
The Right of Privacy



The right of privacy—the right to be left alone, as Justice Louis Brandeis once defined it—is fundamental to our understanding of freedom, but nowhere does the Constitution mention it. When Congress submitted the Bill of Rights to the people for ratification in 1789, privacy was not listed as a liberty that required protection from government. Yet today it is difficult to imagine American society without this right. How did privacy become an essential liberty?

For eighteenth-century men and women, privacy meant the right to be secure in one's home, safe from the powers of government. The common law phrase, "A man's home is his castle," expressed this understanding. All Englishmen, whether in the Old World or the New, believed that "the poorest man may in his cottage bid defiance to all the forces of the crown," as Sir William Pitt, former British prime minister, said in 1763. This definition of privacy made its way into the U.S. Bill of Rights, albeit indirectly, in two separate amendments. The Third Amendment restrained the government from housing soldiers in private homes; this amendment reaffirmed the English practice as expressed in the Petition of Right (1628). The Fourth Amendment protected homeowners from searches except for probable cause and only then with a properly approved warrant. These guarantees were important, but no one understood them to include the right to be left alone. What they meant instead was protection from arbitrary government.

Privacy in the sense of solitude and isolation—or an ability to have "my space," as we call it today—was a luxury enjoyed only by the wealthy until the industrial age of the nineteenth century. Most people before then lived on top of each other, literally as well as figuratively. Houses were small and bare. Entire families often slept in one room; toilets were neither separate nor private. The opportunities for intimacy we take for granted simply were not available to most people. The wealth created by industrialization began to change this condition. Houses grew in size, as did the number of people who could afford them, and with these developments came more physical separation and more opportunity to be left alone. The choices offered by a burgeoning marketplace and the vast scale of the American continent also encouraged individualism to a degree unknown in Europe. With these changes came a new meaning of privacy. Now it became a valued part of individual liberty; people assumed that what they did beyond public life, in their own homes, was no one's business but their own.

After the Civil War, both the rise of large cities and the emergence of new technologies reshaped the concept of privacy. Block upon block of tenement houses in New York City, Chicago, and other big cities re-created the crowded conditions of earlier times. Inventions such as the telephone and the camera made it possible to enter people's homes and their private lives without physical intrusion. Among the developments most threatening to the sense of privacy was the inexpensive daily newspaper, which regularly reported on the lives of the rich and famous for the amusement of ordinary folks. The stories carried by

the new mass media had the ability to ruin reputations, and it was this threat that led to the first laws to protect privacy. These measures allowed harmed individuals to sue for damages by recognizing a general right to privacy, but not a fundamental or constitutional right. Future Supreme Court justice Louis Brandeis captured this new meaning in “The Right to Privacy,” an important *Harvard Law Review* article in 1890 that outlined its common-law roots.

The Supreme Court began to consider a constitutional right to privacy in the 1920s. Cases involving the Fourth Amendment offered the first opportunity for the justices to consider privacy as a guaranteed right. In 1928, Justice Brandeis eloquently disagreed with the majority decision in *Olmstead v. United States* that wiretapping did not require a warrant because it involved no physical trespass. The framers of the Fourth and Fifth Amendments, he argued, “sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the one most valued by civilized men.” His views on wiretapping ultimately prevailed, as did his belief that privacy was a constitutionally protected right.

But what about other areas of privacy? What rights did citizens have to make private decisions without governmental interference? Or stated another way, in what private decisions did government have a legitimate interest? Clearly, the right to privacy was not absolute: even in their own homes, citizens could not, for example, commit murder or molest a child. Where did the right to privacy end?

In the 1960s, the use of a new technology—the birth control pill—raised this question in a case that became the basis for our modern understanding of a right of privacy. This case was different from many the Supreme Court has used to interpret the Bill of Rights. It involved an act of civil disobedience for the specific purpose of testing a law. Also, the plaintiffs were well-educated and respected citizens, quite unlike the “not very nice people,” as Justice Felix Frankfurter once labeled them, who were at the center of other rights controversies. The case did not lead to the cries of outrage that accompanied other expansions of rights in the 1960s, but it did set the Court on the path to its most divisive privacy decision, *Roe v. Wade*, which guaranteed a woman’s right to choose an abortion.

Estelle Griswold was concerned about the problem of world overpopulation. A religious, well-educated woman and wife of an advertising executive, she had worked in Europe after World War II with the Church World Service, helping to relocate the continent’s vast number of refugees. The experience shaped her views about the need to bring the world’s resources and its people in better balance. “A look at the slums of the world, at the chaos of a war-scorched earth, and you realize that life at the point of survival, where food, water and shelter are unobtainable is close to reversion to an animal order,” she wrote later. “Survival is first; civilization is second.”

It was this concern that led her to become executive director of the Planned Parenthood League of Connecticut. She became a crusader for birth control in a campaign that would last the rest of her life, but as she admitted, she really knew little about the subject. She had never seen a diaphragm, then the leading means of birth control, at the time of her interview. What she knew was that women needed to be able to control this most intimate part of their lives.

