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The Age of Facebook and the Right to Privacy: A Brandeisian Perspective

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Introduction

The era of Facebook, Instagram, text messages, emails, and third-party phone applications raises the following questions: Does privacy exist in virtual domains? Is it comprehensive, or are there limitations, and what are the reasons behind and the extent of these limitations? Does the Constitution guarantee this right? In a world where more interaction occurs within virtual spheres than ever before, the legitimacy of privacy protection remains at the forefront of discussions in the Supreme Court and between lawmakers, corporations, and individuals. The issue received focused attention in the late 1800s when Justices Warren and Brandeis penned *The Right to Privacy* and again in the early 1900s with Justice Brandeis's renowned dissent in *Olmstead v. United States* (1928). There, the Court ruled that wiretapping was not a violation of Fourth Amendment prohibitions against search and seizures or a violation of Fifth Amendment rights against self-incrimination. Brandeis's sharp dissent in *Olmstead*, wherein he argued that wiretapping was in fact a violation of the right to privacy implied in the Constitution under the Fourth and Fifth Amendments, laid the groundwork for future expansions of privacy. Justice Louis Brandeis's role as a leading advocate for the advancement of constitutional privacy protection set the stage for future Court rulings and precedents, extending privacy protections into a multitude of avenues that the Founding Fathers would have never imagined.

Although Justice Brandeis's arguments for a constitutional right to privacy depart from an originalist understanding of the Constitution, they also offer compelling logic that favors a right to privacy. "The right to be let alone", a statement crafted by Supreme Court Justices Warren and Brandeis, laid the foundation for an understanding of a constitutionally protected right to privacy. Brandeis acknowledged that privacy rights are not absolute, but he would

advocate for the most extensive possible protection of individual privacy rights in a technological age, one that sets conditions for the ever-growing likelihood of undetectable government and corporate surveillance. Today, from a Brandeisian perspective, if an individual has a constitutional guarantee to security in his home, the government and private entities should not have relatively unconstrained access to digital information that individuals desire to keep private.

Why is privacy so important in today's digital era? First, more of our lives unfold in virtual domains than ever before. Individuals rely on digital databases to store personal information, adhere closely to the feeds of their social media networks to stay connected to loved ones, and lean on third-party applications to track sensitive health information. No longer are private documents and individual thoughts kept under lock and key in the privacy of one's home. Citizens of a digital world rely on the cloud to quickly and securely store their most personal information and on social media networks to allow them to share their lives, but only with those whom they deliberately and consciously "friend" - if their privacy settings reflect such a decision. Even though these networks and databases are open to the public, most individuals still expect a level of privacy and trust these platforms to keep their information secure. Whether that trust is misplaced is up for debate. However, recent accounts of potential privacy infringements are cause for concern, as discussed in depth later.

Unfortunately, our current technological brave new world blurs the lines between the public and private spheres. Justice Brandeis believed in a clear distinction between the public and domestic circles, but today, this bright line disappears with increasing frequency. Personal information that once found security in the private confines of one's home, free from unwelcomed intrusions, is now stored or posted online. It is difficult to determine in today's age

what information deserves protection and what information does not. The discussions surrounding the right to privacy remain highly pertinent today because advanced technologies allow for extensive, covert government surveillance. This state of affairs leads to the proposition of the following questions: Is the right to privacy comprehensive in a digital era, taking into account Brandeis's historical perspective on the topic? Is this right fixed across eras, or must it be somewhat malleable to evolve with the times? Did Justice Brandeis present valid arguments in favor of protecting privacy that provide potential applications for today? How would Brandeis answer the most pressing privacy questions of a digital age?

Justice Brandeis knew that the *Olmstead* case was just the beginning of privacy infringements that occur because of technological advancements. Today the government and even corporations have covert means to seek personal information and invade one's privacy that Justice Brandeis could have never imagined. A study of Brandeis provides thought-provoking arguments in favor of privacy protections in a digital era, even if the right does not find its sole foundation in the Constitution.

Literature Review

Since the 1890 publication of Justice Brandeis and Justice Warren's *The Right to Privacy,* the topic has been debated up to the present day in America's courts and in Congress. The following questions are posited: Does the right to privacy still exist in a digital world? If so, is privacy constitutionally protected? How does the right to privacy extend to a digital world where lives are publicly viewable on multiple technological platforms? How far does the right to privacy extend? Finally, did Justice Brandeis present valid arguments in favor of more comprehensive privacy protections that should be considered today? Scholars continue to conduct extensive research on Justice Brandeis's development of the right to privacy and how this right extends

into today's technological world. While scholars mostly agree that the right to privacy exists, they differ in their understanding of the development of this right, to what degree its existence relies on Brandeis's perspective, where its constitutional basis lies, and – accepting Brandeis's perspective – how deeply this right penetrates a digital world. Additionally, there is significant room for further research and conclusions on the place of the right to privacy in a digital era.

The Development of the Right to Privacy

Many scholars argue that the concept of the right to privacy formally emerged with the penning of *The Right to Privacy* in 1890 by Justice Brandeis and Justice Warren. Concerned with modern technological developments which allowed the government to interfere into the lives of citizens with relative ease, Brandeis set out to propose a legal remedy for the invasion of privacy. While Brandeis found the basis for the right to privacy in the Fourth Amendment, which guarantees freedom from unreasonable searches and seizures, his views expanded this right to extend to far more than just tangible property. Brandeis proposed that it extended to an individual's intellectual property: "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others" (Warren and Brandeis, 1890, pg 198). Under this formulation, the right to privacy was not only a constitutional guarantee against physical intrusion into one's home, but it also protected individual thoughts, emotions, and conversations.

In addition to finding an implied right to privacy in the Fourth Amendment, others like Brandeis also argue that the right to privacy was present in common law. Dorothy Glancy proposes that this right already existed in common law as a protection of an individual's "inviolate personality" (Glancy, 1979, pg. 2). Rao also agrees that privacy found its basis in common law, but that this common law was "elastic" in nature (Rao, 2017). At the time of the

writing of *The Right to Privacy*, Glancy believes that Brandeis and Warren further expanded on this right and referred to it as "the right to be let alone." This right eventually continued to evolve after the Civil War and became "the right to enjoy life," a right guaranteed by the Fifth Amendment (Glancy, 1979, pg. 3). Glancy further argues that as life became more complex and as the newspapers and the press became new avenues of intrusion, Brandeis and Warren knew additional measures were necessary to protect privacy. Glancy, in contrast to other scholars, also notes that Brandeis looked to social commentator E.L. Godkin to further develop the right to privacy. Godkin had previously observed that since humans were becoming more sensitive, more extensive privacy protections were necessary to safeguard human sensitivity.

Many scholars agree that a motivating factor behind the writing of *The Right to Privacy* was Justice Warren's personal experience with how the press and newspapers spread false or sensitive information about his family. Glancy and Rosen both agree that Warren's personal experience with privacy invasion may have been a motivating factor in seeking out a legal remedy. Richards proposes that Brandeis was more interested in a "duty of publicity" which dealt solely with the press (Richards, 2010, pg. 1300). Richards further notes, in contrast with Glancy (1979), that *The Right to Privacy* was not nearly as crucial in the development of the enduring American concept of the right to privacy as most scholars believe. However, Richards, like others, believes in the protection of the right to privacy as a means of ensuring the prevention of psychological and personality injuries. Unfortunately, Richards does not further expound on why the development of a constitutional right to privacy is so crucial to preventing psychological injuries.

Overall, scholars agree that Brandeis was crucial in the development of personal privacy as an enduring concept worthy of legal protection. While some disagree as to the factors that

motivated Brandeis to develop and expand this right, they agree that the right to privacy took shape during Brandeis's tenure as a Supreme Court justice and that his influence on the right's development extends into cases today.

The Constitutional Basis for the Right to Privacy

Scholars and judges have long sought to determine the validity of a constitutionally-protected right to privacy. Furthermore, scholars have extensively researched Brandeis's interpretation of the Constitution and how his interpretation shaped the development of the right to privacy. Overall, most scholars conclude that Justice Brandeis advocated for a living interpretation of the Constitution, denoting that its very meaning and intent change as societal needs change. Essentially, this method of interpreting the Constitution allows constitutional imperatives to evolve with the times and deems original interpretation too rigid for useful interpretation in contemporary times.

Richards notes that Justice Brandeis believed that the Constitution was a living law, while Morgan Cloud also argues that Justice Brandeis's interpretation of the Fourth and Fifth Amendments in *Olmstead v. United States*, 277 U.S. 438 (1928) is evidence of his living interpretation. Additionally, Justice Frankfurter notes that Brandeis's living interpretation of the Constitution advocates for "imagination" in interpretation (Frankfurter, 1932, pg. 53). Frankfurter observes that Brandeis's method of constitutional interpretation led him to interpret the Constitution in a way that catered to social changes. Lewis Paper, like many other scholars, also states that Brandeis knew that the literal language of the Constitution, and the Fourth Amendment specifically, were not comprehensive enough to protect individual privacy.

