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The Puzzle of Brandeis, Privacy, and Speech

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The Puzzle of Brandeis, Privacy, and Speech

Neil M. Richards[*]

INTRODUCTION 1295
I. TORT PRIVACY AND PUBLICITY 1300
  A. The Right to Privacy *and Free Speech* 1300
    1. Nature of the Injury 1302
    2. Nature of the Remedy 1305
  B. *The Duty of Publicity* 1310
II. FREE SPEECH 1317
  A. *Free Speech Before 1919* 1317
  B. *Brandeis's First Amendment: Self-Governance and Civic Courage* 1322
  C. *Speech and Tort Privacy* 1329
III. PRIVACY BEYOND TORT 1335
IV. THE BRANDEIS LEGACY: TORT AND INTELLECTUAL PRIVACY 1343
  A. *The Limits of Tort Privacy* 1343
  B. *The Promise of Intellectual Privacy* 1347
CONCLUSION 1351

INTRODUCTION

Two short texts by Louis D. Brandeis are the foundation of American privacy law—his coauthored *Harvard Law Review* article

[*] Professor of Law, Washington University School of Law. For helpful discussions and comments on earlier drafts, thanks to Sam Bagenstos, Vince Blasi, Marc Blitz, Danielle Citron, Amy Gajda, Joel Goldstein, Pauline Kim, David Konig, Margo Schlanger, Dan Solove, Wendy Richards, Brian Tamanaha, Andy Taslitz, and participants in faculty workshops at the 2010 Berkeley-GW Privacy Law Scholars Conference, Washington University School of Law, the Washington University Political Theory workshop, and the Oklahoma City College of Law. Thanks also to my research assistants Jim Stanley, Diana Huang, and Matthew Venezia.

The Right to Privacy[1] and his dissent in *Olmstead v. United States*.[2] In *The Right to Privacy*, Brandeis and Samuel Warren argued that intrusion into and public disclosure of private affairs by the press was deeply hurtful, and that the common law should be read to recognize a tort remedy for such violations. Their short article is considered by scholars to have established not just the privacy torts but the field of privacy law itself.[3] Brandeis is also famous (though less so) for his *Olmstead* dissent—a document which introduced modern concepts of privacy into constitutional law, and ultimately led not only to the "reasonable expectation of privacy" test that governs Fourth Amendment law,[4] but also shaped the constitutional right to privacy recognized in *Griswold v. Connecticut*[5] and *Roe v. Wade*.[6]

While sounding good in theory, the right to privacy has proven hard to apply in practice. From its earliest recognition by the common law, and particularly since the 1960s, tort privacy has conflicted with First Amendment rights of free speech and press. Over the years, the conflict between privacy and speech has generated a substantial literature.[7] Important litigation has also examined the

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

2. 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

3. *See, e.g.*, Harry Kalven, Jr., *Privacy in Tort Law—Were Warren & Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966) (arguing further that *The Right to Privacy* is "the most influential law review article of all," in any field).

4. Katz v. United States, 389 U.S. 347, 361–62 (1967) (Harlan, J., concurring).

5. 381 U.S. 479, 486–87 (1965) (Goldberg, J., concurring).

6. 410 U.S. 113, 152 (1973).

7. For examples of scholarship addressing this conflict, see generally THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 556 (1970); DANIEL J. SOLOVE, THE FUTURE OF REPUTATION (2008) [hereinafter SOLOVE, FUTURE OF REPUTATION]; Edward J. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis's Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611 (1968); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000); Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195 (1990); Marc. A. Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107 (1963); Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039 (2009); Ruth Gavison, *Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech*, 43 S.C. L. REV. 437 (1992); Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139 (2001); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989); Roscoe Pound, *The Fourteenth Amendment and the Right of Privacy*, 13 W. RES. L. REV. 34 (1961); William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149 (2005); Frederick Schauer, *Free Speech and the Social Construction of Privacy*, 68 SOC. RES. 221 (2001); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967 (2003) [hereinafter Solove, *Virtues*]; Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000).

constitutionality of privacy rights under the First Amendment, with the First Amendment usually prevailing.[8] An important theme running throughout these cases and commentary is that privacy and speech are in irreconcilable conflict.

The assumed conflict between privacy and speech reveals a puzzle. In addition to establishing the modern legal conception of privacy, Brandeis is also a central figure in the genesis of First Amendment law.[9] In a series of separate opinions in free speech cases from 1919-1925, Justice Brandeis articulated a more robust notion of the First Amendment that has subsequently become the dominant one in American constitutional law.[10] Brandeis's most important contribution to this tradition is his opinion in *Whitney v. California*,[11] which Vincent Blasi has called "arguably the most important essay ever written, on or off the bench, on the meaning of the First Amendment."[12]

How can privacy and speech be irreconcilable if Brandeis played a major role in creating both? And how, if at all, did Brandeis recognize or address these tensions? Despite the vast literature addressing Brandeis's life and legal career,[13] these questions have remained largely neglected by scholars.[14] But the puzzle of Brandeis's views on privacy and speech is more than a mere biographical

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8. *See infra* note 284 and accompanying text (discussing case law).

9. Richards, *supra* note 7, at 1154.

10. *See* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 156–66 (1988) (discussing the influence of Brandeis's opinions); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 369 (1997) (same); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 143 (2000) (same); Robert M. Cover, *The Left, the Right, and the First Amendment: 1918–1928*, 40 MD. L. REV. 349, 374 (1981) (same).

11. 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring).

12. Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 668 (1988). Numerous other scholars have made similar claims. *See, e.g.*, Ashutosh A. Bhagwhat, *The Story of* Whitney v. California*: The Power of Ideas*, *in* CONSTITUTIONAL LAW STORIES 407–08 (Michael Dorf ed., 2004); KALVEN, *supra* note 10, at 156–66; RABBAN, *supra* note 10, at 369; WHITE, *supra* note 10, at 143.

13. For the principal books on Brandeis's life and thought, see generally ALLON GAL, BRANDEIS OF BOSTON (1980); ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE (1946); EDWARD A. PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION (2000); PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE (1984); MELVIN I. UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION (1981) [hereinafter UROFSKY, PROGRESSIVE TRADITION]; MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE (2009) [hereinafter UROFSKY, A LIFE].

14. A few scholars have noted the puzzle, but none have tried to resolve it. *See generally, e.g.*, MASON, *supra* note 13; Blasi, *supra* note 12; Gewirtz, *supra* note 7; Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1 (1979); Nathaniel L. Nathanson, *The Philosophy of Mr. Justice Brandeis and Civil Liberties Today*, 1979 U. ILL. L.F. 261 (1979); Richard C. Turkington, *The Legacy of the Warren and Brandeis Article: The Emerging Unemcumbered Constitutional Right to Informational Privacy*, 10 N. ILL. U. L. REV. 479 (1990).

curiosity. The complex relationships between privacy and the First Amendment have taken on great importance in our modern, digital, and networked society—an era of Internet surveillance, warrantless wiretapping, and vast opportunities to disclose private information online.[15] Brandeis's writings are invoked repeatedly as authorities in these debates.[16] A clearer understanding of their meaning or meanings could indicate new perspectives from which to view the timely and timeless tension between the right to speak on the one hand and the right to keep information private on the other.

In this Article, I argue that the puzzle of Brandeis's views on privacy and speech can be resolved, and that its surprising resolution points the way towards a more useful understanding of both privacy and free speech. My basic claim is that Brandeis's thinking evolved over the course of his life, and he came to be deeply ambivalent about the tort theory he announced in *The Right to Privacy*. Whereas tort privacy is about preventing the disclosure of embarrassing information by the press, Brandeis came to embrace the somewhat contradictory idea that public disclosure of many kinds of fraud and wrongdoing is in the public interest. As he famously put it, "sunlight . . . is the best of disinfectants."[17] Brandeis also changed his mind about the importance of free speech. Although he had not been a strong believer in free speech as a young lawyer, he thought deeply about the importance of free speech after the First World War. He also came to believe that a robust free press was essential for a democratic state, and that the excesses of expression had to be tolerated rather than suppressed. Although he never repudiated tort privacy, by the end of his life, Brandeis had moved to a position on publicity and free speech that was inconsistent with a broad reading of the tort theory of *The Right to Privacy*.

Brandeis's partial rejection of tort privacy is not the most important part of the story. His later writings reveal a commitment to a second conception of privacy that is distinct from tort privacy. I call this conception "intellectual privacy." In *Olmstead* and some of his free

15. *See* SOLOVE, FUTURE OF REPUTATION, *supra* note 7 (regarding online speech); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008) (regarding surveillance and wiretapping).

16. *See, e.g.*, Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039, 1045 (2009) (citing Brandeis); Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1130 (2002) (same); Daniel J. Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 MINN. L. REV. 1137, 1174 (2002) (same); Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1658 (2009) (same); Volokh, *supra* note 7, at 1088 (same).

17. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY—AND HOW THE BANKERS USE IT 92 (1914).

speech writings, Brandeis suggested some subtle ways in which privacy and First Amendment values could be related. Privacy of thought and private discussion, he argued, are essential preconditions for the meaningful exercise of First Amendment liberties. Free speech thus requires some measure of intellectual privacy to be effective. These connections have been overlooked by prior scholarship, but they have important implications for modern theories of civil liberties. Indeed, in the Information Age, Brandeis's forgotten ideas have enormous potential to change the ways we think about information, speech, and privacy for the better.

In Part I, I examine *The Right to Privacy* and its attempt to remedy emotional injury caused by the revelation of embarrassing private facts by the press. I argue that both Brandeis's private correspondence and his public career reveal *The Right to Privacy* should not be understood as a centrally-important part of his legacy. The project was Warren's idea, not Brandeis's, and Brandeis almost immediately distanced himself from the work. Even as he was finishing the article, Brandeis was more concerned with a contrary commitment to "publicity" of wrongdoing—a commitment that remained important to him throughout his life. In Part II, I examine Brandeis's First Amendment writings, and show how the theory he developed in them is in direct tension with his earlier dalliance with tort privacy. I identify four ways in which Brandeis's mature free speech theory undermined and was inconsistent with the argument in *The Right to Privacy*, and show that Brandeis rejected a broad commitment to tort privacy rules against the press. In Part III, I reconsider Brandeis's First Amendment opinions in light of *Olmstead*, and show that these later writings contain the implicit but recurring theme that privacy of intellectual activity and freedom of thought are essential preconditions for any meaningful exercise of First Amendment liberties. This second conception of intellectual privacy is distinct from the tort privacy theory of *The Right to Privacy* in that it protects, rather than threatens, freedom of speech and press.

In Part IV, I shift my mode of analysis from intellectual history to normative theory, and consider Brandeis's ideas from a contemporary perspective. I briefly sketch out the surprising and compelling implications of Brandeis's mature views on privacy and speech—that we should largely put tort privacy aside and think hard about intellectual privacy. I argue that, although it was not fully developed in Brandeis's writings, intellectual privacy provides a novel framework with which to view a subset of important privacy problems in the Information Age.

I. TORT PRIVACY AND PUBLICITY

More than a century after it was published, Warren and Brandeis's *The Right to Privacy* remains the basic text of American privacy law.[18] Its argument that the common law should recognize a tort for invasion of privacy against the press set the agenda for the development of a variety of conceptions of privacy,[19] and has produced a large literature about the article itself.[20] Virtually unquestioned by scholars is the assumption that the arguments in *The Right to Privacy* are attributable to Brandeis and represent his most important words on privacy.

In this Part, I show that this assumption is wrong, and that the argument in *The Right to Privacy* was not as important to his thought as most privacy scholars have believed. First, I discuss the article on its own terms, identifying a number of themes that show its relationship to free speech. Second, I make the case that tort privacy may be Brandeis's most famous legacy, but its importance to his thought has been significantly overstated. Brandeis, it turns out, cared much less about his tort theory of privacy than scholars have assumed, at least when we situate the *Harvard* article in the broader context of his life's work and complete writings. Not only did Brandeis almost immediately privately recant the article's broader claims, but his subsequent public career shows a devotion not to the right of privacy, but to identifying and developing an alternative value he called "the duty of publicity."

A. The Right to Privacy *and Free Speech*

In 1890, Warren and Brandeis were in their early thirties, friends from Harvard Law School who had practiced law together in the 1880s.[21] *The Right to Privacy* was the third in a series of annual

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18. *See* Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 124–25 (2007) (summarizing and collecting the scholarly acclaim for the article).

19. ALAN WESTIN, PRIVACY AND FREEDOM 346–49 (1967); Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. (forthcoming 2010).

20. *See generally* James H. Barron, *Warren and Brandeis,* The Right to Privacy, *4 HARV. L. REV. 193 (1890): Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875 (1979); Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890–1990*, 80 CAL. L. REV. 1133 (1992); Amy Gajda, *What if Samuel D. Warren Hadn't Married a Senator's Daughter?: Uncovering the Press Coverage that Led to the Right to Privacy*, 2008 MICH. ST. L. REV. 35; Dorothy Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1 (1979); Richards & Solove, *supra* note 18; Diane Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1981).

21. MASON, *supra* note 13, at 56; STRUM, *supra* note 13, at 21, 30–34.

articles in the first volumes of the *Harvard Law Review*, a journal that Brandeis helped to create and continued to support as a regular author.[22] All three of their articles (the first two were about the law of ponds)[23] dealt with technical areas of law.

Although privacy was an obscure scholarly topic in 1890,[24] it was becoming a pressing social issue in American cities. Late nineteenth century society was becoming more urban, mobile, and diverse. A growing share of the population was crowding into cities; and urban populations increasingly felt the need for some respite from social and public life.[25] The new, so-called "Yellow Press" was profiting through a kind of entertaining reportage featuring more scandal and gossip than before.[26] And the rapid adoption of the portable camera had begun to make people uneasy about its ability to record daily life away from the seclusion of the photo studio.[27] Old norms of deference and respect seemed under assault, and there was great anxiety among elites keen on protecting their status, authority, and privacy.[28]

Newspaper and magazine articles during the summer of 1890 reflected these developments and anxieties.[29] In June, the *New York Times* reported that a court had granted an injunction to famous opera star Marion Manola against a theater promoter who had wanted to use a flash photograph of her wearing tights for publicity purposes without her consent.[30] In July, E.L. Godkin, the editor of *The Nation*,

22. MASON, supra note 13, at 67.

23. Samuel D. Warren, Jr. & Louis D. Brandeis, *The Watuppa Pond Cases*, 2 HARV. L. REV. 195 (1888); Samuel D. Warren, Jr. & Louis D. Brandeis, *The Law of Ponds*, 3 HARV. L. REV. 1 (1889). Melvin Urofsky suggests that the topic of pond law may have come from the importance of water power to their client, the Warren's family paper mill. UROFSKY, A LIFE, *supra* note 13, at 83.

24. LAWRENCE FRIEDMAN, GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY 215 (2007); Richards & Solove, *supra* note 18, at 129.

25. FRIEDMAN, *supra* note 24, at 221; ROCHELLE GURSTEIN, THE REPEAL OF RETICENCE: A HISTORY OF AMERICA'S CULTURAL AND LEGAL STRUGGLES OVER FREE SPEECH, OBSCENITY, SEXUAL LIBERATION, AND MODERN ART 34–38 (1996); NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 191–92 (1986); MICHAEL SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 102 (1978); G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 173 (expanded ed. 2003).

26. FRIEDMAN, *supra* note 24, at 214; DON R. PEMBER, PRIVACY AND THE PRESS 14 (1972); Barron, *supra* note 20, at 889–91; Benjamin E. Bratman, *Brandeis and Warren's* The Right to Privacy *and the Birth of the Right to Privacy*, 69 TENN. L. REV. 623, 645–46 (2002); E.L. Godkin, *The Rights of the Citizen: IV.To His Own Reputation*, 8 SCRIBNER'S MAG. 58, 66 (1890).

