancy of Beecher's notion of privacy, with its emphasis on secrecy, over her own conception of privacy as an assertion of individual freedom.[49] Fittingly, in 1871, long before the Beecher scandal had exhausted the public's attention, a member of his congregation published an expanded version of the minister's earlier remarks on the "sacred right to privacy."[50] Tellers of family secrets, Beecher proclaimed, ought to be not merely shunned, but physically attacked:

> These hungry-eyed wretches who sit in the unsuspicious circle of parents and children . . . spying

[45] *See, e.g.*, Margaret H. Sanger, *Comstockery in America*, 16 INT'L SOCIALIST REV. 46, 46-49 (1915).
[46] Warren & Brandeis, *supra* note 1, at 196.
[47] Warren & Brandeis, *supra* note 1, at 196.
[48] Carol Felsenthal, *The Strange Tale of the First Woman to Run for President*, POLITICO MAGAZINE (Apr. 9, 2015), http://www.politico.com/magazine/story/2015/04/victoria-woodhull-first-woman-presidential-candidate-116828.
[49] FRISKEN, SEXUAL REVOLUTION, *supra* note 13, at 6.
[50] ALFRED I. HOLMES, LIFE THOUGHTS FROM PULPITS AND FROM POETS 218 (Brooklyn, Rev. A. I. Holmes eds., 1871).

> their weaknesses, misinterpreting the innocent liberties of the household, and then run from house to house with their shameless news, are worse than poisoners of wells or burners of houses. . . . If one opens his mouth to tell you such things, with all your might smite him in the face! . . . Tale-bearers have no rights. . . . Hunt, harry, and hound them out of good society.[51]

Beecher's admonitions illustrate the unexamined assumptions made by privacy advocates until well into the twentieth century. Here, as usual in the wake of the Beecher scandal, the focus of discussion was not freedom of conscience or action, but the evil of public revelation.[52] Echoing legal opinion in his era, Beecher maintained without explanation that the disclosure of personal misconduct must be, at least in most cases, somehow more malevolent than the original misdeed.[53] From this vantage point, it makes sense that whatever Beecher may have done or lied about doing, he suffered no formal penalty while Woodhull and her sister landed in jail.[54] However much he and other moralists may have exalted individual integrity in other contexts, in regard, for instance, to promoting resistance to slavery, they argued that every man had a perfect right to preserve his public image even if he had engaged in behavior that he publicly condemned.[55]

The gulf between these two perspectives allows us to understand more fully how the public/private dichotomy evolved in later decades. Whatever uncertainty remains about Woodhull's motives, there is no doubt about her contempt for the "system of social espionage."[56] In her view, maintaining a façade of normalcy merely to seem virtuous in the eyes of society robbed the right to

---

[51] *Id.* at 219-20.

[52] State v. Rhodes, 61 N.C. 453, 459 (1868) ("We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence.") (overruling recognized by Virmani v. Presbyterian Health Services Corp., 515 S.E.2d 675 (N.C. 1999)).

[53] *Id.* at 454 ("The courts have been loath to take cognizance of trivial complaints arising out of the domestic relations . . . Not because those relations are not subject to the law, but because the evil of publicity would be greater than the evil involved in the trifles complained of; and because they ought to be left to family government.")

[54] *See* Turley, *supra* note 42.

[55] *See* Turley, *supra* note 42.

[56] Victoria C. Woodhull, *The Beecher-Tilton Scandal Case. The Detailed Statement of the Whole Matter By Mrs. Woodhull*, WOODHULL & CLAFLIN'S WEEKLY, Nov. 2, 1872, at 12.

privacy of all meaning.[57] "Respectability!," she declared, "It is the most horrid word in the language, so long as a man or woman has a particle of it left, their ability for usefulness is dwarfed if not wholly eliminated."[58] For Beecher, in contrast, the essential purpose of the right to privacy was to shield the domestic realm from intrusion so that men could preserve their reputations irrespective of their actual conduct and thereby enjoy inner peace.[59] Beecher was never formally found guilty, but in the aftermath of the scandal, he came to symbolize hypocrisy as he was constantly caricatured in newspaper illustrations and otherwise ridiculed in the press.[60]

