

Expressive Property in a Digital Age

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1. Introduction: Private Property and Individual Rights

The belief that we possess a *legal right to privacy* is embedded so deeply in contemporary culture that it is surprising to learn that the idea is a recent addition to American law. The belief that we have a *constitutional right to privacy* is an even more recent development, taking root only in the second half of the twentieth century. Both the legal and constitutional rights to privacy supplanted well-established rules grounded in property law, rules that had long been used to protect rights now regulated within fluid doctrines of privacy.

The constitutional right to privacy is perhaps more suspect than the legal right, in large part because of its use in defining rights protected by the Fourth Amendment and Section 1 of the Fourteenth. Neither text contains the word *privacy*, of course, and both expressly rely on property to define some protected rights.

The Fourth Amendment guarantees the “right of the people to be secure in their *persons, houses, papers, and effects* from unreasonable searches and seizures.”² The Fourteenth commands, in part, that “No State shall ... deprive any person of life, liberty, or property, without due process of law.”³ Over the past fifty years, the debate over the question of whether substantive due process is a source of some privacy rights has been sufficiently extensive and passionate that there is no need to address that issue here. On the other hand, the idea that property rights could function as a powerful device for protecting private expressive conduct not within the scope of the statutory intellectual property regime, or due process, or the First Amendment is not currently an important element of the debate about communications privacy.

Similarly, for almost a half century, critical analysis of the relationship between property rights and Fourth Amendment rights has been, if not moribund, sparse at best. Interest in that relationship has been rekindled by three Supreme Court decisions

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² U.S. Const. amend. IV.

³ U.S. Const. amend. XIV, § 1.

issued since 2012,⁴ but typically the analysis is constrained by narrow doctrines of interpretation and restrictive definitions of property and its functions.⁵

These recent Supreme Court opinions could presage a twenty-first century revolution in constitutional theory. The extensive development of privacy as a core principle in Fourth Amendment theory since the 1960s has depended upon an explicit rejection of the property based rights named in the constitutional text.⁶ Earlier in the twentieth century progressives had largely succeeded in discrediting property rights in other areas of constitutional law, but property rights survived as an important interpretive tool in Fourth Amendment doctrine until the Warren Court's ill-fated attempt to expand the Amendment's reach to encompass the government's use of modern technologies to intrude into peoples' lives.⁷

I propose that a theory of property rights, which was part of Anglo-American legal theory from at least the late 17th century until the early 20th century, offers a model for reimagining the nature of personal rights in a digital age. Contemporary privacy doctrines in the United States have rejected this older view of property rights as a muscular tool for preserving individual liberty and privacy, and also have abandoned the values and functions originally imagined for legal privacy rights. This reimagining of legal rights is particularly relevant to the continuing debate about the security accorded private digital documents like emails, text messages, and electronic files. The constitutional "privacy" rules now applied in the United States make these records vulnerable in ways that private documents were not until the twentieth century.

I begin at the "beginning" in part 2 by introducing the "broad" theory of property articulated by John Locke in the late seventeenth century. The best known statement of the theory appears in Locke's *Second Treatise of Government*. In several critical passages, Locke defined a person's private property to include her legal and social rights, her labor, the products of that labor as expressions (and extensions) of her person. The implications of these ideas for our digital age are examined in part 3.

Part 3 turns to the origins of the legal right to "privacy" in American law by examining the substantive arguments made by Charles Warren and Louis Brandeis in their 1890 law review article "The Right to Privacy."⁸ This article is generally considered to mark the beginning of "privacy" theory in American law. Warren and Brandeis argued that traditional common law doctrines were incapable of coping with unprecedented-

4 *United States v. Jones*, 132 S.Ct. 945 (2012); *Florida v. Jardines*, 133 S.Ct. 1409 (2013); *Riley v. California*, U.S., 134 S.Ct. 2473, 189 L.Ed. 2d 430 (2014).

