

Demetri Kofinas: What's up everybody? Welcome to another episode of Hidden Forces, with me Demetri Kofinas. Today I speak with Jeffery Rosen the nation's most widely read and influential legal commentator. Mr. Rosen is the President and Chief Executive Officer of the National Constitution Center. The only institution in America [00:00:30] chartered by Congress to disseminate information about the United States Constitution on a non-partisan basis. Rosen is also a professor at the George Washington University Law School. A non-resident Senior Fellow at the Brookings Institution and a contributing editor for the Atlantic Magazine. In this episode we step back from the partisanship and ranker of the marketplace of ideas, and appreciate the wisdom and forethought of that four page document in which [00:01:00] are enumerated the guiding principle's by which this republic has stood the test of time.

The American Constitution is a living, breathing document whose life force is expressed in the innumerable opinions issued by the courts, and debated on by the citizenry of this republic. How do we interpret a document written more than 200 years ago, by a handful of white, slave owning revolutionary's in an age of empire, terror and technological futurism? [00:01:30] How do theories of mind apply to the laws of personhood? How do we interpret the first, fourth, fifth, and sixth amendments, in an age of synthetic news, artificial intelligence, and genetic engineering, and can this enduring document safeguard our liberty, autonomy, and freedom in the digital age?

As always you can gain access to reading lists, put together by me, ahead of every episode, by visiting this show's website at HiddenForces.io. [00:02:00] com. Lastly, if you're listening to this show on iTunes or Android make sure to subscribe. If you like the show, write us a review, and if you wanna sneak peek into how the show is made, or for special storylines told through pictures and questions, then like us on Facebook, and follow us on Twitter and Instagram at @hiddenforcespod.

And now, let's get right to this week's conversation.

Professor Rosen, welcome to Hidden Forces.

Jeffery Rosen: Thank you, wonderful to be here.

Demetri Kofinas: [00:02:30] I am very excited to have you on the program. As I mentioned to your staff, I've listened to your Great Courses series and I loved it. I have gone through your book "Constitutional Law 3.0." Well its actually edited by you, it's actually got a number of really great, articles in there from different writers. So, it's no surprise, that's kind of the area that I want to cover today. But, there's sort of two general areas that I'm thinking about. I'm sort of breaking it down in my head and each of those sub-divides as well.

One of them has to do with sort of the impact of information technology [00:03:00] and this general technological revolution and how that affects privacy, autonomy, agency and freedom. The second has to do more with this emergent science in neuropsychology and

bioethics as well as, cybernetic organisms and artificial intelligence and how that affects our notions of personal responsibility and culpability for crimes, etc.

Maybe you could start by sort of walking us through the evolution of the law, as this sort of organism in the context of technological [00:03:30] change. Because, I think you've done a really remarkable job of doing that in particular, with your lectures, and I'd love to hear, maybe you sort of start us on that path for the audience.

Jeffery Rosen: Sure, it's such a fascinating topic and maybe it'd be helpful to just take one example, which is the evolution of law as it relates to electronic surveillance.

The law began by focusing on physical trespass as a necessary trigger for constitutional protections against unreasonable searches and seizures. The fourth amendment says "The right of the people to be secure in our persons, houses, papers, and effects, against unreasonable [00:04:00] searches and seizures, shall not be violated." And, the paradigmatic example of that at the time of the framing, was a general warrant, or the writs of assistance that sparked the American Revolution by allowing the King, and his agents to break into the homes of his critics, and search for authors of anonymous pamphlets. Basically, the law of trespass defined the contours of the fourth amendment for much of the 18th, 19th, and early 20th century.

Then wiretapping was invented, and the court had to decide whether a wiretap, which could [00:04:30] listen in on conversations without a physical trespass, violated the fourth amendment. In a wooden majority opinion, the court said no. Chief Justice William Howard Taft said "No trespass, no constitutional violation since the wire taps were under a public sidewalk leading up to the suspected bootlegger's office, no warrant was required." In a visionary dissenting opinion, which set the stage for the law of the electronic surveillance in the 20th century, just as Louis Brandeis disagreed, [00:05:00] he said that "electronic surveillance is even more invasive than a search of someone's home or private diaries, because it can invade the conversations of people on both ends of the telephone."

Brandeis had in his desk drawer a clipping about a new technology television, which he misunderstood as a kind of two way technology. Essentially, he had anticipated Skype, but he eludes to Skype and Cloud computing in this incredibly visionary passage, and he says in this remarkable dissenting opinion [00:05:30] that "the progress of science and invention is not likely to stop with wiretapping, ways may someday be developed by which, it's possible without physically intruding into desk drawers, to extract secret papers and introduce them in court." Advances in the psychic and related sciences Brandeis predicted may make it possible to reveal unexpressed thoughts, sensations and emotions.

At the time of the framing, as smaller intrusion. The general warrants was held to violate the fourth amendment, Brandeis insisted that we had to translate the fourth amendment, [00:06:00] so it protected the same amount of privacy in the age of the wires, as it did at the time of the framing. Well the Supreme Court later in the 20th Century adopted some of Brandeis' insights but, in a way that inadvertently undermined his central vision.

