FREE SPEECH, PRIVACY, AND THE WEB THAT NEVER FORGETS

BY JEFFREY ROSEN*

Thank you so much and good morning. It is a great pleasure to be here. As Paul Ohm said, my interest in the fascinating subject of how to reconcile free speech and privacy, in an age when the Web never forgets, began with a conversation that we had about a year ago. Paul's work—and the center he's established here—have been invaluable in exploring the tensions between free speech and privacy on the Internet, and I can't think of a better place to talk about these challenging issues. So I am much looking forward to our conversation.

Keynote address sounds a little grand, but I'm at least supposed to set the stage for our discussions. And, what I want to say is this: new media technologies are presenting wrenching tensions between free speech and privacy. Around the world citizens are experiencing the difficulty of living in a world where the Web never forgets, where every blog and tweet and Facebook update and MySpace picture about us is recorded forever in the digital cloud. This experience is leading to tangible harms, dignitary harms, as people are losing jobs and promotions. But—and this is a big "but"—law is not always a good remedy for these harms. Although there are proposals in Europe and around the world to create new legal rights of oblivion that would allow us to escape our past, these rights pose grave threats to free speech.[1] And if forced to choose between my privacy instincts and my free speech instincts, I have no hesitation in this case in choosing free speech over privacy. So if there are to be remedies for the problem of digital forgetting, my sense is that the most promising ones involve technology and norms and not law.

Let's begin with a reluctant icon of the problem of digital forgetting, because it's hard to talk about a privacy problem without putting a face to it. The privacy icon that is bringing home to people the

* Jeffrey Rosen is a professor of law at The George Washington University and the legal affairs editor of The New Republic. He the author of The Supreme Court: The Personalities and Rivalries that Defined America, The Most Democratic Branch, The Naked Crowd, and The Unwanted Gaze. Rosen is a graduate of Harvard College, summa cum laude; Oxford University, where he was a Marshall Scholar; and Yale Law School.

1. *See infra* notes 36 & 43-46 and accompanying text.

dangers of a Web that never forgets is Stacy Snyder. She is the young woman who was about to graduate from teachers college, and days before her graduation her employer, a public high school, discovered that she had posted on MySpace a posting criticizing her supervising teacher and a picture of herself with a pirate's hat and a plastic cup and she had put the caption "drunken pirate" under it.[2] The school concluded that she was behaving in an unprofessional way and promoting underage drinking. Therefore, they did not allow her to complete her student teaching practicum.[3] As a result, her teachers college denied her a teaching certificate.[4]

She sued and invoked the First Amendment, claiming she had a free speech right to post the MySpace picture.[5] A federal judge rejected her claim on two grounds.[6] He said, first, that she was a public employee and, second, that her speech did not relate to a matter of public concern.[7] Because Snyder lost her lawsuit, she never graduated from teachers college, and she is now working in human resources.[8]

The unfortunate case of Stacey Snyder sums up the problem of what to do when we've posted embarrassing information about ourselves and have trouble getting it back down. Claiming we have a free speech right doesn't work under American law. Nor could she attempt to claim that she has a constitutional privacy right against MySpace, a private corporation.

If Stacey Snyder were in Europe, she might claim that her dignitary rights had been assaulted, and she might demand that Google and Yahoo remove all references to the picture by invoking a new right proposed by the European Union and the French data protection President, namely a right to oblivion.[9] This is an extremely French notion. In America we want to be remembered; the French want to be forgotten. It's straight out of Sartre. And the French data protection President, Alex Türk, has proposed that you should be able to remove embarrassing information about yourself.[10] Google and Yahoo should not be allowed to index the picture even if they want to, and they should

2. Snyder v. Millersville Univ., 2008 U.S. Dist. LEXIS 97943 (E.D. Pa., Dec. 3, 2008).

3. *Id.* at *6-8.

4. *Id.* at *8-9. Instead of receiving a Bachelor of Science with a teaching certificate, Snyder graduated with a Bachelor of Arts in English. *Id.* at *2.