27. Robert E. Mensel, *"Kodakers Lying in Wait": Amateur Photography and the Right of Privacy in New York, 1885–1915*, 43 AM. Q. 1, 28 (1991).

28. *See* FRIEDMAN, *supra* note 24.

29. These developments are detailed in Barron, *supra* note 20, at 884–87.

30. *Manola Gets an Injunction*, N.Y. TIMES, June 18, 1890, at 2; *Photographed in Tights*, N.Y. TIMES, June 15, 1890, at 2; *see also* PEMBER, *supra* note 26, at 56 (noting the Manola case).

argued in *Scribner's Magazine* that the development of the Yellow Press required greater protection for what he called "the right to privacy," encompassing "[t]he right to decide how much knowledge of his personal thought and feeling, and how much knowledge, therefore, of his tastes and habits, of his own private doings and affairs, and those of his family living under his own roof, the public at large shall have."[31] Private correspondence between Warren and Brandeis suggests that the Godkin article did not directly prompt their writing. The genesis of the project seems to have come instead from Warren's "deepseated abhorrence" for gossip in the society pages of the Boston newspapers regarding his social life, particularly related to his wife and domestic social engagements.[32] Such gossip may seem mild by modern standards, but it injured Warren's sensibilities enough that he enlisted Brandeis in the project, which they completed over the autumn.[33]

In their article, Warren and Brandeis argued that the common law should recognize the right to privacy: the principle that individuals had the "right to be let alone" and could enforce this right through tort actions against the press. They claimed further that such a principle was fully consistent with the best traditions of the common law. Their article is the subject of a vast literature assessing its historical context and legal legacy,[34] which I do not intend to duplicate here. Because my purpose is to identify its place in Brandeis's understandings of privacy and free speech, I will highlight only two elements of its argument—the nature of the injury it sought to remedy and the way in which it envisioned the remedy itself.

1. Nature of the Injury

Warren and Brandeis argued that press reports caused two related kinds of social injuries—specific harms to the feelings and

31. Godkin, *supra* note 26, at 65.

32. *See* 1 LETTERS OF LOUIS D. BRANDEIS 303 (David W. Levy & Melvin I. Urofsky, eds. 1971) [hereinafter LETTERS]. In an exchange of letters in April 1905, Brandeis remarked to Warren, "My own recollection is that it was not Godkin's article but a specific suggestion of yours, as well as your deepseated abhorrence of the invasions of social privacy, which led to our taking up the inquiry." Warren replied, "You are of course right about the genesis of the article." LETTERS, at 303.

33. For a detailed examination of the news reports that seem to have offended Warren, see Gajda, *supra* note 20, at 44–57.

34. *See generally, e.g.*, Barron, *supra* note 20 (addressing the article's historical context and legacy); Bratman, *supra* note 26 (same); Gajda, *supra* note 20 (same); Kalven, *supra* note 3 (same); Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703 (1990) (same); Post, *supra* note 7 (same); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 388–89 (1960) (same); Zimmerman, *supra* note 20 (same).

personalities of individuals and a general harm to the level of public discourse in the press. The specific harm they wanted to remedy was the publication of private facts and photographs that caused hurt feelings. Warren and Brandeis argued that this "evil of the invasion of privacy" by journalists and others trading in personal gossip caused serious emotional and psychological damage.[35] The problem stemmed from technological and social changes that created new threats to human happiness: "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' "[36] The trade in gossip thus created by the press, Warren and Brandeis argued, included the publication of "details of sexual relations" and

> idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.[37]

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.[38]

Beyond the specific injury to individual feelings, Warren and Brandeis suggested more generally that the trade in personal gossip harmed the quality of public debate. While personal gossip was damaging enough, the authors argued that widely-circulated gossip by journalists was the most dangerous, and caused "the lowering of social standards and of morality."[39] Moreover, the prevalence of even harmless gossip had the effect of "inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder

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35. Warren & Brandeis, *supra* note 1, at 195.
36. *Id.* at 195.
37. *Id.* at 196.
38. WHITE, *supra* note 25, at 102–03.
39. Warren & Brandeis, *supra* note 1, at 196.

that the ignorant and thoughtless mistake its relative importance."[40] By crowding out more serious and important information in the minds of citizens, gossip lowered social standards and encouraged "the weak side of human nature" to flourish. [41] Protecting privacy was thus essential to protect not just hurt feelings, but the level of public discourse itself.

Warren and Brandeis conceptualized the injuries from invasion of privacy as psychological injuries to personality—especially to refined, cultured, social personalities. In this regard, their conception of privacy was constructed along both class and gender lines. From a social class perspective, Warren and Brandeis clearly sought to protect the refined sensibilities of elites from the unwanted gaze of their social inferiors, as a handful of scholars have recognized.[42] Lower classes would suffer less injury from invasion of privacy, both philosophically, since they were less refined by culture, and practically, since their domestic affairs were less likely to be the subject of journalistic reports. The article can also be seen as part of what Lawrence Friedman has called "The Victorian Compromise," a larger social movement among American urban elites to protect their own reputations and allow slippages from their own demanding codes of moral propriety.[43] Friedman argues convincingly[44] that rather than proposing an entirely novel theory, Warren and Brandeis were actually part of a broader cultural movement seeking to protect the autonomy of elites and the existing social structure.[45]

The Right to Privacy also reflected traditional Gilded Age notions of gender roles and the "cult of domesticity." Gilded Age conceptions of public and private were inseparably bound up in gendered conceptions of masculinity and femininity. As a number of feminist privacy scholars have demonstrated, the public sphere was conceptualized as masculine, while the private sphere was conceptualized as feminine and tied to the "cult of domesticity."[46]

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40. *Id.*

41. *Id.* at 196.

42. Barron, *supra* note 20, at 884–87; James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1205 (2004).

43. FRIEDMAN, *supra* note 24, at 4.

44. Neil M. Richards, *Privacy and the Limits of History*, 21 YALE J.L. & HUMAN. 1, 168 (2009).

45. FRIEDMAN, *supra* note 24, at 214–15.

46. *See* Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441, 441 (1990) ("The privacy tort was the brainchild of nineteenth-century men of privilege and it shows. . . . [A]s conceived by Warren and Brandeis and initially applied by the courts, the privacy tort bears the unmistakable mark of male hegemony."); Susan E. Gallagher, *A Man's Home: Rethinking the Origins of the Public/Private Dichotomy in American Law*, HISTORY OF PRIVACY,

Warren and Brandeis drew a revealing distinction between the feminine "sacred precincts of private and domestic life,"[47] such as the publication of a "woman's face, her form, her actions,"[48] and the masculine public sphere, such as a man's business or "his fitness for a public office."[49] It is thus one of the ironies of the Warren and Brandeis article that although their project was socially conservative, it looked to radical theories of tort law for relief.

2. Nature of the Remedy

Another important dimension of the Warren and Brandeis theory of privacy was the nature of its intended remedy—tort, injunctive, or even criminal liability against the press.[50] The authors relied on a number of common law doctrines allowing remedies for disclosure of private information, including the law of literary property,[51] breach of confidence,[52] and trade secrets,[53] to establish "the more general right to the immunity of the person,—the right to one's personality."[54] No American court had recognized a duty of journalists to be sensitive to the "thoughts, emotions, and sensations"[55] of their subjects. So Warren and Brandeis shifted the remedy from one of breach of duty to injuries to the "inviolate personality" of the subjects of unreasonably intrusive newspaper reports. They shifted the nature of the injury from a breach of a relational duty to a more direct personal injury in tort. The essence of this tort injury, then, was liability of the press for disclosing truthful private information that injured the feelings and personality of plaintiffs—a tort against publications that hurt people's feelings. By crafting the tort in such a way, *The Right to Privacy* gave birth to a tort that was inevitably going to come into conflict with the constitutional values protected by the First Amendment.

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http://www.historyofprivacy.net/ (last visited Sept. 9, 2010) (describing Warren and Brandeis as part of a "revolt against modernity" and "an attempt to preserve the traditional family from both the unsettling effects of the women's rights movement and the invasive aspects of mass culture, especially as embodied in the popular press.").

47. Warren & Brandeis, *supra* note 1, at 195.

48. *Id.* at 214.

49. *Id.* at 216.

50. *Id.* at 219–20.

51. *Id.* at 198–206.

52. *Id.* at 207–12.

53. *Id.* at 212.

54. *Id.* at 207.

55. *Id.* at 206.

Warren and Brandeis recognized this problem and tried to avoid it in two ways. First, they modeled their tort on defamation law, which was a recognized example of tort liability against the press based upon the hurtful content of its articles.[56] In constructing the elements of their new tort, Warren and Brandeis drew freely upon the structures of libel and slander. For instance, they suggested that the new privacy tort should exclude matters privileged by the law of libel and slander,[57] the absence of "malice" by a publisher should not constitute a defense, and, as with defamation law, damages and injunctive relief should be allowed.[58] And like defamation law, the proposed privacy tort excluded oral publication from the scope of liability in the absence of special damages.[59] Certainly, this analogy tracked the historical distinction between oral slander and printed libel in American defamation law.[60] But more significant was the justification Warren and Brandeis gave for this exclusion. Relying upon Godkin's article in *Scribner's*, they suggested that "[t]he injury resulting from such oral communications would ordinarily be so trifling that the law might well, in the interest of free speech, disregard it altogether."[61] The explicit mention of free speech reveals that Warren and Brandeis recognized the tension with free speech that their tort created.

While they used defamation as a model, Warren and Brandeis changed or eliminated a number of the features of defamation law that minimized its conflict with a free press. Unlike defamation, which protects intangible property interests in reputation, the privacy tort remedied "mere injury to the feelings,"[62] an injury that was even harder to quantify than reputation. The proposed privacy tort also jettisoned the defense of truth, by which defamation defendants could avoid liability by proving the truth of their allegedly false statement.[63] The truth defense balances the interests in reputation with the

56. *Id.* at 214.

57. *Id.* at 216.

58. *Id.* at 219.

59. *Id.* at 217.

60. Both libel and slander protect a property-like interest in reputation. At common law, a libel was "any writings, pictures or the like" which exposed another to "public hatred, contempt and ridicule." 4 WILLIAM BLACKSTONE, COMMENTARIES *150. Slander was speaking or writing against, cursing or wishing ill, or giving out scandalous stories concerning another. *Id.* at *123. In the absence of a few special circumstances, plaintiffs could not recover for slander without proof of a "special harm," a "harm of material and generally of a pecuniary nature." RESTATEMENT (FIRST) OF TORTS § 575 cmts. a, b (1938).

61. Warren & Brandeis, *supra* note 1, at 217.

62. *Id.* at 197.

63. *Id.* at 218.

interests in free speech and press, and under modern law proof of falsity is required in most cases by the First Amendment.[64] But since they sought to remedy the publication of private true facts, Warren and Brandeis eliminated the truth element from their tort as well.[65]

Second, admitting that a general remedy against the press for hurt feelings threatened free speech interests, Warren and Brandeis tried to draw a line between protected public matters and actionable private ones. Once again, the authors looked to defamation law for a solution, and sought to borrow the way defamation law balanced the tension between tort injury and a free press. Modern constitutional law subjects most torts creating civil liability for speech to direct First Amendment scrutiny, but before the 1960s private tort lawsuits were not thought to implicate the Constitution because of the absence of state action. Rather than measuring tort rules against a First Amendment standard of minimum constitutionality (as modern courts do after *New York Times v. Sullivan*[66]), the traditional method for resolving conflicts between tort harms and free speech was to balance them within the contours of the tort.[67]

Warren and Brandeis acknowledged that in applying the right to privacy, courts would have to engage in line-drawing between public and private matters. As they put it, their tort would protect only information "concern[ing] the private life, habits, acts, and relations of an individual,"[68] but would not "prohibit any publication of matter which is of public or general interest."[69] Thus, the tort would not protect the publication of information lacking a "legitimate connection" with the fitness of a candidate for public office or any actions taken in the public sphere.[70] Recognizing that these general principles did little more than sketch a rough distinction, the authors acknowledged that they had not provided "a wholly accurate or exhaustive definition," leaving the contours of the distinction to the common law method of case-by-case adjudication.[71] But the principle that should guide the distinction should be the idea that "[s]ome

64. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Gertz v. Welch, 418 U.S. 323 (1974); N. Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). Under modern law, when a defamation plaintiff seeks punitive damages against the press for publishing matters of public concern, she must prove "actual malice"—either intentionally or recklessly false statements of fact. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1465–76 (2009).

65. Warren & Brandeis, *supra* note 1, at 218.

66. 376 U.S. 254.

67. Solove & Richards, *supra* note 16, at 1658.

68. Warren & Brandeis, *supra* note 1, at 216.

69. *Id.* at 214.

70. *Id.* at 216.

71. *Id.*

things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation."[72]

Two aspects of this line-drawing exercise are particularly important. First, Warren and Brandeis displayed the intellectual honesty that this particular line was neither clear nor predictable. Although they acknowledged the difficulties in distinguishing between private matters and those of "public and general interest," they argued that the line-drawing exercise was no more difficult than others routinely undertaken by common law methodology such as reasonableness in negligence law.[73] Second, their balance between public and private turned in large measure upon the type of plaintiff alleging injury, with people in "public life" or aspiring to "public office" receiving less protection from the tort than private individuals who had not thrust themselves into the public sphere. This distinction tracks the modern constitutional law of defamation, under which the Supreme Court draws a number of distinctions between "public figures" and "private figures" in balancing reputational interests against free press reportage on matters of "public concern."[74]

Although its attempt to protect tort rights in personality was balanced against a free press, from a modern perspective, the article is inconsistent with both substantive and procedural understandings of what the First Amendment protects. Substantively, modern First Amendment law has tended to reject hurt feelings as a value important enough to justify restricting speech.[75] Procedurally, the judicial policing of a line between protected speech on public matters and actionable disclosure of private facts would lack the "breathing space" that modern law affords speech.[76] The judicial policing of the quality of public debate is even more at odds with modern understandings of free speech.[77] And the Warren and Brandeis cause of action reflects a gender and class bias that sits uneasily with

72. *Id.*

73. *Id.* at 214.

74. *See, e.g.*, Gertz v. Welch, 418 U.S. 323 (1974).

75. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 414 (1992); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 54–56 (1988).

76. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 769–70 (1985); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 499 n.3 (1975); *Gertz*, 418 U.S. at 342 (1974); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967); N. Y. Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964); NAACP v. Button, 371 U.S. 415, 433 (1963).

77. *See Dun & Bradstreet*, 472 U.S. at 769–70; *Cox Broad. Corp.*, 420 U.S. at 499 n.3; *Gertz*, 418 U.S. at 342; *Time, Inc.*, 385 U.S. at 374; *Sullivan*, 376 U.S. at 271–72; *Button*, 371 U.S. at 433.

modern notions of equality. But it is probably unfair to label the article, as one critic has, a "profoundly conservative . . . form of press censorship."[78] Within the context of its times, and within the pre-*New York Times v. Sullivan* view of the relationship between free speech and tort law, the argument of *The Right to Privacy* was well within the mainstream of legal thought, even if it was creatively reading precedent and calling for a new tort.[79] In the nineteenth century, freedom of speech was relatively unimportant as a legal matter, even while political rhetoric about its importance was widespread.[80] As I will argue in Part II, many progressives and even future leading free speech theorists like Brandeis and Oliver Wendell Holmes were uninterested in substantial protection for free speech, considering it just one of a number of social values that the law should try to protect.[81] Courts dealing with privacy suits in the decades immediately after the publication of the article acknowledged, like Warren and Brandeis, that the right to privacy was in some tension with free speech.[82] However, such courts either reconciled[83] the privacy tort with free speech or rejected it on non-free speech policy grounds.[84] Similarly, despite the outpouring of academic commentary dealing with the right to privacy over the same period, even critics of the right tended to base those criticisms on grounds other than free speech.[85]

But before leaping directly into the issues of the conflict between tort privacy and a free press, it is necessary to put *The Right to Privacy* in context as a part of Brandeis's social thought as a whole.

