THE RIGHT TO PRIVACY
Foundations of a Constitutional Debate

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Introduction

A citizen's legal right to privacy has been on the minds of citizens and legal officials for more than 120 years. One of the first important articles to discuss the origins of right-to-privacy law was written in 1890 by Boston lawyer Samuel Warren and future Supreme Court justice Louis Brandeis. In their article, Warren and Brandeis conduct a detailed review of historic British and U.S. "common law,"—laws based on court decisions rather than legislation—and conclude that it was time to create a new right-to-privacy law in the United States. They felt that American citizens deserve to be legally protected from commercial and corporate privacy invasions—in which a company or individual violates the privacy of another individual for profit or personal gain. With this, they advocated for "the right to be left alone."

Because this 1890 "The Right to Privacy" article was the legal start to the conversation about privacy rights in this country, it was chosen as the first document to analyze in this new work—*Opinions Throughout History: National Security vs. Civil and Privacy Rights*. The further you move through this volume, the more you will understand why Brandeis and Warren's article is one of the most often-cited law review articles in history and the arguments made by the authors in favor of privacy protections are still cited by jurists, scholars, and politicians debating the issue in the 2010s. It makes a clear, compelling argument about the right to privacy and, indeed, covers privacy from many angles—from health conditions to personal relationships to "processes of the mind." Most interesting, too, is that many of the issues written about in 1890 are still unresolved in 2018.

Topics covered in this chapter include:

- Journalism ethics and "fake news"
- Common law and statutory law
- Philosophy of privacy rights
- Commercial invasion of privacy

This Chapter Discusses the Following Primary Sources:

» Warren, Samuel D. and Louis D. Brandeis. "The Right to Privacy." *Harvard Law Review,* Vol. 4, No. 5. (Dec. 15, 1890), pp. 193-220.

1788 State legislatures ratify the U.S. Constitution, establishing the basic precedent for all future constitutional law

1791 The U.S. Congress ratifies the Bill of Rights, creating the first 10 amendments to the United States Constitution

The Right to Privacy
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In 1890, Boston attorney Samuel Warren and future Supreme Court justice Louis Brandeis published a now-famous review article, "The Right to Privacy," in an issue of Harvard Law Review. The article partially reprinted here, and the discussion about privacy rights that it ignited, would inform more than a century of debate and legislation. In later years government and state surveillance, and the need to balance privacy and national security, would sit at the center of the debate. When Warren and Brandeis wrote their seminal article, however, their main concern was to combat what they saw as the pervasive and invasive spread of tabloid journalism:

> ***To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.***

In the years leading up to Brandeis and Warren's article, several prominent court cases dealt with issues surrounding the publication of photos, personal details, and rumors about the lives of public figures. The problem was, in many ways, similar to the debate about "fake news" in the 2010s, in that (at least in Brandeis and Warren's opinion) the popular press of the era was guilty of publishing unsubstantiated rumor and gossip. Further, the two legal experts argued that, in pursuit of rumor and information for their articles, journalists were violating the privacy of the individuals and families targeted for exposés and articles.

In their article, Brandeis and Warren advocated for an approach to privacy defined first in an 1880 paper by jurist Thomas Cooley on tort law, in which Cooley defined privacy as a "right to be let alone."

1868 The Fourteenth Amendment to the U.S. Constitution guarantees all citizens the right to due process under the law

1890 Warren and Brandeis publish "The Right to Privacy" in the *Harvard Law Review*.

Guided by this somewhat folksy definition, Brandeis and Warren explored precedent laid out in "common law," a body of British legal principles derived from common custom and precedent, rather than established statutes. In the late nineteenth century, British common law was the basis for an extensive list of laws adopted by U.S. states covering a variety of issues, and so legal discussions in the nineteenth century tended to draw on common law arguments, especially where insufficient recent court decisions existed to justify arguments on an issue. They noted, in their discussion, that common law principles had already been used, in England, to generate a right to privacy without legislation or statute:

"THE RIGHT TO PRIVACY"

Harvard Law Review

Primary Source Excerpt

Lord Cottenham stated that a man "is that which is exclusively his," and cited with approval the opinion of Lord Eldon, as reported in a manuscript note of the case of *Wyatt v. Wilson*, in 1820, respecting an engraving of George the Third during his illness, to the effect that "if one of the late king's physicians had kept a diary of what he heard and saw, the court would not, in the king's lifetime, have permitted him to print and publish it;" and Lord Cottenham declared, in respect to the acts of the defendants in the case before him, that "privacy is the right invaded."

Building on precedent from common law, Brandeis and Warren utilized a concept of legal evolution to justify the argument that there should be a distinct legal framework for protecting privacy.

1923 Supreme Court case of *Meyer v. Nebraska* establishes that the liberties protected under the Fourteenth Amendment

1928 *Olmstead v. United States*

"The Right to Privacy" continued

Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible.

