

# BRANDEIS LAW JOURNAL

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Louis D. Brandeis: An Inspiring Life

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Celebrating the 100th Anniversary of Louis D. Brandeis's Appointment to the U.S. Supreme Court

## ESSAYS

**Analyzing the Birth of "The Right to Privacy" and the  
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THEN & NOW

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# Analysing the Birth of "The Right to Privacy"<sup>1</sup> and the Process Behind its Legal Justification

G. Amogha Rao\*

In the year 1890, Samuel D. Warren and Louis D. Brandeis, both Boston-based lawyers, co-authored an article titled "The Right to Privacy." This was, perhaps, the first time in the history of the common law that such a right was being formalised with an accompanied legal rationalisation. While notable legal scholars of the 20<sup>th</sup> century, the likes of Roscoe Pound, have credited the authors for "adding a chapter to [the] law"<sup>2</sup>, the greater contribution is not, perhaps, "addition" but the successful derivation of a 'modern' right from existing principles of the archaic common law. The purpose of this analysis is *not* to discuss the impact of the conceptualisation of the Right but to decipher and trace the thought-process associated with the derivation of the said right, an explication of the said legal thought-process. The objective is to follow as to *how* the authors firstly, justify the inherent association of the said right with the common law and secondly, as to *why* the Right to Privacy, if it is in fact intrinsically and inherently associated with the common law, requires an explicit description and the special title of a 'Right'. These questions acquire a higher degree of importance in a 21<sup>st</sup> century setting because of the hyper-social nature of contemporary society, which values both privacy as well as the lack of it in certain domains, many of which are intangible realms like cyberspace. In such an environment, it is most relevant to recall how Brandeis and his co-author derived a modern right for a changing

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<sup>1</sup> Warren, Samuel D., and Louis D. Brandeis. "The Right to Privacy". *Harvard Law Review* 4.5 (1890): 193–220. Web...

<sup>2</sup> Letter from Roscoe Pound to William Chilton (1916), quoted in A. Mason, *Brandeis: A Free Man's Life*, p.70 (1956)

society from the elasticity of the common law – the repetition of which might just be the need of the hour.

The authors begin by emphasising the elastic nature of the common law, being flexible enough to meet the demands of a changing society. The evidence for this flexibility begins with how, from its very inception, the common law has protected the individual and his claim to property. However, the origin of this protection was in the form of providing a remedy for any *physical* harm to one's body or any *physical* violation to the dominion of one's land. These remedies were formalised to give birth to the ideas of "right to life" and "trespass" that on extrapolation, gives way to the "right to property." Likewise, the guarantee of "liberty" was the direct product of legal protection against *physical* restraint. The authors argue that these 'physical' forms of protection against bodily and tangible harm were expanded to accommodate less visible and more intellectual conceptions of the law such as the "right to *enjoy* life" beyond the archaic logic of a simple physical existence. The reasoning is furthered by the inclusion of intangibles within the sense of the term 'property'. Through the allusive discussion of patent rights that provide protection for the "products and processes of the mind"<sup>3</sup>, the authors note that the term 'property' finds a more relevant meaning beyond physicality. The authors provide this background to exemplify how the law has transitioned from assuring physical wellbeing to also protecting, the less tangible, emotional wellbeing of an individual by merely recognising that "pain, pleasure and profit" are neither ruled by nor constrained to the physical realm.<sup>4</sup>

The authors further extend their reasoning by stating that the law grants recognition to other forms of human emotion and sensation by prohibiting even "attempts to do [...] injury."<sup>5</sup>

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<sup>3</sup> "The Right to Privacy". *Harvard Law Review* 4.5 (1890): 194

<sup>4</sup> *Ibid.* 195

<sup>5</sup> *Ibid.* 193

Meaning to say, the law made it illegal to even subject an individual to the sensation of 'fear' associated with injuries such as battery or trespass. A threat unto itself is a deplorable action and sometimes, as deplorable as the injury that gives the threat credibility. The legal recognition of human sensation is further qualified by the conceptualisation of the laws of nuisance and other laws such as the ones against offensive noise and odour. Brandeis and his co-author use this transition as evidence to portray how the law is trending towards securing the emotional wellbeing of the individual above and beyond the physical protection it already guarantees. The authors mention the development of the laws on defamation, libel and slander as illustrations for how the law recognises the importance of an individual's dignity and standing in society. Brandeis and Warren further mention the "right to be let alone"<sup>6</sup>, as defined by Judge Thomas Cooley, in reference to capturing pictures of private individuals without their express permission. The 'right to be let alone' is morphed into what the authors define as the 'right to privacy', which at the time, according to them, desperately required the shelter of the common law. The authors trace the origins of the abovementioned rights and laws as a form of evidence to demonstrate that the right to privacy is, in fact, the logical extension of an already established and accepted trend that is unique to the common law, growing to meet the needs of an ever-changing society.

The question still arises, what was so distinct about the period that it prompted Brandeis and Warren to formulate an explicit 'right to privacy', as an extrapolation from the 'right to be let alone'? *Prima facie*, the justification that the authors provide alludes to the development of novel "inventions and [modern] business methods."<sup>7</sup> The authors mention the use of unauthorised "instantaneous photographs" by newspaper houses as a potent threat, posing to destroy the

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<sup>6</sup> Cooley, Thomas McIntyre. *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract*. 2nd ed. Littleton, CO: F.B. Rothman p.29, 1993. Print.