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78. Ken I. Kersch, *The Reconstruction of Constitutional Privacy Rights and the New American State*, 16 STUD. AM. POL. DEV. 61, 76 (2002).

79. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 205 (1992).

80. MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICA'S HISTORY 8–9 (2000); RABBAN, *supra* note 10, at 131.

81. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 51–52 (1919) (upholding conspiracy conviction under the Espionage Act for obstructing the draft in wartime); Fox v. Washington 236 U.S. 273, 277–78 (1915) (upholding state statute punishing advocacy that produced disrespect for law); Patterson v. Colorado, 205 U.S. 454, 462 (1907) (upholding a prior restraint against the press); Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895) (Holmes's rejection of free speech claims in a public park); MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 106–12 (1991).

82. PEMBER, *supra* note 26, at 57, 77. *See also* Corliss v. Walker, 57 F. 434 (C.C. Mass. 1893) (denying enjoinment of publication of private facts for free press policy reasons); Atkinson v. Doherty, 80 N.W. 285 (Mich. 1899) (any right to privacy in a person's image ends at death).

83. Pavesich v. N. Eng. Life Ins. Co., 50 S.E. 68, 74 (Ga. 1905).

84. Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902).

85. *E.g.*, Denis O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437, 440–42 (1902) (arguing that any right to privacy should be recognized by the legislature); Herbert Spencer Hadley, *The Right to Privacy*, 3 N.W. U. L. REV. 1 (1895) (critiquing Warren & Brandeis on equity grounds).

As I will show in the next section, although he remained proud of his article, *The Right to Privacy* was actually a fairly minor part of Brandeis's thought, at some odds with ideas he felt to be more important.

B. The Duty of Publicity

Although privacy law scholars have long identified Brandeis as the father of American privacy law, Brandeis's personal feelings about tort privacy seem to have been deeply ambivalent. While he remained proud of his legal innovation in this area throughout his life, it does not appear to have been an issue he gave any significant attention to after 1890, other than in his dissent in *Olmstead v. United States* almost forty years later. The editor of his letters concluded that he "did not really want to get involved" in Warren's project.[86] In fact, even before the article was published, Brandeis privately expressed some misgivings about it. In a letter to his future wife Alice Goldmark in November 1890, he noted that while the proofs had arrived back from the *Harvard Law Review* editors, "I have not looked over all of it yet, but the little I read did not strike me as being as good as I had thought it was."[87] Brandeis later confided in his official biographer Alpheus Mason that "[t]his, like so many of my public activities, I did not volunteer to do."[88]

Brandeis never publicly disclaimed the article, and some fifteen years later he expressed "pleasure" when the Georgia Supreme Court cited the article favorably and expressly recognized a privacy tort against the use of a person's image in advertising without consent.[89] In an exchange of letters with Warren, he revealed his pride that their article had "remain[ed] a vital force."[90] Acknowledging that "invasions of [Warren's] social privacy" had prompted him to enlist Brandeis in the project, Warren urged Brandeis to draw up "such a statute as

86. UROFKSY, A LIFE, *supra* note 13, at 98.

87. Letter from Louis D. Brandeis to Alice Goldmark (Nov. 29, 1890) *in* 1 LETTERS, *supra* note 32, at 94–95.

88. UROFSKY, A LIFE, *supra* note 13, at 102.

89. *See* Pavesich v. N. Eng. Life Ins. Co., 50 S.E. 68, 74 (Ga. 1905); Letter from Louis D. Brandeis to Andrew Jackson Cobb (Apr. 17, 1905), *in* 1 LETTERS, *supra* note 32, at 303–04; Letter from Louis D. Brandeis to James Bettner Ludlow (Apr. 20, 1905), *in* 1 LETTERS, *supra* note 32, at 306.

90. Letter from Louis D. Brandeis to Samuel D. Warren (Apr. 8, 1905), *in* 1 LETTERS, *supra* note 32, at 302–03.

would meet the chief invasions of privacy, without covering more ground than considered public opinion would sustain."[91]

But Brandeis never drafted the statute Warren suggested. Scholarship on Brandeis has claimed, while linking the *Harvard* article to the *Olmstead* dissent, that "[p]rivacy had of course been a major concern of Brandeis's for years."[92] But there is no known evidence, apart from the correspondence just quoted, that Brandeis spent any significant time working on privacy between 1890 and 1928, when he dissented in *Olmstead*—a period of thirty-eight years representing the bulk of his active public life. Given the number and variety of issues—industrial democracy, Zionism, savings bank life insurance, rate regulation, institutional bigness—that Brandeis occupied himself with during these years, if privacy remained a major concern of his, he did not manifest this concern during his most productive and vital years of public service. Rather than being a major theme in his life's work, privacy seems more accurately to represent a sidelight; certainly one which he treated with typical care and thoughtfulness, but one he devoted time to once when he was thirty-four and just starting his career and once again when he was seventy-two. In this regard, the limited treatment of privacy in his official biography seems representative of the lesser importance of privacy to Brandeis in the totality of his life.[93]

In striking comparison to Brandeis's views on privacy was his more deeply-held attachment to a reciprocal "duty of publicity." Throughout Brandeis's career, publicity and the application of known facts to practical situations remained the hallmark of his approach to legal problems. A free and zealous press was an essential part of this process. As a young lawyer, he suggested that in questions of reform politics, "[a] reform-minded press must not only point out new evils, but remind people of old ills, so they will not be forgotten."[94] And in an 1886 letter to his brother Alfred about a political issue, Brandeis noted that "[t]he more the matter is canvassed & discussed (and the papers have taken up the question now), the better for us. It is only ignorance and dark dealing that we must fear."[95] Melvin Urofsky aptly

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91. Letter from Samuel D. Warren to Louis D. Brandeis (Apr. 10, 1905), *quoted in* 1 LETTERS, *supra* note 32, at 303.

92. STRUM, *supra* note 13, at 325.

93. *See* MASON, *supra* note 13, at 70, 564, 567–68 (devoting limited attention to privacy).

94. Letter from Louis D. Brandeis to Edwin Bacon, *quoted in* THE BRANDEIS GUIDE TO THE MODERN WORLD 200–01 (Alfred Leif ed., 1941), *and* UROFSKY, A LIFE, *supra* note 13, at 87.

95. Letter from Louis D. Brandeis to Alfred Brandeis (Mar. 20, 1886) *quoted in* UROFSKY, A LIFE, *supra* note 13, at 87.

characterizes this approach as "Brandeis's inexorable fact-laden logic."[96]

These ideas were running through Brandeis's mind when he was working on *The Right to Privacy*, and he found them more compelling than the privacy argument that Warren had proposed. In a letter to Alice Goldmark several weeks after the publication of *The Right to Privacy*, Brandeis wondered about what his next project should be, noting:

> Lots of things which are worth doing have occurred to me as I sit calmly here. And among others to write an article on "The Duty of Publicity"—a sort of companion piece to the last one that would really interest me more. You know I have talked to you about the wickedness of people shielding wrongdoers & passing them off (or at least allowing them to pass themselves off) as honest men. Some instances of that have presented themselves within a few days which have fired my imagination. If the broad light of day could be let in upon men's actions, it would purify them as the sun disinfects. You see my idea; I leave to you to straighten out and complete that sentence.[97]

Brandeis's interest in the publicity idea was manifested in *The Right to Privacy* as well.[98] Toward the end of the article is a curious section dealing with "privileged communications."[99] This section, which has been largely overlooked by scholars, suggests that the right to privacy should be inapplicable to any publication of private facts "made under circumstances which would render it a privileged communication under the law of slander and libel."[100] This category includes communications made in courts, legislatures, or any public or quasi-public organization (including benevolent societies and charities) created for the public interest.[101] Brandeis thus suggested that, although the right to privacy should cover newspapers and other forms of published *gossip*, the right was simply inapplicable to *facts* needed by governmental and quasi-governmental entities involved in the processes of lawmaking, governance, and social control. But the distinction between facts and gossip, like the distinction between public and private, was not a clear one.

Brandeis did not write his "duty of publicity" article in 1891, but the idea of a duty of publicity remained with him for the remainder of his public career. As Alpheus Mason put it aptly in 1946, "Louis never got around to writing the article, but he did fulfill the

96. UROFSKY, A LIFE, *supra* note 13, at 565.

97. Letter from Louis D. Brandeis to Alice Goldmark (Feb. 26, 1891), *in* 1 LETTERS, *supra* note 32, at 100.

98. LETTERS, *supra* note 32, at 102; MASON, *supra* note 13, at 94 n.*.

99. Warren & Brandeis, *supra* note 1, at 216.

100. *Id.*

101. *Id.*

duty."[102] Unlike privacy, publicity was a theme that Brandeis returned to frequently and with enthusiasm. A hallmark of Brandeis's social thought, as many commentators have noted, was the necessity of facts as the basis for neutral professional judgment.[103] This was the philosophy that undergirded much of his public career as both the "People's Attorney" and a Justice on the Supreme Court.

Brandeis spoke openly about the importance of publicity throughout his career. As he told a Congressional committee in 1911, "in all our legislation we have got to base what we do on facts and not on theories."[104] Like many progressives,[105] Brandeis believed that the modern state needed the power to compel facts from individuals and businesses in order to govern effectively. And in order to produce these facts, the state needed to pry into areas of American life that had previously been thought private, such as private industry, private property, or private facts.

These ideas about facts and governance coalesced around the need for what Brandeis termed "publicity" in commercial relations. He had alluded to this concept in his 1890 letter to Alice Goldmark about commercial fraudsters. But he expressed the concept most fully in his celebrated 1913 essays in *Harper's Magazine*, later collected and published in book form as *Other People's Money*.[106] Brandeis devoted an entire chapter of the published book to the duty of publicity and its regulatory potential. In it, he argued that underwriters of securities issuances were extracting enormous and excessive commissions for performing their services, the cost of which was borne by ordinary investors.[107] Because he believed that the investors could better protect themselves if they knew the size of the commissions, Brandeis proposed publicity as the remedy in order to empower investors with the knowledge they needed to protect themselves.[108] And the central claim of the essay was the fruition of the idea he had first suggested to Alice Goldmark over two decades before:

> Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman. And publicity has already played an important part in the struggle against the Money Trust. The Pujo Committee has, in the disclosure of the facts concerning financial concentration, made a most important contribution toward attainment of the New

102. MASON, *supra* note 13, at 94.

103. *See, e.g.*, MASON, *supra* note 13, at 249–50; UROFSKY, A LIFE, *supra* note 13, at 63, 130–31, 477.

104. UROFSKY, PROGRESSIVE TRADITION, *supra* note 13, at 50.

105. Kersch, *supra* note 78, at 77 (2002).

106. BRANDEIS, *supra* note 17, at 62–63.

107. *Id.* at 94–97.

108. *Id.* at 101–04.

> Freedom. The battlefield has been surveyed and charted. The hostile forces have been located, counted and appraised. That was a necessary first step—and a long one—towards relief. . . . But there should be a further call upon publicity for service. That potent force must, in the impending struggle, be utilized in many ways as a continuous remedial measure.[109]

To counter the problem of excessive underwriters' commissions, Brandeis proposed that issuers of securities make mandatory disclosures in prospectuses and advertisements of any commissions or profits they anticipated receiving. Such a remedy "is knowledge to which both the existing security holder and the prospective purchaser is fairly entitled. If the bankers' compensation is reasonable, considering the skill and risk involved, there can be no objection to making it known. If it is not reasonable, the investor will 'strike.' "[110] Brandeis continued that such publicity was warranted for the additional reason that it would aid investors in assessing the risk involved in a particular investment, which would rationally be reflected in the size of the commission.[111] Brandeis thus advocated giving publicity to private financial arrangement in order to solve a social problem—the excessive and mutually-reinforcing wealth of what he called the "Money Trust" in much the same way that the federal "Pure Food Law" had required mandatory disclosures of ingredients. Publicity, he believed, promoted fair dealing and fair profits for issuers, without taking the odious step of fixing profits or policing market exchanges for merely bad or unwise bargains.[112]

In *Other People's Money*, Brandeis confronted what for him, like other Progressives, was the defining problem of their time: how to reconcile traditional American values in a time of rapid technological and social change.[113] Brandeis believed that the solution was a change in the nature of the state to deal with these problems through fact-based expertise and judgment. Ken Kersh suggests that Brandeis's interest in publicity exemplifies the larger progressive interest in the process by which a state visualizes and examines its society[114]—a process political scientist James Scott has termed the "project of legibility."[115] But in order to govern effectively, the new state needed to be able to examine the society it was trying to order. In order to govern American society, progressives needed a state that could

109. *Id.* at 92.

110. *Id.* at 101–02.

111. *Id.* at 102–04.

112. *Id.*

113. *Id.* at 162–88.

114. Kersch, *supra* note 78, at 76.

115. JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 80 (1998).

"render many formerly dark corners of civil society visible in order to control and manipulate them."[116]

Brandeis also believed that accurate facts were necessary for courts to do their jobs properly. As he told a reporter in 1911, "in the past the courts have reached their conclusions largely deductively, from preconceived notions and precedents. The method I have tried to employ in arguing before them has been inductive, reasoning from the facts."[117] Brandeis believed that judges should apply a "living law" rather than one characterized by a dusty formalism divorced from social reality.[118] This approach is exemplified by the "Brandeis Brief" made famous by his submissions in *Muller v. Oregon*.[119] This process required lawyers to educate judges with facts and context so that they could decide cases in a way attentive to a changing society. In *Muller*, a case in which Brandeis defended Oregon's statute providing a ten-hour day for female workers, he needed a weapon to deal with the *Lochner*-era fears that the statute was unequal "class" legislation or interfered with the liberty of contract.[120] Brandeis believed that a living law required him to explain to the Supreme Court exactly why Oregon's statute did not violate the constitutional requirement of equality in social legislation or infringe the liberty of contract of equal parties. The solution lay in explaining the facts of social reality. As Melvin Urofsky eloquently describes the *Muller* brief:

> Brandeis devoted a scant two pages to legal citations, and more than a hundred to employment statistics. The *Lochner* decision had held out the possibility of court approval if justification could be shown; this Brandeis did by citing one study after another on the effects of long working hours on the health and morals of working women. He did much more than just argue the case for Oregon; he tried to get all sides to understand why the state had passed the law, why it was necessary, how it justifiably utilized the police power. He advised the Court, and in doing so he lectured the learned Justices on matters about which they knew little yet were essential to their understanding of the case.[121]

As a Justice, Brandeis continued to believe that facts and social context should inform judicial deliberations. As he wrote in a 1927 dissent, even in a juridical regime properly respecting stare decisis,

116. Kersch, *supra* note 78, at 62.

117. Melvin I. Urofsky, *Louis D. Brandeis: Teacher*, 45 BRANDEIS L.J. 733, 733–34 (2007) (quoting Ernest Poole, *Brandeis, A Remarkable Record of Unselfish Work Done in the Public Interest*, AM. MAG., Feb. 1911).

118. Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461 (1916); UROFSKY, PROGRESSIVE TRADITION, *supra* note 13, at 50.

119. 208 U.S. 412 (1908).

