

Swarthmore College

Works

Political Science Faculty Works

Political Science

2015

Privacy, Police Power, And The Growth Of Public Power In The Early Twentieth Century: A Not So Unlikely Coexistence

Carol Nackenoff

Swarthmore College, cnacken1@swarthmore.edu

Follow this and additional works at: <https://works.swarthmore.edu/fac-poli-sci>



Part of the [Political Science Commons](#)

Let us know how access to these works benefits you

Recommended Citation

Carol Nackenoff. (2015). "Privacy, Police Power, And The Growth Of Public Power In The Early Twentieth Century: A Not So Unlikely Coexistence". *Maryland Law Review*. Volume 75, Issue 1. 312-327.

<https://works.swarthmore.edu/fac-poli-sci/580>

This work is brought to you for free by Swarthmore College Libraries' Works. It has been accepted for inclusion in Political Science Faculty Works by an authorized administrator of Works. For more information, please contact myworks@swarthmore.edu.

Privacy, Police Power, and the Growth of Public Power in the Early Twentieth Century: A Not So Unlikely Coexistence

Carol Nackenoff

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>

 Part of the [Constitutional Law Commons](#), [Fourth Amendment Commons](#), and the [Legal History Commons](#)

Recommended Citation

75 MD. L. REV. 312 (2015)

This Symposium is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

**PRIVACY, POLICE POWER, AND THE GROWTH OF PUBLIC
POWER IN THE EARLY TWENTIETH CENTURY: A NOT SO
UNLIKELY COEXISTENCE**

CAROL NACKENOFF*

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.¹

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent.²

Louis Brandeis and Samuel Warren published *The Right to Privacy* in the Harvard Law Review in 1890 because they were concerned that the modern era provided inadequate safeguards for protection of the private realm and the “right to one’s personality.”³ With the emerging recognition of a “man’s spiritual nature,” feelings, and intellect, came the acknowledgement of “the right to enjoy life—the right to be let alone.”⁴ Brandeis and Warren argued that if thoughts, emotions, and sensations demanded legal protection, that the common law was beautifully capable of

© 2015 Carol Nackenoff.

*Richter Professor of Political Science at Swarthmore College; Professor of Constitutional Law, American Politics, and Environmental Policy. Author of *The Fictional Republic* (Oxford Univ. Press 1994). Co-editor (with Marilyn Fischer and Wendy Chmielewski) of *Jane Addams and the Practice of Democracy* (Univ. of Ill. Press 2009) and (with Julie Novkov) of *Statebuilding from the Margins* (Univ. of Pa. Press 2014). I would like to thank Jay Clayton and Allison Hrabar, Swarthmore Class of 2016, for research assistance, and Ken I. Kersch and Ronald Kahn for comments on an earlier draft of this Paper.

1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

2. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

3. Warren & Brandeis, *supra* note 1, at 207.

4. *Id.* at 195. The authors cite Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* for the concept of the right “to be let alone.” From the 1880 edition: “The right to one’s person may be said to be a right of complete immunity: to be let alone.” THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT* 29 (Chicago, Callaghan & Company, 1880).

growing to afford such protections, and judges could “afford the requisite protection, without the interposition of the legislature.”⁵ The notion of battery, for example, was expanded to offer “a qualified protection of the individual against offensive noises and odors, against dust and smoke, and excessive vibration,” and the law of nuisance developed.⁶ The common law was vibrant, useful, and far from dead.

Influential from the time it was published at the outset of the Progressive Era, the Warren and Brandeis article was a harbinger of a new wave of concern for personal privacy and for legal protections thereof. It is noteworthy—but not surprising—that this escalating interest in the right to be let alone developed alongside expanded use of common and statutory law to extend state power over children, juveniles, and families of poor and working class residents and citizens, as well as over Native American families and others who were seen as economically dependent, vulnerable, or irresponsible. Eileen McDonagh has even characterized the Progressive Era as an era of negative civil rights, with legislatures actively curtailing the civil rights of particular groups.⁷ Ken Kersch argues that progressive reformers did not so much discover individual rights, as displace and marginalize pre-existing rights claims with their own (and constitutionally enshrined) rights conceptions.⁸ He further points to “the tension at the heart of liberal political cultures between their animating commitment to the prerogative of the individual concerning his conscience and his choices, and the recognition . . . that the essence of government is to guide and to coerce.”⁹ At certain times, the question of when it is justifiable to coerce individuals—because of perceived reform imperatives and perceived threats—in order to protect or advance public morals becomes highly politicized, implicating the boundaries between public and private.¹⁰ And, “[a]s a practical matter, these arguments will often be subsumed within arguments about law, be it (judge-made) common, statutory, or constitutional.”¹¹ The Progressive Era was just such a period of contestation, involving redefinition of public and private.¹²

5. Warren & Brandeis, *supra* note 1, at 195.

6. *Id.* at 194.