<sup>7</sup> "The Right to Privacy". *Harvard Law Review* 4.5 (1890): 195

sanctity of private life by stealing the veil of the domestic setting. Attributable to the press, the authors mention the prevailing fear as, "what is whispered in the closet shall be proclaimed from the house-tops."<sup>8</sup> There were other empirical concerns that were emerging from the judicial system. In a case that the authors mention but do not reference in detail, a Broadway actor complains against a photographer for taking a picture of her wearing tights during a theatre performance. She petitioned the Supreme Court of New York to grant her relief by way of an *ex parte* injunction, disallowing the photographer(s) from making use of the photograph. The Court granted the relief requested.<sup>9</sup> The judiciary did show willingness to accord the enshrinement of such a right as the right to privacy but the requisite academic effort to actually synthesise the idea came from Brandeis and Warren who saw the Right as a necessity for civilised existence.

In their article, the authors frequently identify the menacing nature of the press and the damage it can cause to private citizens in the continuance of their domesticity. Brandeis and Warren observe the print media's tendency to profit off gossip, compromising – what they believe everyone has a claim to – the right to privacy. The authors note that, "[t]o occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle."<sup>10</sup> A brief analysis of the extract reveals the origins of, perhaps, the first rudimentary definition of privacy and a basic description of its subsequent violation. The authors define privacy as, that which is meant for the domestic circle; any published information that could only be acquired by having unauthorised access to the domestic circle is seen to be a violation of that right to privacy. Brandeis and Warren condemn the press' scornful lust for gossip concerning sexual relations and other private information that, according to them, should

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<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*, Times, N.Y. "Manola Gets an Injunction." *N.Y. Times* [New York] 18 June 1890: 2. Web...

<sup>10</sup> "The Right to Privacy". *Harvard Law Review* 4.5 (1890): 196

never have reached the public's gaze in the very first place. The authors thoroughly criticise the press for its admonishable behaviour that seems to have overstepped the boundaries of decency and propriety.<sup>11</sup> However, the press is in itself an element and product of society, providing a service that has popular demand. Their scornful lust for the acquisition and delivery of gossip is balanced by the reader's thirst for consumption. Although brief, Brandeis and Warren do account for the consumption of gossip on part of the private citizen. As a sad reflection on human nature, the reason why the press indulges in the distribution and sale of gossip is the same reason why the Arabs distribute and sell oil. There is a large societal demand for seemingly scandalous and private information. "Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality."<sup>12</sup> The bitter truth is that a large portion of society, at Brandeis' time, and presumably, even now, would prefer to derive entertainment at the cost of another's privacy while cherishing and guarding one's own right to it. Recognising this "weak side of human nature,"<sup>13</sup> Brandeis and Warren promulgate the right to privacy as not only a means to protect the individual's domestic sanctity but to also further the law's role as a civilising force. The right to privacy and its enshrinement into the common law must not just be observed as a micro phenomenon benefiting the individual and his/her domesticity but should also be seen as a corrective macro phenomenon improving the general standards of morality of a given society.

The authors' primary source of stimulus for the derivation of such a right appears to be the loss of face and dishonour that the publicity of private information causes. However, they realise that the laws of libel and slander do cover such injuries and provide appropriate and

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

approximate remedies in the forms of civil and criminal penalties. As a means of distinguishing these existing laws from the right to privacy, the authors indulge in an examination of the laws associated with defamation and the rationale behind their enshrinement. Brandeis and Warren find that the laws concerning libel and slander, defamation in general, protect the individual's standing in relations and dealings with the exterior world. The honour and respect commanded by the individual aid him/her in the accumulation of wealth and prosperity. Any unjust and unwarranted harm done to an individual's societal standing that allows for prosperity and success is seen to be unlawful because it unfairly inhibits a person from a chance at a quality life.

Therefore, Brandeis and Warren essentially reason that the existent laws of the time protected the material aspect of human life, paying little to no attention to the emotional and spiritual suffering that the loss of dignity entails. The authors first establish the legal trend of extending material protection to cover spiritual elements of life and then argue that the spiritual equivalent of the material law of defamation is, in fact, the right to privacy. Therefore, logically, it is within the ambit of the common law to grant legitimacy to the natural outcome of an established trend – the recognition of the right to privacy.

The authors reason by yet another common law analogy that involves the common-law right over intellectual and artistic property and how that right, in essence, confirms the legitimacy of the right to privacy, if analysed in the spirit of the common law. Brandeis and Warren observe that the common law provides proprietary protection to artistic and intellectual creation. This protection is independent of the quality or nature of the protected material. It is immaterial if the work is a word or an essay, if it is mere ink on paper or a painting, all that matters is the right of the creator over the status of that which has been created. The common law gives to the creator the right to decide the extent to which he/she would like to expose his/her

work to the outside world. As a form of corroborative evidence, the authors quote the dissenting opinion of Sir Joseph Yates from an English Judgement, *Millar vs. Taylor* (1769). The relevance of the dissent is that Sir Yates declared that the common law gives to each individual the right to decide the forum for the expression of his/her thoughts, words and actions.<sup>14</sup> Therefore by extension, it is the right of the creator to decide the level of privacy and publicity associated with the exposure of his/her creation. This proprietary protection is further qualified by the authors through another common-law practice wherein a person is protected from expressing his feelings under duress, by way of force or through compulsion, with the exception of being on the stand in a court of law.<sup>15</sup> In other words, the individual has the power to decide where, when and before who he/she wants to express his/her thoughts and sentiments, providing evidence of a rudimentary application of the right to privacy.

