



Celebrating the 100th Anniversary of Louis D. Brandeis'

Appointment to the U.S. Supreme Court

Translating Justice Brandeis's Views on Privacy for the 21st Century

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When I was a Brandeis student, I learned a lot about Justice Brandeis: I knew he was the first Jewish person to be nominated to the Supreme Court; I knew he was sometimes known as the “People’s Lawyer” or the “Robin Hood of the Law;” and I knew that he was respected for submitting what later became known eponymously as the “Brandeis brief.” The Brandeis brief is interesting because it uses non-legal (e.g. social science) arguments to bolster one’s legal case.

Since I became a practicing attorney and law professor, I have studied Justice Brandeis’s career and jurisprudence in greater detail. His ideas were extremely ahead of his time. In 1877, Brandeis graduated first in his class from Harvard Law School. He was valedictorian; his good friend Samuel Warren was salutatorian. Together, Brandeis and Warren penned the seminal article entitled, “The Right to Privacy.” The right to privacy is something in everyday parlance today—but 125 years ago, when it was published in 1890, there was no “right to privacy.” Those words are not enshrined in the Declaration of Independence, the Constitution, or even the Fourteenth Amendment. The concept of a “right of privacy” did not exist until Brandeis and Warren created it.

The views Brandeis held in the late nineteenth century as a young lawyer and the opinions he wrote in the early twentieth century as a Justice of the U.S. Supreme Court were prescient and are equally compelling today as they were more than a century ago. But much more than a retrospective, hermeneutic exegesis on Brandeis's writings, this essay takes Brandeis's opinions from a century ago and applies them to the very real Constitutional issues society is struggling with today.

After examining Brandeis's writings on privacy, I wondered how he would feel about today's headlines: electronic surveillance of citizens at public events; the government collecting metadata of Americans' phone calls; or reading the emails of U.S. citizens. Would Justice Brandeis find these practices tantamount to search and seizure in conflict with the fundamental principles underlying the Fourth Amendment? How would Justice Brandeis feel about government's use of GPS-related data (for example, tracking an individual via his cell phone) or placing a GPS tracker on a suspect's vehicle—all without warrants? What would he think about using remote-sensing data collected from satellites in outer space to assist in prosecuting drug traffickers? Brandeis was known to fight for the common man and protect individuals from unwarranted government power; in that light, I examine Brandeis's views on privacy and apply them in a modern-day, twenty-first century technological context.

One other note: the term "translation" is being used in this article as a legal term of art. Translation is a strategy used for interpreting a text such as Brandeis's writings or the Constitution itself. Rather than talking about what the "framers" or the "founders" would do if they could teleport to the twenty-first century and apply their original words to technologies that did not exist at the birth of our nation, translation in this context refers to finding a modern reading of original text that preserves its original intentions but in the context of the present day; that is, for present purposes, we preserve the meaning and intention of the words in the Constitution, changed circumstances notwithstanding.¹ It is in that context that this article translates Brandeis's views on privacy to twenty-first century circumstances.

But before we can view Brandeis in a contemporary light, let's examine his work in the light in which it was written.

The Year Is 1890

Louis Brandeis, and his school chum and law firm partner Samuel Warren, just published their article “The Right To Privacy” in the *Harvard Law Journal*. The article begins by stating the thesis that “the individual shall have full protection in person and in property is as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection.” The authors acknowledge that political, social, and economic changes “entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.”² Brandeis and Warren explain the evolution of remedies for privacy violations, noting that the law first provided a remedy for privacy violations that also caused physical interference with life and property. Later, the law recognized protection for “man’s spiritual nature, of his feelings and intellect” and the right was broadened over time “to mean the right to enjoy life,” and “the right to be let alone.”³ The authors stated that this “development of the law was inevitable” asserting that: “The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition. . . .”⁴

In the next part of the article, Brandeis and Warren turn to an offensive practice that was gaining in popularity—“instantaneous photography.” Mass-produced newspapers had begun “gossip pages,” which widely circulated intrusive portraits of individuals without their consent.”⁵ The authors then reach the central tenet of their article: “It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is.” Brandeis and Warren then go on to explain how they reached their conclusion that there should be a “right to privacy” or a “right to be let alone,” as well as the limitations on this newly conceived right.

