The Right to Privacy

in communication:

The old technologies and the new
Bentham’s Panopticon, 1787

a building designed so all the residents can be monitored –

the important thing is not so much 24/7 surveillance, but establishing a sense that you are always at risk of being watched.

technology—in this case, the design of a building—can be used to regulate privacy.
The structure would be suitable for,

“punishing the incorrigible, guarding the insane, reforming the vicious, confining the suspected, employing the idle, maintaining the helpless, curing the sick, instructing the willing in any branch of industry, or training the rising race in the path of education, in a word... houses of correction, or work-houses, or manufactories, or hospitals, or schools.”

Is there privacy in any of these institutions?
Privacy is both a social practice and a legal right

Although we keep hearing that privacy is dead, people still find a need for it.

In what ways has privacy changed for you in the past few years?

How has technology been involved in that change?

Facebook’s Mark Zuckerberg telling an interviewer that we have moved beyond privacy.
that which is true; but it is to be recollected, that the question at present is not as to the moral, or even legal delinquency of one who publishes the truth, with a malicious design to create mischief, but whether the party, concerning whom nothing more than the truth is published, has such a right to privacy and concealment, as shall, even in point of reason and natural justice, entitle him to a compensation in damages from one who publishes the fact. Now, it may be observed, in ad-

An early citation for “right to privacy” associates invasion of privacy with publication.

from Thomas Starkie, A treatise on the law of slander and libel, 2e London 1830, Vol 1, p. liv.
The case of *Prince Albert v. Strange*: Queen Victoria and Prince Albert made sketches of family and other subjects, and had them turned into etchings to be given to friends and family.

In 1849 Strange published a catalogue of the private etchings done by Prince Albert and Queen Victoria; he had obtained the etchings from a light-fingered printer.

Albert sued Strange to enjoin the exhibition of the images and the publication of a descriptive catalogue, claiming the etchings were private, and not published to the world.

The court agreed with the Prince.
One of Victoria’s “secret” etchings. A batch of them were recently found in a box in an attic and auctioned by an anonymous owner in January, 2013. Other etchings with a clearer provenance—the were given to one of Victoria’s friends—are on offer at the Belgravia Gallery.
In *Albert v. Strange*, the court considered this argument:

If a party published a drawing of a house or tree belonging to another person, could the owner restrain him by an injunction, because his privacy was invaded?

The question here is, how far the publication of this Catalogue is in violation of the law? That there is property in the ideas which pass in a man's mind is consistent with all the authorities in English law. Incidental to that right is the right of deciding when and how they shall first be made known to the public. Privacy is a part, and an essential part, of this species of property.

Prince Albert’s etching, “Bearded Oriental Head,” is going for £6000 at the Belgravia Gallery.
In 1890, Samuel Warren and Louis D. Brandeis asked how the law can accommodate the challenges to privacy posed by such new technologies as photography and the daily newspaper:

Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the house-tops.”

Warren and Brandeis complained:

For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; and the evil of the invasion of privacy by the newspapers, long keenly felt.
Warren and Brandeis also complain that “gossip has become a trade.”

Weddings, especially society weddings, are more or less public events, so it’s not surprising to see newspapers covering them.

Even more intrusive than wedding stories are ones like the Washington Post’s report of the sudden death of Warren’s sister-in-law.

The story ran on page 1 under the headline, “Death’s Sad Summons.”

Nowhere did the story state that Katie Bayard had committed suicide by overdosing on sleeping meds, but everybody knew.

Washington Post, Jan. 17, 1886
In any case, Warren and Brandeis warned that changing technologies were eroding the private sphere.

A history of these technologies shows how this came about:

The printing press made text reproduction faster than copying by hand, but for centuries the process remained labor-intensive, and the number of copies the press turned out was pretty small.

In the 19th century, print technology changed radically.

Working replica of Gutenberg’s first printing press; Gutenberg adapted a wine press for his new print technology.
The rotary steam press (1814) automated printing and doubled output over the older manually-operated flat-bed screw press.

The *Times* of London was the first newspaper to use Koenig’s rotary steam press.

Now newspapers could print many more copies of many more pages.

They needed more stories to fill these pages.
In addition, a new photoengraving process called *rotogravure*, invented in the late 19th century, made it possible to print photos, not just line drawings or engravings, in periodical publications.

Rotogravure allowed an image to be transferred to a cylinder and printed on a rotary steam press, and presto, instead of weeklies illustrated with engravings, you have daily newspapers with photographs.

