INTRODUCTION

Privacy law in the United States is frozen in amber; encapsulated in the four privacy torts that William Prosser first began to delineate in 1941.¹ Despite numerous articles and books that argue for a broader conception of

what is referred to as “information privacy law,” the law has failed to evolve sufficiently to address the threats to personal privacy posed by the Information Age. Indeed, as some have argued, the current state of privacy law in the United States reflects a retraction from the flexible concep-

2. This Article uses “information privacy” to mean the privacy of personal information and includes “an individual’s claim to control the terms under which personal information is acquired, used, and disclosed.” Jerry Kang, A Privacy Primer for Policy Makers, 1997 UCLA J.L. & TECH. 2, ¶ 4, http://www.lawtechjournal.com/archives/blt/1-jk.html [hereinafter Kang, A Privacy Primer]. See Jerry Kang, Information Privacy in Cyberspace Transactions, 50 STAN. L. REV. 1193, 1205 (1998) [hereinafter Kang, Information Privacy]; see also ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967) (information privacy is the “claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”).


4. See, e.g., JONATHAN KAHN, BRINGING DIGNITY BACK TO LIGHT: PUBLICITY RIGHTS AND THE Eclipse of the Tort of Appropriation of Identity, 17 CARDOZO ARTS & ENT. L.J. 213, 220 (1999) (“Warren and Brandeis, in first setting forth the right, were less concerned with protecting “privacy” per se, than with protecting a particular conception of human dignity embodied in the ‘spiritual nature of man’ , . . . ”); ROBERT C. Post, REREADING WARREN AND BRANDEIS: PRIVACY, PROPERTY AND APPROPRIATION, 41 CASE W. RES. L. REV. 647, 674 (1991) (noting that Prosser’s formulation of four privacy torts is narrower than the conception of privacy envisioned by Warren and Brandeis).
tion of privacy law that was articulated by Samuel Warren and Louis Brandeis in their famous 1890 law review article.5

The point of this Article is not to simply add another voice to the many that call for a broader conception of privacy.6 The proposed argument accepts that the current state of information privacy law in the United States is confusing and limited and should be better defined and broadened. The purpose of this Article is to explore why privacy law in the United States has failed to evolve and to identify a potential means for expanding the law of privacy so that it better protects personal information.7 The Article does


6. See, e.g., SOLOVE, THE DIGITAL PERSON, supra note 3, at 37 (arguing that Franz Kafka’s novella The Trial provides a better metaphor for privacy concerns than George Orwell’s novel Nineteen Eighty-Four); WESTIN, supra note 2, at 7; Randall P. Bezanson, The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990, 80 CAL. L. REV. 1133, 1135 (1992) (arguing for an expanded view of privacy based upon an individual’s control of information); Edward J. Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U. L. REV. 962 (1964) (arguing that, as envisioned by Warren and Brandeis, the right of privacy should not be limited or defined by the four torts identified by William Prosser, but that it is a unitary tort designed to protect an individual’s spiritual interests); Julie E. Cohen, Examined Lives: Informational Privacy and the Subject as Object, 52 STAN. L. REV. 1373, 1375-76 (2000) (arguing that our penchant for categorizing information privacy rights has constrained the development of privacy law); William J. Fenrich, Common Law Protection of Individuals’ Rights in Personal Information, 65 FORDHAM L. REV. 951 (1996) (arguing for judicial expansion of information privacy law); Charles Fried, Privacy, 77 YALE L.J. 475, 477 (1968); Graham, supra note 3, at 1396 (arguing that the common law should expand to “protect privacy rights from invasion in the information age”); Matthew C. Keck, Cookies, the Constitution, and the Common Law: A Framework for the Right of Privacy on the Internet, 13 ALB. L.J. SCI. & TECH. 83 (2002) (arguing for recognition of an information privacy tort); Andrew Jay McClurg, Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places, 73 N.C. L. REV. 989 (1995) (arguing for recognition of a fifth privacy tort); Reidenberg, Privacy in the Information Economy, supra note 3, at 236-44 (suggesting a new legal framework for the protection of personal information).

7. Personal information can be variously defined. Rochelle Cooper Dreyfuss defined it as “information generated for private reasons, but in public or semipublic spaces--information produced through such activities as surfing the internet, making purchases by computer or with computer-mediated payment methodologies (such as EZ Pass), or through appearances in public places surveilled by video cameras.” Rochelle Cooper Dreyfuss, Warren and Brandeis Redux: Finding (More) Privacy Protection in Intellectual Property Lore, 1999 STAN. TECH. L. REV. 8 ¶ 4. In a recent article, Katherine Strandburg chose to define personal information as “information ‘about’ a specific individual” and distinguished it from identifying information. Katherine J. Strandburg, Privacy, Rationality, and Temptation: A Theory of Willpower Norms, 57 RUTGERS L. REV. 1235, 1260 (2005). For the purposes of this Article, personal information is defined broadly to include personally identifiable information, information about an individual that they possess and that they may choose to share with others, and information about an individual that is collected by others. Doing so acknowledges that the nature of the information will be a factor in determining whether the information is “relatively private” and, therefore, deserving of legal protection.
so by comparing the development of information privacy law with the development of trade secret law.

This Article is not the first to recognize the connection between information privacy law and trade secret law. In her article *Privacy as Intellectual Property?*, Pamela Samuelson argues that certain aspects of trade secret law can be used to expand information privacy law so that it better protects personal information. As she notes, although the laws governing information privacy and trade secrets differ in many respects, they share three common interests:

[1] First, an interest in protecting the interest of the claimant to restrict access to and unauthorized uses of secret/private information; second, an interest in giving firms/individuals control over commercial exploitations of secret/private information; and third, an interest in setting and enforcing minimum standards of commercial morality.

For reasons that are explained in the discussion that follows, modern trade secret law has done a much better job of protecting these interests than has the law governing information privacy. The question is why? What can be learned from the procedural and substantive development of trade secret law which might lead to the broader conception of privacy law that the public and many legal scholars desire?

In Part I, this Article examines the development of both trade secret law and privacy law, from common law to their expression in the Restatement (Second) of Torts (hereinafter “the Restatement Second”). Many parallels exist between the development of trade secret law and privacy law in the United States. Both began at common law. Both were the subject of doctrinal disputes rooted in narrow conceptions of compensable injuries and equitable relief.

---


9. *Id.* at 1152.

10. In trade secret parlance, the first interest concerns the “acquisition” of information. The second interest has to do with how the information, even if properly acquired, is “disclosed or used.” The interest in protecting commercial morality is reflected in the definition of both “misappropriation” and “improper means.” See UNIF. TRADE SECRETS ACT § 1 (amended 1985).

11. See *infra* Part I.


13. See, e.g., *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 540 (1902) (argument of appellant’s counsel) (“An injunction cannot be granted in this case, for equity deals only with matters of contract or property, and does not exercise jurisdiction in matters of morals or conduct.”); *Sarat Lahiri v. Daily Mirror, Inc.*, 295 N.Y.S. 382, 384 (N.Y. Sup. Ct. 1937) (“[C]ourts of law had provided remedies only for injuries to property rights, and the mental anguish caused one individual by another was irremediable . . . .”).
proven difficult to define. Finally, both areas of law struggled with the need to balance competing interests. What distinguishes modern trade secret law from the current state of information privacy law are the procedural and substantive ways in which these issues were addressed.

In Part II, this Article discusses the procedural paths of each area of law. While trade secret and privacy law share similar beginnings, the paths of their development diverged in the 1960s. Where privacy law was the subject of categorization by one influential individual, trade secret law became the subject of an extensive examination by multiple committees of the American Bar Association (the ABA) and by the National Conference of Commissioners of Uniform State Laws (NCCUSL). Where William Prosser described what he believed the state of privacy law was, representatives of the ABA and NCCUSL considered what the law of trade secrets should be. In the process, many of the definitional and doctrinal debates that surrounded trade secret law, and which still plague the law of privacy, were resolved.

As William Prosser explained in *Handbook on the Law of Torts*, due to the limited availability of damages for mental suffering:

> [Privacy cases] are now confined within rather narrow limits, since the tendency has been, as in other cases of mental disturbance, to find some other basis of liability, such as defamation, breach of an express or implied contract, or the invasion of some property right, upon which to base the action. There remains a restricted field in which privacy becomes important because no other remedy is available.

*Prosser, Law of Torts*, supra note 1, at 1054 (citation omitted). See also James H. Barron, *Warren and Brandeis, The Right to Privacy*, 4 Harv. L. Rev. 193 (1890): Demystifying a Landmark Citation, 13 Suffolk Univ. L. Rev. 875, 882 n.33 (1979) (noting that by arguing that the harm suffered from an invasion of privacy was emotional, Warren and Brandeis placed privacy law squarely within the debate concerning the availability of damages for emotional distress). As indicated by the author of an early treatise on trade secret law: “So long as unfair practices have to be treated by legal concepts of property rights in general, arguments will be made that if rights cannot properly be classified as ‘property,’ they are not rights cognizable at law or in equity.” *Ridsdale Ellis, Trade Secrets* § 6 (1953) (citing Notes, *Equitable Protection of Trade Secrets*, 23 Colum. L. Rev. 164 (1923); Sachs v. Cluett, Peabody & Co., 31 N.Y.S.2d 718 (N.Y. 1941)).


16. See infra Part II.

17. For a discussion of the property/not property debate as it relates to trade secret law, see Samuelson, *supra* note 8, at 1104 n.227. A number of legal scholars have advanced the argument that the best way to protect personal information is by giving individuals a
In Part III, this Article examines the substantive divergence of trade secret and privacy law. It asks, why does U.S. law protect business information to a greater degree than personal information? The Article contends that this inadequacy is the result of three features of U.S. privacy law: (1) the misapplication of the expectation of privacy doctrine, (2) the abandonment of a focus on relationships, and (3) a narrow vision of actionable wrongdoing.18 Trade secret law does not share these same faults. Instead, the effectiveness of modern trade secret law is due to the development of the relative secrecy doctrine, a balanced focus on relationships, and a definition of misappropriation that includes the acquisition, disclosure, and use of trade secret information.19

Ultimately, the Article argues that privacy law can be expanded and improved by following both the procedural and substantive paths of trade secret law. We need not wait for the common law to provide better protection for personal information. Because privacy law has developed to a point where its strengths and weaknesses can be identified,20 lawmakers can and should adopt a uniform law or federal statute that resolves all lingering debate.21 Following the model of trade secret law, it can be determined which interests to protect, the necessary elements of an invasion of those interests, and the appropriate remedies.22 In the same way that trade secret rights are property right in such information. See, e.g., Patricia Mell, Seeking Shade in a Land of Perpetual Sunlight: Privacy as Property in the Electronic Wilderness, 11 BERKELEY TECH. L.J. 1, 26-41 (1996); Paul M. Schwartz, Property, Privacy, and Personal Data, 117 HARV. L. REV. 2055, 2126-28 (2004). This debate is reminiscent of debates in the early days of trade secret law. See infra notes 26-40 and accompanying text.

18. In his article, Accounting for the Slow Growth of American Privacy Law, Rodney A. Smolla explores the same issue, concluding that privacy torts are generally strongest “when the laws are alloyed in some sense with property concepts.” 27 NOVA L. REV. 289, 321 (2002).

19. See infra Part III.

20. See James P. Nehf, Incomparability and the Passive Virtues of Ad Hoc Privacy Policy, 76 U. COLO. L. REV. 1, 4 (2005) (“Forty years of self-regulation supplemented by incremental, ad hoc privacy regulation have prepared fertile ground for exploration. Norms, preferences, and shared values are emerging. As more laws, standards, and policies about information privacy evolve, we will in time arrive at a consensus about our collective privacy preferences.”).