5. *Id.* at *15-16.

6. *Id.*

7. *Id.* at *16.

8. Jeffrey Rosen, *The Web Means the End of Forgetting,* N.Y. TIMES MAG., July 21, 2010, at MM30.

9. *Data Protection Reform – Frequently Asked Questions*, EUROPA, Nov. 4, 2010, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/542&format=HTML&aged=0&language=EN&guiLanguage=en (last visited May 13, 2011).

10. *Id.*

have to pay you damages if they index the picture in ways that cause you moral harm. Now this obviously raises tremendous free speech implications. I had a good debate with the French data protection President[11] in Jerusalem at a recent privacy conference,[12] and I asked about the details of how the right to oblivion would to be implemented. Well, he suggested, you would need an international tribunal of forgetfulness to adjudicate on a case-by-case basis what pictures had to come up and what came down. Who would decide what was worthy and what was free speech? "Well, experts would decide this sort of thing."

This is an area where Europe and America very much diverge, and I'm curious to take a pulse of the audience right now. If forced to choose right now, without more details, would you endorse a legally enforceable right to oblivion or do you prefer the free speech side? Who would choose the right to oblivion? And who would prefer free speech? I'm not surprised to see such a strong majority for speech. That's the American way.

Stacy Snyder may be the modern icon, but obviously this is not a new problem. It goes back to Brandeis. You'll forgive me for proselytizing, but I am writing about the relevance of Louis Brandeis today, and when it comes to the tension between free speech and privacy, Brandeis is both our greatest prophet of protecting privacy in an age of new technologies and of protecting free speech in an age of expanding democracy. How would he come down on the tension between two liberties he cared passionately about?

Brandeis's famous article on the right to privacy in 1890, of course, was reacting to a particular technology, the instant camera and the tabloid press.[13] He said they ensured that what once was whispered in the closets was now shouted from the rooftops.[14] "To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers[,]" he wrote. "To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle."[15] The item that upset Brandeis is conventionally said to have been a mild society item in the Boston tabloids about

11. Alex Türk is the president of France's National Commission on Informatics and Liberties. *Alex Türk – President of CNIL,* NAT'L COMM'N ON INFORMATICS AND LIBERTIES (CNIL), http://www.cnil.fr/la-cnil/qui-sommes-nous/equipes/la-commission/alex-turk (last visited Apr. 20, 2011).

12. The 32nd Annual Conference of Data Protection and Privacy Commissioners was held October 27, 2010, in Jerusalem, Israel. *See* 32ND INT'L CONFERENCE OF DATA PROT. & PRIVACY COMM'RS, http://www.justice.gov.il/PrivacyGenerations (last visited Apr. 20, 2011).

13. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

14. *Id.*

15. *Id.* at 196.

Brandeis's partner's daughter's wedding breakfast.[16] This can't have been the case, because as Brandeis's biographer, Melvin Urofsky, said, the daughter was only a few years old at the time.[17] But Brandeis himself said that Samuel Warren, his co-author, was concerned about the intrusions on social privacy by the tabloid press.[18] As a result of these intrusions, Brandeis proposed the four Brandeis torts, which sounds like a yummy dessert.[19] But they proved in practice, for reasons Neil Richards will explore today, to have been an inadequate way of protecting privacy in an age of new technology.[20]

The reasons that the Brandeis torts largely failed are, first, because they pose grave threats to free speech and require decisions about who is a public figure and who is not—a concern that, as David Lat will describe, is more and more difficult in an age when everyone has his or her 15 minutes and everyone is a micro public figure with a few Twitter followers. *The New York Times* reported on a 26-year-old Manhattan woman who said that she is afraid of going out on dates and being tagged in online photos because it would reveal that she only wears two outfits.[21] "You have movie star issues," she said, "and you're just a person."[22]

In Brandeis's day you had to be a Boston aristocrat to be gossiped about in the tabloids, and now all of us are experiencing the indignity of being tagged and commented on. Trying to identify who is a public figure and who is not is increasingly elusive. So, that is one reason the Brandeis torts failed, and it's all the more difficult now that the scope of people who are being commented on has so dramatically increased. Brandeis and Warren were concerned about a few Boston tabloids; now Facebook has more than 500 million members who share more than 30 billion pieces of content a month.[23] The sheer scope of the gossip is so extreme that the idea that law could constrain it is more implausible than ever.

