

WHAT IF SAMUEL D. WARREN HADN'T MARRIED  
A SENATOR'S DAUGHTER?: UNCOVERING  
THE PRESS COVERAGE THAT LED TO "THE  
RIGHT TO PRIVACY"

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2008 MICH. ST. L. REV. 35

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ABSTRACT

Modern tort protection for personal privacy is commonly traced back to Samuel Warren and Louis Brandeis's 1890 law review article, "The Right to Privacy," yet scholars have long been uncertain what prompted Warren and Brandeis's impassioned attack on invasive press practices, unable to point to any news coverage of Warren, the principal author, that

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might convincingly explain his evident outrage at the press. This Article attempts to solve part of that mystery by examining approximately sixty newspaper stories from Boston, New York, and Washington, D.C., most never before analyzed, that report on the personal lives of Warren and his family. These stories—including some particularly intrusive coverage of Warren family tragedies—very plausibly explain what Warren had in mind when he wrote that ruthless gossip regarding private matters had become a social blight requiring legal remedy. This Article concludes that Warren and Brandeis’s landmark article likely would not have been written if Warren had not married into a political family in the public eye.

#### INTRODUCTION

Mr. Samuel D. Warren married Miss Mabel Bayard at the Church of the Ascension in Washington, D.C., just before noon on January 25, 1883. The wedding party was a large one, with ten ushers and eight bridesmaids. Miss Bayard wore a gown of heavy satin with shirred paniers across her hips, and a necklace of gold beads. Her bridesmaids wore white Gainsborough hats and dresses of white mull. The newlyweds left the reception at 4:00 p.m. to take a train north.

*The New York Times* covered the Bayard-Warren wedding in its “Washington Society World” column in a long, three-paragraph story that also named some of the guests and reported details from both the wedding reception and two additional parties that took place later in the evening.<sup>1</sup> The press took notice of the wedding because the new Mrs. Warren was the daughter of Thomas F. Bayard, a United States Senator from Delaware and former candidate for President, who would soon become Secretary of State under Grover Cleveland.<sup>2</sup>

Louis Brandeis, with whom Samuel D. Warren practiced law in Boston and who would later co-author “The Right to Privacy,” is not mentioned in the story.

*The Washington Post*’s coverage of the Bayard-Warren wedding was both more substantial and more sensational. The article on the nuptials was headlined “A Brilliant Bridal” and subheaded “A Ceremony in the English Style Attended By the Blue Blood of Delaware and Boston.”<sup>3</sup> The reporter wrote that this was the long-expected “marriage of the season,” adding dra-

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1. *The Washington Society World: Marriage of Senator Bayard’s Daughter*, N.Y. TIMES, Jan. 26, 1883, at 1.

2. Thomas was the fourth Bayard to serve in the Senate, and the Bayards had been a prominent political family for years. *Thomas Francis Bayard*, WASH. POST, Sept. 5, 1886, at 6.

3. *A Brilliant Bridal*, WASH. POST, Jan. 26, 1883, at 4 (also noting that “two loving hearts [had been] united for life”).

matically (and perhaps even ominously) that it was one “for which there had been hopes and fears, heart flutterings, and silent longings.”<sup>4</sup> The story repeatedly described the scene as an “anxious” one before the bride and groom appeared, though “[t]he church was well filled—not crowded.”<sup>5</sup> Samuel D. Warren, the now-famous author of a very famous law review article, was described this way: “There was a bridegroom, too, but bridegrooms are seldom much noticed on occasions of this kind, and he may be passed by with this remark, that there was a bridegroom.” There is no mention of Brandeis in the *Post* story, either.

The wedding coverage from *The New York Times* and *The Washington Post* in 1883 may have been two of the embers that helped spark Warren and Brandeis’s “The Right to Privacy,”<sup>6</sup> the landmark *Harvard Law Review* article arguing that the press’s penchant for inane and intrusive gossip should be met with aggressive new legal controls to restore civility and common decency. The twenty-eight pages of “The Right to Privacy,” suggesting that privacy be protected through tort law, may be the most famous law review pages in history: the ideas within them are often credited for laying the foundation for all privacy law in the United States.<sup>7</sup>

But what truly provoked Warren, who is thought to be the moving force behind the article,<sup>8</sup> has remained a mystery. Scholars have suggested that popular accounts of the impetus for Warren’s pique against the press

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4. *Id.*

5. *Id.*

6. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

7. The article suggests almost precisely what is now recognized as the tort of publication of private facts. Courts, moreover, have repeatedly stressed the importance of the article for privacy law more generally. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001) (using the word “classic”); *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202, 209 (3d Cir. 1991) (“landmark”); *Machleder v. Diaz*, 801 F.2d 46, 52 (2d Cir. 1986) (“[T]his influential article has left a permanent imprint on our tort law jurisprudence.”); *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 81 (W. Va. 1983) (“[P]erhaps the most influential article ever published in an American law journal.”); *Hirsch v. S. C. Johnson & Son, Inc.*, 280 N.W.2d 129, 132 (Wis. 1979) (“denominated as one of the most influential [articles] ever written”). While the article itself has certainly had an effect, there is evidence that the publication of private facts tort would have developed without it. *See* Amy Gajda, *Rethinking the Origins of The Right to Privacy Without Warren and Brandeis* (unpublished manuscript, on file with author).

8. Brandeis was not a focus of media attention. He is mentioned in the *Boston Daily Globe* fewer than ten times from 1872 through the end of 1890, and those articles related to his professional activities. *See, e.g.*, *Surplus Revenue*, BOSTON DAILY GLOBE, Jan. 28, 1884 (“Louis Brandeis lectured yesterday . . . on the subject of ‘Taxation, Valuation and Public Finance’”); *Business Troubles*, BOSTON DAILY GLOBE, May 18, 1889, at 3 (“Louis D. Brandeis, the assignee of [two financially troubled stores] when seen could not give any figures” about store liabilities); *Club Dinners*, BOSTON DAILY GLOBE, Oct. 19, 1889, at 7 (“A dozen members or so of the Curtis Club, all lawyers, were present at the monthly dinner of that organization last night at Young’s. L.D. Brandeis presided.”).

are mythical or apocryphal.<sup>9</sup> Dean William Prosser, in his own landmark article on privacy in 1960,<sup>10</sup> suggested that it was “highly personal and embarrassing” coverage in Boston’s *Saturday Evening Gazette* of Mrs. Warren’s social affairs and especially wedding coverage of the Warrens’ daughter that had spurred Warren to write “The Right to Privacy.”<sup>11</sup> Prosser’s claim was readily accepted and remains, with occasional permutations, even today the canonical back story to Warren and Brandeis’s landmark article.<sup>12</sup>

There are, however, serious problems with the standard account. Some scholars who have looked at Warren’s family records, including Pro-

9. Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1431 n.191 (2001) (“The motivation of the authors in writing the article is widely disputed.”); William J. Chriss, *Personhood and the Right to Privacy in Texas*, 48 S. TEX. L. REV. 575, 577 (2007) (noting that “exact details” of Warren’s dissatisfaction with media are unclear); Oliver R. Goodenough, *Go Fish: Evaluating the Restatement’s Formulation of the Law of Publicity*, 47 S.C. L. REV. 709, 721 (1996) (“Much myth has grown up around the inspiration for the article.”); Craig D. Tindall, *Argus Rules: The Commercialization of Personal Information*, 2003 U. ILL. J.L. TECH. & POL’Y 181 (noting that the motivation is disputed); Susan P. Stuart, *Fun with Dick and Jane and Lawrence: A Primer on Education Privacy as Constitutional Liberty*, 88 MARQ. L. REV. 563, 593 n.175 (2004) (“[S]tories explaining Warren’s crusade for privacy are apocryphal.”).

10. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960) (famously organizing privacy tort law into four distinct categories: publication of private facts, intrusion into seclusion, misappropriation, and false-light publicity). Prosser’s influential article undoubtedly boosted the impact of Warren and Brandeis’s article substantially. A LexisNexis search reveals that during the seventy-year span between the publication of “The Right to Privacy” in 1890 and Prosser’s article in 1960, only about eighty cases mentioned Warren and Brandeis’s article by name. In the forty-seven years between 1960 and 2007, more than 400 cases cited “The Right to Privacy.”

11. Prosser, *supra* note 10, at 383 (“Socially Mrs. Warren was among the elite; and the newspapers of Boston, and in particular the *Saturday Evening Gazette*, which specialized in ‘blue blood’ items, covered her parties in highly personal and embarrassing detail. . . . The matter came to a head when the newspapers had a field day on the occasion of the wedding of a daughter, and Mr. Warren became annoyed.”).

