Legally Speaking -- Warren, Brandeis, and the Creation of the Legal Concept of Privacy

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The concept of privacy developed alongside the common law, but it also has a philosophical background. It is especially important for librarians, archivists, publishers, and book distributors to understand the concept of privacy, since behind all the philosophical debates is the fact that privacy is about the dissemination of information. And, of course, that is the business we are all in. As one author explained:

Privacy [law] attempts to draw a line between the individual and the collective, between self and society. It seeks to assure the individual a zone in which to be an individual, not a member of the community. In that zone he can think his own thoughts, have his own secrets, live his own life, reveal only what he wants to the outside world.¹

In the U.S. Constitution, privacy comes first from the fourth and fifth Amendments, later applied to the states by the fourteenth Amendment. In the 20th century, the U.S. Supreme Court decided a number of First Amendment cases on the basis of privacy. In the 19th century, however, the concept of privacy was the purview of philosophers rather than lawyers.² The concept traces its roots back to Aristotle’s “distinction between the public sphere of political activity and the private sphere associated with family and domestic life.”³ As John Stuart Mill asked his readers in the classic treatise On Liberty: 

WHAT, then, is the rightful limit to the sovereignty of the individual over himself? Where does the authority of society begin? How much of human life should be assigned to individuality, and how much to society? Each will receive its proper share, if each has that which more particularly concerns it. To individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society.⁴

The idea of privacy as a function of liberty was an attempt to differentiate the home from the society. As author Randall P. Bezanson has noted:

The right to privacy thus represented an effort to preserve communitarian values and institutions. The right “to be let alone” connoted protection of the community from the masses, the maintenance of a local reference point for personal identity. It did not, as it does today, convey an idea of extreme individualism, of freedom “to” rather than freedom “from.” It was not a protection against public embarrassment. It was not even, at the time, a concept principally designed to instill norms of decency in the public press or the public dialogue; that purpose arose later. Rather, privacy reflected the fact that personal identity developed in discrete institutions such as the extended family and the circle of friends and associates that are perhaps best captured in the term “local community.” The concept of privacy represented an attempt to protect the functioning of those discrete social institutions from the monolithic, impersonal, and value-free forces of modern society by channeling [sic] that which is personal to these discrete institutions and foreclosing it to society at large.³

It took the future Supreme Court Justice Louis D. Brandeis and his partner, Samuel Warren, to define the legal right to privacy in a famous article in the Harvard Law Review.⁵ Warren and Brandeis were concerned with the free flow of information, and felt that technological developments had made family life public. They were especially upset over information and illustrations printed in the newspaper about the wedding of Warren’s daughter. The two lawyers struggled to find a way to legally protect this realm of privacy. According to the article:

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. . . . Gradually, the scope of these legal rights broadened, and now the right to life has come to mean the right to enjoy life — the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term “property” has grown to compromise every form of possession — intangible as well as tangible. . . .

Recent inventions and business methods call attention to . . . the right “to be let alone.” 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 rooftops.”⁷

The Warren and Brandeis article was the first attempt to define a legal privacy right. In seeking to define a law of privacy, Warren and Brandeis looked at the law of defamation. The issue of privacy is very similar to defamation, since privacy seeks to restrict the flow of information while defamation seeks to punish false information. However, there are also important differences. While defamation is concerned with damage to reputations, false light invasion of privacy deals with the plaintiff’s mental distress.⁸ Courts have decided that “false light invasion of privacy” is often also defamation. In many cases, the two theories are included as alternatives; however, the plaintiff can only recover on one ground for a single publication.⁹
Comparisons Between Privacy and Defamation

When the privacy article was written in 1890, Brandeis was already showing flashes of the genius that would make him the first Jewish member of the U.S. Supreme Court. (Samuel Warren was no slouch, either.) The two authors didn’t just advocate a right of privacy; they actually tried to define its structure and borders. The law partners articulated a series of principles from defamation law that could be applied to their proposed right of privacy. The rules that Warren and Brandeis described are as follows:

(1) The right to privacy does not prohibit any publication of matter which is of public or general interest.

