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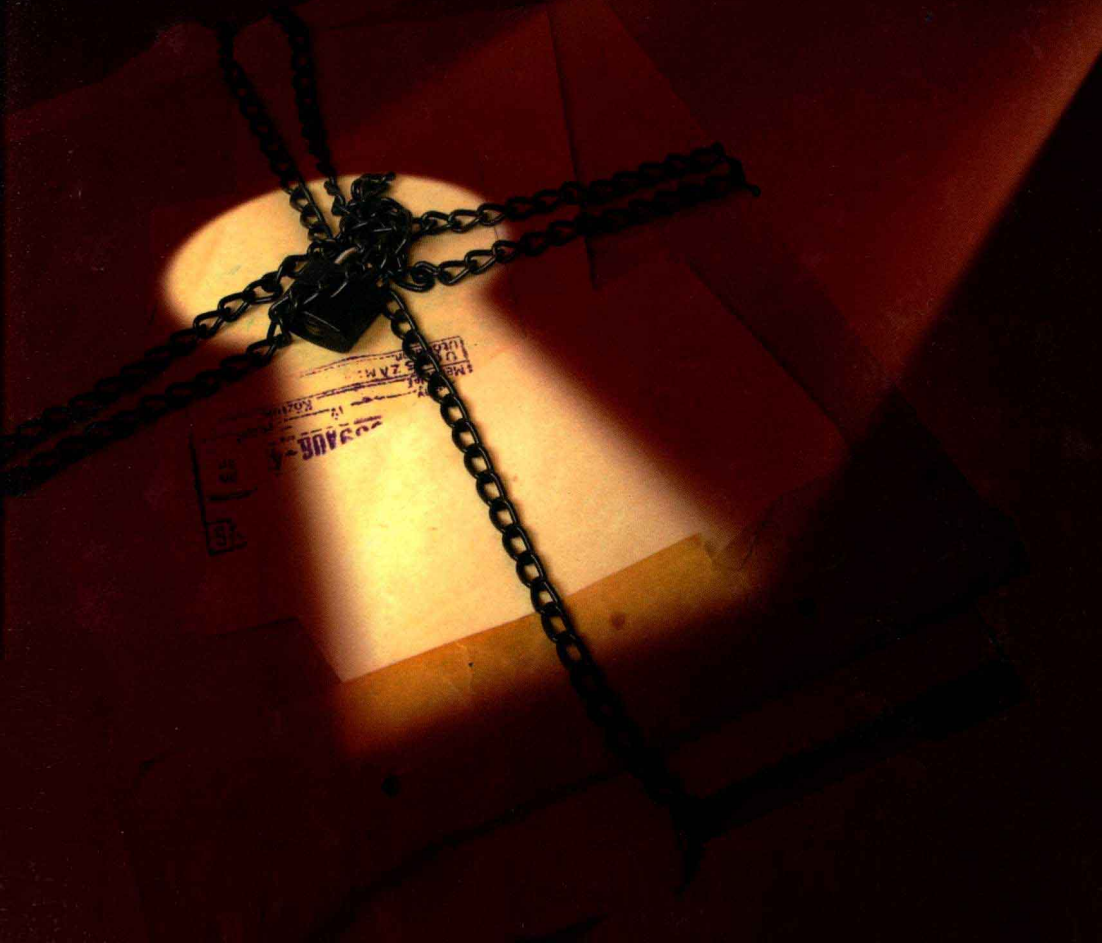

Breach of Confidence

Social Origins and Modern Developments

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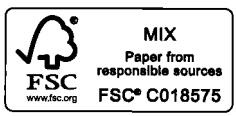

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1. Introduction and synopsis

Breach of confidence is often thought of as a doctrine of minor importance. However, that perception must be questioned in the light of recent developments which have seen it emerge as a significant component of the intellectual property, privacy and security laws of common law jurisdictions including Australia, New Zealand, Singapore, Malaysia and Hong Kong. The authors of the newly-published second edition of Francis Gurry's classic text on breach of confidence point out that the legal concept of confidentiality is, if anything, likely to increase in importance in the future, playing a critical role 'in determining the boundary between "openness" and "secrecy"'.[1] On the other hand, experience shows that a breach of confidence doctrine is by no means an essential doctrine in all common law jurisdictions. For instance, in the United States the doctrine has over the last century largely been jettisoned in favour of trade secret and privacy torts and an expansive treatment of confidentiality contracts; while in Canada and New Zealand privacy law has more recently developed a *sui generis* form as a result of legislative and common law action.