In contrast to the aforementioned authors, Liu, Karlan, and Schroeder propose a slightly different method than the one employed by Brandeis in his constitutional interpretation, and this

paper will discuss this treatment later in greater depth. The authors note that Brandeis's method of interpretation was not living, but instead, that he pursued the idea of "constitutional fidelity" (Liu, Karlan, and Schroeder, 2009, pg. 25). Constitutional fidelity is the notion that the document's original meaning is preserved but that it is interpreted in a way that allows for the original intent of the Constitution to cover modern societal needs. It is a means by which judges can remain faithful to the Constitution while still responding to modern challenges.

Liu, Karlan, and Schroeder observe that Brandeis's interpretation of the Fourth and Fifth Amendments was not intended to change the Constitution's original intent, but rather to recognize that the Founders could not have foreseen how government interference would become so intrusive with technological advancements. Justice Brandeis believed that the lack of leeway in interpretation to meet modern challenges could compromise the original intent of the text. The authors do note that there is a substantial difference between a living interpretation of the Constitution and constitutional fidelity that will be discussed later.

The Extent of the Right to Privacy

Examining Brandeis's conception of the extent of the right to privacy, some literature suggests that he believed in a comprehensive, absolute right to privacy, while others argue that he acknowledged limitations. Glancy explains that Brandeis believed in clear distinctions between public and private spheres. However, she remains silent on how technological advancements today may have led Brandeis to rethink his understanding of clear differences between public and private matters. She argues that Brandeis would acknowledge exceptions to the right to privacy in cases of public interest, slander and libel, or the suppression of free speech (Glancy, 1979, pg. 38). However, Glancy proposes that Brandeis was opposed to any interference not in the interests of the exceptions above. Moreover, she argues for legal liability

in cases involving private matters that have become public against an individual's will and "…where such unconsented publication was 'beyond the pale of propriety'" (Glancy, 1979, pg. 37). Glancy notes that the right to privacy is not guaranteed if one publicly publishes information. This is a strong argument with which a contemporary Brandeis would likely agree.

Jeffrey Rosen reinforces Brandeis's belief in intellectual privacy, stipulating that an individual should be free from interference in his generation of ideas. Per Rosen, intellectual privacy is a fundamental human right. Rosen provides a strong argument that the courts should do more to protect intellectual privacy. He proposes that if Brandeis were still alive today, he would be appalled by government surveillance of one's private thoughts and emotions, whether through private emails, text messages, or private social media pages. Moreover, Rosen observes that Brandeis believed that counter-speech was more important and more useful in suppressing dangerous ideas than government surveillance (Rosen, 2015). While Rosen provides thought-provoking insight, a stronger argument would have included the proposal of more tangible solutions to address government surveillance and examples of specific emergencies that would allow for government surveillance from Brandeis's point of view.

Others argue that Brandeis's conception of privacy was absolute. Mirmina noted that Brandeis's idea of the right to be left alone was extensive and that if Brandeis were alive today, he would argue that this right should extend to all technological mediums (Mirmina, n.d.). Brandeis surely could not fathom a world where the government could track citizens secretly via GPS or social media. Steiker also argues that Brandeis's conception of privacy was comprehensive, regardless of search warrants (Steiker, 2009). However, Steiker does not further elaborate on how this right applies today. Rao further notes that Brandeis argued for the protection of privacy in all domestic circles: "…any published information that could only be

acquired by having unauthorized access to the domestic circle is seen to be a violation of that right to privacy" (Rao, 2017). Rao, like others, did not elaborate on applications for today.

Because of disagreements surrounding Brandeis's conception of the extent of privacy, there is additional room and necessity for research to determine what Brandeis believed regarding privacy's extent and reach, especially in today's technology-intensive world. While it may be relatively simple to ascertain how far Brandeis thought privacy should extend in a world where wiretapping was the latest technological advancement, it is difficult to extrapolate from that how he would view social media surveillance, for example. As a result, there may be some limitations to the conclusive precision of this research without an actual, living Brandeis's perspective available in the twenty-first century.

The Right to Privacy in an Information Age

Brandeis's views on wiretapping do allow for a good deal of inference. Given this paper's findings on privacy in the Information Age, one can conclude that a contemporary Justice Brandeis would likely push for more extensive privacy laws to protect an individual's information in a technological world. He would likely argue that "private" social media pages, along with private emails, text messages, and phone calls should never be surveilled by the government; he would likely allow few exceptions. Research on the specific topic of Brandeis's conception of the right to privacy and technology advancement is scarce, but prior research has convinced scholars that significant steps must be taken to protect individual privacy in a digital world. While some scholars would argue that the potential for privacy in its bygone form no longer exists today, most agree that there is at least some enduring right to privacy, even though the conditions under which it is extended and the extent to which it applies may have changed.

With a basis in Brandeis's conception of the right to privacy, much of the literature written on this topic agrees that the United States needs more comprehensive privacy laws. Because Brandeis knew that technological advancements would not stop with wiretapping, he argued that the right to privacy must evolve to meet modern demands. Brumis (2016) provides strong arguments that current privacy laws in the United States are severely inadequate and she insists that the right to privacy must continually evolve. She contends that social media privacy laws are especially critical and even suggests that constitutional amendments may be necessary. However, support for her arguments in favor of constitutional amendments is lacking because she does not acknowledge the difficulty of constitutional change nor does she offer a mechanism that would be effective for overcoming it. Other scholars offer more substantive and realistic arguments that favor congressional legislation instead.

Many authors agree that Brandeis would value informational and intellectual privacy as much as physical property. Chemerinsky states that today, "there has been minimal judicial protection for informational privacy" (Chemerinsky, 2006, pg. 644). Cameron Kerry of the Brookings Institute recently wrote a persuasive article noting substantial gaps in privacy protection. For example, he claims that in the United States, some sectors, such as health care and financial affairs, have rather extensive privacy laws, while other industries have no substantive privacy protections whatsoever (Kerry, 2018b).

Perhaps the most compelling research regarding the realities of government surveillance in today's digital era is an article written by Rachel Levinson-Waldman in the *Howard Law Journal*. Levinson-Waldman provides extensive insight into privacy violations via social media avenues. She provides sobering accounts of law enforcement surveillance of individuals and groups without their knowledge. An even more sobering reality is that social media surveillance

is disproportionately used to monitor "communities of color" (Levinson-Waldman, 2018, pg. 525). Levinson-Waldman provides the strongest arguments in favor of enacting more broad, unified privacy laws in the United States to protect privacy.

Conclusion

While current literature reveals disagreements on the development of the right to privacy, the constitutional basis for this right and the extent of the right to privacy, very few scholars argue that the right is non-existent today, even in a digitized world. Calls for privacy protection are more pertinent than ever before. Americans still want their private information protected, even if it is online. However, the Supreme Court has yet to answer specific questions regarding the intersection between the right to privacy and technological advances, like social media.

Although technology has advanced dramatically since the advent of government surveillance through wiretapping, understanding the right to privacy and the extent of privacy in a digital era must find some basis in Justice Brandeis's development and conception of this right. Understanding and examining Justice Brandeis's influence on the development of the right to privacy and the Court's historic protection of privacy rights following Warren and Brandeis's authorship of *The Right to Privacy* provides a sturdy foundation for additional research on the extent of the right to privacy in a digital era.

Methodology

This paper primarily relies on a qualitative research methodology. Data collection included content analysis of primary and secondary written documents, both contemporary and historical. Law journals, scholarly articles, and books comprise the majority of the resources consulted and referenced in this paper. Case studies underpin the study of the development of the right to privacy and in researching the scholarship and thoughts of Justice Brandeis. Much of the

research for this paper was speculative since it relies on a presumed body of thought from a deceased judiciary figure. Many scholars relied on theories to understand how Brandeis might interpret questions of a digital age.

This research methodology presents some challenges and limitations. Since Brandeis is no longer alive, it is difficult to determine the focus of the lens through which he would answer questions about the current high-technology era. While he did predict technological advancements that he could not imagine in his own day, it is unlikely he would have known the extent of possible privacy infringements today. Because scholars must hypothesize Brandeis's thoughts on these issues, large gaps in research exist. Additionally, analysis of numerous scholarly articles and journals on this topic finds disagreement on Brandeis's constitutional interpretation of the right to privacy. Finally, stemming from these same lines, research uncovered conflicting viewpoints among scholars regarding the constitutionally protected nature of this right. Following Brandeis's tenure as a Supreme Court justice, differing opinions of a constitutionally protected right to privacy have led to sharp disagreements between constitutional originalists and living constitutionalists.

