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Agnieszka Czubik
Institute of Political Studies and International Relations
Jagiellonian University, Krakow, Poland

"The Right to Privacy" by S. Warren and L. Brandeis – The Story of a Scientific Article in the United States

The author of this paper will examine the history and influence of "The Right to Privacy," a scientific article written at the end of the nineteenth century by S. Warren and L. Brandeis on the development of the right to privacy in the United States. The paper will also present the main thesis of the article, which illustrates how the right to privacy was understood at the time. Furthermore, the author will also explore the impact of the article on jurisprudence and case law in the United States, and identify the most important solutions of US federal statutory law. Finally, she will discuss the research of F.R. Shapiro in the United States, humorously referred to as "citatology," which indicates that the above-mentioned article is one of the most influential scientific legal works in the United States.

Key words: origin of the right to privacy, jurisprudence in the United States, influential legal papers

Introduction

Nowadays, the right to privacy is widely acknowledged and protected in almost every jurisdiction in the world. Protective mechanisms range from regulations at the constitutional level, to highly detailed solutions regarding particular domains of individual life. Currently in the United States, the right to privacy is protected by the provisions of amendments I, IV, V and XIV to United States Constitution. Privacy in the United States is also addressed by statutory federal law. These provisions protect the privacy of the individual against violations by the government. The individual is also protected against any breach of the right to privacy by other individuals. Today, this protection is enforced mainly by state law and judicial decisions issued by state courts.

It is also a highly recognized human right, protected not only at the national

level, but also by universal and regional international regulations. Historically, it is worth noting that the right to privacy not so long ago gained legal protection. Furthermore, unlike other human rights, which have their origins in continental law, the origin of the right to privacy can be found in the common law system. What should be emphasized is the fact that the concept of privacy was created on the basis of American rather than British law.[1] In literature on the subject (including in Polish literature), development of the concept is regarded as an achievement of the American legal system; and emphasis is put on the fact that the British legal system borrowed the concept exclusively from the United States. [2]

The purpose of this article is to indicate the historical origin of the right to privacy and its legal protection in the United States. It can be traced back to "The Right to Privacy," a scientific article published by Samuel Warren and Louis Brandeis in 1890 in the Harvard Law Review[3]. The article played a significant role in the development of the right to privacy in the American legal system. It was defined therein as the "right to be left alone." Nowadays, the definition is widely used. Moreover, the article set in motion the process of conceptualization and legal regulation of the right to privacy in the United States. The concept was also referred to in legal literature outside the United States, national and international one and, what should be particularly stressed, in the case law of national and international courts. In the United States itself, the great majority of publications concerning privacy protection and its initial development refer to the abovementioned article. Doubtlessly, this work has had a great influence on legal writings in the United States.

A Short History of the Article

Samuel Warren and Louis Brandeis were two young counsellors and graduates of Harvard Law School practicing in Boston. Samuel Warren was a member of the Boston elite due to his family's high financial status. His marriage with senator Thomas Francis Bayard's daughter strengthened his social position. As he was a member of the Boston elite, his family's lifestyle was particularly interesting for the press.[4] Publication of information on Warren's family life in The Saturday Evening Gazette was a catalyst for his writing the article.[5]

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[1] "The protection of privacy in law is one of the great contributions of the American legal system." R. A. Smolla, *Law of Defamation*, Part II. Invasion of Privacy and Related Torts, Chapter 10. Invasion of Privacy, § 10:1. Overview: "The area of interrelated torts encompassed by the umbrella term 'invasion of privacy' is largely an American contribution to the common law, which is usually said to have its origins in the seminal law review article by Samuel Warren and Louis Brandeis published in 1890 […]"

[2] L. Kański, „Prawo do prywatności, nienaruszalności mieszkania, tajemnicy korespondencji", [in:] *Prawa człowieka – model prawny*, ed. R. Wiszniewskiego, Wrocław–Warszawa–Kraków 1991, p. 323.

