Privacy and the American Constitution

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WITHIN America's modern constitutional tradition, both "privacy" as a single word and the "right to privacy" as a legal concept are almost universally associated with the famous 1965 Supreme Court ruling in *Griswold v. Connecticut* (381 U.S. 479, 1965), which struck down a long-standing state criminal statute that prohibited the use of contraceptives even by married couples (Garrow, 1994a: 1-259). The court's majority opinion in *Griswold,* authored by Justice William O. Douglas and supported by only the necessary minimum of five justices, offered an enthusiastic paean to the importance of marriage in American life but failed to provide any explicit constitutional grounding for the recognition of a "right" that was not itself specifically named anywhere in the Constitution's own text. That failure notwithstanding, *Griswold*'s invocation of a constitutional right to privacy inspired a handful of youthful attorneys to envision how *Griswold*'s shielding of marital contraception could be expanded to encompass constitutional protection for a pregnant woman's choice to obtain a legal and medically safe abortion (Garrow, 1994a: 335-388), and within less than eight years that legal crusade triumphed with the landmark pair of Supreme Court decisions in *Roe v. Wade* (410 U.S. 113 (1973)) and *Doe v. Bolton* (410 U.S. 179 (1973)).

Ironically, that 1973 triumph in *Roe v. Wade,* rather than presaging expanded acceptance of constitutional protection of the right to privacy, turned out instead to be the high-water mark for constitutional privacy as a legal concept. Over the past quarter century, and especially over the past decade, as public and civic elite interest in protecting manifold aspects of individual privacy has expanded at a seemingly exponential rate as a result of the

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ongoing information technology revolution, recognition of "privacy" as an important right or even cognizable constitutional concept by the Supreme Court has all but vanished. As every attentive student of the court knows well, the court's remarkable 1992 reaffirmation of the constitutional core of *Roe v. Wade* in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (505 U.S. 833 (1992)) took place in an opinion in which invocation of the constitutional concept of "liberty" completely and utterly supplanted the court's previous employment of "privacy" as the operative legal construct. Privacy's complete disappearance from the court's constitutional worldview was quietly and indeed silently underscored in June 2000 when the court's majority opinion in its first abortion case since *Casey, Stenberg v. Carhart* (120 S.Ct. 2597 (2000)), failed to mention the word "privacy" even once.

This conundrum—why has privacy as a constitutional value all but disappeared from the radar screen of the United States Supreme Court at the same time that cultural commentators and legal observers have been calling more and more attention to the concept's importance (see, e.g., Rosen, 2000)—is actually susceptible to a far simpler—and perhaps more depressing—answer than many might suspect. Privacy as a reputable constitutional concept has been the victim—and probably in all truthfulness the no longer breathing or revivable victim—of the constitutional commentators whose academic assaults on first *Griswold* and then far more so *Roe* have left both of those rulings with the widespread reputation of being either an analytical laughingstock or at least an academic embarrassment. "Privacy" may be widely embraced and celebrated within the popular culture as a legal value of preeminent importance, but hardly anyone looks askance at a sitting Supreme Court justice openly displaying in his chambers a sign—"Please don't emanate in the penumbras"—that mocks the court's majority opinion in *Griswold* (see Carelli, 1994, reporting that Justice Clarence Thomas displays such a sign).

It is this devastating reputational injury to constitutional privacy over the course of the past generation that will make any restora-

tion of substantive acceptance of the concept an extremely difficult and perhaps impossible undertaking. My task here does not encompass the narrower Fourth Amendment realm where constitutional "privacy" within the ambit of search and seizure and the warrant clause has likewise been in serious decline ever since its own high-water mark in *Katz v. United States* (389 U.S. 347 (1967)), but it is of considerable import to our undertaking to examine why privacy as a constitutional concept and prospective "right" is in more dire circumstances at the advent of the twenty-first century than it was at the beginning of the twentieth.

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The constitutional right to privacy that the Supreme Court first acknowledged in *Griswold* had its earliest American origins in a trio of late nineteenth-century writings. The legal scholar Thomas Cooley's 1888 coining of the phrase the "right to be let alone" was the first of the three (Cooley, 1888: 29), but the initial apparent public invocation of "the right to privacy" itself took place in 1890 when the well-known journalist E. L. Godkin, writing in *Scribner's Magazine,* attacked tawdry and intrusive newspaper stories.

Just five months later, in what was to become one of the most renowned law review articles of all time, two young Boston lawyers, Samuel D. Warren and Louis D. Brandeis, used that very phrase as the title of a *Harvard Law Review* essay that advocated legal recognition of "a general right to privacy for thoughts, emotions and sensations" (206).[1] As with Godkin, it was "the unwarranted invasion of individual privacy" (215) by journalists that most concerned Warren and Brandeis, who wanted legal protection for "the private life, habits, acts, and relations of an individual" (216). Their call to "protect the privacy of private life" (215) won approbation both in popular magazines such as *The Nation* ("The Right to Privacy," 1890) and in other law reviews,[2] but in its

first major courtroom test, in 1902, the Warren and Brandeis argument came out on the losing side of a four-to-three decision by the New York Court of Appeals in *Roberson v. Rochester Folding Box Co.* (171 N.Y. 538 (1902)).

