Protecting the “Right to be Let Alone”:
Privacy as a Human Right in the Twenty-First Century

In 1928, U.S. Supreme Court Justice Louis Brandeis penned a profound statement in his dissenting opinion in the case *Olmstead v. United States.*¹ He declared:

“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.”²

Justice Brandeis was forcefully objecting to the actions of federal prohibition agents. These federal officers had wiretapped the telephones of suspected criminals in order to procure the evidence necessary to charge and convict them for violating the Eighteenth Amendment -- an action Brandeis understood to be illegal.³ As his statement illustrates, Justice Brandeis viewed the government’s actions as a grave violation of personal liberty -- particularly the right to privacy. In his eyes, the government’s undertakings had been conducted by men who were too zealous in their attempt to protect social order and too myopic to see the illegality of their actions.

Recent revelations in our time have added new weight to Justice Brandeis’s powerful words. In the current Information Age, it has become eminently clear that the right to privacy is the fundamental civil right being weakened most rapidly. The warning Justice Brandeis gave with regard to “men of zeal” who are “well meaning but without

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² Ibid.
³ Ibid. The Eighteenth Amendment prohibited “the manufacture, sale, or transportation of intoxicating liquors” in the United States; see U.S. Const. amend. XVIII.
understanding” applies most obviously to the assault on the right to privacy that has emanated from the surveillance tactics of the National Security Agency (NSA). In light of the alarming fact that the NSA has spied upon foreign leaders and American citizens, and not just those people considered to be security threats to the United States, many Americans now understand how important it is “to be most on our guard to protect liberty when the Government’s purposes are beneficent.”

In addition to the surveillance tactics of the U.S. and other governments, one may also look upon the various practices of large technology corporations, such as Apple and Google, which utilize “big data” collection by viewing and storing user data -- often using this data for advertising purposes. Due to the transnational nature of data storage and communications surveillance, protecting the right to privacy in the Information Age has become an increasingly global concern. However, to date, there have been no major international agreements devoted solely to the protection of privacy as a human right. This stands in contrast to the rights protections set forth in other major international legislation -- such as the Convention against Torture.

Looking at the current NSA spying scandal and its worldwide repercussions, it is clear that the international community must create a substantive legal document in a convention that defines the right to privacy. This definition should utilize a historical understanding of the legal constructions of the right to privacy -- conceptions drawn from

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4 Olmstead v. United States. The NSA spying scandal will be discussed in greater detail below.
6 According to the Washington Post, the “large-scale collection of Internet content” from Yahoo and Google “would be illegal in the United States,” but because “the operations take place overseas, […] the NSA is allowed to presume that anyone using a foreign data link is a foreigner,” giving the NSA far more latitude in its ability to collect user data; see Barton Gellman and Ashkan Soltani, “NSA infiltrates links to Yahoo, Google data centers worldwide, Snowden documents say,” Washington Post, October 30, 2013, http://www.washingtonpost.com/world/national-security/nsa-infiltrates-links-to-yahoo-google-data-centers-worldwide-snowden-documents-say/2013/10/30/e51d661e-4166-11e3-8b74-d89d714ca4dd_story.html.
both nation-states and international agreements. In particular, it is necessary to look at
the construction of the right to privacy in the United States -- where the NSA’s
surveillance is based -- as well as Germany, which, along with Brazil, has introduced a
draft resolution in the UN General Assembly seeking to reaffirm the importance of the
right to privacy as a human right.7 Ultimately, this legal and historical analysis will seek
to elucidate a definition of the right to privacy and demonstrate why the right to privacy
is a vital human right the world community must protect with a new international
convention for the Information Age.

