

REDISCOVERING BRANDEIS'S RIGHT TO PRIVACY*

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The first research paper I remember writing was in fifth grade and it was a short biography of Louis Brandeis. What was most special to me was that he was Jewish. As a ten-year-old Jewish boy in 1963, I aspired to be Sandy Koufax. But lacking any semblance of athletic ability, Brandeis offered the possibility of another, more realistic path. I never met a single lawyer growing up and probably Brandeis was one of the first that I ever even heard about.

At the wonderful symposium at the University of Louisville on the occasion of the 150th anniversary of Brandeis's birth, his grandchildren told me that his Jewishness was a key part of his identity. Undoubtedly, it shaped how the world treated him and how he saw the world. The intense opposition to his confirmation in 1916 surely was fueled, in part, by anti-semitism. Once on the Court, he had a colleague, Justice James McReynolds who refused to have a photo taken together or to allow his law clerks to speak to Brandeis's clerks.¹ Brandeis was instrumental in the early days of the Zionist movement.

Brandeis's work as a lawyer and as a Justice seems obviously to have been influenced by the Jewish concept of "tikkun olam"—the duty that each of us has to heal a broken world. Brandeis certainly did this as a public advocate, as an attorney, and as a Justice. One other way he accomplished this was as a legal scholar.

Many years before he became a Supreme Court Justice, Louis Brandeis co-authored one of the most famous law review articles in American history. The article, written with his law partner Samuel Warren, was titled "The Right to

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¹ See THE FORGOTTEN MEMOIR OF JOHN KNOX: A YEAR IN THE LIFE OF A SUPREME COURT CLERK IN FDR'S WASHINGTON 36 (David J. Garrow & Dennis J. Hutchinson eds., 2002) (describing McReynolds forbidding his clerks from speaking to Justice Brandeis's clerks).

Privacy.”² Although there scarcely was a mention of privacy in the first century of Supreme Court decisions, in the last fifty years it has been among the most important and controversial areas of constitutional law. The Supreme Court has used the right to privacy to protect a right to purchase and use contraceptives,³ the right to abortion,⁴ and the right to engage in private, consensual homosexual activity.⁵

But these issues were not at all what Warren and Brandeis were concerned about when they wrote of the “right to privacy.” Their concern was with a media that was increasingly interested in gossip and was revealing personal things about individuals without their consent. They wrote: “The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery.”⁶

Interestingly, this aspect of privacy has received little protection from the Supreme Court. No Supreme Court decision has yet clearly articulated or protected a right to informational privacy. In fact, I believe that the controversy over reproductive privacy decisions makes expansion of privacy protections unlikely for the foreseeable future. This is unfortunate, and even tragic, because technology for learning and disseminating highly personal things about individuals poses an unprecedented risk of invasion of privacy.

In this Article, I make three points. First, the concept of privacy is used to protect very different rights. The use of a single label produces confusion and has undesirable consequences. Second, there has been minimal judicial protection for informational privacy, the primary focus of Brandeis and Warren. Finally, I argue that it is essential to rediscover Brandeis’s right to privacy and provide much more protection for informational privacy.

Thus, my Article is a bit different from the others in this symposium. I am less focused on describing a body of work by Louis Brandeis and more intent

² Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

³ See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (stating the right to privacy, found in the penumbra of the Bill of Rights, includes the right to purchase and use contraceptives).

⁴ See *Roe v. Wade*, 410 U.S. 113 (1973) (stating the right to privacy includes a right for women to choose to terminate their pregnancies).

⁵ See *Lawrence v. Texas*, 539 U.S. 558 (2003) (stating the right to privacy means that a state cannot criminally punish private homosexual activity between consenting adults).

⁶ Warren & Brandeis, *supra* note 2, at 196.

on examining what his work in this area has meant in the development of the law and particularly to the development of constitutional law.