120. *See* Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 932–33 (2005).

121. UROFSKY, PROGRESSIVE TRADITION, *supra* note 13, at 53; *see also* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 166 (2000).

"the logic of words should yield to the logic of realities."[122] Unfortunately, Brandeis could not always count on the sort of technically-precise factual advocacy he had tried to proffer when he was a lawyer. Thus, he believed that judges should be free to undertake factual investigations of their own, and use the process of judicial notice to inform their deliberations. In this regard, he is the "great practitioner" of Holmes's idea that "the life of the law is not logic but experience."[123] For example, *Jay Burns Baking Co. v. Bryan*[124] involved a Nebraska statute regulating bread weights, in which the facts and technicalities of bread production were relevant to the disposition of the case. As Barry Cushman has explained,[125] Brandeis was dissatisfied with the state of the record, and apparently undertook with his law clerk to assemble a massive amount of data relating to the "the history of the experience gained under similar legislation, and the results of scientific experiments made since the entry of the judgment below."[126] Brandeis believed that such factual investigation was required for the proper administration of justice.[127] As he concluded in his dissent, "[o]f such events in our history, whether occurring before or after the enactment of the statute or of the entry of the judgment, the court should acquire knowledge, and must, in my opinion, take judicial notice, whenever required to perform the delicate judicial task here involved."[128]

Brandeis thus believed firmly that facts were necessary to good governance, and that publicity and sunlight produced those necessary facts. A commitment to legibility and sunlight is a commitment to disclosure—one typically at odds with a commitment to privacy. Certainly, Brandeis seems to have continued to believe that privacy had its place, and may have viewed industrial and political privacy as different from personal privacy, i.e., privacy of the feminine "domestic circle." Under this view, while most matters relating to commerce or politics were public, domestic matters of all but the most public of

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122. DiSanto v. Commonwealth of Pennsylvania, 273 U.S. 34, 43 (1927) (Brandeis, J., dissenting).

123. UROFKSY, A LIFE, *supra* note 13, at 217.

124. 264 U.S. 504 (1924).

125. Cushman, *supra* note 120, at 953.

126. *Jay Burns*, 264 U.S. at 533 (Brandeis, J., dissenting).

127. Cushman, *supra* note 120, at 953.

128. *Jay Burns*, 264 U.S. at 533 (Brandeis, J. dissenting). In a similar vein, see *Adams v. Tanner*, 244 U.S. 590, 600 (1917) (Brandeis, J., dissenting) ("Whether a measure relating to the public welfare is arbitrary or unreasonable, whether it has no substantial relation to the end proposed, is obviously not to be determined by assumptions or by a priori reasoning. The judgment should be based upon a consideration of relevant facts, actual or possible—*Ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law.")

figures still retained their private nature. This reading is certainly consistent with the documentary evidence and with the text of *The Right to Privacy*. But this reading misses the relative weight that Brandeis gave to the interests of privacy and publicity. While Brandeis never disclaimed tort privacy, he never pursued it again in his public career. In fact, while he remained proud of the job he did for Warren in the article, he spent much greater energies as a writer and advocate arguing for the importance of facts, sunlight, and disclosure. In the totality of his life's work, Brandeis's commitment to tort privacy is better considered as an exception to the general rule of publicity rather than a hallmark of his social theory. Moreover, after Brandeis's commitment to publicity had rendered tort privacy an exception, his growing interest in free speech suggested that robust protection of tort privacy might be inconsistent with the Constitution as well. This is the story to which we now turn.

II. FREE SPEECH

Brandeis came to the First Amendment later in life, but when he embraced the freedom of speech and press, he did so fully. By the time of his death in 1941, Brandeis had established himself as one of the principal theorists of the modern First Amendment. But his views on free speech changed significantly over time. Although he was largely unconcerned with free speech for most of his life, Brandeis ultimately came to embrace the importance of First Amendment values and their relationship to his vision of a good society. His views evolved as a result of a series of First Amendment cases he worked on as a judge in the aftermath of the First World War. Brandeis's contributions to free speech theory were novel, thoughtful, and influential. They were also deeply inconsistent with his earlier treatment of the freedom of speech and press in *The Right to Privacy*.

A. Free Speech Before 1919

Before American entry into the First World War and the enactment of the Espionage Act of 1917, the Supreme Court had not had much occasion to consider issues of free speech.[129] Nor had most progressive intellectuals like Brandeis, who tended to distrust popular rule as inferior to governance by a class of disinterested experts, and

129. G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth Century America*, 95 MICH. L. REV. 299, 310–11 (1996); *see also* GRABER, *supra* note 81, at 41; RABBAN, *supra* note10, at 131.

who were suspicious of constitutional liberties in general during the *Lochner* era.[130] Although Brandeis's mature brand of free speech theory reflected many of the themes of his larger body of social thought, for most of his life his views on free speech reflected the mainstream view of his social class that free speech was a worthy goal, but not a particularly special one.[131] Under this view, free speech was to be protected where possible, but could be freely traded off or balanced against other social goods. A fine example of this belief is Warren and Brandeis's own proposal to protect the privacy of the upper classes in their 1890 article.[132]

Brandeis's views on free speech prior to the Espionage Act are also illustrated by his first judicial opinion involving free speech issues—his dissent in the 1918 case of *International News Service v. Associated Press*.[133] The case involved the legality of the International News Service's practice of reprinting the Associated Press's news stories from early editions of newspapers. In an opinion still read in first-year property law courses, Justice Pitney held that both ethical questions of justice and the utilitarian public interest in the creation of news warranted injunctive relief against International News Service.[134] In a typical fact-laden opinion, Brandeis argued that the majority's rule might prove counterproductive, and that the "free use of knowledge and of ideas" could be curtailed by the majority's recognition of a quasi-property right in news reports.[135]

More generally, Brandeis argued that the Court lacked the competence to set news policy; rather than announcing a new common law rule, it should leave the question to the greater expertise of the political branches.[136] In a normative and methodological departure from the argument in *The Right to Privacy*, he suggested that while the common law "possesses capacity for growth and has often satisfied new demands for justice by invoking analogies or by expanding a rule of a principle," such an approach was unwarranted in the factual context of the news business.[137] Although common law rules could prove useful for simple legal problems involving only private interests, "with the increasing complexity of society, the public interest tends to

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130. GRABER, *supra* note 81, at 11; *see also* Cover, *supra* note 10, at 365–69 (discussing skepticism of popular government in the writings of influential progressive Walter Lippmann).

131. *Id.*

132. *See supra* Part I.A.

133. 248 U.S. 215 (1918).

134. *Id.* at 235.

135. *Id.* at 263.

136. *Id.* at 267.

137. *Id.*

become omnipresent."[138] In such cases, like the present one involving the news industry, even where "the propriety of some remedy seems to be clear," courts were incapable as a practical matter of prescribing the detailed regulations that an effective remedy required, because unlike legislatures they lacked the power to determine the relevant facts upon which a legitimate decision must rest.[139] In its protection of the "omnipresent" public interest in news reports over private interests, and also in its rejection of simple common law remedies in the news media context, Brandeis's opinion in *International News Service* suggests that he had moved away from his argument in *The Right to Privacy* by 1918. With the maturation of Brandeis's views on free speech in the following few years, he would move even further still.

The most striking fact about *International News Service* from a modern perspective is that no Justice on the Court understood the issue in First Amendment terms, even though the case involved the issuance of injunctions against the reporting of accurate news by the media.[140] Moreover, Brandeis's willingness to experiment with intricate legislative and administrative approaches to the problem would also seem to create obvious constitutional problems from direct government regulation of the press's reporting of news.[141] But Brandeis was not alone in having thought little about the importance of free speech. Before American entry into the First World War, the Supreme Court had considered free speech issues on only a handful of occasions, and had never sustained a free speech claim on constitutional grounds.[142] The thinness of the Court's free speech docket was about to end, and this would present Brandeis with facts that would change his mind about the importance of free speech.

The Espionage Act of 1917 was enacted as part of American entry into the First World War.[143] It criminalized, among other things, obstruction of the draft and produced over a thousand convictions, many of which were based upon speech critical of the war, the government, or conscription.[144] Such convictions seem to have been

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138. *Id.*

139. *Id.* at 267.

140. *See* Cover, *supra* note 10, at 370–71.

141. *Id.* at 371.

142. *E.g.*, Fox v. Washington, 236 U.S. 273 (1914); Patterson v. Colorado, 205 U.S. 454 (1906).

143. DAVID KENNEDY, OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY 24–26 (1980).

144. RABBAN, *supra* note 10, at 256; RONALD SCHAFFER, AMERICA IN THE GREAT WAR: THE RISE OF THE WELFARE STATE 15 (1991); Phillippa Strum, *Brandeis: The Public Activist and Freedom of Speech*, 45 BRANDEIS L. J. 659, 668 (2007).

contemplated by the statute, which was intended to safeguard the war effort (including conscription).[145] A number of these cases were heard by the Supreme Court, and formed the context within which Brandeis and Holmes changed their minds and adopted more speech-protective conceptions of the First Amendment. These cases fall into two groups—one group decided in early 1919, and a second from late 1919 through the 1920s. In the first set of cases, a unanimous court rejected all free speech claims under the Espionage Act. In the second, Brandeis and Holmes dissented, articulating an innovative speech-protective conception of the First Amendment.

In the first group of cases, Brandeis and Holmes actually authored the opinions unanimously dismissing the free speech claims. On March 3, 1919, Brandeis delivered the opinion in *Sugarman v. United States*,[146] upholding a conviction for draft obstruction. Abraham Sugarman had addressed a meeting of socialists and had urged any men registered with the draft to refuse to be inducted into the armed forces.[147] Brandeis's opinion rejected without analysis Sugarman's First Amendment challenge to his conviction on the grounds that it failed to present a substantial federal question.[148] The same day, Brandeis joined Holmes's majority opinion in *Schenck v. United States*, [149] upholding a conviction under the Espionage Act for printing antidraft leaflets intended to be mailed to young men of military age. The leaflets called on the targets of conscription to assert their constitutional rights and to sign an anticonscription petition at the socialist party headquarters.[150] Holmes's opinion rejected Schenck's First Amendment defense on the grounds that Schenck's words could be punished because there was a "clear and present danger that they will bring about the substantive evils that Congress has a right to protect."[151] Although later opinions by both Holmes and Brandeis would use this formulation to create a more speech-protective test in the 1920s, the opinion in *Schenck* does not seem to have been intended this way.[152] Indeed, a week later, Holmes announced two other opinions for a unanimous Court (including Brandeis) upholding two other convictions under the Espionage Act

145. RABBAN, *supra* note 10, at 250.

146. 249 U.S. 185.

147. *Id.* at 183.

148. *Id.* at 185.

149. Schenck v. United States, 249 U.S. 47 (1919).

150. *Id.* at 50–51.

151. *Id.* at 52.

152. GRABER, *supra* note 81, at 106–08; RABBAN, *supra* note 10, at 282; White, *supra* note 129, at 318.

for subversive speech. Neither opinion used the "clear and present danger" formulation.[153]

Although their early 1919 opinions upheld the Espionage Act convictions, Brandeis and Holmes had developed reservations about them by the summer of 1919. As Brandeis told a young Felix Frankfurter in 1923:

> I have never been quite happy about my concurrence in *Debs* and *Schenck* cases. I had not thought the issues of freedom of speech out—I thought at the subject not through it. Not until I came to write the *Schafer* and *Pierce* cases did I understand it. . .[and] made up my mind that I would put it all out, let the future know what [we] weren't allowed to say in the days of the war and following.[154]

Brandeis's correspondence contains a number of letters from friends dealing with the growing threat to free speech; he also kept a news clippings file containing articles about the persecution of pacifists and socialists, which suggests a growing concern about free speech issues.[155]

For Holmes, a chance encounter on a train with district judge Learned Hand sparked a lengthy exchange of letters about the importance of free speech between the two men, with Hand eventually persuading Holmes that speech should receive greater protection.[156] Holmes and Brandeis may also have been affected by the negative commentary that the opinions received in progressive journals like *Nation* and *The New Republic*.[157] But the most important cause of their change of heart seems to have been Harvard law professor Zechariah Chaffee. Chaffee published *Freedom of Speech in Wartime* in the June 1919 volume of the *Harvard Law Review*, in which he was sharply critical of the Supreme Court's approach in the Espionage Act cases, arguing that it essentially ignored the substantial free speech issues presented. [158] Both Brandeis and Holmes read the article[159] and were greatly influenced by it, with Brandeis citing it favorably in his

153. Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919).

154. Cover, *supra* note 10, at 374 (quoting Brandeis-Frankfurter Conversations, *in* BRANDEIS PAPERS (on file at Harvard Law School)).

155. UROFSKY, A LIFE, *supra* note 13, at 533–54.

156. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 161–67 (1994); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 732 (1975).

157. *See* Bradley C. Bobertz, *The Brandeis Gambit: The Making of America's First Freedom, 1909–1931*, 40 WM. & MARY L. REV. 557, 607–11 (1999) (discussing *Danger Ahead*, 108 NATION 186 (1919)); *Freedom of Speech: Whose Concern?*, 18 NEW REPUBLIC 102 (1919); *The Call to Toleration*, 20 NEW REPUBLIC 360 (1919); *see also* Strum, *supra* note 144, at 675.

158. Zechariah Chaffee, Jr., *Freedom of Speech in War Times*, 32 HARV. L. REV. 932 (1919).

159. STRUM, *supra* note 13, at 675–76; UROFSKY, A LIFE, *supra* note 13, at 553.

1920 dissent in *Schaefer v. United States*.[160] Brandeis and Holmes were also outraged when conservative Harvard alumni tried to drive Chaffee from the academy because of his criticism of the Espionage Act cases and the "Palmer Raids," the widespread arrest of radicals and deportations of radical immigrants initiated by Attorney General Mitchell A. Palmer.[161] Thus, by late 1919, both Brandeis and Holmes had changed their minds and were resolved to take a stronger position in the First Amendment cases still on the docket. For Holmes, the act of changing his mind was unusual, but not so for Brandeis, who believed in the power of facts, education, and experience.[162]

The new term's docket contained a second series of cases raising the same issues as the four opinions Brandeis and Holmes had authored in March. The first of these was *Abrams v. United States*, decided in October 1919, in which Holmes's dissent argues that the contested nature of truth meant that, absent an emergency, a "free trade in ideas" was required that prevented popular majorities from censoring minority views—even "opinions that we loathe and believe to be fraught with death."[163] Brandeis joined the dissent, telling Holmes privately that "I join you heartily & gratefully. This is fine—very."[164]

B. Brandeis's First Amendment: Self-Governance and Civic Courage

In a series of cases following *Abrams*, Brandeis and Holmes developed these ideas, adding greater substance to Holmes's elegant but vague language.[165] Brandeis drafted important dissents in a number of free speech cases during the next decade, making both theoretical and doctrinal contributions to the project of a more speech-protective First Amendment jurisprudence. In the same term as *Abrams*, he dissented in *Schaefer v. United States* (1920)[166] and *Pierce v. United States* (1920).[167] He also issued important dissents in *Gilbert v. Minnesota* (1920)[168] and the *Milwaukee Leader* case (1921)[169] before

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160. Schaefer v. United States, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting).

161. UROFSKY, A LIFE, *supra* note 13, at 555–56.

162. *Id.* Brandeis changed his mind on many issues over the course of his life—in addition to privacy and free speech, he came to reject the *Lochner* regime of constitutional rights, and to embrace both women's suffrage and Zionism. *Id.* at 214, 365, 399.

163. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

164. UROFSKY, A LIFE, *supra* note 13, at 553.

165. Cover, *supra* note 10, at 381.

166. 251 U.S. 467, 482 (1920) (Brandeis, J., dissenting).