And to understand the context of Brandeis' suggested "right to privacy," we have to go back in time one century more.

The Year Is 1789

In 1789, James Madison, twenty years before he would become the fourth President of the U.S., was a member of Congress from Virginia. Madison's story is interesting. Some scholars suggest that, were it not for very bad weather on Election Day, which kept a lot of voters home, he would have lost his Congressional seat to James Monroe (who later would become first a Congressman from Virginia and then the fifth President of the United States). Madison stood no more than five feet, four inches tall and never weighed more than a hundred pounds. Nevertheless, he is known as the "Father of the Bill of Rights"—that is, the first ten amendments to the U.S. Constitution.

The fourth of those Amendments is the one most closely related to the "right to privacy." The Fourth Amendment provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

After the American Revolution had ended, the American people demanded guarantees against "unreasonable searches and seizures." Many Americans had been subject to abuses by British soldiers under what were called "writs of assistance" that allowed the British soldiers to search any place where goods might be found (with no limit in the writ to the place or duration). Colonial officials also utilized "general warrants" that merely specified an offense and let the soldiers decide which persons should be arrested and which places searched. These writs and warrants empowered officials to search at will, and break open receptacles or packages wherever they suspected illegal (or untaxed) goods to be.⁶

The Year Is 1886

Just a few years before Brandeis authored his groundbreaking article on the right to privacy, the U.S. Supreme Court decided the first substantial case involving the Fourth Amendment to the Constitution and the “right to privacy.” In the case of *Boyd v. United States*, the Supreme Court heard a case involving the propriety of using evidence gathered in violation of the Fourth Amendment in a criminal proceeding, and whether a defendant’s Fifth Amendment right against self-incrimination would be violated. Specifically: In 1884, the State of New York sued E. A. Boyd and Sons (Boyd), a company that imported plate glass from England. The State of New York asserted that Boyd never paid customs duty for importing the glass. Several cases of plate glass were confiscated from the defendants by federal customs agents because of suspicion that certain documents had been falsified for the purposes of avoiding customs fees or duties. During the course of the proceedings, the defendants were ordered by the judge to produce documents showing the quantity and value of the shipments. The defendants protested under the theory that they could not be compelled to produce evidence against themselves. Nevertheless, Boyd delivered the evidence to the Court, but asserted that the law unconstitutionally amounted to an unreasonable search and seizure. The Supreme Court held that the Fourth Amendment protected against government action that demanded private papers as a condition of a criminal charge or a forfeiture of property (like a fine). The Court asserted that the Fourth Amendment must be understood in the context of the Revolutionary War’s discussions regarding the searches and seizures in both the Colonies and Great Britain. Historically, the Court noted, British officials would break into homes for the purpose of seizing evidence of tax evasion or political sedition. The Court emphasized that the Fourth Amendment protects “the sanctity of a man’s home and the privacies of life.”⁷

The “privacies of life” includes the ability to exclude the government from one’s home. Thus, Brandeis will be aware of the holding (or outcome) of this case—that there does not need to be a physical invasion of one’s home to constitute a violation of the

Fourth Amendment—both at the time he writes his article, and four decades later, when he is hearing a case as a Justice on the Supreme Court.

The Year Is 1928

Brandeis has now been a Supreme Court judge for more than a decade. A case similar to *Boyd* is now before him, but instead of seizing one's personal papers, the government wanted to seize one's personal conversations. Specifically, the case of *Olmstead v. United States* involved the government installing wiretaps to listen to the defendants' conversations. It is important to note that the government did not break into the defendants' houses—but rather, the wiretap equipment that intercepted the conversations was installed on telephone lines exterior to Mr. Olmstead's house. Recall that the Fourth Amendment protects: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .” Because the wiretaps were placed outside Mr. Olmstead's home, and because the Amendment provides protections for “persons, houses, papers, and effects,” one could ask whether there was any Fourth Amendment violation at all.