I. PRIVACY: ONE WORD FOR MANY MEANINGS

Invasion of privacy did not exist as a separate tort prior to the twentieth century. William Prosser, in a famous article in 1960, described how privacy came to be established in tort law and how many distinct torts fit within it, including torts for intrusion, public disclosure of private facts, and placing a person in a false light.⁷

My focus is on privacy as a constitutional concept, and the same thing is true in that context: privacy is used to describe at least three distinct rights.⁸ First, privacy is about freedom from government intrusion into an individual's home or on to an individual's person. This, of course, is the focus of the Fourth Amendment and the Supreme Court frequently has spoken of it protecting a reasonable expectation of privacy.⁹ Interestingly, this focus of the Fourth Amendment can be tied to a dissenting opinion by Justice Brandeis. In *Olmstead v. United States*,¹⁰ the Supreme Court considered whether the Fourth Amendment applied to wiretapping if there was no physical intrusion into a person's home.¹¹ Over Justice Brandeis's eloquent dissent, the Court held that the Fourth Amendment was inapplicable.¹² Brandeis, though, made an eloquent argument that the Fourth Amendment should apply because people have a reasonable expectation of privacy for their conversations. He wrote:

⁷ William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

⁸ Professor Solove makes a similar point, though describes the differing rights as involving information collection, information processing, information dissemination, and intrusion. Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 489 (2006). Professor Jerry Kang has defined privacy as involving three overlapping clusters of ideas: (1) physical space ("the extent to which an individual's territorial solitude is shielded from invasion by unwanted objects or signals"); (2) choice ("an individual's ability to make certain significant decisions without interference"); and (3) flow of personal information ("an individual's control over the processing—i.e., the acquisition, disclosure, and use—of personal information"). Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1202–03 (1998).

⁹ This phrasing is repeatedly used by the Supreme Court. See, e.g., *Samson v. California*, 126 S. Ct. 2193, 2196 (2006); *Georgia v. Randolph*, 126 S. Ct. 1515, 1529 (2006) (Breyer, J., concurring); *Kyllo v. United States*, 533 U.S. 27, 44 (2001).

¹⁰ 277 U.S. 438 (1928).

¹¹ *Id.* at 455.

¹² *Id.* at 466.

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.¹³

Brandeis also offered a reminder about governmental abuse of power that has special salience today:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.¹⁴

Several decades later, in *Katz v. United States*,¹⁵ the Supreme Court adopted Brandeis's approach and held that the Fourth Amendment applies when there is a reasonable expectation of privacy.¹⁶ In *Katz*, the Supreme Court held that the government needed a warrant under the Fourth Amendment to listen to a person's conversations from a telephone booth. The Court stressed that the individual had a reasonable expectation of privacy.¹⁷

Privacy is also used in constitutional law in a second, quite different sense to protect aspects of autonomy. The right of a person to make certain crucial personal decisions is described as privacy.

Constitutional protection for autonomy can be traced back to decisions from Brandeis's time on the Court. In *Meyer v. Nebraska*,¹⁸ in 1923, the Supreme Court, with Justice Brandeis voting with the majority, declared unconstitutional a state law that prohibited the teaching in school of any language

¹³ *Id.* at 478 (Brandeis, J., dissenting).

¹⁴ *Id.* at 479.

¹⁵ 389 U.S. 347 (1967).

¹⁶ *See id.* at 358–59.

¹⁷ *Id.* at 353–54.

¹⁸ 262 U.S. 390 (1923).

except English.¹⁹ The Court broadly defined the term “liberty” in the Due Process Clause to protect basic aspects of family autonomy. The Court said,

Without doubt, [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.²⁰

Although the opinion did not mention “privacy,” it clearly was about safeguarding autonomy.

The word “privacy” was introduced into this area in *Griswold v. Connecticut*,²¹ in 1965. In *Griswold*, the Supreme Court declared unconstitutional a state law that prohibited the use and distribution of contraceptives.²² A Connecticut law said, “Any person who uses any drug, medicinal article, or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.”²³ The law also made it a crime to assist, abet, or counsel a violation of the law.²⁴

The case involved a criminal prosecution of Estelle Griswold, the executive director of the Planned Parenthood League of Connecticut, and a physician, who openly ran a Planned Parenthood clinic from November 1 to November 10, 1961. They were prosecuted for providing contraceptives to a married woman.²⁵

The Supreme Court, in an opinion by Justice Douglas, found that the right to privacy was a fundamental right.²⁶ Douglas found that privacy was implicit in many of the specific provisions of the Bill of Rights, such as the First, Third, Fourth, and Fifth Amendments. Douglas declared:

¹⁹ *Id.* at 403.

