

# Introduction

## Surveillance, Privacy, and Power in the Information Society

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Surveillance and privacy are two of the primary concepts through which we seek to make sense of modernity and of a world in which virtually all forms of social interaction are digitally mediated. They have already become—and are certain to remain—two of the most contentious issues of our age. In this book I will argue that the two concepts can only be understood in relation to one another and that this relationship is mediated by two interrelated factors: the forms of social and political power that structure information exchange in specific contexts and the power generated by the technologies and bureaucratic routines employed to collect and process this information.

Population surveillance has been theorized in a number of different ways. Many studies have argued in a Weberian vein that the development of bureaucracy has enhanced the power of the modern state by making it possible to identify and mobilize individual members of the population for fiscal, military, and welfare purposes.<sup>1</sup> However, the identification, classification, registration, enumeration, and monitoring of the population—that is, those administrative practices that Pierre-Joseph Proudhon collectively condemned as the essence of “government”<sup>2</sup>—did not simply make all individuals equal before the state. They also opened the way to the individualized care and control of these persons, and both the socio-medical discourses through which these individual differences were theorized and the disciplinary technologies through which such knowledge was deployed have been the privileged objects of Foucauldian studies of surveillance.<sup>3</sup> Surveillance has also been approached from a third influential perspective, whose constitutive insight is that the schemata through

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which populations are categorized and classified must be understood as systems of language or representation. This school analyzes the process through which human bodies are abstracted from their physical and social existence and dissolved into discrete data flows, which can then be re-assembled to form “data doubles” that can themselves become the targets of political intervention and administrative control. This approach, which takes the database as its paradigm and seeks to illuminate the distinctive features of digital surveillance, has been most systematically developed by the new subdiscipline of surveillance studies.<sup>4</sup>

While the present study draws on both the Weberian and the surveillance studies schools, it has been influenced by three works in particular. James Beniger’s *The Control Revolution* (1986) and Alfred Chandler’s *The Visible Hand* (1977) both describe the formation and functioning of surveillance and control systems, whose primary objects were material objects and economic processes. These systems functioned through the collection, processing, and application of information, and both authors argue—the one explicitly, the other implicitly—that the consolidation of these systems and the forms of social organization and social control to which they gave rise marked the emergence of the information society. However, the nature of the objects surveilled through these systems did not raise questions regarding personal privacy. By contrast, James Rule’s *Private Lives and Public Surveillance* (1974) was the first major work to use such a framework to analyze the large-scale surveillance of individuals by means of records and personal information, the ways in which such systems functioned as a mechanism of social governance and control, and the impact of such surveillance on the personal privacy and civil liberties of the population being surveilled.<sup>5</sup>

In earlier times, the informational needs of the state and business were limited; the available paper-based technologies imposed narrow limits on the amount of personal information that could be collected by large organizations; and, as a result, most of the information that was collected was maintained and processed decentrally and at the local level. In such a world, privacy was conceived primarily as a quality belonging to the intimate, domestic sphere of individuals and families. It seldom arose as a problem in relation to records of personal information, and, even when it did, it was conceived primarily in terms of insuring the security of such data against unauthorized access. However, Rule was writing at the moment when computers were just coming into use as tools for the processing of administrative data, and the specific nature of the privacy problems associated with integrated processing of such information had not yet become clear. The present study can in part be read as a continuation of Rule’s account in order to analyze both the growing centrality of personal

information as a steering medium, which plays a role comparable to that of money, law, and political power in the governance of the welfare state, and the distinctive ways in which population surveillance and personal privacy were theorized in the age of the mainframe. It represents the first broadly conceived, archivally grounded historical study of population surveillance, privacy law, and the diverse problems posed by the use of personal information for the governance of individuals and populations in Germany (and the European welfare state more generally) since World War II.

The issues that were raised during these years continue to shape public debate. However, my goal in this work is to reach behind both the explosive growth of social media and the internet and the enormous expansion of state surveillance of the digital domain since the early 2000s to the moment of the mainframe in order to understand the origins and import of these controversies.