Another reason the Brandeis torts failed is because they all depend on some social consensus about what sort of invasions are highly offensive to a reasonable person or outrageous according to existing social

16. Dorothy Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 1 (1979) (citing Letter from Roscoe Pound to William Chilton (1916), *in* ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 70 (1956)).

17. *Id.* at 5 (citing William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383-84, 423 (1960)).

18. *Id.* at 6 (citing MASON, *supra* note 16, at 70).

19. Warren & Brandeis, *supra* note 13, at 214-18.

20. *See* Neil M. Richards, *The Limits of Tort Privacy*, 9 J. ON TELECOMM. & HIGH TECH. L. 357 (2011).

21. Rosen, *supra* note 8, at MM30.

22. *Id.*

23. *Statistics*, FACEBOOK, https://www.facebook.com/press/info.php?statistics (last visited Apr. 16, 2011).

norms. And, as sexual mores changed, as gender equality grew, juries and citizens could no longer agree about what sort of intrusions were highly offensive—a problem that's only exacerbated by the volume of content on the Web.

There has also been a transformation in the idea of gossip itself and of its status in our society. Gossip is conventionally defined as idle talk about the personal or private affairs of others.[24] I am not concerned right now about rumors, which may be false. I want to focus on truthful, but embarrassing, private gossip about the personal affairs of others. In Brandeis's day, Brandeis lamented the idea that a focus on private matters could crowd out the attention in the public sphere that could be devoted to matters of public concern. "Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things,"[25] he wrote. Today, we lack that confidence about the importance of maintaining the boundaries between higher and lower discourse. Now the personal is political; authenticity is more important than reticence, and disclosure norms are being transformed. Talk about private affairs, from Eliot Spitzer to the Duke lacrosse players, is inherently considered a matter of public concern, and we do not want judges deciding in advance what people should be interested in.[26] So the idea that off-the-record conversations, as these WikiLeaks show so dramatically, shouldn't be attended to in the public sphere is not something that we are willing to accept.

There is yet another difference between Brandeis's day and ours that makes the idea of the Brandeis torts hard to enforce. And that's the end of the distinction between oral and written gossip. E.L. Godkin wrote an article on gossip just around the time that Brandeis wrote his famous article, and emphasized that oral gossip was less of a dignitary harm because it didn't have to be responded to; it didn't assault your public face if you knew your neighbors were gossiping about you behind your back.[27]

By contrast, once something was written down in the press it

24. *See*, *e.g.*, NEW OXFORD AMERICAN DICTIONARY 750 (3d ed. 2010) (defining gossip as "casual or unconstrained conversation or reports about other people . . . a person who likes talking about other people's private lives").

25. Warren & Brandeis, *supra* note 13, at 196.

26. *See* Danny Hakim & William K. Rashbaum, *Spitzer is Linked to Prostitution Ring*, N.Y. TIMES (Mar. 10, 2008), http://www.nytimes.com/2008/03/10/nyregion/10cnd-spitzer.html?pagewanted=all; Duff Wilson, *Lawyer Says Two Duke Lacrosse Players Indicted in Rape Case*, N.Y. TIMES, Apr. 18, 2006, at A23.

27. E.L. Godkin, *The Rights of the Citizen: IV. To His Own Reputation*, 8 SCRIBNER'S MAG. 58, 66 (1890).

required a response. Facebook has literally exploded that distinction, and gossip that used to be spoken is now written down and has to be responded to, a transformation that is also challenging the distinction between the low and high press. It used to be, even during the Clinton era, that if something was in the *National Enquirer*, you didn't have to respond to it, but if it was in *The New York Times*, you did. Now the *National Enquirer* itself is breaking sex stories of political significance, such as Al Gore's poodle-like indiscretions,[28] and the idea that there is a distinction between the *Enquirer* and the *Times* is under stress. In other words, the Brandeis torts were on life support even before the explosion of the Internet. The 'Net has only added increasing pressure that makes it hard to resurrect them.