The authors also analyse the rationale behind as to why this *apparent* spirit of the right to privacy (without using those words) is granted in cases of artistic and intellectual work, even when the judges of the time considered the nature of the work to be irrelevant in the determination of those rights. Brandeis and Warren realise that proprietary over such works is akin to the ownership of property. The common-law provides such protection because creation has value and not because the creator has a sentimental attachment to his/her work. There is yet again the fundamental question of having a corporeal rationale behind a law and the lack of prescribing a remedy for a sentimental injury. The authors note that the law of property protects against unjust enrichment by prohibiting unauthorised use of artistic and intellectual work. However, if the individual places worth over a creation, the worth of the creation is only as strong as its legal recognition. In other words, the material evaluation of privacy is indefinable

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<sup>14</sup> Yates, Sir Joseph. (Dissenting Opinion) *Millar vs. Taylor*. Court of the King's Bench, England. 1769. Web.

<sup>15</sup> "The Right to Privacy". *Harvard Law Review* 4.5 (1890): 201

and by extension, the value of the peace of mind derived from the maintenance of one's privacy is imperceptible. Consequently, privacy and private information might not find protection from public gaze under the narrow definition of the term 'property.' Meaning to say, there is no method of transferring a sentimental injury to the objectivity of a material remedy and therefore, there is no means of measuring the injury itself, at least through the narrow definition of the term 'property.' However, in another English case, *Prince Albert vs. Strange* (1849), the authors cite a distinction that the High Court of Chancery draws between property and "that which is exclusiv[e]."<sup>16</sup> As the judge in *Prince Albert*, Lord Cottenham observed that a man "is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his."<sup>17</sup> Although similar to the understanding of the term 'property', "that which is exclusive" is broader and contains even those elements that are seemingly ordinary, elements that have limited material value in the eyes of the law but sentimental value in the eyes of the proprietor. The authors also quote Lord Cottenham as having said, "privacy is the right invaded"<sup>18</sup> in relation to the actions of the defendants. However, Lord Cottenham's views were limited to the context in which he spoke and the case in question involved royalty, the consort of Queen Victoria herself. In matters involving the crown and royalty, discretion is assumed to be a duty more than an attribute associated to the crown's claim to privacy. Nevertheless, Lord Cottenham accorded privacy the status of a right and that unto itself is a significant contribution to the authors' cause.

The authors do, however, highlight an inconsistency between the law's treatment of artistic-intellectual material and its treatment of private-domestic material. The claim that ordinary domestic information and material do not have value in comparison to artistic-

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<sup>16</sup> Lord Cottenham. *Prince Albert vs. Strange*. High Court of the Chancery, England. 1849. Web.

<sup>17</sup> *Ibid.*

<sup>18</sup> "The Right to Privacy". *Harvard Law Review* 4.5 (1890): 205

intellectual works, and therefore, not akin to the status of property, is, perhaps, true at a superficial qualitative level. However, at the level of reality, even that which is ordinary and domestic acquires a value when it is published by profiteers of gossip. In one sense, if exclusivity is a protected attribute for seemingly ordinary information and if that information is accessed without consent for the purpose of enrichment, then is it not true that the act of enrichment without consent is unjust and that which has been used to derive such enrichment, akin to property? The question is, what will fill the legal void between seemingly unjust enrichment and the desire for its prohibition by those who are *sentimentally* injured (as opposed to a material injury)? The unequivocal answer that the authors provide is the right to privacy. The authors recognise that both the profiteers of gossip as well as the ones being injured by its publicity give value to private-domestic information but the law fails to recognise that worth, blinded by the ordinary face value. It is also important to recognise that the injury is sentimental and spiritual but not indefinable. However, the material measurement of the injury is only realisable after it has been committed. While private information is definitely distinct from intellectual property, there is enough practical similarity to accord privacy the same-level of protection as that accorded to property. Therefore, the authors note, "[t]he 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."<sup>19</sup>

The authors promulgate the right to privacy as an existent notion within the common law and prove its existence through analogy. The first pillar that the authors establish is the accommodating elastic nature of the common law, which appears to show a trend in the direction

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<sup>19</sup> *Ibid.*

of preserving the spirituality of its subjects. That trend is extended to include privacy, the deprivation of which causes spiritual-sentimental distress and therefore, requiring the shelter and recognition of the common law. The authors further show that the laws of libel, slander and defamation in general, provide remedies for the injuries associated with the invasion of privacy. They draw parallels between the ownership of property and the exclusivity of private information, while testing their practical similarities and proving their legal disparities. The law's role as a civilising force, assuring the social advancement of mankind is also underscored. While the authors do successfully piece together the various elements of the common law that give the right to privacy the legitimacy and force of the law, they also realise that all these elements would have to operate in unison for a just outcome. This realisation provided the authors the impetus to distinguish the right to privacy from those principles that share its spirit, at least in part. It is in the privacy of our homes and walls that we find the courage to express and be our true selves, the comfort to nurse our sorrows and the freedom to explore and exercise our unique spirituality. The deprivation of those joys may occur but it will be because of Brandeis and Warren that such injustices will not stand the scrutiny of the law.

