Brandeis's first law partner was Samuel Warren, a member of a prominent Boston family. They remained on friendly terms after Warren left the partnership to help manage his family's business interests. In 1890, the two men became concerned about what they felt was the overly intrusive and lurid coverage being given to prominent Boston society figures by the local press. The result was an article, "The Right to Privacy," which they published in the Harvard Law Review. In it they argued that the law included a right to privacy that protected the individual's thoughts, statements, and emotions from undesired publicity. The article proved so influential that Dean Roscoe Pound of the Harvard Law School credited it with "nothing less than adding a chapter to our law." It also made Judge Thomas M. Cooley's phrase "the right to be let alone" part of American political discourse.

Brandeis wrote about the article to his fiancee, Alice Goldmark, telling her among other things that when he glanced over the proofs, the article "did not strike me as being as good as I had thought it was." Goldmark's letters, since lost, apparently included some comments about privacy. On December 28, 1890, he continued the discussion in another letter, this time saying, "Of course you are right about Privacy and Public Opinion. All law is a dead letter without public opinion behind it. But law and public opinion interact—and they are both capable of being made. Most of the world is in more or less a hypnotic state—and it is comparatively easy to make people believe anything, particularly the right. Our hope is to make people see that invasions of privacy are not necessarily borne—and then make them ashamed of the pleasure they take in subjecting themselves to such invasions... The most perhaps that we can accomplish is to start a back-fire, as the woodmen or the prairie men do."

Although the privacy that was the subject of both the article and the letter was privacy against invasion by the press, Brandeis cared about privacy against governmental intrusion as well. This dovetailed with his emphasis on communication and discussion of ideas, for without
privacy there could be no real freedom of speech. The right of the individual not to have his or her privacy violated by the government thus was a central element in his theory of democracy.

Brandeis was particularly distressed at the governmental invasions of privacy that accompanied World War I and the years immediately thereafter. He bombarded Frankfurter with letters about the subject, and two excerpts are included here. He also wrote at length about government and privacy in a number of cases heard by the Court during that period, excerpted below.

Brandeis found himself disagreeing with Justice Holmes about the right to privacy. Although they both dissented from a Court decision that permitted material stolen from an office and then turned over to public officials to be used in a criminal proceeding, they parted company in cases involving government entrapment and wiretapping. Brandeis was certain that government "espionage" and invasion of privacy ultimately would hurt democracy. Holmes, who had less faith in democratic processes, was more concerned with the undeniable fact that the people convicted had indeed committed the crimes.

While Brandeis's condemnation of government espionage perhaps unfortunately has not become part of mainstream American political thought, the right to privacy that he asserted in his 1890 article and his Olmstead dissent is now integral to it. It illuminates the case law upholding the constitutional right to privacy and is the basis for provisions in a number of state constitutions.

LETTERS TO FELIX FRANKFURTER

Frankfurter, a professor at the Harvard Law School, was involved with the Harvard Law Review, and Brandeis inundated him with suggestions about articles on various topics. Frankfurter's connection to the New Republic led Brandeis to suggest other articles more appropriate for the popular press. The two men had been colleagues in liberal causes and in Zionism before Brandeis went onto the Court, and most of the matters that Brandeis cared about continued to be mentioned in the correspondence the two men maintained.

November 26, 1920, Washington, D.C.

... the N[ew] R[epublic] ought to take up a continuous campaign against espionage ... The fundamental objection to espionage is [t]
that espionage demoralizes every human being who participates in or uses the results of espionage; (2) that it takes sweetness & confidence out of life; (3) that it takes away the special manly qualities of honor & generosity which were marked in Americans.

It is like the tipping system an import from Continental Europe & the Near East only a thousand times worse . . .

It is un-American. It is nasty. It is nauseating.

July 2, 1926, Chatham, Massachusetts

[The survey referred to is a study that Frankfurter was supervising on the "effect of legal control on the restraining of crime and the efficacy of the law's treatment of criminals" in Boston.]