Thus, with the recognition of the legal value of sensations, the protection against actual bodily injury was extended to prohibit mere attempts to do such injury; that is, the putting another in fear of such injury. From the action of battery grew that of assault. Much later there came a qualified protection of the individual against offensive noises and odors, against dust and smoke, and excessive vibration. The law of nuisance was developed. So, regard for human emotions soon extended the scope of personal immunity beyond the body of the individual. His reputation, the standing among his fellow-men, was considered, and the law of slander and libel arose. Man's family relations became a part of the legal conception of his life, and the alienation of a wife's affections was held remediable. Occasionally the law halted, as in its refusal to recognize the intrusion by seduction upon the honor of the family. But even here the demands of society were met. A mean fiction, the action per quod servitium amisit, was resorted to, and by allowing damages for injury to the parents' feelings, an adequate remedy was ordinarily afforded. Similar to the expansion of the right to life was the growth of the legal conception of property. From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind, as works of literature and art, goodwill, trade secrets, and trademarks.

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations that came with the advancement of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth that characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

1934 The Federal Communications Commission (FCC) is established under the Federal Communications Act (FCA)

1942 *Goldman v. United States*

Essentially, Brandeis and Warren argued that the interpretation of other rights, such as the right to property and the freedom from injury, had demonstrated a gradual shift from literal, physical interpretation, to broader interpretations needed to protect the intangible assets of personhood. Property rights, which once referred specifically to physical property, had thus been expanded to cover, also, the ownership of ideas and what became known as "intellectual property." Similarly, the right to live free from injury was gradually expanded to include emotional injury and injuries to a person's professional or personal reputation, in the form of libel or slander.

"The Right to Privacy" continued

These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not be assaulted or beaten, the right not be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed—and (as that is the distinguishing attribute of property) there may some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.

If we are correct in this conclusion, the existing law affords a principle from which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for rewording or reproducing scenes or sounds. For the protection afforded is not confined by the authorities to those cases where any particular medium or form of expression has been adopted, not to products of the intellect. The same protection is afforded to

1945 The NSA secretly creates Project SHAMROCK

1950 Senator Joseph McCarthy delivers a shocking speech claiming that more than 200 communist spies have infiltrated the U.S. government

continued

emotions and sensations expressed in a musical composition or other work of art as to a literary composition; and words spoken, a pantomime acted, a sonata performed, is no less entitled to protection than if each had been reduced to writing. The circumstance that a thought or emotion has been recorded in a permanent form renders its identification easier, and hence may be important from the point of view of evidence, but it has no significance as a matter of substantive right. If, then, the decisions indicate a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.

Brandeis and Warren also recognized that there were certain conditions in which an individual could be seen as having forfeited his or her privacy rights. They recognized, for instance, that an individual who is a public figure must necessarily forfeit some of his or her rights against the publication of information, whether such information might be seen as private in other instances, when such information is in the public interest.

"The Right to Privacy" continued

There are persons who may reasonably claim as a right, protection from the notoriety entailed by being made the victims of journalistic enterprise. There are others who, in varying degrees, have renounced the right to live their lives screened from public observation. Matters which men of the first class may justly contend, concern themselves alone, may in those of the second be the subject of legitimate interest to their fellow-citizens. Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for public office. Some further discrimination is necessary, therefore, than to class facts or deeds as public or private according to a

"The Right to Privacy" continued

standard to be applied to the fact or deed per se. To publish of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly, is an unwarranted, if not an unexampled, infringement of his rights, while to state and comment on the same characteristics found in a would-be congressman could not be regarded as beyond the pale of propriety.

Although Brandeis and Warren's assertion that the right to privacy could be derived from common law, the authors argued that, "It would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law, but for this, legislation would be required." Essentially then, while Brandeis and Warren supported statutes to protect privacy, their argument, based on the facility of using available principles, was meant to argue for preexisting grounds to protect privacy in the courts.

On a more philosophical level, the definition of privacy as the "right to be let alone" or as a matter of "inviolate personality," speaks to a fundamental challenge in the effort to create and amend laws protect- ing privacy, and the difficulty in defining and elucidating the concept so as to render it vulnerable to legal protection. Brandeis and Warren's 1890 article also initiated a new branch of legal philosophy, dedicated to studying privacy as a right, claim, or value and to determining when and how legal protections were needed to protect the privacy of individuals in various situations. This effort evolved and expanded over time, with many different proposals on how to view privacy and its importance in human life.

