

Bulletin of the GHI Washington

Issue 41

Fall 2007

Copyright

Das Digitalisat wird Ihnen von perspectivia.net, der Online-Publikationsplattform der Max Weber Stiftung – Stiftung Deutsche Geisteswissenschaftliche Institute im Ausland, zur Verfügung gestellt. Bitte beachten Sie, dass das Digitalisat urheberrechtlich geschützt ist. Erlaubt ist aber das Lesen, das Ausdrucken des Textes, das Herunterladen, das Speichern der Daten auf einem eigenen Datenträger soweit die vorgenannten Handlungen ausschließlich zu privaten und nicht-kommerziellen Zwecken erfolgen. Eine darüber hinausgehende unerlaubte Verwendung, Reproduktion oder Weitergabe einzelner Inhalte oder Bilder können sowohl zivil- als auch strafrechtlich verfolgt werden.

GHI RESEARCH

THE RIGHT TO PRIVACY: DEBATES AND MEANINGS IN AMERICAN POLITICAL AND LEGAL HISTORY

Markus Hünemörder

University of Munich

*GHI Postdoc Stipendiat für Nordamerikanische Geschichte,
2006–2007*

The right to privacy is among the most contentious and ambivalent issues in American politics and jurisprudence today. Take, for example, the nomination of Samuel Alito to the United States Supreme Court in 2006. During the confirmation hearings, the right to privacy was one of the main topics on which the Senate committee questioned the nominee. Alito, unlike Robert Bork nearly twenty years before him, agreed that the United States Constitution implies a right to privacy, while at the time remaining purposefully vague about just what it entailed.¹ In fact, the right to privacy has played a key role in Supreme Court nominations since the 1970s, and has been one of the most obvious dividing lines between the justices of the high bench themselves. Legal philosopher Lloyd Weinreb argues that “the right to privacy [. . .] has been a litmus test of one’s constitutional credentials as a scholar or (would-be) judge: liberal or conservative, activist or textualist, and so forth.”²

It is not immediately apparent why this should be the case. Although the word “privacy” does not appear in the US Constitution, most Americans would readily agree that privacy is a central value of American life worthy of legal protection.³ The problem lies in the fact that privacy is such an ambiguous, politically charged concept; there simply is no agreement on what privacy entails, or even what the word precisely means. An early advocate of privacy at the dawn of the computer age, Arthur Miller, summed it up: “[T]he concept of privacy is difficult to define because it is exasperatingly vague and evanescent, often meaning strikingly different things to different people.”⁴

A large part of the problem is that the Supreme Court based its 1973 abortion decision *Roe v. Wade* on the right to privacy.⁵ Abortion is arguably the single most contentious issue in American politics; this is why privacy plays such a prominent role during Supreme Court nominations. Accordingly, when Alito confirmed the existence of a right to privacy in

the US Constitution, he meticulously avoided accepting *Roe* as irrevocable precedent.⁶ However, Alito's confirmation hearings also happened at a time when another privacy issue was in the news: the Bush administration's program of monitoring telephone conversations between the United States and foreign countries without judicial warrants.⁷ To critics, that program constituted not only an alarming excess of executive power, but also a dramatic violation of American citizens' rights to privacy.

What, then, does "privacy" or "right to privacy" really mean? There simply is no commonly accepted definition. Translating the term into German is even more difficult: *Privatheit* is not a commonly used German word, whereas *Privatsphäre* would be too narrow. In American usage, the right to privacy has been connected to extremely diverse issues: freedom from unreasonable searches and seizures, the secrecy of the mails, freedom from physical and electronic surveillance, contraception, abortion, homosexuality, the right to die, freedom of the press, identity theft, and data protection, to name just the most prominent ones.

This research project aims to examine the legal and political history of the right to privacy in the twentieth century, with a focus on the 1960s through the 1980s. Next to the statutory and constitutional development in the United States, special attention will be given to the political and public debates on privacy, as well as their impact on American political culture. The project is also transatlantic and comparative in scope: The development of privacy rights and debates in the Federal Republic of Germany will be compared to the United States. In Germany, for example, privacy rights have had little impact on the abortion debate, quite unlike in the United States. In contrast, the German census of 1982 sparked a heated struggle over the right to informational self-determination, whereas the American census has been mostly uncontroversial. Right-to-privacy issues also affect current transatlantic relations: The debates over the handling of airline passenger data between the EU and the US or the issue of biometric data in identity documents may serve as examples.