Justice Brandeis provided a workable foundation for the development and evolution of the right to privacy, and his thoughts offer a starting point for interpreting questions of privacy in a digital age. Many scholarly articles detail Brandeis's conception of privacy and how his thoughts would apply today, but because of the limitations mentioned above, there is substantial latitude to determine the applicability of Brandeis's conception of privacy today. This paper primarily seeks to detail the development of the right to privacy under Justice Brandeis and how he would interpret questions of a technological era and the applicability of his thoughts today.

Justice Louis Brandeis: Background and Significance

Who was Justice Brandeis and why is he relevant to the discussion of privacy in a digital age? Born on November 13, 1856, to Jewish parents who immigrated to the United States, Justice Louis Brandeis became the first person of Hebrew ancestry nominated to the United States Supreme Court in 1916. Brandeis served on the Court for twenty-three years, and his influence and legacy on Court decisions echoes through the walls of the Court even today. Unlike most celebrated Supreme Court justices, Brandeis is most known and revered for his dissenting and concurring opinions, not his majority opinions. His famous dissent in *Olmstead v. United States* (1928) is foundational to his conception of privacy detailed in this paper, but went on to be even more important with its foundational role in privacy cases for many years after his death.

A *Marquette Law Review* article written by Joel Goldstein and Charles Miller notes that Brandeis's *Olmstead* dissent "…endured, including his classic encomium of the constitutional concept of privacy" (Goldstein and Miller, 2016, pg. 470). It is unlikely that Brandeis recognized in 1928 how foundational his dissent would be. The *Olmstead* dissent laid the groundwork for modern conceptions of the legal right to privacy in recent cases such as *Griswold v. Connecticut* (1965), *Kyllo v. United States* (2001), *United States v. Jones* (2012), and so forth. The famous *Olmstead* dissent was even referenced in *Roe v. Wade* (1973), which referenced Brandeis's conception of the "right to privacy in the right to be let alone," the concept detailed in *The Right to Privacy* (Goldstein and Miller, 2016, pg. 473). Brandeis's dissent in *Olmstead* is recognized as one of the great Supreme Court dissents because of its influence on the overturning of the initial *Olmstead* ruling in *Katz v. United States* (1967). In this case, the Court ruled there are guaranteed rights to privacy in the Constitution, relying heavily on Justice Brandeis's rationale for a

constitutional right to privacy in his *Olmstead* dissent. The *Olmstead* dissent warned of intrusive government surveillance using technological means. Brandeis's warnings in his dissent have been referenced in modern cases regarding government surveillance.

Brandeis, though, is perhaps most famous for his co-authorship with Justice Warren of *The Right to Privacy* in 1890. *The Right to Privacy* was formative in the development of privacy rights and provides an understanding of Brandeis's rationale behind the need for protected privacy rights. The concept of the "right to be let alone" comes directly from *The Right to Privacy* and summarizes Brandeis's understanding of privacy, the right to be left alone and protected from intrusive government surveillance. This concept is referenced today in regards to covert government surveillance of individuals and provides a foundation for the development of more comprehensive digital privacy laws in the future.

Brandeis's most well-known legacy from his time on the Supreme Court is his advocacy of the protection of individual privacy rights from government intrusion. His thoughts on privacy formed the basis for later Court decisions regarding private activities the Court deemed free from government intrusion, including reproduction, abortion rights, and homosexual activity (Chemerinsky, 2006, pg. 644). However, Brandeis's legacy has additional important facets. Goldstein and Miller observe that Brandeis was one of the greatest moral teachers to ever sit on the Supreme Court bench (Goldstein and Miller, 2016, pg. 463). He frequently relied on his judicial opinions to shape and share his beliefs in "fundamental constitutional values in a profound and memorable way" (Goldstein and Miller, 2016, pg. 463). He had a unique interest in moral issues especially, and his most memorable dissents and opinions usually surrounded questions of morality and values.

Additionally, Brandeis was revered for his advocacy for the common man. Known as "The People's Attorney," Brandeis's utmost desire was "to save the individual citizen from the oppression or large corporations and corrupt governments" (Paper, 1987, pg. 161). Brandeis was skeptical of the powers of the government and knew that if the rights of the individual man were not vigilantly protected, the government could quickly suppress freedoms. Paper further noted that "…citizens of virtually every stripe looked to Brandeis for help in dealing with the government" (Paper, 1987, pg. 161). The people knew they could rely on Brandeis to fight for their most valuable rights and freedoms, which would later include the right to privacy. Brandeis's advocacy for the common man was reflected in his interpretation of the Constitution. For Brandeis, the social needs of the people require modern constitutional applications. Comparing Justice Holmes to Justice Brandeis, Philippa Strum (1989) observes:

> Confronted with a case of legislative experimentation, Holmes asked only whether there was anything in the Constitution that reasonable people would agree explicitly prohibited it. Brandeis asked instead whether reasonable people, looking at the factual context, would agree that it was a rational (if not necessarily a good) approach to the problem. Holmes was the detached, cynical observer; Brandeis, the deeply involved reformer (pg. 311).

Finally, as a result of Brandeis's legacy as "The People's Attorney" and his advocacy for the protection of moral rights and values, the Court began to rely more on facts than just legislative considerations. Brandeis understood that the government's position of power could easily infringe upon individual freedoms and liberties and the Court had a responsibility to give the facts framing a case consideration and not to only weigh its legislative procedural questions. The Court began to rely more heavily on logic than "legislative argumentation" (Strum, 1989, pg. 338). Strum (1989) further notes:

> ...the Court started to present its opinions as no more than logical conclusions drawn from 'facts', which in turn have been supplied to the Court by those arguing for broadened definitions of liberties. Whether these 'facts' are correct or not, the Court has rendered

> constitutional decisions that have altered the balance of power between competing groups and values in American life on the strength of its belief that reasonable legislators could consider certain facts to warrant particular legislation, rather than on the basis of purely legislative argumentation (pgs. 337-338).

The Right to Privacy: A Brandeisian Perspective

Viewed through a Brandeisian lens, the discussion of the right to privacy in a digital era rests firmly on the definition of privacy Brandeis himself formulated. For Brandeis and Warren, privacy was the legal protection of all of one's property. It was an implied constitutional right, found in multiple amendments. However, privacy did not only extend to tangible property, like the Fourth Amendment would have an originalist to believe; privacy rather was also the protection of one's thoughts, feelings, and emotions. In *The Right to Privacy*, Brandeis and Warren (1890) define privacy as:

> The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise (pg. 213).

Various understandings of Brandeis's right to privacy have emerged over time. Some scholars believe Brandeis's conception of privacy was absolute and comprehensive, while others argue that he thought the right was limited. Referring to Justice Brandeis's understanding of the right, Dorothy Glancy (1979) noted:

> ...this right to privacy was not an absolute right. Rather it operated as a presumption of individual self-determination. Each individual should decide for himself or herself which aspects of his or her personal life would be private, kept away from the public concerns of the wider community, and the law should enforce that decision unless there was a good reason not to do so (pg. 21).

Other scholars, like Neil Richards, writing for the *Vanderbilt Law Review*, argue that Brandeis simply called for privacy protections for the "duty of publicity," meaning that privacy rights only extended to published pieces like newspapers and magazines (Richards, 2010, pg. 1312).

Richards believed that Brandeis's involvement in the development of privacy as a right was rather meager and he was not as influential in the development of the right as other scholars believe. However, Richards stands in direct contrast with the vast majority of literature and his viewpoint is difficult to reconcile with Brandeis's writings and other scholarly interpretations of his work.

To understand Brandeis's conception of privacy, it is necessary to understand the factors that motivated Brandeis to advocate for privacy rights. Many scholars agree that the rise of individualism and the publication of vast amounts of sensitive information in newspapers during Brandeis's period were deciding factors in Brandeis's push for constitutional privacy protections. During Brandeis's day, society began to push across a spectrum of behavior that reflected a transition from a primarily collectivistic society to one that placed more emphasis on individualism. As a result, extensive individual rights became a priority and the Court responded accordingly. Not only did society become more individualistic, but the overall composition of American society changed rather dramatically during this period. Glancy noted that immigration also played a significant role in the changing of societal needs; communities, families, and life in general became more complex (Glancy, 1979, pg. 7). As societal needs began to change and as the question of individual rights appeared at the forefront of many Supreme Court cases, it is no surprise that Brandeis wished to influence the development and constitutional protection of personal privacy protections. If one concludes that during this era society was coming to value individual interests more highly relative to collective interests, this premise seems to offer explanatory power as to why Brandeis desired to protect individual privacy interests, especially in concert with his distrust of the government.