The court in the case called "The Katz Case," in 1967, held that the police couldn't put a wiretap in a public phone booth to listen in on the phone conversations of a suspected gambler without a warrant. But, it said that the test for deciding whether the fourth amendment was triggered, [00:06:30] was whether people had a subjective expectation of privacy that society was prepared to accept as reasonable. That sounded like an advance because, the court said the fourth amendment protects people, not places, and therefore physical trespass wasn't required. But the problem with the expectation of privacy test is that it's quite circular. Our expectations of privacy depend on the amount of privacy we subjectively experience, and as electronic surveillance became more pervasive, our expectations were lowered in a way that correspondingly lowered constitutional protections.

So the '70s and '80s [00:07:00] are just full of cases of where the court says "well you have to assume the risk, that when you turn over information to a third party, you abandon all expectations of privacy in it." That was a case called "Smith vs. Maryland." That led to a dramatic diminution of privacy in an age where many of our intimate thoughts and sensations and emotions are stored in the digital cloud.

Well this is still a contested and open area, the court has in cases, been willing to translate [00:07:30] the amendment so that it forbids warrantless searches without physical trespass, in particular, a case where someone was arrested, and the court unanimously said that the police couldn't search his cell phone without a warrant, because we do have an expectation of privacy in our cell phones. But that of course, would have involved a physical seizure. Really the dramatic culmination of this fascinating story may come later this year in the Carpenter case, heard at the end of November, where the Supreme Court will decide whether the police can subpoena geo locational records from our cell phones without a warrant, [00:08:00] and that will force the court squarely to confront an issue that it sidestepped in a case involving global positioning system's surveillance, namely can you reconstruct people's movements in public without a warrant.

There's a bi-partisan coalition in favor of privacy in the court, so I'm cautiously optimistic that the court will hold that a warrant is required, but whether it will do so now or later, broadly and precisely what the reasoning will be, remains to be seen.

Demetri Kofinas: So, Professor Rosen, you're also touching on there, what you mentioned was, first you really brought up the case of John Wilkes, [00:08:30] right? That was the first sort of thing that you were describing in terms of what initiated this, well not initiated but, what the framers had in mind when they sat down to write the Constitution and the Bill of Rights. The first case you mentioned there was *Olmstead vs. The United States*, and you touched on the dissenting opinion by Justice Brandeis. I wanna actually read that because, I have that written out here, and I want our audience to really appreciate this one particular passage that I really like, and then I wanna ask you something.

"Ways may someday be developed by which the Government, without removing papers [00:09:00] 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." I want people to

sort of, think about that a bit, and the reason why is because, one of the things I find fascinating and I wanna sort of, get to that point in this discussion is, the way in which prior opinions have influenced future cases, and the way in which we try to imagine the ways in which technology may be applied going forward. I wanna think about that as we make sort of projections, [00:09:30] towards the end of this discussion. But, having said that, quoting Justice Brandeis there, you often say "What would Brandeis do." I think you say, or yeah what would Brandeis do. What would Brandeis think, what would he say about where the law has taken us today? What would he think?

Jeffery Rosen: Well I'm so glad that you read that passage, it's so prophetic and so worth reflecting on. Brandeis was right, that ways have been developed by which the government without removing papers from secret drawers can reproduce them in court. [00:10:00] That's what Cloud computing is, and its remarkable how he seemed to anticipate it.

I think Brandeis would have been distressed by the court's well-meaning efforts to protect privacy in cases where there wasn't physical invasion, but in ways that made privacy so vulnerable, in particular this so called third party doctrine that says that when I turn over information to a third party, I lose all expectation of privacy in it. I think that he would have felt that this doctrine which [00:10:30] arose in a case called "Smith vs. Maryland" in the 1970s, is not appropriate when it comes to the surveillance of cell phones records, or geo locational records, or intimate data stored in the third party cloud, because so many of our intimate thoughts, sensations and emotions can be revealed by these searches. The second part of the sentence you quoted says, "By which it will be enabled to expose to a jury the most intimate occurrences of the home." That's exactly what the search of cloud data can do, and it can also expose the most intimate [00:11:00] thoughts that we have, that may be stored digitally.

So he would have been alerted to the challenge, but on the other hand I think he would have been happy that there's such a bi-partisan consensus among liberal and conservative justices. And, by the fact that, I think all nine justices of the court have cited at various times, Brandeis' dissenting opinion in *Olmstead*, which has broad bi-partisan support, and he would have applauded creative efforts to translate the amendment in an age of new technology, so he's a [00:11:30] prophetic guide and I hope that the court will live up to his example later this year.

Demetri Kofinas: Can you speak a little bit about the proportionality principle as it applies to *Olmstead vs. The United States*, and also you touched on the home there with his dissenting opinion that I read. Could you also talk a little bit about the privacy that is afforded to us by virtue of that decision, and the role of the home in being a sort of, bulwark for that in American society.

Jeffery Rosen: Well the home really has the highest constitutional protection because, it's the paradigmatic example of a [00:12:00] constitutionally protected space at the time of the framing. It was, I'm glad you mentioned John Wilkes' case and Wilkes as you know what the British critic of King George who wrote anonymous pamphlets criticizing

the King and then stored the printer's proofs, in his home. So, the Kings agent had to break into his home in order to reveal him as the author of this pamphlet, "North Briton 45," and based on the outrage against the warrantless search of Wilkes' home and the home of other columnists, and [00:12:30] Englishmen, the home has the highest Constitutional protection.