167. 252 U.S. 239, 253 (1920) (Brandeis, J., dissenting).

168. 254 U.S. 325 (1920) (Brandeis, J., dissenting).

his own free speech masterpiece in *Whitney v. California* (1927).[170] By contrast, Holmes contributed only two significant opinions following his masterpiece in *Abrams*,[171] dissenting in *Gitlow v. New York* (1925)[172] and the fairly obscure case of *United States v. Schwimmer* (1929).[173]

Although both Justices adhered to a creative and expanding interpretation of the "clear and present danger" formulation from *Schenck*, their justifications for why speech should be protected were very different. Holmes's theory of free speech was pragmatic and pessimistic; it justified free speech on the grounds that it advanced the search for truth in spite of Holmes's own resigned skepticism about the human ability to ever know the truth.[174] Brandeis, by contrast, developed an idealistic conception of free speech rooted in its critical importance to democratic self-government. His self-governance theory of the First Amendment had four dimensions, each of which is important to an understanding of his view of the relationship between free speech and privacy.

Brandeis first justified free speech on the grounds that it was indispensable to the ways in which a self-governing citizenry made intelligent, informed decisions. For Brandeis, free speech was worth protecting not merely because it was an individual right, but because it safeguarded the social processes of self-governance.[175] In a self-governing society, discussion of public matters was essential, and free speech was the source of the information to be discussed. Free speech gave self-governing citizens the facts and opinions they needed to perform their civic duty, and a government could only deny access to

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169. United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 417–36 (Brandeis, J., dissenting).

170. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring). Although Brandeis concurred in the result for technical reasons, the opinion was a dissent in all other respects. In fact, the opinion started off as a dissent in another case that involved even more dangerous revolutionary speech than the *Whitney* case did, involving the prosecution of a prominent national figure in the national Communist Party. *See* Cover, *supra* note 10, at 384.

171. As Bradley Bobertz puts the point well, "[a]lthough he usually agreed with Brandeis, Holmes never really moved beyond his *Abrams* position." Bobertz, *supra* note 157, at 632.

172. 268 U.S. 652 (1925) (Holmes, J., dissenting).

173. 279 U.S. 644 (1929) (Holmes, J., dissenting). *Schwimmer* was a Naturalization Act of 1906 case that is significant only for Holmes's characteristically witty epigram that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate." *Id.*

174. LOUIS MENAND, THE METAPHYSICAL CLUB 4 (2001); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 2; Thomas C. Grey, *Holmes, Pragmatism, and Democracy*, 71 OR. L. REV. 521, 523 (1992).

175. White, *supra* note 129, at 325.

such information if there was a serious and imminent emergency threatening serious harm to persons or the state.

These ideas appear throughout Brandeis's post-*Abrams* free speech opinions. In *Pierce*, he once again stressed the importance of access to facts and information as an essential part of free governance. The First Amendment thus protected the important relationship between a free dissident press and "[t]he fundamental right of free men to strive for better conditions through new legislation and new institutions."[176] His opinion in *Whitney* also shows the depth of Brandeis's faith in free speech as an important safeguard of a democratic society and of the value he placed on the free exchange of ideas. For Brandeis, these issues were essential commitments of free societies in general and American society in particular. As he famously put it:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[177]

Free speech, then, represented for Brandeis the only legitimate means that the processes of self-governance could take.

In practice, this commitment to free speech and self-governance required several different things. At the most basic level, it meant that a self-governing people needed access to information, and the press should be given leeway to provide relevant information to voters. Here again, one sees Brandeis's larger commitment to the critical importance of facts and his belief in the importance of publicity in the context of self-governance. In order to ensure this, Brandeis insisted in *Schaefer* that the clear and present danger test required scrupulous proof of the danger justifying suppression of speech, lest the government threaten not only free speech but also freedom of thought as well.[178] He argued that the government power to suppress speech must be used sparingly and wisely in order to "preserve the right of free speech both from suppression by tyrannous well-meaning majorities, and from abuse by irresponsible, fanatical minorities."[179]

176. Pierce v. United States, 252 U.S. 239, 273 (1920) (Brandeis, J., dissenting).

177. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting).

178. Schaefer v. United States, 251 U.S. 482, 495 (1920) (Brandeis, J., dissenting).

179. *Id.* at 482–83 (Brandeis, J., dissenting).

Schaefer involved a prosecution under the falsity provision of the Espionage Act for reprinting some German-language articles critical of the draft. Brandeis's dissent carefully examines the allegedly false and draft-obstructing publications, showing that they were neither false nor likely to result in any actual draft obstruction under the circumstances of the case.[180]

Brandeis's second innovation in First Amendment doctrine was to insist on the absolute protection of opinion, which courts should read broadly because of the difficulty in distinguishing between opinion and fact. *Pierce v. United States* upheld an Espionage Act conviction for the circulation of a socialist party leaflet charging that capitalists had started the war.[181] Brandeis's dissent again insisted that the importance of a free press to a democratic society required the government to prove falsity, but he ventured further by suggesting that many opinions—like those relating to the cause of the war—cannot be proven false.[182] A contrary rule allowing a jury to punish expressions of opinion would not only subject many leading politicians to possible criminal sanction, but "would practically deny members of small political parties freedom of criticism and of discussion in times when feelings run high and the questions involved are deemed fundamental."[183]

Underscoring Brandeis's argument here is a point more important than the need to protect unpopular opinion from criminal sanction. Brandeis's opinions expressed a deep skepticism about the ability of trial courts to police careful lines in the First Amendment context. In order for free speech to perform its democratic function of informing the electorate of new ideas, careful distinctions of protected and unprotected speech must give way to deference to speakers. Just as he had suggested in *International News Service* that the public-private line was beyond the judicial competence, in his First Amendment cases Brandeis maintained that courts similarly lacked the capacity to act as censors in matters of speech more generally. In *Pierce*, he declared that this was a First Amendment requirement.[184] And whereas in 1918 Brandeis was willing to defer to the legislatures in matters of media policy, once he had "thought through" freedom of speech, he became convinced that when it came to speech, deference must lie with individual speakers and not the government.

180. *See id.* at 484–95 (Brandeis, J., dissenting).

181. 252 U.S. at 251–52.

182. *Id.* at 267, 269–70 (Brandeis, J., dissenting).

183. *Id.* at 269 (Brandeis, J., dissenting).

184. *Id.* at 269 (Brandeis, J., dissenting).

The idea of counter-speech—that speakers and not the government must ordinarily determine what is acceptable in public debate—is *Whitney*'s third and most significant innovation. Brandeis argued not only that individual speakers must police their own speech but that in the ordinary case the remedy for dangerous speech was not censorship but rather more speech by the offended party. As he famously put it in *Whitney*:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.[185]

In making this argument, Brandeis was not acting as a historian—his arguments about "those who won our independence" are debatable, to say the least.[186] It is better to understand Brandeis's argument, as Vincent Blasi has suggested, as that of a political philosopher making a particular kind of argument about the basic elements of a free democratic society.[187]

Other thinkers before Brandeis had also linked free speech to self-government,[188] but Brandeis's fourth major contribution to free speech theory was entirely novel. Brandeis argued that free speech was important not just because it resulted in better democratic *decisions*, but also because it produced better democratic *citizens*. This is what Brandeis meant in *Whitney* when he argued that liberty should be valued "both as an end and as a means."[189] The idea that law should promote good civic character had been with Brandeis for decades. In a series of letters he wrote to his future wife in 1890, he agreed with Matthew Arnold that "[l]ife is not a having and a getting; but a being and a becoming."[190] Although he believed that Americans were used to thinking about "huge figures," they should appreciate

185. Whitney v. California, 274 U.S., 357 377 (1927) (Brandeis, J., concurring).

186. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 280 (1985) (arguing that Revolutionary-era beliefs in a free press were less robust than modern libertarian conceptions).

187. Blasi, *supra* note 12, at 671.

188. Most notably James Madison and Learned Hand. *See, e.g.*, JAMES MADISON, THE VIRGINIA REPORT OF 1799–1800, TOUCHING THE ALIEN AND SEDITION LAWS; TOGETHER WITH THE VIRGINIA RESOLUTIONS 227 (J.W. Randolph ed., 1850); Masses Pub. Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1919) (Hand, J.).

189. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

190. Letter from Louis D. Brandeis to Alice Goldmark (Oct. 27, 1890), *in* 1 LETTERS, *supra* note 32, at 94.

"the value of the unit in the great mass" and realize that individual character can be led by example.[191] In 1922, he told a religious group that in a democratic society, the

> development of the individual is, thus, both a necessary means and the end sought. For our objective is the making of men and women who shall be free, self-respecting members of a democracy—and who shall be worthy of respect. . . .
>
> [D]emocracy in any sphere is a dangerous undertaking. It substitutes self-restraint for external restraint. It is more difficult to maintain than to achieve. It demands continuous sacrifice by the individual and more exigent obedience to the moral law than any other form of government. Success in any democratic undertaking must proceed from the individual.[192]

Brandeis's opinion in *Whitney* echoes these earlier themes and represents his fullest statement of the relationship between civic character and democratic self-governance. His argument was two-fold: it was about the kinds of civic virtues necessary to promote effective self-governance, and also about how the activities of self-governance reproduced those virtues in a democratic citizenry. Such a citizen believed "that public discussion is a political duty,"[193] and that we should not, as Blasi puts it "underestimate the value of discussion, education, good counsels." Brandeis suggests that bad ideas are truly dangerous only when their "opponents lack the personal qualities of wisdom, creativity, and confidence."[194] And Brandeis argued that these virtues come from "discussion and education, not by lazy and impatient reliance on the coercive authority of the state."[195] Most fundamentally, Brandeis argued that when faced with dangerous and harmful speech, a democratic society should have faith in the enduring goodness of its institutions, and should not fear the consequences of such speech. Thus, he could assert in *Schaefer* that the state must scrupulously prove the direct dangerousness of any leaflets it wished to punish, and he could assert his faith in *Whitney* that in order to suppress speech "there must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly."[196]

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191. Letter from Louis D. Brandeis to Alice Goldmark (Dec. 9, 1890), *in* 1 LETTERS, *supra* note 32, at 96.

192. Letter from Louis D. Brandeis to Robert W. Bruere (Feb. 25, 1922), *quoted in* MASON, *supra* note 13, at 585.

193. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

194. Blasi, *supra* note 12, at 674.

195. *Id.* at 674–75.

196. *Whitney*, 274 U.S. at 378 (Brandeis, J., concurring).

Each of Brandeis's First Amendment innovations has been adopted as a principal element of modern First Amendment law. The Court first adopted the *Schaefer* argument that scrupulous proof is required for any harms alleged to have been caused by speech. On the page immediately following the *Whitney* concurrence in *United States Reports* is the Court's opinion in *Fiske v. Kansas* (1927). *Fiske* invalidated a conviction for incitement on sufficiency of the evidence grounds under the Due Process Clause of the Fourteenth Amendment.[197] Although the opinion does not speak explicitly in terms of free speech, it is fully consistent with Brandeis's approach in *Schaefer*. Ten years later, in *Herndon v. Lowry* (1937)[198] and *DeJonge v. Oregon* (1937)[199] the Court carefully scrutinized anti-incitement statutes under the First Amendment the way Brandeis had done in *Schaefer*, dismissing them for insufficient evidence of harm.[200]

Brandeis's second innovation, his concern in *Pierce* that trial courts could not effectively police a fine line between protected and unprotected speech was recognized by the Court in *New York Times v. Sullivan*, which gave constitutional protection of many kinds of false and defamatory statements in order to give "breathing space" to true statements by the press.[201] *Pierce*'s absolute protection of opinion was recognized by a later defamation case, *Gertz v. Robert Welch* (1974), which declared that "there is no such thing as a false idea."[202] Finally, Brandeis's suggestion that the remedy for dangerous speech is not suppression but counter-speech has become a basic element of First Amendment doctrine, most clearly established in *New York Times v. Sullivan*.[203] Justice Brennan's opinion quoted Brandeis's *Whitney* discussion of counter-speech at length before declaring that free speech on matters of public concern "should be uninhibited, robust, and wide-open."[204] *Sullivan*'s language about the nature of public debate, relying directly on Brandeis's counter-speech theory, is perhaps the most important and widely-accepted statement of what the modern First Amendment requires.[205]

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197. 274 U.S. 380, 387 (1927).

198. 301 U.S. 242 (1937).

199. 299 U.S. 353 (1937).

200. *DeJonge*, 299 U.S. at 365; *Herndon*, 301 U.S. at 247.

201. 376 U.S. 254, 272 (1964); *see also* NAACP v. Button, 371 U.S. 415, 433 (1963) (first using the "breathing space" analogy).

202. 418 U.S. 323, 339 (1974); *accord* Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 688–89 (1959).

203. Solove & Richards, supra note 16, at 1657–58.

204. *Sullivan*, 376 U.S. at 270 (quoting Whitney v. California, 274 U.S 357, 375–76 (1927) (Brandeis, J., concurring)).

205. Solove & Richards, supra note 16, at 1657.

Finally, Brandeis's emphasis in *Whitney* on the link between free speech and civic character has permeated modern First Amendment doctrine in numerous important ways.[206] For example, in *Cohen v. California*, the Supreme Court refused to accept any regulation of profane political speech on the grounds that it would offend the sensibilities of viewers or listeners.[207] Driving this conclusion was Brandeis's argument from *Whitney*:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[208]

Brandeis's ideas about freedom of speech from the early twentieth century thus lie at the core of what the modern First Amendment protects. Both doctrinally and as a matter of theory, modern free speech law is inextricably linked with Brandeis's ideas about why speech matters and how it should be protected.

C. Speech and Tort Privacy

Brandeis did not develop his speech-protective theory of the First Amendment in the context of privacy, but in the context of what modern First Amendment lawyers call incitement—speech that induces others to break the law. How do these ideas sit with his earlier commitment to tort privacy? The answer is somewhat complex, but certainly, Brandeis's First Amendment ideas from the 1920s are inconsistent with many aspects of the right to privacy he called for in 1890. Brandeis never abandoned his interest in privacy in the abstract, and he occasionally referred to tort privacy rights in his judicial writings. But in his mature jurisprudence, tort privacy survived at best as only a small and limited exception to his broader interests in publicity, a fearlessly free press, and a vigorous public debate driving the projects of self-governance and political freedom.

At a general level, a tort action against the press seems inconsistent with the kind of self-regulated press envisioned by Brandeis's model of speech in a democratic society. A free and self-governing people need access to facts and opinions on which to act, and subjecting the press to injunctions or liability for printing the

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206. Blasi, *supra* note 12, at 692–95 (collecting examples).

207. 403 U.S. 15, 24 (1971).