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# The Brandeis Déjà vu: Looking at the Then and Now of Media Privacy

*Eric Paik\**

## Introduction

The accelerated development of cyber technology stands in distinction in a world that has, in the past few decades, witnessed strong dynamicity all throughout. It is easy to put the developmental rapidity of cyber technology into perspective, if one were to take the example of current U.S privacy laws and recognize them as being made antique by growing cyber-technology; a monumental reaction of the American legal system concerning the federal collection of personal information in computer databases was the Privacy Act of 1974, a framework that has been preserved to this day on how the U.S government “gathers, shares, and protects Americans’ personal information.”

<sup>1</sup> Needless to say, forty years of technological development has long rendered the Privacy Act insufficient, resulting in a problematic amount of concerns and a concerning amount of problems related to data privacy and the American Government.<sup>2</sup> Expectedly, Government collection and utilization of digital data has received an abundance of media attention in the past few years, but we must appropriately remind ourselves that the urgent matter of privacy protection is one that encompasses much more, for example, the vast market of electronic commerce; new technology is everywhere to be found, and so are privacy concerns that come with it. After all, we live in a world where five exabytes (the equivalent amount of information,

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<sup>1</sup> State of Federal Privacy and Data Security Law: Lagging Behind the Times?: 1

<sup>2</sup> The Teaching Company/The Great Courses. “Privacy for the Cyber Age.” *Kanopy* video, 33:00. 2013. <https://brandeis.kanopystreaming.com/video/privacy-cyber-age>

if hypothetically digitalized, accumulated throughout human history of texts and images until 2003) of information is produced in a matter of minutes.<sup>3</sup> There is enough information on everyone's plates. Simply put, there is an abundance of highly portable information, technological ways to access the said information, entities that are interested in utilizing the information, and a shortage of ways to stop the daunting consequence of the whole situation: privacy invasion.

If, by any chance, the given situation (which is seemingly unique to our modern digital age) triggers a déjà vu, that is because we have dealt with this issue before, more than a hundred years ago. Former Supreme Court Justice Louis D. Brandeis and Samuel D. Warren in their landmark article, *The Right to Privacy*, dealt with the legal conceptualization of privacy and the possible solutions of privacy intrusion in a time that witnessed the increasing usage of photographic technology by the media.<sup>4</sup> With *The Rights to Privacy* being a foundational article of legal philosophy in American privacy law, it is an appropriate piece of literature that we could refer back to for the acquisition of guidance in thinking about privacy and its legal guardian today. So, therefore, it is in the following sections of this essay where we observe *The Rights to Privacy* in its legal philosophy and then attempt at determining its applicability in today's cyber-dominated world. In doing so, we specifically explore the birth of the privacy tort through the publication of *The Right to Privacy*, and then look towards the changing definition of privacy tort factors in today's social media that necessitates a re-evaluation of Brandeis and Warren's legal genius.

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<sup>3</sup> State of Federal Privacy and Data Security Law: Lagging Behind the Times?: 3

<sup>4</sup> Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy", *Harvard Law Review*. (1890): 195

## The Right to Privacy (1890) – Birth of the privacy tort

*From the perspective of tort law at the time, Warren and Brandeis's argument that tort law should remedy psychological and emotional harm was fairly radical. Their arguments about its evolutionary potential notwithstanding, the common law had traditionally rejected claims of emotional injury and had required plaintiffs to prove physical or property injuries to recover damages.<sup>5</sup>*

*The Right to Privacy* still maintains its identity as a monumental article on the subject of legal protection of privacy. Written by Louis D. Brandeis and Samuel D. Warren, and Published in the *Harvard Law Review* in 1890, *The Right to Privacy* famously referred to Justice Thomas M. Cooley's definition of privacy as the "right to be let alone," and detailed the emergent concern of the violation of privacy due to technological inventions, specifically the technology utilized by the press.<sup>6</sup> The increasing focus of print media on private affairs, aided by the newly implemented use of photography, had essentially created a market of information entailing rumors and personal details, one that was "pursued with industry as well as effrontery."<sup>7</sup> This situation had given rise to two concerns for the co-authors of *The Right to Privacy*, one of which was the fallen integrity and standards of print media, and another which carried more weight of legal significance was the lack of protection that privacy received.<sup>8</sup> Privacy in the interactions among private parties, though a growing concern, was not sufficiently protected by congressional statutes, and neither was it protected sufficiently through common law. In fact, the legal concept of privacy in the wake of growing technology was one without concrete identity. The initiating

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<sup>5</sup> Neil M. Richards, "Puzzle of Brandeis, Privacy, and Speech." *Vanderbilt Law Review* 63.5 (2010): 1303