Newspapers needed more photographs to fill their pages.
Photography itself is an art that invades privacy.

Invented in the 19th century, it changed notions of how we represent the natural world, and it reconfigured our notions of privacy.

Photography, held to be more realistic than drawing, could be seen as eliminating the role of the artist:

> All nature shall paint herself —

Henry Fox Talbot, *The Pencil of Nature*

In the early 1840s, Henry Fox Talbot “photographed” this fern by placing it directly on a piece of photosensitive paper and then putting it in the sunlight for several minutes.
It is not the artist who makes the picture, but the picture which makes *itself*—

To photograph this “library,” Fox Talbot took the bookcase outdoors and set it in the sun, then exposed the photosensitive paper for several minutes.

One effect of de-emphasizing the role of the artist in photography is to take artistic responsibility, or culpability, out of the hands of the photog.

Of course this is a fiction: photography may seem more realistic than other reproductive arts, but it is not.
Warren and Brandeis warn of the assault on the right to be let alone that is posed by technological innovations:

- newspaper photography—essentially, a fear of paparazzi—
- and gossip columnists, whose articles frequently appeared as page 1 news.

No longer do subjects have to pose to have their picture taken. New developments in photography, like the portable camera, allow the photographer to take surreptitious photos outdoors, in public, and publish these photos in the newspaper without the subject’s consent.

Ad for early Kodak portable automatic camera:

“You press the button, we do the rest.”
Warren and Brandeis observe, that the stresses of modern life make privacy both more important, and harder to obtain:

As civilization progresses, the need to retreat from the world increases, and we seek out privacy.

Modern enterprise and invention have, through invasions upon privacy, subjected people to mental pain and distress, far greater than could be inflicted by mere bodily injury.
Is privacy different for public figures and for private individuals?

Warren and Brandeis propose a right to privacy that encompasses more than our spoken and written thoughts:

a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.

To demonstrate that the press is not always intrusive, even when the person is a public figure:

Warren eventually left his law practice with Brandeis to run his family’s business, though he remained a public figure in Boston’s art world. When he committed suicide in 1910, the cause of his death was reported as apoplexy.
But new technologies invade the privacy of private persons.

This 1897 pamphlet from the Rochester Optical Company, a Kodak competitor, encourages amateur photographers to catch their subject unawares:

*Instantaneous Photography* possesses a fascination peculiar to itself; the amateur feels a peculiar desire to take “something,” and if that “something” be an animate object, unconscious of his presence, so much the better, and with what a thrill does he see his first “snap shot” develop up, whether a railroad train, trotting horse, or a man hurrying along the street, whom he has transfixed with one foot on the ground, the other in the air, and his whole figure in an attitude that the original would repudiate, and declare he never assumed such a position, were the proof not against him.

[Carlton 1897, 38]

How do advances in camera technology today impact the notion of privacy?
In addition, the potential to use the camera as a surveillance tool was recognized early on. In 1844, Fox Talbot, a pioneer in photography, envisioned this scenario based on his experience with simple pinhole, black-box cameras:

I would propose to separate ... invisible [i.e., ultraviolet] rays from the rest, by suffering them to pass into an adjoining apartment through an aperture in a wall or screen of partition. This apartment would thus become filled (we must not call it illuminated) with invisible rays, which might be scattered in all directions by a convex lens placed behind the aperture. If there were a number of persons in the room, no one would see the other: and yet nevertheless if a camera were so placed as to point in the direction in which any one were standing, it would take his portrait, and reveal his actions.

And this note written in 1888 envisions the camera as a burglar alarm, with a trip wire setting off the shutter and the flash:

As soon as [the burglars] had begun operations the police would be alarmed, and at the same instant a picture of the men would be made by the camera and the flash-light combined, so that even if the men escaped the police, they would leave behind them evidence which would very probably eventually result in their detection.

[“Flash-light Photography” 1888, p. 3]
The British police began to use surveillance photography to monitor suffragists. The assumption is that the camera doesn’t lie; but as these photos show, it can distort the truth.

Left: Jailed Suffragist Evelyn Manesta, photographed at the door of a prison. Right: That doctored photograph as it appeared on a “wanted” poster after her release.
Can you photograph anything or anybody?

Pretty much, in the U.S.; even after 9/11, no laws were passed prohibiting photos of bridges, industrial plants, or trains, so long as you don’t trespass on private property.

