SKATING ON STILTS

Why We Aren't Stopping Tomorrow's Terrorism

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13 What's Wrong with Privacy?

One question still nags at me. It's easy to understand why business interests fight any government action that might slow or redirect the exponential path of their industry. It's even understandable that for many countries the default position is opposition to U.S. initiatives. In each case, it's a cold calculation of self-interest.

But why are privacy groups so viscerally opposed to government action that could reduce the risks posed by these exponential technologies? The cost of their stance was made clear on September 11, 2001. That tragedy might not have occurred if not for the aggressive privacy and civil liberties protection imposed by the FISA court and OIPR; and it might have been avoided if border authorities had been able to use airline reservation data to screen the hijackers as they entered the United States.

But even after 9/11, privacy campaigners tried to rebuild the wall and to keep DHS from using reservation data effectively. They failed; too much blood had been spilled.

But in the fields where disaster has not yet struck—computer security and biotechnology—privacy groups have blocked the government from taking even modest steps to head off danger.

I like to think that I care about privacy, too. But I had no sympathy for privacy crusaders' ferocious objection to any new government use of technology and data. Where, I wondered, did their objection come from?

So I looked into the history of privacy crusading.

And that's where I found the answer.

In the 1880s, Samuel Dennis Warren was near the top of the Boston aristocracy. His father was a self-made paper-manufacturing tycoon. His wife, Mabel Bayard Warren, was the daughter of a U.S. senator and secretary of state.

Warren himself was no slouch. He had finished second in his class at Harvard Law School. He founded a law firm with the man who finished just ahead of him, Louis Brandeis, and they prospered mightily. Brandeis was a brilliant, creative lawyer and social reformer who would eventually become a great Supreme Court justice.

But Samuel Dennis Warren was haunted. There was a canker in the rose of his life. His wife was a great hostess, and her parties were carefully planned. When Warren's cousin married, Mabel Warren held a wedding breakfast and filled her house with flowers for the event. The papers described her home as a "veritable floral bower."

No one should have to put up with this.

Surely you see the problem.

No? Well, Brandeis did.

He and Warren both thought that, by covering a private social event, the newspapers had reached new heights of impertinence and intrusiveness. The parties and guest lists of a Boston Brahmin and his wife were no one's business but their own, he thought.

And so was born the right to privacy.

Angered by the press coverage of these private events, Brandeis and Warren wrote one of the most frequently cited law review articles ever published. In fact, "The Right to Privacy," which appeared in the 1890 *Harvard Law Review*, is more often cited than read—for good reason, as we'll see. But a close reading of the article actually tells us a lot about the modern concept of privacy.

Brandeis,[1] also the father of the policy-oriented legal brief, begins the article with a candid exposition of the policy reasons why courts should recognize a new right to privacy. His argument is uncompromising:

> The press is overstepping in every direction the obvious bounds of propriety and of 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 . . . To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury . . . Even gossip apparently harmless, when widely and persistently circulated, is potent for evil . . . When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance . . . Triviality destroys at once robustness of thought and delicacy of feeling.[2]

What does Brandeis mean by this? To be brief, he thinks it should be illegal for the newspapers to publish harmless information about themselves and their families. That, he says, is idle gossip, and it distracts "ignorant and thoughtless" newspaper readers from more high-minded subjects. It also afflicts the refined and cultured members of society—like, say, Samuel Dennis Warren and his wife—who need solitude but who are instead harassed by the fruits of "modern enterprise and invention."

What's remarkable about "The Right to Privacy" is that the article's title still invokes reverence, even though its substance is, well, laughable.

Is there anyone alive who thinks it should be illegal for the media to reveal the guest-list at a prominent socialite's dinner party or to describe how elaborate the floral arrangements were? Today, it's more likely that the hostess of a prominent dinner party will blog it in advance, and that the guests will send Twitter updates while it's under way. For most socialites, what would really hurt is a *lack* of media coverage. To be blunt, when he complains so bitterly about

media interest in a dinner party, Brandeis sounds to modern ears like a wuss.

Equally peculiar is the suggestion that we should keep such information from the inferior classes lest they abandon self-improvement and wallow instead in gossip about their betters. That makes Brandeis sound like a wuss *and* a snob.

He does sound quite up-to-date when he complains that "modern enterprise and invention" are invading our solitude. That is a familiar complaint. It's what privacy advocates are saying today about Google, not to mention the NSA. Until you realize that he's complaining about the scourge of "instantaneous photographs and newspaper enterprise." Huh? Brandeis evidently thinks that publishing a private citizen's photo in the newspaper causes "mental pain and distress, far greater than could be inflicted by mere bodily injury."