208. *Id.* (citing *Whitney*, 274 U.S. at 375–77 (Brandeis, J., concurring)).

truth could deter the press from performing this important function. And if the individual, and not the state, is the final judge of what is public, it would seem to follow that the state would lack the power to declare the publication of certain facts off-limits. Moreover, the specific harm that drove Warren's interest in the project—reportage about his wife in the society pages—bears at least a passing relationship to public affairs due to her membership in a prominent political family. Lawrence Friedman has shown that *The Right to Privacy* was part of a larger effort by Gilded Age elites to protect their reputation and social standing.[209] It was thus a product of nineteenth-century views of society and social harm.[210]

Though Brandeis retained both a personal[211] and a legal[212] interest in privacy throughout his life, he seems to have jettisoned many of the legal and social assumptions with which he and Warren had approached the issue in 1890. As noted earlier, unlike many nineteenth-century legal figures, Brandeis never believed that commercial activity should be private, and throughout his career he repeatedly called for sunlight to expose fraud and corruption that economic and social elites might prefer to hide—the same concern that was more interesting to him when he was revising *The Right to Privacy* in late 1890. Another good example of the evolution of Brandeis's increasing ambivalence towards tort privacy is his skepticism in *International News Service* about the ability of courts to make fine distinctions about what was fit to be published by the press. As he acknowledged in *International News Service*, "with the increasing complexity of society, the public interest tends to become omnipresent."[213]

Brandeis's free speech opinions are also inconsistent with his earlier writing on tort privacy. His absolute protection in *Pierce* of press statements of opinion is clearly at odds with his earlier optimism about the ability of courts to police the line between public and private matters in *The Right to Privacy*. Recall that the article had suggested courts could use ordinary common law line-drawing to police the line between privileged information of public interest and actionable private facts.[214] But in his free speech cases, Brandeis rejected the idea that common-law balancing was appropriate when it

209. FRIEDMAN, *supra* note 24, at 214–15; *see also* Richards, *supra* note 44, at 166.

210. FRIEDMAN, *supra* note 24, at 213; Danielle Citron, *Mainstreaming Privacy Torts*, 98 CAL. L. REV. (forthcoming Dec. 2010).

211. UROFSKY, A LIFE, *supra* note 13, at 154.

212. *See infra* Part III.

213. Int'l News Serv. v. Associated Press, 248 U.S. 215, 262 (1918) (Brandeis, J., dissenting).

214. Warren & Brandeis, *supra* note 1, at 214–20.

came to determining what a newspaper could publish. His belief in the overriding importance of a free press to the processes of democratic self-governance and civic character suggests that if he believed the press could publish false statements, they could not be meaningfully stopped from publishing true but private ones either. And of course, the Warren and Brandeis article's suggestion that the press should be regulated to avoid a lowering of social standards[215] is fundamentally inconsistent with Brandeis's close to absolute commitment to individual judgment, counter-speech, and to his claim in *Whitney* that absent a dire emergency, the remedy for bad speech "is more speech, not enforced silence."[216]

Notwithstanding these arguments, it could still be possible to read *The Right to Privacy* consistently with Brandeis's free speech opinions, even if only as a limited and sui generis exception. However, two cases from the end of Brandeis's judicial career suggest that even though he never fully repudiated tort interests in privacy, his mature jurisprudence was far less sympathetic to tort privacy than previous scholars have believed.

The first of these cases is *Near v. Minnesota* (1931), in which the Court struck down as a prior restraint a special injunction against *The Saturday Press*, a Minneapolis newspaper that had published a series of false and virulently anti-Semitic articles denouncing an alleged Jewish conspiracy in the city.[217] Brandeis joined Chief Justice Hughes's opinion of the Court holding that prior restraints were invalid even if issued to "miscreant purveyors of scandal" like *The Saturday Press*.[218]

Although he did not write separately in the case, Brandeis confronted the lawyers for the State of Minnesota during oral argument and maintained that exposure of wrongdoing was the duty of a free press.[219] Granting that *The Saturday Press*'s articles were full of falsehoods, Brandeis went on:

> Of course there was defamation. You cannot disclose evil without naming the doers of evil. It is difficult to see how one can have a free press and the protection it affords in the Democratic community without the privilege this act seems to limit. You are dealing here not with a sort of scandal appearing too often appearing in the press, and which

215. *See supra* notes 39–41 and accompanying text.

216. Whitney v. California, 274 U.S 357, 377 (1927) (Brandeis, J., concurring).

217. 283 U.S. 697, 737–38 (1931).

218. *Id.* at 720.

219. FRED W. FRIENDLY, MINNESOTA RAG: THE DRAMATIC STORY OF THE LANDMARK SUPREME COURT CASE THAT GAVE NEW MEANING TO THE FREEDOM OF THE PRESS 130–31 (1981).

> ought not to appear to the interest of anyone, but with a matter of prime interest to every American citizen.[220]

In his remarks, Brandeis did seem to imply that there was a difference between *The Saturday Press*'s articles and the kind of "scandal too often appearing in the press" which he and Warren had written about years before in *The Right to Privacy*. But newspapers like *The Saturday Press* were the very targets Warren and Brandeis had in mind in 1890. Moreover, the fantastical anti-Semitic articles in its pages alleging a Jewish conspiracy were filled with the sorts of language calculated to cause emotional injury and damage to a inviolate personalities—not just those of public officials, but of businessmen and other private citizens named by the paper as well.[221] Brandeis still seemed willing to contemplate a category of private activity beyond the proper scope of journalism, but given his commitment to publicity and his acknowledgement in *International News Service* that more things were public in the complex twentieth century, the category of private facts he was prepared to recognize appears to have shrunk significantly from the one he had suggested over forty years before.

Further evidence of Brandeis's shrinkage if not outright abandonment of the category of private disclosures is revealed by a second case, *Senn v. Tile Layer's Protective Union* (1937), decided two years before his retirement. Although an obscure case, *Senn* suggests how the three related concepts of speech, privacy, and publicity could operate in Brandeis's mature jurisprudence. The case involved the application of a state statute permitting labor unions to publicize labor disputes. Senn, a small-time tile-layer, had declined to join the union and had been aggressively picketed by union members. The union was acting pursuant to a state statute authorizing "[p]eaceful picketing" and "[g]iving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, [or other peaceful methods]."[222] Its picketers carried signs alleging his unfairness to the union and the interests of laborers more generally. Believing that his *Lochner*-era right to pursue his calling had been violated by the union's actions in publicizing the dispute, Senn challenged the statute under the Fourteenth Amendment.

220. *Brandeis Criticizes Minnesota Gag Law*, N.Y. TIMES, Jan. 31, 1931, at 6.

221. *See* FRIENDLY, *supra* note 219, at 45–51 (quoting anti-semitic articles and describing the authors' motivations and the public's reactions).

222. Senn v. Tile Layers Protective Union, 301 U.S. 468, 472 (1937).

Writing for the Court in a 5-4 decision, Brandeis rejected Senn's claims. Brandeis began his analysis with the observation that Senn had alleged only that his substantive due process right to work with his own hands had been violated; he had not alleged that the Federal Constitution barred states from authorizing publicity and picketing in the context of a labor dispute.[223] As a result, the case brought Senn's economic liberty into conflict with the right of the union to give publicity to a labor dispute. For the author of *What Publicity Can Do*, who believed in a living law rather than dusty formalism, this was not a particularly difficult problem. First, the state law authorizing publicity was consistent with the Fourteenth Amendment because union members might, "without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."[224] In this respect, Brandeis made clear, publicity and free speech were not just mutually reinforcing, but one and the same.

Second, he argued, the state could certainly authorize laborers to combine as pickets, just as employers could combine in other ways to promote their own interests,[225] and the right of publicity given to the union was merely "on a par with advertisements in the press."[226] Thus, if Senn were aggrieved by the union's actions, it was up to him "to disclose the facts in such manner and in such detail as he deemed desirable, and on the strength of the facts to seek the patronage of the public."[227] In making this argument, Brandeis evoked his claim in *Whitney* that "the fitting remedy for evil counsels is good ones."[228] Third and consequently, the statute did not run afoul of the due process clause because it did not violate the *Lochner* period's requirement that legislation be neutral rather than favoring one class over another.[229] This requirement was met, Brandeis held, because "[t]he sole purpose of the picketing was to acquaint the public with the facts and, by gaining its support, to induce Senn to unionize his

223. *Id.* at 477.

224. *Id.* at 478.

225. *Id.* at 477–78.

226. *Id.* at 479.

227. *Id.*

228. Whitney v. California, 274 U.S 357, 375 (1927) (Brandeis, J., concurring).

229. One of the hallmarks of *Lochner*-era jurisprudence was that a law which took the property of A and gave it to B was repugnant to due process of law. *See* Cushman, *supra* note 120, at 909 (citing Smyth v. Ames, 134 U.S. 418, 458 (1890)). Unsurprisingly, then, the *Lochner* traditionalists—the "Four Horsemen" of Justices Butler, Van Devanter, McReynolds, and Sutherland—dissented on precisely this basis, arguing that the state statute gave the union, which was not in competition with Senn, the power to take away his livelihood. *Senn*, 301 U.S. at 489–92 (Butler, J., dissenting).

shop."[230] Brandeis concluded by asserting that both the unions and Senn had a right to earn their living:

> Earning a living is dependent upon securing work; and securing work is dependent upon public favor. To win the patronage of the public each may strive by legal means. Exercising its police power, Wisconsin has declared that in a labor dispute peaceful picketing and truthful publicity are means legal for unions.[231]

Nor was the emotional injury from the publicity actionable. Brandeis noted that while the activities of the picketers might be annoying to Senn, "such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution."[232]

What then, of privacy? If the unwanted disclosure of facts about the labor dispute was annoying to Senn, why was Senn's right to privacy not implicated? In a cryptic footnote citing three articles which had lavished praise upon *The Right to Privacy*, Brandeis noted casually that "[t]he state has, of course, power to afford protection to interests of personality, such as 'the right of privacy.' The protection by decision or statute of such interests of personality rests on other considerations than are here involved."[233] Taken in isolation, Brandeis's footnote appears vague. However, in the context of his views regarding privacy, publicity, and speech, Senn was not entitled to invoke the right to privacy with respect to the union's publicity. First, the dispute was an economic one rather than a personal, social, or political one. And second, the dispute was a public one, in which Senn and the union competed for customers, just as the securities underwriters in *Other People's Money* did. Brandeis thus suggested that although the right to privacy remained vital, it was inapplicable to commercial disputes like this one in which the domestic sphere, with its "sacred precincts of private and domestic life,"[234] was not threatened. Commercial disputes in the public sphere, particularly those in which consumers had an interest, were to be resolved through publicity and counter-speech. As a result, they simply did not implicate the right to be let alone, which seems to have become in his mind a very small category.

Brandeis's opinion in *Senn* suggests that he had significantly shrunk his conception of tort privacy for an additional reason. Most of the early privacy cases involved the misuse of photographs in

230. *Senn*, 301 U.S. at 480.
231. *Id.* at 481–82.
232. *Id.* at 482.
233. *Id.* at 482 n.5.
234. Warren & Brandeis, *supra* note 1, at 195.

commercial advertising,[235] rather than the disclosure of private facts by newspaper or others. But in 1927, Brandeis's home state of Kentucky became the first state to recognize a privacy action for wrongful disclosure of private information. In *Brents v. Morgan*, the Kentucky Supreme Court found an invasion of privacy where a man had posted a sign reading "Dr. W. R. Morgan owes an account here of $49.67. And if promises would pay an account, this account would have been settled long ago. This account will be advertised as long as it remains unpaid."[236] *Brents* produced a flurry of scholarly commentary noting the significance of the recognition of a new kind of privacy right.[237] But of course, *Brents* had similar facts to *Senn*, and some of the articles commenting on *Brents* were the same articles Brandeis cited in *Senn*. In distinguishing tort privacy in *Senn*, Brandeis seems to have been of two minds with respect to his creation of tort privacy: while he was proud of it and reluctant to disclaim it, in practice his commitment to tort privacy was minor to nonexistent.

In the context of his commitment to publicity and freedom of expression, tort privacy represents a relatively minor part of Brandeis's theories on the role of the press in a democratic society. This conclusion is consistent with that of Brandeis's official biographer, who after interviewing an elderly Justice Brandeis in preparation for the posthumously-published book, devoted only four of 700 pages to the subject of privacy at all.[238]

III. PRIVACY BEYOND TORT

My argument so far has suggested that Brandeis's commitment to the conception of tort privacy he introduced in 1890 was fleeting and relatively limited. Brandeis cared about his personal privacy and continued to be proud of the public impact that the article had made on the law, but despite his many public activities, he did not devote much further energy to the project it started. Brandeis instead spent significant efforts developing theories of when and how the disclosure of facts and opinions were essential to a vibrant self-governing

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235. Richards & Solove, *supra* note 19, at ms. 9. *See, e.g.*, Pavesich v. N. Eng. Life Ins. Co., 50 S.E. 68, 74 (Ga. 1905) (insurance company appropriated man's photograph for newspaper advertisement); Roberson v. Rochester Folding Box Co., 64 N.E. 442, 541 (N.Y. 1902) (portrait of attractive young woman used in flour advertisements).

236. 299 S.W. 967, 968 (Ky. 1927).

237. *E.g.*, Leon Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932); Rufus Lisle, *The Right of Privacy (A Contra View)*, 19 KY. L.J. 137 (1931); Roy Moreland, *The Right of Privacy Today*, 19 KY. L.J. 101 (1931); George Ragland, Jr., *The Right of Privacy*, 17 KY. L.J. 85 (1929).

238. *See* MASON, *supra* note 13, at 70, 564, 567–68 (devoting limited attention to privacy).

democracy. These theories suggest that to the extent he retained a belief in tort privacy to the end of his life, it was a narrow category subordinated to the interests of publicity and free speech. Although Brandeis's public career lasted for almost a half-century after the publication of his privacy article, only once more did he expound in any detail about the importance of privacy: in his dissenting opinion in *Olmstead v. United States*.[239] And like the genesis of his *Harvard* article, his participation in the *Olmstead* case was as much thrust upon him as sought out. Nevertheless, his opinion in *Olmstead* has been widely hailed not just as one of the seminal texts of privacy law,[240] but also as one of the most influential opinions in American constitutional law.[241] If Brandeis's commitment to tort privacy seems to have been limited by his more strongly-held beliefs in publicity and speech, what role does *Olmstead* play in his views about privacy and speech in a democratic society?

In this Part, I reconsider Brandeis's First Amendment opinions in light of *Olmstead*. I argue that although he seems to have backed away from the tort theory of privacy he advanced in *The Right to Privacy*, his later writings contain an implicit but recurring theme demonstrating a different way in which privacy and speech can be reconciled. Although Brandeis seems to have conceded that broad rights of tort privacy were inconsistent with more important First Amendment values, he also recognized that certain kinds of privacy are essential if First Amendment rights are to be meaningful. Indeed, reading *Olmstead* together with his dissent in *Gilbert v. Minnesota* suggests a second, distinct conception of privacy in his later writings. Unlike the tort privacy of 1890, this second conception of privacy protects the freedom of thought of self-governing citizens from the state. It thus reinforces, rather than conflicts with, the First Amendment values that Brandeis elsewhere found so compelling.

The Supreme Court in *Olmstead* upheld the conviction of Olmstead, an enterprising bootlegger, under the National Prohibition Act.[242] The prosecution's case had rested largely upon evidence produced as a result of extensive wiretapping of Olmstead's home and office.[243] Chief Justice Taft's opinion held that because there had been

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239. 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

240. *See, e.g.*, DANIEL J. SOLOVE & PAUL SCHWARTZ, INFORMATION PRIVACY LAW 33 (3d ed. 2008) ("Brandeis, then a Supreme Court justice, wrote a dissent that has had a significant influence on Fourth Amendment law.").

241. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 432 (1986).

242. 277 U.S. at 466.