There are also some suggestions that, in some of the jurisdictions that continue to rely on the doctrine (for the time being), it has lost its traditional moorings and is fracturing into a series of sub-doctrines with little binding them together in terms of principle or policy. The United Kingdom is a case in point. English judges now quite commonly refer to breach of confidence in the language of tort rather than in traditional equitable terms. In the most recent cases since the Human Rights Act 1998,[2] some judges may even prefer the language of an information privacy tort giving effect to the right to privacy in Article 8 of the European Convention on Human Rights,[3] encompassing and going beyond 'old-

[1] Tanya Aplin, Lionel Bently, Simon Malynicz and Phillip Johnson, *Gurry on Breach of Confidence: The Protection of Confidential Information*, (Oxford: Oxford University Press, 2nd ed, 2012) [1.24].

[2] Human Rights Act 1998 (UK).

[3] *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*European Convention on Human Rights*'), opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953).

fashioned' breach of confidence. There is a suggestion here that privacy is submerging breach of confidence, and that an 'old-fashioned' breach of a relationship of confidence may simply be a particularly egregious breach of information privacy. It is as if the values behind breach of confidence belong to an earlier age.

In our contribution to the scholarly jurisprudence, we explore the historical foundations and modern developments of this rather obscure doctrine. We conclude that despite its humble beginnings, stilted development and air of quaintness, the doctrine has modern relevance and influence, its normative standard of 'trust and confidence' still resonating with the information society of today. The cases show that the precise meaning of this normative standard has adapted over time, reflecting contemporary conclusions of judges about desirable social norms of behaviour in the treatment of another's information than is manifestly 'not . . . public property or public knowledge'.[4] Rather than proclaiming any grand policy to guide the doctrine's development, judges for most of the doctrine's history appear content to rely on its adaptable language of conscience to adapt its content and operation for current situations and circumstances, in what might be described (not necessarily critically) as a process of 'muddling through'.[5] And if what counts as breach of confidence has become somewhat uncertain and contested in the current century, this only is to be expected given the fluid and evolving social contexts in which the doctrine now functions compared to earlier periods when things seemed relatively more stable. Even so, we suggest, there have been other periods of considerable uncertainty in the doctrine's long history. Indeed, the doctrine's ability to surmount an array of challenges in the past has provided one of the greatest signs of its longer-term resilience.

In the chapter that follows this one, the early history and social origins of breach of confidence are surveyed with particular reference to the small business, private and domestic relations, and master-servant dealings which characterise the early doctrine's small but interesting body of cases – to the extent we can tell these from the limited law reports, supplemented by Lewis Sebastian's *Digest of Cases on Trade Mark, Trade Name, Trade Secret, Goodwill, &c.*[6] We find that the ancient language of

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[4] *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, Lord Greene MR at 215.

[5] See, for an assessment of muddling through as an efficient process of decision making in times of uncertain futures and difficult policy choices, Charles Lindblom, 'The Science of Muddling Through', (1959) 19 *Public Administration Review* 79.

[6] Lewis Sebastian, *Digest of Cases of Trade Mark, Trade Name, Trade Secret,*

'trust and confidence' was put to a variety of uses in cases of the eighteenth century; but by the nineteenth century the equitable breach of confidence doctrine became pronounced and began to garner an identity and shape of its own. But ambiguities remained which continued to make this an obscure doctrine, little understood and often confused with other doctrines. In particular, some cases suggested it was much like contract, while others treated it as akin to the so-called common law property right in unpublished works which predated the doctrine and continued to operate alongside it until that right was abolished with the Copyright Act of 1911.[7] More generally, the language of 'trust and confidence' had no determined parameters, deliberately perhaps since this allowed the doctrine to have a flexible operation in contemporary situations and circumstances. The cases show that the doctrine's central function during this period was to express and protect relational norms of friendship, loyalty and devotion, seen as crucial to the operation of a post-feudal society's social institutions. However, in 1825 the case of *Abernethy v Hutchinson*,[8] involving surreptitious conduct by a possible stranger whose identity was never uncovered in making shorthand notes of a famous surgeon's lectures for purposes of publication in the newly established and rather bumptious medical journal *The Lancet*, reveals a rather more modern set of circumstances and hence treatment of the doctrine than in previous cases.