7. Eileen L. McDonagh, *The “Welfare Rights State” and the “Civil Rights State”: Policy Paradox and State Building in the Progressive Era*, 7 *STUD. AM. POL. DEV.* 225, 236 (1993).

8. KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW* (2004).

9. Ken I. Kersch, *The Right to Privacy*, in *THE BILL OF RIGHTS IN MODERN AMERICA* 217 (David J. Bodenhamer & James W. Ely, Jr. eds., rev. & expanded ed. 2008).

10. *Id.*

11. *Id.*

12. Carol Nackenoff, *The Private Roots of American Political Development: The Immigrants’ Protective League’s “Friendly and Sympathetic Touch,” 1908–1924*, 28 *STUD. AM. POL. DEV.* 129 (2014); *see also* Kersch, *supra* note 9, at 217–19, 240.

Despite the near-certainty of many progressive activists that acute social and economic problems would yield to advances in the social sciences and social ethics, there was pushback from those who had differing understandings of rights, whether parental rights or rights of business owners.¹³ Contestation between groups over the redefinition of boundaries between public and private is hardly surprising. However, the fact that Brandeis both supported many progressive initiatives that might be seen as privacy-limiting and was also an early leader in the call for more privacy rights begs for further investigation. According to Neil Richards, Brandeis's views evolved, and he changed his mind about privacy and free speech after co-authoring *The Right to Privacy*.¹⁴ However, in David Bernstein's assessment, Brandeis was "far from a consistent civil libertarian" when viewed from the position of those living in post-Warren Court America. For Bernstein, Brandeis was "a transitional figure in writing opinions that served as a bridge between the statist Progressives of the early twentieth-century and mid-century legal liberals."¹⁵ I contend that it is productive to consider the nature of the balance Brandeis struck, not only because it provides clues into the worldviews of a subset of progressive reformers, but also because it reveals something more about how distinctions between public and private were being drawn—distinctions with legacies.

The intersection of new governmental capacities and new conceptions of rights must be closely interrogated in any attempt to understand changing notions of private and public in this period. How were changing borderlands between private and public understood, and what was the role of common law, criminal law, and constitutional law in policing them, given that the progressive agenda of reform included expanding the role of the state?

Acknowledging the existence of different strains within progressivism can help when thinking about tensions between rights, including rights to a private sphere and a private self: Walter Weyl was not Jane Addams, and Woodrow Wilson was not Theodore Roosevelt. This much is true, but insufficient for our purposes. Progressive reform did not love unalloyed appeals to rights, despite Brandeis's defense of privacy rights.

13. See DAVID M. RABBAN, *LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY* 430 (2013) (citing Roscoe Pound, *Law in Books and Law in Action* 44 AM. L. REV. 12, 30–31 (1910)); see also JANE ADDAMS, *DEMOCRACY AND SOCIAL ETHICS* (1902). On resistance to the reform agenda, see Kathleen S. Sullivan & Carol Nackenoff, *Family Matters as Public Work: Reformers' Dreams for the Progressive Era Juvenile Court*, American Political Science Association 2013 Annual Meeting (Aug. 22, 2013), <http://ssrn.com/abstract=2303396>; KERSCH, *supra* note 8, at ch.2; Kersch, *supra* note 9.

14. Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1298–99 (2010).

15. David E. Bernstein, *From Progressivism to Modern Liberalism: Louis D. Brandeis as a Transitional Figure in Constitutional Law*, 89 NOTRE DAME L. REV. 2029, 2033 (2014).

The recognition of a private sphere that was insulated from state oversight or intrusion depended on a judgment about what kind of citizen the judges, legislators, or public administrators confronted. While Warren and Brandeis spoke of “inviolable personality” or the “right to one’s personality” in universal terms, they seemed to rely upon particular notions of moral personhood.¹⁶ This Paper considers the development of privacy alongside robust rationales for state intrusions on what opponents saw as family or individual prerogatives—matters of the private sphere—during the waning years of the nineteenth century and the early decades of the twentieth. William Novak argued that “on the whole, the law and language of individual rights were not antagonistic to state building,” but he nevertheless thought that the “uneasy alliance of state and individual, power and liberty” was held together by the displacement of common law by constitutionalism in the twentieth century.¹⁷ I suggest, instead, that the displacement may not have been so clean, leaving boundary issues between public and private unresolved in a number of arenas even in the early twenty-first century.

I. REFORM: THE ROLE OF COMMON LAW, POLICE POWERS, AND CONSTITUTIONAL LAW

The growth of the state in the late nineteenth and early twentieth centuries is generally studied as the expansion of the federal government and its administrative apparatus. States and courts are cast as losers as power was wrested away from these traditional sources of authority during political struggles.¹⁸ While such an account marginalizes courts as backward-looking impediments to progress, loathed by many reformers of the era, many progressive legal scholar-activists saw the judiciary’s role as crucial.¹⁹ And they were not wrong. A number of important social welfare reforms began with the courts at the state and municipal level.²⁰ Lawyers and law school faculty, including such high profile figures such as Roscoe

16. See Warren & Brandeis, *supra* note 1, at 205, 207 (respectively).

17. WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 245 (1996).

18. See STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877–1920* (1982) for the fullest treatment of this thesis.