5 See, e.g., *United States v. Jones*, 132 S.Ct. 945 (2012) (limiting the analysis to the vehicle context).

6 Morgan Cloud, "The Fourth Amendment During the Lochner Era: Privacy, Property and Liberty in Constitutional Theory," 48 *Stan. L. Rev.* (1996) p. 555; Morgan Cloud, "Pragmatism, Positivism, and Principles in Fourth Amendment Theory," 41 *UCLA L. Rev.* (1993) p. 199; Morgan Cloud, "A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment," 3 *Ohio St. J. Crim. L.* (2005) p. 33; Morgan Cloud, "A Conservative House United: How the Post-Warren Court Dismantled the Exclusionary Rule," 10 *Ohio St. J. Crim. L.* (2013) p. 477.

7 Cloud, "The Fourth Amendment During the Lochner Era" (*supra* note 5) pp. 573–616; Cloud, "Pragmatism, Positivism, and Principles in Fourth Amendment Theory" (*supra* note 5) pp. 247–265; Cloud, "A Liberal House Divided" (*supra* note 5) pp. 40–42, 53–61, 66–73.

8 Charles Warren & Louis Brandeis, "The Right to Privacy," 4 *Harv. L. Rev.* (1890) p. 193.

ed intrusions into people's lives, writings, and secrets made possible by nineteenth century technologies. They argued that a new right of privacy was needed to replace these common law doctrines.

Part 3's analysis of the common law authorities Warren and Brandeis rejected leads me to a different conclusion. The old cases demonstrate that property law (along with other established common law and statutory doctrines) offered vibrant protection for the rights that were of concern to Warren and Brandeis. These authorities typically employed a "broad" concept of property rights consistent with and perhaps descended from John Locke's late seventeenth century treatise.

This discussion also illustrates one of the anomalies of their proposal: the values underlying the Warren and Brandeis conception of a legal right to privacy mirror the values embedded in Locke's idea of a broad theory of property rights. Those values are of particular interest here because both theories empowered individuals to control how their expressive property could be used. For example, both the leading common law cases and the proposed new privacy right allowed any individual to prevent others from distributing a person's writings, musical creations, and works of art without the creator's permission. Both theories protected these works as extensions of the creator's being. And these prohibitions applied to any private individual or entity. This was and is important because private invasions of our property or privacy may fall outside the reach of constitutional rights. For example, Fourth Amendment rights—whether defined by property or privacy theory—only limit government actors. They offer no protection against intrusions by private actors. The common law rules consistent with a broad definition of privacy rights, however, did prohibit invasions by private sector actors. One of my core claims is that the same theories could offer the same protections for many of our digital creations, and would apply to many violations of property rights by government actors, as well.

And we need not even do all the work ourselves. For example, a "broad" theory of property-based Fourth Amendment rights actually prevailed at the time Warren and Brandeis published their seminal arguments in favor of creating a new right to "privacy." This theory of property was applied aggressively by the Supreme Court only four years before publication of their article,⁹ and served as a foundation of Fourth Amendment law for more than forty years. During those decades these property based doctrines provided more vigorous protection for expressive communications than has any doctrine employed by the Supreme Court since the 1920s.¹⁰

The idea that the right to be secure from unreasonable searches and seizures is enforced most effectively by reference to property rights might seem odd to most contemporary readers, if only because it differs so dramatically from the theories employed by the Supreme Court in recent decades.¹¹ Yet this is precisely my argument.

9 *Boyd v. United States*, 116 U.S. 616 (1886).

10 Cloud, "The Fourth Amendment During the Lochner Era" (*supra* note 5) pp. 573–616.

11 Cloud, "Pragmatism, Positivism, and Principles in Fourth Amendment Theory" (*supra* note 5) pp. 247–265; Cloud, "A Liberal House Divided" (*supra* note 5) pp. 40–42, 53–61, 66–73.

A broad theory of property rights could provide the means for protecting individuals from some of the most invasive actions committed by both government and private actors in our digital world.

I do not propose that we can simply import seventeenth century rules—or eighteenth and nineteenth century rules for that matter—to solve twenty-first century problems. But the essential meaning of the Lockean concept of broad property rights reveals how we can use property law to replace the unreliable—and sometimes perverse—doctrines now existing in American law, particularly as construed in Fourth Amendment doctrine.