In the 1970s and 1980s, West Germany was among the most technologically advanced countries in the world, and the country was a pioneer in both the use of the new information and communication technologies for population surveillance and the adoption of privacy protection legislation. This book originated as a study of the cornerstone of this legislative complex: the Federal Privacy Protection Law (*Bundesdatenschutzgesetz*), which was approved at the turn of 1976/77.<sup>6</sup> However, it quickly evolved into a search for a framework that would make it possible to understand how both the law and the new conception of informational privacy that informed it functioned as a means of resolving the social conflicts generated by new informational practices, new information technologies, and the disruption of the norms that had governed social communication in the bourgeois era. In the chapters that follow, I make two main arguments, one theoretical, the other historical. First, the book is conceived as an intervention into the ongoing debate over the nature of informational privacy as it has been waged in the disciplines of law, philosophy, sociology, and surveillance studies. I argue—most explicitly in the final section of this introduction and in chapter 2, but implicitly throughout the text—that in the 1970s and 1980s West German theorists of informational privacy developed a model for thinking about privacy and power in ways that pointed beyond the liberal, individualist conception of privacy, which, despite its intrinsic theoretical limitations, has been the cornerstone of virtually all thinking on the topic. Second, I use this understanding of the ways in which social and power relations structure information exchange as the framework for my historical account of population surveillance and the evolving meaning of privacy in West Germany.

The politicization of privacy in West Germany and across the Western world at the turn of the 1970s can be understood only in relation to the

evolution of the information society. Unfortunately, the existing literature is of limited usefulness in illuminating precisely how this connection is to be made. The grand sociological theories, which have used the concept to theorize the impact of computers and the internet on markets, firm organization, and the social organization of labor, are for the most part relentlessly presentist and technologically determinist.<sup>7</sup> Neither these works nor the growing body of scholarly literature devoted to the history of information, the early—and early modern—information society, the history of libraries, the discipline of information science or documentation, the social circulation of information, the informationalization of labor processes, and the question of information and empire provide useful ways for thinking about the relationship between surveillance and privacy.<sup>8</sup> In the chapters that follow, I argue that surveillance and privacy in the contemporary world can be understood only by focusing on a phenomenon that has been neglected by existing theories of the information society: the systematic use of *personal information*—that is, information pertaining to identified (or identifiable) individuals and their vital, biopolitical activities—as a medium for social governance, the new forms of power generated by control over this information, and the conflicts arising out of its use.

It has become almost a matter of ritual to begin accounts of privacy with a nod to the difficulty, if not the impossibility, of defining the concept, at least in the abstract, and I see no reason to deny myself this pleasure.<sup>9</sup> In the recent literature, privacy has been conceptualized in terms of three dimensions or strands: spatial, decisional, and informational. Informational privacy is the newest of these strands, and in this book I argue that the articulation of this new approach was driven by a growing awareness of the fact that the older concept of the private sphere was incapable of theorizing either the specific problems associated with the routine, bureaucratic collection of personal information or the use of the new information technologies to store, process, and disseminate it.<sup>10</sup>

“Surveillance” is the conceptual label that is most often applied to these informational activities. For example, a 2006 report written by the Surveillance Studies Network for the United Kingdom’s information commissioner defined surveillance as the “purposeful, routine, systematic and focused attention paid to personal details, for the sake of control, entitlement, management, influence or protection.”<sup>11</sup> This does not differ in any fundamental way from Anthony Giddens’s often-cited definition of surveillance as the accumulation, storage, and use of coded information to coordinate populations and superintend the activities of the persons to whom this information pertains.<sup>12</sup> However, by including the encoding of this information in his definition, Giddens highlights the fact that information is never gathered for its own sake, but only in anticipation of how

it can be used, and that its meaning is determined by the pragmatic interests of those organizations that define, collect, and control it. This process of encoding, as James Scott has argued, simplifies the infinitely complex structures of the social and natural worlds, and, in so doing, it gives rise to specific “regimes of visibility,” accessibility, and governability and naturalizes those forms of knowledge constructed in this way.<sup>13</sup> What both of these definitions have in common is that they argue that surveillance cannot be understood apart from the anticipated use of the information collected in this way to exercise control—that is, power—over the objects of such attention, regardless of whether this power is conceived as a means of care or control.<sup>14</sup> My central claim is that privacy describes a social relation and that it should, therefore, be understood as a means of conceptualizing and contesting both the exchange of information in specific contexts and the forms of social power that structure these exchanges.<sup>15</sup>