Chapter 3 notes that the doctrine's focus on privacy and publicity rights was also a feature of its early development. It begins with this case of *Abernethy v Hutchinson*, pointing out that the *Lancet*'s publication extended not only to the content of the lectures but also to more personal characteristics of the lecturer, John Abernethy, who was known as a great performer in the classroom. It then moves on to the 1849 royal etchings case of *Prince Albert v Strange*,[9] another remarkably modern case. And again there are traces of surreptitious conduct in the background of this case, it being initially suspected that Strange and his collaborator's possession of the royal couple's family etchings which they intended to exhibit to the public, for a fee, complete with a catalogue which they had prepared, came by way of theft from the couple's apartment. It was only as the case unfolded that it was determined that a more likely source was an assistant to a printer who had been given the plates for the purposes of making

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Goodwill, &c, Decided in the Courts of the United Kingdom, India, the Colonies and the United States of America (London: Stevens and Sons, 1878).

7 Copyright Act 1911 (UK), s 36.

8 *Abernethy v Hutchinson* (1825) 1 H & Tw 28; 47 ER 1313.

9 *Prince Albert v Strange* (1849) 1 H & Tw 1; 47 ER 1302.

limited copies for private circulation and kept copies which he then sold on – and even then there was some uncertainty remaining as to whether this was the precise factual background. In this case, as in *Abernethy v Hutchinson* previously, we see English judges relying on breach of confidence, using language broadly framed to include not just those with whom a person knows he or she is dealing but the conduct of strangers as well. The Lord Chancellor noted that the defendants had no answer to the plaintiff's claim that the private etchings had come into their hands by surreptitious or improper means, and held that their planned exposure of information about the etchings in the defendant's catalogue was a 'breach of trust, confidence or contract', citing *Abernethy v Hutchinson.* Similar language of surreptitious or improper obtaining was used in other cases of the period, including *Tipping v Clarke* in 1843,[10] where the defendant was enjoined from disclosing information about the plaintiff's affairs 'surreptitiously obtained' from the plaintiff's clerk. These cases suggest that new practices of surreptitious or improper obtaining (involving both intermediaries and third parties) were seen as requiring definite legal response, the doctrine of breach of confidence being the most convenient tool.

The chapter finishes with the 1854 case of *Gartside v Outram*,[11] in which one important exception to the application of an obligation of confidence was recognized. A firm of wool-brokers sought to prevent public disclosure of fraudulent dealings by a former sales clerk relying on *Tipping v Clarke.* But Wood V-C denied the injunction, stating that 'the true doctrine is that there is no confidence as to the disclosure of iniquity'.[12] There is a certain symmetry to this finding that a conscience-based doctrine of breach of confidence must also acknowledge proper standards of social candour and conduct appropriate to a modern trading environment – the beginning, that is, of a public interest exception to the operation of breach of confidence. As with the framing of the doctrine itself, there were no clear boundaries to this exception. Indeed, the Vice-Chancellor suggested, there may be a variety of 'exceptions to this doctrine',[13] their character still to be explored.

These mid-nineteenth century cases show how the embryonic doctrine of the earlier century was being fleshed out and refurbished in a transitional period between post-Revolutionary romanticism, with its focus

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10 *Tipping v Clarke* (1843) 2 Hare 383; 67 ER 157.
11 *Gartside v Outram* (1856) 3 Jur (NS) 39; 26 LJ Ch (NS) 113.
12 26 LJ Ch (NS) 113 at 114.
13 *Ibid.*