Regulation of sex and birth control had a tortuous history in Connecticut, as it did in the nation. One of the state’s best-known citizens in the nineteenth cen-

tury was Anthony Comstock, a lobbyist for the Young Men's Christian Association's (YMCA) Committee for the Suppression of Vice. The son of Connecticut Calvinists and a lifelong advocate for religion, he rallied his fellow believers and persuaded Congress to pass the Comstock Act of 1873, which outlawed obscene and immoral materials from the U.S. mails. Among the banned items was anything "advertised or described in a manner calculated to lead another to use or apply it for contraception or abortion." Six years later, the Connecticut legislature went further and banned the use of any birth control device. State courts interpreted the law also to mean that doctors could not prescribe these devices.

Each year, supporters of Planned Parenthood lobbied the legislature to revise or repeal the ban on the use of birth control—among all the states, only Connecticut took this extreme position—but each year they failed. It was an unfair law, they argued, and its burden fell disproportionately on poor women who either had to refuse their husbands or risk their health and the family's pocketbook on an unwanted child. Planned Parenthood defied the law by opening clinics in Connecticut in 1935, but the police promptly shut them down. The legislature refused to repeal or modify the ban. Catholic presence was strong in the state, so the law persisted until the 1960s, even though by then it was largely ignored in practice.

It was this situation that Estelle Griswold was determined to remedy. With her allies, she identified two women whose health clearly would be endangered by a pregnancy and enlisted them to bring suit against the state for refusing to allow them to buy birth control devices. Their suit, *Poe v. Ullman*, made it to the U.S. Supreme Court in 1961, only to be rejected by the justices because of the state's long-standing refusal to prosecute anyone for violating the statute. There was no fear of enforcement, the Court said, so no harm was done. It would not "be umpire to debates concerning harmless, empty shadows." This rebuff spurred Griswold to turn the empty shadows into a real controversy. She opened a birth control clinic and set out to ensure that police had no choice but to arrest her for breaking the law. Acting on a complaint, police visited the clinic, where Griswold made certain they saw the banned activities and products. Even though the prosecutor normally declined to bring cases like this to trial, Estelle Griswold's unwillingness to have the arrest dismissed led to her trial and conviction for violating the state law. She finally had the case that demonstrated harm.

When this case reached the Supreme Court in 1965, the justices sided with Griswold. Writing for the 7-to-2 majority, Justice William O. Douglas ruled that marital relations between a husband and wife were a basic "right of privacy older than the Bill of Rights." The Constitution protected this right even if it did not mention it specifically. It was an implied right, one that was part of the "penumbra," or shadow, of several amendments. The First Amendment, for example, contained a freedom to associate privately; the Third and Fourth Amendments protected the sanctity of private homes; the Fifth Amendment's guarantee against self-incrimination allowed an accused person to keep information private. The majority also found the right of privacy guaranteed in part by the Ninth Amendment, which reserved to the people any rights not named in the Bill of Rights. Rights are expansive, not restrictive, and whenever fundamental rights are at stake, Justice Arthur Goldberg noted in a concurring opinion, the state must have a compelling purpose for abridging these liberties. Invading the "sacred precincts of marital bedrooms" was not a legitimate reason, Goldberg wrote.

Griswold v. Connecticut was a landmark case in establishing constitutional protection for the right of privacy, and it received widespread approval. For Estelle Griswold, it was vindication for a cause she held dear. Three months after the decision, she reopened the birth control clinic in New Haven, and she remained active in women's causes until her death in 1981. By then, the right of privacy had come to include the right of women to choose whether or not to continue a pregnancy. Unlike the earlier decision, the right to an abortion unleashed a bitter debate that continues today and raises new questions about the limits of privacy in a free society.

In 1972, the Supreme Court extended the right of privacy by striking down a Massachusetts law barring the sale of contraceptives to unmarried couples. This decision was a prelude to *Roe v. Wade* (1973). The question in the *Roe* case was straightforward: did government have any compelling interest in a woman's pregnancy? In language rooted in *Griswold*, the answer was "no," at least not in the early stages of pregnancy. The right of privacy, the justices concluded, was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy," although once the fetus became capable of living outside the womb, the state could intervene as long as the woman's health or life is protected.

Roe raised profound moral and religious questions for many Americans: When does life begin? At what point does the state's interest in protecting life outweigh the woman's right to privacy, personal autonomy, and equality? Opinion polls continue to reflect a lack of public agreement on these questions. Most Americans support the right to privacy, including a woman's control over her body, but they are uneasy with the idea that abortion might become a casual practice. The question raised by *Roe* is not whether abortion will continue to exist in the United States, but what is the extent of the constitutional protection?

Americans overwhelmingly want to keep government out of the bedroom, so the Court's recognition of a fundamental right to privacy in this area receives broad support, as seen by *Lawrence v. Texas*, a 2003 case striking down a law that prohibited consensual gay and lesbian sex. Is abortion different? During the three decades since *Roe*, the justices have reaffirmed the right to privacy in matters of abortion but also have accepted some legislative limits on its practice. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Court retreated from its position in *Roe v. Wade*. It allowed some restrictions on the woman's right to choose, provided the government did not unduly burden or interfere with her ability to get an abortion. Among the limits the justices have found acceptable are laws mandating a twenty-four-hour waiting period, requiring doctors to provide information intended to discourage abortion, and restricting abortions for teenagers younger than a certain age, usually eighteen, if they do not have parental or judicial consent. Today, it is unclear if the justices will continue to trim the broad right it recognized in 1973. A reversal of the *Roe* decision would give states greater latitude to regulate or even outlaw abortion.