12. See, e.g., RICHARD A. EPSTEIN, *TORTS* 520 (1999) (Warren and Brandeis’s “immediate motivation, Prosser reports, was to curb the prying eyes of the press, which had covered in great detail the comings and goings of Warren’s family, including the marriage of his daughter”); JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 43 (2001) (suggesting that it was coverage of Warren’s daughter’s wedding that had been the push behind the article); Ely R. Levy & Norman I. Silber, *Nonprofit Fundraising and Consumer Protection: A Donor’s Right to Privacy*, 15 STAN. L. & POL’Y REV. 519, 577 n.3 (2004) (“The article was written, as the famous story goes, in response to officious news coverage of Brandeis [sic] daughter’s wedding.”); Rochelle C. Dreyfuss, *Warren and Brandeis Redux: Finding (More) Privacy Protection in Intellectual Property Lore*, 1999 STAN. TECH. L. REV. 8, ¶ 6 (“The Right to Privacy was supposedly inspired by . . . a newspaper picture of Warren’s daughter taken in the course of her wedding day.”); Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1885 (2006) (“According to William Prosser, Warren was upset at the aggressive coverage the Boston newspapers had been giving to his wife’s high society parties, particularly the wedding of the Warrens’ daughter.”).

fessors Don Pember and Ken Gormley, have pointed out that coverage of a daughter's wedding could not have been a motivation for the article because the Warrens themselves had married only seven years before "The Right to Privacy" was published.<sup>13</sup> Moreover, not only did the Warrens have no daughter of marrying age at the time, but Professor Gormley found that Boston's *Saturday Evening Gazette* "only mentioned [Samuel D. Warren's] name twice between the years 1883 and 1890."<sup>14</sup>

James Barron has offered an alternative account of the source of Warren's ire, attributing the inspiration for "The Right to Privacy" instead to publicity over the wedding of one of Warren's cousins in 1890. This explanation is more plausible than Prosser's focus on the wedding of a Warren daughter, but, standing alone, also seems problematic. The cousin's wedding occurred just months before Warren and Brandeis's article appeared in print—timing which, by law review standards, would have required remarkable efficiency in collaborating, writing, editing, and publishing. Yet, Barron is at a loss to suggest other possible grounds to explain Warren's hostility to the press, finding that earlier press coverage of the Warrens was "virtually nonexistent, let alone lurid."<sup>15</sup> "The names of Samuel D. Warren, Jr., and his wife, Mabel," Barron wrote, "rarely appeared on the long lists of social notables in attendance at various weddings, parties, dances, and other social activities."<sup>16</sup>

Other scholars have professed to be similarly perplexed. Professor Diane Zimmerman, in her *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy*,<sup>17</sup> noted skeptically that it was apparently only two "nonintimate" news articles that provoked the strident anti-press language in "The Right to Privacy."<sup>18</sup> Writing in 2004, Professor James Whitman cited Zimmerman and Barron in asserting that Warren and Brandeis's article "was written in a fit of outrage over newspaper reports of a party

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13. See DON R. PEMBER, *PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT* 24 (1972); James H. Barron, *Warren and Brandeis, The Right to Privacy*, 4 *Harv. L. Rev.* 193 (1890): *Demystifying a Landmark Citation*, 13 *SUFFOLK U. L. REV.* 875, 893 (1979); Ken Gormley, *One Hundred Years of Privacy*, 1992 *WIS. L. REV.* 1335, 1348-49.

14. Gormley, *supra* note 13, at 1349. James Barron has further pointed out that the *Gazette* had an ethics provision in its newsroom that "attacks on private character are inexcusable." Barron, *supra* note 13, at 900.

15. Barron, *supra* note 13, at 896.

16. *Id.*

17. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 *CORNELL L. REV.* 291 (1983).

18. *Id.* at 296 ("In 1890, two newspapers carried items in their gossip columns describing in rather restrained tones a wedding breakfast held by the Warrens for a cousin and her new husband. This sort of nonintimate coverage may have been what induced the authors to lament [that column upon column in newspapers are filled with gossip to occupy the indolent]." (internal citation omitted)).

given by the Warrens.”<sup>19</sup> In *The Family Letters of Louis D. Brandeis*, David W. Levy wrote that research showed that “there was relatively little newspaper coverage of the Warren parties; but whatever the origins of the article, it remains a landmark in legal history.”<sup>20</sup>

Many, of course, have pointed to the journalism of the day in general as the impetus for “The Right to Privacy.” Professor Randall Bezanson, for example, suggested that “Warren and Brandeis were expressing concern about the [strand of journalism that focused on ‘snooping’ and a story’s meaning and emotional impact] especially in their statements bemoaning the debasing of social norms and the threat to decency and gentility.”<sup>21</sup> But not all scholars agree that journalism had run amok in the 1880s. Professor Pember studied the Boston newspapers of the time and “failed to uncover . . . any instances in which the press was ‘overstepping in every direction the obvious bounds of propriety and decency,’” though he did find “instances of poor journalism, bad taste, some sensationalism, and even gossip.”<sup>22</sup>

Professor Gormley, then, perhaps put it best when he called the mysterious circumstances behind “The Right to Privacy” an “ill-defined legend of quarrels between Warren and the Boston press.”<sup>23</sup> Indeed, many scholars have essentially resigned themselves to living with the mystery, agreeing with Professor Dorothy Glancy that “[p]recisely why Warren and Brandeis chose to write about the right to privacy may never be fully known.”<sup>24</sup>

Nonetheless, there is strong historical evidence based on letters and other family history that Samuel D. Warren bristled at the way the press reported on his family and that such coverage motivated the article, despite the fact that scholars have, thus far, found only a few newspaper references to the Warrens. Professor Pember, in his book *Privacy and the Press*, quot-

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19. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1204 (2004). In a footnote, Professor Whitman acknowledged that “[t]here has been some confusion about this, but the basic story remains the same.” *Id.* at 1204 n.262.

20. THE FAMILY LETTERS OF LOUIS D. BRANDEIS 55 (Melvin I. Urofsky & David W. Levy eds., 2002) [hereinafter FAMILY LETTERS].

21. Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890–1990*, 80 CAL. L. REV. 1133, 1139 n.14, 1154 (1992) (noting also that Warren and Brandeis’s privacy “had a distinctly class-based character” and that the two authors also simultaneously reflected on “the demise of aristocracy”).

22. PEMBER, *supra* note 13, at 40. See also W. JOSEPH CAMPBELL, *YELLOW JOURNALISM: PUNCTURING THE MYTHS, DEFINING THE LEGACIES* 5 (2001) (“Yellow journalism has been equated to lurid and sensational treatment of the news [and] to egregious journalistic misconduct of almost any kind [but] [n]one of these shorthand characterizations is adequate, revealing, or even very accurate.” (internal citation omitted)).

23. Gormley, *supra* note 13, at 1350.

24. Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 5 (1979).

ed a letter Louis Brandeis wrote to his co-author Warren some years following publication of “The Right to Privacy.”<sup>25</sup> In it, Brandeis recalled that it was Warren’s “specific suggestion” and his “deep-seated abhorrence of the invasions of social privacy, which led to [the two co-authors] taking up the inquiry.”<sup>26</sup> Warren, Pember wrote, responded affirmatively: “You are right of course about the genesis of the article.”<sup>27</sup> Pember later quoted Warren’s grandson, who recalled that his grandfather found social news that had no public importance “wrong,” and that that notion led his grandfather to write “The Right to Privacy.”<sup>28</sup> Based on this evidence, Professor Pember inferred that Warren must have been motivated by his own feelings of having been violated by gossip-mongers in the press.<sup>29</sup>

But what, specifically, could have provoked Warren’s feelings of violation? The question is significant because the answer could shed a revealing light on the sort of press coverage Warren meant to penalize and prevent through publication of his article. And, yet, the voluminous scholarly literature scrutinizing and critiquing Warren and Brandeis’s landmark article has failed to identify any news coverage that might explain the authors’ personal stake in the legal crusade they launched. The news items mentioned in scholarly accounts such as Prosser’s either post-date or effectively coincide with the article’s publication, and scholars otherwise have largely assumed that Warren very nearly escaped the press’s notice prior to 1890.

What is missing from the literature, then, is the proof—the specific articles or coverage that might explain why the Warrens felt that they had suffered through repeated privacy invasions at the hands of the press.

This Article seeks to fill that gap. It examines newspaper coverage of the Warrens and their social affairs before and shortly after Warren and Brandeis published “The Right to Privacy” (beyond the two innocuous articles found in the *Saturday Evening Gazette*). It collects approximately sixty examples of newspaper articles from New York, Washington, and Boston—articles as lighthearted and seemingly mundane as the brief mention of a luncheon hosted by Mrs. Warren, and as private and emotionally gripping as the description of Mrs. Warren’s sister’s and mother’s bodies during their funerals, held a little more than two weeks apart.