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To understand the full effect of the erosion of the right to privacy, it is first
necessary to critically assess an institution that has historically been seen as a protector of
human rights: the United Nations. On the UN website, there is provided a “Privacy
Notice,” which states: “By accessing this site, certain information about the User, such as
Internet protocol (IP) addresses, navigation through the Site, the software used and the
time spent, along with other similar information, will be stored on United Nations
servers.”8 Thus, manifold personal data of those accessing the website is taken by the
UN and saved for an indeterminate amount of time on UN computers. Although the
“Privacy Notice” states “[t]hese will not specifically identify the User,” it also asserts:
“The United Nations […] assumes no responsibility for the security of this information.”9
In doing so, the UN acknowledges that users of its website can expect only a limited
amount of privacy protection. The discussion above does not intend to vilify the United

7 UN General Assembly, Draft resolution A/C.3/68/L.45, “The right to privacy in the digital age,”
9 Ibid.
Nations -- which must play a central role in the protection of the right to privacy as a human right. Instead, it merely illustrates the dangers to the right to privacy in the age of widespread data collection, even when it is conducted by a benevolent institution.

This makes the NSA’s surveillance strategies even more disconcerting. It is necessary to list several of these programs to understand the tremendous extent to which the right to privacy has eroded for both Americans and members of the international community. Through the NSA program “Upstream,” the intelligence agency gathers Internet and phone data from fiber-optic cables between North America and the rest of the globe.\textsuperscript{10} The NSA program “PRISM” collects information from Microsoft, Yahoo, Google, Facebook, PalTalk, AOL, Skype, YouTube and Apple.\textsuperscript{11} With the program “MUSCULAR,” the NSA broke into Google and Yahoo data center links, without the companies’ knowledge, allowing the agency to gather information “from hundreds of millions of user accounts.”\textsuperscript{12} Another NSA operation collects “hundreds of millions of contact lists” and address books “from personal e-mail and instant messaging accounts around the world.”\textsuperscript{13} The NSA program “CO-TRAVELER” collects “nearly 5 billion records a day on the whereabouts of cellphones around the world,” which allows the NSA to track individuals across the globe.\textsuperscript{14} Finally, it was discovered by the German publication \textit{Der Spiegel} that the NSA and CIA had worked together at the U.S. Embassy

\begin{thebibliography}{9}
\bibitem{Ibid} Ibid.
\bibitem{NSA2} Gellman and Soltani, “NSA infiltrates links.”
\bibitem{NSA3} Barton Gellman and Ashkan Soltani, “NSA collects millions of e-mail address books globally,” \textit{Washington Post}, October 14, 2013, http://www.washingtonpost.com/world/national-security/nsa-collects-millions-of-e-mail-address-books-globally/2013/10/14/8c58b5be-34f9-11e3-80c6-7e6dd8d22d8f_story.html.
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in Berlin to monitor the cellphone of German Chancellor Angela Merkel. Once these surveillance programs and tactics were revealed, an enormous backlash erupted among Americans and within the international community.

Two nations in particular led the charge against the NSA’s troubling surveillance project -- Germany and Brazil. Germany has strict privacy laws extending back to post-World War II West Germany “in connection with the painful experiences of Nazism,” according to James Q. Whitman, a legal historian at Yale Law School. The right to privacy is viewed so seriously in Germany that in 1983, after protestors against the West German census filed suit in the Federal Republic’s Constitutional Court, the court ruled that a new census could not take place until the government created a new census law “that conformed to the data protection laws.” Recently, in 2008, the right to privacy was recognized by Germany’s highest court, the Bundesverfassungsgericht (Federal Constitutional Court), as extending to the hard-drive data of German citizens.

In light of these strict protections of the right to privacy, it is not surprising that some in Germany are putting forward proposals for Internet and email service that would keep German data in Germany, rather than allowing it to pass through servers in other countries -- particularly the United States.

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An analogous plan was also suggested in Brazil, where, similar to Germany, the NSA may also have spied on President Dilma Rousseff’s communications. Some Brazilian legislators have drawn up a bill that would force internet-based companies to store data in Brazil, in order to allow the country to have a stronger hold on its own data and privacy protection. Most importantly, however, Germany and Brazil have begun working together in an effort to further strengthen privacy rights in the international sphere by creating a resolution on the subject for the UN General Assembly.

