

The Roots of Sexual Privacy: Warren and Brandeis & the Privacy of Intimate Life

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It is lovely to be here, especially because, as a privacy scholar, I am a bit of an interloper with the IP crowd. Whenever anyone mentions IP, I think they mean “information privacy.” So, in this group of intellectual property scholars, I am surely an outlier as well. It is exciting to find a kindred spirit in Jennifer Rothman’s book,¹ which conceptualizes privacy as centrally involved with the formation of identity.

What I am going to do is circle back to tell the story of Samuel Warren and Louis Brandeis, what they were doing in their famous law review article, how they broke new ground, and some of the history around the project and the writers themselves. Then, I am going to talk about sexual privacy, the focus on my current work.

In writing what is now considered the most famous law review article of all time, Warren and Brandeis, in 1890, called for a “right to be let alone” in one’s private affairs. They wrote about the indignity of the press spying on the domestic circle, taking photographs and publishing them without authorization.² They objected to reporters’ invasive spying on family life (most pertinent to upper-crust society to which Warren and his wife belonged),³ and the publication of articles concerning people’s sexual relations.⁴ They warned that intimacies whispered in the family closet were being shouted onto the rooftops without consent.⁵

Warren and Brandeis conceived of a new tort—a tort that had much in common with torts like assault and defamation but that deserved recognition on its own.⁶ The new tort was the right to privacy. Warren and Brandeis explained that someone who sat for a photograph later published without permission could sue under copyright and contract law, seeking to obtain the profits from publicizing the images. Privacy,

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1. JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* (Harv. Univ. Press 2018).

2. Samuel D. Warren & Louis D. Brandeis, *Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

3. *Id.* at 195.

4. *Id.* at 196.

5. *Id.* at 195 (“[N]umerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”).

6. *See id.* at 197–204.

however, was about something different.⁷ It differed from defamation, which concerned damage to one's reputation and the financial ruin that resulted from looking badly in other people's eyes.⁸ As Warren and Brandeis explained, privacy involved the spiritual.⁹ It was not about material economic or physical harm. They argued for a right to be let alone, a respect for one's inviolate personality and the ability to control for oneself "one's thoughts, communications, and sentiments."¹⁰

Warren and Brandeis provided an example that illustrated how privacy was a spiritual wrong, rather than a material one. They imagined a husband who wrote in a letter to his son that he would not be dining with his wife that night.¹¹ They explained that the right to decide for oneself whether others could see the letter—and the emotional harm that would ensue upon the nonconsensual publication of the letter—was the heart of the right to privacy. Privacy concerned the emotional harm that would be suffered if the letter was published without consent. It was not about the letter's market value. No one would care about whether the man dined with his wife. For Warren and Brandeis, the revelation of the letter—the publication of gossip about family relations—without permission invaded the right to privacy, causing spiritual harm. The emotional harm was at the heart of privacy, not financial loss.

At the time, this was fairly revolutionary. Others had mentioned the right to privacy, but Warren and Brandeis developed an argument for its recognition as a *separate* tort. Emotional harm, in the view of Warren and Brandeis, was even more injurious and costly to individuals and society than physical or pecuniary harms.¹² They argued for the recognition of a right to one's inviolate personality, a right to determine for oneself how much of one's intimate life is known to others.¹³

Brandeis was no foe of the First Amendment—a fact that should be obvious to anyone familiar with his concurrences and dissenting opinions on the subject.¹⁴ The last six pages of Warren and Brandeis's article concerns exemptions to the right to privacy.¹⁵ In those pages Brandeis's influence is clear. The first exemption involves matters related to the public interest. And they give the illustration of a public official. Warren and Brandeis explain that private information about the domestic

7. See *id.* at 200 (finding the copyright "of no value, *unless* there is a publication"). See *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902), *superseded by statute*, N.Y. Civ. Rights Law §50 (McKinney 2019).

8. See *id.* at 197.

9. See *id.* at 200 (discussing the "peace of mind or the relief afforded by the ability to prevent any publication at all" of certain facts); see also *id.* at 193 (describing the legal protection of "spiritual" liberty).

10. See *id.* at 200.

11. *Id.* at 201.

12. See *id.* at 195.

13. See Warren & Brandeis, *supra* note 2, at 195 ("Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone.'") (citation omitted).

14. See generally VINCENT BLASI, *FREE SPEECH IN THE HISTORY OF IDEAS* 429–60 (West 2016).

15. See Warren & Brandeis, *supra* note 2, at 214–20.

life of a *public official* raises free speech concerns.¹⁶ You can see the germ of Brandeis' dissents and concurrences about the First Amendment in this discussion.¹⁷

So, what was the context out of which this article grew? There was wonderful lore about Samuel Warren and his family that turned out to be wrong as Amy Gajda showed.¹⁸ The apocryphal story was that Sam Warren got his law partner Louis Brandeis to write the article with him because the press covered his daughter's wedding. Turns out, at the time of the writing of *The Right to Privacy*, Warren's daughter was seven. Samuel Warren was the impetus for the piece but for different reasons. His wife Mabel was the daughter of a U.S. Senator, and, to Warren's dismay, the penny press covered their dinner parties. Warren's brother also was believed to have been gay. If news got out about his brother's effeminate nature and suspected homosexuality, the Warren family risked social ruin.¹⁹

Warren and Brandeis articulated the notion of zones—spiritual zones²⁰—surrounding our families and domestic lives that are important to how we think about ourselves, our identities, and emotional lives.