Roy Olmstead and his codefendants were bootleggers. Rumrunners. Smugglers. And very successful bootleggers they were. Recall that in the 1920s, alcohol was prohibited in the U.S.—the Eighteenth Amendment (passed in 1919) prohibited the manufacture, transportation, and sale of “intoxicating liquors.” Many citizens ignored the ban on alcohol and opposed the government's role in the private lives of citizens. Federal enforcement of these laws began relying on new kinds of evidence gathering, including by wiretapping phones. Roy Olmstead imported liquor from Canada and sold it throughout Seattle. He had a huge business and employed many people in his enterprise. When the Federal officials wiretapped his phone line, they heard conversations between him and members of his gang, who were all charged with conspiracy to violate the National Prohibition Act.⁸ The Court faced the impact of new technology (in this case, the telephone) and the application of the Fourth Amendment to conditions unimaginable to James Madison, James Monroe, or any of the framers of the Bill of Rights.

In this 5–4 case, the Court reasoned that the wiretaps required no entry into Olmstead’s house or office and thus the wiretap evidence obtained was not unconstitutional under the Fourth Amendment. In addition, the opinion stated that the phone conversations were not the equivalent of sealed letters, which previous Supreme Court decisions had protected from warrantless searches and seizures. The Court stated that the invention of the telephone had not changed the meaning of the Fourth Amendment. “The language of the Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant’s house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched.” Finally, the Court stated that Congress was free to protect telephone communication through legislation, but the courts could not do so without distorting the meaning of the Fourth Amendment. In the majority opinion, Chief Justice Taft reasoned that once a person “projects” his voice over wires exterior to his home, he has lost the ability to control or exclude others from accessing it.

Brandeis did not agree with the opinion. In fact, his dissent in the Olmstead case may be better known than the opinion signed by the majority of Justices. Brandeis wrote about a general “right to be let alone” from government intrusion, and he asserted that the purpose of the Fourth Amendment was to secure that right. Contrary to the majority opinion, Brandeis determined that “there is, in essence, no difference between the sealed letter and the private telephone message.” Brandeis saw no distinction between the government’s opening and reading a sealed letter entrusted to the postal service (citing an earlier case *Ex Parte Jackson*)⁹ and the Government eavesdropping on a phone call over phone lines. Brandeis stated that the protections of the Fourth Amendment did not only apply to the forms of media familiar to the framers of the Constitution. “Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it.” Since Brandeis determined the Fourth Amendment was violated, he also would have concluded that the use of the wiretap evidence had violated the defendants’ Fifth Amendment protection against self-incrimination.

Brandeis's dissent in *Olmstead* was prescient. Brandeis referred to and built upon the Boyd case, and he suggested that the Fourth Amendment extends to concepts of privacy even broader than physical property. His dissenting opinion foresaw that technology would continue to evolve and that the government would eventually have the ability to access “what is whispered in the closet,” the contents of papers without ever removing them from the drawers, and other “intimate occurrences of the home.”¹⁰ Next, Brandeis offers the most famous passage of his dissent:

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 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 against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Brandeis wanted the focus to shift from constitutional protection of places (houses, papers, and effects) to constitutional protections of privacy of the person. In his dissent, he further argued that: “It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property. . . .”¹¹

Brandeis expressed his “right to be let alone” in his dissent—implying, unfortunately, that his view was in the minority. But as times change, laws change as well. There was a time that *Plessy v. Ferguson* was the law of the land¹²—*Plessy* was the 1896 case held that “Separate but Equal” facilities (and, thus, racial segregation) was constitutionally permissible. But, that changed in 1954 with *Brown v. Board of Ed.*,¹³ which overturned *Plessy* by a 9–0 vote, holding that “separate but equal is inherently unequal.” Similarly, Brandeis's dissent in *Olmstead* was proven correct in a subsequent case in 1967, 25 years after Brandeis's death.