This new “property law” would, for example, prohibit private citizens and government actors from freely accessing, and using many digital writings—private emails, text messages, and electronic documents—just as common law property theory was used to protect documents created with “old” technologies, like ink and paper. Contemporary Fourth Amendment privacy doctrines have failed to secure that protection for countless acts of communicative expression.¹² This parsimonious interpretation of our rights has in turn influenced our broader societal understandings of the meaning of “privacy.” Long rejected property theories may allow us to erect effective legal rules to protect us from unwarranted public and private intrusions into our lives.

2. Locke, Private Property, and Rights of Personhood

John Locke employed both “narrow” and “broad” concepts of property.¹³ The narrow conception is consistent with the common understanding of the word: a person’s property includes her “estates,”¹⁴ her “possessions”¹⁵ including land,¹⁶ goods, and chattels which she has a right to own. The broader theory included those concrete forms of property, but was not limited to them.

The broad conception of property was a cornerstone of Locke’s complex theories about the nature of human beings, individual rights, society, and government. According to this broad theory, a person’s property was not limited to the external objects she owned. Locke wrote famously (at least to those who study Locke) that a man’s property is “his life, liberty, and estate.”¹⁷ This definition was not a mistake or merely a rhetorical flourish. It was central to his arguments justifying the creation of both private property and societies. Indeed, Locke argued that the ultimate justification for abandoning the freedom of nature and accepting the constraints inherent in living in

12 See, e.g., *United States v. Doe*, 465 U.S. 605 (1984).

13 See, e.g., A. John Simmons, *The Lockean Theory of Rights* (Princeton, NJ: Princeton University Press, 1992) p. 227; C.B. McPherson, *The Political Theory of Possessive Individualism* (Oxford: Oxford University Press, 1962) pp. 198, 230, 247–50.

14 See, e.g., John Locke, *The Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government* β 123. J.W. Gough, ed. (Oxford: Barnes & Noble, 1966).

15 *Ibid.* p. 36 and 38.

16 *Ibid.* p. 32 (“But the chief matter of property being now ... the earth itself ...”).

17 *Ibid.* p. 87.

society, is “for the mutual preservation of their lives, liberties, and estates, which I call by the general name, property.”¹⁸

Life in nature was perilous. Without a society with rules and institutions to enforce them, every individual faced the threat that other more powerful people would appropriate her property. People agreed to join societies to ameliorate those risks. “The great and chief end, therefore, of men’s uniting into commonwealths, and putting themselves under government, is the preservation of their property; to which in the state of nature there are many things wanting.”¹⁹

The property requiring protection included, but was not limited to, items of physical property. It consisted of our persons (our lives) and our rights (liberties) as well as our estates (our physical property). People had a property in their persons, their rights, and the products of their labors.²⁰

This conception of property is so different from typical contemporary understandings that it warrants additional discussion, starting with the idea that a person’s rights were her property. The Lockean broad concept of property was widely held by Americans during the period of the founding of the United States. Historian Jack Rakove has described the importance of this conception of property at the time of the American Revolution:

[T]here was a deeper sense in which their attachment to the rights of property identified a value that all Americans shared. For property was one of the strongest words in the Anglo-American political vocabulary. Its security from unlawful taxation had been a dominant value of then-common constitutional culture since the previous century. John Locke had grounded an entire theory of government—and the right to resist tyranny—on the concept of property in his *Second Treatise of Government*. But Locke only gave philosophical rigor to a belief that already permeated Anglo-American law and politics.

For Locke, as for his American readers, the concept of property encompassed not only the objects a person owned but also the ability, indeed the right, to acquire them. Just as men had a right to their property, so they held a property in their rights. Men did not merely claim their rights, but also owned them, and their title to their liberty was as sound as their title to the land or to the tools with which they earned their livelihood.²¹

18 *Ibid.* p. 123.

19 *Ibid.* p. 124.

20 *Ibid.* p. 44. Locke’s other statements of these arguments continue to invoke the broad concept of property. See, e.g., *ibid.* p. 95: The only way whereby any one divests himself of his natural liberty and puts on the bonds of civil society is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it.

21 Jack Rakove, *Revolutionaries: A New History of the Invention of America* (Boston, New York: Houghton Mifflin Harcourt, 2010) p. 78.