Perhaps Justice Brandeis's most significant influence on the development of privacy was his co-authorship of *The Right to Privacy* with Justice Warren in 1890 and his famous *Olmstead* dissent. *The Right to Privacy* extensively details Brandeis and Warren's conception of a constitutional right to privacy and why this "new" right deserved a legal remedy. It detailed that privacy did not only extend to tangible property, but to "intellectual privacy" as well. Finally, the article defines privacy in terms of one simple phrase: "the right to be let alone." This right laid the groundwork for future developments of the right to privacy and provides helpful rationale to determine how Brandeis might interpret the privacy questions of a digital era. In *Olmstead*, Brandeis famously detailed why wiretapping was a clear violation of a constitutional right to privacy under the Fourth Amendment prohibitions against unreasonable searches and seizures. He also prophetically observed that future technological advancements would eventually allow the government to intrude into one's private life without setting foot into the private confines of one's home.

While scholars mostly agree that the primary motivating factor behind the publishing of *The Right to Privacy* was direct invasions of Warren's own family's privacy, scholars agree that the incursions of Warren's privacy so moved Brandeis that he proposed a legal remedy. Jeffrey Rosen observed that "stories about Mrs. Warren's friendship with President Grover Cleveland's young bride- and this aristocratic distaste for invasions of what Warren called their 'social privacy' led him to seek Brandeis's help in proposing a new legal remedy" (Rosen, 2015). On numerous occasions, the press leaked information about Warren's family that was deeply upsetting, motivating Warren and Brandeis to develop what would later become the right to privacy. Brandeis and Warren argued that if an individual wished to keep personal information private, no outside source should have the right to access or publish this information. The

"newspaperization" of this time that resulted from advancing technologies posed a significant risk to the private life of individuals (Glancy, 1979, pg. 8).

For Warren and Brandeis, intrusions into one's life without prior consent presented a danger to one's personality. They described it as an "already existing common law right which embodied protections for an individual's 'inviolate personality'" (Glancy, 1979, pg. 2). Warren and Brandeis believed that no one had the right to access or publish one's thoughts, emotions, or conversations without permission. Doing so without permission could hurt one's self-image and could harm an individual's emotional well-being (Glancy, 1979, pg. 2). Because Brandeis and Warren believed there were significant dangers resulting from invasions of privacy, Brandeis advocated for a new legal remedy.

Warren and Brandeis noted in *The Right to Privacy* that "[t]houghts, emotions, and sensations demanded legal recognition (Warren and Brandeis, 1890, pg. 195). They argued that invasions of privacy could be characterized as "mental suffering which results from mere contumely and insult, from an intentional and unwarranted violation of the 'honor' of another" (Warren and Brandeis, 1890, pg. 198). At this point in time, in Brandeis's opinion, the law fell woefully short of protecting individual privacy. Defamation laws were profoundly insufficient; as a result, Brandeis and Warren advocated for this new, legal right to privacy that protected individuals and their personalities. Glancy (1979) noted:

> As a result, by 1890 there was a vacuum, a type of injurious conduct (unconsented publication of true personal information) for which the law provided no remedy. Warren and Brandeis designed the right to privacy to fill this vacuum by providing legal grounds for individuals victimized by the unconsented publication of true personal information to sue the publishers…they invented a new concept which would protect a different and otherwise unprotected legal interest- the individual's control over his or her own personality (pgs. 15-16).

Jeffrey Rosen noted that Brandeis advocated for a specific type of privacy: "intellectual privacy…protection from surveillance or interference when we are engaged in the process of generating ideas" (Rosen, 2015). Furthermore, Brandeis noted that even though dangerous ideas were inevitable, the solution to countering dangerous ideas was not censorship; it was counter-speech (Rosen, 2015). Brandeis believed that the government did not have the right to censor private thoughts and conversations, even if they were dangerous. Instead, society functioned best when other individuals countered dangerous ideas. Finally, Rosen observed that, under the umbrella of intellectual privacy, Brandeis advocated for a "principle of anonymity," which gave individuals the reassurance they had the freedom to freely express their ideas without fear of governmental interference (Rosen, 2015).

Additionally, Steven Mirmina noted that Brandeis's conception of intellectual privacy was a "constitutional protection of the privacy of the person" (Mirmina, n.d., pg. 8). These privacy protections Brandeis advocated for covered the entire person, not just his physical property. Rao further observed that Brandeis believed that individual creations of any form must be protected, including all thoughts and ideas. He stated that Brandeis believed, "it is the right of the creator to decide the level of privacy and publicity associated with the exposure of his/her creation…" (Rao, 2017). Brandeis included all forms of self-expression in his conception of intellectual privacy, also referred to as "rights tied to expressive property" (Cloud, 2017, pg. 59).

Finally, *The Right to Privacy* provided a specific term for this newly-conceived right to privacy: "the right to be let alone." For Warren and Brandeis, this right to be let alone was an outworking of the very right to life. The right to life "entitles one to the right to enjoy life, the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term 'property' has grown to comprise every form of possession- intangible, as well as tangible"

(Warren and Brandeis, 1890, pg. 193). For Brandeis, the right to privacy includes "personal security, personal liberty, and private property" (Mirmina, n.d., pg. 8).

Brandeis's *Olmstead* dissent set critical precedents for the future protection of privacy. Brandeis already recognized that as technology advanced, the right to privacy required new applications and reinforcement (*Olmstead v. United States,* 1928): "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 housetops'." Brandeis knew that if wiretapping was classified as a constitutional search, the government would eventually use more covert means of surveillance as technology advanced. Departing from the Court's ruling in *Olmstead* that wiretapping was constitutional, Brandeis argued that every individual should be free from government intrusion into the private confines of his home. Brandeis's dissent in this case, arguing that wiretapping was an unconstitutional search under the Fourth Amendment and a violation of one's right to privacy, paved the way for the eventual overturning of *Olmstead* in *Katz v. United States* (1967) when the Court determined that wiretapping did violate the Fourth Amendment protection against unreasonable searches and seizures. Brandeis argued that wiretapping would apply to all future technological developments as well (Cloud, 2017, pg. 62). As will be discussed in further detail later, Brandeis would likely still rely on his rationale in *Olmstead* to apply to cases today of government surveillance using technological methods.

While Brandeis staunchly argued for privacy protections, he did not believe this right was absolute. He acknowledged that in the presence of prior consent or in the event that an individual published personal information, this information would not receive privacy protections (Warren

and Brandeis, 1890, pg. 218). Additionally, in cases of publications of information pertaining to public interests, the right to privacy is also not guaranteed. Goldstein and Miller (2016) note:

> As he wrote in his *Olmstead* dissent, the 'right to be let alone- the most comprehensive of rights and the right most valued by civilized men,' was not an absolute, because the Fourth Amendment did not prohibit every governmental intrusion into individual privacy but only 'every unjustifiable intrusion' (pg. 483).

Foundations of a Protection of the Right to Privacy

Justice Brandeis found his foundation for a right to privacy in common law, the Constitution, and in the thoughts of some of America's greatest political philosophers. However, to fully understand the basis for Justice Brandeis's advocacy for a comprehensive right to privacy, it is imperative to understand his method of constitutional interpretation. While most scholars agree that Justice Brandeis was a living constitutionalist, there is additional research that proposes that he employed an interpretational method called "constitutional fidelity." Regardless of its origin and the precise form it took, Brandeis's preferred and distinct method of constitutional interpretation provided the foundation for this new right to privacy.

If Brandeis was truly a living constitutionalist, scholars agree that this method of interpretation allows for significant flexibility in understanding the Constitution. They argue that the Constitution is a general guide, but its language does not require literal or strict interpretation. As a result, the Constitution can have multiple meanings. For living constitutionalists, the Founding Fathers could not have foreseen how society would evolve and become more complex over time, requiring additional protections the Constitution did not explicitly grant to individuals and societies at its penning. Brandeis likewise adhered to this belief. He argued that the Constitution was a "living law," and because society was constantly changing, the law must also be in "experimental flux" to meet modern demands (Frankfurter, 1972, pg. 41). Brandeis believed that in many ways, the law should be subservient to the needs

of the people, the source of its strength and effectiveness. Brandeis knew that strict adherence to the original interpretation and language of the Constitution could not protect society's most pressing needs, like the right to privacy. He knew that under original and strict interpretation of the Constitution, the Fourth Amendment would only protect material property and could not extend to man's most important property- his intellectual and emotional property. Brandeis knew "…the Constitution's reach could not be confined to the literal language" (Paper, 1983, pg. 312).