The Year Is 1967

Brandeis' views on privacy are celebrated in the *Katz* case.¹⁴ Charles Katz enjoyed gambling. And he was smart enough not to use the phone in his own house. When he wanted to share wagering information, he frequently used a public phone booth on the street. The FBI, suspicious of Katz, installed a microphone on the exterior of the phone booth to record his conversations. In the course of his prosecution, Katz's attorneys asserted that his Fourth Amendment rights were violated.

Recall that the text of the Fourth Amendment protects: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ." Since the microphone was placed outside of his home, on the street, on the outside of a public phone booth, one might wonder whether any violation of the Fourth Amendment occurred. Would there even exist a "right to privacy" in a public phone booth? If you thought the Fourth Amendment was not violated, then you would be correct, according to both the trial court judge and the Court of Appeals.

However, the U.S. Supreme Court felt differently. Justice Potter Stewart wrote the majority opinion overturning Katz's conviction and holding that installation of the listening devices had violated Katz's constitutional rights. The Court rejected the reasoning of *Olmstead* and other decisions that required physical penetration of property to establish a Fourth Amendment violation. Changes in technology, including "the vital role that the public telephone has come to play in private communication," had altered the idea of "trespass" as the Court relied on in the *Olmstead* case. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." The Court famously stated that the Fourth Amendment "protects people—and not simply areas . . ."¹⁵

Brandeis's scholarship—starting with his seminal article on the right to privacy and continuing through his time on the Court—was responsible for this fundamental shift in Constitutional interpretation of the Fourth Amendment. That is, from protection that, on its face, was limited to "The right of the people to be secure in their persons, houses, papers, and effects, . . ." to what became almost synonymous with a "right to privacy,"

Brandeis's views that people are entitled to reasonable expectations of privacy even if they are outside of their own home leads to some very interesting questions. With the development of technology over the last hundred years since Brandeis's nomination to the Court, one wonders what Brandeis might have thought about modern day issues—for example, is there privacy on public streets? Does one have a privacy interest in one's car under surveillance by police (while driving down public roads)? Or what about in one's basement? Would it be okay for the police to monitor the temperature of the basement from the street outside? Does it matter if the curtains are open or closed? Is there a privacy interest in one's completely fenced-in back yard? Assuming nothing is visible from the street, is it permissible that police use airplanes and helicopters (or drones) to peer down? Would it be permissible for the Government to use satellites in outer space for surveillance of suspects or their vehicles?

The Year Is 1989

What would Justice Brandeis think about reasonable expectations of privacy when the government uses advanced technology to increase its ability to perform surveillance? Mr. Riley was a rather entrepreneurial farmer, growing a crop of marijuana inside his Florida greenhouse. The greenhouse, and the fence surrounding his farm, prominently displayed DO NOT ENTER signs. Acting on a tip, the local sheriff flew over the greenhouse with a helicopter. Unfortunately for Mr. Riley, the roof of the greenhouse was missing some shingles, and the police took photos of the marijuana through the holes in the roof. In this case, the Court held that there was no Fourth Amendment violation, because any member of the public could have been operating a helicopter at that altitude, and thus, Mr. Riley would not have had a reasonable expectation of privacy for his property.¹⁶ Justice O'Connor added in her concurrence that in her view, aerial traffic was a common enough occurrence that it would trump any expectation of privacy.

How would Brandeis have considered this issue? He would not have joined the majority. In fact, on this one, he would have been one of the dissenters. In this case, Justice Brennan (joined by Justices Marshall and Stevens) dissented asserting that it was

necessary to consider the frequency of air travel above Mr. Riley’s property, and specifically whether ordinary citizens were normally in the air over the greenhouse:

The police officer positioned 400 feet above Riley’s backyard was not, however, standing on a public road. The vantage point he enjoyed was not one any citizen could readily share. His ability to see over Riley’s fence depended on his use of a very expensive and sophisticated piece of machinery to which few ordinary citizens have access.