This is both an acknowledgement of the First Amendment and an attempt to create a workable rule. An analogy from defamation law would be the case of New York Times v. Sullivan. In that case, Sullivan was the police officer of Montgomery, Alabama. Sullivan was newsworthy because he was a public figure. Thus, the Supreme Court ruled that stories about Sullivan and the way in which he runs the police department are of general interest. As Warren and Brandeis state:

The design of the law must be to protect those persons with those affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons from having matters which they may properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented. The distinction, however, noted in the above statement is obvious and fundamental. There are persons who may reasonably claim as a right, protection from the notoriety entailed by being made the victims of journalistic enterprise. There are others who, in varying degrees, have renounced the right to live their lives screened from public observation. Matters which men of the first class may justly contend, concern themselves alone, may in those of the second be the subject of legitimate interest to their fellow citizens. Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance if found in a candidate for political office. Some further discrimination is necessary, therefore, than to class facts or deeds as public or private. To publish of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly is an unwarranted, if not an unexampled, infringement of his rights, while to state and comment on the same characteristics found in a would-be congressman could not be regarded as beyond the pale of propriety.\footnote{11}

(2) The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.

This exception concerns statements made in court, during the deliberation of a legislative body, and similar types of situations. There are times when a private matter is brought up in a courtroom. If the information occurs, the matter is no longer private, and becomes a matter of public record. For example, allegations of adultery by a person who is not a public figure shouldn’t be put on the front page of the newspaper under normal circumstances. However, they may be revealed during divorce proceedings.

(3) The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.

In this situation, Warren and Brandeis are talking about the 19th Century belief that the words in print would last longer and be disseminated more widely than spoken words. With the technological advances in radio and television, spoken words can be disseminated as widely as print, and can last just as long. This principle may not have stood the test of time. Warren and Brandeis were also thinking about political speech issues, stating: “The injury resulting from such oral communications would ordinarily be so trifling that the law might well, in the interest of free speech, disregard it altogether.”

(4) The right to privacy ceases upon the publication of the facts by the individual, or with his consent.

This principle is based on a type of implied consent. Naturally, if someone puts information into the public sphere, he or she can’t later claim invasion of privacy (or defamation, for that matter). Of course, if the information is released for a restricted purpose, this does not constitute a disclosure.

For example, medical records can’t be disclosed without permission. A physician can’t tell a newspaper reporter that Joe Smith has cancer. However, if Joe Smith writes an article talking about having cancer, the newspaper can report this later. After all, Joe Smith already put the information in the public sphere. On the other hand, just because Joe Smith tells his family that he has cancer doesn’t mean that it has become public knowledge, so the paper can’t report on this illness. “[T]he important principle in this connection [is] that a private communication of circulation for a restricted purpose is not a publication with the meaning of the law.”\footnote{12}

(5) The truth of the matter published does not afford a defense.

Warren and Brandeis stress that truth should not be a defense, since: “It is not for injury to the individual’s character that redress or prevention is sought, but for injury to the right of privacy. For the former, the law of slander and libel provides perhaps a sufficient safeguard. The latter implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all.”\footnote{14}

(6) The absence of “malice” in the publisher does not afford a defense.