²⁰ *Id.* at 399. For a critique of the Supreme Court’s decisions protecting family autonomy, see David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527 (2000).

²¹ 381 U.S. 479 (1965).

²² *Id.* at 485.

²³ *Id.* at 480.

²⁴ *Id.*

²⁵ *Id.* at 480–81.

²⁶ *See id.* at 485–86.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. . . . We have had many controversies over these penumbral rights of privacy and repose. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.²⁷

Douglas then concluded that the Connecticut law violated the right to privacy in prohibiting married couples from using contraceptives.²⁸ Douglas said, "Would we allow the police to search the sacred precincts of the marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."²⁹

It is interesting and important to note that Douglas did not focus on a right to avoid procreation or to make reproductive choices. Rather, Douglas focused on the need to protect the privacy of the bedroom from intrusion by the police and the ability to control information about contraceptive use. It was not until later cases, discussed below, that the Court expressly protected access to contraceptives as part of reproductive autonomy.

In subsequent decisions, the Court made it clear that privacy is protected under the Due Process Clause of the Fifth and Fourteenth Amendments. For example, in *Roe v. Wade*,³⁰ after reviewing earlier cases dealing with family and reproductive autonomy, Justice Blackmun, writing for the Court, concluded:

This right of privacy, whether it be founded in the Fourteenth Amendment's conception of personal liberty and restrictions upon state action, as we feel it is, or, . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.³¹

It is notable that the Court did not find privacy, as Douglas did in *Griswold*, in the penumbra of the Bill of Rights, but instead as part of the liberty protected under the Due Process Clause.

²⁷ *Id.* at 484–85 (citations omitted).

²⁸ *Id.* at 485–86.

²⁹ *Id.*

³⁰ 410 U.S. 113 (1973).

³¹ *Id.* at 153.

In *Lawrence v. Texas*,³² the Supreme Court invoked the right to privacy to protect a right to engage in private, consensual homosexual activity. Justice Kennedy, writing for the Court, stated:

It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.³³

There is a third, distinct way in which privacy is used in constitutional law: to safeguard the ability of a person to restrict dissemination of personal information. This, of course, is a common use of the word “privacy.” Alan Westin, in a seminal book on the right to privacy, focused on the information in each of our lives. He analogized it to a series of circles within circles. The inner-most circle contains the things we tell no one about ourselves. The next inner-most circle contains the things about us that are known only by those with whom we are most intimate. The circles continue until one reaches the information that is known by all.³⁴

Statutes dealing with privacy, such as the Federal Privacy Act, are about informational privacy. The Privacy Act concerns information obtained by the executive branch of the federal government and generally prohibits “nonconsensual disclosure of any information that has been retrieved from a protected record.”³⁵ More specifically, the Privacy Act applies to information that is “about an individual,”³⁶ and that is stored in a system of records “under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.”³⁷

In tort law, the tort of public disclosure of private facts focuses on informational privacy. The tort of public disclosure of private facts, a tort for invasion of privacy, exists if there is publication of nonpublic information that is “not of legitimate concern to the public” and that the reasonable person would find of-

³² 539 U.S. 558 (2003).

³³ *Id.* at 567.

³⁴ See ALAN F. WESTIN, *PRIVACY AND FREEDOM* 33 (1964).

³⁵ *Bartel v. FAA*, 725 F.2d 1403, 1408 (D.C. Cir. 1974).

³⁶ 5 U.S.C. § 552a(a)(4).

³⁷ *Id.* § 552a(a)(5).

fensive to have published.³⁸ Unlike defamation, where the information is false and a retraction conceivably could lessen the harm to reputation, the tort of public disclosure of private facts involves the publication of true information and the harm that is done once publication occurs.