To acquire this evidence, the government went through a lot of effort and expense: utilizing a helicopter to fly over his greenhouse and peer into it, combined with expensive photo apparatus. It reminds one of Brandeis’s prediction that “[w]ays may someday be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose a jury the most intimate occurrences in the home.”¹⁷ Taking into account Brandeis’s view that people possess the “right to be let alone,” I believe that Brandeis would have found a Fourth Amendment violation in this case, joining his voice along with those of the three other dissenters. As Brandeis noted in his *Olmstead* dissent, “It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property.”

The Year Is 2001

Danny Lee Kyllo lived in Oregon. Danny was a similar entrepreneurial agriculturalist in the same vein as Mr. Riley—except rather than using a greenhouse, Mr. Kyllo grew his crop in his basement. The Oregon police used a remote sensing device to measure the temperature around his house, and they noticed an inordinate amount of heat coming from his basement. The police presumed that this heat was coming from Mr. Kyllo’s grow-lights, necessary for the marijuana plants to photosynthesize. On the basis of the information gleaned from the thermal imaging device, along with tips from informants and Mr. Kyllo’s higher than average utility bills, the police obtained a warrant and then

found over a hundred marijuana plants inside. Justice Scalia wrote the majority opinion, holding that there was a violation of the Fourth Amendment in this case, because obtaining any information through sensory enhancing technology that one could not normally obtain without intruding into the home would amount to a result of a Fourth Amendment search, and thus, it triggered Fourth Amendment protections.¹⁸

This was another 5–4 case in which one vote could have swung the decision a different way. Justice Stevens argued in his dissent that thermal imaging (alone) did not constitute a search or require a warrant. He reasoned that any person could detect the heat emissions—for example by merely feeling that some parts around the house are warmer than others; or that snow is melting more quickly on one side of the house than the other. Since any member of the public could collect this information, there would be no need for a warrant. Additionally, Stevens argued that *Kyllo* was trying to incorporate something as intangible as “heat” into the realm of “privacy.” Stevens explained that: “Heat waves, like aromas that are generated in a kitchen, or in a laboratory or opium den, enter the public domain if and when they leave a building.”¹⁹ The dissent also noted that there is a long line of cases stating unequivocally that: What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.

Where would Brandeis have come out on this one? With the majority holding that a warrant was necessary to conduct this search? Or with the dissent, asserting that the search was an ordinary one that could have been made by any passerby, required no warrant, and was perfectly reasonable? Personally, I think that Brandeis would have sided with the majority. Given his views that the Courts are to protect “man’s spiritual nature, . . . his feelings . . . his intellect . . . , pain, pleasure and satisfactions of life,” and his view that the founding fathers “sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations,” he would have felt that the Government surveillance in this case would have required a warrant. Recalling the text of the Fourth Amendment’s protections of “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” Brandeis would

have ensured that the burden of proof remain with the Government to demonstrate why the search was reasonable. And, in this case, given that the Special Agent had several compelling justifications for believing that Mr. Kyllo was growing marijuana inside his house, it would not have been difficult to convince a judge merely to issue a warrant for a search. And if it were, for some reason, difficult to convince a judge to issue a warrant, then maybe there was not sufficient evidence to justify the invasion of Mr. Kyllo's "right to be let alone."

The Year Is 2012

Antoine Jones was a nightclub owner in Washington, DC. In 2004, the FBI, along with the DC Police Department, began investigating Mr. Jones on suspicion of cocaine trafficking. As part of the investigation, the police applied for, and got permission from a judge, to attach a Global Positioning System (GPS) device to Mr. Jones' Jeep Grand Cherokee. For four weeks, 24 hours a day, this device tracked Jones' vehicle's movements. Later, as part of his criminal defense, his attorneys protested the use of the GPS data in the trial.