19. This was especially true with the juvenile court and new, specialized courts. See ELIZABETH J. CLAPP, *MOTHERS OF ALL CHILDREN: WOMEN REFORMERS AND THE RISE OF JUVENILE COURTS IN PROGRESSIVE ERA AMERICA* (1998); VICTORIA GETIS, *THE JUVENILE COURT AND THE PROGRESSIVES* (2000); DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* (2004); MICHAEL WILRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* (2003); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

20. Carol Nackenoff & Kathleen S. Sullivan, *The House that Julia (and Friends) Built: Networking Chicago’s Juvenile Court*, in *STATEBUILDING FROM THE MARGINS 171–202* (Carol Nackenoff & Julie Novkov eds., 2014); Sullivan & Nackenoff, *supra* note 13.

Pound, Ernst Freund, Julian Mack, and Louis Brandeis, were active in reform movements. They saw room for the common law, police powers, and constitutional law to lead the way in adapting the law to changing circumstances.

The courts were not, in their view, necessarily legislating from the bench, for “it is not the application of an existing principle to new cases, but the introduction of a new principle, which is properly termed judicial legislation.”²¹ Nor was judicial legislation viewed as necessarily illegitimate:

This power has been constantly exercised by our judges, when applying to a new subject principles of private justice, moral fitness, and public convenience. Indeed, the elasticity of our law, its adaptability to new conditions, the capacity for growth, which has enabled it to meet the wants of an ever changing society and to apply immediate relief for every recognized wrong, have been its greatest boast.²²

The common law has protected privacy in certain cases for well over a century, and granting the protections suggested here would merely be a further application of an existing rule.²³ As Warren and Brandeis noted: “The common law has always recognized a man’s house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands.”²⁴ Although Warren and Brandeis conceded that the boundary lines between consideration of “the dignity and convenience of the individual” and “the demands of the public welfare” could not be clearly drawn in advance of experience, they laid out several general principles for determining such boundaries, and for establishing when private rights of action for invasion of privacy would be warranted.²⁵

Brandeis was long a supporter of progressive reforms that extended the government’s reach into what some business owners and members of the public viewed as the realm of private decisionmaking. He was especially concerned with modern technology and its capacity for intrusion into the private sphere, including the proclivity of the press to expose the private affairs of individuals for sensational and prurient interests.²⁶ Newspapers could therefore debase tastes and cause blight and injury.²⁷ Warren and Brandeis worried about the privacy of artists, writers, and collectors, as well

21. Warren & Brandeis, *supra* note 1, at 213 n.1.

22. *Id.*

23. *Id.*

24. *Id.* at 220.

25. *Id.* at 214–20.

26. See Richards, *supra* note 14, at 1303–04, 1306, 1339; Warren & Brandeis, *supra* note 1.

27. Warren & Brandeis, *supra* note 1.

as the privacy of persons of substance—especially those who were not candidates for public office.²⁸

While on the Supreme Court of the United States, Brandeis did not suppose that only common law protections for privacy were available; sometimes, there were constitutional protections. Brandeis concluded as early as 1920 that state infringement of rights guaranteed protection by the United States Constitution should be reachable through the Fourteenth Amendment.²⁹

*Meyer v. Nebraska*³⁰ and *Pierce v. Society of Sisters*³¹ reveal some of the situations in which the boundary cut in the direction of rights protection.³² In these cases, the Court concluded that the state has an interest in the physical, mental, and moral improvement of its citizens, an interest in fostering a people with American ideals, and an interest in teachers being patriotic and of good moral character, but individuals nevertheless retain certain fundamental rights.³³ The state may certainly compel school attendance and regulate the curriculum, and may even require that English be taught, but barring instruction in a foreign language exceeds the power of the state.³⁴ Nor could a state bar parental decisions to educate their children in private and parochial schools on the grounds that it slowed immigrant assimilation and provided inferior English language instruction.³⁵ Brandeis's understanding of privacy extended to thoughts, beliefs, emotions, and sensations, which was consistent with his concurrence in *Whitney v. California*,³⁶ that the free exchange of ideas is vital to democracy.³⁷

28. *Id.* at 195–99, 215; MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 99–101 (2009).

29. UROFSKY, *supra* note 28, at 619 (citing *Gilbert v. Minnesota*, 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting)).

30. 262 U.S. 390 (1923).

31. 268 U.S. 510 (1925).