That ruling, which refused to vindicate a claim by a young woman whose photograph had been used without her permission in a baking products ad for the "flour of the family," met with widespread public and professional criticism (see Mensel, 1991, esp. 36-40, and O'Brien, 1902, a rather defensive rejoinder to the critics of *Roberson* by one of the four judges who had endorsed the majority opinion). However, just three years later, when a Georgia man filed suit against a life insurance company that had similarly used his photograph in its advertising without obtaining his permission, the Georgia Supreme Court rendered the first American ruling embracing a tort law right of privacy. "Each person has a liberty of privacy," the Georgia court held, "derived from natural law" and protected by constitutional due process. "The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence" (*Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68, 69-71 (1905)).

The Georgia decision in favor of Paolo Pavesich received widespread legal praise,[3] and once Louis Brandeis himself ascended to a seat on the United States Supreme Court in 1916, opportunities to introduce the privacy concept into high court opinions, albeit in dissent, were not long in coming.[4] In 1920 Brandeis spoke of "the privacy and freedom of the home" in *Gilbert v. Minnesota* (254 U.S. 325, 335 (1920)), and eight years later, in his famous dissent in *Olmstead v. United States* (an early wiretapping case), Brandeis linked Cooley's early phrase to the Fourth Amendment's prohibition of "unreasonable searches and seizures." The Constitution, Brandeis asserted, "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the

individual, whatever the means employed, must be deemed a violation of the Fourth Amendment" (277 U.S. 438, 478 (1928)).

After Brandeis's retirement, two majority opinions, the first by Justice Wiley B. Rutledge in *Prince v. Massachusetts* in 1944, and the second by Justice William O. Douglas in 1948 in *McDonald v. United States,* each explicitly invoked privacy.[5] Rutledge spoke of "the private realm of family life which the state cannot enter" (*Prince v. Massachusetts,* 321 U.S. 158, 166-67 (1944)), and Douglas in *McDonald* invoked both "the constitutional barrier that protects the privacy of the individual" as well as a similarly protected "privacy of the home" (335 U.S. 451, 455-56 (1948). See also *Davis v. United States,* 328 U.S. 582, 587 (1946) and *Kovacs v. Cooper,* 336 U.S. 77, 87 (1949)). Four years later, writing this time in dissent, Douglas spoke of "the constitutional right to be let alone" and asserted that "Liberty in the constitutional sense must mean more than freedom from unlawful government restraint; it must include privacy as well, if it is to be a repository of freedom" (*Public Utilities Commission v. Pollak,* 343 U.S. 451, 467, 468(1952)).[6]

Prior to the court's decision of *Griswold v. Connecticut,* arguably the best argument for constitutional privacy to appear in a Supreme Court opinion occurred in Justice Douglas's dissent in *Griswold*'s own immediate precursor, *Poe v. Ullman,* in 1961. Both at that time and in later years, Douglas's *Poe* dissent was significantly overshadowed by Justice John Marshall Harlan's extremely influential dissent, which articulated an explicitly substantive due process liberty application of the Fourteenth Amendment (367 U.S. 497, 522 (1961)). Douglas, however, contended in *Poe* that any actual enforcement of Connecticut's criminal prohibition of the use of contraceptives against married couples would be "an invasion of the privacy that is implicit in a free society" and that legally "emanates from the totality of the constitutional scheme under which we live" (367 U.S. 497, 509, 521 (1961)).

Douglas's 1965 *Griswold* opinion, joined by Justices Tom C. Clark, William J. Brennan, Jr., and Arthur J. Goldberg, and by Chief Justice Earl Warren,[7] simultaneously created an apparently

fundamental (although nontextual) constitutional right to privacy *and* placed the newly acknowledged right on an extremely tenuous and uncertain analytical footing. Less than seven pages in length, Douglas's majority opinion disclaimed *any* reliance on the kind of substantive due process philosophy that underlay Justice Harlan's *Poe* dissent (as well as Harlan's own separate concurrence in *Griswold* itself [381 U.S. 479, 501 (1965)]) and began its affirmative argument by invoking the previously recognized but otherwise nontextual First Amendment-based right of association. Asserting that the First Amendment "has a penumbra where privacy is protected from governmental intrusion" (381 U.S. 479, 483 (1965)), Douglas then cited several cases, including *Schware v. Board of Bar Examiners* (353 U.S. 232 (1957)), before enlarging on his First Amendment conclusion to declare that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." After citing his own *Poe* dissent in support of that view, Douglas then concluded that "Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment" was one, and the Third, Fourth, and Fifth Amendments likewise each protected another "facet" or "zone" of privacy (381 U.S. 479, 484 (1965)).

After quoting the Ninth Amendment without further comment and appending several additional case and commentary citations, Douglas in his penultimate paragraph declared that *Griswold*'s invocation of marriage "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." Connecticut's outlawing of contraception, he added, "seeks to achieve its goals by means having a maximum destructive impact upon that relationship" and police searches of "the sacred precincts of marital bedrooms," Douglas rhetorically volunteered, would be "repulsive to the notions of privacy surrounding the marriage relationship." Douglas's final paragraph offered an endorsement of the importance of marriage and asserted that "We deal with a right of

privacy older than the Bill of Rights" (381 U.S. 479, 485, 486 (1965)).

In the months and years immediately following the handing down of *Griswold* in June 1965, virtually every legal commentator who addressed the case agreed that it had been correctly decided, but many also voiced discomfort with the "nebulous language" Douglas had used in the majority opinion (Wilkins, 1966: 306. See also additional citations collected in Garrow, 1994: 784-85 n. 87). Perhaps the most insightful law review discussion of *Griswold* was offered by Robert G. Dixon, who explained that "By invoking the married couples' fictional fear of prosecution for *use* of contraceptives to give the clinic defendants"—Connecticut Planned Parenthood Executive Director Estelle T. Griswold and Planned Parenthood medical director Dr. C. Lee Buxton—"standing to defend themselves from actual prosecution for giving *advice,* the Court tied marital privacy and access to information together into a single bundle of rights." Dixon concluded that "unless some kind of information-access theory is recognized as implicit in *Griswold,* then it stands as a decision without a satisfying rationale" (Dixon, 1965: 214, 217).