Even though the police in this case had obtained a search warrant, they had not followed the judge's instructions for installation of the device.²⁰ Thus, the case needed to be prosecuted as if the police did not have a search warrant. Justice Scalia wrote the majority opinion for the Court, which held that the Government's attachment of the GPS device to Mr. Jones's vehicle, and its use of that device to monitor the vehicle's movements, did constitute a search under the Fourth Amendment.²¹ The Court reasoned that the Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, *and effects*, against unreasonable searches and seizures" (emphasis supplied). Here, the Government's physical intrusion on an "effect" (Mr. Jones' car [in fact, it was a car registered to Mr. Jones' wife]) for the purpose of obtaining information constitutes a "search." The Court justified its decision, asserting that this type of encroachment on an area enumerated in the Amendment would have been considered a search within the meaning of the Amendment at the time it was adopted.

Justice Brandeis would have been fascinated by this case. As had been mentioned earlier, the legal doctrine of “translation” is used as one way to consider what the “framers” or “founders” would do, if we could teleport them to the twenty-first century and have them opine on technologies that did not exist when they were practicing law. The goal of translation is to preserve the original intentions of the Constitution’s provisions and apply them in present day circumstances. It is not critical that we apply their *words* per se—rather, we apply their *intentions*. In this case, Brandeis would have looked at the facts, including that this GPS tracker was about the size of a credit card, weighed about two ounces, was affixed to the outside of the vehicle, and required no genuine physical trespass into Mr. Jones’ “person, house, papers, or effects.” When one reads the opinion of the Court, along with the various concurrences, one can see the disagreements of the justices. For example, Scalia said (correctly) that we need to examine whether this would have been a search within the meaning of the Amendment at the time it was adopted. His opinion went on to explain that this would imply imagining a constable riding along in a coach with Mr. Jones, taking notes of all of his movements, nonstop, for 24 hours per day, for 28 days. To Mr. Scalia, that clearly would have constituted a search under the Fourth Amendment. On the other hand, Justice Alito published his own concurrence, which concurred in the decision but for different reasons (which distinguishes his opinion from a dissent). Justice Alito finds it very hard to imagine a late eighteenth-century analogy to installation of the GPS tracker as occurred in this case. Brandeis would have chuckled at Alito’s comment that: “The [majority opinion written by Scalia] suggests that something like this might have occurred in 1791, but this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.”²²

So, what would Brandeis have thought about this? First, let’s recall that the Fourth Amendment provides in relevant part that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” Was Mr. Jones in his house? No. He was on a public street. In fact, he wasn’t even the one tracked. It was his car. His wife’s car. His wife’s car’s movements

on a public street. One possibility is that Brandeis might conclude that no search occurred here, since Jones had no “reasonable expectation of privacy” in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible to all.

Brandeis would have recalled some of the Court’s earlier jurisprudence. For example, in *Olmstead*, from which he dissented, the Court held that wiretaps attached to telephone wires on the public streets did not constitute a Fourth Amendment search because there was no entry of the houses or offices of the defendants. He also would recall that the Court abandoned that strictly property-based approach in the Katz case, where they held that “the Fourth Amendment protects people, not places,” and found a violation in attachment of an eavesdropping device to a public telephone booth. He also would have considered the cases of Mr. Riley (aerial surveillance with a helicopter (held: no search, though we think Brandeis would have dissented) and Mr. Kyllo (using remote sensing technology to measure indoor house temperature held to be a search).

On one hand, Brandeis would agree that this particular case of Mr. Jones is an expansion of the Fourth Amendment—in essence, it is a request for what some might consider to be privacy in public. It started with Mr. Olmstead, who expected privacy when he spoke on the telephone from his house. But then, the “circle of privacy” widens: Mr. Katz expected privacy when he used a public phone booth. Later, Mr. Riley expected privacy for the sky above his greenhouse; as Mr. Kyllo expected privacy for the heat rising out of his basement. And Mr. Jones expected privacy when he drove his wife’s car around town. It is not likely that any of these individuals imagined there was the equivalent of a little, tiny constable driving around with him (or flying in a helicopter over his house, or surveilling his basement, or miniaturized and sitting in his phone receiver).

