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## **Chapter II**

# **Is It Safe to Talk, Yet? The Evolution of Electronic Privacy Law**

John Thomas, Quinnipiac University School of Law, USA

## **Abstract**

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*This chapter traces the development in the United States of legal protections of the right to privacy. It begins with the common law “right to be let alone” in the early 1900s and proceeds through the enactment of the U.S. Patriot Act in 2001 and the National Security Administration’s warrantless wire tapping program revealed to the public in 2005. It concludes with a discussion of emerging electronic threats to the security of privacy of the public and concomitant challenges to lawmakers and law enforcers.*

## **Introduction**

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The notion of a right to privacy first entered the legal lexicon in 1890 with the Harvard Law Review’s publication of Samuel Warren’s and Louis Brandeis’ *The Right to Privacy* (1890). As the authors put it more than a century ago, law evolves in

response both to perceived threats to the enjoyment of life and to social recognition of the value of that enjoyment:

*That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.* (Warren & Brandeis, 1890, p. 195)

As a result, the eventual legal recognition of the right to privacy in “[t]houghts, emotions, and sensations” (Warren & Brandeis, 1890, p. 206) was inevitable:

*The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to man that only a part of the pain, pleasure, and profit of life lay in physical things.* (Warren & Brandeis, 1890, p. 207)

Of course, recognized Warren and Brandeis, “[r]ecent inventions and business methods can create new needs for protection of what courts as early as 1834 called a right ‘to be let alone’” (Warren & Brandeis, 1890, p. 208).

The passage of time has proven Warren and Brandeis prescient. Invention has driven both the need for privacy protection and the development of law to ensure that protection. From the telephone to the magnetic tape recorder, photography, the personal computer, wireless telephone, electronic payment systems, and the Internet, technology has created new challenges to our privacy and the law’s ability to protect privacy. Indeed, security and privacy laws are the progeny of invention.

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## Origins of the “Right to Be Let Alone”

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“The right to privacy” that Brandeis and Warren conjured derived from an earlier notion that Thomas McIntyre Cooley articulated in his *Treatise of the Law of Torts* (1879): “The right to one’s person may be said to be a right of complete immunity: to be let alone” (Cooley, 1879, p. 29). Cooley, in turn, had found this right as a logical correlate to the right to own property. Property ownership entails the right to do with one’s property what one wishes, limited only by the rights of other property owners to be free from interference caused by the actions of those on adjacent

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