The project relies primarily on printed sources. Court decisions and statutes are obvious choices. The bulk of source material will reflect the political and public debates on privacy: newspaper and news magazine articles, congressional hearings and reports, law reviews, party platforms, and NGO publications. There is also a large body of privacy activist literature; at least since the 1950s, many books addressed the right to privacy, and typically warned of its erosion in American society. Prominent examples include *The Eavesdroppers* by Samuel Dash, Richard F. Schwartz, and Robert E. Knowlton (1959); *The Naked Society* by Vance Packard (1964); *Privacy and Freedom* by Alan Westin (1967); *The Intruders* by Senator Edward V. Long (1967); and *The Assault on Privacy* by Arthur

Raphael Miller (1971).⁸ Especially in the 1960s and 1970s, public debate in the United States coalesced around a number of privacy issues that define the field to the present day.

The following remarks present a rough sketch of the development of the term “right to privacy” in American legal and political history in order to demonstrate the ambivalence and complexity of the concept.

Common Law Privacy

The term “right to privacy” entered American legal parlance in 1890 in a *Harvard Law Journal* article by a young lawyer named Louis Brandeis, who later rose to prominence as a Supreme Court justice.⁹ The article addressed the problem of the emergence of snapshot photography, and the intrusive new forms of journalism and advertising it introduced. Brandeis argued in favor of a “tort of privacy”: Individuals should be able to defend their “right to be let alone” in civil actions against those who used their picture against their will. The text is today considered the most influential law review article in American legal history. Even so, it took fifteen years before the Supreme Court of the state of Georgia recognized a right to privacy that gave individuals control over their own likenesses, albeit more with regard to commercial advertising than to press coverage.¹⁰ Other states followed suit, sometimes with a privacy statute, but more frequently through the mechanism of the common law.

By 1960, legal scholar William Prosser found that this right to privacy provided citizens some protection against the publication of embarrassing information about themselves, the publication of distorted facts about themselves, and the unauthorized use of their names and likenesses.¹¹ The truthful publication of facts by the press, especially with regard to persons of public interest, remains unabridged by this specific form of privacy, which affects primarily privacy conflicts between individual citizens and commercial enterprises. Over the course of the twentieth century, however, conflicts of privacy between citizens and their government at the state and federal level emerged as the primary focus of the privacy debate.

Fourth Amendment Privacy

Unlike common law privacy, privacy as a civil right is clearly implicit (although not explicitly spelled out) in the US Constitution. In order to protect the sanctity of private homes against government intrusion, the founding fathers included the Fourth Amendment in the Bill of Rights, which prohibits “unreasonable searches and seizures,” i.e. those not authorized by a judicial warrant upon probable cause. The Supreme Court

enlarged this narrow protection of the home as early as 1878, when it deduced the secrecy of the mails¹² (first-class mail, to be precise) from the Fourth Amendment and limited the use of personal papers as evidence in court.¹³ However, the primary Fourth Amendment protection against searches and seizures within the home was only affirmed relatively late through the adoption of the exclusionary rule. In 1914, the Supreme Court declared unconstitutional the use of evidence gained through illegal searches in federal court;¹⁴ not until the 1961 decision *Mapp v. Ohio* was this crucial rule widened to the much more significant state courts, which handle the bulk of all criminal cases.¹⁵ Before then, state and local police had rarely bothered to secure a warrant from a judge before conducting a search.