32. Justice McReynolds authored *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. *Pierce* was unanimous, but Justice Holmes (joined by Justice Sutherland) dissented in *Meyer*. For Justice Holmes (in an argument that also extended to *Bartels v. Iowa*, 262 U.S. 404, 412 (1923), decided the same day), it was not unreasonable for Nebraska or Iowa to require that a student should hear or speak only English at school; the state's measures were reasonably related to a legitimate state interest and did not unduly restrict the liberty of teachers or scholars.

33. *Pierce*, 268 U.S. at 534; *Meyer*, 262 U.S. at 401–02.

34. *Meyer*, 262 U.S. at 402–03.

35. *Pierce*, 268 U.S. at 534.

36. 274 U.S. 357 (1927).

37. *Id.* at 373. Brandeis concurred with the majority only because the record below failed to raise the question of whether Whitney's actions constituted "clear and imminent danger," and the Court could not, in his view, raise the issue. This failure to raise the issue warranted governmental interference with Whitney's rights of speech and assembly. Citing *Meyer* and *Pierce*, among others, for the proposition that the right of free speech, the right to teach, and the right of assembly are fundamental, Brandeis continued, "[b]ut, although the rights of free speech and assembly are fundamental, they are not, in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from

Constitutional protections, too, evolve beyond the evils that gave rise to them, and Brandeis helped extend them. He came to regard the Fourth Amendment's ban on unreasonable search and seizures and the Fifth Amendment protection against self-incrimination as integrally linked to privacy.³⁸ In his dissent in *Olmstead v. United States*,³⁹ Brandeis contended that wiretapping telephone conversations to pursue violators of the National Prohibition Act was a breach of the Fourth and Fifth Amendment's protections of "the sanctities of a man's home and the privacies of life."⁴⁰ Quoting *Weems v. United States*'s language that "[t]ime works changes, brings into existence new conditions and purposes," Brandeis argued that the right to be protected against government espionage or searches warrants broad construction.⁴¹ He reasoned that "[t]he makers of our Constitution . . . 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."⁴²

One of the key questions in the right to privacy debate was what *was* of public or general interest. This question was central to the Warren and Brandeis analysis of when the right to publish trumped the right to privacy. Stipulating what was of public interest, and why, was also central to the rationale progressives developed for removing children from dangerous home environments, for compulsory education, for limiting child labor, and for limiting work hours for women. As an attorney, Brandeis had a hand in developing these arguments. He was enlisted by the National Consumer's League to defend Oregon's law imposing an eight-hour limit for women in court.⁴³ From that victory, he and Josephine Goldmark repeated the process in other states.⁴⁴ Brandeis worked with progressive reformers in defense of minimum wage and maximum hours legislation, as well as other reform causes.⁴⁵ He supported workers' efforts to unionize and believed business

destruction or from serious injury, political, economic or moral." He pointed to *Schenck v. United States*, 249 U.S. 47 (1919), for the proposition about limits on rights. See PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 306–07 (1984); Philippa Strum, *Brandeis, Louis D. 1856–1941*, in 1 ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 188, 190 (David S. Tanenhaus ed., 2008).

38. UROFSKY, *supra* note 28, at 630.

39. 277 U.S. 438 (1928).

40. *Id.* at 473 (Brandeis, J., dissenting) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Justice Holmes and Justice Stone joined Justice Brandeis' dissent. Justice Butler filed a separate dissent.

41. *Id.* at 472–73 (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)).

42. *Id.* at 478.

43. ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 248 (1946).

44. See NANCY WOLOCH, *A CLASS BY HERSELF: PROTECTIVE LAWS FOR WOMEN WORKERS, 1890S–1990S*, at 87–89 (2015).

45. On the range of reform causes with which Brandeis was associated, see UROFSKY, *supra* note 28, at 331, and Strum, *supra* note 37, at 188–91. See also Justice Holmes's dissent, which

had an obligation to be socially responsible, all while refusing to be paid for his services on behalf of the public.⁴⁶ The police power, even if not always named, was frequently the vehicle for asserting the power of the state over such matters of public concern.

II. WHEN A MAN'S HOME IS NOT HIS CASTLE

Household governance had historically been viewed as private governance; therefore the question of under what circumstances the state could exercise internal authority over members of the household necessitated changes in this public-private relationship. The King's duty to maximize the welfare of the realm—his household, in effect—included using his authority as *pater patriae* through disciplinary measures. Restraining pernicious vices that endangered the public was considered part of this power.⁴⁷ Juvenile court proponents invoked this power, calling it *parens patriae*, to remove juveniles from the criminal justice system and work for their rehabilitation in a less rule-bound and more fatherly (motherly?) court system.⁴⁸

Roscoe Pound received great attention in the initial years of the twentieth century for his assertions that the social interest required state protection. The sovereign, he wrote, is “the guardian of social interests,” and “[a]s social institutions, state and law exist for social ends, and from the beginning have recognized and secured individual interests as a means thereto”; but “the law does not secure individuals in the free exercise of their faculties for the purpose of injuring others, since obvious social interests are opposed to such a claim.”⁴⁹ The overemphasis on individualism in American common law, Pound argued, “exaggerates private right at the expense of public right,” contrary to the interest of the

Justice Brandeis joined, in *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918), arguing that Congress has the power to regulate child labor.