21. For specific proposals for a uniform law or federal statute, see Kang, Information Privacy, supra note 2, at 1267-71.

22. As with trade secret law, we need not resolve the property/not property debate surrounding privacy but can borrow aspects of various legal doctrines. For instance, one of the benefits of a statutory approach is that the common law’s narrow view of available remedies, particularly injunctive relief, can be circumvented. This has been accomplished not only in the Uniform Trade Secrets Act but also in the Lanham Act (15 U.S.C. §§ 1051-1141 (2000)), the Patent Act (35 U.S.C. §§ 1-376 (2000)) and the Copyright Act (17 U.S.C. §§ 101-1332 (2000)). But see eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837, 1839 (2006) (holding that the traditional four-factor test applied by courts of equity when considering whether to award injunctive relief also applies to disputes arising under the Patent Act).
not lost if they are subject to reasonable efforts to protect their secrecy, an individual’s privacy interests in personal information should not be lost if the disclosure of such information is similarly circumscribed. The context in which personal information is disclosed should matter, and, thus, the test for the protection of personal information should not be absolute privacy but “relative privacy.”23

I. THE COMMON LAW DEVELOPMENT OF TRADE SECRET AND PRIVACY LAW IN THE UNITED STATES

A. The Origins of Trade Secret Law in the United States

Trade secret law in the United States reportedly began in the mid-nineteenth century following the recognition of similar claims in England earlier in the same century.24 While the common law courts apparently agreed that the wrongful taking and use of a competitor’s secrets should be actionable, they disagreed about the doctrinal basis for such a claim.25 Commentators could not even agree on which theory was dominant.26

23. Other commentators have labeled this concept as “shared privacy” or “limited privacy.” See Mary I. Coombs, Shared Privacy and the Fourth Amendment, or the Rights of Relationships, 75 CAL. L. REV. 1593 (1987); Strandburg, supra note 8, at 1298. This Article uses the term “relative privacy” in order to highlight the fact that trade secret law already recognizes the concept of shared information.

24. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. a (1995). As noted in the Restatement:

The modern law of trade secrets evolved in England in the early 19th century, apparently in response to the growing accumulation of technical know-how and the increased mobility of employees during the industrial revolution. In the United States, the protection of trade secrets was recognized at common law by the middle of the 19th century, and by the end of the century the principal features of contemporary trade secret law were well established.


25. See supra note 13 and accompanying text.

26. Compare Mathias F. Correa, Protection of Trade Secrets, 18 BUS. LAW. 531, 531 (1963) (stating that unfair competition theory was the dominant theory) with Notes, Common-Law and Statutory Sanctions for Industrial Espionage – A Need for Revision, 52 IOWA L. REV. 63, 69 (1966) (“Breach of confidence is the theory most frequently relied upon in trade secret cases.”). The Restatement (First) of Torts rejects the property theory:

There is considerable discussion in judicial opinion as to the basis of liability for the disclosure or use of another’s trade secrets. Analogy is sometimes found in the law of “literary property,” copyright, patents, trade-marks and unfair competition. The suggestion that one has a right to exclude others from the use of his trade secret because he has a right of property in the idea has been frequently advanced and rejected. The theory that has prevailed is that the protection is afforded only
One of the earliest trade secret cases in the United States was *Vickery v. Welch*[^27] involving the alleged breach of a promise to convey tenements and water privileges “together with [the] exclusive right and art or secret manner of making chocolate.”[^28] Opining that the value of the secrets factored into the price that the plaintiff agreed to pay for defendant’s business, the court read an implied duty of confidentiality into the sales agreement.[^29]

*Peabody v. Norfolk*[^30] is often credited with introducing property theory to trade secret analysis.[^31] Peabody alleged that he was the owner of a secret process for the manufacture of gunny cloth.[^32] When his employee quit and began making plans to build a factory to manufacture gunny cloth, Peabody sought to enjoin the defendant from disclosing secrets he learned while in Peabody’s employ.[^33] Although the case could have been decided on the basis of contract law since the employee had signed a confidentiality agreement, the court was sensitive to the limits of equitable relief under contract law and instead justified the grant of an injunction on the existence of a property right.[^34]

In *E.I. du Pont de Nemours Powder Co. v. Masland,*[^35] Justice Holmes rejected the property basis for trade secret law, emphasizing instead the

[^28]: Id. at 523.
[^29]: See id. at 524.
[^30]: 98 Mass. 452 (1868).
[^31]: See, e.g., Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241, 252 (1998) (identifying *Peabody v. Norfolk* as the case “credited with crystallizing the law of trade secrets in the United States”) (citing 1 MELVIN F. JAGER, TRADE SECRET LAW § 2.02 (1996)). Based largely upon *Peabody*, Professor Bone argues that the historical basis for trade secret law was a formalistic view of property: “[I]t is enough to note that late nineteenth century courts and commentators . . . reasoned formalistically from an ideal conception of ‘property’ linked to the concept of exclusive control.” Id. at 254.
[^32]: 98 Mass. at 452.
[^33]: Id. at 454.
[^34]: According to the Massachusetts Supreme Court in *Peabody*: If a man establishes a business and makes it valuable by his skill and attention, the good will of that business is recognized by the law as property. . . . If he invents or discovers, and keeps secret, a process of manufacture, whether a proper subject for a patent or not, he has not indeed an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it; but he has a property in it, which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons. Id. at 457-58.
[^35]: 244 U.S. 100 (1917).
confidential nature of the relationship between the plaintiff and defendant.\textsuperscript{36} Justice Holmes wrote, “The property may be denied but the confidence cannot be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them.”\textsuperscript{37} Apparently the concern with the property theory was that then-existing concepts of property were too narrow to sufficiently protect against perceived unscrupulous business tactics.\textsuperscript{38} The cases that eschewed the property theory were more concerned with the business ethics of employees and vendors than with the character of the information to be protected.\textsuperscript{39}

The first attempt to set forth a uniform explanation of the parameters and purpose of trade secret law is found in the \textit{Restatement (First) of Torts} (hereinafter “the \textit{Restatement First}”).\textsuperscript{40} The commentary to section 757 begins with a discussion of the strong public policy in favor of a “privilege to compete” which includes the right to copy the business methods, ideas and processes of competitors.\textsuperscript{41} Citing the limitations on the privilege to compete reflected in patent and copyright law, the comment noted that the law governing trade secrets is but “a further limitation on the privilege to copy when the thing copied is a trade secret.”\textsuperscript{42} In a statement that explains the early aversion to the property theory of trade secret law, the comment also noted that trade secret law is different from patent and copyright law because “[i]t is the employment of improper means to procure the trade secret, rather than the mere copying or use, which is the basis of the liability under the rule stated in this Section.”\textsuperscript{43}

\textsuperscript{36} \textit{Id.} at 102.
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Ellis, supra} note 13, § 6 (citing Notes, \textit{Equitable Protection of Trade Secrets}, 23 \textit{COLUM. L. REV.} 164 (1923); Sachs v. Cluett, Peabody & Co., 31 N.Y.S.2d 718 (Sup. Ct. 1941)); \textit{see also} \textit{Attorney’s Guide to Trade Secrets} § 1.5 (Carol S. Brosnahan ed., 1971) (“While the property concept is sometimes indispensable to theories of recovery, it is inadequate for all trade secret situations.” (citing \textit{Callmann, The Law of Unfair Competition, Trademarks, and Monopolies} § 51.1 (3d ed. 1967))).
\textsuperscript{39} As explained by Ridsdale Ellis, misappropriation of trade secrets was seen as just one example of unfair competition. \textit{See Ellis, supra} note 13, § 8. After reviewing the various bases for trade secret law that had been asserted by the courts, including property and contract law, Mr. Ellis concluded that the “true basis for protection of trade secrets is the prevailing public policy regarding fair dealing in business relationships.” \textit{Id.; see also} \textit{Int’l Indus., Inc. v. Warren Petroleum Corp.}, 99 F. Supp. 907, 913 (D. Del. 1951) (“The problem does not involve contracts, as such. . . . Rather, it is a question of the validity and equity of a defendant’s acts in receiving in confidence, pending the formulation of a contractual relationship, a disclosure of plaintiff’s product.”).
\textsuperscript{40} \textit{Restatement (First) of Torts} §§ 757-59 (1939).
\textsuperscript{41} \textit{Id.} § 757 cmt. a.
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.}
As expressed in the *Restatement First*, the early conception of a trade secret was fairly narrow because only information that was secret, non-ephemeral and used in a business was protected. What constituted “secret” information was left to be determined by the courts with guidance from the *Restatement* comments. In keeping with the common law’s desire to prevent unethical business practices, however, section 759 of the *Restatement First* provided a possible additional basis for recovery where a theoretically broader range of information was obtained by improper means.

In contrast to the law of privacy, which received a broadened treatment in the *Restatement Second*, trade secret law was excluded altogether. In fact, all chapters of the *Restatement First* that dealt with trade practices and labor disputes were excluded from the *Restatement Second*, because “these subjects have become substantial specialties, in their own right, governed extensively by legislation and largely divorced from their initial grounding in principles of torts.” One of the effects of this exclusion was to spur the development of a uniform law to govern trade secrets.

44. The *Restatement First* notes: [A trade secret] differs from other secret information in a business (see § 759) in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees. Generally, it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business. 

45. The *Restatement First* provides: An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one’s trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

46. Although section 759 of the *Restatement First* appears on its face to cover a broad range of information, it was intended to apply only to business information. *Id.* § 759 cmt. b (“There are no limitations as to the type of information included except that it relate to matters in his business.”). Moreover, comment b to section 759 acknowledges that for the disclosure or use of non-trade secret business information to cause harm “the information must be of a secret or confidential character.” *Id.*; see also Ramon A. Klitzke, *The Uniform Trade Secrets Act*, 64 MARQ. L. REV. 277, 286-87 (1980) (explaining why section 759 of the *Restatement First* is not as broad as it seems at first glance).


49. *See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS EIGHTY-EIGHTH YEAR* 236 (1979) (“In spite of this need, the most widely accepted rules of trade
B. The Origins of Privacy Law in the United States

The history of privacy law in the United States is often traced to an 1890 law review article by Samuel Warren and Louis Brandeis entitled *The Right to Privacy*.50 In that article, Warren and Brandeis cited a number of cases in support of the proposition that a right of privacy stems from the basic principle that individuals are entitled to “full protection in person and property.”51 After detailing previous instances where the scope of legal rights had broadened to meet new circumstances, they argued that “[r]ecent inventions and business methods call attention to the next step which must be taken for the protection of the person.”52

The brilliance of the Warren and Brandeis article was not only that it recognized and labeled a right to privacy, but also that it did so based upon an argument that existing law already provided for such a right.53 Relying upon the common law right to intellectual and artistic property, they argued that “[t]he common law secures to each individual the right of determining . . . to what extent his thoughts, sentiments, and emotions shall be communicated to others.”54 Such a right is different and broader than the rights that flow from copyright law and is an independent right that is not dependent upon property law or a breach of contract or confidence.55 The interest to be protected is what Warren and Brandeis labeled the right to “an inviolate personality.”56

The benefit of hindsight allows many commentators to cite *The Right to Privacy* as one of the most influential law review articles in the history of
the law. However, its immediate impact was not so clear. It took many
decades and a number of notable failures for most states in the United States
to recognize some form of a right of privacy. The first state to consider
whether an independent right of privacy exists was New York in Roberson v.
Rochester Folding Box Co. Plaintiff, a young woman of apparent
beauty, complained of the humiliation and nervous shock she suffered when
defendants distributed 25,000 advertisements for flour with her image be-
neath the caption “Flour of the Family.” On appeal from an interlocutory
judgment in favor of defendants, the court considered whether a cause of
action had been stated in either law or equity. Although cognizant of the
right of privacy advocated by Warren and Brandeis, the court ruled that it
was “without authority to legislate.” Reminiscent of early trade secret
cases, the court stated that the right of privacy must be premised on a prop-
erty right, a contract right, or a breach of trust.