The key Fourth Amendment privacy issue in the twentieth century, however, revolved around electronic surveillance, especially the wiretapping of phone lines for intelligence and law enforcement purposes. The term “wiretapping” dates back to the Civil War-era practice of literally tapping the telegraph wire, which became a controversial issue after that war.¹⁶ Only the emergence of the telephone, however, created a widespread public debate. During the 1920s, the activities of Prohibition enforcement agents constituted the first widespread use of electronic surveillance of citizens by the federal government. Ironically, in those days, FBI director J. Edgar Hoover denounced wiretapping as a “cowardly” tool of law enforcement, probably in order to portray his own agency as morally superior to the Treasury Department’s unpopular snoops. In later decades, Hoover conveniently forgot his earlier scruples regarding listening in on private telephone conversations.¹⁷

The wiretapping activities of the Prohibition agents eventually led to one of the most significant judicial defeats of privacy as a civil right. In the 1928 case *Olmstead v. United States*, the Supreme Court decided that wiretapping, even without a warrant, did not violate the Constitution, since it did not require a physical intrusion into a private home.¹⁸ The majority opinion, penned by Chief Justice William Howard Taft, made it clear that most justices interpreted privacy primarily as a property right (e.g. in a house or personal papers), but not as a more comprehensive civil right. Louis Brandeis, by then a member of the Supreme Court, protested vehemently: “The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails.”¹⁹ His dissent would become influential later on, but for the time being, the *Olmstead* decision ushered in a forty-year era of nearly unrestricted wiretapping by the federal and state governments, as well as by private investigators.

In 1937, the Supreme Court interpreted the Federal Communications Act as prohibiting the interception and divulgence of electronic communications. However, the Justice Department continued the practice any-

way, arguing that it kept the information so gained within the executive branch and thus did not “divulge” it. Therefore, while federal agents could not use wiretapped evidence in court, they could and did use such material for intelligence purposes.²⁰

The FBI entered the wiretapping business in earnest in 1939, partly authorized by an executive order issued by Franklin Roosevelt, who was concerned about Axis subversion and espionage in the United States. While the evidence so gathered was inadmissible in court, it allowed the comprehensive surveillance of actually or allegedly subversive persons and groups in the context of World War II counterespionage, the anti-communist investigations of the 1950s, the battle against organized crime, and the infiltration and surveillance of civil rights organizations and critics of the Vietnam War. Next to the FBI, various other federal agencies relied extensively on wiretapping, including the CIA, the Treasury Department, and even the Army.²¹

In the late 1950s, after the repressive McCarthy era had ended, a new public debate emerged about government surveillance and wiretapping. The former district attorney Samuel Dash,²² the prominent journalist Vance Packard,²³ the political scientist Alan Westin,²⁴ Senator Edward Long,²⁵ and many others decried the increasing violation of privacy by government snoops, law enforcement agents, and private eyes. In his State of the Union address of 1967, President Lyndon B. Johnson himself called for better protection of privacy and the comprehensive prohibition of warrantless wiretapping.²⁶ A number of congressional committees conducted hearings on privacy and surveillance. Most importantly, the much more liberal Supreme Court under the leadership of Chief Justice Earl Warren overturned the *Olmstead* decision in *Katz v. United States* (1967). It declared unconstitutional warrantless wiretapping not only of private homes, but also of all places where an individual had a “reasonable expectation of privacy,” which in this case included a public telephone booth.²⁷

Congress reacted to the new legal situation by passing the Omnibus Crime Control and Safe Streets Act of 1968.²⁸ Title III (popularly known as the Wiretap Act) for the first time codified rules for electronic surveillance in criminal investigations. In order to wiretap a suspect, law enforcement agencies needed to get a judge’s warrant based on the same criteria as a warrant for a physical search. However, the Omnibus Act gave the president wide discretion over cases involving national security, an area that the Supreme Court had left deliberately untouched. Because of this and other changes from the original bill, Senator Hiram Fong called Title III, which originally carried the working title “Right to Privacy Act,” an “End to Privacy Act.”²⁹

Senator Fong's reservations turned out to be well founded. After the death of J. Edgar Hoover and the shock of the Watergate scandal, the Senate convened one of the most influential investigative committees in its history. The Church Committee revealed, among other things, widespread abuse of government surveillance, including the FBI's infamous Counterintelligence Program (COINTELPRO), as well as illegal domestic surveillance activities by the CIA.³⁰ In response, Congress passed the Foreign Intelligence Surveillance Act of 1978, which required a warrant even for wiretaps in national security cases (e.g. counterespionage) and created the special Foreign Intelligence Surveillance Court to decide such cases. The findings of the Church Committee also led to various other restrictions of domestic surveillance activity which were only loosened by the 2001 US Patriot Act. The current controversy about NSA wiretapping and domestic surveillance is directly connected to these debates of the 1960s and 1970s.³¹