In the U.S., as a result of these pressures, we've drawn what I think is a fairly sensible legal line which is that very little truthful but embarrassing speech is actionable. Only outrageous sexual surveillance in its most pristine form—hidden cameras of sexual activity—is actionable, but little else is. The Rutgers suicide case is a good example here of the kind of privacy invasion that almost everyone thinks should be actionable.[29] This is the tragic case of the young Rutgers student whose roommate turned on a Webcam in their shared dorm and live-broadcasted his dorm room intimacies.[30] The young man was so upset that days later he committed suicide.[31] The roommate and an accomplice are being charged under New Jersey law, and everyone expects them to get serious jail time.[32] Rutgers students are debating whether a five year sentence is too harsh, but few people are disputing that extreme sexual surveillance should be actionable.

What about sexual surveillance in written form, by the blogosphere rather than by the cameras? Here the paradigm case is "the Washingtonienne."[33] A few years ago a blogger, Jessica Cutler, a Capitol Hill staffer for a Republican senator, chronicled her sexual experiences with six different men whom she identified by initials and in some cases by name, including details of their performances and proclivities.[34] One of them, Robert Steinbuch, a fellow staffer, sued Cutler as well as

28. *Al Gore Sex Scandal*, NAT'L ENQUIRER (June 29, 2010, 11:00 PM EDT), http://www.nationalenquirer.com/celebrity/new-evidence-revealed-gore-sex-scandal-victim-tells-all.

29. Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 30, 2010, at A1.

30. *Id.*

31. *Id.*

32. *Id.* (Both were charged with two counts of "invasion of privacy"; the most serious charge has a maximum penalty of five years in prison).

33. *See* Dan Glaister, *Washington Gets Ready to Gossip as DC Sex Blog Goes to Court*, GUARDIAN, Dec. 28, 2006, at 21.

34. *Id.*

Hyperion, which published the inevitable tell-all book that followed.[35] In 2006, a district judge refused to dismiss the lawsuit against Cutler, who went bankrupt, and the Eighth Circuit refused to dismiss the lawsuit against Hyperion.[36] Two years later, the publisher settled with Steinbuch.[37] This shows how hard it is to recover for privacy invasions that are quite dramatic. Had the case gone to trial, Steinbuch might have lost. Was Steinbuch a public figure or not? Was the blog widely circulated? Was the speech a matter of public concern? All of that might have come out at trial, but because of the dangers of litigation the publishers settled and Steinbuch feels vindicated. He is now a law professor at the University of Arkansas,[38] but clearly lawsuits are not a meaningful remedy for most people without very strong stomachs, if not deep pockets. So that's the American line: sexual surveillance by camera or possibly in blogs is possibly actionable, but very little else is, and I think that's a very good legal line to draw that respects free-speech values.

What are alternatives? As I said, other countries are exploring different models that would create legally enforceable rights to forgetting, and the harbinger here is Argentina. Argentina has no fewer than 130 cases pending to force search engines to remove or block offensive content.[39] The leading case about the right to forgetting in Argentina involves a pop star called Virginia da Cunha.[40] She was the lead singer of a band called Bandana who indiscreetly took some racy pictures of herself voluntarily, and they were posted online.[41] After the fact, she thought the better of these pictures and decided that, although she had posed for them voluntarily, they affronted her moral dignity.[42] A judge agreed that there was a dignitary offense to having these pictures out there, and the judge ordered Google and Yahoo to pay 50,000 pesos each in damages simply because their search results had included pictures

35. *Id.*; JESSICA CUTLER, THE WASHINGTONIENNE: A NOVEL (2005).