It's interesting that in some electronic privacy cases, the more conservative justices' are more willing to find invasions when the home is at stake. So, in the Kyllo case involving a thermal imaging device, that could reveal how much heat was on the outside of the home, Justice Scalia wrote a majority opinion saying that "Any cutting edge technology that might reveal information about intimate activities in the home presumptively required a warrant," [00:13:00] and since the thermal imaging technology could reveal heat on the outside of the house, which might suggest that the hour of the day that the lady of the house was taking her daily sauna or bath, therefore, a warrant was presumptively required. A very resonate image from classical imagery, as Jeannie Suk the Harvard scholar has noted.

But, so that's great that the home has such sacrosanct constitutional protection, but it's not enough in an age when our most intimate thoughts and papers are no longer, for most of us, stored in the home, but stored in the [00:13:30] digital cloud, or on our Google Docs, or on our hard drives.

Demetri Kofinas: I want to interject with a question if you didn't mind? What you're referring to is the fourth amendment, correct? This is where the home comes up as well in the Bill of Rights?

Jeffery Rosen: Yes, and let's quote it, "The right of the people to be secure in their persons, houses, papers, and effects." So, houses, as well as persons and papers and effects, are the paradigmatic example of constitutionally protected spaces or things under the fourth amendment.

Demetri Kofinas: So, I wondered, when I was reading that, because I actually printed out the first, fourth, fifth, and sixth amendments, as well as [00:14:00] the eighth, although and I'm not sure exactly why I did that I have to sort of think about that, it must have had, there must have been a good reason for it. But in the fourth amendment, when I was reading through it, I thought a little bit about "secure in their persons," and I thought about the evolution of technology, and I wonder if you've looked at that amendment and thought about how that might be interpreted going forward?

Jeffery Rosen: The evolution of persons?

Demetri Kofinas: The evolution of identity. And, that sort of comes back [00:14:30] to something I mentioned early on, and I'm sort of jumping ahead here, but I mentioned these innovations in, with respect to artificial intelligence, and cybernetic, sort of people. You know as we sort of add appendages that are non-biological, and certainly with respect to the artificial intelligence, you may be familiar with these arguments, in particularly in Silicon Valley, around building a theory of mind for consciousness, so that if we get to a place where technology fulfills certain, checks certain boxes, that we [00:15:00] have to

afford it certain constitutional rights. It may sound bizarre, if it is the first time you're hearing it, I can certainly relate to that, but I'm curious if you've heard that, and if there is any sort of conversation in the legal community around that, is anyone looking forward to those types of arguments?

Jeffery Rosen: They are, in the collection that you mentioned, Constitution 3.0 which, Ben Wittes and I edited, there's an interesting piece by Jamie Boyle of Duke Law School about the future of personhood, and Boyle imagines futures [00:15:30] genetically enhanced chimpanzees for example, or dolphins, or even, I think this is his example not mine, as sort of sapient sex toy that would seem like a human being, but would not have human characteristics, and so forth. So, and in this piece Boyle tries to imagine what the future personhood might be, and basically what a definition of personhood might be, and he offers, as I recall, an example of the Turing Test, which is the ability of an enhanced [00:16:00] AI object to perform certain tasks, to appear to meet a certain threshold of human intelligence. That's just one proposal.

You know there's so many things to say about this fascinating thought experiment, but the fourth amendment talks about the right of the people to be secure in their persons, their houses, their papers, and their effects. So, the most obvious originalist thought that comes to mind is that Chief Justice Taney and his infamous opinion in the Dred Scott [00:16:30] case, said that we the people were the people who created the U.S. Constitution, and he infamously and historically incorrectly said African Americans were not part of that people, that part of his opinion is discredited, but the part that the Supreme Court has repeatedly reaffirmed is that "the people" refers to American citizens, interestingly, it does not refer even to aliens.

And, the court has reaffirmed that when the Bill of Rights refers to people, it's referring to citizens. So, if you were going to translate the fourth amendment so it included artificial intelligence, you could try to persuade [00:17:00] the court to overturn that holding, although that would be tough, because it's pretty well established. But, it appears that even though the notion of personhood may evolve, the question of "the people" itself at the moment is defined as American citizens, you also would have to describe what kind of citizenship to enhanced robots or sapient animals, or as you please. So, there's a lot of moving parts to this interesting question.

Demetri Kofinas: That's very fascinating. I love your answer, it really resonates with me because I must say, this is the first time I really went [00:17:30] through the Constitution in any level of detail. I have no law degree, and really looking at these amendments, and trying to think about them, I find humbling, and also in some ways it gives me a sense of confidence around the system. Because I see the way in which the law has evolved, given all its major imperfections, but I appreciate your answer there. To follow along that thread, in terms of looking forward, one of the other things that has come up, certainly on this show it's something we talk about given the topics, [00:18:00] is the ethics around engineering, and the way in which, I sort of shorthand this in my thinking, I call it algorithmic jurisprudence. And, I think the most obvious place to look at it, and to find it,

where I think it's easiest to think about, is in respect to the engineering of utility functions and values in technology around driverless cars.