Intimate Privacy

The arguably most controversial aspect of the right to privacy developed seemingly independently of, but almost simultaneously with, the debates on surveillance and wiretapping: personal decisions on family and intimate matters and their regulation by the government. As early as 1923 and 1925, the Supreme Court declared unconstitutional two state laws prohibiting private (Catholic) schools and foreign language (German) instruction, thus giving parents broad rights to shape their children's education.³² However, the key decision in terms of intimate privacy came in 1965 in the case *Griswold v. Connecticut*.³³ At the time, a Connecticut statute (the so-called Little Comstock Act) prohibited the sale and dissemination of information about contraceptive devices, even to married couples by licensed physicians. The advocacy group Planned Parenthood deliberately established a birth control clinic in violation of the law, and Executive Director Estelle Griswold arranged for her own arrest in order to establish a precedent.³⁴ The Supreme Court, in a seven-to-two decision, declared the Connecticut law unconstitutional. While the decision was relatively uncontroversial among the general public, it created a major debate among legal scholars, for *Griswold* established a constitutional right to privacy for the first time.

Griswold was one of the most complicated and internally controversial Supreme Court decisions in history. Seven justices voted with the majority, but the sheer number of opinions in the case demonstrated the extent to which the court was divided: there were one majority, three concurring, and two dissenting opinions. The majority opinion, penned by Justice William Douglas, deduced a constitutional right to privacy

from the “penumbras and emanations” of the First, Third, Fourth, Fifth, and Ninth Amendments to the Constitution. He also identified a right to privacy of marriage and family in natural law: “We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”³⁵ Douglas also painted a grim, if unrealistic, picture of what full enforcement of the Connecticut law would mean: “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”³⁶ Other justices agreed with the outcome of the decision, but not with Douglas’s reasoning, and based their concurring opinions on the Ninth Amendment, the due process clause of the Fourteenth Amendment, or even fundamental principles of ordered liberty that existed independently of the Constitution.

The legal debate about *Griswold* was unusual in another way: Even the two dissenting justices did not defend the Connecticut anti-contraceptive law as such. Justice Potter Stewart noted in his dissent: “I think this is an uncommonly silly law.”³⁷ However, the dissenters, especially Justice Hugo Black, protested against the majority’s decision to create a new civil right out of the “penumbras and emanations” of the Constitution, or worse, from the nebulous vagueness of natural law. To Black, this constituted a return to the substantive due process idea of the era of *Lochner v. New York* (1905). During this period, which ended only in 1936, the Supreme Court behaved as a sort of super-legislature, and routinely declared Progressive and New Deal legislation unconstitutional. The *Lochner*-era court justified its decisions with the freedom of contract, which, like the right to privacy, is not spelled out in the Constitution. Although Black was a New Deal liberal (appointed by Franklin D. Roosevelt in an effort to end the *Lochner* era), his scathing dissenting opinion became something of a manifesto of judicial conservatism in post-*Griswold* America. Black insisted that the Bill of Rights constituted a comprehensive list of federally guaranteed civil rights that the Supreme Court had no authority to enlarge or dilute. “I like my privacy as well as the next one,” Black conceded, “but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.”³⁸

The mainstream press reacted to the *Griswold* decision with approval or, more frequently, disinterest, but the reception in legal journals was intense and ambivalent.³⁹ The *Michigan Law Review* devoted a special issue to the decision. Most commentators applauded the introduction of a constitutional right to privacy but were somewhat bewildered by Douglas’s unwieldy “penumbras and emanations” idea. Others expressed

support for Black's dissent and shared his dismay that *Griswold* seemed to resurrect the unpopular doctrine of substantive due process.⁴⁰ Nevertheless, the issue at hand in *Griswold*—contraception—was largely uncontroversial. Even Catholic dignitaries and the Catholic press applauded the decision, or at least treated it with benevolent indifference. After all, many Catholics at the time expected that the Second Vatican Council would loosen the prohibition of artificial contraception: It was only after the 1968 papal encyclical *Humanae Vitae* that contraception became a hot issue in Catholicism again. In 1972, *Eisenstadt v. Baird* struck down the last prohibitions against dispensing contraceptive devices to unmarried persons without causing an uproar.⁴¹