Georgia was the first state to recognize an independent right of pri-
vacy, in Pavesich v. New England Life Insurance Co. Like the plaintiff in
Roberson, the plaintiff sued because his image had been used in an adver-
tisement without his permission. The appellate court carefully examined the arguments for and against recognition of a right of privacy and concluded that such a right should be recognized. The court explained, “The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence.” After quoting the dissent in Roberson and indicating surprise at the decision of the majority, the court in Pavesich predicted that “the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability.”

By late 1959, when the Connecticut Supreme Court considered whether to recognize a tort action for the invasion of the right of privacy, it noted that “a constantly increasing number of jurisdictions have recognized its independent existence.” As with trade secret law before the adoption of the UTSA, however, the law of privacy prior to 1960 was not a picture of clarity. While Warren and Brandeis argued that the right of privacy is an independent right, some courts were reluctant to grant any remedies unless there was a statute on the subject or some other wrong could be shown.

65. Id. at 81. The complaint also included a claim for libel because the advertisement included a quote misattributed to the plaintiff.
66. Id. at 68-69.
67. Id. at 69.
68. Id. at 81.
69. Korn v. Rennison, 156 A.2d 476, 477 (Conn. Super. Ct. 1959). It was not until the late 1990s that the Minnesota Supreme Court was presented with the question “[w]hether Minnesota should recognize any or all of the invasion of privacy causes of action” and decided to recognize three of Prosser’s four privacy torts. Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998).
70. See supra notes 24-34 and accompanying text.
71. For example, a 1931 decision of the California District Court of Appeals commented that “[a] reading of most of the decisions in jurisdictions recognizing this right [of privacy] leaves the mind impressed with the lack of uniformity in the reasoning employed by the various jurisists supporting it.” Melvin v. Reid, 297 P. 91, 91 (Cal. Dist. Ct. App. 1931).
72. See, e.g., Wright v. R.K.O. Pictures, Inc., 55 F. Supp. 639 (D. Mass. 1944) (refusing to recognize claim in the absence of an alleged libel); Melvin, 297 P. at 92 (“In practically all jurisdictions in which this right is not recognized, the decisions are based upon the lack of a statute giving the plaintiff the right to protect a likeness or an incident of life, since the ancient common law did not recognize such right.”). As explained by the court in Mau v. Rio Grande Oil:

In actions founded upon the right of privacy, conservative jurists shied at an intangible spiritual concept as a basis for their conclusions, so they resorted to fictions! The principle was sustained by the weight of authority upon various grounds, such as the right of property, breach of implied contract, breach of trust or confidence, etc.

Thus, a number of early privacy cases continued to be based upon property rights, an alleged breach of contract, or a breach of confidentiality.\textsuperscript{73} An early effort to address the lack of uniformity in the law of privacy occurred when the chapter entitled “Interference with Various Protected Interests” was included in the \textit{Restatement First}. A section entitled “Interference with Privacy” stated that “[a] person who unreasonably and seriously interferes with another’s interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.”\textsuperscript{74} It was not until the \textit{Restatement Second} that the right of privacy received its own chapter and a more complete treatment.\textsuperscript{75} By then, however, the description and subsequent development of privacy law in the United States was highly influenced by Professor William Prosser.\textsuperscript{76}

II. THE PROCEDURAL PATHS OF TRADE SECRET AND PRIVACY LAW

By the mid-twentieth century, the inclusion of both trade secret law and privacy law in the \textit{Restatement First} might have led one to believe that there was consensus concerning both the parameters and doctrinal bases of each area of law. In fact, not all states recognized a right of privacy and there was inconsistency among states concerning the proper scope of trade secret protection.\textsuperscript{77} How each area of law developed from thereon helps

\textsuperscript{73} See, e.g., McCreery v. Miller’s Groceteria Co., 64 P.2d 803 (Colo. 1937) (holding that an implied contract existed by which the photographer plaintiff hired agreed not make a commercial use of plaintiff’s photograph); Bennett v. Gusdorf, 53 P.2d 91 (Mont. 1936) (reporting case in which complaint was based upon implied contract between plaintiff and photographer); Klug v. Sherriffs, 109 N.W. 656 (Wis. 1906) (basing claim upon existence of contract); Brex v. Smith, 146 A. 34 (N.J. Ch. 1929) (recognizing a property right in bank records); Holmes v. Underwood & Underwood, Inc., 233 N.Y.S. 153 (N.Y. App. Div. 1929) (recognizing cause of action based upon implied contract between plaintiff and photographer); Munden v. Harris, 134 S.W. 1076 (Mo. Ct. App. 1911) (finding a property right in an individual’s picture); Woolsey v. Judd, 11 How. Pr. 49 (N.Y. Sup. Ct. 1855) (basing cause of action on existence of a property right); Lunceford v. Wilcox, 88 N.Y.S.2d 225 (N.Y. City Ct. 1949) (finding cause of action based upon express contract).

\textsuperscript{74} \textit{Restatement (First) of Torts} § 867 (1939).

\textsuperscript{75} \textit{Restatement (Second) of Torts}, § 652A (1977).

\textsuperscript{76} See Bloustein, supra note 6, at 964 (opining that William Prosser’s influence on the development of the law of privacy rivals that of Warren and Brandeis); Fenrich, supra note 6, at 972 (“American courts addressing privacy between private persons have been influenced largely by the work of Professor Prosser.”); Peter L. Felcher & Edward L. Rubin, \textit{Privacy, Publicity, and the Portrayal of Real People by the Media}, 88 \textit{Yale L.J.} 1577, 1582-83 n.35 (1979) (“While Warren and Brandeis created the idea of a right of privacy, Prosser was the major influence on its current formulation.”); Graham, supra note 3, at 1417-18 (“Prosser’s description of the law of privacy, and the conceptual structure built around his description, have been treated as legal gospel.”).

\textsuperscript{77} See supra notes 58-74 and accompanying text.
explain why the law of information privacy has failed to evolve beyond Prosser’s four privacy torts.

A. The Path of Trade Secret Law: The Uniform Law Process

Despite the efforts of the Restatement First to advance understanding of trade secret law and make its application more uniform, by the mid-twentieth century the divergence of views concerning the doctrinal basis of trade secret law persisted. One commentator went so far as to state that due to the “divergence of opinion found in the reported cases . . . . [i]t is almost as though each case were a case of first impression.” This may stem from the failure of attorneys and judges to accept the law of trade secrets set forth in the Restatement First. Or it may have been due to the emphasis that the Restatement First, Justice Holmes, and others placed on the improper conduct prong of trade secret law. Whatever the cause, the divergence of opinions prompted calls for a uniform law.

Discussion of a uniform law to govern trade secrets can actually be traced back to 1938 and the U.S. Supreme Court’s landmark decision in Erie Railroad Co. v. Tompkins. In that case, the Court held that there is no general federal common law, thereby wiping away the federal law of unfair competition that had developed to that point. Although the implications of

78. See supra note 39 and accompanying text; see also Theft of Trade Secrets: The Need for a Statutory Solution, 120 U. PA. L. REV. 378 (1971) in which it is stated: [T]he body of state and federal law that has traditionally coped with the problem languishes in a deepening maze of conflict and confusion. The English common law of trade secrets early found its way to America, but any hopes that it would evolve into a unified body died when Erie Railroad v. Tompkins relegated protection of trade secrets to the common or statutory law of several states.

80. In his article on the Uniform Trade Secrets Act, Ramon Klitzke hypothesizes that the failure of the Restatement First to effectuate uniformity in the law of trade secrets was due to two factors. First, since the Restatement is only “expository in nature,” judges are allowed to accept or reject what they see fit. Klitzke, supra note 46, at 282-83. Second, the Restatement First “treated some areas of trade secrets law inadequately, and others not at all.” Id. at 283 (citing damages as an example of an area treated inadequately, and the lack of a statute of limitations as an example of an area that did not receive treatment) (citation omitted). These same observations can be applied to the current state of privacy law.
81. See supra notes 35-39 and accompanying text.
83. 304 U.S. 64 (1938).
Erie were widespread, some commentators were particularly concerned about its potential effect on the law of unfair competition, due principally to the lack of uniformity in state concepts of unfair competition. Thus, even before the full ramifications of Erie were felt, commentators proposed federal and uniform laws of unfair competition which, in a number of instances, contained specific references to trade secrets.

In 1946, Congress responded to calls for a federal law of unfair competition by enacting the Lanham Act. However, because the Lanham Act was principally designed to address unfair competition as it related to the use of trademarks, it did not reach trade secret misappropriation claims. Still concerned about the effects of Erie, Edward S. Rogers wrote an article in 1948 in which he proposed that the Lanham Act be amended to include a broader conception of unfair competition. Among the listed acts of unfair competition was the act of “inducing disclosure of confidential information.”

Prompted by Mr. Rogers’ address to the group, the Committee on Trademarks and Unfair Competition of the Association of the Bar of the

The effect of [the Erie] decision was to nullify the whole body of well-reasoned federal common law on unfair competition. . . . The result of Erie, in the field of unfair competition, has been a bewildering hodgepodge of conflicting decisions which defies harmonization into a uniform national body of law.

Id. 85. See, e.g., Louis Kunin, supra note 82; Chafee, supra note 82, at 1299 (“Whatever the merits of the Tompkins case in other respects, it seems to me very damaging to the law of Unfair Competition.”); Edward S. Rogers, New Concepts of Unfair Competition Under the Lanham Act, 38 TRADEMARK REP. 259, 263 (1948), reprinted in 54 TRADEMARK REP. 752 (1964).

86. See, e.g., Herbert David Klein, The Technical Trade Secret Quadrangle: A Survey, 55 NW. U. L. REV. 437 (1960); Rogers, supra note 85.


88. See the Lanham Act (also known as the Trademark Act of 1946), July 5, 1946, c. 540, 60 Stat. 427.

89. See Rogers, supra note 85. The proposed law began with a flexible definition of unfair competition and then, in section 2, attempted to define the acts “in trade or business” that “shall be deemed to be unfair competition.” Id. at 271.

City of New York began work on a plan to implement his ideas. The resulting legislation, the so-called “Lindsay Bill,” was introduced in every session of Congress from 1959 to 1965 and received its one and only hearing before the House Committee on Interstate and Foreign Commerce on June 16, 1964. Although the legislation did not specifically mention trade secrets, it contained a broad catch-all provision that could encompass trade secret principles.

It is unclear why the Lindsay Bill did not receive a hearing until years after its initial introduction, but the hearing in 1964 may have been prompted by the U.S. Supreme Court’s decisions in *Sears, Roebuck & Co. v. Stiffel Co.* and *Compco Corp. v. Day-Brite Lighting, Inc.* In those cases, the Court held that federal patent law preempted state unfair competition claims brought to prevent the copying of unpatented products. Like the *Erie* case before them, the holdings in the *Sears/Compco* cases sparked a flurry of activity among the intellectual property bar. Efforts to address

91. Louis Kunin, *The Lindsay Bill Before and After the Stiffel Case*, 54 TRADEMARK REP. 731, 736 (1964), citing Rogers, *supra* note 85 (“Federal unfair competition legislation to counteract the effects of *Erie* was suggested by Mr. Edward S. Rogers speaking before the Practising Law Institute at New York City in 1947.”).