If we agreed today, of course, we probably wouldn't have posted 3.5 billion photographs of ourselves and our friends on Flickr.

Anachronistic as it seems, the spirit of Brandeis's article is still the spirit of the privacy movement. The right to privacy was born as a reactionary defense of the status quo, and so it remains. Then, as now, new technology suddenly made it possible to spread information more cheaply and more easily. This was new, and uncomfortable. But apart from a howl of pain—pain "far greater than . . . mere bodily injury"—Brandeis doesn't tell us why it's so bad.

I guess you had to be there.

Literally. Unless you were an adult when photography came to newspapers, you'll probably never really understand what the fuss was about. We've all been photographed, and most of us aren't happy with the results, at least not all the time. But that's life, and we've learned to live with it. Most of us can't imagine suing to prevent the distribution of our photographs—which was the tort Brandeis wanted the courts to create.

We should not mock Brandeis too harshly. His article clearly conveys a heartfelt sense of invasion. But it is a sense of invasion we can

never share. The sensitivity about being photographed or mentioned in the newspapers, a raw spot that rubbed Brandeis so painfully, has calloused over. So thick is the callous that most of us would be tickled, not appalled, to have our dinner parties make the local paper, and especially so if it included our photos.

And that's the second thing that Brandeis's article can tell us about more contemporary privacy flaps. His brand of resistance to change is still alive and well in privacy circles, even if the targets have been updated. Each new privacy kerfuffle inspires strong feelings precisely because we are reacting against the effects of a new technology. Yet as time goes on, the new technology becomes commonplace. Our reaction dwindles away. The raw spot grows a callous. And once the initial reaction has passed, so does the sense that our privacy has been invaded. In short, we get used to it.

At the beginning, of course, we don't want to get used to it. We want to keep on living the way we did before, except with a few more amenities. And so, like Brandeis, we are tempted to ask the law to stop the changes we see coming. There's nothing more natural, or more reactionary, than that.

Most privacy advocates don't see themselves as reactionaries or advocates for the status quo, of course. Right and left, they cast themselves as underdogs battling for change against the entrenched forces of big government. But virtually all of their activism is actually devoted to stopping change—keeping the government (and sometimes industry) from taking advantage of new technology to process and use information.

But simply opposing change, especially technological change, is a losing battle. At heart, the privacy groups know it, which may explain some of their shrillness and lack of perspective. Information really does "want to be free"—or at least cheap. And the spread of cheap information about all of us will change our relationship to the world. We will have fewer secrets. Crippling government by preventing it from using information that everyone else can get will not give us back our secrets.

In the 1970s, well before the personal computer and the Internet, privacy campaigners persuaded the country that the FBI's newspaper clipping files about U.S. citizens were a threat to privacy. Sure, the information was public, they acknowledged, but gathering it all in one file was viewed as vaguely sinister. The attorney general banned the practice in the absence of some legal reason for doing so, usually called an investigative "predicate."

So, in 2001, when Google had made it possible for anyone to assemble a clips file about anyone in seconds, the one institution in the country that could not print out the results of its Google searches about Americans was the FBI. This was bad for our security, and it didn't protect anyone's privacy either.

The privacy campaigners are fighting the inevitable. The "permanent record" our high school principals threatened us with is already here—in Facebook. Anonymity, its thrills and its freedom, has been characteristic of big cities for centuries. But anonymity will also grow scarce as data becomes easier and easier to gather and correlate. We will lose something as a result, no question about it. The privacy groups' response is profoundly conservative in the William F. Buckley sense—standing athwart history yelling, "Stop!"

I'm all for conservatism, even in unlikely quarters. But using laws to fight the inevitable looks a lot like Prohibition. Prohibition was put in place by an Anglo-Saxon Protestant majority that was sure of its moral superiority but not of its future. What the privacy community wants is a kind of data Prohibition for government, while the rest of us get to spend more and more time in the corner bar.

That might work if governments didn't need the data for important goals such as preventing terrorists from entering the country. After September 11, though, we can no longer afford the forced inefficiency of denying modern information technology to government. In the long run, any effective method of ensuring privacy is going to have to focus on using technology in a smart way, not just trying to make government slow and stupid.

That doesn't mean we have to give up all privacy protection. It just means that we have to look for protections that work with technology instead of against it. We can't stop technology from making information cheap and reducing anonymity, but we can deploy that same technology to make sure that government officials can't misuse data and hide their tracks. This new privacy model is partially procedural—greater oversight and transparency. And it is partly substantive—protecting individuals from actual adverse consequences rather than hypothetical informational injuries.