So, you may be familiar, I imagine you are, with the dilemma that engineers face in assessing [00:18:30] the probabilities of hitting a pedestrian, or hitting, or the car hitting a pole and figuring out what's the likelihood of hitting a pedestrian, what's the likelihood of the driver hitting the pole, and what's the distribution there in terms of bodily harm and also in terms of value. Who is worth what? Is a child worth more than an adult? Is an adult worth more than an old person? Certainly the laws have, in civil court, have touched on this I believe, certainly with, you can extract more from a person who is of [00:19:00] an age of income production, as opposed to a child. I mean there are these perverse ways of valuing people. Do you think about that at all with respect to the Bill of Rights? And how it is that we, and this touches of course on corporate power right? And, the way in which the Constitution protects us from the Government much better than it protects us from private corporations?

Do you have any thoughts on that at all? The first part and the second part.

Jeffery Rosen: It's a completely great question just give them each to me separately because I wanna make [crosstalk 00:19:25] sure I do them justice.

Demetri Kofinas: Sure, sure, sure, absolutely. So the first one is really the fact that we [00:19:30] are entering an age where, in a sense there's a sort of extra judicial, people are being, not being tried extra judicially that is a separate issue, I don't mean to conflate it, but what I mean is that if you're engineering, if you're putting a value into an algorithm and deciding what value as a private corporation, individual people have and you're designing cars, that's something that normally the courts would decide after the fact, right? I mean, that entire idea, have you thought of that, do you have any opinions about that?

Jeffery Rosen: It's a really big question, I have not thought [00:20:00] about it in any systematic way at all, but you're quite right, you're absolutely right, that as driverless cars get up and running questions of liability for car accidents will be, have to be rethought. Questions of negligence, intent, reasonable care, all of these right now are premised on the idea of human agency, and once the algorithms of the self-driving cars are taking over, one question is, to what degree should the humans be accountable, and then you raise the question of should the authors of the algorithms themselves be accountable. [00:20:30] And, the common law can impose liability on any party that it thinks will benefit society as a whole. It's all from a kind of cost benefit analysis, and the party in the best position to avoid harm, is often the object of liability, so it's not inconceivable you could imagine common law courts, or legislators putting liability on Google, or whoever's designing the algorithm in order to try to persuade them to design a better algorithm, or they might reach a different balance.

But, there just a whole host [00:21:00] of really fascinating, really complicated questions, I haven't begun to think about them, but they will keep lawyers, law students and citizens busy for decades to come.

Demetri Kofinas: So then, following on that a little bit, I believe that at least one of your graduate students, works or worked at Facebook, is that right?

Jeffery Rosen: One of my students at GW worked at Google, and I'm very proud of him, he's heading up their privacy policy and he's doing a great job.

Demetri Kofinas: I say that because I remember seeing, maybe I was thinking of someone else. Someone was lecturing, I believe it was you, and you spoke about this dilemma [00:21:30] that some law students, and I believe it, maybe it was not you, but whoever was speaking said, my student, one of my students works at Facebook, and he tells me, look I shouldn't be in the position of having to make these decisions, these are decisions that should be made in the court of law. These are constitutional questions, and I'm being forced sort of in my position, this commercial entity to make these decisions. Whether it was you or someone else, it was a public statement, I remember it was part of a lecture. What do you think about that? Of the fact that given these, sort of the technological reality, these corporations [00:22:00] are increasingly in positions to have to make decisions, legal decisions that really should be left to the courts?

Jeffery Rosen: I think you're referring to one of the former heads of hate speech policy at Facebook, it wasn't one of my students, but I did interview him for the New Republic for a piece called "The Delete Squad," and he did say something [crosstalk 00:22:16].

Demetri Kofinas: Okay, I apologize, that was my confusion.

Jeffery Rosen: No trouble at all. But, it's something along the lines that you suggested, that he, kind of questioned the fact that he and his colleagues have this awesome responsibility, and then others in his position have raised similar [00:22:30] questions to the head of, the former head of Google, the former associate general counsel of Google, Nicole Wang told me decades ago for a piece in 2007 called "The Deciders," that she also thought the scope of decisions that she and her colleague had to make was so great, given the hundred and some odd countries that Google does business. That she wondered whether the companies were actual equipped to make them.

Now the fact that the companies have awesome power and are private corporations unconstrained by the Bill of Rights, doesn't necessarily mean that the courts [00:23:00] are the better deciders, or even the legislators, to me there's not a clear answer about who is best equipped to make these decisions given the scope, and the values that may be applied. But I do feel strongly that the principles of the U.S. Constitution, in particular those of the first amendment, which has been improperly construed by the court to allow the restriction of speech only when it's intended to and likely to cause imminent violence, I think that principle should be voluntarily [00:23:30] adopted by the company's to the degree that they can, they can do that in the U.S. not so much in Europe, which has a more constricted notion of free speech.

Essentially, I think we need as a society, to have a vigorous national debate, as they say about whether and how the company should be constrained, to what degree the legislatures and courts should be involved, and how free speech values can be best protected.