on the person, and a coming Victorian-era capitalism,[14] devoted to the making of money. There are some sharp twenty-first century parallels in the cases themselves – including, as they do, an early case of celebrity privacy in the form of *Prince Albert v Strange*, where explicit reference was made to privacy as 'the right invaded',[15] an early publicity rights case in the form of *Abernethy v Hutchinson*, and an early whistle-blowing case in the form of *Gartside v Outram*. In responding to these scenarios, we see breach of confidence being updated for the new conditions of an urbanized capitalist society, with its standards of trust and confidence applied in circumstances that twenty years earlier would have been hard to imagine. Nevertheless, there is still a sense that breach of confidence retained a continuing logic and impetus. It was updated not superseded by a new doctrine that retained only the older doctrine's label of breach of trust and confidence. As long ago as 1755, Samuel Johnson in his famous *Dictionary of the English Language*[16] defined 'confidence' as meaning 'firm belief of another's integrity or veracity, reliance', citing as authority for this meaning the preacher Robert South's statement that 'Society is built upon trust, and trust upon confidence of another's integrity'.[17] Although the circumstances in which a person might be forced to rely on the integrity of those around may be more diverse in a complex urbanized society than one that still retained remnants of a feudal system, the general sense of breach of confidence as founded upon trust and confidence in another's integrity remained.

By the mid-nineteenth century the doctrine had a certain philosophy as well, although there were only hints at this in the cases themselves. The philosopher John Stuart Mill said that British judges operated 'chiefly by

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[14] See also Eric Hobsbawm, *The Age of Revolution: Europe 1789–1948* (London: Weidenfeld and Nicolson, 1962) and *The Age of Capital, 1848–1875* (London: Weidenfeld and Nicolson, 1975).

[15] (1849) 1 H & Tw 1 at 26; 47 ER 1302 at 1312 – and in the earlier decision of the Vice-Chancellor the language of privacy is even more prominent: see *Prince Albert v Strange* (1849) 2 De G & Sm 652; 64 ER 293.

[16] Samuel Johnson, *A Dictionary of the English Language: in which the Words are Deduced from their Originals, and Illustrated in their Different Significations by Examples from the Best Writers: To which are prefixed, a History of the Language, and an English Grammar* (London: printed by W Strahan, for J and P Knapton; T and T Longman; C Hitch and L Hawes; A Millar; and R and J Dodsley, 1755).

[17] The quotation is from Robert South, 'A Sermon Preached at Christ-Church Oxon, Before the University', October 14, 1688', collected in *Twelve Sermons Preached Upon Several Occasions* (London: printed by J Bettenham for Jonah Bowyer, 6th edn, 1727), Vol 1, 458 at p 480.

stealth' in designing and developing their law.[18] But the prevailing philosophy of mid-nineteenth century Britain was a utilitarian one, and breach of confidence could be characterized in utilitarian terms – especially once utilitarianism came to be seen as an essentially liberal philosophy. Mill was an impetus for this understanding. In *On Liberty*, published in 1859,[19] he observed that, although it was already well accepted that commercial freedom promoted a vigorous capitalist economy, individuals were still subject to repressive personal constraints. Allowing individuals to make their own choices as to how to live their lives, including in their 'private life',[20] Mill argued, was the best guarantee of social welfare, the individual being the best judge of his or her own welfare and able to flourish best in a free society. Thus the only proper limitation to a general principle of individual freedom was to prevent harm to others that may constrain their freedom and welfare. In *Utilitarianism*, published in 1861,[21] Mill pointed out that there were certain social norms that were basic to a free society, one being 'security', making 'safe for us the very groundwork of our existence'.[22] On this reasoning, law may have only a minor role in regulating in the few cases that get to court, but a broader role in shaping social norms that operate in a society.[23] Indeed, the normative language of breach of trust and confidence in the mid-nineteenth century cases suggests a judicial desire to shape social norms in terms of individual freedom and trust in the conduct of others, being terms not all that different from the ones that Mill was to espouse.

Nevertheless, as Chapter 4 reveals, it soon became clear that the contours of the doctrine were not completely settled. If anything, breach of confidence became more narrowly conceived as the nineteenth century

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[18] John Stuart Mill, 'Essay on Bentham' (1838), reprinted in Mary Warnock (ed.), *John Stuart Mill: Utilitarianism, On Liberty, Essay on Bentham, together with Selected Writings of Jeremy Bentham and John Austin* (London: Collins, 1962), 78 at p 108.

[19] John Stuart Mill, *On Liberty* (1859), reprinted in Warnock, above n 18, 126 and especially Chapter 3 ('of individuality, as one of the elements of well-being').