This draft resolution developed by Germany and Brazil is entitled “The right to privacy in the digital age,” and was approved without a vote by the Social, Humanitarian and Cultural Committee (the UN General Assembly’s Third Committee) on November 26, 2013. The member representing Brazil averred that this was a historic moment in the history of human rights: “Through this resolution, the General Assembly establishes, for the first time, that human rights should prevail irrespective of the medium and therefore need to be protected both offline and online.”

Moreover, the draft was

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20 Birnbaum, “Germany looks.”
21 Esteban Israel and Anthony Boadle, “Brazil to insist on local Internet data storage after U.S. Spying,” Reuters, October 28, 2013, http://www.reuters.com/article/2013/10/28/net-us-brazil-internet-idUSBRE99R10Q20131028. Interestingly, this complicates the arguments set forth by Richard Posner, formerly a professor at the University of Chicago Law School, who asserted that “privacy legislation is redistributive and reduces rather than increases [economic] efficiency”; Richard A. Posner, “The Economics of Privacy,” The American Economic Review 71, no. 2 (May, 1981), 408. The German and Brazilian plans for protectionism in the service of the right to privacy may, indeed, demonstrate, that some forms of privacy protection could reduce market efficiency by limiting which companies can compete as providers of electronic communication in certain countries. Yet, this protectionism arose because privacy was either not protected effectively, or because legislation protecting the right to privacy was ignored, meaning that a lack of defense of the right to privacy may also increase market inefficiency. Posner himself admits that the reality of the situation is more complex than his own economic analysis seems to demonstrate, because when it comes to “the right to prevent the publicizing of certain intimate facts about oneself,” he must concede that “why people should want to suppress such facts is mysterious from an economic standpoint”; ibid., 408.
22 Israel and Boadle, “Brazil to insist.”
24 Ibid.
“applauded” by some delegates who were pleased that there was a “consensus as a clear international reaction to the national and extraterritorial electronic surveillance activities conducted by the United States.”25

Indeed, the preambular clauses of the draft resolution are particularly successful in effectively recounting the historical construction of how the right to privacy came to be codified as a human right. In particular, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights -- both of which will be discussed in greater detail below -- are reaffirmed as foundational documents for the international legal protection of the right to privacy.26 Furthermore these clauses also discuss the danger that may arise if the right to privacy is not vigilantly protected.27 Although the draft resolution does not explicitly mention the NSA surveillance scandal, it does make a thinly veiled reference to this surveillance as a transgression against human rights: “Deeply concerned at human rights violations and abuses that may result from the conduct of any surveillance of communications.”28 Additionally, the draft resolution notes “while concerns about public security may justify the gathering and protection of certain sensitive information, States must ensure full compliance with their obligations under international human rights law,” including when it comes to “measures taken to counter terrorism.”29 Without a doubt, these preambular clauses open the resolution forcefully, and compellingly repudiate the surveillance tactics of the NSA.

However, the draft resolution begins to flounder once it arrives at the operative clauses in its second part. The resolution does little more than declare that it “Calls upon

25 Third Committee, “Third Committee approves text.”
27 Ibid.
28 Italics in original; ibid.
29 Ibid.
all States” to “put an end to violations of those rights” to “review their procedures, practices and legislation regarding the surveillance of communications” and to “establish independent national oversight mechanisms.” As a firm reassertion of the right to privacy as a human right around which the entire world is supposed to unite, this leaves something to be desired. What is needed is not for states to “review their procedures” or to “establish […] oversight mechanisms.” Instead, what is required is a resolute definition of what the right to privacy is in an international context, so that it can be protected unequivocally.