Unfortunately, using privacy to reflect three such distinct concepts has undesirable consequences. It often causes confusion, including in the courts. Professor Solove recently declared:

Privacy is a concept in disarray. Nobody can articulate what it means. As one commentator has observed, privacy suffers from 'an embarrassment of meanings.' Privacy is far too vague a concept to guide adjudication and law-making, as abstract incantations of the importance of 'privacy' do not fare well when pitted against more concretely stated countervailing interests.³⁹

Consider *Griswold v. Connecticut* as an example of this confusion. The right to use contraceptives clearly is about privacy in terms of autonomy: the right of a person to control whether he or she becomes a parent. But Justice Douglas's opinion never hinted at this autonomy interest and instead focused entirely on concerns over searching the marital bedroom for signs of the use of contraceptives. This focus on intrusion was misplaced because the case did not involve that at all; no one's bedroom or house had been searched. The case involved a doctor and a director of a Planned Parenthood clinic who were prosecuted for distributing samples of contraceptive foam.⁴⁰ *Griswold* provided a shaky foundation for the Supreme Court's protection of privacy because it misidentified the nature of the privacy interest involved.

Moreover, the Fourth Amendment approach to protecting privacy based on whether there is a "reasonable expectation of privacy" also poses serious problems. The government seemingly can deny privacy just by letting people know in advance not to expect any.

I also fear that the federal courts are unlikely to expand protection for any aspect of constitutional privacy because of the enormous controversy over privacy as autonomy. As explained below, there has thus far been little judicial protection for informational privacy. But I think that courts are unlikely to expand this because constitutional protection for privacy as autonomy has been so intensely controversial. Even some liberal scholars have argued that the judi-

³⁸ RESTATEMENT (SECOND) OF TORTS § 652D (1977).

³⁹ Solove, *supra* note 8, at 477–78.

⁴⁰ See *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

cial protection of autonomy was misguided. For example, in a recent book, Professor Kermit Roosevelt declared: “The idea that judges should be deciding cases under the Due Process Clause by determining whether a right is fundamental is bad policy and bad law.”⁴¹ Simply put, any aspect of privacy now suffers guilt by association, making protection of other aspects of privacy far less likely.

II. THE FAILURE TO PROTECT INFORMATIONAL PRIVACY

In their famous article, Warren and Brandeis urged tort law protection for public disclosure of private facts. Their focus was entirely on informational privacy. Ironically, this is the aspect of privacy that has received the least constitutional protection. The Supreme Court has fashioned elaborate doctrines concerning protection of privacy from intrusion under the Fourth Amendment. Privacy as autonomy has been safeguarded in decisions upholding rights such as the right to marry,⁴² the right to procreate,⁴³ the right to custody of one's children,⁴⁴ the right to keep the family together,⁴⁵ the right to control the upbringing of children,⁴⁶ the right to purchase and use contraceptives,⁴⁷ the right to engage in private consensual homosexual activity,⁴⁸ and the right to refuse medical treatment.⁴⁹

But to this point, there has not been constitutional protection for informational privacy. The Supreme Court has considered informational privacy in a couple of contexts, under the Due Process Clause and under the First Amendment. In both areas, informational privacy has failed to receive a favorable reaction from the Supreme Court.

As for due process, *Whalen v. Roe*⁵⁰ is the primary Supreme Court case concerning constitutional protection for control over information. *Whalen* involved a New York law that required physicians to provide reports identifying

⁴¹ KERMIT ROOSEVELT, III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* 120 (2006).

⁴² See *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

⁴³ See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁴⁴ See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972).

⁴⁵ See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

⁴⁶ See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000).

⁴⁷ See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁴⁸ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴⁹ See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

⁵⁰ 429 U.S. 589 (1977).

patients receiving prescription drugs that have a potential for abuse.⁵¹ The state maintained a centralized computer file that listed the names and addresses of the patients, as well as the identity of the prescribing doctors.⁵² Challengers argued that this database infringed the right to privacy because individuals have a right to avoid disclosure of personal matters.⁵³

The Court, however, rejected this privacy argument. The Court noted that the law created liability for Health Department employees who failed, either deliberately or negligently, to maintain proper security.⁵⁴ The Court said that the state has an important interest in monitoring the use of prescription drugs that might be abused. The Court stated:

[D]isclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.⁵⁵

The Court did not reject the possibility that the right to privacy might be recognized in the future to include a right to control information. Justice Stevens concluded the majority opinion by declaring:

We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed.⁵⁶

Justice Stevens said, however, that *Whalen* did not pose such an issue:

We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data whether in-

⁵¹ *Id.* at 593.

