The Washington Post

Opinions

What would privacy expert Louis Brandeis make of the digital age?

By Jeffrey Rosen
March 20, 2015

Jeffrey Rosen is the president & CEO of the National Constitution Center, a law professor at George Washington University and a contributing editor at the Atlantic. His new book about Louis Brandeis will be published next year.

INTELLECTUAL PRIVACY

Rethinking Civil Liberties in the Digital Age

By Neil Richards

Oxford Univ.
220 pp. $29.95

In 1890, Louis Brandeis, the future Supreme Court justice, and his law partner Samuel Warren wrote what became the most famous article on the right to privacy in American history. Warren and his young wife, Mabel, were upset about gossip items in the Boston society press — including 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.

But Warren and Brandeis faced a challenge. Unlike European law, American law had not, historically, protected celebrities from the hurt feelings that resulted from offenses against honor or dignity. So Warren and Brandeis set out to radically transform American law by proposing an entirely new legal right, which they called "the right to be let alone." The right they formulated had three elements: It allowed celebrities to sue the press for emotional injury, it allowed citizens to remove true but embarrassing information from public debate, and it required courts to distinguish between what was and wasn't fit for the public to know.

There was just one problem with the new right that Brandeis and Warren proposed. As Neil Richards observes in his important new book, "Intellectual Privacy," it clashed directly with the First Amendment's protections for free speech and public debate. Richards, a law professor at Washington University in St. Louis, goes on to show that Brandeis changed his mind about the right to privacy. In his

later opinions on the Supreme Court, Brandeis came to believe, like Richards, that "when free speech and traditional notions of privacy conflict, free speech should almost always win." Brandeis also came to embrace a different vision of privacy that supports free speech rather than threatening it. Richards calls it "intellectual privacy," which he defines as "protection from surveillance or interference when we are engaged in the processes of generating ideas." In other words, Brandeis came to believe that we don't need to choose between privacy and free speech because, far from clashing with democratic values of public debate, intellectual privacy is essential to it.

The story of how Brandeis changed his mind about the balance between privacy and free speech is riveting and deeply relevant to all of our most hotly contested current controversies involving civil liberties in the Internet age. In the 1920s, after the Red Scare that followed World War I, Brandeis and his Supreme Court colleague Oliver Wendell Holmes Jr. came to regret their earlier opinions upholding the convictions of critics of the war. But while Holmes emphasized the importance of an unregulated free-speech "marketplace of ideas," Brandeis embraced a more idealistic conception of the value of free speech in a democracy. He came to believe that citizens had to be trusted to deliberate about dangerous ideas because otherwise they would become passive and incapable of making intelligent decisions about how to govern themselves. He concluded that government could deny citizens access to information only if it threatened to produce serious and imminent harm. "Only an emergency can justify repression," he wrote. He came to believe that opinions should be absolutely protected and that judges should get out of the business of distinguishing between opinions and facts. He concluded that access to facts was necessary to allow citizens to educate themselves and to make informed decisions, and therefore that transparency and publicity were more important than privacy in preventing fraud and abuse. ("Sunlight is said to be the best of disinfectants.") And he concluded that counter-speech, rather than censorship, was the best response to hate speech or dangerous ideas. "The fitting remedy for evil counsels is good ones," he wrote.

Brandeis's idealistic vision of free speech was ultimately adopted by the Supreme Court in cases such as *New York Times v. Sullivan*, which held that American courts should protect even false and defamatory speech against public figures in the interest of preserving robust public debate. As a result, Richards writes, "we live under Brandeis's First Amendment." But in addition to defining the American free-speech tradition, Brandeis also came to embrace a new conception of privacy. In a 1927 case involving wiretapping and government surveillance, he reconceived privacy as a constitutional right against the state, not a private right of action against the press. Rather than protecting celebrities against hurt feelings, he sought to protect the right of all citizens to conceal their unexpressed "beliefs, their thoughts, their emotions, and their sensations" from surveillance by government officials, in order to preserve their autonomy and ability to engage in political dissent and debate. And he recognized the importance of anonymity as a precondition for freedom of thought and ultimately for self-governance.

Richards usefully synthesizes Brandeis's ideas about the importance of freedom of thought into what he calls a "theory of intellectual privacy." Until recently, Richards notes, it was hard for the state to monitor our thoughts in ways that threatened the generation of ideas. But in the Internet age, intellectual surveillance is ubiquitous, cheap and efficient. Accordingly, he argues, the Supreme Court should reconsider doctrines in constitutional law that threaten intellectual privacy and inhibit the production of new and possibly heretical ideas.

Richards's channeling of Brandeis on intellectual privacy provides invaluable guidance for citizens and judges as they wrestle with questions involving privacy and free speech today. The Supreme Court has yet to resolve whether ubiquitous surveillance that tracks our movements in public violates the Fourth Amendment's objection to unreasonable search and seizure, even if the surveillance doesn't involve physical trespass by government officials. Brandeis would have had no hesitation in saying yes. By menacing our freedom of thought, ubiquitous surveillance poses a threat to self-government.

Brandeis can also help us negotiate the tensions between U.S. law, which exalts free speech over privacy, and European law, which strikes the opposite balance. Last May, the European Court of Justice recognized a "right to be forgotten" on the Web, which allows European Internet users to demand that Google, Yahoo and other search engines delete truthful but embarrassing information from search results. Richards concludes that the right to be forgotten is a "poorly defined idea" that, in its most expansive form, threatens the First Amendment for the same reason as the original version of the right to privacy that Brandeis ultimately repudiated. By exalting dignity over free thought and expression, the right to be forgotten requires privacy commissioners and lawyers at Google and Yahoo to make decisions about what sort of true information is in the public interest — precisely the kind of decision that citizens in a democracy need to make for themselves.

Brandeis's mature reflections on why freedom of thought for all citizens is more important than avoiding hurt feelings among celebrities provide the best reasons for Google to resist the European Union's demands. As Richards puts it, in an eloquent and concise summary of Brandeis's vision: "We must confront dangerous ideas and have courage in our political institutions so that freedom of speech and thought can be an end as well as a means."

Stories from The Lily

The Lily, a publication of The Washington Post, elevates stories about women.

How primaries in Arizona and Florida could affect gender parity in politics

Take a look inside these women-only co-working spaces, where inclusivity is the goal

Perspective

Serena Williams is 'fine' without her banned catsuit. But why is she constantly scrutinized?