<sup>6</sup> Warren and Brandeis, "The Right to Privacy," *Harvard Law Review* 4.5 (1890): 195

<sup>7</sup> *Ibid.*, 196

<sup>8</sup> *Ibid.*, 196

section of the article *The Right to Privacy*, therefore, spoke of the chronological appropriateness of a new legal recognition of rights:

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights.<sup>9</sup>

Brandeis and Warren explained that the “right to be let alone,” a product of the evolving interpretation of our basic right to life, faced a new chapter of threatening business trend in yellow journalism; even seemingly benign gossip could be utilized with evil intent, if the gossip accompanied large public presence, to jeopardize the emotional well-being of an individual.<sup>10</sup> However, at the time of the article’s publication, emotional injury was not recognized by courts as a legal injury. Therefore, a part of Brandeis and Warren’s argument was that emotional injury was deserving of a legal recognition and remedy. Their philosophical basis in pushing this unconventional idea could be found towards the beginning of the article, which reads: “The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things.”<sup>11</sup> Brandeis and Warren respected the intangible value in honoring the “inviolable personality” of people, and so felt the need for the legal recognition of emotional harm as a legitimate injury.<sup>12</sup>

Following the development of their logic, what Brandeis and Warren ultimately advocated was tort remedy for the emotional damage caused by privacy invasion. However, even in the case of the legal recognition of emotional harm as a legal injury, the existing tort law

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<sup>9</sup> Warren and Brandeis, “The Right to Privacy,” *Harvard Law Review* 4.5 (1890): 193

<sup>10</sup> *Ibid.*, 196

<sup>11</sup> *Ibid.*, 195

<sup>12</sup> *Ibid.*, 205

would not have protected privacy as described by Brandeis and Warren. What was laid out in *The Right to Privacy*, therefore, was the push for the creation of a new category of tort law that specifically protected privacy. In communicating this, Brandeis and Warren showcased their excellence in portraying the standalone uniqueness of the subject of privacy, one that demonstrated the lack of protection privacy received from already existing parts of the common law; privacy was embedded with characteristic details which separated it from the seemingly related legal concepts of property as well as defamation, and so privacy could not sufficiently be accommodated for through the principles of either. In clarifying this uniqueness of privacy in its qualities as a subject of tort, the co-authors first compared the nature of defamation (slander and libel) to that of privacy, highlighting the value of emotional and spiritual well-being that is unique to privacy and absent in defamation:

Owing to the nature of the instruments by which privacy is invaded, the injury inflicted bears a superficial resemblance to the wrongs dealt with by the law of slander and of libel...The principle on which the law of defamation rests, covers, however, a radically different class of effects from those for which attention is now asked. It deals only with damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows. The matter published of him, however widely circulated, and however unsuited to publicity, must, in order to be actionable, have a direct tendency to injure him in his intercourse with others, and even if in writing or in print, must subject him to the hatred, ridicule, or contempt of his fellowmen, -- the effect of the publication upon his estimate of himself and upon his own feelings nor forming an essential element in the cause of action. In short, the wrongs and correlative rights recognized by the law of slander and libel are in their nature material rather than spiritual.<sup>13</sup>

Furthermore, the co-authors stated that though the category of property in tort law secured “to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others,”<sup>14</sup> it did so in a problematic fashion that only

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<sup>13</sup> Warren and Brandeis, “The Right to Privacy,” *Harvard Law Review* 4.5 (1890): 197

<sup>14</sup> *Ibid.*, 198

concerned published material. Property law did not, in its narrowness, deal with instances in which the issue at stake had nothing to do with obtaining profit through publication but rather the “relief afforded by the ability to prevent any publication at all.”<sup>15</sup> In other words, property law came fairly close to protecting the essence of privacy, but its legal boundaries only included either published information or information which the rightful owner had the intention of publishing. What Brandeis and Warren stated was that the fundamental value of protecting the extent to which an individual shares her/his information should not be about the value of the intellectual information as a publishable or published material.<sup>16</sup>

A man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day. No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully; and the prohibition would not be confined to the publication of a copy of the letter itself, or of the diary entry; the restraint extends also to a publication of the contents. What is the thing which is protected? Surely, not the intellectual act of recording the fact that the husband did not dine with his wife, but that fact itself. It is not the intellectual product, but the domestic occurrence.<sup>17</sup>

In both examples of the extension of tort law the emotional suffering of an individual in the public disclosure of unpublished private facts, which was the emergent concern, was unprotected. Therefore, Brandeis and Warren propounded it necessary that the common law made fitting adjustments for the demanding and urgent situation, by first viewing emotional harm as a legal injury and then formulating a new tort recognition of privacy as a unique subject.<sup>18</sup>

Even to this day *The Right to Privacy* is very deserving of its fame; it recognized the philosophical essence of the American common law dealing with one’s right “to be let alone”

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<sup>15</sup> Warren and Brandeis, “The Right to Privacy,” *Harvard Law Review* 4.5 (1890): 200

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, 201

<sup>18</sup> *Ibid.*

which was more or less lost in legal translation and only protected in a limited sense. In other words, Louis D. Brandeis and Samuel D. Warren had addressed the serious issue of emotional damage in the case of unauthorized and undesired circulation of unpublished information, one that slipped past the protection of property and against defamation, and together philosophized the legal category of privacy tort in reaction. While recognizing the significant value of what Brandeis and Warren advocated a century ago, the following section highlights a few factors that have changed and require further attention in how we view privacy tort today.