92. See H.R. 7833, 86th Cong., 1st Sess. (1959); H.R. 4590, 87th Cong., 1st Sess. (1961); H.R. 10038, 87th Cong., 2d Sess. (1962); H.R. 4651, 88th Cong., 1st Sess. (1963); H.R. 5514, 89th Cong., 1st Sess. (1965). The legislation was called the Lindsay Bill because it was introduced by Congressman John Lindsay of New York. *See also* Sidney A. Diamond, *The Proposed Federal Unfair Commercial Activities Act*, 52 TRADEMARK REP. 104 (1962); Walter J. Derenberg, *The Seventeenth Year of Administration of the Lanham Act of 1946*, 54 TRADEMARK REP. 655, n.8 (1964). As explained by one of the witnesses who testified in favor of the bill, the legislation was intended to address three needs:

(a) a sore need to fill-in missing gaps in existing remedies against unfair commercial activities, (b) a need for modernizing these remedies to cope with drastic changes that have been going on all about us in the field of interstate commerce, and (c) a need for encouragement to reputable businessmen who are bewildered and puzzled by the failure of present law to provide relief commensurate with the shifting wrongs which they are encountering in their day to day business activities.


93. See H.R. 4651.


95. 376 U.S. 234 (1964).

96. See *Sears*, 376 U.S. at 231 (“To allow a State by use of its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public.”); *Compco*, 376 U.S. at 237 (“[W]hen an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article.”).

97. The 1964 Committee Reports of the Section of Patent, Trademark and Copyright Law of the ABA (“the PTC Section”) indicate that the activities of Committee 402 were focused on enactment of a Federal Unfair Competition Act. *See Unfair Competition*, 1964 A.B.A. SEC. PAT., TRADEMARK & COPYRIGHT L. COMMITTEE REP. § 402, at 109 (“The Com-
the perceived wrongs of Sears/Compco not only included continued support for the Lindsay Bill and the subsequent but similar “McClellan Bill,”
98 but also fueled interest in legislation to limit the application of the Sears/Compco doctrine.99

It is against this backdrop that in 1966 two committees of the PTC Section of the ABA began to examine the need for a uniform trade secrets law.100 NCCUSL first got involved with the project on February 17, 1968

mittee believes enactment of this legislation will place federal unfair competition law on an equal footing with federal patent law, thus resolving the federal-state conflict that prompted in part the decisions of the Supreme Court in Sears . . . and Compco . . . .") (report of Louis Kunin, Chairman, Comm. 402).

The 1966 Committee Reports contain a good history of ABA efforts in support of a federal unfair competition law. See Unfair Competition, 1966 A.B.A. SEC. PAT., TRADEMARK & COPYRIGHT L. COMMITTEE REP. § 402, at 126 (report of Dayton R. Stemple, Jr., Chairman, Comm. 402). The 1971 Committee Reports state that in 1969, the following resolution was adopted:

RESOLVED, that the Section of Patent, Trademark and Copyright Law favors in principle enactment of legislation making it plain that the patent laws of the United States are not to be construed to pre-empt or to affect state or other federal law relating to inventions not covered by patents or to either trade secret or other unfair competition law, or to contract law.


98. After the Lindsay Bill failed to advance through Congress, Senator McClellan took up the cause for an expanded federal law of unfair competition. The McClellan Bill would have added the following two provisions to section 43(a) of the Lanham Act:

(4) results or is likely to result in the wrongful disclosure or misappropriation of a trade secret or other research or development or commercial information maintained in confidence by another, or (5) results or is likely to result in misappropriation of quasi-property of another, not otherwise protected by Federal statute . . . .


99. See S. 2756, 91st Cong., 1st Sess., § 301 (1969) (“This title shall not be construed to preempt, or otherwise affect in any way, contractual or other rights or obligations, not in the nature of patent rights, imposed by State or Federal law on particular parties with regard to inventions or discoveries, whether or not subject to this title.”).

100. The two committees were Committee 107 and Committee 402. See Protection of Confidential Rights and Know-How, 1967 A.B.A. SEC. PAT., TRADEMARK & COPYRIGHT L. COMMITTEE REP. § 107, at 59 (report of James M. Heilman, Chairman, Comm. 107) [hereinafter Protection of Confidential Rights 1967]; Trade Secrets, Interference with Contracts and Related Matters, 1967 A.B.A. SEC. PAT., TRADEMARK & COPYRIGHT L. COMMITTEE REP. § 402, at 140 (report of Robert E. Isner, Chairman, Comm. 107). In 1966, Committee 107 recommended “in recognition of the increasing state legislation and some court decisions dealing with this subject,” that the ABA study the advisability of a uniform state law for the protection of trade secrets. Protection of Confidential Rights and Know-How, 1968 A.B.A. SEC. PAT., TRADEMARK & COPYRIGHT L. COMMITTEE REP. § 107, at 68 (report of Ernest Fanwick, Chairman, Subcomm. A). By the 1967-68 Report of Committee No. 402, the name of the Committee had changed from “Unfair Competition” to “Trade Secrets, Interference with Contracts, and Related Matters.” From the defined scope of the committee, it is clear that its
when the PTC Section presented it with a proposed act. At that time, the Subcommittee on Scope and Program of NCCUSL reported that there were at least three impediments to the enactment of a uniform trade secret law. First were the ongoing legislative efforts at the federal and state levels. Second was disagreement about how to protect trade secrets without conflicting with the federal policy of encouraging public disclosure of innovation. Third was the ABA’s continued study of the issue.

oversight was narrowed to focus on trade secret issues. See Trade Secrets, Interference with Contracts and Related Matters, supra, § 402, at 140.

In 1968, the PTC renewed its support for a uniform trade secret law when it adopted the following resolution: “RESOLVED That the Section of Patent, Trademark and Copyright Law favors in principle a uniform state law for the protection of trade secrets.” Protection of Confidential Rights and Know-How, supra, § 107, at 68. Committee 107 also had a relevant charge. It was labeled “Protection of Confidential Rights and Know-How” and purportedly addressed issues not previously (or frequently) addressed by an ABA Committee. See Protection of Confidential Rights 1967, supra, § 107, at 59 (“In spite of these periodic efforts on the part of the ABA, it was felt that particular emphasis needed to be placed on a study of the problems surrounding the resignation of a technically trained employee.”) (report of Ernest Fanwick, Chairman, Subcomm. A).

101. The 1971 Report of the PTC Section describes how the proposed uniform trade secret act was presented to NCCUSL for consideration:

In 1968 a resolution was adopted by the Section favoring in principle a uniform state law for the protection of trade secrets. . . . Pursuant to the above resolution, the National Conference of Commissioners on Uniform State Law authorized a Special Committee to prepare a preliminary draft of proposed uniform civil and criminal law protecting trade secrets. Last year’s committee reviewed this preliminary draft, and offered certain comments and suggestions, following which the draft was revised. The entire effort of this year’s subcommittee has been directed to studying the revised working draft. . . . This subcommittee has prepared a revised draft. Mr. R.F. Dole, Jr., . . . has agreed to urge its serious consideration by the Special Committee and present our subcommittee’s recommendations.


103. See supra notes 91-93, 98-99 and accompanying text.

104. See supra notes 96-99 and accompanying text.

A draft uniform trade secret act was read to the members of NCCUSL for the first time on August 10, 1972. The subsequent delay from the first reading of the proposed act until the enactment of the UTSA in 1979 is explained, in part, by conflicting decisions in two lower federal courts cases, *Painton & Co. v. Bourns, Inc.* and *Kewanee Oil Co. v. Bicron Corp.* Because of the preemption issues raised by the Sears/Compco cases, serious doubt was expressed concerning the ability of states to enact trade secret legislation. It was not until the U.S. Supreme Court’s decision in *Kewanee* in 1974 that NCCUSL once again turned its attention to a uniform act to govern trade secrets.

106. The following four policy issues were raised at the first reading: (1) the extent to which the UTSA should be limited to tort based claims or also cover contractual restraints; (2) whether the UTSA should deal with duties arising from confidential relationships as well as duties associated with trade secrets; (3) the circumstances, if any, under which third parties should be liable for trade secret infringement; and (4) whether a person who stole a secret before it became widely known should be subject to sanctions after the secret becomes widely known. *Nat’l Conference of Commissioners on Unif. State Laws, Proceedings: Uniform Trade Secrets Protection Act (1972).*

107. 442 F.2d 216 (2d Cir. 1971). The court rejected the argument that enforcement of an express trade secret agreement was preempted by federal patent law. *See id.* at 223-25.

108. 478 F.2d 1074 (6th Cir. 1973). In the 1973 Summary of Proceedings of the PTC Section, reference is made to the “recent” decision of the Sixth Circuit in *Kewanee Oil Co. v. Bicron Corp.* and the desire of many members for the ABA to file an amicus brief seeking to have the decision overturned. *See* 1973 A.B.A. Sec. of Pat., Trademark & Copyright L. Summary of Proc. 141 (“Immediately upon learning of the decision of the 6th Circuit Court of Appeals [in *Kewanee Oil*], Council had been circulated to see whether the ABA (if we could get their approval) should file a brief amicus in support of the writ of certiorari. Council unanimously approved taking that action.”).

109. The 1971 report of Committee 402 of the PTC states that “[m]uch of the assigned area of Committee 402 involves the subject of trade secrets which currently falls under the shadow of the Lear and Painton cases.” *Trades Secrets 1971, supra* note 105, § 402, at 215 (report of Neil M. Rose, Chairman, Comm. 402); *see also* id. at 224 (report of Henry E. Otto, Jr., Chairman, Subcomm. C) (“The future of our efforts and those of the Special Committee to urge adoption of a Uniform Trade Secrets Protection Act, will, of course, be in doubt unless and until the Congress enacts legislation negating any federal intent to preempt control over causes of action for unfair competition.”); *see also* Trade Secrets, Interference with Contracts, and Related Matters, 1974 A.B.A. Sec. Pat., Trademark & Copyright L. Committee Rep. § 402, at 254 (report of James R. Adams, Chairman, Subcomm. B) (noting that the activities of Committee 402 concerning the UTSA were on hold pending the outcome of *Kewanee*). Ultimately, while members of the Committee 402 continued to differ on various aspects of the proposed legislation, the Subcommittee Chairman concluded that the proposed legislation (a revised draft dated March 5, 1973) was in a condition to be considered by the full section. *See Trade Secrets, Interference with Contracts, and Related Matters, 1973 A.B.A. Sec. Pat., Trademark & Copyright Committee Rep.* § 402, at 179 (report of Henry E. Otto, Jr., Chairman, Subcomm. C).


111. The process was re-invigorated by Richard F. Dole, Jr., in his role as Chairperson of Subcommittee A of Committee 402 of the PTC Section when he wrote to the other members of the Subcommittee that “[o]ur project this year is to implement 1975 PTC Section...
NCCUSL ultimately adopted the Uniform Trade Secrets Act in August of 1979 and amended it in August of 1985. Since its adoption, forty-five states, the District of Columbia, and the U.S. Virgin Islands have adopted a version of the UTSA. Only New York, New Jersey, North Carolina, Massachusetts, and Texas have not adopted the UTSA.