On the other hand, Brandeis might have signed onto Justice Alito’s concurrence. He would have not agreed with the Scalia opinion that a physical trespass (here, putting the device on the car) was required for there to be a search. Remember the passage from Brandeis’s *Olmstead* dissent: “It is not the breaking of his doors and the rummaging of

his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property.” The problem with the majority opinion, Brandeis would reason, is that it implies that when there is no trespass, there is no search. Thus, remote electronic monitoring of individuals would never constitute a Fourth Amendment violation under the majority opinion—it could go on endlessly without any judicial review—something that Justice Sotomayor viewed as inimical to a democratic society, because it could chill the exercise of constitutionally protected freedoms.²³ Brandeis would assert that even when electronic means are the sole method used to violate an individual’s privacy, Fourth Amendment protections are implicated.²⁴

Recalling both Brandeis’s dissent in *Olmstead*, as well as his law journal article from 1890, Brandeis foresaw increasing government intrusion into the private lives of individuals, without the individuals ever knowing: “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 . . . the right ‘to be let alone’ . . . Numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”²⁵ Brandeis was right. The government can do all those things today.

The Year Is Today

My smartphone is next to me as I write this—and I’ll bet yours is near you as you read this. Smartphones are great. They work as flashlights, cameras, navigators, personal shoppers, and some people even use them for talking to each other. But many folks may not be aware that they can also be used to track their owners. This can occur in several ways, but one of them is based on CSLI. That is, when one makes a call, sends or receives a text message, or accesses the Internet, the phone company collects “cell site location information” or CSLI. It makes a log of which cell tower accessed the phone, along with what time you were in that location. In every state, upon request, U.S. law enforcement can access that historical information about your phone without a warrant.

Today's "war on terror" has fundamentally changed Americans' views on privacy. There was a time when people used to lock their luggage before handing it to the airlines. Now, people consent to random bag searches and airline security personnel rummaging through their suitcases daily. This is in addition to passing through millimeter wave scanners, which reveal to airport personnel a virtual, naked image of a traveler. Video surveillance of crowds on the street or at sporting events is another daily occurrence—it's been used in venues ranging from Olympic stadiums to protests and marches to the Super Bowl. After the London bombings in 2005, New York City instituted warrantless searches of luggage and personal belongings of citizens riding the subways.

Perhaps the nature of privacy is changing.

In 2013, Edward Snowden caused the release of thousands of previously classified government documents. The documents revealed the existence of programs by the National Security Agency (NSA) to track cell phone calls and monitor Internet traffic and email of virtually all Americans. Snowden commented: "Even if you're not doing anything wrong you're being watched and recorded."²⁶

Subsequently, in 2014, NBC's Brian Williams interviewed Edward Snowden. Snowden revealed that the NSA can remotely activate your cell phone, so that it seems like it is off, but they can use the microphone and the camera to listen to phone calls and conversations, seeing everything that the camera on the phone would see.²⁷

So, today, the Government can listen to our phone calls, read our emails, track our movements with our cell phones (and activate them remotely so that we wouldn't even know they were turned on) and listen to our conversations and/or video us as we go through our lives. And these are the programs about which we know.

All of this warrantless surveillance would be inimical to Justice Brandeis. These activities seem to go against the very integrity of Brandeis' feelings about privacy. How could they not have a chilling effect on what would otherwise be constitutionally protected freedoms (speech and association, in particular, but life and liberty also). Recall in Justice Brandeis' dissent from *Olmstead*, Brandeis illustrated his understanding that technological advancements and innovation would have adverse impacts for personal

privacy, and thus, the Fourth Amendment needed to be interpreted more broadly in light of such technological innovations. In his dissent, he quoted on an earlier case *McCulloch v. Maryland* for the proposition that: “[W]e must never forget that it is a Constitution we are expounding.”²⁸ Brandeis observed correctly that: “[i]n the application of a constitution . . . our contemplation cannot be only of what has been, but of what may be.” And Brandeis was right. The Constitution, as amended, needs to be interpreted both in light of what has been, what is, and what is still to come. As he profoundly noted 125 years ago: “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 . . . the right ‘to be let alone. . . .’”