Giddens provides a useful set of concepts for thinking about the relationship between information, information processing, and power. In *The Nation-State and Violence*, he begins with the organization, which he defines as “a collectivity in which knowledge about the conditions of system reproduction is reflexively used to influence, shape or modify that system reproduction,” and he defines the political in terms of the administrative power of organizations—that is, their capacity to marshal the “authoritative resources” through which dominion is exercised over individuals and their activities.<sup>16</sup> Giddens argues that surveillance is the primary means for the concentration of the authoritative resources involved in the formation of the nation-state and thus the necessary precondition of the administrative power of states, and his characterization of societies that use information in a reflexive manner to control the evolution of organizations and social systems as information societies situates his work in close proximity to those of Beniger, Chandler, and Rule.<sup>17</sup> While Giddens himself shows how official statistics exemplified the reflexive use of information by the nation-state, I argue that personal information, especially that collected by population registries and the police, could be used to govern individuals, populations, and large-scale social processes in ways that aggregate statistical data could not. When approached from this perspective, the history of both information societies and information states can be written in terms of the development of their surveillance capacity—that is, in terms of the development of their ability to collect, aggregate, analyze, disseminate, and apply both personal information and the aggregate statistical information derived from this individualized data to enhance their administrative power and their ability to govern expanding areas of social life and geographical territory in an increasingly intense, continuous, and effective manner.<sup>18</sup>

Giddens also postulated that the rationalization and intensification of each of the four institutional clusterings of modernity that he analyzed in that work gave rise to social movements directed against the consequences of these processes: a labor movement against the power of private property, an ecological movement against the disenchantment and exploitation of nature, a peace movement against violence as a mechanism of internal pacification, and movements seeking to expand democratic participation in order to redress the imbalances of power resulting from the intensification of surveillance.<sup>19</sup> I argue that the politicization of privacy at the turn of the 1970s represented just such a response to the intensification of administrative power. The expansion, bureaucratization, and computerization of population surveillance by both corporations and the state, as well as the new forms of surveillance that developed in conjunction with the modernization of the welfare state, gave rise to a distinctly postindustrial social question, which Horst Herold (SPD)—the president of the Federal Criminal Police (the *Bundeskriminalamt*) from 1971 to 1981 and one of the chief protagonists of the story to be told below—once called the “information question,” which he presciently predicted would dominate public debate in the 1980s.<sup>20</sup> These processes also gave rise to a new form of social politics, which I call the politics of personal information; to new discourses on (informational) privacy, which became the primary means of theorizing the impact of this surveillance; and to a corresponding social movement, which contested these developments and the forms of governance they authorized in the name of both individual autonomy and the collective needs of a democratic society.

Neither the Third Reich nor the Stalinist society that had been constructed on the other side of the intra-German border were ever entirely absent from the minds of those persons who were concerned about these issues, and West German sensibilities with regard to surveillance and privacy were undoubtedly heightened by the experience of these two dictatorships. However, the nature of state surveillance and the political parameters of personal privacy in both of these states was so radically different from that in the Federal Republic that a direct comparison makes little sense.<sup>21</sup>

The citizens of the Federal Republic enjoyed fundamental rights that had been denied during the Third Reich, and the 1970s debate over surveillance and privacy took place within a constitutional framework that had been constructed as the antithesis of Nazi totalitarianism. Even though these debates served at times as a medium for mastering the country’s Nazi past, the postwar politics of personal information should be understood less as a response to Nazi rule than as an attempt—common to all Western societies during these years—to theorize both the specific forms

of social power generated by new informational practices and technologies and their impact on civil liberties. The rhetorical recourse to Nazism to explain the significance of these new forms of informational power was the product of a transitional moment at which the interested public was still struggling to articulate a new language to express its insights and concerns. Although this rhetoric resonated widely because it expressed an inchoate awareness that these developments were bringing about a secular shift in the informational relations between the individual and both the state and the firm, it contributed little to explaining the actual mechanisms that were driving this process.<sup>22</sup>

In West Germany, the East German Ministry of State Security was invoked much less often than the police or the population technologies of the Nazis as a negative example of state surveillance. There is a certain irony here. Not only was the Stasi much larger than the Gestapo and not only did it directly entangle a much larger proportion of the population in the surveillance of each other; since the early 1970s the Stasi had also made use of computers and other record-keeping technologies that were much more akin to those employed in the Federal Republic than to those available to the Nazis several decades before.<sup>23</sup> Nevertheless, the differences between the political systems of the two German states were reflected in their respective languages of privacy. In the East, “data protection” referred not to the defense of personal privacy and constitutional limitations on state surveillance, but rather to the protection of police files from unauthorized disclosure to outsiders. In view of differences such as these, little is to be learned from a forced comparison of surveillance and privacy in the two states. The more relevant comparisons would be with the very different postwar privacy cultures of the Anglo-American world and Scandinavia, as well as with the other countries of the EU, whose privacy cultures have—despite their different constitutional traditions—converged on the principles codified in the 2016 General Data Protection Regulation. However, these are topics for different studies.