Rights, often won at great cost, were *property* possessed by people as surely as their physical property, secured against violation as much as any physical trespass onto land or against lawful possession of personal property. What is most startling to the contemporary reader is not that people possess rights, but that our rights were defined as our property.

A second element of Locke's theory is particularly relevant to my claim that this broad theory of property can be useful in the twenty-first century. That element is his labor theory of private property, a theory that rested upon the transformative power of human labor and its divine origins.

[G]od gave the world to men in common; but since he gave it them for their benefit, and the greatest conveniences of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational (and labour was to be his title to it), not to the fancy or covetousness of the quarrelsome and contentious.²²

Although a person's efforts might remove physical property from the natural bounty God created for all to share in common, this private appropriation of physical property was also part of God's plan. It did not harm others, but instead benefitted them by increasing the value of the earth and its products for everyone.²³ "[H]e who appropriates land to himself by his labour does not lessen but increase the common stock of mankind."²⁴ In fact, to fulfill God's designs for humanity, it was necessary that people create private property. "[T]he condition of human life, which requires labour and materials to work on, necessarily introduces private possessions."²⁵

One need not share Locke's vision of a divine plan to recognize the import of his labor theory of property for the argument that digital creations can be protected as property. If a person's property includes the products of his labor, then her expressive writings are expressions of her being that deserve protection as property. Locke wrote:

Though the earth and all inferior creatures be common to all men, *yet every man has a property in his own person; this nobody has any right to but*

22 Locke, *The Second Treatise of Government* (*supra* note 13) p. 34. See also p. 26.

23 At least when private property was initially created out of nature, Locke argued that appropriation of property would not harm others. See, e.g., *ibid.* p. 36:

No man's labour could subdue or appropriate all [property of nature]; nor could his enjoyment consume more than a small part; so that it was impossible for any man, this way, to intrench upon the right of another, or acquire to himself a property to the prejudice of his neighbour, who would still have room for as good and as large a possession (after the other had taken out his) as before it was appropriated. This measure did confine every man's possession to a very moderate proportion, and such as he might appropriate to himself without injury to anybody, in the first ages of the world, when men were more in danger to be lost by wandering from their company in the then vast wilderness of the earth than to be straitened for want of room to plant in ... Nay, the extent of ground is of so little value without labour ...

24 *Ibid.* p. 37.

25 *Ibid.* p. 35.

himself. The labour of his body and the work of his hands we may say are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this labour being the unquestionable property of the labourer, no man be he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.²⁶

A man's property includes his own person, his labor, and the products of that labor. When the products of his labor incorporate external objects, they are mixed together with his existing property—including his person and his labor—and are transformed into his property as well. These products of his labor are not merely things that he now owns. They are extensions of his being, expressions of his very personhood.

Whether the labor turns wild land into tillable agricultural fields, or transforms raw metals into cutlery, or uses pigments and bristles to create a picture, the end product always embodies a person's physical exertions and mental creativity. The product is his property because it is an expression of his being.

This property unquestionably includes a person's writings, whether created with pen and ink or a computer. Writings are the products of expressive labor in one of its most obvious forms. Before the emergence of the legal right to privacy, common law judges repeatedly recognized that the creator of writings (and some other forms of creative expression), had a property right in the contents of the private documents she had created. This property right included the power to control who might use this private property, and for what purposes. Yet Warren and Brandeis rejected the idea that these existing common law rules provided satisfactory defenses against noxious intrusions.

Warren and Brandeis recognized that other remedies existed to protect the content of documents from unauthorized uses. These included intellectual property in disputes where it applied, but it offered no protections for many types of expressive property.²⁷ They acknowledged that the law of defamation offered remedies in some cases, but again complained that this body of law was irrelevant for most of the disputes in which they were interested.²⁸ They even acknowledged that a Lockean broad theory

²⁶ *Ibid.* p. 37.

²⁷ Warren & Brandeis, "The Right to Privacy" (*supra* note 7) pp. 193, 200–201:

A man writes a dozen letters to different people. No person would be permitted to publish a list of the letters written. If the letters or the contents of the diary were protected as literary compositions, the scope of the protection afforded should be the same secured to a published writing under the copyright law. But the copyright law would not prevent an enumeration of the letters, or the publication of some of the facts contained therein. The copyright of a series of paintings or etchings would prevent a reproduction of the paintings as pictures; but it would not prevent a publication of list or even a description of them.