News photography in particular is protected under the First Amendment, but here’s a question:

with the spread of online photography and video sites like YouTube and Instagram, the definition of who counts as a journalistic photographer is expanding, or at least becoming problematic

it may be a stretch to argue that anyone posting a silly cat photo online is publishing news, but it’s also true that many news outlets regularly ask readers to upload eyewitness images of breaking stories such as natural disasters, fires, accidents, or crimes.

Video is another matter: while image surveillance in public, even by private individuals, remains generally legal, some states treat the sound track of a video separately, under more-restrictive anti-wiretapping legislation.
The telephone and privacy:

Warren and Brandeis discuss photography and journalism, but they don’t worry about how the telephone, which was becoming popular when they were writing in 1890, invades our privacy.

In the early days of telephony, phones were placed in public locations and you had to shout into them to be heard; privacy, perhaps desirable, was not really possible.

Some early observers feared that phone lines strung high over city streets would capture not just phone conversations, but everything anyone said out loud. In 1877, the New York Times lamented in a story about this new technology,

No matter to what extent a man may close his doors and windows, and hermetically seal his key-holes and furnace-registers with towels and blankets, whatever he may say, either to himself or a companion, will be overheard. Absolute silence will be our only safety.
It took a while for privacy law to catch up with advances in phone technology:

- operators routinely listened to phone conversations as part of their job
- the police carried out warrantless phone taps because the law didn’t require a warrant, and besides, the innocent had nothing to fear

In 1916, New York City’s Police Commissioner told a congressional hearing on wiretaps,

> No one in this town need have any fear that his conversation will be listened to unless he is a crook. We will not listen in on any wire except we are convinced that a crime has been committed or that there is a good chance to prevent crime.
In *Olmstead v. United States* (1928), the Supreme Court approved police wiretaps, because, even though the 4th Amendment banned warrantless searches, “illegally-obtained evidence was still admissible.”

But Supreme Court Justice Louis Brandeis wrote a strong dissent in *Olmstead* that paved the way for a reversal 40 years later:

> The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man’s telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping.

[Writs of Assistance and General Warrants had been used by the British to detain and punish colonists in early America; that practice led to the passage of the 4th Amendment.]
Brandeis even anticipated advances in technology that would create still greater governmental invasions of privacy:

Ways may some day 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 to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping.

[Olmstead 1928. 474; here Brandeis anticipates not just today’s CCTV monitoring, spy satellites, and NSA data mining, but also government-sponsored neuroscience research into lie detection and mindreading, which remain, at least for now, in the realm of science fiction.]
Here’s what Brandeis has to say to counter the argument that only the guilty need fear government surveillance:

Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

[Olmstead, 479]
In *Katz v. United States* (1967), the Supreme Court finally put an end to warrantless wiretaps, until the passage of the USA PATRIOT Act in 2001:

In its argument in *Katz*, the government insisted that telephone booths were not private places, and so a caller would have no expectation of privacy.

But the Court disagreed, ruling that “what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”

The British artist Banksy comments on government surveillance today. April, 2014.
Writing for the Court, Justice Potter Stewart says,

The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth, and thus constituted a “search and seizure” within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance. [Katz, 353]

But in his dissent, Justice Byron White would make a national security exception for such wiretaps that anticipates today’s issues with warrantless NSA surveillance:

We should not require the warrant procedure and the magistrate’s judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable. [Katz, 364]
New technologies pose new problems for maintaining privacy:

In **U. S. v. Jones** (2012), the Supreme Court ruled that placing a GPS device on a suspect’s car constituted a search under the Fourth Amendment.

The government argued that Jones, a suspected drug dealer, had no expectation of privacy in the area where the GPS tracker was placed, the underside of his car.

The Court disagreed—unanimously—citing **Katz v. United States**, 389 U. S. 347: the Fourth Amendment protects a person’s “reasonable expectation of privacy.”

Although the warrant for placing the GPS device had expired, and the DC police placed the device on the car while it was in Maryland, outside their jurisdiction, the Court did not rule whether the search in **Jones** was unreasonable. The case was remanded for retrial.

**sidebar:** cell phones now typically come with GPS which monitors location—unless it is turned off—and can this supply your location not just to government agencies—with a warrant, or without, as per USA Patriot Act warrantless searches—but also to anyone willing to pay for that data because of its marketing value. Many cars also come with GPS trackers built in.
The cone of silence: maybe the *New York Times*’ warning that the telephone would make privacy impossible wasn’t so far-fetched after all.