I suggest that, as an incident of the current survey, special care be taken to ascertain and record:

(a) The character (ethical) of the evidence through which it is sought to obtain a conviction—e.g. to what extent it is of the character . . . [of] the many cases where federal crimes were prosecuted in U.S. courts with evidence illegally procured by state officials.

(b) The instruments through which the evidence [is] introduced—e.g. by policemen & [t]o what extent detectives & undercover men . . .

I have grave doubt whether we shall ever be able to effect more than superficial betterment unless we succeed in infusing a sense (A) of the dignity of the law among a free, self-governing people and (B) of the solemnity of the function of administering justice. Among the essentials is that the government must, in its methods, & means, & instruments, be ever the gentleman . . . There are times of ease & prosperity when the pressing danger is somnolence rather than litigiousness.

I think that, in respect to evidence as in other respects, there is a limit to what can be accomplished by the mercenary alone. There must be some point at which the ability of the citizen to shift the burdens of government upon the paid expert—be he policeman or executive—ends.

BURDEAU V. MCDOWELL, 1920

J. C. McDowell's office was broken into by an unknown person who stole various books, papers, and correspondence and then turned them
over to Joseph A. Burdeau, the assistant attorney general in western Pennsylvania. McDowell sued for return of his materials, to prevent Burdeau from taking them before a grand jury that was investigating mail fraud. Justice William R. Day held for the Court that there had been no government wrongdoing and that Burdeau could use the materials in his grand jury proceeding.

MR. JUSTICE BRANDEIS dissenting, with whom MR. JUSTICE HOLMES con­curs.

Plaintiff’s private papers were stolen. The thief, to further his own ends, delivered them to the law officer of the United States. He, knowing them to have been stolen, retains them for use against the plaintiff. Should the court permit him to do so?

That the court would restore the papers to plaintiff if they were still in the thief’s possession is not questioned. That it has power to control the disposition of these stolen papers, although they have passed into the possession of the law officer, is also not questioned. But it is said that no provision of the Constitution requires their surrender and that the papers could have been subpoenaed. This may be true. Still I cannot believe that action of a public official is necessarily lawful, because it does not violate constitutional prohibitions and because the same result might have been attained by other and proper means. At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man’s sense of decency and fair play.

CASEY v. UNITED STATES, 1928

Casey, a Seattle attorney, was suspected by the warden of a county jail of supplying his clients with drugs. The warden informed federal narcotic agents, who induced two prisoners to offer Casey money for morphine and arranged to record their conversations. It was during these talks that a deal was struck, and a relative of one of the prisoners testified that she subsequently picked up the drugs from Casey’s office.
Holmes wrote for the Court, upholding the conviction because there was no doubt about Casey's having violated the law.

As will be seen in the next chapter, Brandeis concurred rather than dissenting in the important case of Whitney v. California, because of the Court's rule that it would not decide cases on the basis of issues not raised by the parties themselves. In Casey, however, he was sufficiently upset to ignore that rule in order to protect the government.

Mr. Justice Brandeis, dissenting.

... In my opinion, the prosecution must fail because officers of the Government instigated the commission of the alleged crime.

These are facts disclosed by the Government's evidence. In the Western District of Washington, Northern Division, prisoners awaiting trial for federal offences are commonly detained at King County Jail. The prisoners' lawyers frequently come there for consultation with clients. At the request of prisoners, the jailer telephones the lawyers to come for that purpose. A small compartment—called the attorneys' cage—is provided. Prior to the events here in question, the jailer had, upon such request, telephoned Casey, from time to time, to come to see prisoners... To entrap him, [federal narcotic officers] installed a dictaphone in the attorneys' cage and arranged so that, from an adjacent room, they could both hear conversations in the cage and see occupants. Then they deposited with the superintendent of the jail $20 to [prisoner] Cicero's credit; arranged with him to request the jailer to summon Casey to come to the jail; and also that, when Casey came, Cicero would ask him to procure some morphine and would pay him the $20 for that purpose...