Some of the representatives present at the Social, Humanitarian and Cultural Committee’s vote were of the same mindset: “Following the approval, some delegates stressed the need for agreed international human rights mechanisms in relation to ensuring privacy and freedom of expression. Some expressed regret over the lack of a specific reference to such mechanism in the draft […].” The draft resolution does emphasize the need for further discussion of the right to privacy, asking the UN High Commissioner for Human Rights to “submit an interim report on the protection of the right to privacy in the context of domestic and extraterritorial surveillance of communications, their interception and collection of personal data.” The document also asserts that the UN General Assembly “[d]ecides to examine the question on a priority basis at its sixty-ninth session,” meaning that this is likely only the beginning of the international community’s deliberation with regard to the right to privacy. However, if this only leads to an endless discussion of the right to privacy rather than concrete action

31 Third Committee, “Third Committee approves text.”
33 Italics in original; ibid.
that will protect this right, little, if anything, will ultimately be accomplished, and privacy rights will continue to deteriorate.

Moreover, without such a definitive statement, the question will still remain: why should the right to privacy take precedence over other human rights issues that the international community currently faces?

In his book, *The International Human Rights Movement: A History*, American lawyer Aryeh Neier argues for the primacy of “first-generation rights,” rights that are civil and political, in international human rights discourse and legislation. Neier points out that “by far the largest part of the work done by the international human rights movement focuses on civil and political rights.” This may seem to indicate that civil and political rights have been given their due, and that it is time to focus on discussions of economic and social rights (“second-generation rights”) or the right to development ("a third-generation right").

However, a danger arises if these civil and political human rights, especially the right to privacy, do not continue to be protected. The “first-generation” civil and political rights form the foundations upon which economic, social, cultural and developmental rights are structured. Without a solid underpinning, these “second-generation” and “third-generation” rights might easily collapse. Thus, civil and political rights are indispensable human rights. Moreover, the rapid erosion of the right to privacy is so

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35 Ibid., 92.
36 Ibid., 62.
37 For instance, if civil and political guarantees of international agreements that declare “[n]o one shall be subjected to arbitrary arrest, detention or exile” (Article 9 of the Universal Declaration of Human Rights) and “[e]veryone has the right to freedom of peaceful assembly and association” (Article 20 of the same Declaration) are not adequately defended, governments could easily arrest and expel people for organizing together in attempts to gain greater social, economic and developmental protections; see 25+ *Human Rights Documents*, 3rd ed. (New York: Center for the Study of Human Rights, Columbia University, 2001), 6, 7.
alarming because -- unlike economic, social, cultural and developmental rights -- we have agreed that in a liberal society, civil and political rights are inalienable.\(^{38}\) Therefore, it is imperative for the international community to take decisive action in protecting the right to privacy in the current age.

In light of this conclusion, it is necessary to reiterate the criticisms set forth by some members of the UN’s Social, Humanitarian and Cultural Committee: “[S]ome delegates stressed the need for agreed international human rights mechanisms in relation to ensuring privacy and freedom of expression. Some expressed regret over the lack of a specific reference to such mechanism in the draft […]”\(^{39}\) The key word here is “mechanism,” which these representatives are utilizing to essentially ask: through what means are we going to protect the right to privacy?

The main judicial mechanism for the United Nations enforcement of international law is the International Court of Justice (ICJ). However, utilizing the ICJ to enforce the right to privacy in the case of NSA surveillance would be extremely difficult, if not impossible. This is because in 1985, the United States took the “radical step of withdrawing its consent to the [ICJ’s] compulsory jurisdiction” after Nicaragua brought a suit against the U.S. “charging violations of customary and treaty law.”\(^{40}\) Thus, even if there were an attempt to bring suit against the United States in the ICJ for the NSA’s violations of the right to privacy, the U.S. would ignore the suit by arguing that the court does not have the jurisdiction necessary for such a case to be heard. In addition, the U.S.

\(^{38}\) Neier, 57-9. Neier is careful to point out that non-liberal states, such as the Soviet Union and Saudi Arabia, objected to the codification of certain civil and political rights in the 1948 Universal Declaration of Human Rights; see ibid., 61-2. This does not, however, undermine the importance of these rights within liberal nation-states or in the sphere of international human rights.