Under this approach, the first people who should lose their privacy are the government workers with access to personal data. They should be subject to audit, to challenge, and to punishment if they use the data for improper purposes. That's an approach that works with emerging technology to build the world we want to live in. In contrast, it is simple Luddism to keep government from doing with information technology what every other part of society can do.

The problem is that Luddism always has appeal. "Change is bad" is a slogan that has never lacked for adherents, and privacy advocates sounded alarm after alarm with that slogan as the backdrop when we tried to put in place a data-based border screening system.

But would we really thank our ancestors if they'd taken the substance of Brandeis's article as seriously as its title? If, without a legislature ever considering the question, judges had declared that no one could publish true facts about a man's nonpolitical life, or even his photograph, without his permission?

I don't think so. Things change. In an odd way, privacy is a lot like clothing. Like clothing fashions, privacy standards evolve—and not just in one direction. Skirt lengths or necklines that are fashionable in one decade look slutty in the next. Americans grow less private about their sex lives but more private about financial matters. Today, few of us are willing to have strangers living in our homes, listening to our family conversations, and then gossiping about us over the back fence with the strangers who live in our friends' homes. Yet I'll bet that both

Brandeis and Warren tolerated without a second thought the limits that servants put on their privacy.

Why does our concept of privacy vary from time to time? Here's one theory: Privacy is allied with shame. We are all ashamed of something about ourselves, something we would prefer that no one, or just a few people, know about. We want to keep it private. Sometimes, of course, we should be ashamed. Criminals always want privacy for their acts. But we're also ashamed—or at least feel embarrassment, the first cousin of shame—about a lot of things that aren't crimes.

We may be ashamed of our bodies, at least until we're sure we won't be mocked for our physical shortcomings. Privacy is similar; we are often quite willing to share information about ourselves, including what we look like without our clothes, when we trust our audience, or when the context makes us believe that our shortcomings will go unnoticed. Most of us would rather be naked with our spouse than a random stranger. And we would not appear at the office in our underwear, even if it covers more than the bathing suit we wore at the beach on the weekend.

For that reason, enforced nudity often feels like a profound invasion of our privacy. At least at first. In fact, though, we can get used to it pretty quickly, as anyone who has played high school sports or served in the army can attest. That's because the fear of mockery is usually worse than the experience. We often fear mockery because we're self-absorbed; we don't realize that, to others, our private shortcomings are not that unusual and not that interesting. So when we discover that being naked in a crowd of other naked people doesn't lead to mockery and shame, we begin to adapt. We develop a callous where we once were tender.

The things that Brandeis considered privacy invasions are similar. Very few of us are happy the first time we see our photograph or an interview in the newspaper. At first, we're surprised and embarrassed at how big our nose looks or how inarticulate we sound. We're unhappy in a way that Brandeis would find quite familiar. But pretty soon we realize it's just not that big a deal. Our nose and our style of speech

are things that the people we know have already accepted, and no one else cares enough to embarrass us about them. The same is true when we Google ourselves and see that a bad review of our dinner-theater performance is number three on the list. Our first reaction is embarrassment and unhappiness, but the reaction is oddly evanescent.

If this is so, then the zone of privacy is going to vary from time to time and place to place—just as our concept of physical modesty does. The "zone of privacy" has boundaries on two sides. We don't care about some information that might be revealed about us, probably because the revelation causes us no harm—or we've gotten used to it. If the information is still embarrassing we want to keep it private, and society may agree. But we can't expect privacy for information that society views as truly shameful or criminal.

Over time, information will move into and out of the zone of privacy on both sides. Some information will simply become so unthreatening that we'll laugh at the idea that it is part of the privacy zone. Photographs long ago entered that category, despite Brandeis's campaigning. Similarly, in 1948, George Orwell could shock Britons by imagining that the government would install cameras in our homes. Today, it's the homeowners who are buying and installing the cameras so they can broadcast their activities. Some information will move from criminal evidence into the zone of privacy, as sexual preference has. Or it may move in the other direction: Information that a man beats his wife is no longer protected by a zone of familial privacy, as it once was; now it's viewed as evidence of a crime.

The biggest privacy battles will often be in contexts where the rules are changing. (The subtext of many Internet privacy fights, for example, is whether some new measure will expose the identities of people who download pornography or copyrighted music and movies. Society is divided about how shameful it is to download these items, and it displaces that moral and legal debate into a fight about privacy.)

The contextual nature of privacy shows up everywhere. Divorce litigation is brutal in part because information shared in a context of love and confidence ends up being disclosed to the world in a deliberately

harmful way. The unspoken agreement under which the information was shared has been broken: "I am telling you about my alcohol abuse so that we can fight it together, not so you can tell my employer and the rest of the world." A lot of privacy law is an attempt to translate that sense of betrayal into a doctrine that the courts can enforce.