36. Steinbuch v. Cutler, 2006 U.S. Dist. LEXIS 19025 (D.D.C. Apr. 14, 2006) (denying Cutler's motion to dismiss); Steinbuch v. Cutler, 518 F.3d 580 (8th Cir. 2008) (reversing dismissal against Hyperion).

37. Jeffrey Rosen, *Privacy Strikes Back - How to Stop Cyber-Bullies,* NEW REPUBLIC, Nov. 11, 2010, at 6.

38. *Bio: Robert Steinbuch*, UNIV. OF ARK. AT LITTLE ROCK WILLIAM H. BOWEN SCH. OF LAW, http://www.law.ualr.edu/faculty/bios/steinbuch.asp (revised Aug. 17, 2010).

39. *Yahoo! Declared Not Liable for Defamation in Argentina,* YAHOO! BUS. & HUM. RTS. (Aug. 26, 2010, 9:43 PM), http://www.yhumanrightsblog.com/blog/2010/08/26/yahoo-declared-not-liable-for-defamation-in-argentina/.

40. *See generally* Vinod Sreeharsha, *Google and Yahoo Win Appeal in Argentine Case*, N.Y. TIMES, Aug. 20, 2010, at B4.

41. *See generally* Lance Whitney, *Google, Yahoo Win Argentine Celebrity Search Case*, CNET NEWS (Aug. 20, 2010, 11:58 AM PDT), http://news.cnet.com/8301-13578_3-20014265-38.html.

42. *Id.*

of Da Cunha that were linked to erotic content.[43] Yahoo said that the only way to comply with the injunctions would be to block all sites that refer to a particular plaintiff.[44] That might be feasible in a Google situation where there is a country-specific website like Google Argentina.[45] But Yahoo is now using Bing[46]—which may only have one platform—so to block references to this pop star on Bing means all references to her would turn up no search result.

This strikes me as an Orwellian vision of rewriting history on a selective basis. And you can imagine all sorts of cases where the pop star might have decided to run for office, as European porn and pop stars tend to do, became embarrassed about the search results, and then demanded that all references to herself be blocked because of her interest in escaping her past.

My First Amendment knee jerked at this, but I was struck to see how seriously Europe is debating creating broad rights of oblivion. Not only Alex Türk, but Viviane Reding, the European minister for justice and civil rights, has proposed a right to be forgotten that would require a search engine to ignore tagged results.[47] There's another EU proposal to create a legal right to disappearing data,[48] raising all sorts of legal questions. Would the user's right be against Facebook to delete the information that he wrote on his Facebook account? If so, would the same right apply when a third-party Facebook user copied and forwarded the information? Would we need a new definition of data ownership? The details of implementing this right would be complicated, in addition to posing lots of free-speech problems. There may be a big conflict between Europe and America. And we, as privacy and free-speech scholars, will have to debate vigorously where to draw the lines.

There are other proposals in the U.S. to expand the tort and contractual remedies for dignitary invasions. My colleague at George Washington, Daniel Solove, proposes expanding breach of confidence

43. Sreeharsha, *supra* note 41; Juzgado Nacional de Primera Instancia [1a Inst.], 29/7/2009, "Da Cunha Virginia c. Yahoo de Argentina SRL y otro s/ Daños y perjuicios", No. 75, Expte. No. 99.620/06) (Arg.).

44. Sreeharsha, *supra* note 41.

45. *See* Google Argentina, http://www.google.com.ar (last visited Apr. 17, 2011).

46. Nancy Gohring, *Yahoo Moves to Bing in North America*, REUTERS (Aug. 24, 2010, 8:43 AM EDT), http://www.reuters.com/article/2010/08/25/urnidgns852573c40069388088257789006eb-idUS129778380120100825.

47. Leigh Phillips, *EU to Force Social Network Sites to Enhance Privacy*, GUARDIAN (Mar. 16, 2011, 17:38 GMT), http://www.guardian.co.uk/media/2011/mar/16/eu-social-network-sites-privacy.