46. Strum, *supra* note 37, at 188–91.

47. See MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* 58 (2005) on Blackstone and Chapter 2, generally, on Blackstone's Police.

48. Mack, *supra* note 19. A good part of this defense of *pater patriae* would be rejected by *In re Gault*, 387 U.S. 1 (1967), with Justice Abe Fortas writing for the majority and making explicit the Court's rejection of Mack's rationale, where the individual rights of juveniles were increasingly held to require the formal protections afforded the accused by the Bill of Rights. I note “motherly” because the principal architects of the juvenile court in Chicago were female; Pound and Mack worked with these female reformers. Freund worked extensively with another female-led reform project, the Immigrants' Protective League, and its chief architect, Grace Abbott.

49. Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 345, 347, 362 (respectively) (1915).

modern community.⁵⁰ Society needs—and the public wants—protection against individuals and the excesses of individualism.⁵¹

At the turn of the twentieth century, there was a rather pervasive view that state exercises of police power were beyond constitutional scrutiny in the United States. State exercises of police power were viewed as policy measures; only by reclassifying them as criminal could substantive and procedural criminal law or constitutional law reach them.⁵² As Martin Dubber noted, “the police concept can immunize state acts inconsistent with basic principles of substantive and procedural criminal law.”⁵³ During the early years of the twentieth century, until *Hammer v. Dagenhart*⁵⁴ restricted Congress’s powers under the Commerce Clause, the federal government also enacted morals legislation through its commerce power. There was only so much the states could do to police on their own. In *Champion v. Ames*,⁵⁵ the Supreme Court upheld the federal regulation of traffic in lottery tickets by a narrow majority. The Court reasoned that “we should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end.”⁵⁶ In practice, “the federal government enjoyed wide ranging police powers, of which the power to police immigrants as threats to the public police was but one example.”⁵⁷

But in the early twentieth century, the police power was quite ill-defined.⁵⁸ Ernst Freund wrote in his classic treatment of the subject that “[t]he term police power, while in constant use and indispensable in the vocabulary of American constitutional law, has remained without authoritative or generally accepted definition.”⁵⁹ After inventorying ways in which the term is used in Blackstone’s *Commentaries*, Freund noted that “the general tendency is to identify it with the whole of internal government

50. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 457 (1909). The overemphasis on individualism in American common law was also “hostile to legislation.” *Id.*

51. RABBAN, *supra* note 13, at 433–35 (citing, among other sources, Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 403 (1908); Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339 (1905); Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910); Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907); Roscoe Pound, *Puritanism and the Common Law*, 45 AM. L. REV. 811, 815 (1911)).

52. DUBBER, *supra* note 47, at 137–38.

53. *Id.* at 143.

54. 247 U.S. 251 (1918).

55. 188 U.S. 321 (1903).

56. *Id.* at 357–58 (Harlan, J.); see also JOHN W. COMPTON, *THE EVANGELICAL ORIGINS OF THE LIVING CONSTITUTION* 130–32 (2014).

57. DUBBER, *supra* note 47, at 143.

58. *Id.* at 120.

59. ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* iii (1904).

and sovereignty, and to regard it as an undefined mass of legislation.”⁶⁰ Freund quite notably defined police power as “the power of promoting the public welfare by restraining and regulating the use of liberty and property.”⁶¹ The police power “aims directly to secure and promote the public welfare, and it does so by restraint and compulsion”; it is not a fixed quantity but elastic, and capable of development.⁶² Freund’s definition of police power included the regulation of work hours, compulsory school attendance, restraints on the employment of children, and restraints upon parental rights of control over delinquent children. These examples come only from his discussion of control of dependents.⁶³ The police power clearly stood in opposition to the right to be let alone.⁶⁴

Police power in the earlier years of the nation allowed for the regulation of public morals, preservation of order, and maintenance of standards of decency. It has been commonly argued that, “legal support for morals restriction barely wavered in the nineteenth century.”⁶⁵ Morals nuisance legislation (for example, against disorderly houses) and anti-liquor legislation were pervasive, and by the 1850s, in order to deal with such traditional moral evils, state courts had defined state police powers quite broadly.⁶⁶ Historian William Novak argued that there is a difference between nineteenth- and twentieth-century morals regulation: “[O]nly after twentieth-century constitutional innovations like privacy and civil liberties could one expect anything remotely approaching *laissez-faire* or *caveat emptor* in morals.”⁶⁷ Although Warren and Brandeis argued that, at the end of the nineteenth century, common law generally recognized that “a man’s house is his castle,” that was not the reality.⁶⁸ The house was not—and would not become—the quintessentially private sphere that the authors

60. *Id.* at 2.