However, in *Roe v. Wade* (1973), the Supreme Court struck down most state laws against abortion in the first and second trimesters of a pregnancy as unconstitutional. The majority based its decision on the right to privacy established in *Griswold*: "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or [...] in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁴² The court did not specifically refer to Douglas's "emanations and penumbras" theory, and in fact argued more along the lines of Justice John Harlan's concurring opinion in *Griswold*. Even so, the message was clear: The right to privacy established in *Griswold* had become a civil right that went beyond contraception to cover diverse issues of intimate and intensely personal decisions. The practical effect, of course, was to legalize abortion in the United States.

As a result, abortion and the underlying right to privacy became one of the most controversial constitutional, social, and moral controversies in American politics. For designated federal judges, their opinion on privacy and abortion assumed central importance, although most appointees tried to avoid the issue as much as possible, opposing a judicial "litmus test." The political parties, too, had to take sides, although individual politicians sometimes diverged from their party's majority. Even beyond abortion, the right to privacy established in *Griswold* and *Roe* continued to generate controversy. In 1987, the Supreme Court still refused to apply the right to privacy to "anti-sodomy," i.e. anti-homosexuality, laws. However, in the 2003 decision *Lawrence v. Texas*, the court reversed itself and struck down state laws against homosexual practices in private homes because they violated citizens' right to privacy.⁴³ The issues of homosexual marriage and the right to die have not yet been settled by the Supreme Court, but they, too, revolve primarily around a right to privacy in intimate matters.⁴⁴ Overall, the right to privacy has become a collective and highly contested term that defines the conflict between judicial con-

servatives and liberals. At its core lies the debate over the legislative regulation of public morality.⁴⁵

Information Privacy

Data protection, meaning an individual's control over his or her data stored in government and commercial databases, is also discussed under the heading of privacy in the United States. Before the 1930s, the federal government largely limited itself to conducting the constitutionally mandated census every ten years. The census remained mostly uncontroversial, even though it increasingly went beyond the constitutional necessity of counting each state's population and came to include all sorts of statistical information about US residents. While some census questions were criticized for being too intrusive (for example, in 1890, there were protests against questions about household debt and diseases), the census retained a high degree of acceptance. In fact, the Bureau of the Census may be considered a pioneer in information privacy: "The criticism leveled against it notwithstanding, the Census Bureau has an unequalled record among federal agencies in preserving the confidentiality of personal information."⁴⁶

Information privacy became a concern on the federal level primarily due to the various welfare programs of the New Deal (especially the Social Security system) and the Great Society, as well as the emergence of a national security state after the Second World War. An increasing number of ever larger federal agencies busily gathered detailed information about American citizens and residents. The advent of computer technology made it possible to network, correlate, and search the data better than before. Obviously, it also made possible whole new forms of abuse.

Computer technology and its pitfalls gave rise to the first major American debate about information privacy. In 1966, there were efforts to create a national data center that was supposed to collect the data of all federal agencies for statistical purposes. Almost immediately, however, the project ran into resistance in the press and in Congress.⁴⁷ Committees in both the Senate and the House interviewed a large number of witnesses, including critical privacy experts like Alan Westin, Vance Packard, and Arthur Miller.⁴⁸ The national data center never materialized; instead, the need for a federal data protection law became evident.⁴⁹

Congress reacted to that need in 1974 by passing the Privacy Act, a supplement to the Freedom of Information Act. The Privacy Act was the world's first data protection law and was both visionary and flawed. It required all federal agencies to abide by the principles of modern data protection: Data should only be gathered for a specific and legally mandated purpose; it should not be shared among agencies, except for legally

mandated purposes; and citizens should have the right to review and correct the data stored about them. The principal weakness of the law was the lack of enforcement. Unlike in most Western European countries (which enacted similar laws in the late 1970s and 1980s), no data protection agency or ombudsman was instituted. This was largely due to the opposition of President Gerald Ford, who feared the creation of a bureaucratic behemoth and threatened to veto the law. Furthermore, the Privacy Act concerned only federal agencies. Neither state nor local governments were affected (though several states passed privacy laws of their own), and commercial data gathering and mining were left completely out of the equation.⁵⁰