I am aware that courts—mistaking relative social values and forgetting that a desirable end cannot justify foul means—have, in their zeal to punish, sanctioned the use of evidence obtained through criminal violation of property and personal rights or by other practices of detectives even more revolting. But the objection here is of a different nature. It does not rest merely upon the character of the evidence or upon the fact that the evidence was illegally obtained. The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the Government; that the act for which the Government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission. The Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the
criminal, its creature. If Casey is guilty of the crime of purchasing 3.4 grains of morphine, on December 31st, as charged, it is because he yielded to the temptation presented by the officers. Their conduct is not a defence to him . . . But it does not follow that the court must suffer a detective-made criminal to be punished. To permit that would be tantamount to a ratification by the Government of the officers' unauthorized and unjustifiable conduct.

This case is unlike those where a defendant confessedly intended to commit a crime and the Government having knowledge thereof merely presented the opportunity and set its decoy. So far as appears, the officers had, prior to the events on December 31st, no basis for a belief that Casey was violating the law, except that the jailer harbored a suspicion. Casey took the witness stand and submitted himself to cross-examination. He testified that he had "never bought, sold, given away or possessed a single grain of morphine or other opiate" and that he had "never procured, or suggested to anyone else to procure morphine or narcotics of any kind." He testified that the payments made on orders from Cicero and Roy Nelson were payments on account of services to be rendered as counsel for the defence in the prosecutions against them then pending. He denied every material fact testified to by witnesses for the prosecution and supported his oath by other evidence. The Government's witnesses admitted that the conversations in the attorneys' cage were carried on in the ordinary tone of voice; that there was no effort to lower the voice or to speak privately or secretly; and that they could have heard all that was said without the use of the dictaphone. They admitted that when the narcotic agents searched Casey's office under a search warrant, on the evening of December 31st, they did not find any narcotics or any trace of them or any other incriminating article; and that when, at about the same time, they arrested Casey, he was taking supper with his wife and daughter at his home seven miles from Seattle. Whether the charge against Casey is true, we may not enquire. But if under such circumstances, the mere suspicion of the jailer could justify entrapment, little would be left of the doctrine.

The fact that no objection on the ground of entrapment was taken by the defendant, either below or in this Court, is without legal significance. This prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts. In my opinion, the judgment should be vacated with direction to quash the indictment.
The facts of the wiretapping case appear in Brandeis's first paragraph. Chief Justice William Howard Taft wrote for the majority, upholding the convictions on the grounds that the Fourth Amendment's prohibition against governmental "searches and seizures" did not apply to wiretapping. There had been no physical trespass, nothing had been physically seized, and no one had forced the people involved to talk over their telephones. To Brandeis, who believed in the necessity for the law to reflect societal changes and who had written in Truax v. Corrigan (1921) that "rights of ... the liberty of the individual must be re-molded from time to time to meet the changing needs of society," this was as outrageous as the behavior of the government. It is in Olmstead that Brandeis penned the famous phrase calling privacy "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men," and spoke of the importance of the example set for the people by its government. Discussing the case with a niece sometime later, he commented, "lying and sneaking are always bad, no matter what the ends," and "I don't care about punishing crime, but I am implacable in maintaining standards."

MR. JUSTICE BRANDEIS, dissenting.

The defendants were convicted of conspiring to violate the National Prohibition Act. Before any of the persons now charged had been arrested or indicted, the telephones by means of which they habitually communicated with one another and with others had been tapped by federal officers. To this end, a lineman of long experience in wire-tapping was employed, on behalf of the Government and at its expense. He tapped eight telephones, some in the homes of the persons charged, some in their offices. Acting on behalf of the Government and in their official capacity, at least six other prohibition agents listened over the tapped wires and reported the messages taken. Their operations extended over a period of nearly five months. The type-written record of the notes of conversations overheard occupies 775 typewritten pages. By objections seasonably made and persistently renewed, the defendants objected to the admission of the evidence obtained by wire-tapping, on the ground that the Government's wire-tapping constituted an unreasonable search and seizure, in violation of the Fourth Amendment; and that the use as evidence of the conversations overheard com-
pelled the defendants to be witnesses against themselves, in violation of the Fifth Amendment.