Now as it happens, we're having precisely that debate. Congress and citizens are concerned about fake [00:24:00] news, and interference in Russian elections, there's pressure on Facebook, and the platforms to filter fake news. The question of whether that will take legislative form remains to be seen, but citizens around the world, as well as legislators are aware of the power these companies face, and we're trying to figure out now how to strike the right balance.

Demetri Kofinas: So that kind of brings us to this question of what is the role of Congress versus the courts, right? Because this would be something that Congress would have to intervene in, am I correct in thinking of it that way?

Jeffery Rosen: Yes, [00:24:30] the question of whether it should be Congress, the courts, or neither, or regulators, or even a constitutional amendment to regulate the platforms, all of those are on the table.

Demetri Kofinas: Do you have any feelings on this whatsoever, I mean do you have thoughts, do you fall in one perspective or another? I know that philosophically speaking, having studied your work, you believe, again Brandeis is very much sort of an icon for you, and in that I assume, it's really you think the spirit of the amendments, of the Bill of Rights is what we should be more concerned on and not the [00:25:00] literal language, correct?

Jeffery Rosen: Yes, but literal language, the first amendment isn't self-interpreting, but I do believe that the spirit and the historic principles that Brandeis properly read into the first amendment, which date back to Jefferson, and Madison, and theories of natural rights are the correct spirit of those amendments, and should be applied as much as possible by the platforms to the degree that they're adjudicating free speech.

I don't have a confident feeling about the [00:25:30] appropriate interventions by judges and legislators at the moment. In practice, I find it hard to imagine that Congress would adopt anything like first amendment for Facebook that would require the platforms to allow speech to be restricted only when it was intended to and likely to cause imminent violence. And, even if Congress were likely, hypothetically, to pass such a law, which it's not, there are questions about the speech rights of company's and the virtues of federal [00:26:00] regulation that need to be debated as well.

But, I guess I believe, and I also think Facebook and Google, have not so far done a decent enough job, given the alternatives of adopting something approaching the American first amendment tradition, although they've also allowed the banning of more speech than the first amendment would ban, but their subject to overpowering commercial as well as political pressures that may make that less stable in the future.

Over the long term of U.S. history, [00:26:30] courts have proved to be the best defenders of the rights of minorities, and of unpopular speech than any other institution. So, that alone suggests that there might be some role for courts in the future, but I'm not confident enough to have a clear sense of what the right path is at the moment.

Demetri Kofinas: Well you mentioned this fake news controversy, and that's something I want to ask you about as well. Fake news on the one hand, which is I think is one particular phenomena that we are experiencing currently under this umbrella "fake news." [00:27:00] And, the other one I want to ask you about is something that we've discussed on this show a little bit in our episode with John Borthwick, which is what he calls synthetic news, I don't know if there's an actual term for that, but it's something that is enabled by technology, which is you can actually stitch together and recreate, make someone, like Barack Obama for example, who you have plenty of video footage of him, and audio, you can make him say something that looks convincingly real that he in fact did not say. And, that's going to be a real problem if we're gonna simply just go [00:27:30] off of things like video footage. You know, go to the video tape, you know what I mean?

I wonder what you think about that, the challenge of truth in this digital age?

Jeffery Rosen: Well it's obviously a tremendous challenge, which is shaking our notions of facts to the core. And, Brandeis believed that without agreement about facts, democracy would perish because, citizens couldn't develop their faculties of reason, and converge around a common understanding of truth.

But, exactly what the role of the platform should be, again, forgive me for being so [00:28:00] tentative. These are really tough problems and, they are just be playing out before our eyes. Some are calling on the platforms, to review all news that goes out under them, and to label as fake, fake news. That would represent a transformation of the way the platforms are treated legally, and philosophically at the moment they're immune from liability for falsehoods and libel posted on them by Section 232 of the Communications Decency Act, which says that as long [00:28:30] as the platforms don't act as editors, but are merely hosts, then they're not liable for anything people post. And, that's proved to be a great boon for free speech in the U.S. because the platforms don't have to censor a lot and can let a thousand, or a million, or a billion flowers bloom.

Were they required to review everything that would put them in the view of being newsstands rather than neutral platforms, like a public park. And, if they were newsstands or editors then they'd have to exercise editorial judgements, which might [00:29:00] lead them to over regulate. And also the question of fake news is sometimes contested, I suppose there's some stuff that's deliberately created by algorithms to be false, but in other cases, what's fake news is a matter of opinion, in fact is a form of opinion, and that's why American law has traditionally not allowed the regulation of opinion of any kind, that was the core of the Jeffersonian belief, and the definition of freedom of conscience. And therefore, putting the platforms in the business of distinguishing between fact and opinion, especially [00:29:30] given the volume, billions of pieces of content exchanged every, whatever it is, minute or hour.

Demetri Kofinas: All the time.

Jeffery Rosen: Daunting. Yeah all the time.

Demetri Kofinas: I absolutely, and it's a fair point, and in fact I don't mean to put you on the spot and ask you necessarily what you think, I'm also saying, okay what are the opinions out there, what are some of interesting ideas around that? I think, where I fall in this, when I talk about fake news, I don't actually mean willful deceit meant to achieve some political objective. I know that's the big [00:30:00] theme in the media, but I think what's really more troubling is the way in which, content is created to target the algorithms of the social media platforms and the platforms in general in order to find a way to accelerate your content, get it on trend, and just push it out. That's the idea of conflating cat videos with hard news. That is a problem, without question, and how to resolve it, I don't know either. It certainly is a big one.