[20] See *ibid*, p 195.

[21] John Stuart Mill, *Utilitarianism*, 1861, reprinted in Warnock, above n 18, 251.

[22] *Ibid*, p 310.

[23] And see (advocating a norm-shaping role for law) Cass Sunstein, 'On the Expressive Function of Law', (1996) 144 *University of Pennsylvania Law Review* 2021; Robert Cooter, 'Expressive Law and Economics', (1998) 27 *Journal of Legal Studies* 585; and generally Gillian Hadfield, 'The Second Wave of Law and Economics: Learning to Surf', in Megan Richardson and Gillian Hadfield (eds), *The Second Wave of Law and Economics* (Fed Press, 1999) 50, for social norms as a preoccupation of modern lawyer economists.

progressed, and other doctrines came more to the fore in a period of high capitalism – a period that, according to Karl Marx and Friedrich Engels' *Communist Manifesto*, was marked by an obsession with private property and profit-making enterprise.[24] Firstly, there was the property right in unpublished works which was referred to in Abernethy's case as potentially available even to unwritten works and in *Prince Albert v Strange* became an alternative basis for a remedy precluding unauthorized publication of a catalogue that clearly had commercial value. Secondly there was the rising action for breach of contract.[25] In *Abernethy v Hutchinson* Lord Eldon thought it only logical that a third party should be prevented from profiting from another's breach of contract, relying on breach of trust and confidence. In *Morison v Moat*,[26] in 1851, Turner V-C went further, positing that the obligation of confidence *itself* was like 'a promise on the faith of which [a] benefit has been conferred',[27] in other words hardly different from breach of a contract.

The conflation continued in later cases. Thus, the contractual-confidentiality obligation was treated as somehow placing obligations on third parties, while the property right in unpublished (confidential) material was extended to material with no determined written form, in the way of the older property right. An example was the case of *Exchange Telegraph Co Ltd v Gregory* in 1896,[28] involving theft of stock exchange information which was circulated to the plaintiff's subscribers. The defendant argued that the information had not been conveyed to him on any contractual terms since he had merely induced a subscriber to pass it on in breach of his contract with the plaintiff. Moreover, he added, the process of transmitting information by ticker-tape did not give it the status of a work. The arguments failed. The Court of Appeal held that the defendant's conduct entailed violation of the plaintiff's property in valuable and saleable information and the defendant's inducement of the plaintiff's breach of contract constituted a tort. At the same time, the judicial condemnation of

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[24] Karl Marx and Friedrich Engels, *The Communist Manifesto* (1848, transl into English by Samuel Moore, 1888), reprinted in Gareth Stedman Jones (ed.), *The Communist Manifesto* (London: Penguin, 2002), 218. And see at p 225 especially: 'Modern bourgeois society with its relations of production, of exchange and of property, a society that has conjured up such gigantic means of production and of exchange, is like a sorcerer, who is no longer able to control the powers of the nether world whom he has called up by his spells'.

[25] Noted by Patrick Atiyah in *The Rise and Fall of Freedom of Contract* (Oxford, New York: Oxford University Press, 1979).

[26] *Morison v Moat* (1851) 9 Hare 241; 68 ER 492.

[27] 9 Hare 241 at 255; 68 ER 492 at 498.

[28] *Exchange Telegraph Co Ltd v Gregory* [1896] 1 QB 147.

the defendant's conduct as a 'mean and contemptible act'[29] suggests that the idea of trust and confidence had not been wholly forgotten. Rather than such moralizing language being anachronistic in a high-capitalist age, there is a sense of a real concern with business morality at the tail end of the Victorian era, in the same way as more generally there were concerns being expressed in the 1890s about socialism, anarchism, decadence and other forms of 'deviant' behaviour.[30]