### **Important Factors in Modern Application**

*A more modern and specific interpretation of privacy tort was constructed by William Lloyd Prosser some seventy years after the article “The Right to Privacy” was published.<sup>19</sup> Prosser’s take on privacy tort in itself has merit as well as compatibility issues in its application to today’s world, with complex legal examples being notably stated by scholars such as Professor Danielle Keats Citron.<sup>20</sup> However, this essay solely observes the broad original ideas of Louis D. Brandeis and Samuel D. Warren in their application to today’s world without considering William Lloyd Prosser’s more specific interpretation of privacy tort.*

The simplified essence of *The Right to Privacy* would be best described as a discussion about the much needed tort remedy for emotional injury arising from the undesired disclosure of unpublished private facts. In an attempt to translate that philosophy into today’s world, we must consider that modern societal complexity has changed the types and depth of the injury at risk as well as the perception of terms such as “unpublished” and “private facts.” Though the essence of the article *The Right to Privacy* remains more important than ever, privacy tort should, and

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<sup>19</sup> Danielle Keats Citron. “Mainstreaming Privacy Torts.” *California Law Review* 98.6 (2010): 1805

<sup>20</sup> Ibid.

already does, deal with a much more complex reality. This section of the essay, therefore, attempts to observe two of many factors relating to the modern application of the philosophy of *The Right to Privacy* by specifically considering the example of social media. In sub-section one, the discussion focuses on the difficulty in maintaining the definition of privacy as exactly articulated in *The Right to Privacy* due to the changing definition and relevancy of consent and private space. In sub-section two, the increasing emotional harm as well as the emergence of new types of harm in social media are highlighted.

### **Section 1: Gray Areas of Private Space and consent- whose data is it anyway?**

*Given the current usage of social media, it is easy to argue that society generally has a lower expectation of privacy when it comes to sharing personal information online. That is, until their privacy is intruded upon.<sup>21</sup>*

There are a few fundamental questions that require consideration when it comes to discussing the ideas of “The Right to Privacy” in its applicability to today’s cyberspace. To initiate the discussion, we start with the nature of social media in being representative of both private and public elements.

The expectation of privacy in the arena of social media, if derived from the essence of *The Right to Privacy*, is confusing due to the following statement: “the right to privacy ceases if an individual, or someone by consent of the individual makes public the information

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<sup>21</sup> Renee Prunty and Amanda Swartzendruber, “Social Media and the Fourth Amendment Privacy Protections.” In *Privacy in the Digital Age: 21<sup>st</sup> -century Challenges to the Fourth Amendment*, ed. Nancy S. Lind and Erik Rankin (Santa Barbara, California: Praeger, 2015), 402-403

themselves.”<sup>22</sup> Sharing information on social media is conventionally understood as a voluntary act which, if we were to refer to the statement above, could eliminate legal expectations of privacy. This is not a surprising development of logic because the common understanding of the intended function of social media is that “people post because they want others to read the information.”<sup>23</sup> However, the added complexity of social media originates from the existence of adjustable privacy settings. Taking the social media giant Facebook as an example, it is apparent that, first of all, there are three modes of privacy settings at large: sharing information with your approved “friends”, sharing information with the public that uses Facebook services, and sharing information with the specific list of users selected. Due to the existence of different privacy settings and some 1.23 billion active monthly users,<sup>24</sup> it cannot be stated that every individual participates in social media with the same expectation of privacy; some people have Facebook accounts with the expectation of sharing information with a limited group of people and they have the privacy setting details to help reinforce that will. What is implied through all of this is that social media participation does not necessarily constitute information being made public in the black and white sense. Instead, selective publicity seems to better describe the general expectation of user experience when it comes to Facebook. Put another way, limited privacy is what the typical user might want or expect from using Facebook.<sup>25</sup> This gray area of situationally defining and expecting privacy is a source of trouble for privacy tort.

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<sup>22</sup> Katherine Leigh, “Developments on the Fourth Amendment and Privacy to the 21<sup>st</sup> Century.” In *Privacy in the Digital Age: 21<sup>st</sup>-century Challenges to the Fourth Amendment*, ed. Nancy S. Lind and Erik Ranking (Santa Barbara, California: Praeger, 2015), 14

<sup>23</sup> Meghan E. Leonard, “The Changing Expectations of Privacy in the Digital Age.” In *Privacy in the Digital Age: 21<sup>st</sup>-century Challenges to the Fourth Amendment*, ed. Nancy S. Lind and Erik Rankin (Santa Barbara, California: Praeger, 2015), 317

<sup>24</sup> Lisa M. Austin, “Enough About Me: Why Privacy Is About Power, Not Consent (or Harm),” in *A World Without Privacy: What Law Can and Should Do?*, ed. Austin Sarat (New York: Cambridge University Press, 2015), 147