[3] S. Warren, L. Brandeis, "The Right to Privacy", *Harvard Law Review*, Vol. IV, No. 5, December 1890, p. 194 et seq.

[4] D. J. Glancy, "The Invention of the Right to Privacy", *Arizona Law Review*, Vol. 21, No. 1, 1979, p. 5.

[5] Ibidem.

The idea for the article came from S. Warren, but the content itself was probably written by L. Brandeis.[6] L. Brandeis came from Louisville in the South and was the son of Jewish immigrants of rather limited means. According to D.J. Glancy, L. Brandeis "brought a certain amount of objectivity and a more democratic approach to the argument for the right to privacy." The abovementioned author also refers to the words of Chief Justice Gray of the Supreme Judicial Court of Massachusetts, who described Brandeis as "the most ingenious and most original lawyer I ever met."[7]

Cooperation of the two lawyers resulted in this well-known article. It is worth mentioning that it was not the only one of their shared projects, as they also ran a law office called "Warren & Brandeis." As abovementioned, a probable reason for the article was the publication of information on S. Warren's private life. It is difficult, however, to say with certainty whether that was the only reason. Indeed, according to literature, there may have been others. For example, the article may have been an attempt to raise brand awareness of "Warren & Brandeis," or simply to write an interesting article for the Harvard Law Review.[8] Nevertheless, whatever the motivations, the implications it had for the legal system definitely exceeded the authors' expectations.

The Fundamental Thesis of the Article

S. Warren and L. Brandeis stated that technological progress, i.e. the invention of many "mechanical devices," had created more opportunities for interfering in the private life of individuals. The press were driven to capture the attention of their target readers, and these new technologies were used to obtain "sensational" information. They did not even think of the need for permission. Such actions on the part of the press thus resulted in their subjects' "mental pain and distress, far greater than could be inflicted by mere bodily injury."[9]

According to S. Warren's and L. Brandeis's assumptions, privacy should be protected by law as a value in and of itself. They stated that protecting only things like privacy of correspondence and property was insufficient. On the contrary, the right of privacy should be of a general nature. The authors borrowed their definition of privacy from T.M. Cooley, according to whom it was the "right to be left alone."[10] This became the briefest and most widely used definition.

The authors laid the foundations of the right to privacy by redefining protection of self and property. They regarded the right to enjoy life as an element of the right to life.[11] As far as legal protection of property is concerned, the consideration of hu-

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[6] P.A. Freund, "Privacy: One Concept or Many", [in:] *Privacy: Nomos XIII*, ed. J.R. Pennock, J.W. Chapman, New York 1971, p. 184, as cited in D. J. Glancy, op. cit., p. 5. Letter from Brandeis to Warren (April 8, 1905), p. 303 [in:] *Letters of Louis D. Brandeis, 1870-1907: Urban Reformer*, Vol. 1 (Urofsky & Levy eds. 1971) as cited in D. J. Glancy, op. cit., p. 6.

[7] D. J. Glancy, op. cit., p. 5.

[8] Ibidem, p. 6.

[9] S. Warren, L. Brandeis, op. cit., p. 194-195.

[10] T. M. Cooley referred this formula to "an *inviolable* personality", see also: T. McIntyre Cooley, *Treatise of the Law of Torts*, Callaghan, 1888, p. 29

[11] S. Warren, L. Brandeis, op. cit., p. 194-195.

man feelings as a legally protected value was a highly significant milestone. This meant that the extent of personal inviolability was broadened beyond just bodily inviolability.[12] As stated by S. Warren and L. Brandeis, the last stage in the development of human spiritual protection was formulating the right to privacy. The issue of privacy embraced "the sacred precincts of private and domestic life" and comprised the following components: likeness;[13] domestic circle;[14] domestic occurrence;[15] retreat from the world;[16] solitude;[17] robustness of thought and delicacy of feeling;[18] and peace of mind.[19]