Furthermore, Brandeis believed that the Founding Fathers intended for future generations to use their "imagination" to interpret its reaches into daily life (Frankfurter, 1972, pg. 53). For Brandeis, while the Constitution provided helpful general principles to follow, ultimately, these principles must be applied considering modern-day needs. The Constitution must evolve as a living document to meet society's needs. As a result, Brandeis believed that the right to privacy was an imperative societal need that deserved constitutional protection under the Fourth and Fifth Amendments specifically. Brandeis (1997) noted:

> …it was the obligation of each generation to decide how best to realize these principles in light of contemporary experiences and circumstances. After all, the alternative to viewing the Fourth Amendment as a living commitment to 'vital' principles (such as privacy or a right to be let alone) was that it would become a dead letter, relevant to eighteenth century questions but silent on twentieth century questions (pg. 4).

Constitutional fidelity, on the other hand, while similar in some ways to living constitutionalism, seeks to preserve the Constitution's original meaning and legitimacy, while accounting for modern needs. The American Constitution Society notes that the Constitution endures because the general principles and intentions behind its penning have been preserved, while making them "relevant to the conditions and challenges of each generation through an ongoing process of interpretation" (Liu, Karlan, and Schroeder, 2009, pg. 34). Liu, Karlan, and

Schroeder (2009) also note the difference between constitutional fidelity and living constitutionalism:

> Living constitution misleadingly suggests that the Constitution itself is the primary site of legal evolution in response to societal change and that the Constitution can come to mean whatever a sufficient number of people think it ought to mean...it unduly minimizes the fixed and enduring character of its text and principles (pg. 29).

Constitutional fidelity preserves the general principles of the Constitution, remaining vigilant to protect the original intent behind the principles so as to best apply them today. By remaining true to the original purpose behind these principles, while understanding that societal needs change over time, judges can preserve the "power and meaning [of these principles] in light of the concerns, conditions, and evolving norms of our society" (Liu, Karlan, and Schroeder, 2009, pg. 25). The American Constitution Society argues that Justice Brandeis was a proponent of constitutional fidelity and remained faithful to the original intent behind the Fourth and Fifth Amendments, while ensuring citizens' protection against a growing government that employed more covert means of surveillance. For Brandeis, this understanding of the general principles found in the Fourth and Fifth Amendments provided the basis for an expansion of privacy. Brandeis observed (Liu, Karlan, and Schroeder, 2009):

> When the Fourth and Fifth Amendments were adopted, 'the form that evil had therefore taken' had been necessarily simple. Force and violence were then the only means known to many by which a government could directly effect self-incrimination. Protection against such invasion of the sanctities of a man's home and the privacies of life was provided in the Fourth and Fifth Amendments by specific language. But 'time works changes, brings into existence new conditions and purposes'. Subtler and more far-reaching means of invading privacy have become available to the government...Ways may some day be developed by which the government, without removing papers from secret draws, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home (pg. 27).

When the Constitution was written, the only real means by which the government could intrude upon one's privacy was through physical trespasses and searches. However, by the time

the *Olmstead* case reached the Supreme Court in 1928, new technology allowed the government to intrude upon one's privacy through covert means. For Brandeis, these new means of government surveillance were included in the searches and seizures principle in the Fourth Amendment. Brandeis believed that wiretapping, absent the oversight of an appropriate legal authority, was just as unconstitutional as a physical search of one's home. For proponents of constitutional fidelity, the Constitution does not change over time, but modern-day conditions require a modern interpretation of the Constitution.

The American Constitution Society provides the most compelling argument that Brandeis preferred the constitutional fidelity method, which is consistent with much of Brandeis's writings. In his writings, it is not apparent that Brandeis was interested in adopting a method of constitutional interpretation that understood the document to continually change, giving it multiple meanings. Brandeis seemed to desire to retain the original intent behind the Constitution and its amendments, while accounting for the changing needs of society. He acknowledged that the Founding Fathers could not predict how society would change over time; as a result, they provided general principles to guide the courts in determining how these general principles applied to modern needs. Similarly, Brandeis is also referred to as a "living originalist," meaning that the preservation of the Constitution's original intent is critical, while acknowledging the necessity of some adaptations throughout each generation (Rosen, 2016). However, this treatment does not imply that the Constitution itself changes with the frequency a living constitutionalist would impute. The Constitution remains the same and its principles endure, even if some interpretative changes are necessary given modern conditions.

Given a deeper understanding of Brandeis's method of constitutional interpretation, it is more apparent why Brandeis believed in the implied right to privacy in the Fourth and Fifth

Amendments of the Constitution. As technology evolved, no longer was the government physically trespassing onto one's property; instead, it intruded upon the private confines of one's home through technology. The Fourth Amendment's protection against unreasonable searches and seizures was a general principle put in place by the authors of the Constitution that was not solely limited to physical trespasses and searches. To meet modern demands, Brandeis interpreted this general constitutional principle as the right to privacy, or the right to be let alone. Wiretapping, or any other method of covert surveillance, was a clear violation of the Constitution. Brandeis knew that as technology advanced, the Fourth Amendment must adapt to meet the challenges of a technological world. In the Fifth Amendment, the protections against self-incrimination also evolved as technology changed and as the government could compel evidence in more covert ways. Justice Brandeis believed that the right to privacy was implied in additional amendments as well, like in the First Amendment's protection of beliefs and the Third Amendment's prohibition of quartering soldiers in the private confines of one's home without consent (Linder, n.d.). However, Brandeis relied predominantly on the Fourth and Fifth Amendments for his foundations of privacy. His interpretation of the Constitution, though, retained the general constitutional principles, while only making slight adaptations to meet modern demands.

Brandeis also found some of his basis for privacy in common law, before the penning of the Constitution. Brandeis and Warren noted that the "common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others" (Warren and Brandeis, 1890, pg. 198). Rao notes, "…the right to privacy is, in fact, the logical extension of an already established and accepted trend that is unique to the common law, growing to meet the needs of an ever-changing society" (Rao, 2017).

Scholars also note that Brandeis found some of his basis for privacy in Lockean and Madisonian beliefs pertaining to natural law. Glancy notes that Brandeis relied on many of John Locke's thought that "[l]ives, liberties and estates' of individuals were, as a matter of fundamental natural law, a private reserve, almost literally walled off from public interference" (Glancy, 1979, pg. 23). Brandeis also relied on some of James Madison's thoughts surrounding intellectual property that "…broad property rights…encompassed tangible property and the expressions of a person's ideas" (Cloud, 2017, pg. 60).

The Modern Evolution of the Right to Privacy

As Justice Brandeis noted, "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society" (Warren and Brandeis, 1890, pg. 193). As mentioned above, Brandeis's method of constitutional interpretation allows for the adaptation of constitutional principles to meet modern demands. He warned of rapidly-advancing technology even in the 1920s, prophetic of what was to come. Because society was in a constant state of flux, and because means of government surveillance also evolved at a rapid pace, for Brandeis, the right to privacy and its extent must evolve to keep up with the changes. Today, technology continues to advance, and methods of privacy invasion are easier and more covert than ever. Justice Brandeis would be appalled by the government methods employed to monitor individual activity without physical entry into one's home. The continuous evolution and expansion of the right to privacy is most evident in a series of relatively recent Supreme Court cases that followed *Olmstead*.

While many scholars recognize the *Olmstead* case as the first case involving this new "right", other scholars believe that the first implied mention of a right to privacy occurred in *Boyd v. United States* (1886), when the "Court emphasized that the Fourth Amendment protects

'the sanctity of a man's home and the privacies of life'" (Mirmina, n.d., pg. 5). It is unclear whether this 1886 case directly affected Brandeis's rationale in *The Right to Privacy*, but it is highly likely that the Court's ruling, in this case, did influence Brandeis in some way. *Katz v. United States* (1967) famously overturned the Court's ruling in *Olmstead* that wiretapping was not a violation of the Fourth Amendment. Katz's conversation, though in a public telephone booth, was wiretapped and deemed a constitutional violation. The Court established the *Katz* Test which would determine violations of a "reasonable expectation of privacy" (*Katz v. United States*, 1967). The test had two-prongs enumerated by Justice Harlan: (1) "…that a person have exhibited an actual (subjective) expectation of privacy"; (2) "…that the expectation be one that society is prepared to recognize as 'reasonable'" (*Katz v. United States*, 1967). The Court determined that electronic searches constitute searches worthy of Fourth Amendment violations. Additionally, following much of Brandeis's ideology surrounding privacy, the Court determined that the Constitution inherently protected "people, not places" (Steiker, 2009, pg. 157). In this case, the Court determined that "Katz's Fourth Amendment rights had been infringed because the government's wiretap 'violated the privacy upon which [Katz] justifiably relied while using the telephone booth'" (Steiker, 2009, pg. 157). Even though Katz used a public telephone booth, he had a reasonable expectation of privacy when he entered the booth.

