

## **The Right to Privacy: The Need For an Ever-Evolving Legal Movement**

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*Louis Brandeis and Samuel Warren wrote “The Right to Privacy” in response to the rise of the newspaper and its threat to the public’s privacy during the late 19th century. They critiqued the laws of the time because they saw a change in the world that was not being accounted for in existing legislation. Today, new technology is changing the world at an exponential rate and the public’s privacy is once again at risk. The laws have fallen behind the technology and there needs to be a call to update the current privacy laws.*

### **Introduction**

Diaries can be locked away and letters can be hidden. However, there is a lack of control over our digital footprint in which our thoughts can easily be viewed and shared in a matter of seconds without our consent. In the late 19th and early 20th centuries, the only lines of long-distance communication included phone calls and written letters. For disseminating information to significantly larger groups, there were newspapers. That said, it could take weeks to spread information nationally or even internationally, whereas today, cellphones, computers, and social media have added hundreds of new platforms and applications that distribute information to millions of people in a matter of seconds. It has never been easier to disseminate both accurate and inaccurate information to large audiences, resulting in the rise in exposés and the growth of ‘cancel culture.’ Louis Brandeis and his law partner, Samuel Warren, set the groundwork for improving privacy laws, especially concerning privacy from the media, but nearly a century later and in the new age of (social) media, those ideas are not being applied in the same way as they were during Brandeis’ lifetime.<sup>30</sup> The Right to Privacy legal movement should be re-evaluated in light of social media and the use of exposés which cultivate cancel culture.

### **Background**

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<sup>30</sup> Erwin Chemerinsky, "Rediscovering Brandeis's Right to Privacy," 644.



### *The Right to Privacy*

Brandeis and Warren’s “The Right to Privacy” was published in the Harvard Law Review in 1890. They were inspired to write the article because of the new technology of the time, such as cameras, and the intense pressure of the press. Concerned by these developments, they wanted to take a deeper look into how those factors affected the Commonwealth.<sup>31</sup> Brandeis began the article by stating, “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 the exact nature and extent of such protection,” which immediately acknowledges the necessity for redefining laws as technology progresses.<sup>32</sup> Brandeis explained that during the early development of common law, most rules centered around the notion of the “right to life,” which then only referred to the preservation and protection of physical life. Over time, the term “right to life” has been extended to include the protection of one’s physical, spiritual, and intellectual property. Brandeis published the article as a way to influence the continuation of this trend through the creation of new protections for privacy, stating,<sup>33</sup>

The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.<sup>34</sup>

Brandeis acknowledged the need to “update” laws to encompass the new threats to one’s privacy. He articulated the importance of not only bodily and material protection, but also protection over one’s identity and personal work.

### *Examples*

Brandeis sought to protect one’s personal life and work from the public view. The rise of photography and printed media posed a major threat

31 Cayce Myers. “Warren, Samuel & Louis Brandeis. The Right to Privacy, 4 Harv. L. Rev. 193 (1890).” 520.

32 Louis D. Brandeis, and Samuel D. Warren. “The Right to Privacy.” 193.

33 Myers, 519.

34 Brandeis, 213.



to the general public's privacy. Since there were no formal doctrines protecting personal privacy, it was technically not against the law to take photos of someone and their property or personal documents and share them without permission. Brandeis even went so far as to assert under his proposed privacy rules that even if photos or documents rightfully came into the possession of someone else other than the original owner, the secondary individual still could not and should not share them. This would be especially true if there was an intent to devastate one's reputation. For example, Brandeis explained that if "a man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day," then neither the son who received the letter, nor a person who may receive his diary, should share anything about those documents without penalty.<sup>35</sup>

### ***Modern Day Application***

"The Right to Privacy" greatly influenced understandings of privacy as a barrier between the government and its citizens through a new interpretation of the 4th Amendment, as well as between citizens themselves as through the Privacy Act of 1974 and its subsequent overviews.<sup>36</sup> Brandeis called for a constant update to privacy rules due to an ever modernizing press and its new capabilities. Since privacy rules are updated largely following the development of new technology, the approaches will always be a step behind any potential new dangers to privacy. Brandeis used the example of the man writing a letter to his son and how his son should not be able to share that letter to the public; the modern day equivalent to letters are emails and, by extension, text messages. Following the example, it should then not be legal to share responses to personal emails and text messages publicly without prior permission from the respondent. However, there is very public proof of messages being shared in this way, specifically through exposé videos on Youtube.

### **Cancel Culture**

#### ***The Origin of Cancelling***

The concept of cancel culture has played a variety of roles in modern society. The term "cancelled" or "to be cancelled" has recently appeared in

<sup>35</sup> Brandeis, 201.

<sup>36</sup> Pam Dixon and Robert Gellman. "Online Privacy : A Reference Handbook."

128.; "Overview of the PRIVACY Act: 2020 Edition." The United States Department of Justice. <https://www.justice.gov/opcl/overview-privacy-act-1974-2020-edition/disclosures-third-parties>.



right-wing political rhetoric, as early as 2016, as a way to claim that conservatives' competitors silenced counter-perspectives in important debates. The term was used to denote the danger of moving away from true academic debate and towards an emotion-based discussion of particular topics. Over time, the term morphed from opinion-oriented cancelling into cancelling people, and now in 2021, this has come to mean more specifically cancelling celebrities.<sup>37</sup>