61. *Id.* at iii.

62. *Id.* at 3.

63. *Id.* at 248–58.

64. See David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 MO. L. REV. 93, 147–48 (1990), for a contrast between Tiedeman’s earlier understanding of police power as warranted only because it enlarged or protected individual liberty and Freund’s view that police power was an infringement on individual liberty.

65. NOVAK, *supra* note 17, at 151. But see *infra* note 66, for criticism of the breadth of Novak’s claim.

66. NOVAK, *supra* note 17, at 156; COMPTON, *supra* note 56, at 84–89. Compton argues, however, that many scholars of the nineteenth century, including Novak, overstate the judiciary’s affinity for non-traditional types of morals legislation. *Id.* at 6–8. For the development of constitutional arguments at the state and federal level protecting moral minorities during this same period, see KYLE G. VOLK, *MORAL MINORITIES AND THE MAKING OF AMERICAN DEMOCRACY* (2014).

67. NOVAK, *supra* note 17, at 156.

68. *Id.* at 157.

described.⁶⁹ The *salus populi* tradition was one that permitted communities to “defend themselves aggressively by imposing stringent requirements of orderliness on all spaces and activities.”⁷⁰ And arguably, there would not follow any clean break with a tradition of morals regulation.

Progressive reformers, including Roscoe Pound, who became famous for arguing that the common law needed to change to become better attuned to the times, often justified their concern in terms of growing public sympathy for the “underdog.”⁷¹ By the first decade of the twentieth century, a marked movement for judicial reform was underway—to dispense justice, courts needed to be modern, efficient, and fair to the poor and vulnerable. Pound’s paper about the court system delivered before the American Bar Association (“ABA”) in 1906 became a rallying cry for reform and prompted the ABA to recommend a set of changes that included improvement in the administration of the courts.⁷² Pound, noting that “real and serious dissatisfaction with courts and lack of respect for law . . . exists in the United States today,” declared that “our system of courts is archaic and our procedure behind the times.”⁷³ The modernization of the urban court system—of which the Cook County juvenile court stood for Pound as a fine example—brought new assumptions, concerns, and state practices to bear in what Pound called “the socialization of law.”⁷⁴ This process involved “adjusting the law, shaped by the individualism of the past three centuries, to the ideal of social justice of the twentieth century.”⁷⁵ Pound criticized courts for mechanical reasoning, but the judicial elites he addressed were generally quite receptive to calls for the courts to address social and economic ills.⁷⁶ Dean John Henry Wigmore of Northwestern University, who had hired Pound in 1907, noted in 1917 that common law judges were constantly making law, and “our own Supreme Courts have long been drawing copiously and consciously from this unbounded field of

69. *Id.*

70. *Id.*

71. N. E. H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 50–51 (1997).

72. See WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, at 79 (1994).

73. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 10 CRIME & DELINQ. 355, 356, 365 (respectively) (1964) reprinted from Transactions of the Twenty-ninth Annual Meeting of the American Bar Association, August 29, 1906.

74. MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO xxxii (2003). The Illinois Legislature enacted the Juvenile Court bill in 1899 and amended the law several times in its first decade at the behest of reformers. But reformers sought change through informal invention as well. See Nackenoff & Sullivan, *supra* note 20.

75. Roscoe Pound, *Story Professor of Law in Harvard University*, in THE ORGANIZATION OF COURTS: AN ADDRESS BEFORE THE LAW ASSOCIATION OF PHILADELPHIA 7 (1913).

76. BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 32–33 (2010).

public policy.”⁷⁷ Reform of the legal system helped enable courts to play an important role in developing new conceptions of rights and warrants for government intrusions of the home.

Hull-House-influenced reformers who had pressed for the formation of the juvenile court after experimenting with reforms in Chicago, and then helped spread the gospel to the rest of the country, were especially determined to include immigrants and the working class in participatory democratic ventures; civic knowledge grew only as they shaped goals together. The juvenile court and other specialized courts designed in this period were supposed to learn, change, and grow through interaction with those the institutions served.⁷⁸ Pragmatism required flexibility.

III. WHAT KIND OF RIGHTS SERVED PROGRESSIVE REFORM INTERESTS?

The kind of legal flexibility many of these progressive reformers sought in order to develop dynamic, iterative responses to social problems was more easily found through appeals to police power and development of the common law than through statutory authority that was often difficult to revisit and amend. This conclusion, however, may not have been clear to those pragmatist reformers who hoped that statutory law and administrative procedures could develop in more flexible and participatory directions. Additionally, the language of social good and social progress was steeped in a vision of a larger community interest. Individualism, or expressions of individual self-interest, were deemed outmoded and unsuited to goals for new, twentieth-century citizenship.⁷⁹ A bright-line conception of constitutional rights based on individual self-interest and a right to be let

77. *Id.* at 73; HULL, *supra* note 71, at 65–66.