48. Jason Walsh, *When it Comes to Facebook, EU Defends the "Right to Disappear"*, CHRISTIAN SCI. MONITOR (Apr. 6, 2011), http://www.csmonitor.com/World/Europe/2011/0406/When-it-comes-to-Facebook-EU-defends-the-right-to-disappear.

suits so you could sue your Facebook friends for breaching confidence if they violate your privacy settings.[49] That would keep the plaintiffs' bar very busy, in my view. And the practical difficulties of suppressing that volume of speech concern me, as well as the free-speech issues, which are complicated. My instinct in all of these cases is that law is too heavy-handed an instrument and technological solutions are better.

So the solution I like best is proposed by Viktor Mayer-Schönberger in his wonderful book "Delete." That solution is expiration dates for data.[50] Facebook could, if it chose, encourage the development of apps that would allow us, when we post that drunken picture from Cancun, to specify whether we want the picture to stay up there forever or for three months or for three days. And Google, of course, now has an app that asks you when you post e-mails at midnight on Saturday when you may be tipsy, "are you sure you really want to do this?"[51] The combination of persuasive technologies like that combined with a specification that the picture should only last for three days when it's posted on a Saturday evening would go a long way toward solving the problem.

Facebook has been reluctant to encourage these apps at the moment because of its business model, which encourages it asserting ownership over its data and targeting apps on the basis of it. But I think that soft nudges from privacy regulators, not creating a legal right to delete, but creating incentives to develop apps that would allow this, would be welcome.

A small-scale model of this is TigerText, which is the text messaging system that allows you to say that you want your texts to disappear after three months or three days.[52] (This was named before the Tiger Woods text-messaging scandal.) And a new German Facebook app, X-Pire, would also create an option of disappearing data.[53] We need more apps along these lines, and more support for them from the Facebook platform.

In addition to technological solutions, there are norms-based solutions. The Japanese have come up with a great solution along these lines. In Japan, social networking accounts are almost always pseudonymous.[54] People rarely use their real names, so if your real friend

49. DANIEL J. SOLOVE, PRIVACY IN AN OVEREXPOSED WORLD 174-76 (2007).

50. VIKTOR MAYER-SCHÖNBERGER, DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE 15 (2009).

51. *See* Jon Perlow, *New in Labs: Stop Sending Mail You Later Regret*, GMAIL OFFICIAL BLOG (Oct. 6, 2008, 6:25 PM), http://gmailblog.blogspot.com/2008/10/new-in-labs-stop-sending-mail-you-later.html (describing how Mail Goggles requires users during late-night weekend hours to solve math problems before an email will send).

52. *See* TIGERTEXT: SECURE MOBILE MESSAGING, http://www.tigertext.com (last visited Apr. 17, 2011).

53. *See* X-PIRE, http://www.x-pire.de/index.php?id=6&L=2 (last visited Apr. 17, 2011).

54. Hiroko Tabuchi, *Facebook Wins Relatively Few Friends in Japan*, N.Y. TIMES, Jan. 10, 2011, at B1 (stating, "[i]n a survey of 2,130 Japanese mobile Web users . . . , 89 percent of

is someone who is not a fake friend, you share your pseudonym. That way, your real friends have access to the whole account, but employers and strangers never do, and you can always walk away from your pseudonym. That kind of pseudonymity is more practical than Google CEO Eric Schmidt's solution: people should just change their names on high school graduation.[55]

The question of norms and gossip brings us to perhaps the most practical solution to the problem of digital forgetting, which is to create new norms of atonement and forgiveness. The Talmud, for example, takes gossip very seriously, and it prohibits *lashon hara*, which includes not only false gossip or tale bearing, but even truthful tale bearing or speech about others, unless the gossip has a serious public purpose.[56] Every word that we speak, according to the Talmud, ascends to the divine cloud, and Google's virtual cloud has made this metaphor literal. The Talmud says that the only way to atone for speech about others—even if it's the truth and not especially nasty—is to go to the person that you have spoken about and ask for forgiveness. But if the person you've gossiped about forgives you for the gossip, then God wipes the heavenly slate clean.[57] The idea in the Talmud that you can atone for your mistakes allows the possibility not only of forgetfulness, but of forgiveness, which allows us to grow in wisdom and to become better people and atone for our sins. The Talmud says, "Let it not be said of a repentant sinner 'remember your former deeds.'"[58] It is a terrible sin to call someone to account for bad deeds in the past if they have been atoned for.