III. PRIVACY AND THE PRESS

A decade after the Beecher affair had faded from the headlines, when Brandeis and Warren joined the campaign to protect the right to privacy, they followed the minister's lead.[61] In keeping with the explosive growth of the newspaper industry at the end of the nineteenth century, *The Right to Privacy* updated Beecher's focus on *tale-bearers* by excoriating journalists for having turned neighborhood gossip into a national pastime.[62] Likewise, responding to the rapid development of the telegraph, the telephone, and photography, Brandeis and Warren stressed that the domestic realm had become increasingly vulnerable to intrusion, making it even more imperative to introduce legislation that would shore up the boundaries between public and private life.[63]

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the, individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper

[57] OLIVER, *supra* note 19, at 144.
[58] OLIVER, *supra* note 19, at 69.
[59] OLIVER, *supra* note 19, at 69.
[60] *See, e.g.*, JAMES E. COOK, TESTIMONY IN THE GREAT BEECHER-TILTON SCANDAL CASE ILLUSTRATED (photo. reprt. 1875), https://www.loc.gov/item/99400533/; *see also* Laura Hanft Korobkin, *The Maintenance of Mutual Confidence: Sentimental Strategies at the Adultery Trial of Henry Ward Beecher*, 7 YALE J.L. HUMAN. 1, 6-7 (1995).
[61] Warren & Brandeis, *supra* note 1, at 193.
[62] Warren & Brandeis, *supra* note 1, at 196.
[63] Warren & Brandeis, *supra* note 1, at 195-96.

> enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; and the evil of invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer.[64]

The *able writer* referred to here was E. L. Godkin, longtime editor of *The Nation*, whose essay, *The Rights of the Citizen to His Own Reputation*, was twice praised in *The Right to Privacy*.[65] Like his contemporaries, Godkin condemned the mass circulation of personal information both because it undermined public discussion of broader issues and because it turned the mortification of individuals into profitable entertainment.[66] Directly foreshadowing Brandeis' and Warren's complaint that the gossip industry deprived men of any escape from the pressures of modern society, Godkin recalled Coke's dictum that "[a] man's house is his castle" in order to show that the right to privacy had long been recognized as a fundamental principle of law.[67]

> And this recognition by law and custom of a man's house as his *tutissimum refugium*, his place of repose, is but the outward and visible sign of the law's respect for his personality as an individual, for . . . that inner world of personal thought and feeling in which every man . . . who is worth much to himself and others, passes a great deal of time. The right to decide how much knowledge . . . of his own private doings and affairs, and of those of his family living under his roof, the public at large shall have, is as much one of his natural rights as . . . how he shall [decide to] eat and

[64] Warren & Brandeis, *supra* note 1, at 195.
[65] Warren & Brandeis, *supra* note 1, at 195 n.6, 217 n.4.
[66] E. L. Godkin, *The Rights of the Citizen to His Own Reputation*, 8 SCRIBNER'S 58, 66 (1890).
[67] *Id.* at 65.

> drink, what he shall wear, and . . . [how] he shall pass his leisure hours.[68]

Godkin, Warren, and Brandeis all reached back into history to prove the venerable heritage of the right to privacy and all three stressed that the conditions of modern industrial society made it necessary to invent new protections for this ancient right.[69] On the one hand, they argued, technological development had vastly increased the speed and scope of the circulation of personal information.[70] On the other, the progress of civilization had deepened men's delicacy of feeling, making them more susceptible to the pain of public scrutiny. Indeed, according to Brandeis and Warren, the depth of emotional awareness in the modern age was so profound that men were apt to suffer more from insults to their honor than they would from physical violence.[71]

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.[72]

From this standpoint, we can see how the development of the popular press, commercial and news photography, the telegraph, and, somewhat later, the telephone fueled what might be described as an epistemological shift in American law and society. With the evolution of new modes of communication, men felt compelled to look to the law to control, not only what individuals could or could not do, but whether what they did would become generally known.[73] As illustrated in the elevation of public disgrace above bodily injury, command over public knowledge of a man's domestic affairs became