²⁸ *Ibid.* pp. 197–198.

of property could supply robust protections against misuse of a person's expressive property, but asserted that the more common narrow theory of property did not.²⁹ The solution for them was not to openly advocate a broad conception of property, but to abandon common law property doctrine entirely where intellectual property and defamation law were irrelevant.³⁰

3. Is the Legal Right to Privacy Necessary?

3.1 Privacy and Property

If we read their works carefully, it becomes apparent that the underlying values and the social functions fundamental to the Warren and Brandeis right to privacy were remarkably similar to the values and functions embodied in Locke's broad concept of property.

As discussed earlier, Locke's broad theory protected not just a person's physical person and his tangible property. Unlike a narrow definition limited to external forms of property (chattels and land), it offered equivalent protections for her natural, social, and legal rights, and for her labor and its products of her labor. Locke's broad theory protecting property in all its forms prohibited unlawful interference by both government and private actions.

On the other hand, Lockean property rights were not indefeasible. A person could lose her property rights by consent and by the lawful exercise of society's rules—at least those not violating natural law. But absent those occurrences, a person had the right to control her property and decide how it could be used.³¹

Warren and Brandeis argued for a legal right to privacy that served similar values and functions, in particular as it applied to a person's expressive writings and other creations left unprotected by copyright and defamation law. Recognizing a new right to privacy was necessary because

29 *Ibid.* pp. 204 (“Although the courts have asserted that they rested their decisions on the narrow grounds of protection to property, yet there are recognitions of a more liberal doctrine ... If the fiction of property in a narrow sense must be preserved ...”); *ibid.* p. 203 (“The belief that the idea of property in its narrow sense was the basis of the protection of unpublished manuscripts led an able court to refuse, in several cases, injunctions against the publication of private letters, on the ground that ‘letters not possessing the attributes of literary compositions are not property entitled to protection.’”) (emphasis supplied).

30 Similarly, they rejected legal claims based on breaches of confidence, of an implied contracts, and trade secrets as irrelevant to protect the privacy right to be let alone. *Ibid.* pp. 211–212.

31 See, e.g., Locke, *The Second Treatise of Government* (*supra* note 13) p. 138:

[T]he supreme power cannot take from any man any part of his property without his own consent. For the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires that the people should have property, without which they must be supposed to lose that, by entering into society, which was the end for which they entered into it ... Men, therefore, in society having property, they have such a right to the goods which by the law of the community are theirs, that nobody hath a right to take their substance or any part of it from them without their own consent; without this they have no property at all. For I have truly no property in that which another can by right take from me when he pleases, against my consent. Hence it is a mistake to think that the supreme or legislative power of any commonwealth can do what it will, and dispose of the estates of the subjects arbitrarily, or take any part of them at pleasure.

[t]he common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. Under our system of government, he can never be compelled to express them (except when upon the witness stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular method of expression adopted. It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music. Neither does the existence of the right depend upon the nature or value of the thought or emotions, nor upon the excellence of the means of expression. The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public. No other has the right to publish his productions in any form, without his consent. This right is wholly independent of the material on which, the thought, sentiment, or emotions is expressed. It may exist independently of any corporeal being, as in words spoken, a song sung, a drama acted. Or if expressed on any material, as in a poem in writing, the author may have parted with the paper, without forfeiting any proprietary right in the composition itself. The right is lost only when the author himself communicates his production to the public, -- in other words, publishes it.³²

Warren and Brandeis' description of the social and technological realities that created the need for a legal right of privacy in the late nineteenth century will be familiar to the contemporary reader. We need only substitute new technologies that have emerged in recent years for those that emerged during the second half of the nineteenth, and their complaints could be ours.

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 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 ..."

Of the desirability -- indeed of the necessity -- of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. 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

32. Warren & Brandeis, "The Right to Privacy" (*supra* note 7) p. 198.

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. 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. Nor is the harm wrought by such invasions confined to the suffering of those who may be the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in the lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.³³

If one did not know they were writing about the late nineteenth, this passage could be mistaken for a jeremiad describing the early twenty-first century. Confronted with new technological and commercial assaults on individuals' private lives, Warren and Brandeis asked "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[?]"³⁴

Their answer had two parts. The first echoed the Lockean broad definition of property rights, but the second proposed the recognition of a new right of privacy not defined by traditional doctrines but instead described as the right to be left alone.