What can these rituals of atonement and forgiveness teach us as journalists about gossip? I think Paul and Wendy Seltzer's paper is a model in this regard. As you'll see, they have a concrete recommendation: that media outlets should not publish stories based solely on leads developed through non-public social networking sites.[59] They describe Facebook chat as the equivalent of water cooler gossip, which in fact it is. People share gossip on Facebook, not intending for it to be fully public. And if journalists respected that and didn't quote from it directly, they could set privacy norms and help construct zones of privacy. Journalists can follow these sorts of norms. In the *Times*

---

respondents said they were reluctant to disclose their real names on the Web.").

55. Holman W. Jenkins, Jr., *Google and the Search for the Future*, WALL ST. J., Aug. 14, 2010, at A9.

56. Leviticus 19:16.

57. TALMUD, Baba Mezi'a 58b.

58. *Id.*

59. *See* Privacy and the Press: Scoops, Secrets, and Ethics in the New Media Landscape, *Panel One: The Shifting Privacy Norms of Journalism*, SILICON FLATIRONS (Dec. 3, 2010), http://lawweb.colorado.edu/events/mediaDetails.jsp?id=3164.

Magazine piece, as it happens, I quoted an interview with a Texas scholar that took place on a public Facebook privacy blog, and that seemed to me fair game.[60] But quoting that scholar's own Facebook chat would seem like a very different kettle of fish.

As for piercing anonymity, I'm suspicious of it on free-speech grounds unless the harm caused by the anonymous speech is clearly and indisputably illegal under current law. Anonymity is necessary to encourage the expression of unpopular opinions, especially in this age of digital mobs where conformity is so quickly and so brutally enforced. It's also a norm to comment anonymously, as the comments section on any news article will show. It can be harrowing as a journalist to be dissected anonymously, but it's very much a part of a vigorous free-speech debate, and as the Supreme Court recognized in the NAACP case where it refused to require the NAACP to turn over its membership lists, the piercing of anonymity can have huge chilling effects.[61]

Where does this leave us? We have a raucous new universe where there is less and less distinction between spoken and written gossip or between public and private speech. Anonymity reigns, and there are harsh attacks without obvious legal remedies. But as Louis Brandeis recognized better than anyone, democracy is not for the faint-hearted.[62] And when I wonder what Brandeis would have made of the blogosphere, I imagine he would have been nervously optimistic about its potential, even as he recognized its dangers. He would have been appalled by the polarization of speech on the Internet, by the explosion of trivial gossip. But ultimately he was an optimist. I imagine he would have recognized that to the degree the Web is expanding the opportunities for ordinary citizens to debate both public and private issues in chat rooms and other virtual spaces, this is a fulfillment of the highest free-speech ideal which Brandeis located in Periclean Athens and in the shires of Jeffersonian democracy. Small-scale communities that allow vigorous Web debates were his ideal.

When I wonder about how Brandeis would have resolved conflicts between privacy and free speech, I imagine he would have come down on the side of free expression. He was the inventor of the idea that sunlight is the best disinfectant, and his concurring opinion in *Whitney v. California* is the greatest and most inspiring essay on free speech ever written in the 20th century.[63] And here's what Brandeis said:

60. Rosen, *supra* note 8, at MM30.
61. NAACP v. Patterson, 357 U.S. 449, 458 (1958).
62. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).
63. *Id.*

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution.[64]

That's my opinion, too, and I look forward to our conversation about these fascinating issues. Thank you so much.

64. *Id.*