\(^{39}\) Third Committee, “Third Committee approves text.”

could, as it did in the Nicaragua Case, veto any UN Security Council resolutions that attempt to enforce an ICJ judgment.\textsuperscript{41} Without the ICJ to act as the enforcer of the right to privacy as a human right with regard to the surveillance tactics of the NSA and the United States government, it is clear that utilizing an international judicial mechanism for protecting certain aspects of the right to privacy is, at present, only a partial solution.

Nevertheless, this does not mean that there are no other alternatives for the international community. Most importantly, the world community can come together to structure an international agreement, similar to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or the International Covenant on Civil and Political Rights. This is by no means a perfect solution, but it will have three significant effects, the first effect generating the second. A “Convention on the Right to Privacy” will, initially, demonstrate how seriously the international community takes the right to privacy. The United States cannot ignore that such a convention exists, and even if the U.S. chooses not to adhere to such a convention, American policy makers will have been made aware of the fact that numerous other members of the international community view the right to privacy as an indispensable human right. This may cause shifts in American strategies of realpolitik with regard to surveillance. Although Brazil and Germany have initiated a similar process with their draft resolution, even if this resolution passes in the UN General Assembly, it cannot have nearly as much authority as an international convention, because a resolution is not legally binding.\textsuperscript{42}

\textsuperscript{41} Delahunty and Yoo, 111.
This leads to the second salutary effect of an international convention on the right to privacy. In contrast to a UN General Assembly resolution, a convention is legally binding when it is ratified by a nation-state, as the United Nations notes. Even if the United States does not ratify a “Convention on the Right to Privacy,” numerous other nations will likely ratify such a convention -- as the support for Brazil and Germany’s draft resolution in the UN seems to indicate. When these ratifications occur, the UN will be given the jurisdiction to enforce the convention’s protections of the right to privacy using legal means, such as through the ICJ. Furthermore, if a “Convention on the Right to Privacy” comes into existence, it will be much easier for the United States to ratify such a document in the future -- rather than the international community creating one from scratch -- which will be important if the American government decides to consent to the ICJ’s jurisdiction once again.

Third, and most significantly, a “Convention on the Right to Privacy” will provide a clear definition of the right to privacy -- at least for our current period in history -- that can stave off further breakdown of and even strengthen the right to privacy. To establish the substantive definition of privacy, it is necessary to once again return to the dissent of U.S. Supreme Court Justice Louis Brandeis in the case *Olmstead v. United States*. In the words of Harvard Law School professor Lawrence Lessig: “If there is a justice who deserves cyberspace’s praise, if there is a Supreme Court opinion that should be the model for cyber activists in the future, if there is a first chapter in the fight to protect

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cyberspace, it is this justice, this opinion, and this case.” Brandeis’s dissent offers the most powerful definition of the right to privacy using logic that is still applicable in the Information Age.

In the late nineteenth century, decades before his appointment to the U.S. Supreme Court, Louis Brandeis’s interest in privacy rights first arose. Together with Samuel Warren, Brandeis wrote an article for the *Harvard Law Review* entitled, “The Right to Privacy,” which was published in 1890. Warren and Brandeis argued in their article: “From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind, as works of literature and art, goodwill, trade secrets, and trademarks.” Thus, as pointed out by the late Alan F. Westin, formerly a professor at Columbia Law School, according to the two attorneys the conception of the right to privacy arose in the common law out of the right to private property.