### *Cancelling Celebrities*

Certain celebrities live very public lives and, in order to maintain their image, share their lives and their thoughts with their millions of followers across all social media outlets. Images, captions, newsletters, or anything else those celebrities have shared is "liked," retweeted, and reposted by various other accounts in a matter of a few seconds. Even if later in the day the celebrity decides to delete what they had posted, the digital print will still exist because followers had the chance to save the post to their own devices to keep their own copy. Celebrities who are "cancelled" end up chastised on social media, losing potentially thousands of followers, and possibly even brand deals because followers do not want to be associated with the celebrity or their remarks. Cancelling a celebrity is essentially attempting to revoke their celebrity status and influence. Cancelling does not happen randomly, as it is a reaction to something the celebrity has done, such as "morally offensive words and deeds, racism and ethnocentrism, anti-Semitism and Islamophobia, sexual harassment and abuse, misogyny and agism, and homophobia and transphobia."<sup>38</sup> In 2020, *Harry Potter* author, J. K. Rowling came under fire after publicly making transphobic comments. Patrons on social media, specifically on Twitter, berated Rowling and called for her to issue an immediate apology. Social media "allow[s] marginalized groups to engage in networked framing, a process by which collective experiences of an offending party's (or their proxies) unjust behavior is discussed, morally evaluated, and prescribed a remedy (...) through the collective reasoning of culturally aligned online crowds."<sup>39</sup> Celebrities like Rowling who have large followings tend to lose a large amount of popularity but usually do not suffer large scale

37 Pippa Norris. "Cancel Culture: Myth or Reality?"

38 Norris, "Cancel Culture: Myth or Reality?"

39 Meredith D. Clark. "Drag Them: A Brief Etymology of so-Called 'Cancel Culture.'" 90.



consequences because of the strength of their already well established social base.<sup>40</sup>

### ***#JamesCharlesIsOverParty***

While A-list celebrities do not typically lose their careers over potentially morally compromising behaviour, micro-celebrities, such as YouTubers, who may have a large but niche following, could lose everything overnight. Micro-celebrities do not have the luxury of a stable following as social trends, and hence their own relevance, are always fluctuating. In order to stay in the public sphere, micro-celebrities constantly need to ride the current trends, but also need to get involved in drama and cancel culture in order to keep people talking about them.<sup>41</sup> In 2019, YouTubers Tati Westbrook, James Charles, and Jeffree Star were all involved in a scandal that was later titled *Dramageddon 2.0*. In short, during Coachella, James Charles brokered a deal with a brand that was in direct competition with his friend, Westbrook. Distraught, Westbrook released a series of Instagram videos and a Youtube video, which have all since been deleted. The first one regarded Charles' disloyalty, but later posts built on her momentum to claim that he had been exhibiting sexual predatory behavior. Star, who had no connection to either at the time, tweeted his support in Westbrook's favor while further disparaging Charles' name. Between Westbrook's videos and Star's support, Charles was officially "cancelled" on social media and lost nearly 3 million followers because of the scandal, which greatly affected the possible revenue he could receive from his content.<sup>42</sup>

### **Critique**

#### ***Charles' Response***

Less than a month after Charles' acceptance of the brand deal, he released a video entitled *No More Lies*, in which he apologized to Westbrook for taking the controversial brand deal, but he also asserted his

40 Norris, "Cancel Culture: Myth or Reality?"

41 Tenbarge, Kat. "One Year after the Beauty Youtuber WAR Burned Their Community to the Ground, New Battle Lines Have Been Drawn between the Growing Stars That Started It All." <https://www.insider.com/jeffree-star-james-charles-dramageddon-2-tati-westbrook-2020-5#thats-when-star-leveled-his-own-accusations-against-charles-including-that-the-teenager-was-a-danger-to-society-4>.

42 Tenbarge, "One Year after the Beauty Youtuber WAR Burned Their Community to the Ground, New Battle Lines Have Been Drawn between the Growing Stars That Started It All."



innocence against the allegations of Westbrook and Star. Up until that point, the allegations made against Charles were either verbal or written digitally, and were in the nature of a “He Said, She Said” situation, with no physical proof either way. In Charles’ video, he went line by line through each allegation and tried to clear his name by showing timestamps of messages as well as messages he sent *and* received. Some messages he showed were just his messages along with the recipient’s messages, but he also showed screenshots of just the recipient’s messages, which is essentially the exact scenario Brandeis warned against with his example of the man and the letter to his son.<sup>43</sup>

### ***Brandeis’ Response***

The events of Dramageddon 2.0 were not an isolated situation. The act of sharing personal messages on social media has been normalized, not just in regard to proving ones’ innocence or guilt, but increasingly also for amusement.<sup>44</sup> Regardless of their use, Brandeis’ arguments assert that the sharing of the recipients’ messages is a violation of their privacy. He wrote, “The Right to property in its widest sense, includ[es] all possessions.”<sup>45</sup> Just as the son could not share what his father wrote in a letter addressed to him, people should not be able to share messages that are not their own with others regardless of intention. Unfortunately, they continue to do so.

### **Conclusion**

The possibilities for interpersonal communication have grown exponentially since Brandeis’ time. New technology and social media has made sending, sharing, and receiving information easier and faster than ever. Since privacy laws continue to fall behind the new technology, private messages are being shared without permission which is harmful because, as seen on YouTube, it is being used for the exploitation of people for exposés. Brandeis called for a constant update to privacy laws to bridge the gap between the laws and the technology of the time so as to preserve the privacy of personal messages and conversations.

43 James Charles, *No More Lies*. <https://youtu.be/uFvtCUzfyL4>.

44 Michelle Rennex, Joseph Earp, Merryana Salem, and Edwina Storie. “Teens Are Sharing Their Most Hilariously Awkward Texts in This New Tiktok Trend.” <https://junkee.com/awkward-texts-tiktok/232099>.

45 Brandeis, 211.



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