78. Carol Nackenoff, *Toward a More Inclusive Community: The Legacy of Female Reformers in the Progressive State*, in THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE (Bruce Ackerman, Stephen Engel & Stephen Skowronek eds., forthcoming 2016). Pound served for several years on Chicago's Juvenile Court Committee. For more information on Pound's association with Hull House and the Juvenile Court Committee, see, e.g., HULL, *supra* note 71, at 72. The New York juvenile court was different in that children and adolescents were not removed from the criminal court system, but rather given probation. Shortly after the New York statute was enacted, Judge Julian Mack wrote of the distinctions in 1909. The New York model works:

[B]y suspending sentence and releasing the child but under probation, or, in case of removal from the home, sending it to a school instead of to a jail or penitentiary. The criminal proceeding remains, however. The child is charged with the commission of a definite offense, of which it must be found either guilty or not guilty. If not guilty of the one certain act, it is discharged, however much it may need care or supervision. If guilty, it is then dealt with but as a criminal.

Mack, *supra* note 19, at 108; see also John P. Woods, *New York's Juvenile Offender Law: An Overview and Analysis*, 9 FORDHAM URB. L.J. 1 (1980).

79. Carol Nackenoff, *New Politics for New Selves: Jane Addams's Legacy for Democratic Citizenship in the Twenty-First Century*, in JANE ADDAMS AND THE PRACTICE OF DEMOCRACY, 119 (Marilyn Fischer, Carol Nackenoff & Wendy Chmielewski eds., 2009).

alone, then, was not consistent with the kind of flexibility that good, progressive policymaking sought.

The fact that progressive reform did not love unalloyed appeals to rights suggests a few possibilities. First, a balancing approach to rights might more easily permit the government to advance important social welfare and police power interests (especially at the state level) than would a fundamental rights approach. Second, the notion of a “person” who is entitled to privacy may not include everyone. Third, if one’s home is one’s castle, it is also likely that not everyone had a proper “home.” Any of these possibilities could help us make sense of how a number of progressive reformers, Brandeis among them, understood public-private boundaries.

The fact that neither Brandeis nor any other liberal justice dissented from Justice Holmes’s 1927 opinion in *Buck v. Bell*⁸⁰ suggests that these possibilities merit serious consideration. In his famous *Olmstead* dissent, just prior to a much more famous quote that appears earlier in this Paper, Brandeis remarked on *Buck*:

We have likewise held that general limitations on the powers of Government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the States from meeting modern conditions by regulations which “a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.”⁸¹

The Fourth and Fifth Amendments prohibited warrantless telephone wire taps because they violated privacy rights, but as Justice Holmes wrote in *Buck*:

[T]he public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.⁸²

Government intervention in bodily integrity was not necessarily an unwarranted foray into the private sphere—there were competing social considerations. There seemed to be no elevated scrutiny of decisions made public officials about the public welfare in this sphere. It cannot be, then, that the right to be let alone was understood as a hard barrier against

80. 274 U.S. 200 (1927). The Holmes majority opinion was joined by, among others, Brandeis, Taft, and Stone. Only Justice Pierce Butler dissented. Victoria Nourse notes Brandeis’s silence in *Buck v. Bell: A Constitutional Tragedy from a Lost World*, 39 PEPP. L. REV. 1, 101, 112 (2013).

81. *Olmstead v. United States*, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926)). Brandeis wrote this segment of the dissent only for himself. He also joined a dissent written by Justice Holmes, in which Justices Stone and Butler also joined.

82. *Buck*, 274 U.S. at 207 (Holmes, J.).

measures seen as promoting what progressive reformers understood as social welfare measures. The long public tradition of regulating moral nuisances in the name of a well-regulated society⁸³ found continuing expression in a generous—and sometimes remarkably implicit—acceptance of certain exercises of police power.

“Home” had a moral dimension to Progressive Era reformers. Much like their predecessors and successors, they sought to police homes of those who had come to the attention of public agencies and courts. For earlier generations, disorder authorized public action; the welfare of the people, the common law of nuisance, and the expectation that an owner would use his or her own so as not to injure another all supported that conclusion.⁸⁴ But the nineteenth century authorization of public regulation did not simply disappear with the rise of privacy concerns and constitutional protections thereof. Not everyone enjoyed the same level of protection.