The Government makes no attempt to defend the methods employed by its officers. Indeed, it concedes that if wire-tapping can be deemed a search and seizure within the Fourth Amendment, such wire-tapping as was practiced in the case at bar was an unreasonable search and seizure, and that the evidence thus obtained was inadmissible. But it relies on the language of the Amendment; and it claims that the protection given thereby cannot properly be held to include a telephone conversation.

"We must never forget," said Mr. Chief Justice Marshall in McCulloch v. Maryland, "that it is a constitution we are expounding." Since then, this Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the Fathers could not have dreamed. 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." Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world. It was with reference to such a clause that this Court said in Weems v. United States, "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions... Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality." When the Fourth and Fifth Amendments were adopted, "the form that evil had theretofore taken," had been necessarily simple. Force and violence were then the only means known to man by which a Government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure ef-
ected, if need be, by breaking and entry. Protection against such inva-
sion of "the sanctities of a man's home and the privacies of life" was
provided in the Fourth and Fifth Amendments by specific language. But
"time works changes, brings into existence new conditions and pur-
poses." Subtler and more far-reaching means of invading privacy have
become available to the Government. Discovery and invention have
made it possible for the Government, by means far more effective than
stretching upon the rack, to obtain disclosure in court of what is whis-
ered in the closet.

Moreover, "in the application of a constitution, our contemplation
cannot be only of what has been but of what may be." The progress of
science in furnishing the Government with means of espionage is not
likely to stop with wire-tapping. Ways may some day be developed by
which the Government, without removing papers from secret drawers,
can reproduce them in court, and by which it will be enabled to expose
to a jury the most intimate occurrences of the home. Advances in the
psychic and related sciences may bring means of exploring unexpressed
beliefs, thoughts and emotions . . . Can it be that the Constitution
affords no protection against such invasions of individual security?

In Ex parte Jackson, it was held that a sealed letter entrusted to the
mail is protected by the Amendments. The mail is a public service fur-
nished 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 . . . The evil incident to inva-
sion of the privacy of the telephone is far greater than that involved in
tampering with the mails. Whenever a telephone line is tapped, the pri-
vacy of the persons at both ends of the line is invaded and all conversa-
tions between them upon any subject, and although proper, confiden-
tial and privileged, may be overheard. Moreover, the tapping of one
man's telephone line involves the tapping of the telephone of every
other person whom he may call or who may call him.

Time and again, this Court in giving effect to the principle underly-
ing the Fourth Amendment, has refused to place an unduly literal con-
struction upon it . . . Literally, there is no "search" or "seizure" when
a friendly visitor abstracts papers from an office; yet we held in Gouled
v. United States that evidence so obtained could not be used. No court
which looked at the words of the Amendment rather than at its under-
lying purpose would hold, as this Court did in Ex parte Jackson, that its
protection extended to letters in the mails . . .

Decisions of this Court applying the principle of the Boyd case have
settled these things. Unjustified search and seizure violates the Fourth Amendment, whatever the character of the paper; whether the paper when taken by the federal officers was in the home, in an office or elsewhere; whether the taking was effected by force, by fraud, or in the orderly process of a court's procedure. From these decisions, it follows necessarily that the Amendment is violated by the officer's reading the paper without a physical seizure, without his even touching it; and that use, in any criminal proceeding, of the contents of the paper so examined—as where they are testified to by a federal officer who thus saw the document or where, through knowledge so obtained, a copy has been procured elsewhere—any such use constitutes a violation of the Fifth Amendment.

The protection guaranteed by the Amendments is much broader in scope. 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. To protect that right, 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. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants' objections to the evidence obtained by wire-tapping must, in my opinion, be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

When these unlawful acts were committed, they were crimes only of the officers individually. The Government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on
its behalf. When the Government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers’ crimes. And if this Court should permit the Government, by means of its officers’ crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the Government itself would become a lawbreaker.

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.