Enforcing the Privacy Act was left to the Office of Management and Budget, which did not receive enough funds or personnel to do its job. For all practical purposes, each federal agency had to control its own data privacy practices. The Privacy Act also created a privacy commission, which submitted a report to President Jimmy Carter in 1977. It recommended a major overhaul of the information privacy system, most importantly, the establishment of a permanent privacy agency.⁵¹ However, Congress did not act on the report, and under the Reagan administration, any efforts to give the Privacy Act teeth faded. To this day, information privacy practice in the United States is lax by European Union standards, creating problems in the removal of trade barriers and causing controversy about antiterrorism measures such as the exchange of airline passenger or international banking data.

Privacy: Extent and Coherence

Even the diverse concepts of common law privacy, Fourth Amendment privacy, intimate privacy, and information privacy do not cover all of the ambivalent and multi-faceted privacy debates in the United States. There are also debates about medical privacy, financial privacy, identity theft, commercial data mining, and more. However, the four concepts described here comprise the largest part of privacy issues between individual citizens and their governments. While privacy issues between individuals and third parties, especially commercial enterprises, are also highly contested and relevant, they would require a separate research project altogether.

Given the ambivalence and diversity of privacy debates, most privacy studies pick one specific aspect, such as electronic surveillance, as their field of inquiry. Also, a number of publications argue that the intimate privacy concept established by the *Griswold* decision is a misnomer, and personal autonomy would be a better term than privacy.⁵² The inclusion of intimate privacy certainly poses many problems: The sheer

divisiveness of the abortion issue has considerably distorted the political front lines about privacy. As late as 1969, archconservative Senator Strom Thurmond opposed the national data center on the grounds that it would have strengthened the federal government vis-à-vis the states and infringed on personal privacy. After 1973, however, privacy became an almost exclusively liberal term, largely due to *Roe v. Wade*.⁵³ Ironically, many American feminists find themselves championing the concept of privacy despite its origins as a property right and even a patriarchal value (in the sense of “my home is my castle.”) At the same time, many conservatives reject privacy because of abortion, although they could use the libertarian aspects of privacy to curb the power of the federal government and roll back the welfare state. Accordingly, a number of American conservatives have made attempts to reclaim the privacy concept for their side.⁵⁴

It is precisely such distorted front lines and arguments, however, that make a comprehensive study of privacy debates attractive. In public debate, no clear dividing line exists between the various aspects of privacy: The *Griswold* decision is often mentioned in the debate about electronic surveillance, and Louis Brandeis’s “right to be let alone” is invoked in the abortion debate. The impact of the various privacy debates on American political culture cannot easily be separated into neatly divided packages because they are constitutionally and chronologically intertwined.

The constitutional connection stems from the fact that, short of the arduous amendment process, modern civil rights can only be divined from the Constitution through the relatively free interpretation of the original text. Taken literally, the Fourth Amendment does not protect the secrecy of the mails, nor does the Fourteenth Amendment guarantee the right to have an abortion. The level of interpretation of the Constitution by the Supreme Court, however, is one of the most controversial issues in American politics, and it often revolves around the various meanings of the privacy concept. The modern front lines of constitutional interpretation between the textualist approach of Justice Antonin Scalia, for example, and the dynamic, liberal approach of the Warren court emerged principally from the debates surrounding the right to privacy.

The various meanings of that right are also intertwined chronologically, especially from the mid-1960s to the late 1970s. Intimate privacy, Fourth Amendment privacy, and information privacy did not evolve separately, but at the same time: from the *Griswold* decision in 1965 and the Omnibus Crime Control and Safe Streets Act in 1968 to the Privacy Act of 1974 and the Foreign Intelligence Surveillance Act of 1978. In the 1960s and 1970s, technological innovations (e.g. in surveillance electronics and contraceptive devices), social changes (the welfare state and the rise of an information society), and political conflicts (Watergate and the

Vietnam War) reached a sort of critical mass that dramatically changed the relationship between individual and state. It is small wonder then that American society debated the right to privacy with special vehemence during this era.