Undoubtedly, S. Warren's and L. Brandeis's concept was not only associated with the distinction of the subject of the new right. The authors put a huge emphasis on the fact that privacy should be legally protected. In establishing the new right, they had to rationalize its existence. The article contains some references to the concept of natural law; however, its authors perceived law in a more relative way than proponents of classical theories on the law of nature, who assumed the existence of universal rules of justice. According to S. Warren and L. Brandeis, the law of nature was supposed to develop together with social shifts, which resulted in its relativity. It is stated in the article that "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."[20] Thus, the right to privacy defined as the right to be left alone should be regarded as a right which is not waived by an individual when they enter into a social contract; and must be interpreted in accordance with the circumstances and needs of a particular society functioning in a specific period of time.[21]

It should be noted that S. Warren and L. Brandais, when conceiving of this new right, did not dissociate themselves from common law. Quite the opposite, they sought substantiation for their "concept" in already existing legal principles. The distinction of the right to privacy was preceded by an analysis of already existing legal institutions and determination of differences in the subject of protection. The institutions were worthless in the protection of privacy hence it was necessary to develop a new institution.

The article also contains references to judicial decisions of English courts operating under common law: Abernethy v. Hutchinson (1825); Prince v. Strange (1849); Tuck v. Priester (1887); and Pollard v. Photographic Co. (1888).[22] These examples were intended to indicate the gradual development of the right to privacy through precedence concerning right of inviolability in the English legal system. The authors

[12] Ibidem, p. 194.
[13] Ibidem, p. 195.
[14] Ibidem, p. 197.
[15] Ibidem, p. 201.
[16] Ibidem, p. 197.
[17] Ibidem.
[18] Ibidem.
[19] Ibidem, p. 200.
[20] Ibidem, p. 195.
[21] D. W. Leebron, "The Right to Privacy's Place in the Intellectual History of Tort Law", *Case Western Reserve Law Review*, Vol. 41, 1991, p. 790-791.
[22] S. Warren, L. Brandeis, op. cit., p. 207 et seq.

referred to the protection of reputation, which already existed in common law. Defamation was considered damage to the reputation of an individual, which in turn influenced their social relations and judgments. As stated by the authors, an invasion of an individual's feelings and judgments of themselves constituted a violation of the right to privacy.[23] S. Warren and L. Brandais postulated that the right to privacy was intended to allow each individual to determine the extent to which their thoughts and emotions were to be exposed to others.[24] It was meant to protect individuals regardless of the value or nature of their thoughts and feelings, as well as the quality of the means of expression, since the subject to protection was inviolability[25], and the right to privacy was a part of the right to inviolate personality, namely the right of personality. The authors stated: "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."[26] The postulate included in the described article concerned the necessity for distinction of a new delict in the legal system. It was a consequence of distinguishing a new legal interest that would be a subject to protection, namely the privacy regardless of property, copyrights, or good reputation.

However, it seems that this postulate was not solely limited to the protection of privacy on the basis of tort law, as it assumed the protection of privacy also by the right of general character,[27] which, in turn, is protected at the constitutional level. In contemporary literature are opinions that the term "right to privacy" used by S. Warren and L. Brandeis should be considered both in terms of tort law and constitutional law.[28] This position was later supported by L. Brandais, who, as a Supreme Court Justice, issued a dissenting opinion in the case of Olmstead v. United States in 1928.[29] The case was about the admissibility of evidence taken from phone taps proving that the defendant perpetrated a breach of commercial law. The Court applied provisions of the Fourth Amendment only to material objects subject to physical violation such as houses, documents or belongings. The protection based on the Amendment did not include words that had been said. L. Brandais objected to the decision of the adjudicating panel, referring directly to "The Right to Privacy," which suggested that protection of privacy was necessary in the given case.[30]

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[23] Ibidem, p. 197.