Juvenile court probation officers in the early years of the twentieth century, for example, visited the homes of young people, collecting data and working to purge the home environment of harmful influences.⁸⁵ Beyond offering friendly guidance, probation officers helped procure services for the family and also functioned somewhat like latter-day social workers.⁸⁶ They could attempt to relocate family residences to remove temptations and unhealthy influences on the young. In extreme cases, they could insist upon removal of the child from the home.⁸⁷ Evidence suggests that such removals were far more common in the case of African American children than white ones. Mothers’ pensions, administered by juvenile courts, were also more likely to be awarded to white mothers to keep the family intact.⁸⁸ Workers in the juvenile court system were not the only ones allowed to intervene in homes and residential spaces. The Chicago-based Immigrants’ Protective League, wielding quasi-public powers, attempted to make sure that young women arriving in Chicago were only released into the hands of responsible relatives, and not lodged in co-ed boarding houses.⁸⁹ They sent “friendly visitors” to follow up with repeat visits.⁹⁰ These boarding houses could pose dangers to the young, and to

83. NOVAK, *supra* note 17, at 156–57.

84. *Id.* at 157.

85. SOPHONISBA P. BRECKINRIDGE & EDITH ABBOTT, *THE DELINQUENT CHILD AND THE HOME*, app. VI at 333–43 (1912); THOMAS ELIOT, *THE JUVENILE COURT AND THE COMMUNITY* 173–75 (1914); Hon. William H. DeLacy, *Functions of the Juvenile Court*, 36 *ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI.* 61 (1910); Mack, *supra* note 19, at 116, 119–20.

86. Nackenoff & Sullivan, *supra* note 20, at 184–92.

87. BRECKINRIDGE & ABBOTT, *supra* note 85, 174.

88. TANENHAUS, *supra* note 19, at 74–75.

89. See, for example, Report of the Director (Grace Abbott), *LEAGUE FOR THE PROTECTION OF IMMIGRANTS, ANNUAL REPORT, 1909–1910*, at 31.

90. Nackenoff, *supra* note 12, at 140–50.

vulnerable urban newcomers. And dangerous homes and residential spaces could further endanger the public.

IV. LEGACIES

Later generations of reformers also crafted social welfare policies that intruded upon the home and of middle-class expectations of privacy in the name of progress and the public interest. Welfare programs, including Temporary Assistance for Needy Families (“TANF”), “subordinate[] recipients to a series of requirements, sanctions, and stacked incentives aimed at rectifying their personal choices and family practices.” By accepting welfare, “TANF recipients must surrender or compromise their vocational freedom, sexual privacy, and reproductive choice, as well as the right to make intimate decisions about how to be and raise a family.”⁹¹

Further complicating privacy, homes were seen as posing potential dangers because of their physical condition, layout, and location.⁹² Substandard homes and urban blight were considered dangers to the public. Progressive Era reformers and their New Deal heirs considered certain qualities necessary to the very concept of “home.” The basic, adequate home had certain prerequisites in terms of personal space and opportunities for privacy, natural lighting, plumbing, heating, access to fresh air, yard space, and other amenities. By the early 1920s, these standards were being disseminated across the nation by Better Homes in America and local chapters of the General Federation of Women’s Clubs. In the 1930s, they were enshrined in home mortgage underwriting standards that disqualified the overwhelming majority of then-existing urban residences from mortgage insurance.⁹³

The Court continues to develop protections of the private realm. One important recent declaration is found in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁹⁴ part of the prelude to the right of same-sex couples to marry:⁹⁵

Our precedents “have respected the private realm of family life which the state cannot enter.” These matters, involving the most intimate and personal choices a person may make in a lifetime,

91. Gwendolyn Mink, *Violating Women: Rights Abuses in the Welfare Police State*, 577 ANNALS AM. ACAD. OF POL. & SOC. SCI. 79, 79 (2001). See GWENDOLYN MINK, *THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917–1942* (1996) for continuity in such policies and their connection to maternalism.

92. See GWENDOLYN WRIGHT, *BUILDING THE DREAM: A SOCIAL HISTORY OF HOUSING IN AMERICA* 116–20 (1981).

93. James L. Greer, *The Better Homes Movement and the Origins of Mortgage Redlining in the United States*, in *STATEBUILDING FROM THE MARGINS*, supra note 20, at 203, 203–35.

94. 505 U.S. 833 (1992).

95. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–605 (2015) (discussing cases involving the Fourteenth Amendment’s protection of liberties “central to human dignity and autonomy”).

choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁹⁶

Should we uncritically accept this claim about the trajectory of privacy and Fourteenth Amendment liberty interests at face value?

During the Progressive Era, some gained more privilege with recognition of privacy rights, while public power was used to regulate the bodies, behavior, homes, and lives of others. This tension involving “a heightened American rhetoric of individual liberty with a constant and historic readiness to employ the coercive state powers of regulation and police” did not disappear with the constitutional celebration of liberty.⁹⁷ A narrative that suggests privacy, equal protection, and constitutional protection for a number of individual rights displaced the common law and police power has serious limitations if it neglects the differential access of persons under the jurisdiction of the laws of the state and the nation to rights to be let alone.

96. 505 U.S. at 851 (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

97. NOVAK, *supra* note 17, at 237.