In 2001, *Kyllo v. United States* set the precedent that heat-sensing devices around the outside of one's home also constituted a Fourth Amendment search and violation of privacy, Suspicious that Kyllo was growing marijuana inside his home, the Department of the Interior placed heat-sensing devices around the base of Kyllo's house to determine if these suspicions were correct. Justice Scalia argued that the placement of heat-sensing devices around the outside of one's home violated the Fourth Amendment "because obtaining any information through

sensory-enhancing technology that one could not normally obtain without intruding into the home would amount to a result of a Fourth Amendment search…" (Mirmina, n.d., pg. 12).

Recently, *United States v. Jones* (2012) extended privacy protections to prohibit GPS trackers on an individual's vehicle without their knowledge. In this case, Jones was convicted of drug possession after law enforcement attached a GPS tracker to his vehicle without permission. The Court determined that the GPS tracker constituted a prohibited search under the Fourth Amendment because the vehicle was personal property. Applying this case to modern violations of privacy using technological means, Alyssa Brumis observes that if the GPS tracker on Jones's car constituted an unreasonable search, "…how then, can privacy violations in an Internet-driven world be determined if the right to privacy is tied only to physical property?" (Brumis, 2016). Following Brandeis's rationale, Brumis argues that privacy extends much farther than just physical property. Individual privacy can be violated through technological means like the Internet and could constitute a prohibited Fourth Amendment search in the same spirit as a clandestine GPS tracker on a personal vehicle. Like Justice Brandeis would argue if he were alive today, Justices Sotomayor and Alito's concurring opinions argue that there are substantial, growing gaps in privacy protections in a digital age. They even propose that revealing some personal information to third parties does not automatically mean that an individual does not still have a reasonable expectation of privacy. The technological era is not conducive to maintaining the country's current established standard for privacy protections. Justice Sotomayor observes (*United States v. Jones,* 2012):

> More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks...I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited...But whatever

> the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy.

The Right to Privacy in a Digital Age: A Brandeisian Perspective

Justice Brandeis's formative and crucial role in the development of the right to privacy leads to the following question: How would Brandeis answer the most pressing questions of a digital era? He staunchly advocated for protection from intrusive government surveillance and prophetically warned of future covert government surveillance that took advantage of advancing technology. As a result, he argued that the right to privacy must continually evolve to match the times: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth" (Cloud, 2017, pg. 62). For Brandeis, the literal language of the Fourth Amendment is not extensive enough to protect individual privacy in a technological age. Before discussing how Brandeis may answer today's privacy questions, it is important to address potential challenges in understanding Brandeis's hypothetical reactions to privacy in a digital era.

Because Brandeis is no longer alive, there are challenges to hypothesizing how he may respond to today's privacy concerns. While his documents and the scholarship written about him prove helpful, there are gaps in research surrounding a definitive understanding of his privacy interpretations applied to today's questions. Additionally, Brandeis's understanding of strict boundaries between the public and private spheres is essentially irrelevant now. In today's age, these boundaries are extremely blurred, making the extent of privacy protections challenging to discern. Brandeis and Warren defined privacy as, "…that which is meant for the domestic circle; any published information that could only be acquired by having unauthorized access to the domestic circle is seen to be a violation of that right to privacy" (Rao, 2017). In Brandeis's day,

it was easier to ascertain the boundaries between public and private. However, in today's digital era, much of life takes place in virtual spaces with blurry domestic-public boundaries. Nowhere is this more true than with the rise of social media, which presents substantial challenges in determining what is private and what is public. Additionally, because of rapid technological changes, it is difficult for the law to keep up with these changes. Woodrow Hartzog observes, "The law's struggle to conceptualize privacy has often stunted its ability to adapt to rapid technological change. That has been especially true with the Internet's rapid rise as courts grapple to define the contours of privacy in cyberspace" (Brumis, 2016).

As life becomes more digitized than ever before, an imagined contemporary Brandeis may too have difficulty determining what is public and what is private. The courts continue to wrestle with this question. No longer are there clear distinctions between the public and private spheres. Millions of people share sensitive personal information on social media platforms, in emails, text messages, and on third-party phone applications. However, given Brandeis's stance on related issues in the past, it is reasonable to assume that today he would advocate for the adoption of more comprehensive privacy laws in the United States. He would be especially insistent on legislating or setting precedents applicable to digital forums and platforms, the heretofore non-existent virtual spaces that give the privacy question of today's world its new twist. In a technologically-advanced world, it is easier than ever for law enforcement and the government to seek out sensitive personal information on individuals without them ever knowing, and the Internet more than any other modern invention enables this undetected access.

Brandeis would be astounded by the means the government uses to track and monitor individual activity today: "All of this warrantless surveillance would be inimical to Justice Brandeis" (Mirmina, n.d., pg. 17). For Brandeis, if wiretapping private conversations was

unconstitutional, why then would this right not extend to private communications between individuals online or to private social media pages? He would likely advocate for extensive privacy protections for social media, especially for social media pages that individuals have chosen to make private. He would argue that the right to privacy must evolve as technology advances. Many scholars with similar ideologies argue that privacy laws in the United States are severely inadequate for a digital era. Brumis further observes that the advent of the Internet and social media requires a revisiting of individual privacy laws (Brumis, 2016). Hartzog also notes, "The traditional privacy torts are not well-suited to protect users of social media... (Brumis, 2016).

Brandeis would express deep concerns regarding the lack of cohesive privacy laws in the United States, where the body of privacy law tends to be a patchwork of specific legislation that covers only certain sectors, like health care and finance. Regarding privacy on social media and the Internet, Brandeis would likely argue that if an individual chooses to make his social media page private and decides to keep his emails and text messages private, warrantless government surveillance of any of these means would constitute a prohibited Fourth Amendment search. However, because Brandeis did not believe the right was absolute, he would likely acknowledge that if an individual chose to make his social media page public or posted personal information on public forums, his right to privacy would not extend into these areas. While the right to privacy was not absolute for Brandeis, the right was comprehensive; today, he would be a leader in the movement to adopt comprehensive laws to protect individual privacy from government - and even corporate surveillance - using today's latest technology.

Brandeis's Conception of the Right to Privacy: Is There Validity to His Arguments?

Even though Brandeis departs from an originalist interpretation of the Constitution and the implied right to privacy he acknowledges in multiple amendments is debatable, he did present compelling and thought-provoking support for the protection of individual privacy. The absence of real limits on government surveillance of individuals stands in contradiction to the multitude of the many freedoms that set America apart from the rest of the world. If the government can use whatever means it chooses to monitor and track citizens whenever it decides with little to no legal restraint, then are Americans genuinely free? In a world where the government has more accessible, covert access into the private lives of citizens than ever before, one must pose the question: Did Brandeis present valid arguments that could be applied today? As Neil Richards notes, "[I]n the Information Age, Brandeis's forgotten ideas have enormous potential to change the ways we think about information, speech, and privacy for the better" (Richards, 2010, pg. 1299).

Although originalists disagree that the right to privacy is a constitutionally explicit, guaranteed right, there is apparent validity to Brandeis's arguments for the necessity of protecting individual privacy, and such protections have utility in an orderly society even if there is disagreement surrounding their foundations of existence. Responsible state and federal legislation could fill this void, even if it is not a demarcated, explicit right protected under the Constitution. The Constitution does grant states the power to make laws that are in the best interests of its people, and appropriate privacy legislation could fall under this umbrella. Even if privacy is not explicitly constitutionally guaranteed, it is a freedom that has a place in a democratic society, like the United States. David Inserra notes, "Freedom requires that one be

safe and secure in one's possessions" (Rosenzweig, 2015). The Constitution does not clearly specify every potential action the government is permitted to take or explicitly detail every law that is permitted to pass. The Constitution does grant states and the federal government a degree of liberty to pass laws that are in the best interests of the people, as long as these laws do not conflict with the Constitution. It is a reasonable assumption that the government could and should pass laws to protect individual privacy from intrusive, unnecessary government surveillance. While originalists would disagree with Brandeis on the foundations of this right to privacy, many originalists would heartily agree that the government must be limited in its ability to surveil citizens in order to best promote freedom and flourishing human interaction, free from government interference.

Today's Digital Privacy Concerns

Given Brandeis's compelling arguments for a right to privacy and their applicability to today's digital era, it is advantageous to explore recent privacy concerns that highlight a need for more comprehensive privacy laws in the United States. While new technologies like the Internet and the social media that utilize it have numerous advantages and streamline many historically-tedious processes, technological advancements opened the door for more covert and more intrusive government and even corporate surveillance of individuals. Some of the means of government surveillance used today are troubling and emphasize a need for greater privacy protections for individuals.