Let me ask you something that I think is easier [00:30:30] to sort of, for both of us to discuss because, it's older, it's been around. This is this notion of net neutrality, but I also want to talk about that in the context of what we were just describing, which I think of content neutrality.

Now net neutrality, could you tell our audience a little bit, what net neutrality is for whoever doesn't know?

Jeffery Rosen: Sure, net neutrality is the principle that platforms shouldn't discriminate among content that they host, and should treat content equally. So, to take an example, Comcast got [00:31:00] into trouble a few years ago, when it was alleged to have discriminated against bit torrent, which is a file sharing network, on the grounds that it was allegedly preferring its own file sharing service. As a result, people had trouble downloading barber shop quartets, or copies of the King James Bible on bit torrent. So, net neutrality would prohibit Facebook, or rather Comcast from favoring its own file share over bit torrent, and would require the content to be treated equally.

That's [00:31:30] the thinnest version of net neutrality. Things get trickier when the question is can Comcast charge more for non-affiliated platforms that use a lot of bandwidth? So, Netflix takes up a lot of bandwidth, can Comcast charge Netflix users more for downloading Netflix videos than for videos downloaded under Comcast owned companies? That is a prohibition on price discrimination, which is a more robust version of net neutrality. But, the one that the FCC [00:32:00] has adopted, and then was, that's the Federal Communications Commission, and then was struck down by the courts on the grounds that the congressional authorizing statutes didn't support it, and then, which the FCC tried again under a different provision. Essentially was the first version, which would have prohibited platforms from discriminating among content providers, and require them to treat every bit of content equally.

Demetri Kofinas: You're basically saying is there is no discrimination between the bits of information, the idea that every bit is treated equally [00:32:30] on an informational level, that would be, I think, what net neutrality is, correct?

Jeffery Rosen: Well I'm hesitating only because, there are all sorts of ways that we might treat different bits of information differently. I think this was really a question of can it be blocked or slowed, or degraded.

Demetri Kofinas: Right.

Jeffery Rosen: Or can it be accessed as quickly as every other bit of information?

Demetri Kofinas: Right. The idea for example, if you have a VOD service, video on demand service, for example, it's a simple, an example I would use, if you're Time Warner and you want people to use your video on demand [00:33:00] service, this is especially true in the earlier days, it would be in your interest to throttle Netflix, because you'd rather have your customers watching your own view of the library, then going to Netflix. That would be I think, a good example.

I bring it up because, I think for me, net neutrality is conceptually reaches further in the minds of people who haven't really looked at the, of what that is in legalistic terms. Because, of the fact of that within the net itself, it brings us back to this notion of the platforms, [00:33:30] and the ability of the platforms to actually throttle traffic on a software level. So, that Facebook can throttle traffic, and in fact they do, and I've experienced this myself, in fact I've experienced it over time, as many have, and many publishers have, there are ways in which on a regular basis, content that exists online, goes through these virtual choke points that are really sort of parallel to the choking that would happen at the ISP level.

Anyway that was my point about that, I was just curious if you had any thoughts on it, and I think it ties [00:34:00] back into this issue of the platforms and commercial power, and it's a really big deal, I mean it's a really big deal in the current paradigm of what we're facing.

If you have any thoughts on it let me know, or I, we could just move forward to some of the more sexier topics, like designer babies.

Jeffery Rosen: Well you're absolutely right, the architecture blocking is crucial, and there are some moves to block really offensive content at the network level, and in Britain, bullying videos, or in the U.S. child pornography. [00:34:30] There's pressure on the internet providers themselves, like Comcast to identify the censored content, and block it. That would set us down a road toward putting the owners of the pipes essentially, in the position of being content reviewers that could lead to some troubling consequences.

Demetri Kofinas: Your hesitation I think reveals something important, which is that these are extremely complex conversations to have, and I think so often in the framing, they're framed in such simple terms, but when you actually look [00:35:00] at the law,

could you speak a little bit about that maybe, sort of your experience with the complexity of the evolution of law in your career?

Jeffery Rosen: Well, of course, the technological changes in the past decade alone have been dizzying beyond imagination. The law is always, it's a conservative force, in a small sea, and it moves incrementally and tries not to leap ahead of technological change, but also not to lag too far behind.

But, I suppose I've been struck and [00:35:30] moderately optimistic about the willingness of judges of different backgrounds to grapple with these changes, and to help translate the law into an age of new technology. The fact that the Supreme Court is unanimous or nearly so, in the global positioning system case, and the cell phone on arrest search case, suggests that this is not a partisan issue, that justices of all backgrounds, and judges as well, can understand the importance of translating the law in light of new technologies. And, although technology [00:36:00] itself is complicated, the translation of constitutional principles, although challenging and requiring rigorous thought, doesn't require a degree in Science, it requires a leap of constitutional faith, an act of creative constitutional translation of the kind that Brandeis insisted on. So that we preserve these amendments and have the same amount of privacy today as we did then. So, the challenge comes [00:36:30] not from the technological complexity, but of a lack of, or presence of creativity.