<sup>25</sup> Austin, “Why Privacy is About Power, not Consent (or Harm),” 149-150

Considering the fact that different privacy settings generate varying user experiences with different execution of privacy protection, it is then crucial to understand that privacy settings are often complicated: “Knowing exactly which settings to choose and how to best protect your privacy on Facebook is difficult for even the most adept of users... In addition, the privacy setting options change frequently, as does the Facebook interface.”<sup>26</sup> Social media users, in this case Facebook account holders, may by mistake make information “more public” than what they had intended. A hypothetical college student under the legal drinking age might share a photograph depicting the consumption of alcohol with the intention of privately sharing his/her enjoyment of youthful energy with friends (not in reference to the Facebook idea of “friends”) and unexpectedly face consequences of public viewership due to a mistake of a click or corporate-induced changes in privacy settings. The student in this given scenario faces privacy concerns, concerns that could very possibly bring with them emotional suffering, that the student did not anticipate or want at the time of sharing the information. However, in logical terms, this hypothetical student has indeed given her/his consent to Facebook regarding privacy details as proven by the preferences selected online. Here, we notice the difference between the issue of privacy back in the time of intruding print media and now: back in the day of yellow journalism it was easy to see that in the case of unauthorized and unwanted picture publication that very clearly there was no consent or the desire for disclosure, whereas in the case of Facebook it is difficult to assume the same. After all, “Facebook and other social-networking sites remind users of the privacy risks when creating an account.”<sup>27</sup> The responsibility could be argued to belong solely with any user that mistakenly induces more publicity into the shared information.

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<sup>26</sup> Leonard, “The Changing Expectations of Privacy in the Digital Age”, 316

<sup>27</sup> Ibid.

In analyzing the above situation, it might be helpful to turn to a relic of another side of the American legal system dealing with privacy, the fourth amendment case of *Katz v. United States*.<sup>28</sup> The portion of our concern is the court recognition of privacy rights in instances where intentionally private acts take place in public settings, and the contrary denial of privacy protection in situations where public disclosure of information is made in an expectedly private space.<sup>29</sup> So going back to Facebook, are we to understand the general utilization of social media as an act with private intent in a public area, or are we to understand it as public disclosure of information in an area that could be private? On one side we may be justified in expecting privacy, and on the flip side we may not, or it really may be situational.

The discussion about consent and the varied expectation of privacy and user experience was initiated above, and is continued here. The factor of consent in the example of Facebook is made even more confusing because of what is recognized by Professor Lisa M. Austin, in the chapter “Why Privacy is About Power, not Consent (or harm)” which is published in the book *A World Without Privacy*, as “implied consent.”<sup>30</sup> The legal acceptance of implied consent means that privacy recognition could happen at a broad level of general user expectation without considering the privacy affinity of each individual user:

General expectation of users, formed through the active architectural choices of Facebook, can even undercut individual consent entirely. For example, CIPPC complained that Facebook does not provide users with the ability to opt-out of profile memorialization. Although the Assistant Commissioner originally found this to contravene the consent requirements, she changed her view due to “reasonable expectations” with respect to content... Because of this, the Assistant Commissioner found that Facebook could rely upon implied consent. However, this implied consent is based on what “typical” users would want, and indeed what “users generally” would want

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<sup>28</sup> *Katz v. United States*, 389 U.S. 347 (1967)

<sup>29</sup> Prunty and Swartzendruber, “Social Media and the Fourth Amendment Privacy Protections.” 402-403

<sup>30</sup> Austin, “Why Privacy is About Power, not Consent (or Harm),” 151

in relation to another individual... Reasonable expectations of the “Facebook experience” trump individual consent.”<sup>31</sup>

Facebook’s often changing privacy settings and policies, in other words, just have to conform to what would be legally recognized as acceptable general user standards and expectations. The fact that Facebook “has no obligation to change its infrastructure so as to better enable individual choice”<sup>32</sup> raises the possibility that accommodation for the varying privacy needs of social media users is unlikely to materialize. However, the emotional damage (the amplified nature of which is discussed in the next section) is very plausible to arise from genuine mistakes or unexpected changes in privacy settings, and could be then viewed as unintended sharing of private information. The application of the philosophy of *The Right to Privacy* is challenging when considering such an aspect of today’s privacy.

This section is concluded with the peculiar example of a Facebook function called “tagging.” Facebook account holders often reveal information about others in photographs and texts through “tagging,” or name labeling, other people. “Tagging” could involve other Facebook users but could also involve those that have no participatory will when it comes to Facebook. Not only would it be a problem for individuals that are “tagged” to be unaware of their information being shared online, but there are only two offered solutions for a concerned and aware individual in that situation, and both of them are revealing of private information.<sup>33</sup> The first solution is to make a Facebook account and “untag” herself/himself, and the other solution is a method that still involves Facebook obtaining the non-user’s email information.<sup>34</sup> Though the legal responsibility in the given scenario might lie primarily with the user of Facebook that

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<sup>31</sup> Ibid., 147

<sup>32</sup> Austin, “Why Privacy is About Power, not Consent (or Harm),” 152

<sup>33</sup> Ibid.