From this starting point, Brandeis’s understanding of the right to privacy continued to develop. Although the conception of the right to privacy may have arisen out of an understanding that the right to property could be extended to the products of the mind, in his 1928 dissent for *Olmstead v. United States*, Justice Brandeis came to conclude the right to privacy itself transcended the right to property, and could be understood as a separate right, existing unto itself. His stunning definition of the right to privacy in his dissent achieves an almost poetic quality:

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44 Lawrence Lessig, *Code: Version 2.0* (New York: Basic Books, 2006), 163. It should also be noted that the opinion of the U.S. Supreme Court in *Olmstead v. United States*, against which Brandeis was arguing, was ultimately overturned in the 1967 U.S. Supreme Court case *Katz v. United States*; see *Katz v. United States*, 389 U.S. 347 (1967).
46 Warren and Brandeis, 194-5.
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 a 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, as against the Government, the right to be let alone -- the most comprehensive of rights, and the right most valued by civilized men.48

According to Brandeis, the right to privacy was not defined based on “material things,” but rather, in “man’s spiritual nature of his feelings, and of his intellect.” This means that the right to privacy in the physical world is ineradicably connected to individual freedom in one’s metaphysical “beliefs,” “thoughts,” “emotions” and “sensations.” Thus, the right to privacy must protect against forced intrusion -- particularly government intrusion -- into the mental realm of the individual. This mental realm is the highest level of the private sphere in which the individual operates. It is for this reason that Justice Brandeis defines “the most comprehensive of rights, and the right most valued by civilized men” as “the right to be let alone.” No entity -- especially not an entity as powerful as the U.S. government -- should have the power to intrude upon the private sphere in which the individual operates. In particular, the government must not intrude into the mental realm of the private sphere. This intrusion would run the risk of forcing upon an individual certain beliefs, thoughts and emotions that they themselves had not created and that they might not want to have.

Justice Brandeis’s conception of an individual’s right to privacy as a “right to be let alone” in one’s private life -- most importantly, in the mental realm of beliefs, thoughts, emotions and sensations -- should be used as the foundational definition the

48 Olmstead v. United States.
right to privacy in an international convention.\textsuperscript{49} This is because Brandeis’s concept reaches to the heart of privacy, present in the highest plane of the individual -- the mind.

Moreover, international law has already set forth regulations with regard to an individual’s right to freedom of thought. The International Covenant on Civil and Political Rights (ICCPR) -- implemented on March 23, 1976 -- delineates several of these rules. Article 18 of the ICCPR defends the freedom of the mental realm, including its relationship to worship, declaring: “Everyone shall have the right to freedom of thought, conscience and religion.”\textsuperscript{50} Article 19 of the ICCPR is particularly notable in the dictates it sets forth. Paragraph 1 of Article 19 guarantees that an individual’s freedom in the mental realm will be unimpeded, proclaiming: “Everyone shall have the right to hold opinions without interference.”\textsuperscript{51} In Paragraph 2 of Article 19, this guarantee is further expanded upon with the pronouncement: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.”\textsuperscript{52}

These rights to the freedom of thought have not yet been directly connected to the right to privacy. However, a “Convention on the Right to Privacy” could proclaim these rights to be intrinsically connected to an individual’s right to privacy -- conceived of as a “right to be let alone” in one’s private life.\textsuperscript{53} Furthermore, by using Paragraph 2 as a starting point, a new international convention could update the definition of “the right to freedom of expression” -- including the “freedom to seek, receive and impart information

\textsuperscript{49} Olmstead v. United States.  
\textsuperscript{50} 25+ Human Rights Documents, 20.  
\textsuperscript{51} Ibid., 20.  
\textsuperscript{52} Ibid., 20.  
\textsuperscript{53} Olmstead v. United States.
and ideas of all kinds” -- by extending its protections to the digital realm. In doing so, the international community would demonstrate that the right to liberty of thought must lead to the right to freely transmit those thoughts to others -- through mail, telephone, email, text message or various other forms of communication -- without government infringement. This would set forth a formidable definition of the right to privacy in the spirit of Justice Brandeis.

It is helpful to build once again upon the words of Brandeis in another instance, this time in designating what specifically constitutes a violation of the “right to be let alone.” In his dissent, Brandeis declared: “To protect that right [to be let alone], every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.” The text of the Fourth Amendment to the U.S. Constitution, which Brandeis cites, states: “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.” Thus, the “right to be let alone” is contravened when the government conducts warrantless searches and seizures of an individual’s private property.