According to Warren and Brandeis, it shouldn’t matter whether the disclosure of information was made with malice or whether it was made in innocence. It is the disclosure of information itself that they are concerned with, not the reason for the disclosure. This principle is borrowed from defamation law as well, since proof of actual malice is only necessary if the subject is a public figure. “The invasion of the privacy that is to be protected is equally complete and equally injurious, whether the motive by which the speaker or writer was actuated are, taken by themselves, culpable or not; just as the damage to character, and, to some extent, the tendency to provoke a breach of the peace, is equally the result of defamation without regard to the motives leading to its publication.”\footnote{16}

It is amazing how much of the law of privacy comes from this article by Warren and Brandeis. Although somewhat dated (the belief that oral communications didn’t matter has been surpassed by technology), most of the principles articulated by these two authors are still a part of the law of privacy. The article recommended that the remedies for invasion of privacy be an action for damages or an injunction. These are still the remedies that are used. Warren and Brandeis set the framework for our right of privacy, and we are still following this framework more than a century later. Everything that came later was simply a refinement. Yet there have been a few changes in our conception of privacy law. As Randall P. Bezanson has noted:

[P]rivacy in 1890 was focused principally on apprehension about disclosure of personal affairs in the public forum, particularly in the relatively new mass media. In 1890, information was tightly controlled over information looms large. There is little likelihood that the mechanisms that earlier served as gatekeepers on information are an effective limit on disclosure today. The comfort, if that is an apt description, of a large but limited
threat has been removed. Indeed, part of the concern about privacy today is the seemingly unlimited potential for disclosure from multiple sources for multiple, and unknown, uses. Disclosure of information in the public press seems hardly the bulk of the privacy problem today, although it is surely the most widely noted.\textsuperscript{57}

The 20th Century court cases involving privacy have tended towards a finding of privacy as a First Amendment right to receive information, including (with great controversy) the case of Griswold v. Connecticut.\textsuperscript{21} This record was reviewed by the Hawaii Attorney General in a discussion of library privacy:\textsuperscript{19}

The First Amendment “necessarily protects the right to receive” information. It protects the anonymity of the author; the anonymity of members of organizations; the right to ask persons to join a labor organization without registering to do so; the right to dispense and to receive birth control information in private; the right to have controversial mail delivered without written request; the right to go to a meeting without being questioned as to whether you attended or what you said; the right to give a lecture without being compelled to tell the government what you said; and the right to view a pornographic film in the privacy of your own home without governmental intrusion.

If by virtue of the First and Fourteenth Amendment, “a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch,” then neither does the state have any business telling a man’s neighbor what book or picture he has checked out of the public library to read or view in the privacy of his own home.\textsuperscript{20}

On the other hand, the First Amendment also provides a counter-balance to the idea of privacy in certain situations. For example, the “public figure” test in the case of New York Times v. Sullivan\textsuperscript{22} points in the other direction. Also, the guarantee of freedom of the press can be in conflict with privacy. These factors make privacy cases very difficult to decide. “While almost everyone favors privacy in the abstract, conflict always arises over the particulars. Like obscenity, most people agree there is a line beyond which conduct is unacceptable: but where is it? Who is to draw the line? How will it be drawn? Specificity is particularly important in understanding whether informational privacy is something that we have and must protect or is something to be gained.”\textsuperscript{23}

As Michael Grossberg has observed, “[I]t is impossible to escape these definitional issues. . . . Privacy is in many ways a matter of shared expectations and sensibilities; thus, controversy over its meaning has always been linked to clashing normative concerns about the flow of information and the social occasion, purpose, timing, and status of those gathering and using information.”\textsuperscript{23}

The biggest problem with defining the limits of privacy comes in the idea that a democracy works best when information is made known to the people. For example, privacy concerns are a powerful reason for the denial of a FOIA request or for redaction of names and addresses. We also want our medical records available for emergencies, but protected the rest of the time. Security is another area where the dichotomy between the private and the public sphere has broken down.\textsuperscript{24} Yet for all its difficulties, privacy has become a piece of our liberty, and the right of privacy is here to stay.

The work of Samuel Warren and Louis Brandeis made history when it was published. A whole body of law sprang up overnight, with most of its principles already established. While we have made refinements to the law of privacy in the past 128 years, most of what we know today as the law of privacy came from the pen of these two great legal minds. It is only fitting that we pay tribute to the unexpectedly large in

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