If it was wedding coverage that irked Warren especially, as both Prosser and Barron separately supposed, then it is important to look at the coverage described earlier of Warren’s own wedding from both *The New York Times* and *The Washington Post*, coverage that has not been explored fully, if ever, before. Interest about the wedding would have been greater in

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25. PEMBER, *supra* note 13, at 24-25.

26. *Id.* at 24 (quoting Letter of Louis D. Brandeis to Samuel D. Warren).

27. *Id.* (quoting Letter of Samuel D. Warren to Louis D. Brandeis).

28. *Id.*

29. *Id.*

New York and Washington than in Boston, because it was Mabel Bayard who was newsworthy—a senator’s daughter who lived in both Washington and Wilmington—not her intended husband, a lowly Boston lawyer.

This Article also uncovers additional wedding coverage involving the Bayard-Warrens<sup>30</sup> in the year 1889, just one year before “The Right to Privacy” was written. It was then that Mabel Warren’s father married a woman twenty years his junior. These engagement and wedding stories, published in major newspapers and containing at least one mention of the family dynamic between the Bayard daughters and their father’s new wife, may have been especially unnerving and embarrassing to the proper couple from Boston.

This Article concludes that this and other ample coverage of the Warrens from 1883 to 1890, regaling readers with breathless accounts of their weddings, social gatherings, and funerals, and even noting Mrs. Warren’s friendship with Mrs. Grover Cleveland, a woman who herself had been repeatedly stung by scandal in the press, very plausibly could explain Warren’s evident desire in “The Right to Privacy” to rein in the press through new tort protection for personal privacy.

Though Mr. Warren is clearly more famous today—thanks ironically to his publicized plea for privacy—in the 1880s it was, in fact, his wife who was the focus of media attention. Samuel D. Warren married into what he would surely consider a media maelstrom. Indeed, if Samuel D. Warren had not married a United States senator’s daughter, “The Right to Privacy” might not have been written.

#### I. “THE RIGHT TO PRIVACY” AND ITS ATTACK ON JOURNALISM

In “The Right to Privacy,” it is clear that Warren had had his fill of one particular type of newspaper reporting. He and Brandeis<sup>31</sup> complained that “evil” newspapers had “spread broadcast” the “blighting influence” of belittling and perverting gossip throughout the land.<sup>32</sup> Such gossip would be the ruin of society, they argued, and something needed to be done about it.

The law, they wrote, “must afford some remedy”<sup>33</sup> so that the “gossip-monger” would not be given license to publish “the facts relating to [an-

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30. References to the Bayard-Warren family encompass Samuel D. Warren’s extended family by marriage.

31. Interestingly, there is some suggestion that Brandeis was not fully satisfied with the article and, therefore, likely did not feel as strongly about the problem as did Warren. Brandeis wrote in a letter to a family member that he had reviewed the page proofs for “The Right to Privacy,” and though he had “not looked over all of it yet . . . the little [he] read did not strike [him] as being as good as [he] thought it was.” FAMILY LETTERS, *supra* note 20, at 55. The letter is dated November 29, 1890. *Id.* at 54.

32. Warren & Brandeis, *supra* note 6, at 196.

33. *Id.* at 195.

other's] private life, which he has seen fit to keep private."<sup>34</sup> Any privacy law, they suggested, must be designed "to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity."<sup>35</sup> Only then would the "too enterprising press"<sup>36</sup> that willingly discussed "one's private affairs," and "a woman's face . . . form, and her actions, by graphic descriptions colored to suit a gross and depraved imagination,"<sup>37</sup> be thwarted. Only then would "the acts and sayings of a man in his social and domestic relations be guarded from ruthless publicity."<sup>38</sup>

The word gossip is used no fewer than five times in a single, key paragraph:

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 the vicious, but has become a trade, which is pursued with industry as well as effrontery. . . . To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. . . . Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a 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. . . . 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.<sup>39</sup>

Indeed, Warren and Brandeis suggested that all persons, no matter their station in life, had a right to keep the press away. Politicians, presumably including Warren's famous father-in-law, should be covered in the media only when the news items had a "legitimate connection with . . . fitness for public office."<sup>40</sup> Otherwise, if the news item be of the sort that concerned "the private life, habits, acts, and relations" of a politician or a would-be politician, such item would be a privacy invasion.<sup>41</sup> After all, Warren and Brandeis wrote, "[s]ome things all men alike are entitled to keep from popular curiosity, whether in public life or not."<sup>42</sup>

"The Right to Privacy," then, was a direct attack on the journalism of the day, particularly gossip columns and other coverage of private, personal

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34. *Id.* at 205.

35. *Id.* at 214.

36. *Id.* at 206.

37. *Id.* at 214.

38. *Id.*

39. *Id.* at 196.

40. *Id.* at 216.

41. *Id.*

42. *Id.*

family matters. For Warren and Brandeis, the right to be let alone meant, at its heart, the right not to have one's private affairs be covered by newspapers, no matter one's station in life.<sup>43</sup>

It is probably no coincidence that much of the coverage of the Bayard-Warrens is contained in articles headlined with the word "gossip."

## II. COVERAGE OF THE BAYARD-WARRENS

It was when Samuel D. Warren became engaged to Miss Mabel Bayard, daughter of a high-profile politician on the national stage, that he got his first real experience with what he would later term gossip-mongers. On October 22, 1882, there was this short note in the otherwise long and recurring column in the *Boston Daily Globe* titled "Table Gossip," filled with society news: "The engagement is announced of Samuel D. Warren, Jr., of Mount Vernon street and Miss Mabel Bayard, daughter of Senator Bayard."<sup>44</sup> The engagement also received short coverage a day later in *The Washington Post*: "The engagement of Miss Mabel Bayard, daughter of Senator Bayard, and Mr. S.O. [sic] Warren of Boston, is announced and the marriage will take place shortly."<sup>45</sup>

What Warren would probably consider an onslaught of media coverage had begun. From 1882 until December 1890, when Warren and Brandeis submitted "The Right to Privacy," there would be nearly sixty articles about the Bayard-Warrens or mentions of the Bayard-Warrens, many in gossip columns, most in *The Boston Daily Globe*,<sup>46</sup> *The Washington Post*, and *The New York Times*. The annual amount of coverage of the family varied, from as few as one article per year to more than thirteen. There were eleven pieces published in the year 1886, a year of considerable tragedy for the Bayard-Warren family, thirteen in 1889, the year in which Mrs. Warren's father remarried, and five in 1890, the year in which Warren and Brandeis completed work on "The Right to Privacy." Many were published on the newspapers' front pages.<sup>47</sup>

This Article breaks the coverage up into key years and key periods in the Bayard-Warrens' lives together. It all began with news of the impending wedding in 1882.

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43. See Whitman, *supra* note 19, at 1204-05.

44. *Table Gossip*, BOSTON DAILY GLOBE, Oct. 22, 1882, at 7.

45. *City Intelligence*, WASH. POST, Oct. 23, 1882, at 4.

46. Of note, the *Globe* was considered "the most sensational paper in the city." Barron, *supra* note 13, at 896 n.110 (citing historians such as O. Villard, who described the *Globe* as the "yellowest" of the Boston dailies).

47. See discussion *infra* Sections II.A-F.

## Spring]What If Samuel D. Warren Hadn't Married a Senator's Daughter?45

### A. 1882–1883

These years brought mostly engagement and wedding coverage of the Bayard-Warrens.<sup>48</sup> The engagement announcements in Autumn 1882 were followed by a short item in *The Washington Post* published on December 26, 1882, about Warren's stay in a Washington hotel over the holidays,<sup>49</sup> presumably to visit with Mabel and her family. He may have had time to celebrate with some old friends: on New Year's Eve, "The Social World," a gossip column in the *Post* (subheaded "Other Society Gossip"), reported that an "honorable" Samuel D. Warren had joined with friends for a Christmas party at Wormley's hotel. "It is unnecessary to say that the entertainment was in Mr. Wormley's usual excellent style, and the occasion was highly enjoyed by all present," the *Post* reported.<sup>50</sup>

As the January Bayard-Warren wedding neared, and in a clear sign of the wedding's significance, *The New York Times* joined the *Post* and the *Globe* in coverage of the event in a column titled "The Gossip of Washington."<sup>51</sup> In the column, published on January 18, 1883, approximately one week before the wedding, the *Times* reported that "cards" had gone out, that the wedding would be held at the Church of the Ascension in Washington, and that the ceremony would be "followed by a wedding breakfast and reception at Senator Bayard's residence."<sup>52</sup> Indeed, the wedding apparently had such news value that the *Post* reported somewhat breathlessly the day before the wedding that Samuel Warren had arrived in Washington from Boston, accompanied by his parents, family, and others.<sup>53</sup>

On January 26, 1883, the day after Miss Bayard and Mr. Warren were wed, both the *Post* and the *Times* covered the wedding in great detail for their readers. The *Post* story contained 728 words, while the *Times* devoted 550 words to the event. Though the *Times* coverage seems fairly mundane, other than a mention of the new Mrs. Warren's hips and how her dress accentuated them,<sup>54</sup> the *Post* coverage was much more tabloid-like, with its

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48. Much of the wedding coverage is quoted at the start of this Article, and the engagement announcements are quoted at the start of this Section.