Demetri Kofinas: Let me ask you something else. This concept, this notion of liberty, and freedom, this is so central to the American Constitution, and to the framing. One of the things I thought about in preparation for this interview, I saw the case of Aaron Hernandez, the tight end for the Patriots, and I thought about that because of certain things that came out after he, this is the gentleman who allegedly, not [00:37:00] allegedly he was convicted of murder, and then he hanged himself recently in his jail cell. A very tragic case. It was later discovered that he in fact had damage to his brain, I don't remember what the exact term is for when you get this from football, but he actually had, he was exhibiting early stage symptoms of that. It made me think a little bit, and in fact it may have even been talked about in the media, but I thought about how this can connect towards this evolution of neuro law, right, and the way we're thinking about agency and free will [00:37:30] in the 21st century.

Do you have any thoughts on this, are there any interesting cases, or are there any interesting opinions, have you read anything interesting around neuro law, and the advancements in neuropsychology and insights around free will and the way this is changing, and how this is affecting, or could affect the law going forward?

Jeffery Rosen: It's a fascinating topic, I did a piece on neuro law for the New York Times Magazine a while ago, it was in, just checking about the date but it was a few years ago, and [00:38:00] I haven't followed the field closely, it was 2007, it was quite a long time ago. It was called "The Brain on the Stand," and I haven't followed the field closely since then, but my understanding is that, the law has not dramatically evolved beyond the place it was then, which is that judges are occasionally admitting neuroscience evidence in at the sentencing stage, where any evidence is admitted under a low relevant standard. But, that

essentially people are not being acquitted on [00:38:30] the basis that "my brain made me do it." That was the strong claim of neuro law when it launched more than a decade ago.

The idea that people who had overly active medulla's and whose pre frontal cortex, which is the conscience part of the brain, were underactive might be excused on the basis that they basically had an abnormal brain. And, that hasn't really flown, it hasn't persuaded juries or judges, essentially those juries and judges are treating neuroscience evidence just like the Twinkie defense.

Ordinarily [00:39:00] the law doesn't care if you shot someone because you had a bad childhood or ate too many Twinkies, or because your brain made me do it, you're held responsible for your freely chosen actions, and unless neuro law got to the point of calling into question the notion that we are, that we have free will itself. If it got to the point of claiming that although I think right now, I'm gesturing, and talking to you on a podcast, but this is just an illusion, that I'm doing this intentionally and actually I'm programmed to be moving my hand and to be speaking in the way that I am, and an essentially automaton or a robot, the kind [00:39:30] of artificial intelligence type we were talking about earlier. If that were proven by neuroscience, then that might be different but it hasn't come close to being proven so, at the moment, judges and juries are treating this as interesting stuff that can come in, along with almost everything else, but stuff that's not at the moment dispositive.

Demetri Kofinas: Well my most recent interview was with Dr. Heather Berlin, who's a neuroscientist here in New York, and this came up, and this is a very common perspective I think, it's an emerging perspective in the materialist sciences, that [00:40:00] we are moving towards this place of accepting this notion that in fact, agency is an illusion, and it does concern me, this you know, the advancements that are happening again, this is a remarkably challenging field, and I say this with great humility, especially preparing for this interview, because I really wanted to think critically about how I wanted to take your time. Because you have spent so much of your career thinking about this stuff, and you've lectured on it. And I'd highly recommend to anyone who's interested, to get your Great Courses series on lecture if [00:40:30] they wanna learn about the implications of constitutional law in the 21st century, in the age of technology and technological intermediation.

I say with great humility because these are very complex ideas, and the notion that they would pervade the courts, is something that we should consider. We talk about all these technologies, and these scientific advancements on this show, we've never really talked about the legal implications and how would the law deal with them. I think, again preparing for this interview and thinking [00:41:00] about that, really brought some humility to me in that respect. What about for example, what about the innovations and the advancements in the genomic sciences, and genetic engineering? What have you heard, is there anything interesting in that field that legal scholars are discussing?

Jeffery Rosen: Well there were some great papers in that Constitution 3.0 book, and again this was published a while ago, about how notions of genetic engineering are challenging ideas of human autonomy. There [00:41:30] are efforts to create designer

babies, and couples wanting to select, or not select when their creating embryos through in vitro fertilization in favor of height, or eye color, or sexual orientation, or what not, and the question is, is that constrained by the constitution? Well the one side, the strong autonomy side says, that it's the court, and Roe V. Wade, and associated cases, said that we have an autonomy right rooted in the liberty clause of the 14th amendment to choose to procreate or not, and we have the right to choose [00:42:00] what kind of children we want to create in the course of our procreation. Therefore, our ability to create designer babies should be unconstrained.

The other side says, if the full, the embryo, the fertilized embryo is a human being with full constitutional rights under the 14th amendment, then any attempt to engage in genetic engineering or even stem cell research itself, could be murder, and could be punished as such.