[24] Ibidem, p. 198.

[25] Ibidem, p. 205.

[26] Ibidem, p. 207.

[27] D. W. Leebron, op. cit., p. 780.

[28] R. B. McKay, "The Right of Privacy: Emanations and Intimations", *Michigan Law Review*, Vol. 64, 1965, p. 259-261.

[29] Olmstead v. United States, 277 U.S. 438 (1928). It should be mentioned that the precedent from Olmstead v. United States was overruled by a Supreme Court decision taken in Katz v. United States, 389 U.S. 347 (1967). The Supreme Court stated that the Fourth Amendment clause, which prohibits unreasonable search and seizure, applies also to immaterial intrusion with technology.

[30] "The protection guaranteed by the [4th and 5th] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only part of the pain, pleasure and satisfactions of life are to be found in

Influence

The publication of S. Warren's and L. Brandais's article received almost immediate response in legal and academic circles, as well as in the judicature. Shortly after its publication, there were a number of other publications on the same topic. This sparked a debate on the right to privacy itself, as well as the thesis, arguments, and solutions presented in S. Warren's and L. Brandais's article. There were also some comments made on the new judicial decision concerning the right to privacy,[31] the first of which were aimed at assessing the nature and substantiation of the new right, as well as the capability of existing legal institutions to contribute to its implementation. S. Warren and L. Brandais were also criticized for using court precedence to illustrate the development of the right to privacy.[32] Looking through the later quotations referring to the article by S. Warren and L. Brandais is impossible due to the size of this essay.

In Polish literature, the article is also widely known and quoted by researchers studying the right to privacy.[33] For instance, J. Wawrzyniak classifies the definitions of privacy in the American legal system according to their compliance with the theory of S. Warren and L. Brandais.[34] He distinguished definitions that view privacy as a kind of independence on the basis of which individuals are allowed to make decisions on the scope and extent of passing information about themselves. These definitions are very similar to that of privacy as the "right to be let alone." Definitions which interpret privacy in a broader sense can also be classified in the same category. In other words, the concept of the "right to be let alone" includes definitions which interpret privacy as the freedom of an individual to make decisions on important issues, as well as definitions that assume that privacy is the freedom from undesired stimulation or protection against strident observation.[35]

The concept of legal protection of privacy was almost immediately embraced by the American judicature. In 1891, the Supreme Court of the state of New York passed a judgment in the case of Schuyler v. Curtis, which deemed publication of the image of a dead private person a violation of law. The Court issued judgments in accordance with the thesis of S. Warren's and L. Brandais's "The Right to Privacy"[36]

material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone–the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth". Olmstead, 277 U.S. 438 (1928) (Brandeis, J., dissenting, 478-79).

[31] T. Thompson, "The Right of Privacy as Recognized and Protected at Law and in Equity", *Central Law Journal*, Vol. 47, 1898, p. 148.

[32] H. S. Hadley, "The Right to Privacy", *Northwestern Law Review*, Vol. 3, 1984, p. 4.

[33] W. Sokolewicz, op. cit., p. 248; J. Wawrzyniak, op. cit., p. 6 and 8; L. Kański, op. cit., p. 321.

[34] J. Wawrzyniak, *Prawo do prywatności. Zarys problematyki*, Warszawa 1994, p. 8.

[35] Ibidem.

[36] Schuyler v. Curtis, 15 N.Y.S. 787 (N.Y. Spec. Term 1891). The judgment was reversed by the Court of Appeals of New York. The Court stated that the right to privacy did not survive a person's death. See: *Schuyler v. Curtis, 147 N.Y. 434* (N.Y. 1895).

in the following cases: Marks v. Jaffa (1893);[37] Robertson v. Rochester Folding Box Co (1900);[38] and Pavesich v. New England Life Insurance Co. (1905).[39] Judgments based on the "right to be left alone" were gradually spread throughout state courts.