---

[68] *Id.*
[69] *See* Godkin, *supra* note 66, at 8; Warren & Brandeis, *supra* note 1, at 193-96.
[70] *See* Godkin, *supra* note 66, at 8; Warren & Brandeis, *supra* note 1, at 195.
[71] Warren & Brandeis, *supra* note 1, at 198.
[72] Warren & Brandeis, *supra* note 1, at 196.
[73] Warren & Brandeis, *supra* note 1, at 195.

an integral part of prevailing conceptions of middle and upper-class masculinity.[74] As a result, in regard to marital infidelity, domestic violence, and sexual assault and misconduct, legal fictions that were designed to safeguard men's emotional well-being overtook the lived experiences of women and children when these cases could not be kept out of court.[75] For the most part, however, reporting on sexual crimes and misbehavior simply ended as publications such as *New York Times*, which remade itself as a so-called family newspaper in 1896,[76] excluded these matters from "All the News That's Fit to Print," the motto that still appears on its masthead today.[77]

Along these lines, Brandeis and Warren wrote approvingly of the action *per quod servitium amisit*, which, in cases of sexual molestation, equates harm done to dependent children with those inflicted on servants and allows parents to collect damages based on the loss of their children's *services*.[78] This equation was, Brandeis and Warren admitted, "[a] mean fiction," but it answered the "demands of society" because it permitted "damages for injuries to the parents' feelings"[79] without actually specifying the nature of the crime. Although it may seem that the inclusion of both parents in the main text implies that this loss of honor also pertained to mothers, the footnote to this passage makes it clear that Brandeis and Warren had in mind the way the rape of a daughter specifically and materially injures her father.[80]

The note begins with the observation that the basis of this claim is not the injured child's inability to contribute to the material welfare of her parents: "[l]oss of service is the gist of the action; but it has been said that 'we are not aware of any reported case brought by a parent where the value of such services was held to be the

[74] Anita L. Allen & Erin Mack, *How Privacy got its Gender*, 10 N. ILL. U. L. REV. 441, 441-42 (1991).
[75] *Id.* at 452-53.
[76] DE YONGH, NEW YORK TIMES. EASTER. THE MODEL OF DECENT AND DIGNIFIED JOURNALISM (photo. reprt. 2001) (1896), http://www.loc.gov/pictures/item/93513098.
[77] *Our History*, N.Y. TIMES (Sep. 8, 2016, 11:00 PM), http://www.nytco.com/who-we-are/culture/our-history.
[78] Keller v. Donnelly, 5 Md. 211, 211-13, 216-19 (1853); Warren & Brandeis, *supra* note 1, at 194.
[79] Warren & Brandeis, *supra* note 1, at 194.
[80] Warren & Brandeis, *supra* note 1, at 194 n.5 ("[T]he feelings of the parent, the dishonor to *himself* and *his* family, were accepted as the most important element of damage.") (emphasis added).

measure of damages.' "[81] Brandeis and Warren then recounted how emotional harm to the father became the fulcrum of the claim:

> First the fiction of constructive service was invented. Then the feelings of the parent, the dishonor to himself and his family, were accepted as the most important element of damage. The allowance of these damages would seem to be a recognition that the invasion upon the honor of the family is an injury to the parent's person, for ordinarily mere injury to parental feelings is not an element of damage, *e.g.*, the suffering of the parent in case of physical injury to the child.[82]

The priority here given to men's feelings over the physical harm done to their children, underscores the baleful legacy of *The Right to Privacy*.[83] By maximizing the importance of men's public image and minimizing the significance of bodily injury and actual fact, the essay helped to forge the *gentlemen's agreement* that not only kept reports of sexual and domestic violence out of the press, but also served for decades to discourage victims of these crimes from speaking out.[84] The deterrent to the wives and daughters, whose physical well-being and emotional security were mainly at issue in this context, was not simply that they had no legal identity apart from their husbands and fathers.[85] It was also that coming forward would jeopardize the honor of the men who were duty-bound to protect them, a frightening prospect in a world in which reputation was regarded, in Godkin's words, as "the most valuable thing on earth."[86]