But many commentators were more expressly critical than Dixon. One complained about Douglas's "curious, puzzling mixture of reasoning" and about the decision's "ambiguous and uncertain reach" (Kauper, 1965: 242, 244). Another, more impassioned critic, writing in the *New York University Law Review,* attacked *Griswold* as "a malformation of constitutional law which thrives because of the conceptual vacuum surrounding the legal notion of privacy" (Gross, 1967: 35). Most critics, however, were more measured, saying that the opinion was "far from satisfying," "shot through with serious weaknesses," or "rather opaque" (Blackshield, 1966: 404; Bodenheimer, 1966: 458; Greenawalt, 1971: 478). "Only the rhapsody on marriage," one later commentator wrote, "saves an opinion whose concepts fall suddenly in a heap" (Gerety, 1981: 152).[8]

A number of critics zeroed in on Douglas's use of the term "penumbra." First coined in 1604 by the astronomer Johannes Kepler to describe the area of shaded or partial illumination occasioned by an eclipse, several subsequent commentators concluded that *Griswold*'s use of the astronomical metaphor was "obfuscating rather than clarifying" (Allen, 1987: 478 n.).[9] Many critics failed to realize that Douglas was far from the first Supreme Court justice to employ "penumbra" in an opinion, and that many of the more than 20 previous invocations appeared in opinions authored by some of the court's most illustrious members.[10] Oliver Wendell Holmes had employed the word in an 1873 article—"the penumbra between darkness and light"—and had subsequently used it three times while serving on the Massachusetts Supreme Judicial Court. After joining the United States Supreme Court, Holmes employed penumbra in four additional opinions, including a dissent of his own in *Olmstead v. United States,* where he spoke of "the penumbra of the Fourth and Fifth Amendments" (277 U.S. 438, 469 (1928)). Benjamin Cardozo, Second Circuit Court of Appeals Judge Learned Hand, and Douglas himself had all used penumbra at least twice in judicial opinions, and even the conservative Felix Frankfurter has used it once. A perceptive later critic of *Griswold* noted that "Douglas could have replaced penumbra with periphery or fringe with no loss of meaning or force" (Greely, 1989: 260), but Douglas's use of so distinctive a word became a prime target for those who were either methodologically uncomfortable or substantively opposed to constitutional recognition of a right to privacy, especially if such a right would insulate issues of sexuality from regulation by the state.

Much as like happened with the short-term impact of *Brown v. Board of Education* (347 U.S. 483 (1954)) in 1954-1955, when those who were inspired to activism by the decision initially stepped forward more energetically than did those who were its opponents (see Garrow, 1987: esp. viii; and Garrow, 1994b), the most important short-run impact of *Griswold v. Connecticut* was on the young attorneys who saw in *Griswold*'s protection of reproductive choice

the never before imagined opportunity to challenge criminal statutes prohibiting abortion as unconstitutional infringements on women who did not want to carry a pregnancy to term (Garrow, 1994a: 334-39, 351-54). The concept of a *Griswold*-based constitutionally fundamental right to privacy that protected women's reproductive choices was *the* substantive analytical centerpiece of all that followed between 1965 and 1973. *Griswold*'s potential promise was immediately recognized by both proponents and opponents of the legalization of abortion (Garrow, 1994a: 301-12 passim), and by the fall of 1969, when the first actual case posing a privacy challenge to existing state anti-abortion statutes was filed in federal district court for the southern district of New York (*Hall v. Lefkowitz,* 305 F.Supp. 1030 (S.D.N.Y. 1969); see also Garrow, 1994a: 379-81), the judicial or constitutional climate was clearly ready for such an expansion and application of *Griswold*-style constitutional privacy.[11]

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The full story of how *Griswold*'s introduction of constitutional protection for reproductive privacy was carried forward throughout the late 1960s and early 1970s by a far from completely coordinated national network of attorneys and abortion activists has already been told in copious detail (Garrow, 1994a: 389-472) and need not be revisited here, but anyone pondering the constitutional vicissitudes of privacy as an American legal concept over the past 35 years simply *must* absorb and acknowledge both the speed and the extent of the acceptance *Griswold*'s application to abortion won between 1969 and 1973.

From a historian's vantage point, the Supreme Court's January 1973 rulings in *Roe v. Wade* and *Doe v. Bolton* were first and foremost the amazingly rapid culmination of the almost wildfire-like fashion in which *Griswold*-based constitutional challenges sped

across the American legal landscape from New York to Texas to California to Georgia in the space of just three years (1970-1972).