Despite the above, the Supreme Court of the United States treated the new right with circumspection, as was evidenced by the aforementioned ruling in Olmstead v. United States (1928).[40] In constitutional case law, the right to privacy was treated as a fundamental right no earlier than the second half of the 20th century. It should be noted that since the publication of "The Right to Privacy," the issue of privacy rights has been constant. Indeed, there has been a continuous search for the best legal conceptualization of privacy protection. This is true not only for state case law (and has been since the publication of the article), but also for the Supreme Court of the United States. Today, the right to privacy is formulated variously according to the constitutional regulations of the First, Fourth, Fifth, and Fourteenth Amendments. The definition taken in the case of Griswold v. Connecticut (1965),[41] which was extrapolated from a series of constitutional regulations, allowed for establishment of privacy as an independent and distinct civil right.

The right to privacy is also enshrined in federal and state legislations. The first initiative at the federal level was taken in 1934 in the form of the Communications Act, which was intended to prohibit the interception of telephone calls and forwarding of the information obtained therefrom.[42] Subsequent restrictions on the interception of telephone calls were introduced by The Omnibus Crime Control and Safe Street Act of 1968.[43] Another important piece of legislation was the Bank Secrecy Act of 1970.[44] Its aim was to introduce procedures to secure banking operations. The first major step towards statutory protection of the right to privacy came in the seventies, with the adoption of the Federal Privacy Act of 1974.[45] Yet legislative activity aimed at the protection of individual privacy continues today. In terms of federal statutory law, the most important pieces of legislation are: the Electronic Communication Privacy Act of 1986;[46] the Fair Credit Reporting Act of 1970;[47] the Gramm-Leach-Bliley Act of 1999;[48] the Health Insurance Portability and Accountability Act of 1996;[49] the Children's Online Privacy Protection Act of 1988;[50] and the USA Patriot Act of 2001.[51]

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[37] Marks v. Jaffa, 26 N.Y.S. 908 (N.Y. City Super. Ct. 1893).

[38] Roberson v. Rochester Folding-Box Co., 71 N.Y.S. 876 (N.Y. App. Div. 1901).

[39] Pavesich v. New England Life Insurance Co., 50 S.E. 68 (Ga. 1905).

[40] Olmstead v. United States, 277 U.S. 438 (1928).

[41] Griswold v. Connecticut, 381 U.S. 479 (1965).

[42] The Communications Act (1934), 47 U.S.C.A. § 307.

[43] The Omnibus Crime Control and Safe Street Act (1968), 18 U.S.C. § 2510-2520.

[44] The Bank Secrecy Act (1970), 31 U.S.C. § 5311-5326.

[45] The Privacy Act (1974), 5 U.S.C. § 552a.

[46] The Electronic Communication Privacy Act (1986), 18 U.S.C. § 2510 – § 2522, 18 U.S.C. § 2701– § 2712.

[47] The Fair Credit Reporting Act (1970), 15 U.S.C. § 1681.

[48] The Gramm-Leach-Bliley Act (1999), 15 U.S.C. § 6801(a).

[49] The Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

[50] *The Children's Online Privacy Protection Act* (1998), 15 U.S.C. § 6501 -§ 6506.

[51] *The USA Patriot Act* (2001), PL 107-56 (HR 31620).

Regulations concerning privacy were implemented at the state level much earlier than their counterparts at the federal level. The legal solutions adopted by the State of New York can serve as an example. In 1903, a few years after the publication of S. Warren and L. Brandeis' article, the legislature of the State of New York enacted sections 50 and 51 of the NY Civil Rights Law entitled "Law of Privacy," which prohibited use of a person's name, picture, and likeness for advertising or trade purposes without consent.[52] Today's regulations on both state and federal levels are multithreaded, developed, and detailed, and they supplement the common law right to privacy.