Some of the world's leaders in technology like Apple and Google, and some of the world's leaders in social media platforms, like Facebook, face continual questioning about their lack of intentional privacy protections for individuals. While individuals may believe their information is safely stored in a "cloud" somewhere, popular applications and platforms may be

secretly sharing their private information with third parties. Rachel Levinson-Waldman observed that "[s]ocial media is fertile ground for information collection and analysis" (Levinson-Waldman, 2018, pgs. 523-524). Schechner and Secada note that Apple and Google "don't require apps to disclose all the partners with whom data is shared. Users can decide not to grant permission for an app to access certain types of information, such as their contacts or locations. But these permissions generally don't apply to the information users supply directly to apps" (Schechner and Secada, 2019). Additionally, a recent test conducted by The Wall Street Journal found that out of seventy of the most popular apps, eleven of them sent Facebook sensitive personal information without user consent (Schechner and Secada, 2019).

Facebook is in the spotlight today because it collected very personal user information from third-party applications. Users of third-party applications remain naively unaware that the sensitive information they input into the app may be directly shared with Facebook just seconds after entering their information (Schechner and Secada, 2019). Recent studies found that Facebook receives exceedingly sensitive information, like individual health data, and then uses that information to customize the user experience by targeting ads to users based on their personal information (Schechner and Secada, 2019). Third-party applications may inform their users of the sharing of some information, but users are typically unaware that highly sensitive information, like reproductive and heart rate data, is being shared with major social media networks, like Facebook, without their express consent. Facebook was recently fined "for allowing now defunct political-data firm Cambridge Analytica illicit access to users' data and has drawn criticism for giving companies special access to user records well after it said it had walled off that information" (Schechner and Secada, 2019). Unfortunately, while Facebook users

can turn off some data-sharing features, they cannot stop data collection (Schechner and Secada, 2019).

Social media presents substantial challenges to privacy protections today. Some courts are beginning to extend some privacy protections to social media. More recently, some courts have determined that social media activity is protected speech under the First Amendment, which may pave the way for further protections under the Fourth Amendment as well (Levinson-Waldman, 2018, pgs. 534-535). Today, there are significant issues regarding law enforcement and the government's use of social media to track individuals, monitor social media pages without warrants, and target and monitor only specific groups on social media platforms. Levinson-Waldman notes that law enforcement surveillance today falls into three categories: following or watching online an identified individual, group of individuals, or affiliation; using an informant, a friend of the target, or an undercover account to obtain information; and using analytical software to generate data about individuals, groups, associations, or locations (Levinson-Waldman, 2018, pg. 525).

Reminiscent of *United States v. Jones*, there are recent cases of government and law enforcement tracking individuals in question via their social media pages. Many social media apps, like Instagram and Snapchat, actively track user locations and law enforcement could have access to this information. If a GPS tracker on a private vehicle was ruled unconstitutional, why can law enforcement track individuals through other means, like social media, today? If Brandeis were alive and serving on the Court today, he would likely argue that tracking individuals via social media is a violation of the Fourth Amendment. An individual's private location is still being tracked, which is not much different than law enforcement placing a GPS tracker on a private vehicle.

Additionally, there are recent cases of law enforcement monitoring private social media pages without a warrant. Many law enforcement agencies employ undercover work to monitor private pages by creating fake accounts or by using friends of the suspect to “friend” the individual in question to gain access to their social media page without a warrant. Brian Mund (2017) observes:

> …courts allow the government to search private social media information without applying Fourth Amendment protections. The law treats these "private" social pages as deserving the same protections as if they were publicly posted on the Internet. Therefore, courts allow the government to search private social media information without any legally cognizable privacy protections. This doctrinal stance creates the troubling reality that law enforcement officials can and do engage in "covert friending" operations (pg. 240).

An NYPD initiative provides an excellent example of recent social media undercover work. This initiative allows detectives to “friend” minors accused of robberies. Detectives “typically befriend the participants- mostly black and Hispanic males- by using a fake avatar of a female teenager. They are not allowed to interact directly with the teenager, but they do ‘spend at least two hours daily monitoring the teenagers’ chatter’” (Levinson-Waldman, 2018, pgs. 541-542). In another case, a woman was arrested after the Drug Enforcement Agency pulled pictures from her Facebook profile to create a fake profile. An agent then used this fake profile, without her knowledge, to friend fugitives, and convict her (Levinson-Waldman, 2018, pgs. 543-544). The woman was granted a $134,000 settlement, but the DEA’s policies have not changed since the incident (Levinson-Waldman, 2018, pg. 544).

In many of these cases, law enforcement uses undercover means to find evidence and then request a warrant afterward to conduct further searches. However, they are receiving evidence from private Facebook accounts to establish a probable cause for a warrant. Brandeis would argue that many of these surveillance methods are clear constitutional violations of the

Fourth and Fifth Amendments. The statistics on law enforcement surveillance of social media pages are frightening and present compelling evidence in support of comprehensive privacy protections for social media. According to Levinson-Waldman (2018),

> ...in a 2016 survey of over 500 domestic law enforcement agencies, three-quarters reported that they use social media to solicit tips on crime, and nearly the same number use it to monitor public sentiment and gather intelligence for investigations. Another sixty percent have contacted social media companies to obtain evidence to use in a criminal case (pg. 524).

In addition to intrusive undercover surveillance, studies find that law enforcement uses social media to target individual groups. Levinson-Waldman found that law enforcement disproportionately targets "communities of color" (Levinson-Waldman, 2018, pg. 525). Law enforcement actively uses social media to surveil gang activity and protests as well, especially in minority communities. Not long ago, the Department of Homeland Security used social media platforms to monitor Black Lives Matter protests and targeted their surveillance to a specific group of people (Levinson-Waldman, 2018, pg. 540). Additionally, Levinson-Waldman found that 95% of NYPD's total surveillance online was directed towards Muslims specifically (Levinson-Waldman, 2018, pg. 550). Not only are there privacy concerns in these cases, but there are also discrimination concerns.

Finally, not only are there privacy concerns regarding social media, but there are questions of privacy in text messages and emails as well. There are grave concerns that current privacy laws are not protective enough of privacy rights for emails and text messages. Paul Rosenzweig, of The Heritage Foundation, notes, "…technology has changed the way Americans live. Today most people store their e-mails in the cloud. But the law has not kept up. That is why Congress needs to modernize the law" (Rosenzweig, 2015). Additionally, there are concerns that even if the Internet and social media users agree to terms of service and privacy disclaimers,

these disclaimers are insufficient for social media and the Internet (Brumis, 2016). Brumis argues that no one truly reads all of the disclaimers, and even if they did, privacy disclaimers are insufficient to meet modern privacy needs.

Conclusions

As Justice Brandeis rightly observed in the 1920s, as technology advanced, comprehensive privacy protections would become even more crucial. As technology advanced, methods of covert government surveillance increased exponentially and posed a significant threat to individual freedom from unnecessary government interference into their private lives. A recent journal article entitled, "Mass surveillance and technological policy options: Improving security of private communications," observed that "…privacy invasion has truly reached Orwellian dimensions" (Schuster, van den Berg, Larrucea, Slewe, Ide-Kostic, 2017, pg. 77). Other scholars issue dire warnings of the detrimental consequences of failing to enact more comprehensive privacy laws. Current US laws are inadequate to protect individuals from privacy infringements on behalf of governments and corporations today, and technological advancements should not automatically equal the sacrifice of all privacy rights. Numerous steps can be taken to protect individual privacy going forward.

As technology advances, US privacy law is falling woefully short of protecting individuals from privacy infringements. Scholars note that the United States, though one of the global leaders in technological advancements, "continues to lumber forward with a patchwork of sector-specific laws and regulations that fail to adequately protect data" (O'Connor, 2018). Current privacy torts, such as "the disclosure tort", do not protect "self-disclosed private information" (Brumis, 2016). Brumis notes that "Online self-disclosure lies at the heart of the problem posed by social media. The rampant self-disclosure of personal information concomitant

with an expectation of privacy is a problem because courts have struggled to determine whether and to what degree self-disclosed information is private" (Brumis, 2016). Scholars and even lawmakers express concerns that the privacy laws currently in place are severely outdated and "cannot keep pace with the explosion of digital information" (Kerry, 2018b). There are very few regulations and laws to protect personal data online and in the hands of third parties. Additionally, many scholars agree that simple privacy consents to terms and agreements are overwhelmingly inadequate. Cameron Kerry (2018a) notes:

> Informed consent might have been practical two decades ago when this approach became the norm, but it is a fantasy today. In a constant stream of online interactions, especially on the small screens that now account for the majority of usage, it is unrealistic to read through privacy policies. At the end of the day, it is simply too much to read through even the plainest English privacy notice, and being familiar with the terms and conditions or privacy settings for all the services we use is out of the question. As devices and sensors increasingly permeate the environments we pass through, old-fashioned notice and choice become impossible.