49. *Personal*, WASH. POST, Dec. 26, 1882, at 4 ("Samuel D. Warren, jr., of Boston, is at Wormley's.").

50. *The Social World*, WASH. POST, Dec. 31, 1882, at 1. It is not clear whether this is Samuel D. Warren, Jr., or his father.

51. *The Gossip of Washington*, N.Y. TIMES, Jan. 18, 1883, at 1. There was a similar announcement in the *Boston Daily Advertiser*. *Capital Notes*, BOSTON DAILY ADVERTISER, Jan. 19, 1883.

52. *The Gossip of Washington*, *supra* note 51, at 1.

53. *The Social World: The Warren-Bayard Wedding*, WASH. POST, Jan. 24, 1883, at 1.

54. "Paniers were shirred across the hips," the *Times* reported. *The Washington Society World: Marriage of Senator Bayard's Daughter*, N.Y. TIMES, Jan. 26, 1883, at 1.

description of anxious guests, a bridegroom who need not be mentioned, and a wedding “for which there had been hopes and fears, heart flutterings, and silent longings.”<sup>55</sup> Perhaps this was the first time Warren would read articles about his family that he believed went too far in coverage.

Just two days after the Bayard-Warren wedding, the *Post* would refer to it specifically as one of several events that proved that Washington society, perhaps “frightened” about the upcoming Lenten season, was trying “to see how much gayety [could] be crowded into one week, each event being rife with pleasure.”<sup>56</sup>

This early coverage, and the nearly complete lack of coverage of Warren’s family before the Bayard-Warren engagement, shows unmistakably that Samuel D. Warren had married into a clan of significant newsworthiness. It was all about her family, the Bayards. Even in coverage of his own wedding, Warren was little more than a stand-in.

## B. 1884–1885

In the two years following the wedding, coverage of the Bayard-Warrens died down significantly. During this period, only a handful of stories were published about the family, most brief mentions of in-laws or social visits.<sup>57</sup> The most significant may have been an April 1884 item in the *Boston Daily Globe*’s “Table Gossip” column about the rather extravagant purchase of a painting: Mrs. Warren, the paper reported, had purchased “A Quadroon,” a painting by artist George Fuller, at a cost of \$3,500.<sup>58</sup> It is not entirely clear whether the Mrs. Warren in the story is Samuel D. Warren’s mother or his wife. Little matter, because the amount of money involved—\$72,000 in today’s dollars<sup>59</sup>—was significant, and the story’s detailed disclosure of the family’s spending would likely have stung Warren in either case. Making public such a significant purchase likely startled a man who would later suggest that private affairs, those of which the public had no concern, should be kept private.

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This has relevance because Warren and Brandeis specifically mention newspapers’ descriptions of a woman’s body as the type of coverage that should not be acceptable.

55. *A Brilliant Bridal*, *supra* note 3, at 4.

56. *Other Society Gossip*, WASH. POST, Jan. 28, 1883, at 1.

57. See, e.g., *Table Gossip*, BOSTON DAILY GLOBE, Aug. 3, 1884, at 12 (“Miss Bayard of Delaware is visiting her sister, Mrs. Samuel Warren, Jr., at Mattapolsett [the Warrens’ summer home].”); *City News in Brief*, WASH. POST, Nov. 18, 1884 (reporting that Warren was visiting Washington and staying at Wormley’s hotel again). There is also mention that a Samuel D. Warren belonged to a group known as the Law and Order League of Massachusetts, one apparently created to help enforce liquor laws. *The Enforcement of Law*, THE CONGREGATIONALIST, Jan. 31, 1884, at 2.

58. *Table Gossip*, BOSTON DAILY GLOBE, Apr. 20, 1884, at 12.

59. Measuring Worth, The Calculators, available at <http://www.measuring-worth.com/calculators/uscompare/result.php> (last visited May 10, 2008).

### Spring]What If Samuel D. Warren Hadn't Married a Senator's Daughter?47

The second story that may have irked the Warrens, although clearly not as significant as ones to follow in 1886, involved coverage of then-Secretary of State Bayard, Mrs. Warren's father. *The Washington Post* took Bayard to task for selfishly foisting himself on President Grover Cleveland during a visit on March 7, 1885.<sup>60</sup> Bayard, it was reported, was one of the multiple visitors whose calls had left the President "a thoroughly fatigued man" because of the "strain" of his relentless guests.<sup>61</sup> It was hoped, the article critically noted, that if there were "the least regard for morals among politicians [the President] will be free from the crowd of callers which has hitherto beset him."<sup>62</sup> So exhausted was the President after visits from Bayard and others that it was reported a "probability" that he would be unable to attend church.<sup>63</sup>

It is conjecture that such relatively mundane coverage peeved the Bayard-Warrens. But the next year would bring intense reporting of a very personal sort. Its potential impact on the musings in "The Right to Privacy" seems much clearer.

#### C. 1886

The year 1886 was a tragic one for the Bayard-Warrens and one that may have solidified Samuel D. Warren's dislike and distrust for journalism: it was the year in which Mrs. Warren would lose both her sister and her mother within a span of fifteen days. The front-page coverage of the two deaths and funerals could be seen as especially invasive, as key newspapers gave vivid descriptions of the deaths, the family's response, and funeral rituals.<sup>64</sup>

If this coverage had a great effect on the Bayard-Warrens, they would not be the first to presume that a family member's death and funeral should be an intensely private time. Indeed, the Supreme Court only recently noted that historically, traditionally, and internationally, "[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."<sup>65</sup> In contrast, the Bayard-Warrens received significant and arguably exploitative coverage during their time of double grief.

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60. *A Three Days' Strain*, WASH. POST, Mar. 8, 1885, at 1.

61. *Id.*

62. *Id.*

63. *Id.*

64. See discussion *infra* notes 65-78 and accompanying text.

65. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 168 (2004). The Court wrote that it is the privacy of the living that requires legal protection when the living bury their dead: "Burial rites or their counterparts have been respected in almost all civiliza-

It is not clear from the newspaper articles exactly what killed Katherine Lee Bayard, Mabel Warren's sister, and Louisa Lee Bayard, Mabel Warren's mother. *The Washington Post* reported that sister Katherine died from heart disease, though the accompanying article explained that her death was hastened by "frosty air" from an open door during a reception at which she reported that she had never been in better health.<sup>66</sup> Katherine and Mabel's mother, Louisa, the *Post* reported, died shortly thereafter from "congestion of the brain" hastened by her daughter's death.<sup>67</sup> Neither woman had been well, according to the articles. Katherine was said to have battled heart disease for some time, and *The New York Times* described Louisa as a "hopeless invalid," whom the city of Washington knew as a sickly woman who, though the wife of a prominent senator, rarely spent time outside her home.<sup>68</sup>

These articles regarding the deaths contained both personal medical information<sup>69</sup> and descriptions of family members' actions at the point when they realized their relatives would not survive.<sup>70</sup> Mrs. Warren was said to be at her mother's bedside when she died; she was presumably also at her sister's bedside, though the articles report only that Katherine's siblings were beside her without naming them precisely.

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tions from time immemorial. . . . They are a sign of the respect a society shows for the deceased and for the surviving family members." *Id.* at 167-68.

66. *Death's Sad Summons*, WASH. POST, Jan. 17, 1886, at 1. The article also suggests that Katherine selflessly stood near the door herself in order to protect her mother—"whose delicate health has always been the object of her deepest concern"—from the ill effects of the cold.

67. *Death of Mrs. Bayard*, WASH. POST, Feb. 1, 1886, at 1.

68. *Mr. Bayard's Wife Dead*, N.Y. TIMES, Feb. 1, 1886.