243. *Id.* at 465. The notes taken from the wiretaps alone totaled 775 typewritten pages. *Id.* at 471 (Brandeis, J., dissenting).

no physical trespass onto the property of the defendant, nor any search or seizure of "tangible material effects," the Fourth Amendment was inapplicable.[244]

Brandeis dissented, relying on two principles that were central to his legal thought—the need for law to adapt to changing times, and the importance of individual civil (as opposed to economic)[245] rights against the state. At the outset, Brandeis explained that the Constitution should change to reflect social realities. Both the language and purpose of the Fourth and Fifth Amendments and cases like *Boyd v. United States*[246] guaranteed against "invasion of the sanctities of a man's home and the privacies of life."[247] Unfortunately, Brandeis noted, these protections were threatened by changing circumstances, and changes in technology had enabled "[s]ubtler and more far-reaching means of invading privacy . . . . Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."[248] Moreover, Brandeis suggested that science was likely to provide governments in the future with even more invasive and secret methods of surveillance beyond wiretapping. For instance, he noted that

> [w]ays may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.[249]

The chief problem with the Court's opinion, according to Brandeis, was that it clung to a narrow and outmoded view of the Fourth Amendment as protecting only tangible property. The Court's position, he noted, was certainly supported by the text of the Fourth Amendment, which protects against seizure of papers but not wiretaps.[250] But the Court's narrow textualism, he maintained, was insufficient to vindicate the privacy rights at the core of the Fourth and Fifth Amendments, which were intended to protect

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244. *Id.* at 464–66 (Brandeis, J., dissenting).

245. *See infra* note 263 and accompanying text.

246. 116 U.S. 616 (1886).

247. *Olmstead*, 277 U.S. at 473 (Brandeis, J., dissenting) (quoting *Boyd*, 116 U.S. at 630) (internal quotations omitted).

248. *Id.* at 473–74 (Brandeis, J., dissenting).

249. *Id.* at 474 (Brandeis, J., dissenting).

250. *See* U.S. CONST. Amend. IV (protecting "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures").

> the significance of man's spiritual nature, of his feelings and of his intellect. [The drafters of the Constitution] knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.[251]

Protection of thoughts and beliefs, Brandeis argued, was a constitutional right of privacy that lay at the core of the Fourth and Fifth Amendments. At the level of doctrine, this meant that "every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth."[252]

This theory is consistent with his broader views about the role law should play in general in producing a better and fairer society. Indeed, animating Brandeis's writings on the importance of legal protection for a right of privacy against both the state and private actors is a belief that the law needed to change in order to best serve society; that it needed to be a "living law."[253] And one of the key values that a living law must protect, according to Brandeis, was the "right to be let alone"—"the most comprehensive of rights and the right most valued by civilized men."[254] But critically, the interest in *Olmstead* differed from the interest in *The Right to Privacy*. *Olmstead* protects privacy against surveillance and disclosure by the state, rather than newspapers, and it justifies the protection of thoughts and emotions as a civil liberty rather than a private right in tort. And the right is not merely one protecting hurt feelings, but keeping "unexpressed beliefs, thoughts and emotions" away from the gaze of an all-seeing state.[255] Privacy expressed in this way was not primarily about maintaining the status of elites, but preserving the dignity and autonomy of a self-governing citizenry.

Brandeis's point in *Olmstead* about the linkages between privacy and civil liberties comes into sharper focus when we consider another of his free speech opinions, *Gilbert v. Minnesota* (1920).[256] The *Gilbert* case involved a conviction of a Minnesota man who had spoken at a public gathering against the First World War and conscription, and been convicted under a state statute prohibiting any person from persuading others not to enlist in the armed forces—essentially a

251. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

252. *Id.* at 478–79 (Brandeis, J., dissenting).

253. Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 461 (1916).

254. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

255. *Id.* at 474 (Brandeis, J., dissenting).

256. 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting).

state version of the Espionage Act.[257] The statute applied to speech "in any public place, or any meeting wherein more than five persons are assembled."[258] The majority upheld the conviction.[259]

Brandeis again dissented, using the opportunity to sketch out the mutually-reinforcing relationship between privacy and free speech, at least when those values are threatened by the state. He argued, anticipating his later opinion in *Whitney*, that

> [t]he right of a citizen of the United States to take part, for his own or the country's benefit, in the making of federal laws and in the conduct of the government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it.... Full and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the nation than it is to himself. Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril.[260]

The chief problem with the Minnesota statute, Brandeis argued, was that it intruded upon the privacy of the home and the family. The provision under which the defendant had been convicted prohibited any person from teaching against enlistment, as long as five persons were gathered together, and applied regardless of the intention or purposes of the speaker. Brandeis lamented that the law applied "alike to the preacher in the pulpit, the professor at the university, the speaker at a political meeting, the lecturer at a society or club gathering. Whatever the nature of the meeting and whether it be public or private, the prohibition is absolute."[261] Worse still, he argued, another provision of the statute made it

> punishable to teach in any place a single person that a citizen should not aid in carrying on a war, no matter what the relation of the parties may be. Thus the statute *invades the privacy and freedom of the home.* Father and mother may not follow the promptings of religious belief, of conscience or of conviction, and teach son or daughter the doctrine of pacifism. If they do, any police officer may summarily arrest them.[262]

Thus, the Minnesota statute not only interfered with the civic duty of public discussion and deliberation, but did so all the more egregiously because it criminalized and deterred such discussions in the privacy of the home. Privacy and speech, under this view, were complementary and reinforcing concepts.

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257. *Id.* at 325.
258. *Id.* at 326.
259. *Id.* at 332–33.
260. *Id.* at 338 (Brandeis, J., dissenting).
261. *Id.* at 335 (Brandeis, J., dissenting).
262. *Id.* at 335–36 (Brandeis, J., dissenting) (emphasis added).

Brandeis concluded by offering some thoughts about the nature of free speech rights in relation to economic rights that received more protection under *Lochner*-era jurisprudence. But in so doing, he again linked privacy to speech in a way that strengthened his claim that the Constitution should protect free discussion. Brandeis noted that under orthodox theories of constitutional law, the Constitution protected an individual's right to contract and to discriminate against workers because (for instance) they belonged to unions or other groups. Under such circumstances, he argued that it would be absurd if the Constitution "does not include liberty to teach, either in *the privacy of the home* or publicly, the doctrine of pacifism; so long, at least, as Congress has not declared that the public safety demands its suppression. I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property."[263]

Reading *Olmstead* and *Gilbert* together reveals a different and overlooked set of connections between privacy and free speech. In these opinions, Brandeis suggests that relatively unfettered and unmonitored private activity is essential to democratic liberty. From this perspective, civil liberty can be seen to require not only an absence of government monitoring of individual activity, but also the opportunity for talking, listening, and teaching before public speech takes place. His suggestion in these cases is that the First Amendment requires not only protection for outputs such as speeches and newspaper articles, but also attentiveness to inputs and the process by which opinions are formed and beliefs are transmitted.

This focus on inputs is not unique to *Olmstead* and *Gilbert*. In his career as a public advocate, for instance, Brandeis campaigned for humane working hours, showing a similar sensitivity to the need to protect the foundations of democratic processes including expressive inputs. In an address to the Civic Federation of New England in 1906, he argued that democracy mandated that "every man is of the ruling class." "Our education and condition of life," he continued, "must be such as become a ruler. Our great beneficent experiment in democracy will fail unless the people, our rulers, are developed in character and intelligence." To properly engage in the processes of self-governance, Brandeis argued, the eight-hour work day was critically important in providing members of the public with the time and energy for civic responsibilities.

Once he had "thought through" the First Amendment, Brandeis realized that these issues were ones of constitutional

263. *Id.* at 343 (Brandeis, J., dissenting) (emphasis added).

magnitude. Robert Cover notes "Brandeis' chief free speech refrain—not that truth will prevail in some market place of ideas but that free input is necessary to deliberative politics."[264] In *Schaefer*, he worried about the ability of "an intolerant majority, swayed by passion or fear, . . . to stamp as disloyal opinions with which it disagrees. Convictions such as these, besides abridging freedom of speech, threaten freedom of thought and of belief."[265] In the *Burleson* case, he canvassed the history of federal postal policy to show that socialist literature should not be denied access to the mail.[266] At stake was the need of citizens to receive information, for the power to deny access to the mail based on content "would prove an effective censorship and would seriously abridge freedom of expression."[267] The *Whitney* opinion also recognizes the importance of expressive inputs and the development of democratic character through public or private discussion, deliberation, and education.[268]

We can also see Brandeis's linkages of speech and education in other areas. He privately told Frankfurter in 1923 that although he was opposed to the *Lochner*-era Court's substantive due process jurisprudence, four rights were "fundamental"—most importantly the "right to speech" and the "right to education."[269] Thus Brandeis could join Justice McReynold's opinion in *Meyer v. Nebraska*, which struck down a state law banning the teaching of foreign languages in schools on substantive due process grounds.[270] Brandeis may have been appalled by the theory, but he believed more strongly in the right of private citizens to teach and learn without interference from the state, and that this right was inseparable from his broader interests in free speech and free thought.[271]

As these cases reveal, Brandeis believed that the interposition of the state in the business of private character development and belief formation was an affront to the dignity of a self-governing people. To govern themselves (and to engage in the speech essential to the processes of self-government), citizens needed space from state

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264. Cover, *supra* note 10, at 377.

265. Schaefer v. United States, 251 U.S. 466, 495 (1920) (Brandeis, J., dissenting).

266. United States *ex rel.* Milwaukee Soc. Democratic Pub. Co. v. Burleson, 255 U.S. 407, 417–36 (Brandeis, J., dissenting).

267. *Id.* at 431.

268. *See* Blasi, *supra* note 12, at 673–77 (providing examples).

269. *See* Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 320 (1985) (published and edited version of Frankfurter's notes). The other two rights were the "right to choice of profession" and the "right to locomotion." *Id.*

270. 262 U.S. 390 (1923).

271. UROFSKY, A LIFE, *supra* note 13, at 619.

scrutiny of their "beliefs, thoughts, and emotions." They had the right to think for themselves and to teach their children and others the truth of their own ideas and beliefs. Brandeis suggested that self-government requires not just free speech, but freedom to explore ideas—even dangerous or subversive ones—in private. He argued that meaningful self-governance requires the protection of private teaching and discussion between parent and child, teacher and student, among friends or between strangers. Moreover, he seems to have argued that the entire experiment of self-governance requires the government to let alone when citizens think and examine ideas privately for themselves. His disciple Alexander Meiklejohn once famously asserted that "to be afraid of ideas, any idea, is to be unfit for self-government."[272] Brandeis suggested something similar in *Gilbert*—that self-government requires the courage of the state to allow the private examination of ideas.

To make these claims, Brandeis drew on a variant of the privacy right he had called for in 1890. But though a variant, the constitutional right to be let alone was a sharply different conception of privacy from the tort "right to privacy." First, the threat to privacy shifts from the press to the state, a reconceptualization that removes the threat that privacy poses to First Amendment values. Second, Brandeis's conception of constitutional privacy supports First Amendment processes of belief formation as well as other critical inputs into the development of a self-governing citizenry, one that is intelligent, courageous, and autonomous. Third, Brandeis's mature version of constitutional privacy transforms the nature of the injury. To be sure, both tort and constitutional privacy address damage to the human psyche. But whereas the tort conception protects the interest in being free from unwanted press disclosures, the constitutional conception protects individuals' emotional and intellectual processes so that they can think for themselves. Rather than being opposed to the interests in free expression, constitutional interests in privacy preserve space for new ideas to develop. In these ways, Brandeis's writings on civil liberties suggest that privacy need not always be opposed to the First Amendment. Instead, the protection of individual mental processes and private discussions against the state is, in fact, a precondition for the kind of democratic self-government he believed the First Amendment to require. Unlike tort privacy, the conception of privacy Brandeis articulated in *Olmstead* and *Gilbert* protects and generates democratic speech rather than stifles it.

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272. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948).

IV. THE BRANDEIS LEGACY: TORT AND INTELLECTUAL PRIVACY

Brandeis's writings can thus be read to include two conceptions of privacy. In addition to the tort conception of privacy underlying *The Right to Privacy*, there is the distinct constitutional conception of privacy he identified in *Olmstead* and *Gilbert*. Although most previous Brandeis scholarship has treated these theories as the same, they protect distinct interests and have fundamentally different relationships to free speech.

In this Part, I shift my mode of analysis from intellectual history to normative theory. I examine these two conceptions of privacy from a contemporary perspective, and consider their relationships with contemporary understandings of the First Amendment. My argument is that Brandeis was essentially correct in his mature assessment of the relationship between privacy and free speech. Warren and Brandeis-style tort privacy is inconsistent with modern understandings of the First Amendment and represents something of a jurisprudential dead end. By contrast, the later *Olmstead* conception of privacy for intellectual activities holds much greater promise. Not only is this "intellectual privacy" at the heart of modern understandings of expressive liberty, but it also holds the potential to help us better understand and resolve some of the most important issues of the Information Age.

A. The Limits of Tort Privacy

From a modern perspective, *The Right to Privacy*'s efforts to balance privacy and free speech are deficient in several ways. First, the Gilded Age notions of propriety embodying *The Right to Privacy* reflect class and gender norms that are inconsistent with modern notions of equality.[273] Second, as a practical matter the policing of the public-private line is difficult and borders on impossible. To use one modern example, how would the test assess the sexual misconduct of public officials? On the one hand, the sexual adventures of politicians like President Bill Clinton or New York Governor Eliot Spitzer have a bearing on their fitness for public office, a conclusion with which most American courts would probably agree.[274] But the argument that sexual affairs that do not involve serious breaches of the criminal law should be private has some merit, even if it does not live well with

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273. *See supra* Part I.A. For an argument that even modern information privacy rules are inconsistent with equality principles, see Lior Jacob Strahilevitz, *Privacy Versus Antidiscrimination*, 75 U. CHI. L. REV. 363 (2008).

274. As might Warren and Brandeis in 1890. *See supra* notes 68–74.

current First Amendment doctrine. Although some things would presumably be private even for national politicians, the public-private distinction does not provide any guidance about where and how to draw meaningful or predictable lines.

Even if courts could define with some specificity the proper scope of press inquiry into the personal lives of famous politicians, there are a wide range of other contexts of "public interest" (celebrities, reality television, etc.) that would create further indeterminacy in the application of such a legal rule. In this regard, the example of American defamation law is instructive, where the same sorts of judge-made distinctions involving "public figures," "private figures," and "limited-purpose public figures" have resulted in a body of jurisprudence that is conceptually clear at a high level of abstraction, but almost entirely indeterminate at the level of case-by-case adjudication.[275] Faced with such a regime, American courts have tended to defer to the judgment of the press about what constitutes information in which there is a legitimate public interest. In practice, this defines "public" as "that which is published by the press," which means that anything published is not private. American tort law has settled on this line because it is clear, but the tradeoff for that clarity is a largely useless tort.[276] The American approach to these issues is in sharp contrast to English law, which currently provides much greater protection for celebrities who wish to keep highly personal information out of the newspapers.[277] Indeed, the recent *Mosley* case in the United Kingdom held exactly that, enjoining newspapers from publishing the salacious details of an alleged orgy involving the head of Formula One Racing and multiple costumed prostitutes.[278]

While American courts might want to follow the English example, a third problem with the public-private distinction as the basis for judging between privacy and press freedom would render it impossible. This problem is a conceptual one resulting from the nature of the injury protected by the tort privacy. As explained earlier, tort privacy is concerned with emotional injury to a defendant's personality. This is largely a function of the way in which Warren and Brandeis crafted their tort to create liability for press disclosures of

275. *See, e.g.*, GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 150–51 (3d ed. 2008) (collecting cases).

276. *See* Solove, *Virtues*, *supra* note 7, at 1030.