But, as noted and underscored at the outset, that seeming triumph for constitutional privacy in January 1973 began to turn sour within just weeks of the decisions as Justice Harry A. Blackmun's majority opinions for the court increasingly became the target of scholarly scorn that in time became both more pointed and more widely shared than the academic criticism attracted by William Douglas's *Griswold.*

To anyone whose understanding of *Roe* and *Doe* has unfortunately been informed primarily by one or another constitutional law casebook rather than by immersion in the justices' own once-private case files from the early 1970s, the apparently crucial doctrinal privacy link between *Griswold* and *Roe* appears to be the court's relatively unheralded March 1972 decision in *Eisenstadt v. Baird* (405 U.S. 438 (1972)). *Eisenstadt,* which voided the arrest, conviction, and imprisonment of freelance birth control crusader Bill Baird for distributing contraceptive vaginal foam to a half-dozen women following a lecture at Boston University (Garrow, 1994a: 320-22), had been viewed as a relatively insignificant case while it was under review inside the Supreme Court during late 1971 and early 1972. *Eisenstadt* had been argued just a few weeks before the initial oral arguments in *Roe* and *Doe* themselves, and the initial draft of Justice William J. Brennan, Jr.'s four-man majority opinion for what was then a seven-member bench (incoming Justices Lewis F. Powell, Jr., and William H. Rehnquist had not yet taken their seats) was distributed on the very day that *Roe* and *Doe* were first argued (Garrow, 1994a: 517-20, 541-42).

The Massachusetts criminal statute under which Baird had been convicted had been amended, in the wake of *Griswold,* so as to allow the distribution of contraceptives to only married people. Brennan's opinion found that the law violated "the rights of single persons under the Equal Protection Clause" of the Fourteenth Amendment since there was no "rational basis" for the statute's

distinction between married and unmarried individuals (*Eisenstadt v. Baird,* 405 U.S. 438, 443 (1972)).

The core of Brennan's opinion declared that "whatever the right of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike." Brennan acknowledged how in *Griswold* "the right of privacy in question inhered in the marital relationship," but he superseded any status limitation by immediately proclaiming that

> the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child (*Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972)).

In retrospect, of course, that oft-quoted and seemingly crucial sentence from *Eisenstadt* about "bear or beget" can appear to the uninitiated as a doctrinally necessary bridge between *Griswold* in 1965 and *Roe* in January 1973, but Brennan's opinion in *Eisenstadt* was under review within the court during the very same months when Harry Blackmun was already at work on *Roe* and *Doe.* The Brennan clerk who worked on drafting *Eisenstadt* understood the echo perfectly well. "Was that recognized at the time? Was it clear to me that that sentence would have some impact on the abortion question?" he later asked in rephrasing an obvious question. "Yes, I certainly knew that and I believe Justice Brennan did too" (Garrow, 1994a: 542, quoting from a July 20, 1992 conversation with former Brennan clerk Gerald Goldstein).

But no other justices offered any written comments or questions about that sentence, even though it of course escaped no one's attention. "We all saw that sentence, and we all smiled about it" for it appeared to have a "transparent purpose," remembered another 1971-1972 clerk. "Everyone understood what that sen-

tence in *Eisenstadt* was doing, but no one believed it would tie anyone's hands in the abortion context or bind anyone in the future" (Garrow, 1994a: 542).[12]

Subsequent academic commentary on Brennan's *Eisenstadt* opinion has been less than complementary. Future federal appellate judge Richard A. Posner wrote that *Eisenstadt* "unmasks *Griswold* as based on the idea of sexual liberty rather than privacy" (Posner, 1979: 198), yet Duke law professor William Van Alstyne concluded that Brennan actually had "begged the crucial question" of whether there was or was not a constitutionally protected right to fornicate (Van Alstyne, 1989: 167). Another future federal circuit judge, John T. Noonan, Jr., erroneously insisted that *Eisenstadt*'s "revolutionary rationale was probably invented" with *Roe* and *Doe* in mind (Noonan, 1979: 21), and Harvard law professor Mary Ann Glendon complained that Brennan had "abruptly severed the privacy right from its attachment to marriage and the family" (Glendon, 1991: 57).[13]

But the significance of either the *Eisenstadt* opinion or the academic criticism of Justice Brennan's constitutional creativity pales in comparison with *Roe v. Wade,* which followed just 10 months later. The greatest substantive irony of *Roe,* still not widely understood or appreciated even more than a quarter-century later, lies in how Harry Blackmun himself drafted and circulated an opinion that would have extended constitutional protection for a woman's right to choose abortion only up to the end of the first trimester of pregnancy; it was the lobbying of several of Blackmun's colleagues, primarily Lewis F. Powell, Jr., and input from a number of their clerks, rather than any initiative on Blackmun's part, that eventually resulted in *Roe*'s holding that constitutional protection extended all the way to the point of fetal viability at approximately the end of the second trimester of pregnancy (see Garrow, 1994a: 580-86, and especially Garrow, 2000: 80-83).

In comparison with William O. Douglas's breezily brief opinion for the court in *Griswold,* Harry Blackmun's opinion in *Roe* was

more than seven times longer, totaling some 51 printed pages. But as most students of the modern Supreme Court well know, Blackmun's discussion of the constitutional basis for *Roe*'s holding was both notably brief and far from resolute in tone. "The Constitution," Blackmun willingly acknowledged, "does not explicitly mention any right of privacy," but in decisions reaching back even to before Brandeis,[14] "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the court or individual justices have indeed found at least the roots of that right in the First Amendment," as in *Stanley v. Georgia* (394 U.S. 557, 564) (a 1969 case concerning the possession of obscene materials within the home), in the Fourth and Fifth Amendments in a number of search and seizure cases, "in the penumbras of the Bill of Rights," as Douglas had written in *Griswold,* in the Ninth Amendment, as Justice Arthur Goldberg in concurrence in *Griswold* had seemed to argue, "or in the concept of liberty" as articulated in the Fourteenth Amendment's due process clause. "These decisions," Blackmun added, "make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy" (*Roe v. Wade,* 410 U.S. 113, 152 (1973)).