Controversies over privacy extend to more areas of modern life than the bedroom. New technologies are again pushing us to consider questions we have never faced before. Advances in medical technologies allow doctors to keep even critically ill patients alive for long periods of time, but can we keep people alive against their will? Do we have a right to die—or to have others make that decision for us, based on their understanding of our wishes, if we are incapable of making it for ourselves? In 1990, the Supreme Court faced this question for the first time and decided that the right of terminally ill patients to die was part of our right to privacy. Within a few years, all fifty states recognized this right,

“How a person engages in sex should be irrelevant as a matter of state law. Sexual intimacy is a sensitive, key relationship of human existence and the development of human personality. In a diverse nation such as ours, we must preserve the individual freedom to choose, and not imply that there are any “right” ways of conducting relationships.

—Justice Harry Blackmun, dissenting opinion, *Bowers v. Hardwick* (1986)

and a national law, the Patients’ Bill of Rights, required federally funded hospitals to respect patients’ decisions regarding their treatment. Oregon extended the meaning of personal autonomy to include a right to doctor-assisted suicide, and in 2006, the Court refused to allow the U.S. attorney general to prosecute assisting doctors under federal drug laws. Further advances in medical technology doubtless will continue to raise questions that require a balance between our right to privacy and society’s interest in preserving life.

New communication technologies, including the Internet, also spur us to consider again our right to keep personal information private. Computers now capture reams of data about each of us, and this information helps to determine everything from our credit rating to the types of advertising we receive. Some of these data relate to things we expect to keep private, such as our medical records or our personal communications. What right do we have to this information, and what right do we have to keep it private? The questions have no simple answers. Knowledge of our purchasing habits allows marketers to provide us more of the goods we want, but it also may open us to sales pitches we prefer to avoid. Potentially far more serious in its consequence is the ability to capture new kinds of personal information, such as our DNA, as part of our medical care. Should insurance companies be allowed to use this information to set individual rates or to deny coverage to those who are genetically vulnerable to costly diseases? Should law enforcement or security agencies have routine access to our DNA, or do we have a expectation of privacy unless the government establishes probable cause to suspect us of a crime?

Increasingly, we as a society are trying to determine what privacy means in this brave new world of advanced technologies. The problem is not a new one. In his dissent in *Olmstead v. United States*, Justice Brandeis saw the threat to privacy that technical innovation posed to liberty: “Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.” He warned that technology had the power not simply to make our lives more comfortable but also to threaten our liberty by invading our private lives.

The right to privacy is about defining the proper relationship between the individual and government. The founding generation aimed to permit individual citizens the widest latitude possible to live their lives and pursue their happiness without interference from government. It also vested sovereignty, or final authority, in the people at large, who in turn authorize elected representatives to act on their behalf. Our sense of democracy, as a result, rests firmly upon the idea of individual autonomy, or personal control over the decisions that affect us. The right of privacy supports our individuality, and it is our ability as individuals to make decisions, separately and collectively, about our present and our future that ultimately protects our liberty.

“The Right to Be Let Alone”

*In 1890, overeager journalists attempted to crash an event hosted by a wealthy Boston lawyer-socialite, Samuel Warren, and his law partner, Louis D. Brandeis, who later became a justice on the U.S. Supreme Court. The two wrote an article, “The Right to Privacy,” for the Harvard Law Review that Dean Roscoe Pound of the Harvard Law School cited as “adding a chapter to our law.” The authors argued for a right of privacy or, as Brandeis later defined it in the wiretapping case of *Olmstead v. United States* (1928), “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.” Although the Constitution does not mention a right to privacy, the Supreme Court has inferred it from the language of the First, Third, Fourth, Fifth, and Ninth Amendments.*

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

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to man that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right “to be let alone.” . . . Of the desirability—indeed of the necessity—of some such protection, there can, it is believed, be no doubt. . . . The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have,

through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. . . .

[T]he protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. The principle which protects personal writings and all other personal productions. . . is in reality. . . the principle. . . of an inviolate personality.

Various Guarantees Create Zones of Privacy

Critics of the Supreme Court's decision in Griswold v. Connecticut (1965), which recognized a right to privacy in marriage, chastised the majority justices because the Constitution does not mention a right to privacy specifically. Justice William O. Douglas, in the majority opinion, argued that the right can be inferred legitimately from the language of at least four amendments. He wrote about "penumbras, formed by emanations," metaphorical language that suggested that the right was as logically related to the amendments as were halos around the sun or other celestial objects.

Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The

Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Justice Arthur Goldberg, in his concurring opinion in Griswold v. Connecticut, relied on the little-used Ninth Amendment, which reserved any rights not listed in the Constitution to the people in his argument in support of the right to privacy.

The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "[t]he enumeration in

the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." . . .

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.