69. In addition to general facts about their medical history, Katherine is said to have been a "still warm but unconscious form" as her family gathered around her. *Death's Sad Summons*, *supra* note 66, at 1. As daughter Katherine lay dying, Louisa Bayard is said to have required "restoratives" after apparently fainting and being led to a sofa. *Id.* By 4:00 p.m. that day, the treating physician left the Bayard home, explaining that Katherine "was not in an unconscious state as the family supposed and hoped," but already dead. *Miss Bayard's Sudden Death*, BOSTON DAILY ADVERTISER, Jan. 18, 1886, at 5. In an article about Louisa Bayard's death, she is said to have been under a doctor's care for at least twenty-five years because of a "complication of diseases which seemed to baffle the skill of her medical attendant." *Death of Mrs. Bayard*, *supra* note 67, at 1. She is later described as being "slightly delirious" shortly before her death. *Id.*

70. A younger Bayard daughter is quoted as screaming, "Katie's dead" when she discovered her unresponsive sister in bed. *Death's Sad Summons*, *supra* note 66, at 1. The scene is described as one of "heartrending distress." *Id.* Secretary Bayard, who had received a note about "trouble" at home after daughter Katherine died, is said to have learned of his daughter's death only upon arriving at the house. *Id.* Mabel Bayard Warren and other siblings, the *Post* reported, were at their mother's bedside when she died "unconscious and without pain." *Id.* In the article about Mrs. Bayard's death, Secretary Bayard is said to have "bravely borne up against a grief that would have prostrated most men." *Mr. Bayard's Wife Dead*, *supra* note 68.

The funeral coverage was perhaps even more invasive. *The Washington Post's* coverage of sister Katherine Bayard's funeral began with a description of the "bleak and dismal rain" that fell that day and suggested that the "wretched weather" kept crowds away.<sup>71</sup> Mabel Bayard Warren was again mentioned specifically: "Secretary Bayard's eldest surviving daughter, Mrs. Mabel Warren," the *Post* reported, "leaned on his arm" during the service.<sup>72</sup> The article described the songs mourners sang and the prayers intoned by ministers. When the casket was lowered into the vault, the article continued, the rain stopped and the sun shone upon it. It then recounted what was likely one of the most private moments for the family that day:

At the head of the tomb stood Secretary Bayard, his daughters, sons and sister, gazing long and lingeringly upon the flower-encanopied coffin, while at the foot were grouped Senator Gray and others near to the family, with quivering lips. Mr. Bayard at length turned from the open grave, and the sad rites were over, and as the mourners filed back to their carriages the sun went back into the clouds and the sky grew murky and the air misty again.<sup>73</sup>

That description, however private, was probably not the most deeply personal one published during this tragic period for the Bayard-Warren family. Approximately two weeks later came coverage in *The Washington Post* and *The New York Times* of Mrs. Bayard's funeral; the information contained there could have been even more upsetting to family members.

When Mrs. Bayard died, the *Post* reported, family members did not want a funeral at the Bayards' Washington home and decided instead that the service would be held in Delaware.<sup>74</sup> Nonetheless, there would be some ceremony in the nation's capital to mark the passing of the Secretary of State's wife. The President, it was reported, and several cabinet members accompanied the hearse "containing the remains" to the train platform for travel to Delaware. Railroad employees "and a representative of THE POST," presumably the reporter, separated the President and the casket from other mourners.<sup>75</sup> The casket—described earlier as oak "completely covered with black cloth, and lined inside with cream colored quilted satin" and inscribed with Louisa Bayard's name and dates<sup>76</sup>—was then removed from the hearse to the railroad car by "four stalwart brakemen" in a very private

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71. *Miss Bayard's Funeral*, WASH. POST, Jan. 20, 1886, at 2. All quotes hereinafter regarding Katherine Bayard's funeral are from this article. Her age is not stated in the article. There is additional coverage in the *Boston Daily Advertiser*. *Burial of Miss Bayard*, BOSTON DAILY ADVERTISER, Jan. 20, 1886.

72. *Miss Bayard's Funeral*, *supra* note 71. It is likely that Mrs. Bayard, Katherine's mother, did not attend because she is not mentioned in the story.

73. *Id.*

74. *The Late Mrs. Bayard*, WASH. POST, Feb. 2, 1886, at 2.

75. *Id.*

76. *Death of Mrs. Bayard*, *supra* note 67, at 1.

fashion. The article noted that this quiet action “disappointed” the crowd that had collected to witness the “impressive spectacle.”<sup>77</sup>

The language within the article that may have been significantly intrusive to the Bayard-Warren family highlighted both the fact that the Bayards themselves did not arrive until approximately one hour after Mrs. Bayard’s body was placed on board the train and also mentioned their desire for privacy: “None of the family of the deceased were present during the transfer of the remains from the house to the baggage car, this being perfected in their absence, in order that they might be spared the annoyance of being gazed at by the morbidly-curious throng certain to be attracted by such an event.”<sup>78</sup>

Coverage of the family members themselves continued within the article. Mabel Bayard Warren was not there at all, the *Post* reported; during the activities in Washington, she waited “at the old homestead in Delaware.” Once Mrs. Bayard’s body arrived in Wilmington, Secretary Bayard followed the hearse to the church, but the daughters, “being unable to stand the ordeal further,” were driven to a relative’s home.

The *Post* also covered the funeral itself.<sup>79</sup> In contrast to her daughter’s funeral ceremony, the *Post* reported, during Mrs. Bayard’s service, the sun shone brightly. An “even better throng” had gathered for this second funeral, though the general rituals and the Bayards’ “avoidance of ceremony” were exactly the same. The reporter described the casket and named the famous mourners, including many politicians. During the funeral procession the next day, Mabel Bayard Warren was said to have walked just behind Secretary Bayard, followed by other family members.

This coverage of family—a family including members who evidently valued privacy enough to stay away when their mother’s body left home and was placed aboard a train—may have had a significant effect on Mrs. Warren and, presumably, her husband. This was deeply personal coverage of four intensely private family times: two deaths and two funerals. Importantly, it came less than five years before publication of “The Right to Privacy.”

Other coverage of the Bayard-Warrens during 1886 was much more mundane, but worth brief mention. On June 17, 1886, *The New York Times* reported on a lawsuit in which attorney Samuel D. Warren represented rag importers. Mr. Warren had argued that imported rags needed no disinfection as “light and air, and the lapse of time” would kill any smallpox within them, and that the smallpox vaccine was efficient anyway.<sup>80</sup> In July, the

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77. *The Late Mrs. Bayard*, *supra* note 74, at 2.

78. *Id.*

79. *Mrs. Bayard’s Funeral*, *supra* note 71, at 2.

80. *The Disinfection Craze: Counsel for the Boston Rag Importers on its Absurdity*, N.Y. TIMES, June 17, 1886, at 2.

Spring]What If Samuel D. Warren Hadn't Married a Senator's Daughter?51

Boston paper reported in “Table Gossip” that Mrs. Warren’s younger sister had come to visit the Warrens at their summer home.<sup>81</sup> In October, the *Boston Daily Advertiser* reported that Secretary Bayard and a daughter had arrived in Boston while Samuel Warren was in Europe.<sup>82</sup>

D. 1887–1888

During the two-year period from 1887 through 1888, most coverage of the Bayard-Warrens was decidedly society gossip, though there was additional mention of the Bayard deaths and some other intimate family matters.

This period may also be especially relevant, however. Six of the stories in 1887 and 1888 mention what appears to be Mabel Warren’s burgeoning friendship with Mrs. Grover Cleveland, the new 21-year-old First Lady. In May 1887, Mrs. Warren, identified as a daughter of Secretary Bayard, was named in a *New York Times* article as one of the attendees along with Mrs. Cleveland at a ceremony welcoming Hawaiian Queen Kapiolani to Washington.<sup>83</sup> Three months later, *The Washington Post* reported that Mrs. Cleveland had paid a visit to Mrs. Warren, again identified as the daughter of the Secretary of State.<sup>84</sup> Nearly one year later, Mrs. Cleveland apparently made the same trip; *The New York Times* reported that it was “expected . . . that Mrs. Cleveland will make a short visit to Mrs. Warren of Boston” that day.<sup>85</sup> Finally, on August 1, 1888, the *Times* reported that “Mrs. Samuel Warren of Boston drove over from her Summer residence at Mattapolsett” to visit Mrs. Cleveland.<sup>86</sup>

The relationship itself between Mrs. Warren and Mrs. Cleveland, who had married the President just the year before,<sup>87</sup> may have had some causal effect on “The Right to Privacy.” The then-22-year-old First Lady, born Frances Folsom,<sup>88</sup> was no stranger to gossip’s sting. Newspapers had reported on her relationship with Grover Cleveland for three years before it

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81. *Table Gossip*, BOSTON DAILY GLOBE, July 18, 1886, at 13 (“Miss Mary Bayard, youngest daughter of Secretary Bayard, is with her sister, Mrs. S.D. Warren, Jr., at her summer house at Mattapolsett.”).