As Justice Brandeis noted in his *Olmstead* dissent, technology has continued to evolve, and the government does possess the ability to access “what is whispered in the closet, the contents of papers without ever removing them from the drawers, and other intimate occurrences of the home.” And, that time is now, and that technology is real.

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Notes

1. Some scholarly pieces on application of the Constitution to problems unforeseen by the Founding Fathers include: Lawrence Lessig, *Code: And Other Laws of Cyberspace* (Cambridge, MA: Basic Books, 1999), chapter 9; and James Boyd White, *Justice as Translation* (Chicago: University of Chicago Press, 1990), chapter 6.

2. Louis D. Brandeis and Samuel D. Warren, “The Right to Privacy,” *Harvard Law Review* 4 (1890–1891): 193.

3. *Ibid.*

4. *Ibid.*, 195.

5. Apparently, some things never change—they had the equivalent of supermarket tabloids then as well.

6. See discussion generally in Russell Weaver, “The Fourth Amendment, Privacy, and Advancing Technology,” *Mississippi Law Journal* 80 (2010–2011): 1131, and 1132 n4.

7. The Court also held that forcing the defendant to produce papers violated the Fifth Amendment by forcing Boyd to be a witness against himself. It went on to explain that the Fourth and Fifth Amendment “throw great light on each other. For the ‘unreasonable searches and seizures’ condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, . . . And we have been unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.” *Boyd v. United States*, 116 U.S. 616, 628 (1886).

8. 8. Interesting to note, it was often said that conspiracy charges were easier to prove than the actual liquor law violations themselves. Olmstead was a former police lieutenant. He used the bribes he took in as a police officer to bankroll his bootlegging operations. He procured his liquor in Canada, and Canada charged an extra tax on liquor destined for the U.S. Olmstead lied to Canadian authorities saying he was shipping the liquor to Mexico. Thus, he got liquor at a far cheaper price than other bootleggers. At his peak, he was delivering over 200 cases of liquor daily to Seattle residents, hotels, and restaurants. He had an expensive house and opened Seattle’s first radio station. Since he bribed the Seattle police and local sheriffs to look the other way, he only needed to be concerned about the Feds going after him.

9. 96 U.S. 727 (1877).

10. *Olmstead*, at 473–474, (Brandeis J., dissenting).

11. *Id.*, at 474–475.

12. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

13. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

14. *Katz v. United States*, 389 U.S. 347 (1967).

15. *Katz*, at 353.

16. *Florida v. Riley*, 488 U.S. 445, 446 (1989).

17. *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting)

18. *Kyllo v. United States*, 533 U.S. 27, 35 (2001).

19. *Kyllo*, Justice Stevens, dissenting, joined by Chief Justice Rehnquist, O'Connor, and Kennedy.

20. Specifically, the judge authorized installation of the device in the District of Columbia within ten days of the issuance of the warrant; the police, however, installed the device on the eleventh day and in Maryland. The GPS data were relevant because they connected Jones to the alleged conspirators' stash house that contained \$850,000 in cash, 97 kilograms of cocaine, and 1 kilogram of cocaine base.

21. *United States v. Jones*, 132 S.Ct. 945 (2012).

22. *Jones*, J. Alito, concurring, fn3.

23. *Jones*, at 956, (J. Sotomayor, concurring).

24. In the case of *Goldman v. United States*, 316 U.S. 129 (1942), the Government installed a listening apparatus (a "detectaphone") in the office next to the defendants which had the capacity to amplify sound waves so conversations could be heard in the next room. In that case, the court found no trespass, and thus no Fourth Amendment violation. Brandeis would have dissented in that case, along with Justice Murphy, who wrote: "science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment." *Id.*, at 139 (Murphy, J. dissenting).

25. Brandeis and Warren, "The Right to Privacy," 195.

26. <http://www.cnn.com/2013/06/10/politics/edward-snowden-profile/> (last visited Nov. 15, 2015).

27. <http://money.cnn.com/2014/06/06/technology/security/nsa-turn-on-phone/> (last visited Nov 15, 2015).

28. *McCulloch*, 17 U.S. (4 Wheat) 316 (1819).

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