⁵² *Id.* at 591.

⁵³ *Id.* at 598–99. The challengers also argued that the law infringed on the right to make decisions concerning medical care. *Id.* at 599–600.

⁵⁴ *Id.* at 600.

⁵⁵ *Id.* at 602.

⁵⁶ *Id.* at 605.

tentional or unintentional or by a system that did not contain comparable security provisions. We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.⁵⁷

The Court also has upheld reporting requirements in other areas even though they pose some risk to privacy. For example, in *California Bankers Ass'n v. Schultz*,⁵⁸ the Court upheld the constitutionality of the Bank Secrecy Act of 1970, which required banks to maintain records of financial transactions and to report certain domestic and foreign transactions.⁵⁹ The Court rejected claims based on the Fourth⁶⁰ and Fifth Amendments⁶¹ and concluded that the law was constitutional because of the government's need to monitor financial transactions and to prevent fraudulent conduct.⁶²

Thus, although there is a strong argument that the Constitution should be interpreted to protect a right to control information, there has been little support for such a right from the Supreme Court. In fact, the United States Court of Appeals for the District of Columbia Circuit has gone so far as to "express[] grave doubts as to the existence of a constitutional right of privacy in the non-disclosure of personal information."⁶³

The other context in which the Supreme Court has considered informational privacy concerns First Amendment challenges to tort liability for public disclosure of private facts. Here, too, the Court has consistently ruled against informational privacy. In *Cox Broadcasting Corp. v. Cohn*,⁶⁴ a broadcast reporter obtained and reported the name of a rape victim from court records that were available to the public.⁶⁵ A Georgia law prohibited the publication of a rape victim's identity.⁶⁶ The father of the girl who had been raped and murdered sued for invasion of privacy.⁶⁷ The Supreme Court said

⁵⁷ *Id.* at 605–06. For a discussion of the need to protect privacy over such information, see Grace-Marie Mowery, *A Patient's Right to Privacy in Computerized Pharmacy Records*, 66 U. CIN. L. REV. 697 (1998).

⁵⁸ 416 U.S. 21 (1974).

⁵⁹ *Id.* at 77–78.

⁶⁰ *Id.* at 69.

⁶¹ *Id.* at 49.

⁶² *See id.* at 76–77.

⁶³ *Am. Fed'n of Gov't Employees v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786, 791 (D.C. Cir. 1997).

⁶⁴ 420 U.S. 469 (1975).

⁶⁵ *Id.* at 469.

⁶⁶ *Id.* at 471–72.

⁶⁷ *Id.* at 474.

that the First Amendment barred liability because the information had been lawfully obtained from court records and truthfully reported.⁶⁸ The Court stressed that the First Amendment protects the publication of information “obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection.”⁶⁹

The Court followed this same reasoning in *Smith v. Daily Mail Publishing Co.*,⁷⁰ where the Court declared unconstitutional a state law that prohibited the publication of the name of a child who was a defendant in a criminal proceeding.⁷¹ The Court relied on *Cox Broadcasting* and held that “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”⁷² Likewise, in *Oklahoma Publishing Co. v. District Court*,⁷³ the Court declared unconstitutional a court order that prevented the publication of a juvenile’s name and photograph that had been lawfully obtained in a court proceeding.⁷⁴ The Court found that *Cox Broadcasting* was controlling and said that “the First and Fourteenth Amendments will not permit a state court to prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public.”⁷⁵

In *Florida Star v. B.J.F.*,⁷⁶ the Court applied *Cox Broadcasting* and *Smith* to hold that there cannot be liability for invasion of privacy when there is the truthful reporting of information lawfully obtained from public records, at least unless there is a state interest of the highest order justifying liability.⁷⁷ A newspaper reporter obtained a rape victim’s name from publicly released police records.⁷⁸ The name was published in the newspaper, even though Florida law

⁶⁸ *See id.* at 496–97.

⁶⁹ *Id.* at 491.

⁷⁰ 443 U.S. 97 (1979).

⁷¹ *Id.* at 106.

⁷² *Id.* at 103.