B. The Path of Privacy Law: Prosser’s Four Privacy Torts

Unlike trade secret law, the purpose and optimal scope of privacy law were never the subjects of extensive study by the ABA or NCCUSL. This was undoubtedly due to the fact that trade secret issues arise not just in the context of litigation but also as part of the day-to-day business activities of a company. Because inventions that might be patented usually begin as trade secrets, trade secrets have long been the concern of attorneys hired to advise companies that are engaged in research and development. As the history of the UTSA reveals, many of these attorneys were involved with the ABA and became natural advocates for a uniform law to govern trade secrets.

Information privacy concerns are more personal and are unlikely to garner the attention of attorneys until there is a gross invasion of privacy. As a result, businesses have been largely unconcerned about the privacy of


112. UNIF. TRADE SECRETS ACT (amended 1985).
114. See id.
115. In the late 1970’s and early 1980’s, NCCUSL was involved in an examination of privacy issues related to government information practices, but the author could find no record of NCCUSL being involved in an examination of the four privacy torts delineated by Prosser. See Unif. Information Practices Code § 1-101, 13 U.L.A. 277 (1986).
117. See DONALD CHISUM, CHISUM ON PATENTS, § 602 (2005) (explaining that the statutory bar set forth in Section 102(b) of the Patent Act is triggered when an invention is disclosed through patenting, publication, public use, or public sale).
118. See supra notes 100-111 and accompanying text.
personal information. Instead of being the subject of a uniform law making process, privacy law was left to develop in accordance with common law tradition. As instances of alleged invasions of privacy arose, lawsuits were brought and the courts handling such disputes determined if, and under what circumstances, a remedy was warranted. In recognition of this development, the American Law Institute briefly discussed privacy law in the Restatement First.

Beginning in 1941 with the publication of his famous treatise, Handbook of the Law of Torts, William Prosser profoundly influenced the law, including the law of privacy. Unlike Warren and Brandeis, his brilliance is not found in arguing for a new or expanded theory of privacy law. Rather, his contribution resulted from his ability to organize and categorize legal principles that he asserted already existed in case law. As G. Edward White explained in his book Tort Law in America, “[c]onsensus’ thinking was . . . a characteristic of intellectual life in the mid-twentieth century” and “[t]he primary consequence for tort law of the emergence of consensus thought was a revived interest in doctrine.” The ability to discern doctrine and the purported elements of a cause of action from the disarray of numerous cases was what made Prosser so influential.

The seeds of what would ultimately become the four existing privacy torts were first detailed in the 1941 edition of Prosser’s treatise.

119. At about the same time that members of the ABA were spearheading the effort to adopt a uniform trade secret law, Arthur R. Miller began sounding the alarm about the impact of computer technology on privacy. See Miller, supra note 3. As Professor Miller noted in a 1992 speech, such pleas have been largely unfulfilled. See Arthur R. Miller, The Right of Privacy—A Look Through the Kaleidoscope, 46 SMU L. REV. 37 (1992).

120. See supra notes 58-73 and accompanying text.

121. See supra note 74 and accompanying text.

122. PROSSER, LAW OF TORTS, supra note 1.


124. Craig Joyce, Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy, 39 VAND. L. REV. 851, 857 (1986) (book review) (“Prosser’s genius was to acknowledge and identify the various interests to be balanced, while relentlessly asserting (and, by copious citations and deceptively simple illustrations, seeming to prove) that the results of the cases, on proper analysis, were but multiple, somewhat varied yet ultimately consistent examples of Prosser’s own general rules.”).


126. See PROSSER, LAW OF TORTS, supra note 1, at 1054-57 (listing intrusion upon the plaintiff’s sense of solitude, publicity which violates ordinary decencies, and appropriation of
Chapter 21 begins with the bold statement that “[t]he majority of the courts which have considered the question have recognized the existence of a right of ‘privacy,’ which will be protected against interferences which are serious, and outrageous, or beyond the limits of common ideas of decent conduct.” At the time, however, only seventeen states had considered the right of privacy and several of those states had expressly rejected the existence of such right.

By the time Prosser updated his treatise in 1955, he had become the Reporter for the Restatement Second. Both the second edition of his treatise and the Restatement Second reflect an expanded view of the law of privacy. Instead of the three privacy torts described in the first edition of his treatise, Prosser now identified four: (1) intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs, (2) public disclosure of embarrassing private facts about the plaintiff, (3) publicity which places the plaintiff in a false light in the public eye, and (4) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.
Unfortunately, Prosser’s writings on the subject of privacy did not follow the lead of Warren and Brandeis, or the ABA and NCCUSL Committees. There is little discussion of the appropriate scope of privacy law or of the competing interests at stake in formulating privacy policy.133 There is not even express recognition of the possibility that privacy law could continue to develop and evolve as it purportedly had done since 1890. Instead, Prosser’s writings on privacy are best described as a report on the current state of privacy law as determined by Prosser himself.

The reportorial nature of Prosser’s writing on privacy law is not surprising given his role as the Reporter for the Restatement Second. As is explained in the introduction to the first published volume of the Restatement series, the purpose of the American Law Institute’s work is “the preparation of an orderly restatement of the common law.”134 It is the job of a Restatement Reporter to review existing case law and statutes, and to prepare drafts of Restatement chapters that organize and explain existing law. Thus, unlike the uniform law process, the Restatement is not designed to make new law:

The sections of the Restatement express the result of a careful analysis of the subject and a thorough examination and discussion of pertinent cases—often very numerous and sometimes conflicting. The accuracy of the statements of law made rests on the authority of the Institute. They may be regarded both as the product of expert opinion and as the expression of the law by the legal profession.135

In 1960, when he published his article Privacy,136 Prosser could have escaped the confines of his duties as Reporter of the Restatement Second and more fully examined the purpose and appropriate scope of privacy law. Instead, the article is an expanded rendition of his earlier writings with much of its content borrowed directly from the first two editions of his treatise.137 An important difference between the article and his earlier treatises, however, was the way in which he described the state of privacy law. When Prosser first described the state of privacy law in 1941, he acknowledged that not all courts had considered the question of the existence of the right of privacy.138 By 1960, Prosser emphatically stated that “the right of privacy, in one form or another, is declared to exist by the overwhelming majority of American courts” and that “the holes in the jigsaw puzzle [of privacy law] have been largely filled in.”139

133. This weakness has been noted in a number of law review articles. See, e.g., Bloustein, supra note 6.
134. Restatement (First) of Contracts, at viii (1932).
135. Id. at xi-xii.
136. Prosser, Privacy, supra note 58.
139. Prosser, Privacy, supra note 58, at 386, 389.
What is not immediately obvious from Prosser’s description of the state of privacy law circa 1960 is that it had not yet fully developed. Rather, it was what one judge called a “haystack in a hurricane.”

Although many states recognized some form of action for the invasion of privacy, they had not all recognized the four privacy torts identified by Prosser. Nor is it obvious that many of the cases that Prosser cites in support of his categorization reveal a broader conception of privacy than his categorization would allow. This is not to suggest that Prosser’s efforts to identify and categorize various privacy torts were not helpful to our understanding of the law. Prosser did privacy advocates a favor by not limiting the right of privacy to one type of claim. But, by listing four privacy torts, without explicitly recognizing the possibility of other formulations, he perhaps unwittingly stunted the growth of privacy law.

There are some indications that if Prosser had not resigned as the Reporter of the Restatement Second in 1970, its provisions on privacy law may have been written to reflect a broader and more flexible view of privacy than his four privacy torts allow. Looking at the Restatement Second, however, it is clear that the American Law Institute’s view of privacy continues to be largely based upon the narrow view of privacy described in Prosser’s 1960 article. The only reference to the possibility of a broader conception of privacy is contained in the following comment:

141. Nearly one-third of the cases cited by Prosser were venued in New York. See Prosser, Privacy, supra note 58. In Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902), a New York court refused to recognize a cause of action for privacy in the absence of a statute. Thus, most of the New York cases cited by Prosser were based upon a statute that was adopted after the decision in Roberson. This statute established a limited version of only one of Prosser’s four privacy torts: the tort of misappropriation of one’s name and likeness. See, e.g., Kunz v. Bosselman, 115 N.Y.S. 650 (N.Y. App. Div. 1909); Jeffries v. N.Y. Evening Journal Publ’g Co., 124 N.Y.S. 780 (N.Y. Sup. Ct. 1910).
142. See, e.g., Pallas v. Crowley-Milner & Co., 54 N.W.2d 595, 597 (Mich. 1952) (“[R]ecovery is dependant upon a showing of an unreasonable and serious interference with [the right to privacy].”)
143. Oscar H. Gandy, Jr., Legitimate Business Interest: No End in Sight? An Inquiry into the Status of Privacy in Cyberspace, 1996 U. CHI. LEGAL F. 77, 125-26 (1996) (“T[he formulations provided by the Restatement (Second) of Torts (§ 652A) in 1977 that incorporated the perspective of William Prosser have generally resulted in a tort without substance.”); Graham, supra note 3, at 1411-12 (“Dean Prosser’s reduction of actionable privacy violations into four discrete categories . . . has resulted in the inflexible application of the common law of privacy to new situations.”).
[T]he four forms of invasion of the right of privacy stated in this Section are the ones that have clearly become crystallized and generally been held to be actionable as a matter of tort liability. Other forms may still appear, particularly since some courts, and in particular the Supreme Court of the United States, have spoken in very broad general terms of a somewhat undefined “right of privacy” as a ground for various constitutional decisions involving indeterminate civil and personal rights. . . . Nothing in this Chapter is intended to exclude the possibility of future developments in the tort law of privacy.\footnote{Id. § 652A. (emphasis added).}

Unfortunately for modern privacy advocates, this view of privacy has succumbed to the continuing influence of Prosser’s four privacy torts.

III. THE SUBSTANTIVE DIVERGENCE OF TRADE SECRET AND PRIVACY LAW

The foregoing examination of the procedural paths of trade secret and privacy law shows that, unlike trade secret law, information privacy law has not fully developed.\footnote{As described by Daniel Solove: Privacy law consists of a mosaic of various types of law: tort law, constitutional law, federal and state statutory law, evidentiary privileges, property law, and contract law. Privacy law is best described with the notion of the bricoleur—a person who uses whatever is at hand as a tool to solve problems.} In addition to—and as a result of—the different ways in which trade secret and privacy law developed, the substantive law of trade secrets and privacy also diverged. An examination of this divergence suggests that information privacy law can better protect personal information if it adopts three features of trade secret law: the relative secrecy doctrine, a balanced focus on relationships, and a broader view of actionable wrongdoing and actionable harm.\footnote{Professor Samuelson makes a similar point in her article Privacy as Intellectual Property?. See Samuelson, \textit{supra} note 8, at 1152-58.}

A. The Expectation of Privacy and Relative Secrecy

As a number of scholars have noted, one of the obstacles to securing privacy in the United States is that much of the discussion about privacy is focused on the concept of concealment.\footnote{See, e.g., Solove, \textit{The Digital Person}, \textit{supra} note 3, at 42; Dreyfuss, \textit{supra} note 7.} In his book \textit{The Digital Person}, Daniel Solove refers to this phenomenon as “the secrecy paradigm.”\footnote{See \textit{Solove, The Digital Person}, \textit{supra} note 3, at 42.}

“Under the [secrecy] paradigm, privacy is about concealment, and it is invaded by watching and by public disclosure of confidential information.”\footnote{\textit{Id.}}
The development of the secrecy paradigm, like privacy law itself, appears to be the product of happenstance and not of a reasoned and principled discussion of the desired scope of privacy protection. In their seminal article, Warren and Brandeis did not identify secrecy, or an expectation of privacy, as requirements of a privacy claim. To the contrary, by expressing concern about advancements in “instantaneous photographs,” they recognized that the right of privacy could attach to activities that were in public view.152 Similarly, when referring to personal correspondence they noted that a right of privacy may exist after it is disclosed to others: “No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully . . . .”153 To Warren and Brandeis, the issue is not simply whether the information has been disclosed, but whether social propriety demands that the information be treated confidentially.