And, I guess unsurprisingly, many people fall somewhere in the middle, and are unwilling [00:42:30] to accept either of those extremes and, might feel that perhaps the constitution, at least in its current form, may not regulate designer babies or genetic engineering, but perhaps there should be statutes, or ethics boards, as there are in Europe, where the British Parliament and many of the French and German governments have set up bodies of experts to establish principles for genetic engineering based on, for example principles that, selection on the basis of therapy, is more morally, [00:43:00] ethically, and perhaps legally acceptable than efforts to enhance embryo's on the basis of particular characteristics. But, these are just some initial thoughts, and the field is in its infancy.

Demetri Kofinas: Well it's great that you bring up Europe, because one of the, I don't know if it's a law, is it a law the right to be forgotten? I don't know how you would refer to it, but I learned about this from reading your work, it shows a distinction between the way in which the Europeans deal with privacy for example, and the way in which the American's do, [00:43:30] what are some of the distinctions between the way in which European courts have dealt with these questions and the way in which American courts have? That you think is interesting.

Jeffery Rosen: Well the right to be forgotten is definitely the most dramatic, and I think perhaps the most significant difference. The European court of justice a few years ago, recognized this broad right to be forgotten on the internet, which says that in Europe, any European data subject, has the right to demand the deletion of any irrelevant or outdated data. [00:44:00] In practice, this means that anyone in Europe, if we were in Europe talking and someone tweeted you know, "Jeff is boring," or "the interview's gone long enough," then I could demand, or you could demand that this scurrilous tweet be deleted by Google as irrelevant, and then Google would have to decide if you or I are public figures, and if the tweet is in the public interest, and if they guess wrong and a privacy commissioner in Europe second guesses them, then Google is liable to up to 2% of its annual income, which last year was \$60 billion per incident.

So, then that kind of fine focuses [00:44:30] the mind, and Google has removed 43% of the take down requests that its received in Europe, including requests to take down articles

about the right to be forgotten itself. None of this could happen in the U.S. where we believe that the publication of truthful but embarrassing information cannot be restrained, unless it's intended to and likely to cause imminent violence, back to Brandeis.

So, a huge difference between the way Europeans deal with privacy rooted in notions of dignity and honor, and the way that American courts do rooted in notions of liberty.

Demetri Kofinas: Professor Rosen, I [00:45:00] appreciate you lending us so much of your time. I wanna ask you one more question before I let you go, and that has to do with, no let me ask you, do you still teach, you teach right now, correct?

Jeffery Rosen: I'm on leave from GW Law School so I can run this wonderful institution, the National Constitution Center.

Demetri Kofinas: I wasn't sure if you also taught on the side. This is what I wanted to asked you, when you did teach, and certainly you do teach in a way, right? By doing these interviews and lecturing. What is the single most, or a couple of the most important things that you want people to understand, and take away about the [00:45:30] law? Because, you do speak so passionately about it, and that's so obvious, that does come through, and I am curious, what is most important to you that people understand? What should the audience understand about our conversation today?

Jeffery Rosen: Well thank you for asking. It is important, and I am passionate about it. The most important distinction that I try to teach law students, and now try to inspire citizens of all backgrounds with, is the importance of separating your political from your constitutional views. All of us have political views, and we're unlikely to convince each other about [00:46:00] them. But, there's a difference between our views about good policy and what the constitution allows or prohibits. There's a difference between what the government should do in our view, and what it may do according to the constitution.

So by asking not, is ubiquitous surveillance by drones in public a good or bad idea, but does the fourth amendment allow it or prohibit it. Then citizens and listeners to this podcast will have to learn enough about the text and history of the fourth amendment, and Supreme Court cases interpreting it, and [00:46:30] new technologies that challenge these interpretations. To have an informed constitutional view. You might find yourself having your political and constitutional views diverging, thinking that ubiquitous surveillance, or the kind of technologies we're talking about are really bad ideas, but the fourth amendment allows them, or conversely that they're good ideas, but the fourth amendment prohibits them.

There's something so rigorous, and important about that distinction. Both because it forces us to learn, and to cultivate our faculties of reason. To take the time to learn enough about these [00:47:00] important provisions to make an educated decision. Also, because it lifts us above our partisan, political views, and allows us to both unite around and debate this great document of human freedom, which unites us, which is the U.S. Constitution.

Demetri Kofinas: I love that. I love that. I felt the same way reading it, it gave me such a tremendous appreciation for the law that I did not have before. So, Professor Rosen thank you again so much for your time. And, audience I want you all to know, there's gonna be as always, there gonna be links to reading materials, but I'm also gonna put a [00:47:30] link up to the Great Courses series, which I think is the easiest way to really, to use a metaphor that's appropriate to today, to download so much of what Professor Rosen has done, as well as his, this book that he edited, Constitutional Law 3.0.

Professor Rosen thank you again so much for your time.

Jeffery Rosen: Thank you for a great conversation.

Demetri Kofinas: And that was my episode with Jeffery Rosen. I want to thank Professor Rosen for being on my program. Today's episode was produced by me and [00:48:00] edited by Stylianos Nicolaou. Sound engineering is also Stylianos Nicolaou. For more episodes, you can check out our website at: HiddenForces.io. Join the conversation through Facebook, Twitter, and Instagram at: [@hiddenforcespod](https://www.instagram.com/hiddenforcespod), or send me an email.

Thanks for listening, we'll see you next week.