"This right of privacy," Blackmun went on, "whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or as the District Court determined, 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 a pregnancy" (410 U.S. 113, 153 (1973). See also *Roe v. Wade,* 314 F.Supp. 1217 (N.D.Tex. 1970)). Blackmun's "or" construction seemed unnecessarily equivocal, and he added, while emphasizing that the abortion right was far from absolute, that "it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the

right of privacy previously articulated in the Court's decisions" (410 U.S. 113, 154 (1973)).

In summation, Blackmun reiterated how "the right of personal privacy includes the abortion decision," subject to state regulation, and sought support by noting how in the extensive list of abortion-rights cases decided by lower courts between 1970 and 1973, "most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision" (410 U.S. 113, 154, 155 (1973)). Later in the opinion, while weighing the state's regulatory interests, Blackmun acknowledged how in light of the embryo or fetus, a "pregnant woman cannot be isolated in her privacy," and that ergo the abortion question "is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt, Griswold, Stanley, Loving, Skinner, Pierce,* and *Meyer* were respectively concerned" (410 U.S. 113, 159 (1973)).[15]

Blackmun's parallel opinion in *Roe*'s companion case, *Doe v. Bolton,* added nothing with regard to the right to privacy, but Blackmun's vague and at times seemingly ambivalent efforts to detail the constitutional status of the privacy concept were not among the *Roe* opinion's strongest or most decisive sections. Of the two dissents, one by Byron R. White and the other by William H. Rehnquist, only the latter took explicit issue with Blackmun's invocation of privacy. "I have difficulty in concluding," Rehnquist wrote, "that the right of 'privacy' is involved in this case," since abortion "is not 'private' in the ordinary usage of that word" (*Roe v. Wade,* 410 U.S. 113, 172 (1973)). Like Justice Potter Stewart, a *Griswold* dissenter who nonetheless joined Blackmun's *Roe* and *Doe* opinions while also contributing a concurrence of his own (*Roe v. Wade,* 410 U.S. 113, 167 (1973)), Rehnquist volunteered that the Fourteenth Amendment's due process clause reference to "liberty" supplied a stronger constitutional peg than the privacy concept (*Roe v. Wade,* 410 U.S. 113, 172 (1973)).

Critical reaction to *Roe* and *Doe* was understandably far more extensive than that which had greeted *Griswold,* but little of the popular commentary focused on Blackmun's usage of the right to privacy.[16] Far and away the most significant early critique of *Roe* and *Doe* was authored by Yale law professor John Hart Ely, who eight years earlier, as a clerk to Chief Justice Earl Warren, had assiduously opposed Warren's endorsement of Justice Douglas's *Griswold* opinion (Garrow, 1994a: 229, 236-37, 240-41, 248-52). One subsequent observer would call Ely's April 1973 *Yale Law Journal* essay perhaps "the most famous and influential legal analysis of the past decade" (Flaherty, 1981: 588).

Ely's most basic objection to *Roe* concerned Blackmun's "inability" to decide whether the right stemmed from the Ninth or the Fourteenth Amendment. That uncertainty, Ely argued, should have raised the question of "whether the Constitution speaks to the matter at all." Ely was willing to concede that "it seems to me entirely proper to infer a general right of privacy, *so long as some care is taken in defining the sort of right the inference will support,*" but in his judgment the *Roe* opinion had failed even to attempt that necessary task (Ely, 1973: 928 n. 58, 929).

In subsequent years, other high-status and high-visibility constitutional commentators seconded and amplified Ely's criticisms. Stanford law professor Gerald Gunther accused *Roe* and *Doe* of "infusing a value of questionable constitutional legitimacy into the basic document" (1979: 820), and other notable legal critics included William Van Alstyne, Ruth Bader Ginsburg, Guido Calabresi, and Richard A. Posner.[17] Even America's best-known liberal constitutional commentator of the 1980s and 1990s, Harvard law professor Laurence H. Tribe, who initially reacted to the *Roe* opinion by expressing regret at how "the substantive judgment on which it rests is nowhere to be found" (Tribe, 1973: 7), was still voicing significant disquiet with the opinion in both his popular and his professional writings in the late 1980s and early 1990s (Tribe, 1990: 110; and 1988: 1349).

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But the most decisive critic of both *Griswold* and *Roe,* and of the underlying concept of constitutional protection for a fundamental right to privacy, was another prominent law school academic destined to go down in history for his spectacularly unsuccessful Supreme Court confirmation fight in 1987: Robert H. Bork. The battle over Judge Bork's nomination exemplifies *both* halves of our modern-day privacy right conundrum, for while Judge Bork was rejected in significant part because of how American public opinion accurately came to perceive him as an opponent of any constitutional right to privacy, at the same time there is no gainsaying the fact that Judge Bork's withering attacks on *Griswold* and *Roe* have been deeply and pervasively influential among legal academics and constitutional commentators, even among those who otherwise would blanch at any identification or association with the views of Bork. Judge Bork's 1987 defeat appears on its face to be a triumphant victory in favor of a constitutional right to privacy, but within the tiny elite whose views of *Griswold* and *Roe* heavily influence the long-term evolution of American constitutional presumptions, Bork may unknowingly have won the war even if everyone 13 years later still remains focused on how he lost so bloody a battle.