In a 2002 analysis of the various legal conceptualizations of privacy, for instance, George Washington University Law School expert on privacy

law Daniel Solove cites one argument regarding the nature of privacy and the link between personal privacy and social/personal dignity:

> ***...social practices have developed to conceal aspects of life that we find animal-like or disgusting as well as activities in which we feel particularly vulnerable and weak. We scrub, dress, and groom our- selves in order to present ourselves to the public in a dignified manner. We seek to cover up smells, discharge, and excretion because we are socialized into viewing them with disgust. We cloak the nude body in public based on norms of decorum. These social practices, which relegate these aspects of life to the private sphere, are deeply connected to human dignity. Dignity is, in part, the ability to transcend one's animal nature, to be civilized, to feel worthy of respect. Indeed, one form of torture is to dehumanize and degrade people by making them dirty, stripping them, forcing them to eliminate waste in public, and so on. When social practices relating to dignity are disrupted, the result can be a severe and sometimes debilitating humiliation and loss of self-esteem.*** [1]

In the years leading up to Brandeis and Warren's article, several prominent court cases dealt with issues surrounding the publication of photos, personal details, and rumors about the lives of public figures. The problem was, in many ways, similar to the debate about "fake news" in the 2010s, in that (at least in Brandeis and Warren's opinion) the popular press of the era was guilty of publishing unsubstantiated rumor and gossip. Further, the two legal experts argued that, in pursuit of rumor and information for their articles, journalists were violating the privacy of the

1968 The Omnibus Crime Control Act holds that police needed to obtain a warrant before engaging in wire-tapping operations

1969 Joseph Licklider creates the Advanced Research Projects Agency Network (ARPANET), which was the forerunner of the Internet

individuals and families targeted for exposés and articles.

Philosophical critics, commenting on this ongoing debate, have even suggested that the concept of privacy itself might be largely illusory, and that there is, therefore, no legal way of defining the concept that satisfies the simultaneous needs of government and individuals. In Ancient Greece, for instance, there was no guaranteed right to privacy because the government itself was conceived of as existing in the "public interest" and, therefore, the right of the government to know all that was available about citizens was, too, seen as appropriate for the greater good.[2]

For many Americans, empowering the state to gather unfettered information on the lives of individuals, as the law allowed in ancient Greek democracy, might be seen as a violation of deeply held, if poorly defined, freedoms. Further, some privacy rights advocates have argued that a fundamental right to privacy should be considered part of a fundamental American creed. Touching on this common value and common inter- est concept of privacy, Brandeis and Warren argued that violations of privacy, however subjective the injury resulting from such violations, might be seen a violation of an individual's right to enjoy life and thus protected as an extension of the most basic and unalienable right to life and liberty promised by the U.S. Constitution.

Between 1890 and 2017, U.S. courts developed a framework for privacy rights by using sections of other rights granted in the Constitution and the Bill of Rights. Aspects of laws prohibiting unreasonable search and seizure, or governmental invasion of property, as well as protections of free speech, free expression, and free association, have been used, in concert, to justify and develop privacy laws. According to a 2012 study, Warren and Brandeis' article had been cited more than 3,600 times, making it the second-most-cited law review article of all time, and this demonstrates the scope of interest in the issue over the ensuing century.

As a Supreme Court Justice, between 1916 and 1939, Brandeis had the opportunity to apply his legal arguments to the evolving debate over privacy law in the courts. Over the years, the debate evolved beyond (though still including) the allegations of corporate privacy violations (like the tabloids reviled by Brandeis and Warren or the debate over Facebook and other Inter- net companies selling customer data in the 2010s), to include a debate over violations by the state when attempting to combat crime or ensure public safety. This goal, balancing national security and civil rights, is a fundamental strain in legal and public policy debate throughout the twentieth and twenty-first centuries, resulting in landmark court cases, contentious and even violent public debate, and years of congressional compromise and conflict, reflecting the broader, underlying evolution of American values.

1974

- The Watergate Scandal results in the revelation that the CIA had been conducting widespread surveillance of American dissidents and foreign leaders without judicial oversight
- The Privacy Act is established

CONCLUSION

Warren and Brandeis' article was influential in early 1900s court cases regarding privacy rights and played a major role in later debates (in the 1960s) over whether or not there was a constitutional right to privacy inherent in the Bill of Rights. The primary issue for the authors was to protect citizens from commercial or corporate privacy invasions—in which a company or individual violates the privacy of another individual for profit or personal gain. Commercial violations of privacy became a major issue in the 2000s and 2010s as part of the national debate over the "data economy" in which companies like Facebook, Google, and Twitter collect data on users and sell data to advertisers and other entities for profit. It is important to note that, though the Warren and Brandeis article was published in 1890, many of the issues raised by the authors have yet to be resolved in US culture or law.

1975 Senator Frank Church leads of series of hearings about the secret NSA SHAMROCK operation in place since 1945 that involved intercepting communications from American citizens

1978 Congress passes the 1978 FISA Act

DISCUSSION QUESTIONS

- Do modern journalists invade the privacy of their subjects?
- What is the difference between tabloid journalism and other kinds of journalism?
- Do social media companies, like Facebook and Twitter, violate the privacy of consumers?
- Are Brandeis and Warren's arguments still relevant in the 21st century?

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