A review of the three hundred plus cases that Prosser cites in his treatise and law review article also establishes that absolute secrecy was not a critical element of early privacy cases because many of those cases involved information that was disclosed to others. The numerous cases involving the alleged wrongful use of an individual’s name or likeness obviously involved information that was seen by others.154 Several cases involved claims for invasion of privacy when a photographer who had been hired to take portraits publicly disclosed them without the permission of his client.155 Some cases even recognized a privacy claim where the published photograph was taken of events occurring in public.156 Another group of cases found an

152. See Warren & Brandeis, supra note 5, at 195.
153. Id. at 201.
156. See, e.g., Leverton v. Curtis Publ’g Co., 192 F.2d 974 (3d Cir. 1951); Gill v. Curtis Publ’g Co., 239 P.2d 630 (Cal. 1952). In Gill v. Curtis Publishing Co., the plaintiffs alleged that their privacy had been invaded when a photograph of them was published in Ladies Home Journal in connection with an article about love at first sight. Although the photograph involved activity that occurred in public, the court refused to deny plaintiffs’ claims and reversed a judgment on the pleadings. Id. at 636. The court identified a number of factors to consider in determining whether the “public interest in the dissemination of
invasion of privacy where the recipient of personal correspondence published it without the permission of the author.157 An important feature of all of these cases is that the courts looked beyond the non-secret character of the information to determine if a privacy claim was stated.

Despite the breadth of the privacy tort envisioned by Warren and Brandeis, and which is revealed in many of the cases cited by Prosser, a significant number of courts have applied a vision of privacy that makes it difficult for individuals to protect personal information once it has been shared with others.158 Perhaps these courts misunderstood or did not agree with Warren and Brandeis’ broad vision of the right to privacy159 or, like the court in Roberson, they were unwilling to “legislate.”160 As suggested above, they may have been restricted by Prosser’s delineation of four privacy torts.161 Where the case involved events deemed newsworthy, the courts may have valued the public’s interest in news over the privacy interests of the plaintiff.162 Daniel Solove argues that privacy law was hampered in its development by what he calls “the Big Brother metaphor.”163 One reason for the narrow application of the right of privacy is what this Article calls the “Katz-effect”: the tendency of courts in privacy cases to focus on whether the plaintiff had a reasonable expectation of privacy.164


158. See infra notes 171-175 and accompanying text.

159. As explained in Waring v. WDAS Broadcasting Station, Inc.: The phrase “the right to privacy” is one that is easily misunderstood... It is not a protection only to those who “seek privacy,” in the usual sense of that word. One who comes into equity demanding protection of his right to privacy is not preliminarily required to show that he has tried to live the life of a recluse and to “hide his light under a bushel.” 194 A. 631, 644-45 (Pa. 1937), quoted in Lisowski v. Jaskiewicz, 76 Pa. D. & C. 79 (Pa. C. P. 1951).

160. See supra note 141.

161. See supra note 143.

162. See Smolla, supra note 18, at 297 (“[T]he tort of public disclosure of private facts is frustrated by the ‘newsworthiness’ defense.”).

163. Solove, Privacy and Power, supra note 147, at 1431.

164. See Karl D. Belgum, Who Leads at Half-Time?: Three Conflicting Visions of Internet Privacy Policy, 6 RICH J.L. & TECH. 1, ¶ 21 (1999) (“Plaintiffs repeatedly lose such cases upon a showing that the fact in question was already in the public domain...”); Strandburg, supra note 7, at 1298 (“Traditionally, there is an assumption of a single ‘public’ and thus rather minimal disclosures destroy any ‘expectation of privacy.’”); see also Lior Jacob Strahilevitz, A Social Networks Theory of Privacy, 72 U. CHI. L. REV. 919 (2005) (noting the need for a “coherent and consistent methodology for determining whether an
In *United States v. Katz*, the U. S. Supreme Court considered a challenge to the admissibility of evidence that was collected by law enforcement personnel via a wiretap installed on a public telephone. Until *Katz*, the key inquiry under Fourth Amendment jurisprudence was whether there was a physical invasion of a “constitutionally protected area.” The ruling in *Katz* shifted attention away from the location where the challenged search took place and toward the person whose information was collected. After *Katz*, the critical inquiry was whether the owner of the information had an actual or subjective expectation of privacy.

Ironically, although the expectation of privacy doctrine was used in *Katz* to expand the defendant’s zone of privacy, it is often applied to limit the types of information protected under the Fourth and Fifth Amendments. For instance, under Fourth Amendment jurisprudence, when a person voluntarily discloses information to a third party, the Fourth Amendment prohibition against unreasonable searches and seizures is not violated if the information is legally obtained from such third parties. Similarly, the Fifth Amendment privilege against self-incrimination is not violated when an individual’s personal records (even if maintained under a duty of confidentiality) are obtained from a third party. Based upon *Katz*

individual has a reasonable expectation of privacy in a particular fact that he has shared with one or more persons.”).

166. Id. at 348.
167. Id. at 350; see also *United States v. White*, 401 U.S. 745, 748 (1971), where Justice White explained that:

Until *Katz v. United States*, neither wiretapping nor electronic eavesdropping violated a defendant’s Fourth Amendment rights “unless there has been an official search and seizure of his person, or such seizure of his papers or his tangible material effects, or an actual physical invasion of his house ‘or curtilage’ for the purpose of making a seizure.”

Id. (quoting *Olmstead v. United States*, 277 U.S. 438, 466 (1928) and *Goldman v. United States*, 316 U.S. 129, 135-46 (1942)).
168. See *Katz*, 389 U.S. at 351-52 (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”) (citation omitted).
169. See id. at 361 (Harlan, J., concurring).
170. Coombs, *supra* note 23, at 1594 (“The courts have applied a narrow, individualistic conception of privacy, rooted in the right to exclude others, the right ‘to be let alone.’ Consequently, current [F]ourth [A]mendment law tends to ignore shared privacy . . . .”).
171. Id. (describing Fourth Amendment jurisprudence); see also *Hoffa v. United States*, 385 U.S. 293 (1966) (involving information given to a police informant); *Smith v. Maryland*, 442 U.S. 735 (1979) (involving information about phone numbers obtained from a phone company); *United States v. Miller*, 425 U.S. 435 (1976) (involving bank records obtained from defendant’s bank).
172. See *Couch v. United States*, 409 U.S. 322 (1973) (involving tax and business records given to the defendant’s accountant.)
and its progeny, plaintiffs in privacy cases understandably assert a bright line test: if personal information has been shared with others it cannot be the subject of a privacy claim.\(^{173}\) While this is arguably a misapplication of Katz,\(^{174}\) the argument has a superficial appeal.

By comparison, trade secret law is not limited by the expectation of privacy doctrine and the secrecy paradigm. Rather, the scope of protectable trade secrets expanded through the development of the doctrine of relative secrecy.\(^{175}\) According to the doctrine of relative secrecy, legal protection for trade secrets does not necessarily cease when information is disclosed to another. Rather, information can be protected as a trade secret even if it is known by multiple individuals or companies.\(^{176}\) As explained in a law review article which pre-dates the enactment of the UTSA:

---

173. See, e.g., Shulman v. Group W Prods., Inc., 955 P.2d 469, 491 (Cal. 1998) (holding that a triable issue of fact exists as to whether plaintiffs had an objectively reasonable expectation of privacy in the interior of a rescue helicopter but finding no expectation of privacy with respect to events occurring in public view); PETA v. Bobby Berosini, Ltd., 895 P.2d 1269, 1279 (Nev. 1995) (“In order to have an interest in seclusion or solitude which the law will protect, a plaintiff must show that he or she had an actual expectation of seclusion or solitude and that that expectation was objectively reasonable.”).

174. See Katz, 389 U.S. at 350 (“[T]he Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’ That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.”); see also Doe v. Mills, 536 N.W.2d 824, 831 (1995) (noting that it was error to blindly import Fourth Amendment analysis into the analogous common law tort of invasion of privacy). Even under Katz and its progeny, absolute privacy is not required. As explained by Justice Scalia in his concurrence in the case of O’Connor v. Ortega:

> It is privacy that is protected by the Fourth Amendment, not solitude. A man enjoys Fourth Amendment protection in his home, for example, even though his wife and children have the run of the place—and indeed, even though his landlord has the right to conduct unannounced inspections at any time.


175. This Article uses the term “relative secrecy” to mean a state of secrecy that is not “absolute” and believe that such definition is consistent with how most courts apply the concept. See, e.g., K-2 Ski Co. v. Head Ski Co., 506 F.2d 471, 473-74 (9th Cir. 1974). In his treatise, however, Roger Milgrim defines the term slightly differently:

> “Absolute” secrecy would be illustrated, at the extreme, by being known to only a single individual, but here, recognizing that a trade secret can be known by the employees of the owner, we employ “absolute secrecy” to denote matter known to only one enterprise and “relative secrecy” to denote that matter may be known to more than one competitor in a trade or industry, but not to all.

See ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 1.07. Regardless of which definition is used, once it is determined that information is not absolutely secret, the degree of secrecy that is required to maintain information as a trade secret must still be determined. Id. The fact that information is only disclosed to employees of a company is certainly a factor to be considered in determining whether the information is still a trade secret, but it is not necessarily determinative.

176. POOLEY, supra note 49, § 4.04[2][a] (“[T]he concept of ‘relative secrecy’ is actually quite simple and compelling: a secret remains protectable even when it is shared, so
Legal protection of data retained in absolute secrecy obviously poses no problem, since no one else has access to it. . . . The legal difficulties begin to arise when the secret does become known to others. Once this happens, the extent to which the law will recognize legal rights in the originator will depend upon the circumstances of disclosure. 177

In other words, the analysis is contextual and depends on a number of factors, not the least of which is the relationship that exists between the trade secret owner and the person(s) to whom the information is disclosed. 178

While the term “relative secrecy” is not used in the UTSA, the concept that information can be shared among a small group of individuals or companies without losing its trade secret status is reflected in a number of its provisions. First, in the definition of a trade secret, secrecy is defined as a condition where information is not generally known or readily ascertainable. 179 As explained by Roger Milgrim, the phrase “generally known” means “well known” or “commonly known to the trade in which the putative trade secret owner is engaged.” 180 Second, trade secret owners are not required to exercise all possible efforts to protect the secrecy of their information, but instead only those efforts that are “reasonable under the circumstances.” 181 Third, the person to whom information is disclosed is a factor to consider in determining both whether a trade secret exists and whether there was a misappropriation. 182

The relative secrecy doctrine, as applied to trade secrets, reflects a fact of life that is equally applicable to personal information: we live in a social and interactive community. Since we must engage with others, there are situations in which personal information must be shared. As explained by Daniel Solove, “Life in the modern Information Age often involves exchanging information with third parties, such as phone companies, Internet service providers, cable companies, merchants, and so on. Thus, clinging to the notion of privacy as total secrecy would mean the practical extinction of privacy in today’s world.” 183

In the case of trade secrets, the law is designed to facilitate limited disclosures, preferring the small-scale dissemination and use of trade secret information over an environment of ultra-secrecy. A similar line should be long as it hasn’t escaped into the mainstream of public knowledge.”); see also Tri-Tron Int’l v. Velto, 525 F.2d 432, 435 (9th Cir. 1975).