Few people now recall that once upon a time, back in the late 1960s, Robert H. Bork welcomed *Griswold* as an example of how the "idea of deriving new rights from old is valid and valuable. The construction of new rights can start from existing constitutional guarantees, particularly the first eight amendments, which may properly be taken as specific examples of the general set of natural rights contemplated" by the framers and particularly by the Ninth Amendment (Bork, 1968: 170).

But as almost ever student of American politics *does* remember, within a very few years Professor Bork's constitutional views shifted sharply to the right. In a 1971 article that became widely cited within academia long before its author first became a fed-

eral circuit judge in 1982, Bork had retracted his previous endorsement and instead denounced *Griswold*'s right-to-privacy holding as "utterly specious." *Griswold* was "an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it," since Douglas's opinion provided "no idea of the sweep of the right to privacy and hence no notion of the cases to which it may or may not be applied in the future" (Bork, 1971: 8, 9). Likewise, in an appearance before a Senate subcommittee in 1981, Bork testified that *Roe* was both "an unconstitutional decision" and "perhaps the worst example of constitutional reasoning I have ever read" (U.S. Senate, 1981: 310, 426).

Even after he became a federal judge, Bork in 1985 told an interviewer that "I don't think there is a supportable method of constitutional reasoning underlying the *Griswold* decision" (McGuigan and Weyrich, 1990: 293, reprinting in full the text of a September 5, 1985 interview).[18] When President Ronald Reagan in early July 1987 announced his nomination of Bork to succeed retiring Justice Lewis F. Powell, liberal anti-Bork interest groups such as People for the American Way and the National Abortion Rights Action League (NARAL) lost little time in launching a media campaign that portrayed Bork as an enemy of the right to privacy. "According to Bork," one NARAL ad proclaimed, "a state can declare the use of birth control illegal and invade your privacy to enforce the law." A Planned Parenthood of New York City ad in the *New York Times* highlighted Bork's characterization of *Griswold* as "utterly specious," and a television ad featuring actor Gregory Peck warned viewers that Bork "doesn't believe the Constitution protects your right to privacy" (Garrow, 1994a: 668-69).

When Bork himself went before the Senate Judiciary Committee for the first day of his confirmation hearing on September 15, he emphasized to the senators that he "agreed with [*Griswold*] politically," since "no civilized person wants to live in a society without a lot of privacy in it." However, he nonetheless stuck to his

constitutional guns. "[T]he right of privacy, as defined or undefined by Justice Douglas, was a free-floating right not derived in a principled fashion from constitutional materials." It "does not have any rooting in the Constitution" and instead "comes out of nowhere." Bork sought to explain that he of course was not opposed to "privacy" per se, but "I certainly would not accept emanations and penumbra analysis," and he willingly acknowledged that had he been on the Supreme Court in 1965, he would have dissented from the decision voiding the Connecticut anti-contraception statute (U.S. Senate, 1987a: 250, 241, 116, 118, 290, 712).

Bork also refused to back off from or qualify his previous denunciations of *Roe v. Wade*. "If *Griswold v. Connecticut* established or adopted a privacy right on reasoning which was utterly inadequate, and failed to define that right so we know what it applies to," he told the committee, then "*Roe v. Wade* contains almost no legal reasoning. We are not told why it is a private act, and if it is—there are lots of private acts that are not [constitutionally] protected—why this one is [constitutionally] protected. We are simply not told that. We get a review of the history of abortion and we get a review of the opinions of various groups like the American Medical Association, and then we get rules. That's what I object to about the case. It does not have legal reasoning in it that roots the right to abortion in constitutional materials" (184-85).[19]

By the time Bork's own five days of testimony were complete, it was utterly clear that his public image as an unyielding foe of constitutional privacy had become perhaps the single greatest negative in spoiling his chances for Senate confirmation. On September 21, with the committee hearings far from over, brash Wyoming Republican Senator Alan Simpson spoke of both *Griswold* and Bork's nomination in the past tense in declaring that "you cannot believe how much time we have spent on that nutty case and how much mileage the opponents of Bork got out of it. This was the key" (1176).

Several weeks later, as the Senate moved toward an October 23 floor vote in which Bork's nomination was rejected by a vote of 58 to 42, moderate New York Democratic Senator Daniel Patrick Moynihan explained his decision to vote against Bork by saying that "it is his restricted vision of privacy which troubles me most. I cannot vote for a jurist who simply cannot find in the Constitution a general right of privacy. . . . Its importance is such that I cannot support anyone for a Supreme Court appointment who would not recognize it" (*Congressional Record*, 1987: 14011-12).

In the wake of Bork's defeat, his victorious opponents acknowledged how important the privacy argument had been to their campaign (see Garrow, 1994a: 669, quoting Ann Lewis and Nikki Heidepriem), and independent observers heartily agreed. As University of Texas law professor Sanford Levinson put it, "Bork was deprived of a seat of the Supreme Court largely because of his refusal to acknowledge the 'unenumerated' right to privacy as being part of the set of constitutional rights legitimately enjoyed by Americans" (1988: 135. See also Michelman, 1988: 1533-34, who writes that the Bork hearings "made clear that 'privacy' . . . enjoys broad popular support as a constitutional value").