Additionally, it is critical to recognize that, contrary to some opinions, technology does not necessarily equal the sacrifice of all privacy rights. Just as Justice Brandeis believed that wiretapping, though not a form of physically trespassing into the confines of one's home, violated privacy rights, likewise, warrantless government surveillance of social media pages today, from Brandeis's perspective, may constitute an unconstitutional search. Rosenzweig observes, "The time is ripe for change and the principle is clear…police and FBI officers should have no more access to Americans' stored email than they do to private letters stored in a trunk in the attic" (Rosenzweig, 2015). Jonathan Turley powerfully argues that if something is not done soon to protect privacy, America's democracy will be in jeopardy (Turley, 2017):

> If successful, most citizens will not only be practically forced to carry around a government surveillance device but will literally pay for the privilege. Make no mistake. To paraphrase the AT&T slogan, the government is on the verge of 'rethinking possible' under the Fourth Amendment and could force the rest of us to rethink privacy in America.

Justice Brandeis was not the only influential figure to express grave concerns about privacy invasions. Many lawmakers and prominent leaders today express the same concerns. They argue that privacy is an inherent freedom that Americans have a unique and invaluable opportunity to enjoy. To promote human flourishing and to ensure the health of America's democracy going forward, many recommendations suggesting the development of stricter privacy laws should be considered. There are some state laws already in place that are on the right track. California adopted an Electronic Communications Privacy Act a few years ago which prohibits law enforcement or government agencies from "compelling a business to turn over any metadata or digital communication- including emails, texts, documents stored in the cloud- without a warrant" (Brumis, 2016). The European Union also enacted the General Data Protection Regulation which gives individuals much greater control over their data and imposed significant fines on companies for non-compliance with new regulations. Recently, Google, Facebook, and Apple were all required to change their data collection policies to comply with the new regulations (Reardon, 2018). In the EU, citizens now have the guaranteed right to ("What are my rights?", European Commission, n.d.):

- Information about the processing of your personal data
- Obtain access to the personal data held about you
- Request that personal data be erased
- Object to the processing of your personal data for marketing purposes
- Request the restriction of the processing of your personal data in specific cases
- Request that decisions based on automated processing concerning you or significantly affecting you and based on your personal data are made by natural persons, not only by computers.

Numerous potential suggestions could bridge the gap between individual privacy and technology. The Council on Foreign Relations proposes the following: enact comprehensive laws that protect all sectors, not just a select few, like health care and finance; establish incentives for

companies to protect personal data; and provide the ability for individuals to redress privacy violations against companies that sell their personal information (O'Connor, 2018). Additionally, Schuster, van den Berg, Larrucea, Slewe, Ide-Kostic (2017) propose the creation of anonymizing services that would do the following:

> …act as a 'man in the middle' while browsing the Web. They handle communications between the device and the website that is being visited anonymously. If everything is configured well and works correctly, the target website only sees information from the anonymizing service, so it cannot identify the user's IP address or other personal information (pg. 79).

A service like this would serve as a buffer between personal information input and the companies that collect personal information. While the collection of information may still occur, it could not be traced back to specific individuals. This service would prevent third parties, especially, from accessing sensitive data.

Perhaps one of the most significant concerns regarding privacy violations in a digital era is social media. As referenced above, there are grave concerns regarding the protection of individual privacy from covert government and corporate surveillance. Many scholars have proposed the adoption of privacy laws that specifically target social media. Levinson-Waldman recommends that all law enforcement and government agencies publicize all means of possible undercover surveillance and make the following public (Levinson-Waldman, 2018, pgs. 561-562):

- Who is authorized to access social media
- How the information obtained may be used
- How long it is stored
- With whom it may be shared
- The protections in place to protect privacy, speech and association
- What training is provided to officers or detectives who access social media as part of their law enforcement work

By publicizing the above information, law enforcement agencies will have greater transparency, and covert surveillance will not be entirely unknown to individuals under question. If agencies are upfront about the tactics employed, privacy concerns are not as substantial. Scholars also propose the prohibition of targeted monitoring of only specific groups. Additionally, there are concerns that in many cases, only a subpoena to access a private Facebook account is needed, even if there is just *suspicion* that there may be evidence ("Courts Limit Warrants For Cellphones And Social Media Accounts, 2017). Ryan Beasley Law notes that under the current state of privacy laws, Facebook warrants present a challenge because, as a circuit judge wrote, "The Facebook warrants…required disclosure to the government of virtually every kind of data that could be found in a social media account. And unnecessarily so…The warrants could have limited the request to messages sent to or from persons suspected…" ("Courts Limit Warrants For Cellphones And Social Media Accounts, 2017). There are also substantial concerns that warrants, if requested, are too general to search social media pages. They fail to narrowly target only one form of data. Brandeis warned of general warrants when referring to wiretapping: "…writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping" (Steiker, 2009, pg. 161). Finally, Facebook is aware of user privacy concerns, and Mark Zuckerberg noted last year that Facebook was working towards a "Clear History" feature that would "allow users to see what data Facebook had collected about them from applications and websites, and to delete it from Facebook" (Schechner and Secada, 2019). While this is a step in the right direction, it does not solve the issue of other third-party applications sharing data with Facebook.

Most privacy scholars agree, however, that the best solution to protecting privacy in a digital era is for lawmakers to enact comprehensive privacy laws. A Consumer Privacy Bill of

Rights, also known as an Internet Bill of Rights, has been proposed in recent years and lawmakers continue to work for the passage of these new laws. United States House Representative Ro Khanna, who drafted this Internet Bill of Rights noted (Reardon, 2018),

> If the internet is to live up to its potential as a force for good in the world, we need safeguards that ensure fairness, openness, and human dignity...this bill of rights provides a set of principles that are about giving users more control of their online lives while creating a healthier internet economy.

Representative Khanna recognizes, like Brandeis, that privacy protections are even more imperative as technology advances. Khanna, like others, believes that technological advancements do not mean the sacrifice of privacy rights. Individual privacy can still be protected, even in a digital era. The Electronic Privacy Information Center notes that the keywords in this proposed privacy Bill of Rights are individual control, transparency, respect for context, security, access and accuracy, focused collection, and accountability" ("White House: Consumer Privacy Bill of Rights," n.d.). Marguerite Reardon (2018) states that the draft of this Internet Bill of Rights includes the following rights:

- To have access to and knowledge of all collection and uses of personal data by companies;
- To opt-in consent to the collection of personal data by any party and to the sharing of personal data with a third party;
- Where context appropriate and with a fair process, to obtain, correct or delete personal data controlled by any company and to have those requests honored by third parties;
- To have personal data secured and to be notified in a timely manner when a security breach or unauthorized access of personal data is discovered;
- To move all personal data from one network to the next…
- To internet service without the collection of data that is unnecessary for providing the requested service absent opt-in consent…
- Not to be unfairly discriminated against or exploited based on your personal data
- To have an entity that collects your personal data have reasonable business practices and accountability to protect your privacy.

While there are challenges to adopting privacy laws in a digital era, such as determining the extent of privacy rights on public forums, like social media networks, it is possible to protect

individual privacy in a technological world. While there are blurred lines between the public and private spheres today, in many instances, it is usually clear if individuals wish to keep information private. If an individual willfully chose to make his social media page public, he should not expect extensive privacy protections. However, if individuals decide to make their profiles private and turn off location services features on other applications, there is a reasonable expectation to privacy in these cases. Additionally, if individuals use applications on their phones to track personal health data, this does not automatically mean there is no reasonable expectation to privacy. Using technology to track and store personal data should be protected just like tangible personal documents in one's home. Individuals must have the right to opt-out of data sharing, and all privacy policies should be as transparent as possible. The sharing of private information with other third parties should not be permitted unless individuals have given their express consent.

Even if the right to privacy is not entirely found in the Constitution, as Justice Brandeis believed, there is substantial room for improvement in protecting individual privacy today through legislation. Federal and state legislatures can enact privacy laws similar to those mentioned above that safeguard sensitive personal information while limiting methods of covert government and corporate surveillance. While there are cases that necessitate government access to personal information, especially in cases involving national security concerns, on a regular basis, the protection of individual data must be prioritized. If the government or law enforcement needs access to information, there must be probable cause, and warrants must be more than general warrants that collect vast unnecessary data. If a government has relatively unconstrained power to surveil its citizens, taking advantage of technological advancements, one must wonder if Americans are truly free. To continue to promote human flourishing in America's free society,

it is imperative that individuals have the freedom to make some information private in technological forums, free from government surveillance and intrusion.

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