178. Id. at 7 (explaining that “limited disclosure” in the context of certain relationships does not destroy the trade secret status of information).

179. UNIF. TRADE SECRETS ACT § 1 (amended 1985). According to the Restatement (Third) of Unfair Competition, the question is whether the information is “sufficiently secret.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. f (1995).

180. MILGRIM, supra note 175, § 1.07[1].

181. UNIF. TRADE SECRETS ACT § 1 (amended 1985).

182. Id.

drawn for personal information. Individuals should not be required to choose between the life of a hermit and the life of a person with little or no control over the use of their personal information. In a manner similar to trade secret law, the types of information subject to privacy protection can be defined, as well as the circumstances under which such information can be used or disclosed without loss of protection.\footnote{See Lior Jacob Strahilevitz, Consent, Aesthetics, and the Boundaries of Sexual Privacy After Lawrence v. Texas, 54 DePaul L. Rev. 671, 683 (2005) (suggesting a limited commons regime for privacy law and noting that “in a plurality of states, disclosing information to a network of friends, relatives, and even some strangers, does not necessarily waive a plaintiff’s reasonable expectation of privacy for purposes of tort law.”).}

B. The Importance of Relationships

One of the ways that the relative secrecy doctrine is applied in practice is by paying attention to the relationships that exist between the trade secret owner and the persons to whom information is disclosed.\footnote{See Protection and Use of Trade Secrets, 64 Harv. L. Rev. 976 (1951) (listing various relationships in which a duty of confidence has been found). Some courts have actually focused on the relationships so much that they failed to ascertain if the information qualified as a trade secret. See, e.g., Smith v. Dravo Corp., 203 F.2d 369 (7th Cir. 1953); see also Futurecraft Corp. v. Clary Corp., 205 Cal. App. 2d 279 (Cal. Dist. Ct. App. 1962) (criticizing the court in Dravo for failing to recognize that the alleged trade secrets were generally known).} Generally, the closer the relationship, the easier it is for the trade secret owner to prove that he undertook reasonable efforts to protect his trade secrets.\footnote{See Poley, supra note 49, § 4.04[2][b] (“If evidence of a confidential relationship and secrecy is strong, courts may relax the requirement to show reasonable precautions.”) (citing Northern Electric Co. v. Torma, 819 N.E.2d 417, 428 (Ind. App. 2004)); see also Restatement (Third) of Unfair Competition § 39 cmt. g (“When other evidence establishes secrecy and the existence of a confidential relationship, courts are properly reluctant to deny protection on the basis of alleged inadequacies in the plaintiff’s security precautions.”).} Such relationships are not limited to express or implied contractual relationships but can include any relationship in which a duty of confidence can be implied.\footnote{An implied duty of confidence is not the same as an implied-at-law or implied-in-fact agreement of confidentiality. See Samuelson, supra note 9, at n.150; see also Mary Jane Morrison, I Imply What You Infer Unless You Are a Court: Reporter’s Note to Restatement (Second) of Contracts § 19 (1980), 35 Okla. L. Rev. 707, 708 (1982) (explaining the difference between a contract implied in fact and a contract implied in law). Breach of the former is a tort, while breach of the latter is a breach of contract. Obviously, the required elements of proof and remedies for each cause of action are different. See Sharon K. Sandeen, A Contract by any Other Name Is Still a Contract: Examining the Effectiveness of Trade Secret Clauses to Protect Databases, 45 IDEA 119, 145-50 (2005). Additionally, pursuant to Section 7 of the Uniform Trade Secrets Act, the common law cause of action for breach of an implied duty of confidence is subsumed in the UTSA, and thus, a plaintiff should not be allowed to state a separate cause of action for breach of confidence. See Unif. Trade Secrets Act § 7 (amended 1985).} The relationships that have given rise to a duty of confidence include the
employer/employee relationship,\textsuperscript{188} the relationship between purchasers and suppliers,\textsuperscript{189} the relationship between a licensor and licensee,\textsuperscript{190} and the relationship between partners and joint venturers.\textsuperscript{191} They also include more attenuated relationships, such as those between a trade secret owner and a prospective licensee,\textsuperscript{192} the seller and purchaser of the business,\textsuperscript{193} and between an inventor and a prospective manufacturer of an invention.\textsuperscript{194}

As stated in \textit{Burten v. Milton Bradley Co.}, “[a] confidential relationship generally arises by operation of law from the affiliations of the parties and the context in which the disclosures are offered.”\textsuperscript{195} In the \textit{Restatement (Third) of Unfair Competition}, it is stated that “A duty of confidence may . . . be inferred from the relationship between the parties and the circumstances surrounding the disclosure.”\textsuperscript{196} The court in \textit{Heyman v. AR. Winarick, Inc.} explained, “As the prospective buyer is given the information for the limited purpose of aiding him in deciding whether to buy, he is bound to receive the information for use within the ambit of this limitation.”\textsuperscript{197} If trade secrets are disclosed for a limited purpose to serve the interests of the trade secret owner, it is generally recognized that an implied duty of confidence arises that (1) prevents the information from losing its trade secret status and (2) renders the subsequent disclosure or use of the information a misappropriation.\textsuperscript{198}


\textsuperscript{190} See, e.g., Hyde Corp. v. Huffines, 314 S.W.2d 763 (Tex. 1958).

\textsuperscript{191} See, e.g., A.L. Labs, Inc. v. Philips Roxane, Inc., 803 F.2d 378, 381 (8th Cir. 1986).


\textsuperscript{195} 763 F.2d 461, 463 (1st Cir. 1985) (describing the circumstances under which a confidential relationship is established and distinguishing between express and implied obligations of confidentiality); see also \textit{Restatement (Third) of Unfair Competition }§ 41 (1995).

\textsuperscript{196} \textit{Restatement (Third) of Unfair Competition} § 41 cmt. b.

\textsuperscript{197} 325 F.2d. at 587.

\textsuperscript{198} See, e.g., Metallurgical Indus. Inc. v. Fourtek, Inc., 790 F.2d. 1195 (5th Cir. 1986) (involving the relationship between a company and the supplier of equipment); see also \textit{Unif. Trade Secrets Act} § 1 (amended 1985) (defining “misappropriation”).
Historically, relationships have also played a role in privacy law. Indeed, several cases cited by Prosser reveal that the relationship that existed between plaintiff and defendant was often the key to plaintiff’s recovery. Some of the cases involved casual business relationships, like those between an individual and the photographer who was hired to take photographs. Another line of cases concerned information that was disclosed in the course of medical treatment. A third group of cases involved the relationship between a letter writer and the recipient of the letters.

What the foregoing cases have in common, aside from the existence of a relationship, is that they reflect a sense of decorum and social propriety.

199. In describing the scope and nature of the right of privacy that they envisioned, Warren and Brandeis were careful to distinguish the right of privacy from claims of breach of confidentiality. Warren & Brandeis, supra note 5, at 207-11. This does not mean that relationships were not important. Rather, similar to concerns that were raised during the UTSA drafting process, Warren and Brandeis did not want privacy law to be limited by existing common law causes of action. They argued that “implying a term in a contract, or . . . implying a trust . . . is nothing more nor less than a judicial declaration that public morality, private justice, and general convenience demand the recognition of such a rule.” Id. at 210. While the existence of a relationship between the plaintiff and defendant was a factor to consider, they viewed reliance on a contract or trust as a fiction used to rationalize the outcome of a case. See id. Rather than relying on such fictions, Warren and Brandeis urged courts to view the right of privacy broadly. See id. at 210-11.

200. The focus on relationships that I refer to is the relationship that exists between the holder of the alleged privacy rights and the person or company to whom such information is disclosed. This is different from the relationships that are involved with so-called “relational privacy.” There the question is whether the right of privacy survives an individual’s death and, if so, whether a relative of a deceased person has standing to assert such privacy rights. Relational privacy also concerns the question of whether the relative of a deceased person has their own privacy rights in the image and story of the deceased. See, e.g., Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions, 10 COMM. L. & POL’Y 313 (2005).


202. See, e.g., Barber v. Time, Inc., 159 S.W.2d 291 (Mo. 1942); Simonsen v. Swenson, 177 N.W. 831 (Neb. 1920) (finding that disclosure of confidential information was privileged under the circumstances and that the hotel doctor was obliged by the general medical licensing statutes to keep the confidences of his patient); Munzer v. Blaisdell, 49 N.Y.S.2d 915 (N.Y. 1944) (involving alleged violation of New York statute prohibiting the disclosure of medical records).

that is often ignored in today’s digital environment. The question asked by the courts was not simply whether information was disclosed to others, but whether it was disclosed under circumstances where it would be considered inappropriate to disclose the information outside of the relationship.

As expressed by the court in Roberts v. McKee, “To give publicity wantonly to confidential correspondence meets with the prompt rebuke and merited condemnation of every one not lost to all honorable feeling. It is a death-blow to the best interests of civilized society itself, as well as to all the endearments of family and social intercourse.”

The foregoing cases also exhibit an innate understanding of the personal and social importance of confidential communications. Today, this instinctive appreciation of the need of individuals to freely express themselves in certain contexts is buttressed by a raft of literature describing the social and psychological benefits of privacy. Of particular importance to communications occurring in the context of various relationships, it has been noted that “persons develop and exercise the capacity for autonomy, and thus the capacity to form and fashion their identities, in the context of relationships.” As expressed by Jeffrey Rosen, “Privacy is necessary for the formulation of intimate relationships, allowing us to reveal parts of ourselves to friends, family members, and lovers that we withhold from the rest of the world. It is, therefore, a precondition to friendship, individuality, and even love.”

---

204. Katherine Strandburg has noted that “[t]he disclosure and dissemination of personal information about individuals within a community has traditionally been regulated by a nuanced system of social norms.” Strandburg, supra note 7, at 1259.

205. As noted by Warren and Brandeis, although the right to privacy generally ceases upon the publication of the facts by the individual, the circumstances surrounding the disclosure are important: “the important principle in this connection being that a private communication of circulation for a restricted purpose is not a publication within the meaning of the law.” Warren & Brandeis, supra note 5, at 218.

206. 29 Ga. at 163.

207. See, e.g., Baker, 97 N.E. at 109 (involving the private letters of Mary Baker Eddy, the founder of Christian Science).

208. As summarized by Professor Kang in his article Information Privacy in Cyber-space Transactions, there are at least four interests that are served by privacy law: (1) avoiding embarrassment; (2) constructing intimacy; (3) averting misuse; and (4) promoting dignity. See Kang, Information Privacy, supra note 2, at 1212-17; see also JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 11 (2000); Charles Fried, Privacy, 77 YALE L.J. 475, 480-83 (1968); Robert S. Gerstein, Intimacy and Privacy, 89 ETHICS 76 (1978); Kang, A Privacy Primer for Policy Makers, supra note 2, at ¶¶ 7-10; Joseph Kupfer, Privacy, Autonomy, and Self-Concept, 24 AM. PHIL. Q. 81 (1987); Jeffrey H. Reiman, Privacy, Intimacy, and Personhood, 6 PHIL. & PUB. AFF. 26 (1976).