A comprehensive analysis of the multifaceted privacy debates in the United States therefore promises to yield important insights into the development of American political culture in the post-World War II era. The right to privacy may serve as a prism to shed light on key changes in American society, law, and politics. And if privacy remains an “exasperatingly vague and evanescent” concept, the same holds true for another term that Americans cherish but find hard to define: liberty.

Notes

¹ Bork was the most spectacular case of the Senate rejecting a presidential nominee to the Supreme Court in recent history. His radically conservative interpretation of the US Constitution, especially regarding the right to privacy, played a decisive role in his rejection. Philippa Strum, *Privacy: The Debate in the United States since 1945* (Fort Worth, 1998), 4.

² Lloyd L. Weinreb, “The Right to Privacy,” in *The Right to Privacy*, ed. Ellen Frankel Paul, Fred Dycus Miller, and Jeffrey Paul (Cambridge, England, 2000), 4.

³ Dorothy Hoobler, Thomas Hoobler, and Richard Brandon Morris, *Your Right to Privacy* (New York, 1986), 61.

⁴ Arthur Raphael Miller, *The Assault on Privacy: Computers, Data Banks, and Dossiers* (Ann Arbor, 1971), 25.

⁵ *Roe v. Wade*, 410 US 113 (1973).

⁶ Charles Babington and Jo Becker, “Alito Says He’d Keep ‘Open Mind’ on Abortion,” *Washington Post*, 11 January 2006, A01.

⁷ Jo Becker and Christopher Lee, “Alito Urged Wiretap Immunity,” *Washington Post*, 24 December 2005, A01.

⁸ Samuel Dash, Richard F. Schwartz, and Robert E. Knowlton, *The Eavesdroppers* (New Brunswick, 1959); Vance O. Packard, *The Naked Society* (New York, 1964); Alan F. Westin, *Privacy and Freedom* (New York, 1967); Edward V. Long, *The Intruders: The Invasion of Privacy by Government and Industry* (New York, 1967); Arthur Raphael Miller, *The Assault on Privacy*.

⁹ Louis D. Brandeis and Samuel D. Warren, “The Right to Privacy,” *Harvard Law Review* 4, no. 5 (1890): 193–220.

¹⁰ *Pavesich v. New England Life Insurance Company*, 122 Ga. 190 (1905). The case concerned a man whose picture was used for a life insurance advertisement without his consent.

¹¹ William L. Prosser, “Privacy,” *California Law Review* 48 (1960): 383–423.

¹² *Ex parte Jackson*, 96 US 727 (1878).

¹³ *Boyd v. United States*, 116 US 616 (1886).

¹⁴ *Weeks v. United States*, 232 US 383 (1914).

¹⁵ *Mapp v. Ohio*, 367 US 643 (1961).

¹⁶ David J. Seipp, *The Right to Privacy in American History* (Cambridge, Mass., 1981), 27–54.

¹⁷ Alan LeMond and Ron Fry, *No Place to Hide* (New York, 1975), 6.