<sup>34</sup> Ibid., 153

shared the information without consent, Facebook still gains profitable private information from the “tagged” individual in the process of problem-shooting, so the issue of legal responsibility is made confusing.<sup>35</sup>

## **Section 2: Amplified injuries Mean Privacy Tort is Increasingly Important**

Renee Prunty and Amanda Swartzendruber, in their co-authored section of the book *Privacy in the Digital Age* titled *Social Media and the Fourth Amendment Privacy Protections*, identified the broad range of potential harm related to social media: “There are many possible negative consequences attached to the use of social media sites. These new forums create a place for gossip, rumors, unwanted contact, stalking, the use of data by third parties, hacking, and even identity theft.”<sup>36</sup> Though Prunty and Swartzendruber’s work analyzes the aspect of government surveillance and its constitutionality, many of the harms that they have listed are injuries that remind us of what Brandeis and Warren wanted to establish a tort remedy for; malicious gossip and rumors were specifically stated by Brandeis and Warren to cause emotional harm that was toxic to the human pursuit of happiness in life. However, what cannot go unnoticed in observing the list of harms above is that in it are things such as stalking and unwanted contact, actions that could consequently entail direct physical harm or robbery. Another thing to keep in mind is the permanent nature of data and its availability which amplifies the emotional and reputational harm that was similarly discussed a century ago by Brandeis and Warren.<sup>37</sup> This sub-section observes the expanded width and depth of injuries related to privacy that seek tort remedy, which

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<sup>35</sup> Ibid.

<sup>36</sup> Prunty and Swartzendruber, “Social Media and the Fourth Amendment Privacy Protections.” 408

<sup>37</sup> Citron, “Mainstreaming Privacy Torts.” 1808

allows us to see the increased value in privacy tort. Again, the specific example we will observe is social media.

As stated above, private information in the modern world is stored digitally. Unlike a century ago when the private information of concern was circulated by print media and most likely withered away with time, private information on the web is permanent and searchable.<sup>38</sup> The horror of digital data permanency for those suffering emotional harm from unwanted disclosure of information is perfectly described by Professor Danielle Keats Citron as “evoking a Nietzschean image of persistent memory.”<sup>39</sup> Combine the permanent nature of digital data with the fact that data is now easily searchable and globally accessible, and we have at our hands the groundwork for the timeless preservation and return of emotional suffering for some individuals.<sup>40</sup> Besides, anybody with the intent to do so could publish private information of others with more ease and potential for publicity than any press we could have imagined a century back. Private information on the web is at a constant risk of being shared by anyone, with the potential to spread globally like wildfire and to be preserved in its most accessible state for the time to come. If that was not enough to induce fear, the increased damage of privacy invasion is discussed next.

“In the past, physical injuries associated with privacy invasions typically involved a person's physical manifestations of emotional distress. For instance, individuals often suffered sleeplessness in the face of privacy invasions.”<sup>41</sup> In today's world of social media, the abundance of easily accessible personal data is allowing the occurrence of life threatening situations.

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<sup>38</sup> Ibid.

<sup>39</sup> Citron, “Mainstreaming Privacy Torts.” 1813

<sup>40</sup> Ibid.

<sup>41</sup> Ibid., 1817

Participants of social media that have access to personal information of others could easily initiate unwanted disclosure of private facts anonymously, or even by pretending to be the very subject of the disclosed information. Take for example the case referred to by Professor Dianne Cintron: “in 2009, a Long Island, New York, mother allegedly posted an advertisement on Craigslist seeking sex and directing men to the mother of her nine-year-old daughter's rival.”<sup>42</sup> With malicious intent and enough personal information, imitating identity online to initiate danger for another individual could be achieved by anyone. To really reveal the alarming danger that is privacy invasion on social media, we end the section with another disturbing example referred to by Professor Dianne Citron, one that serves as a powerful reminder of why the idea of privacy protection as suggested by Brandeis and Warren are more important than ever:

In an early case of online impersonation, a security guard pretended to be a woman in a chat room, claiming that the woman wanted to be assaulted. The chat room posting asserted: "I want you to break down my door and rape me." It also provided the woman's name, address, and instructions about how to get past her building's security system. Over the next few weeks, nine men showed up at her door, often in the middle of the night.<sup>43</sup>

## **Conclusion**

Louis D. Brandeis and Samuel D. Warren understood a very important aspect of our legal system: the law evolves, and justifiably so due to the betterment of our recognition of values and needs over time:

Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect.<sup>44</sup>

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<sup>42</sup> Ibid., 1818

<sup>43</sup> Citron, “Mainstreaming Privacy Torts.” 1818

<sup>44</sup> Warren and Brandeis, “The Right to Privacy,” *Harvard Law Review* 4.5 (1890): 193

Therefore, in the history of the evolution of American law, *The Right to Privacy* has its own special place for its awareness of a need for change. However, as important as it is that we take the principles of Brandeis and Warren to heart, it is now time for the Brandeis or Warren of our generation to step up to the plate. The cyber world that we inhabit is one that Brandeis and Warren could not have imagined more than a century ago, and quite frankly had no responsibility to do so. This new era of cyber development and its byproduct could only be interpreted by those that are responsible for it, namely us. The process of defining our newly adjusted “right to privacy” is to be anticipated in the days to come.

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