⁷³ 430 U.S. 308 (1977).

⁷⁴ *Id.* at 311–12.

⁷⁵ *Id.* at 310; *see also* *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596 (1982) (declaring unconstitutional a state law that completely prohibited the press from attending rape trials in which the victim was a minor).

⁷⁶ 491 U.S. 524 (1989).

⁷⁷ *Id.* at 541.

⁷⁸ *Id.* at 526–27.

prohibited the publication of the name of a victim of a sexual offense.⁷⁹ A jury awarded the victim \$75,000 in compensatory damages and \$25,000 in punitive damages.⁸⁰

The Supreme Court overturned this liability.⁸¹ The Court began by refusing to hold that “truthful publication may never be punished consistent with the First Amendment.”⁸² But the Court said that liability for the truthful reporting of information lawfully obtained from public records and concerning a matter of public significance would be allowed only if there was an “interest of the highest order.”⁸³ The Court explained that the rape victim’s name was lawfully obtained from police records and was truthfully communicated.⁸⁴ The Court rejected the claim that protecting the privacy of rape victims was a sufficient interest to justify liability.⁸⁵ The Court emphasized the failings of the Florida law that created liability for publishing a rape victim’s identity, including that it allowed liability where the information was released by the government, that it permitted liability without any scienter requirement, and that it applied only to actions of the mass media.⁸⁶

The Court stressed that its “holding . . . [was] limited.”⁸⁷ The Court said:

We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order.⁸⁸

These cases can be criticized for giving too much weight to freedom of speech and not enough to protecting privacy. Some argue that there is little public benefit to knowing a rape victim’s identity, but significant harm to the

⁷⁹ *Id.* at 528.

⁸⁰ *Id.* at 527–29.

⁸¹ *Id.* at 541.

⁸² *Id.* at 532.

⁸³ *Id.* at 541.

⁸⁴ *Id.* at 536.

⁸⁵ *See id.* at 537.

⁸⁶ *Id.* at 538–40.

⁸⁷ *Id.* at 541.

⁸⁸ *Id.*

victim who does not want her name published.⁸⁹ Moreover, fear of such publicity may discourage other rape victims from reporting the crime. But the important point here is that the cases show a Court that thus far has failed to provide constitutional protection for informational privacy in any context.

III. THE NEED FOR GREATER PROTECTION FOR INFORMATIONAL PRIVACY

It is time to rediscover Warren and Brandeis's right to privacy. Technology that Warren and Brandeis never could have imagined, that none of us could have imagined a relatively short time ago, presents unprecedented risks to informational privacy.⁹⁰ Two developments are crucial in this regard.

First, there is unprecedented ability to learn the most intimate and personal things about individuals. For example, the human genome project offers the prospect of genetic analysis that can discover a wide array of information about individuals, including their propensity for diseases, addictions, and personal characteristics.

Second, there is unprecedented access to information about individuals. Computerized records and databases store information in a way that it can be accessed by others. The Internet makes it potentially available to many. I saw this vividly in June 1994 when I received a call from a producer at Nightline. They were doing a show on information privacy and wanted me to be a guest. As part of this, they requested my social security number and asked an information broker to see what he could learn in less than twenty-four hours from legal sources. I was astounded at what he obtained, ranging from the value of my house, my credit record, my political party affiliation, the records from a divorce, and countless other facts. He said that he could have obtained my tax and medical records if he had been willing to act illegally.

Obviously, it is not my focus in this paper to detail these threats to informational privacy. Rather, my point is that this is the area of privacy law that is in the most dramatic need of development. There needs to be judicial protection of a constitutional right to informational privacy and greater safeguards through tort law and statutes. The Supreme Court needs to recognize a fundamental right to informational privacy under the Due Process Clauses of the Fifth and

⁸⁹ See, e.g., Ruth Gavison, *Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech*, 43 S.C. L. REV. 437, 458 (1992).

⁹⁰ For an excellent discussion of the impact of technology on the protection of personal data, see Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055 (2004).

Fourteenth Amendments. Tort law and statutes must do a better job of providing for liability for those who reveal deeply personal information about individuals. This is the unfinished legacy of Warren and Brandeis, and now, more than ever, it needs to be realized.