54 It should be noted that Paragraph 3 of Article 19 does allow for “certain restrictions” on the rights set forth in Paragraph 2 of Article 19. In particular, Paragraph 3 allows for restrictions “as are provided by law and are necessary” when it comes to “the protection of national security or of public order”; see 25+ Human Rights Documents, 20. However, a new international convention could also declare with greater specificity what constitutes “the protection of national security or of public order,” in order to prevent unnecessarily stringent restrictions from being created in instances where there are not credible threats to national security or public order.

55 Olmstead v. United States.

56 U.S. Const. amend. IV.
This is not the most innovative aspect of Brandeis’s argument. However, it is still extremely important and must be discussed in greater detail in the context of international human rights law before arriving at Brandeis’s ingenious conception of the protection of the right to privacy. In any international convention on the right to privacy, protections similar to the Fourth Amendment must exist. Over the past sixty years, the international community has already codified these safeguards, first in Article 12 of the 1948 Universal Declaration of Human Rights (UDHR). In language that is extremely similar to the Fourth Amendment to the U.S. Constitution, Article 12 declares: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” Article 17 of the 1976 International Covenant on Civil and Political Rights also proscribes “arbitrary or unlawful interference” in a similar manner. That Germany and Brazil in their draft resolution specifically cite Article 12 of the UDHR and Article 17 of the ICCPR seems to indicate that if there is ever a “Convention on the Right to Privacy,” the protections set forth in these two international agreements will be restated and reaffirmed.

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58 Ibid., 6.
59 Ibid., 20. The full text of Paragraph 1 of Article 17 of the ICCPR proclaims: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.” This is followed by Paragraph 2, which holds: “Everyone has the right to the protection of the law against such interference or attacks”; see ibid.
60 UN General Assembly, Draft resolution A/C.3/68/L.45. In his dissent, Brandeis further expanded upon his explication of the right to privacy by stating: “[T]he use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth [Amendment]”; see Olmstead v. United States. This is clearly a reference to the Fifth Amendment’s declaration: “No person […] shall be compelled in any criminal case to be witness against himself”; see U.S. Const. amend. V. This protection has also been extended in international law, as set forth in Article 14 of the ICCPR, which states that a person is “[n]ot to be compelled to testify against himself or to confess guilt”; 25+ Human Rights Documents, 19. While this right should also, doubtlessly, be included as a specific protection in a “Convention on the Right to Privacy,” it seems to be derived from the “right to be let alone” and the protection against warrantless searches and seizures, and is therefore subsumed under these principles.
What, then, is the novel form of reasoning set forth by Justice Brandeis, and how can this reasoning apply to data collection in the twenty-first century? In his dissent, Brandeis cites *Ex parte Jackson*, in which “it was held that a sealed letter entrusted to the mail is protected by the [Fourth and Fifth] Amendments.” As he continues on in his discussion, Brandeis illustrates why it is necessary to extend this protection to new technologies, such as the telephone, stating: “The mail is a public service furnished by the Government. The telephone is a public service furnished by its authority. There is, in essence, no difference between the sealed letter and the private telephone message.”

Thus, Justice Brandeis is providing a new interpretation of a foundational constitutional guarantee, without using unprecedented innovations. In the words of Harvard Law professor Lessig: “It is an argument, we can say, that aims at translating the protections that the Fourth Amendment gave in 1791 into the same set of protections at any time later in our history […]. It is reading the amendment differently to accommodate the changes in protection that have resulted from changes in technology. It is translation to preserve meaning.”

Brandeis’s understanding of the right to privacy should be the same understanding that is applied to the international guarantees set forth in the UDHR and the ICCPR in order to effectively protect the right to privacy in the Information Age. If, as Justice Brandeis argues, citing the decision in *Ex parte Jackson*, “there is […] no difference between the sealed letter and the private telephone message,” then without a doubt, surveillance of cellphone conversations is an obvious violation of the right to privacy.