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection.

³³ *Ibid.* pp. 195–196.

³⁴ *Ibid.* p. 197.

Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society. . . . 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.³⁵

Nonetheless, the authors argued that property rights did not suffice to protect against intrusions upon the private realms of life recognized by the common law. Warren and Brandeis' defense of this proposition could be mistaken for the Lockean broad definition of property: "The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality."³⁶

As we have seen, that theory of property treated the products of a person's labor as extensions of her being. Warren and Brandeis argued that a common law had developed a right to privacy that protected the expression of ideas, emotions, and other attributes of a person's "inviolable personality." This right was so strong that the "common-law protection enables him to control absolutely the act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all."³⁷ They proposed that common law judicial decisions had been correct to protect this right, but repeatedly judges had erred by labeling it as a property right.

3.2 Expressive Property Rights in England and the United States

How English and American judges employed a broad concept of property is revealed by two of the most important opinions issued during the nineteenth century. The earlier opinion is from England, the later from the United States. Both were cited as precedents in later judicial opinions.

The English case is *Gee v. Pritchard*.³⁸ The dispute involved correspondence between the widow of William Gee and their adopted son William Pritchard. William Gee stipulated in his will that his wife was to control his estate and bequeath money to Pritchard as she saw fit. Ms. Gee later wrote letters to Pritchard disclosing private family information, including allegations that Pritchard was Mr. Gee's illegitimate son. Eventually Gee and Pritchard had a falling out. He returned her original letters, but

35 *Ibid.* p. 193. Note that the authors limit the meaning of property to "possessions". Brandeis's best known statement of the idea that "time works changes" in law, society, and legal rights appears in his dissent in *Olmstead v. United States*, 277 U.S. 438 (1928).

36 Warren & Brandeis, "The Right to Privacy" (*supra* note 7) p. 205.

37 *Ibid.* p. 200.

38 *Gee v. Pritchard*, 2 Swanst. 402, 418 (1818) [found at <http://www.commonlii.org/uk/cases/EngR/1818/605.pdf>].

secretly copied them. When Gee learned that Pritchard intended to publish the letters she filed an action seeking an injunction to prevent publication.

The defendants in the litigation were Pritchard and a book publisher named Anderson. The defendants had agreed to publish the book, *The Adopted Son, or, Twenty Years at Beddington*, which included copies of the letters between Ms. Gee and Pritchard. The defendants had agreed to split the profits from book sales, and advertised its publication in a newspaper. Pritchard claimed that his purpose in publishing the book was not financial gain but instead to vindicate his reputation.

The court granted the prohibitory injunction. It held that as author Gee had a property interest in the letters. These property rights empowered her to prevent unwanted publication of her private letters. Citing as authority an earlier English case, the Court ruled that the recipient of private letters did have a qualified property interest in the letter, but that property interest was limited to possession of the paper on which the letter was printed. The author retained ownership of the ideas expressed in the letter. Because of the author's property rights in the document's contents, the recipient could not publish the contents without the author's consent. The only exception to this rule was that the receiver of a letter may publish a private letter if "justice, civil or criminal, requires the publication."

The legal rules applied in the case implicitly rested on a Lockean broad definition of property rights. As the product of the author's labor and mental processes, the ideas contained in letters were part of the author's person, and as such part of her property. Pritchard relinquished physical possession of the letters by returning them to Gee, which terminated his possessory rights to the physical property, the papers. He had never held a property interest in the contents of the letters, so this left him with no property interest at all.

Gee v. Pritchard was relied upon as a precedent in American cases decided before 1890. These included *Folsom v. Marsh*³⁹, *Woolsey v. Judd*⁴⁰, and *Eyre v. Higbee*⁴¹. As a result, nineteenth century American common law rules treated private letters as "literary property" in which the author retained the sole right to control publication. This was the type of property interest that permitted the author to sue for injunctive relief in courts of equity.