That's another odd thing about privacy that makes it so contextual. Privacy isn't really about keeping data completely hidden from view. It's about making sure that the information isn't used in an unexpected and harmful way. Often the activity in question (like making a telephone call or a credit card purchase) is something that the individual does freely, with clear knowledge that some other people (his bank or his phone company) know what he is doing. Sometimes the activities are proudly public in nature—protests against government policy, for example.

In those cases, the privacy concern is not that the bank or the phone company (or our spouse) actually *has* the information but rather what it will do with the information it has—whether it will use the data in ways we didn't expect or give the data to someone who can harm us. We want to make sure the data will not be used to harm us in unexpected ways.

And that helps explain why privacy advocates are so often Luddite in inclination—because modern technology keeps changing the ways in which information is used. Once, we could count on practical obscurity—the difficulty of finding bits of data from our past—to protect us from unexpected disclosures. Now, storage costs are virtually nil, and processing power is increasing exponentially. It is no longer possible to assume that your data, even though technically public, will never actually be used. It is dirt cheap for data processors to compile dossiers on individuals, and for them to use the data in ways we didn't expect.

Some would argue that this isn't really "privacy" so much as a concern about abuse of information. However it's defined, though, the real question is what kind of protection it is reasonable for us to expect. Can we really write a detailed legislative or contractual pre-nup for

each disclosure, setting forth exactly how our data will be used before we hand it over? I doubt it. Maybe we can forbid obvious misuses, but the more detailed we try to get, the more we run into the problem that our notions of what is private, and indeed of what is embarrassing, are certain to change over time. If so, does it make sense to freeze today's privacy preferences into law?

In fact, that's the mistake that Brandeis made—and the last lesson we can learn from the odd mix of veneration and guffawing that his article provokes. Brandeis wanted to extend common law copyright until it covered everything that can be recorded about an individual. The purpose was to protect the individual from all the new technologies and businesses that had suddenly made it easy to gather and disseminate personal information: "the too enterprising press, the photographer, or the possessor of any other modern device for rewording or reproducing scenes or sounds."[3]

This proposal is wacky in two ways. First it tries to freeze in 1890 our sense of what is private and what is not. Second, it tries to defy the gravitational force of technology.

Every year, information gets cheaper to store and to duplicate. Computers, iPods, and the Internet are all "modern devices" for "reproducing scenes or sounds," which means that any effort to control reproduction of pictures, sounds, and scenes becomes extraordinarily difficult if not impossible. In fact, it can't be done.

There is a deep irony here. Brandeis thought that the way to ensure the strength of his new right to privacy was to enforce it just like state copyright law. If you don't like the way "your" private information is distributed, you can sue everyone who publishes it. One hundred years later, the owners of federal statutory copyrights in popular music and movies followed this prescription to a T. They began to use litigation to protect their data rights against "the possessor[s] of any other modern device for . . . reproducing scenes or sounds," a class that now included many of their customers. The Recording Industry Association of America (RIAA) sued consumers by the tens of thousands for using their devices to copy and distribute songs.

Unwittingly, the RIAA gave a thorough test to Brandeis's notion that the law could simply stand in front of new technology and bring it to a halt through litigation. There aren't a lot of people who think that that has worked out well for the RIAA members, or for their rights.

Brandeis wanted to protect privacy by outlawing the use of a common new technology to distribute "private" facts. His approach has fared no better than the RIAA's. Information that is easy to gather, copy and distribute will be gathered, copied, and distributed, no matter what the law says.

It may seem a little bit odd for me to criticize Brandeis and other privacy campaigners for resisting the spread of technology. After all, the whole point of this book is that we can't simply accept the world that technology and commerce serve up.

True, we can't. The risk is too great. But neither can we defy gravity.

It's one thing to redirect the path of technological change by a few degrees. It's another to insist that it take a right angle. Brandeis wanted it to take a right angle; he wanted to defy the changes that technology was pressing upon him. So did the RIAA.

Both were embracing a kind of Luddism—a reactionary spasm in the face of technological change. They were doomed to fail. The new technologies, after all, empowered ordinary citizens and consumers in ways that could not be resisted. If the law tries to keep people from enjoying the new technologies, in the end it is the law that will suffer.

But just because technologies are irresistible does not mean that they cannot be guided, or cannot have their worst effects offset by other technologies. That is the message of this book: The solutions I'm advocating will only work if they allow the world to keep practically all the benefits of the exponential empowerment that new technology makes possible.

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