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61 Olmstead v. United States.
62 Ibid.
63 Lessig. 163.
64 Olmstead v. United States.
Furthermore, email, text messaging and instant messaging can all be understood as derivatives of the mail and the telephone. All three combine the written word -- analogous to the mail -- and are transmitted using electronic signals -- analogous to the telephone. As a result, the right to privacy must be the same for email, text messaging and instant messaging as it is for mail and telephone conversations. In a “Convention on the Right to Privacy,” the international community can use this line of reasoning to extend the right to privacy to new forms of communication in Information Age.

In addition, although “the mail is a public service furnished by the Government” and “the telephone is a public service furnished by its authority,” because, as Brandeis contends, “there is […] no difference” between the two, then the right to privacy must apply to all forms of electronic communication, regardless of whether or not they are furnished by a public entity or a private corporation.\(^65\) Therefore, even if email, text messaging and instant messaging are provided through private corporations -- such as Google and Yahoo -- instead of a public entity, these corporations must still be required to zealously protect the right to privacy of the people who utilize their services. Thus, an international agreement on the right to privacy could also declare that it is the duty of both governments and private corporations to protect this right to privacy. By defining the right to privacy and the boundaries of surveillance -- something that has never been done in great detail in the realm of international law -- the global community would effectively thwart the continued erosion of the right to privacy and expand our understanding of this right.

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\(^{65}\) Olmstead v. United States.
The world today has reached a key historical moment in the understanding of the right to privacy. In light of the NSA spying scandal -- which has affected people in all areas of the world -- it is clear that the protections of right to privacy set forth in previous decades must be updated. Otherwise, we run the risk of allowing this right to erode irreparably. The nations of Germany and Brazil have taken an important first step in the fight for the preservation of the right to privacy as a human right.

However, more must be done. An international “Convention on the Right to Privacy” must be developed and the right to privacy must be clearly defined so that it becomes increasingly difficult for governments and various other entities to infringe upon this right. Most importantly, the right to privacy should be defined, using the words of U.S. Supreme Court Justice Louis Brandeis, as the “right to be let alone.”66 This means that no government or other entity will have the power to intrude upon the private life on an individual -- least of all his or her mental realm, in which personal “beliefs,” “thoughts,” “emotions” and “sensations” are held and created.67 From this understanding of freedom of thought intimately intertwined with the right to privacy should emerge the recognition that freedom of thought entails a protection of the right to transmit that thought to others, without interference unless based upon carefully delineated and legitimate probable cause tested in a public court of law. Finally, the protection of the right to privacy in various forms of communication between individuals should be extended to new forms of communication in our current time. Drawing upon, once more, the writing of Justice Brandeis, an international “Convention on the Right to Privacy” should demonstrate that the right to privacy in cellphone conversations, email, text

66 Olmstead v. United States.
67 Ibid.
messaging and instant messaging should be protected as rigorously as conversations by mail. Furthermore, this protection of the right to privacy should apply to both governments and corporations.

Although a “Convention on the Right to Privacy” would not be perfect -- it might not be ratified by all nations and it, too, may need to be updated in the future -- such a document will provide a strong starting point for the continued protection of the right to privacy as an essential human right in the Information Age. It will prevent the further disintegration of this right, and will strengthen its defense. A convention might even prevent future surveillance scandals as alarming as those caused by the NSA by increasing international awareness with regard to the individual’s right to privacy as a human right, subject to the rule of law. Most importantly, a “Convention on the Right to Privacy” will bring to life those words so eloquently stated by Franklin D. Roosevelt -- without whom our modern conception of human rights might not exist -- on January 6, 1941, in his “Four Freedoms Speech” before the U.S. Congress. In this speech, Roosevelt proclaimed: “Freedom means the supremacy of human rights everywhere. Our support goes to those who struggle to gain those rights or keep them. Our strength is our unity of purpose. To that high concept there can be no end save victory.”

68 Olmstead v. United States.
70 Ibid.
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