

Confidentiality and Privacy Law: A Transatlantic Comparison



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According to the oft-told legend, the right to privacy was born when Samuel Warren and Louis Brandeis penned *The Right to Privacy* in 1890. Spanning just 28 pages in the *Harvard Law Review*, the article identified privacy as an implicit concept running throughout Anglo-American common law. Commentators have hailed the article as being, among other things, the “most influential law review article of all.” The article spawned at least four torts and more importantly structured the conceptual landscape of privacy, shaping the development of statutory, constitutional, and other privacy protections.

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THE CONVENTIONAL WISDOM, shared by both admirers and critics alike, is that Warren and Brandeis constructed a right to privacy out of a very meager body of law. Indeed, Warren and Brandeis have been hailed as the “inventors” of the right to privacy. Before their article, the conventional wisdom goes, the law did little to establish a firm foundation for the protection of privacy. With brilliant maneuvering of limited precedent, Warren and Brandeis achieved the legal equivalent of pulling a rabbit out of a hat.

The conventional wisdom, however, is wrong. Warren and Brandeis did not invent the right to privacy from a negligible body of precedent, but instead charted a new path for American privacy law out of a substantial body of existing law. By 1890, a robust body of confidentiality law protecting private information from disclosure existed throughout Anglo-American common and statutory law. This included protections for confidential relationships secured through evidentiary privileges, fiduciary law, the law of blackmail, and statutory protection of government records containing personal information. It also included protection for the confidentiality of communications by placing duties of nondisclosure on both those who delivered and those who received letters and telegrams.

Confidentiality focuses on relationships; it involves trusting others to refrain from revealing personal information to unauthorized individuals. Rather than protecting the information we hide away in secrecy, confidentiality protects the information we share with others based upon our expectations of trust and reliance in relationships. Building upon the confidentiality case of *Prince Albert v. Strange*, Warren and Brandeis pointed American common law in a new direction, toward a more general protection of “inviolate personality” and emotions against violations by strangers.

The celebrated torts scholar William Prosser cemented this change of direction in his 1960 article, *Privacy*, and in the *Second Restatement of Torts*, for

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which he was the reporter. Prosser not only established American privacy law as four related torts, but also minimized the importance of confidentiality as a concept in American law. By contrast, English law developed a flexible and powerful law of confidentiality from *Prince Albert v. Strange*, the very same case underpinning Warren and Brandeis's conception of privacy.

Thus far, the story of this fork in the path of privacy law has remained largely unexplored, yet it has had far-reaching effects on the law on both sides of the Atlantic. What the law of privacy protects and does not protect today traces back in large part to this critical divergence in the evolution of the common law of information disclosure. In America, four privacy torts emerged from Warren and Brandeis's article—public disclosure of private facts, intrusion upon seclusion, appropriation of name or likeness, and false light. English courts repeatedly considered whether to adopt the torts spawned by Warren and Brandeis and consistently refused to do so.

THE LAW OF CONFIDENTIALITY in England is very different from the American privacy torts. In America, the prevailing belief is that people assume the risk of betrayal when they share secrets with each other. But in England, spouses, ex-spouses, friends, and nearly anyone else can be liable for divulging confidences. As one English court noted, "When people kiss and later one of them tells, that second person is almost certainly breaking a confidential arrangement." Confidentiality thus recognizes that nondisclosure expectations emerge not only from norms of individual dignity, but also from norms of relationships, trust, and reliance on promises. American privacy law has never fully embraced privacy within relationships; it typically views information exposed to others as no longer private. Although a tort remedying breach of confidence would emerge later on in American law, it developed slowly and quietly in comparison to the Warren and Brandeis privacy torts.

In this article, we examine why American and English privacy law split apart in the 20th century and analyze the consequences of this divergence on both sides of the Atlantic. Although there is some scholarship discussing the Warren and Brandeis article itself, the complete story of the development of the right to privacy in the common law has been neglected in the literature. By revisiting the history, we reveal that the common law of privacy did not unfold according to one path, but two. While American privacy law has centered around the individual's inviolate personality, English privacy law has focused on social relationships. Each body of privacy law has attributes that the other lacks, and English and American conceptions of privacy have much to learn from each other.

Our findings also refine existing understandings of privacy law in the Western legal canon. In a recent article, Yale Professor James Whitman contrasts two "Western cultures of privacy," an American tradition of liberty rooted in the protection of the home and a European tradition of dignity rooted in protection of feelings, which Warren and Brandeis's theory introduced into American law. Our examination of the history reveals that the law of privacy in the West is far more complex than a dichotomy between liberty and dignity. Confidentiality represents a third understanding of privacy, one with firm foundations in both American and English jurisprudence. For all their differences, conceptions of privacy based on liberty and dignity often have been highly individualistic. Confidentiality, in contrast, is a significantly different conception of privacy—one based on the protection of relationships.

ENGLISH LAW SERVES as a useful example of an alternative way that the common law can conceptualize and regulate unwarranted disclosures of personal information. Specifically, one of the lessons that American privacy law can draw from the English law of confidence is that not all information disclosed to others enters the public domain and thereby loses legal protection. English law recognizes intermediate states between being completely private (known only to one person) and completely public (in the public domain). This is in sharp contrast to American privacy law, which has frequently tended to view the private and the public as binary opposites.

Moreover, because confidentiality involves enforcing explicit or implicit promises, it does not have the same First Amendment implications as the public disclosure tort. The broader lesson to be drawn from the divergent paths of privacy law in America and England is that both American-style privacy and English-style confidence protect distinct dimensions of the ways in which unwanted disclosures of personal information can be harmful. Recent developments suggest that both American and English law are coming to this realization. English law seems to be moving towards encompassing privacy at the same time that the American confidentiality tort is maturing. English law can learn much from the American privacy torts, and American law has much to learn from the English confidentiality tort. Perhaps with greater recognition, confidentiality will finally take its place alongside the Warren and Brandeis privacy torts, and the concept of confidentiality will become better integrated into the legal and conceptual landscape of American privacy. IIII

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