82. *Personal Gossip*, BOSTON DAILY ADVERTISER, Oct. 2, 1886, at 4.

83. *Royalty at the White House*, N.Y. TIMES, May 5, 1887, at 4.

84. *Mrs. Cleveland’s Movements*, WASH. POST, Aug. 7, 1887, at 1 (“Mrs. Cleveland drove from Marion to Mattapolsett this morning and made a pleasant call upon Mrs. Samuel Warren and Miss Florence Bayard, daughters of the Secretary of State.”). Mrs. Cleveland visited Mrs. Warren two or three days later. *Mrs. Cleveland*, BOSTON DAILY ADVERTISER, Aug. 10, 1887. Earlier in Mrs. Cleveland’s visit, Mrs. Warren had attended a luncheon in Mrs. Cleveland’s honor. *Marion’s Guest*, BOSTON DAILY ADVERTISER, Aug. 5, 1887, at 8.

85. *Mrs. Cleveland at Marion*, N.Y. TIMES, July 28, 1888, at 1.

86. *Mrs. Cleveland’s Visit*, N.Y. TIMES, Aug. 1, 1888; *Mrs. Cleveland’s Movements*, BOSTON DAILY ADVERTISER, Aug. 1, 1888, at 5.

87. *The Nation’s First Lady*, N.Y. TIMES, June 3, 1886.

88. *The President’s Sweetheart*, N.Y. TIMES, Apr. 27, 1886, at 4.

was confirmed, made especially newsworthy because she was then only eighteen-years-old.<sup>89</sup> The President, a man twenty-eight years her senior, had been her father's law partner and was said to have purchased her carriage when she was a baby<sup>90</sup> and tended to her after her father died.<sup>91</sup>

It is no surprise, then, that Grover Cleveland himself had complained in 1886 in a speech at Harvard that journalists, including those who had followed him around on his honeymoon, were "purveyors of 'silly, mean, and cowardly lies that every day are found in the columns of certain newspapers which violate every instinct of American manliness, and in ghoulish glee desecrate every sacred relation of private life.'"<sup>92</sup>

But there was another reason for Cleveland's complaint. The press had broken another scandalous story just two years before the Cleveland wedding, at a time when Frankie Folsom was likely dating Cleveland: the President may have had a child from a pre-marital affair with a woman named Maria Halpin.<sup>93</sup> Grover Cleveland admitted the affair and supported the child financially.<sup>94</sup> Interestingly, Halpin had named the child Oscar Folsom Cleveland, and historians have suggested that Halpin had had intimate relationships with both Oscar Folsom, Frankie Folsom's father, and Cleveland.<sup>95</sup> This tangled story, described by *The New York Times* as a "scandal" regarding Cleveland's "private life"<sup>96</sup> and clearly impacting Miss Folsom in

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89. *Our Bachelor President*, N.Y. TIMES, Apr. 18, 1886; *President Cleveland's Engagement*, DAILY EVENING BULLETIN, Apr. 27, 1886, at 3 ("The President was very friendly disposed toward Miss Folsom from the time she was a child, but about three years ago his attentions began to assume a more serious aspect.").

90. The White House, Frances Folsom Cleveland, available at <http://www.whitehouse.gov/history/firstladies/fc2224.html> (last visited May 10, 2008).

91. *The President's Sweetheart*, supra note 88, at 4. The article mentions that Miss Folsom then called her future husband "Uncle Cleve." In *Sensations of a Day*, the *St. Louis Globe-Democrat* called Miss Folsom President Cleveland's former ward. *Sensations of a Day*, ST. LOUIS GLOBE-DEMOCRAT, Apr. 16, 1886, at 2.

92. PEMBER, supra note 13, at 16 (noting that journalists "had been particularly insensitive to Cleveland's privacy when he was married in 1886, and had even followed the president and his bride on their honeymoon trip").

93. *Gov. Cleveland's Shame*, BANGOR DAILY WHIG & COURIER, Aug. 20, 1884 (quoting a New York newspaper's report that Cleveland was the child's father and that Cleveland had failed to marry her as promised).

94. H. PAUL JEFFERS, *Grover Cleveland's Political Career*, in *BOOKNOTES: STORIES FROM AMERICAN HISTORY* 146, 149-50 (Brian Lamb ed., 2001).

95. *Id.* at 150 (explaining that a newspaper editor friend of Cleveland's had suggested that Cleveland admitted paternity to save Folsom's reputation since Folsom was married at the time of the affair).

96. *The Charges Swept Away: A Political Scandal Speedily Settled*, N.Y. TIMES, Aug. 12, 1884. The charges mentioned were "drunkenness and immorality." *Id.*

two distinct ways by involving both her father and her soon-to-be husband, was published first in a Buffalo newspaper.<sup>97</sup>

It is not difficult to imagine that Mrs. Warren might have felt empathy for the considerable suffering her friend Mrs. Cleveland felt at the hands of the press. But it was not only her relationship with Mrs. Cleveland that made Mabel Bayard Warren worthy of coverage. Her social life outside the White House entourage made the Boston newspapers more frequently during this two-year period, especially the "Table Gossip" column in the *Boston Daily Globe*, which by 1887 had spread across three full columns. There were several mentions of Mabel Warren's social visits in the period from 1887 to 1888, only two years before publication of "The Right to Privacy."

The one that may be most significant is the very first coverage in the press of the Bayard-Warren children. On March 27, 1887, there was a brief mention of a trip that Mrs. Warren made with them to Washington: "Mrs. Samuel D. Warren, Jr., is in Washington at her father's, Secretary Bayard's. Her children are with her."<sup>98</sup> This would certainly be relevant if the Bayard-Warrens especially wished to protect their children from publicity, a likely desire in a family headed by a man who himself wished to be let alone.

A second item of interest is a one-paragraph story published in *The Evening Herald*, a newspaper in Syracuse, New York. It reported in June 1887 that the Warrens were in New York with Secretary Bayard. "Mr. Bayard refused to see reporters," the reporter noted intriguingly, "and would give no information to the reason of his presence here."<sup>99</sup>

Three other mentions of the Bayard-Warrens appear more mundane. On June 20, 1887, the *Boston Daily Advertiser* reported generally that the Warrens were visiting New York with Secretary Bayard.<sup>100</sup> On February 12, 1888, the *Globe* reported in its "Table Gossip" column that "Mrs. Samuel D. Warren, Jr., gave a delightful luncheon for Miss Terry Wednesday, at her house, on Marlboro Street. Miss Terry's daughter and Mrs. Ion Robertson were among the guests."<sup>101</sup> One week later, Mrs. Warren welcomed her sister Louise, and that visit also made "Table Gossip."<sup>102</sup>

Perhaps more crucial to the analysis here, there was within this two-year period a renewed mention of the Bayard deaths and also of the death of

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97. MILTON RUGOFF, *PRUDERY AND PASSION* 296 (1971) ("In July of 1884, a shoddy Buffalo newspaper published what it entitled 'A Terrible Tale,' describing in detail Cleveland's clandestine affair with a Buffalo woman . . .").

98. *Table Gossip*, BOSTON DAILY GLOBE, Mar. 27, 1887, at 13.

99. *Secretary Bayard in New York*, THE EVENING HERALD, June 29, 1887, at 1.

100. Untitled, BOSTON DAILY ADVERTISER, June 30, 1887.

101. *Table Gossip*, BOSTON DAILY GLOBE, Feb. 12, 1888, at 13.

102. *Table Gossip*, BOSTON DAILY GLOBE, Feb. 19, 1888, at 13 ("Miss Louise Bayard, daughter of the secretary, has left Washington and is visiting her sister, Mrs. S.D. Warren, Jr., at her house on Marlboro street.").

Samuel Warren's father. On January 3, 1888, *The New York Times* reported on major New Year's parties in Washington.<sup>103</sup> There was a description in the front-page article that a younger Bayard daughter greeted guests at the White House at "the head of the receiving line . . ." She was "a tall, graceful girl, with agreeable manners," the newspaper reported, but her presence "revived the recollection of the sad affliction of [the] family two years ago."<sup>104</sup> Her actions, the *Times* reported, proved to everyone present that she could indeed "fill the place made vacant in her house by a double affliction," the deaths of Katherine and Louisa Bayard.<sup>105</sup>

Mrs. Warren was mentioned in a later paragraph in which a party at the Bayard home in Washington was described:

The Secretary was surrounded by his four daughters. Miss Bayard wore her White House gown. Miss Florence, who resembles most the departed Miss Katherine Bayard, wore a dress of black toile, with a bodice of . . . white lilacs. Mrs. Warren, who is a married sister, wore pink silk and Miss Louise Bayard white silk and Spanish lace. The girls all resemble each other very much.<sup>106</sup>

In spring that year, Samuel D. Warren would lose his father. As strong proof of the newsworthiness of his wife's family, there was mention in the *Post* of the elder Warren's death only in connection with the Secretary of State's schedule and—perhaps hurtful or at least annoying to Warren—it was placed in a gossip column. There, *The Washington Post* reported only that "Secretary Bayard has gone to Boston, to attend the funeral of Mr. Samuel D. Warren, a relative by marriage."<sup>107</sup> Meantime, there was only a brief mention of the senior Warren's death in the *Globe*, a story of four sentences with no sentiment, tucked between what appears to be a fictional piece about a young boy and his nurse, and a shorter, somewhat scandalous one-paragraph item relating to a child-custody dispute, titled *She Leaves the Child Behind*.<sup>108</sup>

103. *New Year at Washington*, N.Y. TIMES, Jan. 3, 1888, at 1.