"Miss America" – Rational Data

There is research in the field of American legal studies which has attempted to arithmetically estimate the impact of academic articles on law. This has led to identification of a number of articles which can be counted among the classics of academic law. This particular field of research is humorously referred to as "citationology."[53] F.R. Shapiro, the progenitor of the field, is himself aware of the insufficiency of statistical methods for evaluating the influence of such works. However, his research has allowed us to distinguish the works most influential in legal academic circles.[54]

Shapiro lists "The Right to Privacy" by S. Warren and L. Brandeis as the second most influential work, with 3,678 citations.[55] It could even be stated that it is "obsessively cited."[56] This is another reason why the article has a special place in the American legal academic circles. Nevertheless, both the method and purpose of "citationology" raises many questions.[57] As J. Goldstein banteringly stated, "I suppose that at a time when law schools are ranked, like Miss Americas, by a national periodical, it should come as no surprise that in partial celebration of its 100th Anniversary

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[52] N. Y. Civil Rights Law (1903) §§50, 51. See: A. A. Mersack, Right of Privacy – Civil Rights Law, §§ 50, 51, *St. John's Law Review*, Vol. 9: Issue. 1, p. 159. The author mentioned the article "The Right to Privacy" by S. Warren and L. Brandeis as one of the sources of New York's privacy regulations.

[53] J. M. Balkin, S. Levinson, "How To Win Cites and Influence People, Symposium on Trends in Legal Citations and Scholarship", *Chicago-Kent Law Review* 1996, Vol. 71, p. 843.

[54] F. R. Shapiro, "The Most-Cited Law Review Articles", *California Law Review* 1985, Vol. 73, Issue 5, p. 1540.

[55] F. R. Shapiro, M. Pearse, "The Most-Cited Law Review Articles of All Time", op. cit, p. 1488. Apart from "The Right to Privacy" by S. Warren and L. Brandais, the work with the highest number of citations (5157) is R.H. Coase, "The Problem of Social Cost", *Journal of Law and Economics*, 1960, Vol. 3, p. 1 et seq. The work with the third highest number of citations (3138) is O. W. Holmes, "The Path of Law", *Harvard Law Review*, 1897, Vol. 10, p. 457 et seq.

[56] "Citation obsession" – wording used by F. R. Shapiro in "The Most-Cited Law Review Articles Revisited", Symposium on Trends in Legal Citations and Scholarship, *Chicago-Kent Law Review*, 1996, Vol. 71, p. 753.

[57] J. Stefancic, F. R. Shapiro, "Introduction, Symposium on Trends in Legal Citations and Scholarship", *Chicago – Kent Review*, 1996, Vol. 71, p. 743 et seq. Also in: W. M. Landes, R. A. Posner, "Heavily Cited Articles in Law", *Chicago– Kent Law Review*, 1996, Vol. 71, p. 825 et seq.

The Yale Law Journal ranks its articles by the numbers."[58] However, there are also supporters of such research. For instance, J. M. Balkin and S. Levinson believe that frequently cited works not only gain special status, but also, due to such "reproduction" begin to have some influence on academic circles. This can be likened to a "particularly successful biological species."[59] The article by S. Warren and L. Brandais can definitely be considered part of this group.

Conclusion

"The Right to Privacy," an article by S. Warren and L. Brandais, was written well ahead of its time. The postulates included in the article inspired jurisdiction and jurisprudence in the United States, as well as abroad. In both case law and constitutional law, existing legal regulations were reinterpreted, and a new sphere of human life– – namely, privacy– – is now protected. The article was definitely a kind of initial spark which began a long process that lead to the creation of this "nontextual right," i.e. a right which is not *expressis verbis* mentioned in the Constitution of the United States.

[58] F. R. Shapiro, "The Most Cited Articles From the Yale Law Journal", *Yale Law Journal*, 1991, Vol. 100, p. 1485.

[59] J. M. Balkin, S. Levinson, op. cit., p. 843.