If so, it is not surprising that after the property right in unpublished works was abolished and replaced with a more narrowly framed copyright in unpublished works under the British Copyright Act of 1911, breach of confidence would eventually be drawn on to fill the gap – although it took a considerable amount of time for its role to be settled. Perhaps the legislature assumed the doctrine would have only a minor role when it explicitly retained breach of confidence when the property right was abolished. The Court of Appeal in the lead-up to the new legislation had referred to breach of confidence as a doctrine founded on good faith in the case of *Philip v Pennell*[31] involving the publication of Whistler's diaries (although no breach of faith was found there), the language of 'good faith' implicitly endorsing the proposition from *Morison v Moat* that breach of confidence was at most a contract-like doctrine. After the 1911 Act was passed and came into effect, Swinfen Eady LJ in the case of *Lord Ashburton v Pape*[32] seemed to go further in referring to the doctrine as encompassing 'improper or surreptitious obtaining' of material that is manifestly confidential, pointing out that there were several cases which served as authority for the proposition.[33] But subsequently, in *Sports and General Press Agency, Limited v 'Our Dogs' Publishing Company, Limited*[34] the Court of Appeal (including Swinfen Eady LJ) seemed to take a narrower line again, suggesting a contractual restriction would be needed to preclude the unauthorized taking of photographs at the plaintiff's exhibition.

British courts were not the only arbiters of the breach of confidence doctrine in the early 1900s, so attention must be given also to what was

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[29] See [1896] 1 QB 147, Lord Esher MR at 153 ('a mean and contemptible act'), Kay LJ at 155 ('a grossly fraudulent act'), Rigby LJ agreeing.

[30] See, for instance, Max Nordau, *Degeneration* (translated from the 2nd edition of the German work, London: Heinemann, 1895) and also (in a more sympathetic vein) Arthur Symons, 'The Decadent Movement in English Literature', *Harper's New Monthly Magazine*, November, 1893.

[31] *Philip v Pennell* [1907] 2 Ch 577.

[32] *Lord Ashburton v Pape* [1913] 2 Ch 469.

[33] [1913] 2 Ch 469 at 475.

[34] *Sports and General Press Agency, Limited v 'Our Dogs' Publishing Company, Limited* [1917] 2 KB 125.

going on in other parts of the common law world. As noted in Chapter 5, eyes turned to America, reflecting the country's rising power and influence. And it is clear that here the British common law system was seen as a highly conservative system which treated precedent in a rigid and mechanical fashion and offered limited opportunities for development to deal with modern circumstances. In response, American judges supported by activist legal realist scholars began to make explicit use of policy to reform the law and refashion it to suit the needs of a contemporary and distinctly American society – a society that in some quarters was seen as having more in common with a modernizing Europe artistically and culturally than with Britain. Particularly admired was an influential article written by Samuel Warren and Louis Brandeis (who had been educated in Germany) published in the 1890 *Harvard Law Review*.[35] These authors construed the British breach of confidence doctrine as an antiquated doctrine focused on relations between a confider and confidant, citing *Prince Albert v Strange* but overlooking or ignoring its broader language of surreptitious obtaining, and argued that such a doctrine was inadequate for a modern American society characterized by an intrusive yellow press and the pervasive camera. Using dignitarian reasoning, Warren and Brandeis also re-interpreted the 'right to privacy' talked about in *Prince Albert v Strange* as a right of 'inviolate personality' and insisted that new law framed in terms of privacy was needed to support it. Their article inspired the twentieth century development of a range of privacy torts in various states of the US[36] – although perhaps taking a rather different shape, and more delimited by the constitutional right of free speech, and generally reflecting some rather different social concerns in the modern American environment than in the original Warren and Brandeis conception.[37]

Another important American development was the 'misappropriation doctrine of the 1918 *International News Service v Associated Press* case.[38] In the wake of the First World War, a majority of the Supreme Court in this case used the Lockean language of 'reaping without sowing' to justify

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[35] Samuel Warren and Louis Brandeis, 'The Right to Privacy', (1890) 4 *Harvard Law Review* 193.

[36] For the classic catalogue of the torts in terms of intrusion upon seclusion, public disclosure of private facts (the closest tort to what Warren and Brandeis had in mind), false light publication, and appropriation of name or likeness, see William Prosser's article, 'Privacy', (1960) 48 *California Law Review* 383 and further *Restatement of the Law, Second, Torts* (St Paul, MN: American Law Institute, 1977), Division 6A.

[37] And see James Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty', (2004) 113 *Yale Law Journal* 1151.

[38] *International News Service v Associated* Press 248 US 215; 39 S Ct 68 (1918).