- ¹⁸ *Olmstead v. United States*, 222 US 438 (1928).
- ¹⁹ *Olmstead v. United States*, 222 US 438 (1928), Brandeis dissenting opinion.
- ²⁰ *Nardone v. United States*, 302 US 379 (1937).
- ²¹ LeMond and Fry, *No Place to Hide*, 8; Strum, *Privacy*, 141.
- ²² Dash, Schwartz, and Knowlton, *The Eavesdroppers*.
- ²³ Packard, *The Naked Society*.
- ²⁴ Westin, *Privacy and Freedom*.
- ²⁵ Long, *The Intruders*.
- ²⁶ Lyndon B. Johnson, "Annual Message to the Congress on the State of the Union" (speech, joint session of US Congress, Washington, DC, 10 January 1967).
- ²⁷ *Katz v. United States*, 389 US 347 (1967); *Berger v. New York*, 388 US 41 (1967).
- ²⁸ *Omnibus Crime Control and Safe Streets Act*, 90–351 (1968).
- ²⁹ Miller, *Assault on Privacy*, 161.
- ³⁰ United States Senate: Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, 6 vols. (Washington, 1976).
- ³¹ The *Electronic Communications Privacy Act* (ECPA) of 1986, public law 99–508, widened the surveillance protection to include electronic communications. However, judicial interpretation of ECPA is still controversial; see *United States v. Councilman*, 385 F.3d 793 (2004). Also, the scope of the ECPA was severely limited by the USA Patriot Act of 2001.
- ³² *Pierce v. Society Sisters*, 268 US 510 (1925); *Meyer v. Nebraska*, 262 US 390 (1923). At stake were nativist laws against Catholic schools and German-language instruction passed in the wake of World War I and influenced by the Ku Klux Klan.
- ³³ *Griswold v. Connecticut*, 381 US 479 (1965).
- ³⁴ John W. Johnson, *Griswold v. Connecticut: Birth Control and the Constitutional Right of Privacy* (Lawrence, 2005), 77–96.
- ³⁵ 381 US 485 (1965).
- ³⁶ 381 US 486 (1965).
- ³⁷ 381 US 527 (1965).
- ³⁸ 381 US 510 (1965).
- ³⁹ Johnson, *Griswold v. Connecticut*, 184–87.
- ⁴⁰ Arthur E. Sutherland, "Privacy in Connecticut," *Michigan Law Review* 64 (1965): 283–88; Robert B. McKay, "The Right of Privacy: Emanations and Intimations," *Michigan Law Review* 64 (1965): 259–82; Paul G. Kauper, "Penumbras, Peripheries, Emanations, Things Fundamental, and Things Forgotten: The Griswold Case," *Michigan Law Review* 64 (1965): 253–54; Thomas I. Emerson, "Nine Justices in Search of a Doctrine," *Michigan Law Review* 64 (1965): 219–34.
- ⁴¹ *Eisenstadt v. Baird*, 405 US 438 (1972). See also *Loving v. Virginia*, 388 US 1 (1967), which struck down a Virginia statute prohibiting interracial marriage.
- ⁴² *Roe v. Wade*, 410 US 153 (1973).
- ⁴³ *Bowers v. Hardwick*, 478 US 186 (1987); *Lawrence v. Texas*, 539 US 558 (2003).
- ⁴⁴ Richard A. Glenn, *The Right to Privacy: Rights and Liberties under the Law* (Santa Barbara, 2003), 148–92.
- ⁴⁵ In his dissenting opinion in *Lawrence v. Texas*, Antonin Scalia complained that such a wide interpretation of the right to privacy might mean the end of all public morality legislation, including statutes against polygamy and incest.

⁴⁶ Miller, *The Assault on Privacy*, 135. However, the Bureau of the Census has been accused of collaborating in the internment of Japanese Americans during World War II: see William Seltzer and Margo Anderson, "After Pearl Harbor: The Proper Use of Population Data in Time of War," in *Annual Meeting of the Population Association of America* (Los Angeles, 2000).

⁴⁷ *Saturday Review*, 23 July 1966, 25–26, 70.

⁴⁸ US Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, *Computer Privacy*, 14–15 March 1967; US House of Representatives Committee on Government Operations, Special Subcommittee on Invasion of Privacy, *The Computer and Invasion of Privacy*, 26–28 July 1966.

⁴⁹ Miller, *The Assault on Privacy*, 54–67, 210–38; Evan Hendricks, Trudy Hayden, and Jack Novik, *Your Right to Privacy: A Basic Guide to Legal Rights in an Information Society*, 2d ed. (Carbondale, 1990), xvii.

⁵⁰ David H. Flaherty, *Protecting Privacy in Surveillance Societies: The Federal Republic of Germany, Sweden, France, Canada, and the United States* (Chapel Hill, 1989) offers a good comparative analysis of information privacy practice in Western Europe and North America.

⁵¹ United States: Privacy Protection Study Commission, *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* (Washington, 1977).

⁵² Hyman Gross, "Privacy and Autonomy," in *Philosophy of Law*, ed. Joel Feinberg and Hyman Gross, 2d ed. (Belmont, Calif., 1980), 14–24; Jed Rubenfeld, "The Right of Privacy," *Harvard Law Review* 102, no. 4 (1989): 737–808.

⁵³ Jerry Martin Rosenberg, *The Death of Privacy* (New York, 1969), 9.

⁵⁴ Jeremy Rabkin, "Who Owns the Right to Privacy?" in *Courts and Culture Wars*, ed. Bradley C. S. Watson (Lanham, 2002), 63–77.