The most important American case relying upon *Gee v. Pritchard* was *Woolsey v. Judd*.⁴² Once again, the author of private letters sought an injunction to prevent their publication. Woolsey had sent private letters to William Crowell. Judd, the editor, proprietor, and publisher of the *New York Chronicle* obtained a copy of one of the letters and intended to publish it without the author's consent. Judd argued that he was entitled to publish the letter's contents because an unknown person had sent a

39 *Folsom v. Marsh*, 2 Story, 100 (1841).

40 *Woolsey v. Judd*, 4 Duer, 379 (1855).

41 *Eyre v. Higbee*, 22 How. Pr. (N. Y.) 198 (1861).

42 *Woolsey v. Judd*, 4 Duer, 379 (1855).

copy of it in the mail, accompanied by a note stating that Judd was free to use the letter as he pleased.

The court issued an injunction to preventing publication of the letter. It concluded that “[t]he publication of private letters, without the consent of the writer, is an invasion of an exclusive right of property which remains in the writer, even when the letters have been sent to, and are still in the possession of his correspondent.” Like the court in *Gee v. Pritchard* it also found that the recipient of the letter had only a qualified property claim to the paper on which the letter is written. The ideas expressed in the letter remained the author’s property, and that property right survived regardless of who actually possessed the paper on which the letter was printed. Once again the court held that in this type of case, a court of equity could issue an injunction to protect a property right.

The Woolsey court also opined that one virtue of these property based rules was that they established clear legal rules, and “any definite rule is better than an unlimited discretion.” This observation has even more bite today, when much of American law rests upon the application of flexible standards, like interest balancing, rather than definitive rules.

3.3 Property Rights and Digital Technology

These common law property rules were less important for literary works produced for profit. Intellectual property law existed for that purpose. Warren and Brandeis argued that this undercut the notion that the contents of private letters could be protected by property law.

But where the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, *it is difficult to regard the right as one of property, in the common acceptance of that term.* A man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day. No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully; and the prohibition would not be confined to the publication of a copy of the letter itself, or of the diary entry; the restraint extends also to a publication of the contents. What is the thing which is protected? Surely, not the intellectual act of recording the fact that the husband did not dine with his wife, but that fact itself. It is not the intellectual product, but the domestic occurrence.⁴³

43 Warren & Brandeis, “The Right to Privacy” (*supra* note 7) pp. 200–201 (emphasis not in original).

The application of this doctrine to a world in which people send private emails and text messages and create private electronic documents each day should be obvious. The principle would create a “zone of privacy” protecting those “documents” from publication by anyone—even the recipient of an email or text message—without the author’s permission. As with a broad definition of property rights, the author would have a legal right to prevent others from circulating these new forms of written communication.

In the present day, some remedies already exist that offer protection against some intrusions into the privacies of life. Perhaps these intrusions are best exemplified by hackers breaking into electronic data banks to obtain and publish private emails, pictures and other digital files. Common law and a body increasingly robust statutory rules already offer some protection against these illegal violations of a person’s rights to privacy, or what could easily be characterized as property rights (e.g., the contract rights existing for private email and cloud data storage accounts). Yet defining these records as property could provide additional, and perhaps superior, legal rights to the owners of these creations.⁴⁴

Consider, for example, government hacking of the same emails, text messages, and pictures. In the United States, government actors have great authority to secure many, if not most, of this digital information under the “third party doctrine” in Fourth Amendment law. This doctrine treats the voluntary communication of ostensibly private information with any other people or organizations as an act that effectively eliminates a reasonable expectation of privacy protected by the Fourth Amendment. Under this doctrine, there is no Fourth Amendment barrier preventing government searchers from obtaining voluminous data, including a person’s bank records and the information about the person’s calls (phone numbers called, frequency of those calls, time, date) if they are made using an account with a telecommunications company. The doctrine declares that by allowing the bank to record our financial transactions and the communications company to possess information about our calls, we effectively “waive” the claim that this remains private information protected by the Fourth Amendment. A broadly defined property right, on the other hand, would classify both types of information as private property, and would require government actors to comply with Fourth Amendment limits on government authority to conduct searches and seizures.