That lesson was further underscored two months later when Bork's eventual successor as President Reagan's nominee for the Powell vacancy, Ninth Circuit Court of Appeals judge Anthony M. Kennedy, took his place before the Senate Judiciary Committee and carefully told the senators that he believed "that the concept of liberty in the due process clause is quite expansive, quite sufficient, to protect the values of privacy that Americans legitimately think are part of their constitutional heritage." When committee chairman Senator Joseph Biden asked Kennedy "Do you think *Griswold* was reasoned properly?" Kennedy ducked a direct answer but volunteered that "if you were going to propose a statute or a hypothetical that infringed upon the core values of privacy that the Constitution protects, you would be hard put to find a stronger case than *Griswold*." In response to another question from Biden, Kennedy stated that "the value of privacy is a very

important part" of the "substantive component" of the due process clause and reiterated the interpretive distinction he had articulated earlier. "It is not clear to me that substituting the word 'privacy' is much of an advance over interpreting the word 'liberty,' which is already in the Constitution" (U.S. Senate, 1987b: 164, 165, 233).

Without a doubt, the single most crucial legacy of Robert Bork's senatorial rejection and Anthony Kennedy's unanimous senatorial confirmation was the Supreme Court's surprising five-to-four ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey* in 1992 to reaffirm rather than overturn the constitutional core of *Roe v. Wade.* And most notably, as I emphasized at the beginning of this paper and as Justice Kennedy's 1987 confirmation comments explicitly foreshadowed, when Justices Kennedy, Sandra Day O'Connor, and David H. Souter joined with Justices Harry A. Blackmun and John Paul Stevens to reaffirm *Roe,* their decisive "trio" opinion did so in precisely the manner that anyone familiar with both the Bork hearings as well as the academic "trashing" of *Griswold* and *Roe* should have anticipated: by retaining most of the privacy-protective substance of those now-famous rulings while simultaneously completely jettisoning the privacy concept and language that both *Griswold* and *Roe* had utilized so extensively.

Declaring that "there is a realm of liberty which the government may not enter," the *Casey* trio repeatedly indicated that they were drawing their constitutional guidance from Justice John Marshall Harlan's famous substantive due process dissent in *Poe v. Ullman* rather than from anything William O. Douglas had said in *Griswold* or Harry A. Blackmun in *Roe* and *Doe.* "[T]he most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment," the trio held while refraining from even a single invocation of the "p-word." Citing *Griswold* and *Eisenstadt,* the trio declared that they were not only correctly decided, but that "[t]hey supported the reasoning in *Roe* relating to the woman's liberty"—again invoking

liberty and avoiding privacy (*Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 847, 851, 852-53 (1992)).

In a latter section of the opinion, the trio characterized *Roe* as "an exemplar of *Griswold* liberty," and underscored the social importance of "*Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions" (505 U.S. 857, 860 (1992)). Justice John Paul Stevens, in his individual concurrence, implicitly agreed with his colleagues' conceptual shift, stating that *Roe* "was a natural sequel to the protection of individual liberty established in *Griswold*" and emphasizing how "*Roe* is an integral part of the correct understanding of both the concept of liberty and the basic equality of men and women" (505 U.S. 912 (1992)). Even *Roe*'s own author, Harry Blackmun, in a movingly elegiac concurrence of his own, silently accepted the change when he decried the "stunted conception of individual liberty" underlying Chief Justice Rehnquist's dissent (505 U.S. 940 (1992)).

Constitutional commentators who welcomed *Casey*'s outcome also unsurprisingly embraced the court's conceptual shift from privacy to liberty. Harvard's Laurence Tribe stated that the trio opinion "makes sense and puts the right to abortion on a firmer jurisprudential foundation than ever before," and constitutional philosopher Ronald Dworkin concurred, saying that *Casey*'s improvements "considerably strengthen the case for *Roe*" and gave the abortion right "an even more secure basis" (Greenhouse, 1992: A1, quoting Tribe; Dworkin, 1992: 29-33. See also Garrow, 1992).

The court has continued to consistently and thoroughly supplant privacy with liberty in the eight years since *Casey.* In *Stenberg v. Carhart* in June 2000, Justice Stephen Breyer's majority opinion, and a significant additional concurrence by Justice John Paul Stevens, each echoed *Casey* in speaking of fundamental constitutional "liberty" and omitting any mention of the concept of privacy (*Stenberg v. Carhart,* 120 S.Ct. 2597, 2604 (Breyer), 2617 (Stevens) (2000)). Again, as with *Casey,* this should surprise us not

in the slightest, for it clearly remains the case that the bad name that constitutional privacy acquired within elite academic circles in the wake of *Griswold* and especially *Roe* has quietly but nonetheless decisively influenced the constitutional preferences of those justices who have constituted the moderate or in some ways "liberal" wing of the court over the past decade.

The ironic present-day conundrum that confronts any attempt to re-create or revive the idea of a constitutional right to privacy is of course far more an analytic problem than a political one. As the "up" side or "bright" side of the Bork confirmation battle so telling showed, and as any number of subsequent public opinion polls confirm, the American mass public has no doubt or hesitation whatsoever that the United States Constitution should be read to encompass a very basic, very fundamental, and very inclusive right to privacy.[20] Instead, the problem that any advocate or champion of a constitutional right to privacy faces is almost exclusively an "elite" one of widely shared negative presuppositions about the intellectual quicksand that is believed to underlie any and all efforts to find an inclusive right to privacy within the ambit of the Constitution. Within the realm of reproductive rights claims, the Supreme Court has of course easily and perhaps quite convincingly overcome this problem by simply shifting to a discourse of liberty and simply abandoning the concept of privacy. Indeed, it appears virtually certain that any effort to revive privacy as a fundamental constitutional value will have to take place without any assistance from the court itself.