210. ROSEN, supra note 208, at 11.
While trade secret law, prior to the UTSA, arguably overemphasized relationships,\(^{211}\) privacy law suffers from the opposite problem. Because of the secrecy paradigm and the *Katz*-effect, courts tend to focus so much on whether the information was disclosed that they ignore the context and purpose of disclosure. To solve this problem, privacy law can once again learn from trade secret law. Instead of ignoring relationships altogether, it should consider both the subject matter to be protected and the circumstances in which it is disclosed.\(^{212}\) As expressed by Lior Strahilevitz, privacy law should consider the social networks in which information is disclosed and the expectation of privacy that individuals have when disclosing information within those networks.\(^{213}\) This Article argues that a way to mediate between disclosures that destroy privacy and those that do not is to allow individuals the freedom to share personal information with others as long as the information remains relatively private.\(^{214}\) To accomplish this, we must define the relationships in which information can be disclosed without a loss of privacy.

C. A Different View of Actionable Wrongdoing and Actionable Harm

Another consequence of the secrecy paradigm is that it tends to focus attention on how information was acquired and whether it was improperly publicized. Therefore, it ignores problems associated with the ways in which personal information is used and disseminated.\(^{215}\) Of particular significance to privacy concerns related to databases, the tort of publication of

\(^{211}\) See Sandeen, *supra* note 187, at 129 (“The significance of the UTSA is not that it fundamentally changed the law of trade secrets from that which existed at common law, but that it was designed to re-focus attention on the character of the thing to be protected and, thereby, limit the cases in which a successful trade secret claim can be brought.”).

\(^{212}\) As expressed by Pamela Samuelson:
It is . . . an advance to realize that the propriety of collecting or processing personal data depends in part on context. For my doctor to send information about my medical condition to an insurance company so that it will cover the costs of treatment is appropriate, but for the doctor to give the same information to a prospective employer is inappropriate.
Samuelson, *supra* note 8, at 1172 (citation omitted); see also Bezanson, *supra* note 6, at 1174 (arguing for recognition of a breach of confidence tort to replace the existing privacy torts).

\(^{213}\) See Strahilevitz, *supra* note 164.

\(^{214}\) Professor Jerry Kang refers to this type of disclosure as being made in a “functionally necessary way.” See Kang, *Information Privacy, supra* note 2, at 1249.

\(^{215}\) See Solove, *Privacy and Power, supra* note 147, at 1431 (“Privacy law was developed largely to address privacy problems of disclosure and surveillance, and consequently was aimed at protecting secrets and concealed information.”); Solove, *The Digital Person, supra* note 3, at 43 (“The secrecy paradigm focuses on breached confidentiality, harmed reputation, and unwanted publicity. But since these harms are not really the central problems of databases, privacy law often concludes that the information in databases is not private and is thus not entitled to protection.”).
private facts is often limited by the requirement that the disclosed information be the subject of "publicity" as opposed to mere disclosure or use.\textsuperscript{216} As explained by the United States District Court for the District of Minnesota in \textit{C.L.D. v. Wal-Mart Stores, Inc.}, "'Publication[...] is a word of art, which includes any communication by the defendant to a third person. 'Publicity,' on the other hand, means that the matter . . . must be regarded as substantially certain to become one of public knowledge.'\textsuperscript{217}

As a result of this limitation, personal information that is collected by a business and subsequently used internally or shared confidentially with others may not support a claim of invasion of privacy.\textsuperscript{218}

Privacy law also tends to be limited by a narrow view of actionable harm. Although Warren and Brandeis viewed the invasion of the right of privacy as an independent tort that did harm to one’s emotional well-being, some courts have been reluctant to grant a remedy without proof of some property or monetary loss.\textsuperscript{219} In so doing, they cling to the antiquated notion that only economic harms deserve judicial redress.

At the time the UTSA was under consideration, trade secret law suffered from similar limitations. Courts disagreed about the scope and nature of available remedies, and about the types of activities that would constitute actionable wrongdoing.\textsuperscript{220} Concern was also expressed about the responsibility that third parties should have if they acquired trade secrets through no wrongdoing of their own.\textsuperscript{221} Rather than wait for the common law to develop in order to resolve these issues, the drafters of the UTSA chose to deal with them directly.\textsuperscript{222} They recognized it was not enough to simply discourage the improper acquisition of trade secrets.\textsuperscript{223} Because the relative secrecy doctrine allowed trade secrets to be shared with others without losing protection, it was recognized that the rightful recipients of trade secret informa-

\textsuperscript{216} See Reidenberg, \textit{Privacy in the Information Economy}, supra note 3, at 221-27 (describing the essential elements of Prosser's four torts.)

\textsuperscript{217} 79 F. Supp. 2d 1080, 1084 (D. Minn. 1999) (quoting \textsc{Restatement (Second) of Torts} § 625D cmt. a (1977)).

\textsuperscript{218} Interestingly, although database owners are quick to assert that the information they collect about individuals is not private, they treat their databases as trade secrets.

\textsuperscript{219} See Lawrence Friedman, \textit{Establishing Information Privacy Violations: The New York Experience}, 31 Hofstra L. Rev. 651, 653-55, 659-61 (2003) (discussing two New York cases in which actual harm to property or monetary loss was required to state a privacy claim).

\textsuperscript{220} See supra notes 78-82 and accompanying text.

\textsuperscript{221} Supra note 106. See also 1967 A.B.A. SEC. OF PAT. TRADEMARK AND COPYRIGHT L. REP. 61, 107 (detailing a proposed resolution to make it a crime to sell trade secrets of an employer to a third party).

\textsuperscript{222} See supra note 101 and accompanying text.

\textsuperscript{223} Supra notes 100, 105.
tion should be liable for the improper disclosure or use of the information.\textsuperscript{224} This included not only the public disclosure of trade secrets, but also the private use of trade secrets in a manner not authorized by the trade secret owner.\textsuperscript{225} Second, in recognition of the interest that trade secret owners had in maintaining the secrecy of their information, the UTSA allowed for the grant of injunctive relief without proof of economic harm.\textsuperscript{226} Whether or not the trade secret owner suffers actual damage, injunctive relief can be granted if the defendant has (or threatens to) improperly acquire, disclose or use plaintiff’s trade secrets.\textsuperscript{227}

By failing to extend privacy law to include the improper use of personal information, we have created an environment that encourages companies to collect and share personal information.\textsuperscript{228} One way to discourage this activity is to apply the broad view of actionable wrongdoing that is recognized under trade secret law. As is the case with trade secret law, the tort of invasion of privacy should not depend upon whether plaintiff’s privacy has already been destroyed. If the information that an individual provides to another is “relatively private,” then the actual or threatened improper use of such information should be enjoined.

IV. MODELING PRIVACY LAW AFTER TRADE SECRET LAW

The foregoing analysis of the procedural and substantive paths of privacy and trade secrecy law gives rise to at least two questions. First, should trade secrets and personal information be treated similarly under the law? Second, if we adopt a uniform law to govern information privacy, what should the details of the law be?

In examining the parallel development of trade secret and privacy law, this Article is not meant to suggest that the law governing information privacy should be identical to trade secret law. Due to differences that exist between trade secrets and personal information there are legitimate reasons for different substantive rules. What is being argued is that the basic structure of trade secret law and its procedural history provide a good model for the further development of information privacy law. The structure of trade secret law is commendable because it: (1) precisely defines the information to be protected, (2) respects how the information is likely to be used by its owner, (3) broadly proscribes the ways in which such information can be

\textsuperscript{224} See Unif. Trade Secrets Act § 1 (amended 1985) (misappropriation of trade secret is defined to include the improper acquisition, disclosure or use of a trade secret).

\textsuperscript{225} See id.


\textsuperscript{227} Id.

acquired and used by others, and (4) sets forth remedies that are focused as much on preventing wrongdoing as they are on compensating for resulting harm.

By using the uniform law process, it can be decided what information to protect, against what uses, and with what consequences. The key elements of a uniform information privacy law would include a definition section that defines personal information to include any information that can be used in connection with identity theft as well as information about a person, such as purchasing history. Next, the law should clearly specify the uses of personal information that are presumptively prohibited, including not only the wrongful acquisition of personal information but also the collection, aggregation and dissemination of personal information.

The immediate result of the foregoing provisions would be to shift the balance of power from the database industry to individuals and to make personal information less readily available.230 Because information sharing is important in many contexts, however, the uniform law should exempt certain uses of personal information (for instance, for purposes of credit scoring) under prescribed conditions. Pursuant to such exemptions, entities that have a legitimate need for personal information will be allowed to obtain it, but with the understanding that the use of such information for what Professor Kang refers to as “functionally necessary” purposes231 does not destroy the relative privacy of the information.

In order to put teeth in the law, a uniform information privacy law should provide for broad remedies, including injunctive relief and, perhaps, statutory damages.232 Although trade secrets and personal information may

---

229. See supra note 7.

230. See Fenrich, supra note 6, at 956 (noting that “[t]he balance of power between the direct marketing industry and the consumers upon whose information it depends is currently tilted strongly in favor of the marketers.”).

231. See Kang, Information Privacy, supra note 2, at 1271-72. Jerry Kang explains that: [T]he following uses [are] functionally necessary to executing a cyberspace trans- action: successful communication between parties; successful payment and delivery between parties, including accounting and debt collection through independent contractors; successful dispute resolution between parties, e.g., for a defective exchange of information, goods, or services; warnings to the individual of any defect or danger; maintenance of the information collector’s cyberspace infrastructure; protection of the collector from fraud and abuse; and adherence to governmental recordkeeping regulations, e.g., those required by tax laws.

Id.

232. Because the economic harm that is suffered by one individual whose personal information is wrongfully acquired or used may be small or non-existent (at least until such time as the information is wrongfully disclosed), statutory damages may be required in order to create a greater disincentive for engaging in the wrongful acquisition, use and disclosure of personal information. A similar policy choice was made under U.S. copyright law in
be valued for different reasons, nothing requires us to limit available causes of action to those that are designed to compensate for economic loss. Policymakers can, and often do, decide to provide remedies for non-economic loss, particularly when they want to discourage behavior they deem harmful. The broad remedies that are available to a plaintiff in a trade secret misappropriation are an example of this policy choice.

CONCLUSION

While there are differences between trade secret and personal information, there are sufficient similarities between the goals of trade secret and privacy law to justify similar rules. At their cores, both areas of law are designed to promote socially-appropriate behavior, and to protect information that society values. Due to the economic value of trade secrets, there are those who will scoff at the argument that business and personal information should be treated similarly. As others have noted, however, there are interests other than economics that should possibly be promoted with privacy policies. Moreover, as the foregoing history of trade secret and privacy law demonstrates, the fact that personal information is not currently protected as easily or as well as trade secrets is not the result of a conscious decision by policy makers to value economic interests over personal interests. It is the product of the incomplete development of privacy law.

There are at least three lessons that privacy advocates can learn from the development of trade secret law. First, the development of law at common law can only be relied upon to a point. If a widely-accepted and well-defined understanding of the law is needed, a more systematic process is required to properly define the scope and limitations of the area of law. Second, the privacy of the information to be protected by our laws need not be absolute. Given the need of individuals to share their information with others in a number of legitimate and socially beneficial contexts, the test for privacy should not be absolute privacy but only relative privacy. Rather than focusing on whether personal information has previously been disclosed, we should examine why and to whom it was disclosed. Third, the scope of actionable wrongdoing should not be limited to the wrongful acquisition of personal information. If individuals and companies are given access to personal information in order to facilitate a relatively private recognition of the fact that the act of copyright infringement is deemed to be against public policy even if it results in no economic harm. See 17 U.S.C. § 101 et seq.

234. See Kang, Information Privacy, supra note 2, at 1259-65; Friedman, supra note 219, at 602 (discussing deterrence rationale of privacy law).
235. See supra Part IV.
236. See supra Part III.A.
transaction, they should be liable for the subsequent disclosure or use of that information.237

237. See supra Part III.C.