The Lockean broad theory also would apply to a private actor who distributes emails and text messages without the authors’ consent. The contents of the digital files remain protected as property, even if contained in emails or text messages sent to another person. These rules would apply to everyone, and not merely the hacker who obtains the data files without permission. Under current privacy doctrines, an author

44 See *infra* part IV for a more detailed explication of why a Lockean property doctrine could offer more protection than even the original formulation of the privacy right by Warren and Brandeis.

of an email sent to a friend is likely to have little recourse under privacy doctrines if the recipient forwards the message to others. Depending on which of today's technologies the recipient uses, the result might be that the document becomes available to billions of people who have Internet access. Once again, this would violate a law defining the contents of the email as the author's private property which cannot be disclosed to others without her permission.

Once again this concept of property is consistent with the Warren and Brandeis' seminal definition of the right to privacy, which protected "any other productions of the intellect of or the emotions,"⁴⁵ literary and non-literary creations alike. "The emotions and sensations expressed in a musical composition or other work of art ... words spoken, a pantomime acted, a sonata performed, is no less entitled to protection than if each had been reduced to writing."⁴⁶ The relevance to contemporary digital creations is apparent. Protecting a person's creations as extensions of her being also would apply to writings, drawings, or music, whether created digitally or with pen and paper. Both the right to privacy and a Lockean broad theory of property would reach this conclusion, although I agree with the Woolsey court's conclusion that property rights would provide both greater certainty about the nature of the rights and establish enforceable rules.

4. Conclusion

If Locke's broad concept of property rights and the Warren and Brandeis definition of the right to privacy are so similar in purpose and in the results they produce, it is logical to ask "does it matter which theory is used? Why, for example, did they argue for the recognition of an entirely new legal right to privacy rather than simply press the argument that existing common law rules actually employed a theory of property rights broader in scope than the more commonly used narrow definition?"⁴⁷ They obviously were aware of this alternative definition of the scope of property rights. Warren and Brandeis acknowledged, for example, that "[a]lthough the courts have asserted that they rested their decisions on the narrow grounds of protection to property, yet there are recognitions of a more liberal doctrine."⁴⁸

This more liberal doctrine was the Lockean idea that private property was not limited to physical objects, but included the contents of a person's expressive labors. The judicial opinions holding that the recipient of a private letter only had a property interest in the physical object, the paper, but the author retained ownership of the contents, is the most significant example of this approach. Warren and Brandeis were not oblivious to the fact that these decisions rested upon a broad definition of property. They wrote that the doctrine "which has been applied to protect these rights is

45 Warren & Brandeis, "The Right to Privacy" (*supra* note 7) p.

46 *Ibid.* p. 206.

47 *Ibid.* p. 204 ("If the fiction of property in a narrow sense must be preserved ...").

48 *Ibid.* p. 204.

in reality not the principle of private property, *unless that word be used in an extended and unusual sense.*⁴⁹

Conversely, it is reasonable to ask why we should jettison well-established privacy rules and replace them with a theory of property rights that has generally disappeared from our body of legal rules? Why not simply try to reform current privacy rules to comport with the concept of privacy rights as imagined by Warren and Brandeis?

My answer to the latter question includes these two arguments. First, precisely because today's concept of a legal right to privacy in expressive property differs so dramatically from what Warren and Brandeis imagined, it may be too defective to be reclaimed. In the context of searches and seizures of electronic and digital information, for example, contemporary rules function more as a vehicle for validating government intrusions than as a device for protecting against such invasions of a person's life.⁵⁰ In short, in many areas of life, society, and law, the doctrine of privacy rights is a failure.

Second, whether a body of law "works" depends in no small part upon the legal consciousness existing at that time and in that place.⁵¹ Warren and Brandeis may well have concluded that the "formalist" common law notions of property rights in their time were so encrusted with the weight of history that modifying old property law rules would not work. Instead it was necessary to create a new theory that could operate free from the constraints of past legal practices. The same may be true today. Privacy theories are so embedded in contemporary legal consciousness that it may not be possible to revise them so that they are effective tools for actually protecting the privacies of people's lives. To create such rules, it may be necessary to abandon the concept of privacy and instead look to a different body of law for effective solutions.

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