104. *Id.*

105. *Id.*

106. *Id.*

107. *City Personals*, WASH. POST, May 15, 1888, at 6.

108. *Warren Obsequies*, BOSTON DAILY GLOBE, May 15, 1888, at 6 (the paragraph gives the location of the funeral, names clergy and pallbearers, reports that representatives of all paper houses were present, and names the cemetery where the elder Mr. Warren was buried). The child-custody dispute article, about a seemingly private affair, reported somewhat scandalously that a mother had called the paper to assert that she had not attempted to abduct her son, as the newspaper had previously reported, only that she "made the [boy] an offer to return to New York with her" instead of staying in Watertown with his father. *She Leaves the Child Behind*, BOSTON DAILY GLOBE, May 15, 1888, at 6. She would no longer bother the two, she promised. *Id.* There was a longer Warren obituary in the *Boston Daily Advertiser*. *Samuel D. Warren*, BOSTON DAILY ADVERTISER, May 14, 1888, at 2.

E. 1889

The year 1889 was a significant one for the Bayard-Warrens because it was the year in which then-former Senator and Secretary of State Bayard<sup>109</sup> would marry a woman twenty years younger than himself, Mary Willing Clymer.<sup>110</sup> If Dean Prosser was correct that wedding coverage of a Bayard-Warren relative caused Warren to write “The Right to Privacy,” it is more plausibly coverage of this wedding, certainly a significant one for Mabel Bayard Warren, coming three years after her mother’s death and one year before Warren and Brandeis completed “The Right to Privacy.”

Most of the coverage of the Bayard-Clymer nuptials does not seem intrusive by today’s standards. Their engagement and engagement activities were mentioned repeatedly and approvingly in both *The Washington Post*<sup>111</sup> and the *Boston Daily Globe*,<sup>112</sup> and *The New York Times* described the Bayard family home in conjunction with the engagement in a highly romanticized way, in a story headlined “Mr. Bayard’s Marriage: The Home to Which He Will Take His Bride.”<sup>113</sup>

The *Post*, however, perhaps delved a bit too far into private matters twice. First, on October 30, 1889, just a few days before the Bayard-Clymer wedding, the newspaper noted in a gossip column that the Bayard daughters had arrived in Washington both for their father’s wedding and to call on old friends. “It is said,” the *Post* reported regarding this new family arrangement, “that the Misses Bayard have the greatest fondness for Miss Clymer, and will welcome her as a great acquisition to their family circle.”<sup>114</sup> Second, in a brief paragraph on the upcoming nuptials published in early November, just one day before the wedding, the paper reported on a sudden unexplained change of location, from a church to a house, for the major social event:

The long-expected and much-talked-of marriage of ex-Secretary Bayard and Miss Mary Clymer will occur to-day, at 1 o’clock. At the last moment the plans have been changed, and the wedding will take place at the residence of the bride’s

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109. In 1893 he would be named Ambassador to Great Britain. Biographical Directory of the United States Congress, Bayard, Thomas Francis, Sr., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000253> (last visited May 10, 2008).

110. Thomas F. Bayard was born in 1828. *Id.* Mary Willing Clymer was born in 1848. Ancient Ancestors, Thomas F. Bayard/Mary Willing Clymer, <http://www.ancient-ancestors.net/F211/F211075.htm> (last visited May 10, 2008).

111. *The Bayard-Clymer Engagement*, WASH. POST, May 18, 1889, at 1; *Social Matters*, WASH. POST, Oct. 3, 1889, at 5; *The Cabinet Families*, WASH. POST, Nov. 3, 1889.

112. *May Preside in House*, BOSTON DAILY GLOBE, May 20, 1889; *Table Gossip*, BOSTON DAILY GLOBE, Nov. 3, 1889, at 13.

113. *Mr. Bayard’s Marriage*, N.Y. TIMES, Oct. 27, 1889 (“Such is Delamere Place, where Mr. Bayard will bring his bride, and where he hopes to spend his remaining years in the delightful home existence for which it is so eminently fitted.”).

114. *Social Matters*, WASH. POST, Oct. 30, 1889, at 5.

mother, No. 1617 H street, instead of at St. John's Church, as previously announced. The new rector, Reverend Doctor Douglass, will perform the ceremony, to which only a small circle of friends have been invited, and over which all the society world is on the *qui vive*.<sup>115</sup>

The coverage of the wedding itself was somewhat more matter-of-fact, though some details could have irritated the Bayard-Warrens. *The Washington Post* reminded readers in its article of 1014 words that former Secretary Bayard had "recently attained three-score years" but still looked "hale" and vigorous.<sup>116</sup> It disparaged the house of Bayard's new mother-in-law, in which the wedding took place, as "a grim old house" that, despite the fact that it would host "the most important wedding of the season," "looked not one whit less grim," and had "no exterior evidences of festivity . . . ." "[N]ot even the usual awning protected the bonnetless ladies from the sun," the *Post* complained.<sup>117</sup> The final irritant may have been that Mrs. Warren was referred to as "Mrs. T.O. Warren of Boston" and, her husband, several paragraphs later, as "Mr. T.O. Warren." The *Boston Daily Advertiser*, with similar inattention to detail, referred to the couple as "Mr. and Mrs. L.D. Warren of Boston."<sup>118</sup>

In keeping with earlier Bayard-Warren wedding coverage, *The New York Times* was more admiring. The 908-word *Times* article described the guests' arrivals, the fashions, and the ceremony. It also correctly identified Mrs. Warren and reported that, after the ceremony, she left for Wilmington on the three o'clock train.<sup>119</sup>

Two days after the wedding, Samuel Warren made the newspaper in one of the few stories that mentioned him alone in a context other than in his profession as a lawyer. The Boston paper reported that he had recently played polo with the Dedham Mounted Polo Club and that his team prevailed against Harvard, three to two.<sup>120</sup>

#### F. 1890

The only coverage of the Bayard-Warrens in the *Boston Daily Globe* in 1890, the year in which Samuel D. Warren and Louis Brandeis completed "The Right to Privacy,"<sup>121</sup> was contained within its "Table Gossip" columns,

115. *Wedding Events: The Bayard-Clymer Wedding*, WASH. POST, Nov. 7, 1889, at 5.

116. *Mr. Bayard and Bride*, WASH. POST, Nov. 8, 1889, at 5.

117. *Id.*

118. *Mr. Bayard Married*, BOSTON DAILY ADVERTISER, Nov. 8, 1889.

119. *Mr. Bayard Married*, N.Y. TIMES, Nov. 8, 1889.

120. *Polo on Ponies*, BOSTON DAILY GLOBE, Nov. 10, 1889, at 7.

121. Warren and Brandeis apparently had the page proofs back for their article by November 29, 1890, because Brandeis wrote to a relative that day that he had received the proofs and was not fully satisfied with the piece. FAMILY LETTERS, *supra* note 20, at 54. While coverage in 1890 alone likely had little effect on the article, these articles are those

Spring]What If Samuel D. Warren Hadn't Married a Senator's Daughter?57

aside from one quick mention of an art donation.<sup>122</sup> The social events mentioned were all parties thrown by the Warrens.<sup>123</sup>

On March 16, the *Globe* reported that “Mrs. S.D. Warren” had entertained guests at a dinner the previous Wednesday.<sup>124</sup> One week later, on March 23, it was reported that she again hosted a dinner party, one “of 12 covers at her house on Commonwealth avenue.”<sup>125</sup> Finally, two articles published in June reported that the Warrens had hosted a “handsome wedding breakfast” for a relative at their home; other details of the wedding and the party seem innocuous.<sup>126</sup>

By this time, the *Globe* was interspersing advertisements for products within the society tidbits in its “Table Gossip” column, associating Boston’s high society with products such as “toilet requisites,” “Lime-Fruit Juice,” and “Lady Gray sanitary toilet powder.”<sup>127</sup>

Samuel D. Warren and Louis D. Brandeis would sign and date their article “Boston, December, 1890.”<sup>128</sup> Almost certainly, no event after that date could have provided motivation for writing the article.