IV. CONCLUSION

The type of censorship that Brandeis and Warren advocated became far less routine in the wake of the women's rights movement

[81] Warren & Brandeis, *supra* note 1, at 194 n.5.
[82] Warren & Brandeis, *supra* note 1, at 194 n.5 (citations omitted).
[83] Allen & Mack, *supra* note 74, at 458-59.
[84] Warren & Brandeis, *supra* note 1, at 194 n.5, 196-98.
[85] Godkin, *supra* note 66, at 58.
[86] Godkin, *supra* note 66, at 58.

of the 1970s.[87] However, the legacy of *The Right to Privacy* remains problematic even if we jettison the archaic assumptions about male supremacy that pervade the essay. In seeking to preserve men's ability to control their public persona, Brandeis and Warren introduced an element of untrustworthiness that helped to reconfigure prevailing perceptions of the public/private divide.[88] After all, when they followed Beecher's example by trying to draw a curtain on men's domestic affairs, they did not intend to make home and family invisible.[89] Instead, Brandeis and Warren sought to enable men to seem to conform to conventional standards of decency, a goal that requires a comprehensive portrait of individuals in both their public and private lives.[90] Because this approach to preserving reputation legitimizes some degree of dishonesty, it inevitably raises the issue of fixing the point at which omission becomes concealment or the manipulation of facts becomes a lie.[91]

Although it may be impossible to settle this thorny issue, we can examine the assumptions behind it in order to highlight important aspects of the historical shift embodied in *The Right to Privacy*. When Brandeis and Warren suggested that certain types of personal information be withheld from publication, and recommended that men should be permitted to practice what might be described as personal public relations, they unwittingly upended the traditional priority of the public over the private realm.[92] More specifically, by turning reputation from a set of facts into a managed impression, they raised the question of whether self-presentation might be nothing more than the façade that radicals such as Woodhull had vowed to destroy.[93]

It is, consequently, not surprising that in the wake of *The Right to Privacy*, we have come to view public activities as mere performance, and to assume that the *real truth* can only be discovered

---

[87] *See* Jenny Kitzinger, *Media Coverage of Sexual Violence Against Women*, *in* WOMEN AND MEDIA: INTERNATIONAL PERSPECTIVES 13-33 (2004) (providing an overview of the impact of the feminist movement in pushing the media to report on rape as a serious crime that deserves public attention).
[88] Warren & Brandeis, *supra* note 1, at 199-200.
[89] Warren & Brandeis, *supra* note 1, at 193-96.
[90] Warren & Brandeis, *supra* note 1, at 193-95.
[91] Anita L. Allen, *Lying to Protect Privacy*, 44 VILL. L. REV. 161, 164–65 (1999).
[92] *See* HANNAH ARENDT, THE HUMAN CONDITION 58 (2d ed. 1998) (1958).
[93] *Id.*

if we look behind the scenes.[94] In previous eras, participation in public life was seen as the highest expression of humanity.[95] In our time, in contrast, with the integration of communications technologies into every aspect of existence, we have embraced the idea that public figures only reveal their true selves off camera, in surreptitious recordings, or unplanned remarks.[96] As public activities began to be viewed as scripted presentations, the private realm replaced the public sphere as the site of authenticity, the zone in which we expose who we really are.[97] Given this testament to the continuing vitality of the cult of domesticity, we can see why *The Right to Privacy* failed to convince the public not to pry into private spaces. Rather than deterring intrusion, Brandeis and Warren's efforts to shut the door on public curiosity made us even more eager to peer inside.

[94] Warren & Brandeis, *supra* note 1, at 196-99.
[95] Warren & Brandeis, *supra* note 1, at 196-99.
[96] Justin Bennett, *Media Overload: Restructuring the New York Times Rule in Order to Afford More Protection to Public Figures*, 29 HAMLINE L. REV. 21, 22, 31-32 (2006).
[97] *Id.* at 31-32.