277. Richards & Solove, *supra* note 18, at 166–72.

278. Mosley v. News Group Newspapers, Ltd., [2008] EWHC (QB) 1777, [232-36], [2008] E.M.L.R. 20 (Eng.).Under U.K. law, publication of details of the sexual activities of celebrities violates the right to privacy unless the facts disclosed constitute "a significant breach of the criminal law." *Id.* at [127].

private information. Recall that Warren and Brandeis relied on a series of English breach of confidence cases, but loosened the requirement of a relationship between the parties in order to reach the press. They also changed the nature of the injury from a breach of trust to the psychological embarrassment caused by invasions of an "inviolate personality" produced by private facts made public.[279] They were clearly influenced by the trend in tort law at the time to extend compensation to emotional and psychological injuries.[280] These moves were cemented into the law by William Prosser in the mid-to-late twentieth century, who gave tort privacy its modern form and retained emotional injury as the touchstone of liability for disclosures of private information.[281]

But crafting tort privacy as a remedy for press disclosures of embarrassing information brought privacy directly into tension with the First Amendment. Warren and Brandeis recognized the tension in 1890, but as First Amendment law became more robust over the course of the twentieth century (aided of course by Brandeis), the conflict between the First Amendment and tort privacy's core case against the press only increased. The hallmark of modern American First Amendment jurisprudence is that hurt feelings alone cannot justify the suppression of truthful information or opinion.[282] And under the modern, post-*New York Times v. Sullivan* First Amendment regulation of speech (even by tort) on the grounds that it causes emotional injury is highly disfavored.[283] It should thus be unsurprising that in a series of Supreme Court cases in which psychological privacy harms have been balanced against free press rights, the First Amendment has always prevailed.[284]

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279. *See supra* notes 50–85 and accompanying text.

280. *See* WHITE, *supra* note 25, at 174.

281. Richards & Solove, *supra* note 18 (ms. at 1).

282. *See, e.g.*, cases cited *supra* note 75.

283. Solove & Richards, *supra* note 16, at 1660.

284. *See* Bartnicki v. Vopper, 532 U.S. 514, 527–28 (2001) (refusing to prohibit a radio station from publishing newsworthy information of public concern, even where such information had been illegally obtained by a third party); Fla. Star v. B.J.F., 491 U.S. 524, 526 (1989) (holding that a state statute prohibiting the publication of the name of a rape victim was unconstitutional as applied to a newspaper that had obtained the name from a "publicly released police report"); Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979) (holding the First Amendment prohibits a state from punishing a newspaper for publishing the name of a juvenile murder suspect because the press lawfully obtained the information); Okla. Publ'g Corp. v. Okla. Cnty Dist. Court, 430 U.S. 308 (1977) (holding the First Amendment prevents a state court from prohibiting the media from publishing the name of a juvenile in a proceeding that a reporter attended); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) (holding the name of a rape victim obtained by the press from public records cannot be prevented from being published by statute or made the basis for liability under the nondisclosure tort).

I should be clear about my argument at this point. My claim is not that tort privacy is worthless or always unconstitutional, but rather that the conception of tort privacy articulated by Warren and Brandeis is not especially useful. It is limited on its own terms, and is a particularly poor model for thinking about broader privacy problems. As recent privacy scholarship has argued at length, this is particularly true in the context of Information Age problems commonly thought to implicate privacy, such as identity theft, cyber-stalking, government surveillance, the market for personal data, or even online disclosures of embarrassing facts through blogs or social networking web sites.[285] Tort privacy could perhaps be rehabilitated to some degree,[286] but such proposals have thus far had little practical success.

Fundamentally, because of the way it is structured to remedy emotional injury, tort privacy runs into almost intractable problems when it restricts speech protected by the First Amendment, whether by the press or other speakers.[287] In extraordinary cases, perhaps involving sexually-themed disclosures such as sex tapes, tort privacy can survive a direct clash with the First Amendment protections given to the press. A few such cases impose liability for psychological injuries over free press challenges.[288] But such cases are likely to remain outliers, and appropriately so. As Brandeis himself implicitly recognized later in life, a tort-based conception of privacy protecting against purely emotional harm must remain exceptional in a constitutional regime dedicated to speech, publicity, and disclosure.

This is not to say that information can never be regulated or that all information nondisclosure rules create constitutional problems. I have argued elsewhere that a wide variety of restrictions can be placed on commercial databases consistent with the First Amendment,[289] a conclusion with which courts have agreed.[290] And in some contexts, the concept of confidentiality has great promise to

285. Citron, *Mainstreaming Tort Privacy*, *supra* note 210 (ms. at 2); Lauren Gelman, *Privacy, Free Speech, and "Blurry-Edged" Social Networks*, 50 B.C. L. REV. 1315 (2010); Richards & Solove, *supra* note 18 (ms. at 35).;

286. For my own forthcoming suggestions, *see* Richards & Solove, *Prosser's Privacy Law*, *supra* note 19, at ms. 30–50. For other recent but different proposals, *see* Citron, *supra* note 210, at ms.25–29; SOLOVE, FUTURE OF REPUTATION, *supra* note 7, at 161–88; Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005).

287. Zimmerman, *supra* note 20; Volokh, *supra* note 7.

288. *See, e.g.*, Michaels v. Internet Entm't Group, Inc., 5 F. Supp. 2d 823 (C.D. Cal. 1998) (granting a preliminary injunction barring the Internet distribution of a sex video made by celebrity couple plaintiffs, notwithstanding the defendant's claims of newsworthiness).

289. Richards, *supra* note 7, at 1165–74.

290. IMS Health, Inc. v. Ayotte, 550 F.3d 42 (1st Cir. 2008) (upholding a law restricting pharmaceutical company usage of physician prescription records for marketing purposes).

regulate information disclosure in the context of relationships.[291] But these are not tort privacy rules, as they do not apply to all speakers and they remedy injuries other than emotional injury. As currently understood, tort privacy in the Warren and Brandeis tradition seems too crude an instrument to effectively resolve these problems, particularly because tort remedies based upon emotional harm conflict directly with the post-*New York Times v. Sullivan* First Amendment.

B. The Promise of Intellectual Privacy

Unlike tort privacy, Brandeis's second conception of privacy holds great promise for dealing with contemporary privacy problems. Brandeis's mature theories of free speech and privacy suggest a reorientation in his thought from privacy being in tension with free speech to privacy being supportive of it. His fundamental insight in *Olmstead* and his free speech opinions is that ideas need space to incubate and develop, and that privacy protections for thoughts and new ideas are essential to meaningful debate and discussion. This insight has been overlooked by subsequent scholarship on both privacy and free speech. Moreover, it has the potential to suggest new ways of looking at many of privacy law's most important problems.

Brandeis's second conception of privacy can be thought of as "intellectual privacy." By this term, I mean the ability to develop ideas and beliefs away from the unwanted gaze or interference of others.[292] Surveillance and interference can threaten the generation of new and potentially unpopular ideas, which can benefit from nurturing and testing before they are ready to be disclosed publicly. Intellectual privacy can be threatened in a number of ways, but one of the most important is through the disclosure or surveillance of records relating to reading, thinking, and non-public writing. In the past, such records have included letters, diaries, library records, and transcripts of phone conversations. But in the Information Age, the amount of such records has vastly increased, and includes new varieties, such as email, Internet browsing records, and search engine logs. As our expressive activities of thinking, reading, and communicating are increasingly mediated by electronic communications technologies, the number and importance of these sorts of records is expected to increase. So too will the importance of issues of intellectual privacy. Consider, for example,

291. *See* Richards & Solove, *supra* note 18, at 181–82. We have elsewhere argued that confidentiality-based nondisclosure rules arising in the context of relationships avoid many of the First Amendment problems caused by tort privacy nondisclosure rules face. *See* Solove & Richards, *supra* note 16, at 1697–98.

292. Richards, *Intellectual Privacy*, *supra* note 15, at 389.

how different our reading habits on the Internet might be if a transcript of the web sites we visited or our email were given to the government, to our employer, or to our acquaintances.

Yet modern First Amendment theory and jurisprudence have largely overlooked intellectual privacy.[293] They have been concerned with protecting the ability to speak, but have given relatively little attention to the processes by which speakers develop their ideas. This is unfortunate because the most stringent protections for speech would do little to promote vigorous public debate if we were deterred from thinking of anything new or interesting to say.[294]

Privacy law has also underappreciated intellectual privacy. It has asked the wrong questions and weighed the wrong values. In part this is due to the influence of Warren and Brandeis's article, which has remained the starting point for the analysis of most privacy problems.[295] In practice, even when the context has changed from press disclosures of private facts, the basic Warren and Brandeis division between public and private has remained the dominant question in privacy law. This is a binary determination that has little room for context or for shades of grey such as information that has been shared to a few others, but is still not generally known. For example, the tort law of privacy asks whether the disclosure of information is public or private, and protects only the private.[296] Fourth Amendment law asks whether there is a reasonable expectation of privacy, and does not protect information that has been disclosed even to a few others people.[297] In the Internet context, search engine and database companies have transferred large amounts of personal information to the government—some of it relating to reading and Internet use habits, on the grounds that because it had

293. There are, of course, a few exceptions. For one example, *see* Stanley v. Georgia, 394 U.S. 557, 564–65 (1969) ("[The] right to receive information and ideas . . . is fundamental to our free society . . . . [A]lso fundamental is the right to be free . . . from unwanted governmental intrusions into one's privacy. . . . If the First Amendment means anything, it means that a State has no . . . power to control men's minds.").

294. Richards, *supra* note 15, at 389.

295. *See* Kalven, *supra* note 3, at 327; Prosser, *supra* note 7, at 383; Bratman, *supra* note 26, at 624.

296. *See* SOLOVE, FUTURE, *supra* note 7, at 161–63 (collecting examples).

297. The Supreme Court has repeatedly held that there is no reasonable expectation of privacy in information that is shared with third parties. *See, e.g.*, United States v. Miller, 425 U.S. 435, 443 (1976) (financial records shared with bank); Smith v. Maryland, 442 U.S. 735, 745–46 (1979) (telephone call records kept by telephone company).

been shared by their customers, neither current Fourth Amendment nor privacy tort law restricted the transfer.[298]

Brandeis's arguments in *Olmstead*, *Gilbert*, and *Whitney* suggest an alternative way of looking at these problems and the critically important values at stake in them. Focusing on intellectual privacy can give the law a different way of looking at certain kinds of privacy issues that can make the free speech issues in some of these cases more salient. Take, for example, a government subpoena of a search engine for the records of its users. In such a case, the government might assert a legitimate interest for obtaining the information, such as studying the problems of file-sharing, obscenity, child pornography, or terrorism. Approaching the question from a tort privacy framework, a court might ask whether the information is "public" or "private," and what the nature of the interest in nondisclosure might be. From such a perspective, the information would likely be viewed as public because it had already been shared with the search engine company. Moreover, a tort-like interest in avoiding the embarrassment of disclosure would be unlikely to prevail over government interests (for instance, in preventing crime or copyright violations).[299]

From the perspective of intellectual privacy, both the questions and the interests at stake in such a case are very different. Rather than a clumsy and somewhat metaphysical inquiry into the public or private nature of search information, an intellectual privacy-based inquiry might ask instead whether the information being sought is relevant to the activities of thinking, reading, and discussing safeguarded by the First Amendment. If the government is seeking records within this category, perhaps a higher standard of access such as a judicial warrant might be appropriate. Similarly, because search engine records are relevant to expressive activity, the nature of the interest in nondisclosure would be very different as well. Rather than the interest in avoiding embarrassment, an intellectual privacy interest in nondisclosure would be to avoid government surveillance of intellectual activities and to promote autonomous freedom of thought. This is precisely the interest in thinking, reading, and private

298. *See* Richards, *supra* note 15, at 436–37; *see also* Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741 (2008).

299. In one exceptional case to this trend, Google was able to quash a subpoena that directed it to turn over millions of search results to the federal government. Google was apparently able to prevail not because of the privacy of its users, but rather because of its own economic interest in the goodwill of its users believing that the company was protecting their privacy. Arshad Mohammed, *Google Refuses Demand for Search Information*, WASH. POST, Jan. 20, 2006, at A1.

teaching that underlies Brandeis's opinions in *Olmstead*, *Gilbert*, *Milwaukee Leader*, and other cases.

Again, I want to be clear about the argument I am making. I am not saying that search engine records must be absolutely protected, or that the theory I have just laid out would succeed under current law. I am also not arguing that a focus on intellectual privacy will solve all or even most of the wide variety of legal problems that we might think of as involving one sort of "privacy" or another.

What I am saying instead is that looking at *certain* privacy problems from the perspective of intellectual privacy is essential. And in this subset of problems (often involving access to records of expressive activity like Internet logs), the concept of intellectual privacy can do useful work. I mean to suggest that the concept of intellectual privacy allows us to ask better questions about (for instance) government surveillance of our reading habits and associations. An intellectual privacy-based model could also help to tell us which kinds of records are entitled to privacy protection and which are not. Thus, records of book purchases might receive greater protection than records of other consumer products. And records of Internet browsing histories or the content of emails would warrant greater protection against nondisclosure than would financial or even medical records. There might be independent reasons to protect these other records against nondisclosure, but they would be unlikely to be ones rooted in intellectual privacy.

In addition to providing a new perspective on privacy of electronic records, Brandeis's work helps to explain why privacy of intellectual activity matters and is worthy of protection. Brandeis makes a convincing argument that we must pay attention to the inputs of free speech, and not merely to the outputs. His writings also support the notion that a robust system of free speech requires that individuals and not the state make the choices about what sorts of materials should be read and what sorts of ideas should be entertained, regardless of how unpopular they might be. As Alexander Meiklejohn put it, building on Brandeis's ideas of civic courage and the importance of freedom of thought, "to be afraid of ideas—any ideas—is to be unfit for self-government."[300] If *Whitney* and *Gilbert* teach us anything, it is that in a free society, individuals must be trusted with ideas—even dangerous ones—and that the government cannot police the processes of belief formation any more than it can police the processes of expression.

300. MEIKLEJOHN, *supra* note 272, at 26.

Brandeis's ideas suggest some important ways in which a measure of intellectual privacy is essential to free expression. His conception of intellectual privacy has remained latent for many years, but it suggests different and interesting ways in which we can look at some important modern problems. Brandeis did not develop his ideas fully, however, and they need to be worked out in greater detail. To do so is a project larger than present space allows, and it is a project that is normative rather than primarily historical. But such a project is worthwhile. Unlike tort privacy, which is of limited utility, Brandeis's theory of intellectual privacy has a great deal of promise for dealing with the subset of modern privacy problems that raise issues of access and control to the records of the activities of reading, thinking, and confidential communication. In this respect, his concerns about the problem of intellectual and political liberty in the modern state remain timely and vital.

CONCLUSION

This Article has argued that Brandeis's views on privacy and free speech were more complex than has been previously thought, and that his later writings suggest surprising and overlooked ways in which privacy and free speech can reinforce each other. A note of caution is nevertheless in order, for these suggestions were never fully developed and remain inchoate and latent in Brandeis's writings. Although these suggestions are present, we should not try to read too much into them; or rather we should try to avoid putting too much of ourselves into our interpretations of Brandeis. At the level of historiography, however, I hope that my argument complicates the conventional wisdom's reductionist tendencies to treat Brandeis's thoughts on these issues as no more than what was written in *The Right to Privacy* and to treat his conceptions of privacy as always hostile to the values of free speech.

But from a modern normative perspective, these methodological difficulties disappear. If we consider the ideas present in Brandeis's later writings on civil liberties, what we are left with is the outline of a theory of democratic self-governance that has important places for both rights of free expression and rights of privacy (principally against the state rather than the press). I have argued that our understandings of the First Amendment ought to include a greater place for protections of the intellectual processes by which we produce new and possibly controversial ideas. The transformation of Brandeis's thinking about the role of privacy in a free society is consistent with such an argument. It forces us to

consider how privacy is not always in tension with our First Amendment values, but instead can be an essential precondition for meaningful expressive liberty.