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that Warren himself likely read while he was writing “The Right to Privacy” and could have served as the final straw for Warren.

122. *Art Notes*, BOSTON DAILY GLOBE, Dec. 29, 1890, at 3 (“Mrs. S.D. Warren of Boston has presented to the Museum of the Fine Arts two paintings by French landscapists of note and an ‘Entombment’ ascribed to Cima da Conegliane.”). This likely refers to Samuel Warren’s mother.

123. There is no mention of the immediate Bayard-Warren family in either *The New York Times* or *The Washington Post* during this time.

124. *Table Gossip*, BOSTON DAILY GLOBE, Mar. 16, 1890, at 13.

125. *Table Gossip*, BOSTON DAILY GLOBE, Mar. 23, 1890, at 13.

126. *Table Gossip*, BOSTON DAILY GLOBE, June 8, 1890, at 13 (“One of the prettiest of the mid-week weddings was that of Miss Katherine H. Clarke and Mr. Watson at Trinity, at high noon. Flowers and potted plants made the spacious chancel a bright background for the sweet-faced bride in her white gown and flowing veil.”). The breakfast and the Warrens are also mentioned three days earlier in laudatory coverage of the wedding itself. *Bell of Daisies*, BOSTON DAILY GLOBE, June 5, 1890, at 2 (“After the ceremony, which was witnessed by a large number of guests, a wedding breakfast was given to the immediate bridal party by Mr. and Mrs. Samuel Dennis Warren, the bride’s cousins, at the residence on Commonwealth av.”).

127. *E.g.*, *Table Gossip*, BOSTON DAILY GLOBE, Mar. 23, 1890, at 13 (“Competition proved the best test for Mme. Pinanit’s toilet requisites; they certainly stand above all others in their beneficial efficacy.”); *Table Gossip*, BOSTON DAILY GLOBE, June 8, 1890, at 13 (“London Lancet says of hot weather drinks: ‘Beer and other stimulants are hurtful rather than helpful.’ Montserrat Lime-Fruit Juice is absolutely pure . . . .”); *Table Gossip*, BOSTON DAILY GLOBE, Nov. 9, 1890, at 21 (“If ladies once see Lady Gray sanitary toilet powder, they will not be without it.”).

128. Warren & Brandeis, *supra* note 6, at 220.

## G. 1891 and Beyond

As many have noted, Samuel Warren and Louis Brandeis's article "The Right to Privacy" had little immediate effect.<sup>129</sup> Even though much of the piece suggests a tort very similar to the current tort of publication of private facts,<sup>130</sup> as late as 1960, seventy years after publication, Dean Prosser suggested that the publication privacy tort was still developing.<sup>131</sup> Even today, courts continue to struggle with its critical First Amendment implications and how to balance the right to privacy with press freedoms.<sup>132</sup>

For the Bayard-Warrens, too, the article would have little practical effect. Coverage of the family continued throughout the late 1800s and into the 1900s. In 1891, the year after the *Harvard Law Review* published the article, the newspaper gossip enterprise would focus on Mabel Warren's sisters' weddings,<sup>133</sup> her luncheons and other entertaining,<sup>134</sup> and visits from family.<sup>135</sup> Later, journalists would report on father Thomas F. Bayard's declining health<sup>136</sup> and eventual death.<sup>137</sup> Samuel D. Warren himself died twenty years after publication of "The Right to Privacy," and that coverage certainly delved deeper into private affairs than Warren would have liked.<sup>138</sup>

By 1911, some twenty years after Warren and Brandeis published "The Right to Privacy," and just as courts and state legislatures were begin-

129. Prosser, *supra* note 10, at 384 ("The article had little immediate effect upon the law.").

130. *E.g.*, Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 132 (2007) ("[T]he injury which Warren and Brandeis were most concerned about [was] the publication of embarrassing facts about people by the press . . .").

131. Prosser, *supra* note 10, at 392.

132. *See* Richards & Solove, *supra* note 130, at 126 (suggesting that courts have all but precluded successful publication-of-private-facts claims); Whitman, *supra* note 19, at 1204 (suggesting that although Warren and Brandeis's article is rightly viewed as "the seminal, and still most cited, effort to introduce a continental-style right of privacy into American law," the reality is that "after a century of legal history, it amounts to little in American practice today"). For a detailed look at the history and the current status of the publication of private facts tort, see Amy Gajda, *Privacy, Ethics, and the Meaning of News* (forthcoming 2009) (on file with author).

133. *Table Gossip*, BOSTON DAILY GLOBE, Apr. 5, 1891, at 21; *Angell-Bayard Nuptials*, BOSTON DAILY GLOBE, Dec. 21, 1891, at 2.

134. *Table Gossip*, BOSTON DAILY GLOBE, Apr. 12, 1891, at 21; *Mattapolsett*, BOSTON DAILY GLOBE, July 17, 1892, at 24.

135. *People in General*, WASH. POST, Sept. 2, 1891.

136. *Thomas F. Bayard's Condition*, N.Y. TIMES, Aug. 27, 1898 (noting that Bayard was ill at the Warren home).

137. *Thomas F. Bayard Dead*, N.Y. TIMES, Sept. 29, 1898; *Hon. T.F. Bayard Dead*, WASH. POST, Sept. 29, 1898, at 3.

138. *Death Comes to Samuel D. Warren*, BOSTON DAILY GLOBE, Feb. 21, 1910, at 7 (noting that Warren was stricken suddenly by apoplexy and died before a doctor could reach his home).

ning to accept more readily the notion of privacy as a legal interest, mostly in a misappropriation sense,<sup>139</sup> tragedy would again strike the Bayard-Warren family. Mrs. Warren's brother, Philip Bayard, died after jumping or falling from the window of a hospital in Washington where he had been committed for a somewhat mysterious health issue that required "constant attendance" by nurses.<sup>140</sup> Whether the fall was purposeful is not clear, but both *The New York Times* and *The Washington Post* covered the story in probing detail on their front pages.<sup>141</sup> The *Times* ended its shorter, front-page article this way, describing an interview with Mabel Bayard Warren's surviving brother:

Thomas F. Bayard, Chairman of the Democratic State committee and a lawyer of Wilmington, went to Washington to-day when notified of the tragedy. He returned to-night. When asked what caused the death of his brother he replied: 'Bright's disease.' When further questioned as to whether the death was intentional, he refused to discuss the matter.<sup>142</sup>

Though Warren had demanded privacy in what is considered perhaps the most influential law review article ever, and though, by 1911, courts were beginning to answer the call, the press still hounded the Bayard-Warrens, reporting in detail on another relative's unexpected death during a time in which they would have preferred to remain in private, coming to terms with what may have been a family suicide.

#### CONCLUSION

Samuel D. Warren surely had great influence on the law with his foundational article "The Right to Privacy," but ultimately, he did not succeed in suppressing intrusive press coverage of his own family. Warren had the misfortune (if it can be called that) of marrying into a highly newsworthy political family and for years thereafter suffered the occasional burdens of public curiosity. Had he not, it is quite likely that "The Right to Privacy" would not have been written.<sup>143</sup>

The articles collected here, nearly sixty in number, fourteen of which have the word "gossip" somewhere in a headline,<sup>144</sup> give a glimpse into why Warren likely felt so strongly that the press had overstepped its boundaries, beyond the two innocuous mentions of a wedding breakfast in the *Saturday Evening Gazette* and beyond any more general complaints about the journalism of the day. By the time Warren wrote "The Right to Privacy," he

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139. See Prosser, *supra* note 10, at 385.

140. *Find Philip Bayard Dying Under Window*, N.Y. TIMES, May 15, 1911, at 1.

141. *Id.*; *Vice Consul Killed*, WASH. POST, May 15, 1911, at 1.

142. *Special to The New York Times*, N.Y. TIMES, May 15, 1911, at 1.

143. Or, at the very least, not written so stridently.

144. Still others use similar words, such as "Personal" and "Intelligence."

had read multiple articles in major papers about his own family's marriages and funerals, social gatherings, medical histories, and intimate family moments. More importantly for Warren, so had thousands of other readers of the *Boston Daily Globe*, *The New York Times*, *The Washington Post*, and other newspapers.

This is not to suggest that such coverage would ever or should ever lead to tort liability, of course. But it is indeed revealing that Samuel D. Warren likely thought it should, and that such press coverage has led to our legal conception of privacy. Modern privacy, therefore, owes much of its original form not only to "The Right to Privacy," but perhaps even more to the newspapers that reported on the Bayard-Warrens with varying levels of intrusive intensity.