This leads me to sexual privacy. We should understand Warren and Brandeis's project as concerning sexual privacy. They were writing about the “invasive spying on the family closet;”²¹ the intimacies “whispered in the closet then shouted on the rooftops;”²² and gossip about “sexual relations.”²³ Warren and Brandeis were talking about sexual privacy.

Sexual privacy, as I am describing it in my forthcoming work and book project, is about the social norms governing how we manage the boundaries around our intimate lives.²⁴ So, sexual privacy concerns sex, but not just sex. Sexual privacy concerns the concealment of naked bodies and intimate activities including, but not limited to, sexual intercourse. It involves personal decisions about intimate life, such as whether to entrust others with information about one's sexuality or gender, or whether to expose one's body to others. Sexual privacy relates to communications between intimates about sex, sexuality, or gender. Warren and Brandeis wrote about sexual privacy—the interactions and communications of intimate partners as well as the spheres in which intimacy occurs.

Sexual privacy should be given, in my view, normative priority over other competing privacy claims. The question is why. And this is where Jennifer Rothman and I have much in common—the importance of sexual privacy to autonomy and

16. See *id.* at 216. Note that, at the time, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) had not been decided and facts like those Warren and Brandeis described were not yet expressly protected by the First Amendment.

17. See, e.g., *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring); *Pierce v. United States*, 252 U.S. 239 (1920) (Brandeis, J., dissenting).

18. Amy Gajda, *What If Samuel D. Warren Hadn't Married A Senator's Daughter?: Uncovering the Press Coverage That Led to “The Right to Privacy”*, 2008 MICH. ST. L. REV. 35 (2008).

19. Charles E. Colman, *About Ned*, 129 HARV. L. REV. F. 128, 135 (2016).

20. See notes 25–27, *infra*.

21. See Warren & Brandeis, *supra* note 2, at 195.

22. *Id.*

23. *Id.* at 196.

24. See Danielle Keats Citron, *Sexual Privacy*, 128 Yale L.J. (forthcoming 2019) (manuscript at 8–10), available at <https://perma.cc/FQQ7-MMK6>.

identity formation. Without sexual privacy, we do not get the chance to go backstage and experiment with our naked bodies, sexuality, and gender identities. Before we go onstage, as Erving Goffman would explain, we need to experiment backstage.²⁵ We need sexual privacy for identity formation because of the self-respect that it affords us. It says to us that *we* are in charge of how much others know about us.

Janet Mock, a transgender writer, writes in her autobiography about when she came from Hawaii and moved to New York.²⁶ At the time, she had already become a woman--leaving "Charles" behind and becoming "Janet." She writes that when she came to New York, she did not want to have to tell her colleagues and people she randomly met about her trans woman-ness. She did not want to be seen as just a trans woman. Janet wanted to control what other people knew about her. She wanted to control that crucial piece of her identity, which, if known, might overwhelm how everyone saw her. Janet sought a sense of self-respect and, as Robert Post would describe it, the social basis for respect.²⁷

As highlighted in Warren and Brandeis's piece, sexual privacy is important to intimacy and the forging of intimate relationships. Without sexual privacy, we cannot engage in mutual self-disclosure and mutual vulnerability. The reason we allow ourselves to be vulnerable with intimates is because we trust that they will keep our confidences. Sexual privacy is essential to forge intimate relationships. Without privacy, as Charles Fried would argue, we cannot have intimate relationships.²⁸ It is the essential precondition to love; it is the oxygen for intimate relationships.

Consider the case of Annie Seifullah who served as a school principal in Long Island City.²⁹ She had been previously married and at her house she had an old computer that was not password protected. On the computer, she had pictures she had taken with her ex-husband that showed her in lingerie.³⁰ Some were nude photos. After splitting from her ex, Annie lived with another man. She never showed the photos to the man, but when they broke up he took the old computer, copied the photos and put them on her Department of Education laptop.³¹ He showed the photos on the laptop to Seifullah's supervisor. He sent the photos to the *New York Post*³² and posted them on Twitter. Annie lost her job. As she described to me, after the photos were splashed in the paper and online, she felt that she could no longer define her identity for herself. She was devastated that she was now the slutty teacher appearing in lingerie in the *New York Post*.³³

25. See ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 69–72 (1959).

26. See JANET MOCK, *REDEFINING REALNESS: MY PATH TO WOMANHOOD, IDENTITY, LOVE & SO MUCH MORE* (2014).

27. See Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 961–62 (1998).

28. Charles Fried, *Privacy, Morality, and the Law*, 12 PHIL. & PUB. AFFAIRS 269, 275 (1983).

29. See Ben Chapman, *Ex-Queens Principal Says Boyfriend, School Leaders Spread Her Nude Pics To Ruin Her Career*, N.Y. DAILY NEWS (Dec. 16, 2017, 9:35 PM), <https://perma.cc/8UQC-SRCF>.

30. *Id.*

31. *Id.*

32. Susan Edelman, *Ex-principal Had X-rated Photos on School Computers: Probe*, N.Y. POST (Oct. 9, 2016, 11:56 AM), <https://perma.cc/TET8-NYPK>.

33. *Id.*

The parallels I want to draw—the importance of privacy to identity formation--bring us back to Warren and Brandeis, to rethink why we care about privacy. Crucial is emotional harm resulting from the denial of sexual autonomy and human agency. It is the profound sense of shame when someone's nude photos are posted online. It concerns the damage to human dignity and to intimacy. Hence the difference in the right to publicity, which concerns financial harm and the market value of one's identity. Privacy is crucial but it is not about protecting the right to sell it.