Thus our twentieth-century American history of constitutional privacy is in the end a perhaps surprisingly sad or disconcerting tale. Americans as a people remain eager indeed to embrace privacy as one of their culture's most important social and legal values, but the tradition of constitutional commentary and criticism that plays a dispositive role in predetermining the presumptions and beliefs of America's civic and legal elite has left privacy a mortally wounded constitutional contestant. Only when—or if—that elite conversation about the Constitution and privacy takes a

decided analytical or interpretive turn that cannot now be imagined or foreseen will there be any prospect for privacy to recover the constitutional stature that it briefly appeared to have in those now dimly remembered years from 1965 to 1973.

Notes

[1]As I noted in *Liberty and Sexuality* (1994a), Brandeis biographers and other commentators have erroneously continued to repeat the completely fictional statement that publication of the Warren and Brandeis article was a response to unpleasant coverage of a Warren relative's wedding by a Boston newspaper. Two very good law review articles that correct that error and are essential sources for any serious student of the Warren and Brandeis essay are Barron (1979): 875-922, and Glancy (1979): 1-39. Other relevant articles and commentaries are noted in Garrow (1994a: 783, n. 83).

[2]See Hadley (1894: 20); Hand (1897: 759); Adams (1907: 37).

[3]See, e.g., *Michigan Law Review* 3 (May 1905): 559-63; *Case and Comment* 12 (June 1905): 2-4; and *Virginia Law Register* 12 (June 1906): 91-99.

[4]The concept of privacy, if not the word itself, had been present in at least three pre-Brandeis Supreme Court rulings. See *Boyd v. United States* (116 U.S. 616, 630 (1886)); *Union Pacific Railroad Co. v. Botsford* (141 U.S. 250, 251 (1891)) ("No right is held more sacred . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law"); and *Interstate Commerce Commission v. Brinson* (154 U.S. 447, 479 (1894)) ("the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employees of the sanctity of a man's home, and the privacies of his life").

[5]For less explicit invocations, see also *Prudential Insurance Co. v. Cheek* (259 U.S. 530, 542-43 (1922)), *Meyer v. Nebraska* (262 U.S. 390, 399 (1923)), and *Pierce v. Society of Sisters* (268 U.S. 510, 535 (1925)).

[6]See also *Kent v. Dulles* (357 U.S. 116, 126 (1958)) ("outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases").

[7]Only Clark *directly* joined Douglas; both Brennan and Warren joined a Goldberg concurrence that in turn joined Douglas's majority opinion. See Garrow (1994a: 251-52) for a fully detailed explanation of the justices' behavior.

[8]See also Van Loan III (1968: 48), criticizing how neither Douglas's majority opinion nor Justice Arthur Goldberg's extensive concurrence "adequately explain[s] the origin and nature of the right of privacy or the factors the Court took into consideration in deciding that it was constitutionally protected."

[9]See also O'Brien (1979: 180), and Wolfe (1986: 290). Also note the telling observation made by the late Ronald J. Fiscus (1983: 413-14), with reference to Justice Douglas's judicial prestige (or the lack of it) as of 1965: "the Penumbra theory never had a chance, whatever its virtues, of becoming an accepted constitutional doctrine because of the reputation of its author . . . . By the time Douglas came to write his *Griswold* opinion, nobody was listening to him on doctrinal matters."

[10]See Henly (1987: 81-100) and Greely (1989: 251-65). See also Glancy (1990: 155-77); Clark (1974: 833-84); and Stoneking (1985: 859-77).

[11]See *People v. Belous* (458 P.2d 194 (Cal.S.Ct. 1969)); *United States v. Vuitch* (305 F.Supp. 1032 (D.D.C. 1969)); see also Garrow (1994a: 354-57, 364-66, 372-73, 377-79, 382-85).

[12]But see, e.g., Rubenfeld (1999: 212), which calls Brennan's sentence "the crucial passage that is at the epicenter of modern privacy doctrine."

[13]See also Rubenfeld (1999: 213), which asserts that Brennan's opinion "is just not much of an argument" since it "fails to provide any coherent theory for privacy."

[14]See *Union Pacific Railroad Co. v. Botsford* (141 U.S. 250 (1891)); n. 4 *supra*.

[15]In addition to those precedents already noted, Blackmun's references were to *Loving v. Virginia* (388 U.S. 1 (1967)), which voided state anti-"miscegenation" statutes, and *Skinner v. Oklahoma* (316 U.S. 535 (1942)), an equal protection ruling concerning the right to procreate.

[16]The *St. Louis Post-Dispatch* was one affirmative exception. Individuals nowadays may be greatly surprised by how largely positive the editorial reactions to *Roe* and *Doe* were. See Garrow (1994a: 605-06).

[17]See Van Alstyne (1983: 720; 1989: 1677-88); Ginsburg (1985: 375-86; 1992a: 17; 1992b: 1185-1209) (but see Garrow [1993: C3]); Calabresi (1985: 92-110 passim) (see also Garrow [1994a: 614, 878 n. 25], collecting a large number of additional legal critiques that criticized Blackmun's reliance on the privacy concept); Posner (1992: 337).

[18]See also *Dronenburg v. Zech* (741 F.2d 1388, 1392 (D.C. Cir. 1984)), *Dronenburg v. Zech* (746 F.2d 1579, 1582 (D.C. Cir. 1984)), and Garrow (1994a: 649-50).

[19]See also Bork (1989: 95-96, 112, 116, 158-59, 169, 234, 263).

[20]See Garrow (1994a: 670, 905 n. 101); *National Law Journal,* 26 February 1990: 1, 36-37.

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