## The Argument

Virtually all of the developments to be recounted in the following pages took place within a compact period of time extending from the mid-1960s to the turn of the 1990s. However, the arguments that are developed here cannot be made in a straightforward chronological manner, and the book is instead divided into three thematic parts whose individual arguments can only be fully understood in relation to those made in the other parts. Each part covers the entire period under study here, and the initial

chapter of each part reaches back to anchor the narrative in the immediate postwar years. Within each part, the chapters generally proceed in a chronological manner, though the thematic organization of the book leads to some chronological overlap. I have made considerable effort to both minimize redundancies and flag important references between chapters to help the reader follow the connections among the many individual arguments being made here. As we shall see, the point at which all of the separate strands of the argument (population registration in chapter 1, the census boycotts and the reform of privacy law in chapters 4 and 5, and policing in chapters 7 and 9) converge—and then diverge again—is the December 1983 ruling by the Constitutional Court on the legal challenges to the decennial census, which codified a right to privacy or “informational self-determination.”

Nothing is easier—and often more misleading—than to make large generalizations about information processing, surveillance, and privacy. To avoid these dangers, I approach the question in a very different way and proceed, instead, by means of a thick description of the information processing methods—including the available media, the associated bureaucratic practices, and the possibilities and limits of data exchange and integration—employed by the population registries and the police. Like Rule’s seminal study of large-scale record-keeping systems on the cusp of the computer age, I analyze both the internal dynamics of the population surveillance system being constructed in West Germany at the time (i.e., its individual components and their interaction) and the external power effects of this system. I begin with the manual information processing technologies employed in the postwar years and then examine the crisis of paper-based systems in the age of mass data processing, the specific mechanisms of surveillant control made possible by integrated data processing, and the debates over privacy and power generated by these new ways of using personal information. The logic of privacy protection law discussed in part II cannot be understood without this knowledge.

The contemporary history of the digital age, of the information society, and of the broader social impact of the computer (as opposed to its technological development) is only just now beginning to be written.<sup>24</sup> Although computers vastly expanded the information processing capacity of the state and transformed the ways in which new information was produced from existing data, the computerization of the public administration did not mark a fundamental discontinuity in the history of the West German information society. Rather, it should be seen as one more in a long series of attempts to solve those information processing problems on which state administrative power depended. It is also important to remember that computers are technosocial systems, and that, whatever their functional-



ities, the questions they raised regarding the distribution of privacy and access rights ultimately remained political ones.<sup>25</sup> Nor should we overlook the extent to which the design and functioning of the computer was itself modeled on the bureaucratic systems developed in the age of paper.<sup>26</sup>

From its founding in 1949 into the second half of the 1960s, the Federal Republic was governed by the conservative Christian Democratic Union (CDU) and its even more conservative sister party, the Bavarian Christian Social Union (CSU). Through most of this period, they were joined by the Free Democratic Party (FDP) as the junior member of the governing coalition. In October 1963, the elderly Konrad Adenauer (CDU) was succeeded as chancellor by Economics Minister Ludwig Erhard (CDU), the corpulent, cigar-chomping architect of the 1948 currency reform. However, in 1966, foreign policy setbacks and differences over economic and fiscal policy led to the breakdown of these postwar political arrangements and the formation of a grand coalition of conservatives and Social Democrats (SPD), headed by Kurt Kiesinger (CDU), which held power from December 1966 until October 1969. While the exclusion of the FDP from the governing coalition represented a mortal threat to the party, the entry of the Social Democrats into the national government for the first time since 1930 was one of the first fruits of the party's efforts to distance itself from Marxism and class struggle and transform itself into a broad-based *Volkspartei*.

The public administration that had been constructed under Adenauer was in important respects ill-suited for meeting the needs of the new state. The routines that governed the postwar administration had been established in an era in which the primary responsibility of the public administration was the maintenance of public order and the rule of law. However, by the end of the 1950s, it was becoming increasingly urgent to modernize the policies and procedures of the federal administration in order to respond to the problems posed by the expanding scope of state social intervention, the resulting need for greater coordination across the different levels of government in the new federal state, and the associated need for more information to manage these processes. The rationalization of office processes and the introduction of new technologies, including electronic data processing, was part of this process,<sup>27</sup> and it was under the grand coalition that plans were first laid for many of the projects that will be discussed in the chapters that follow.

Planning was the master concept in the political discourse of the Federal Republic from the mid-1960s to the mid-1970s. The idea of planning—especially comprehensive or “global” social and economic planning, rather than planning for discrete geographical regions or sectors of social life—had been discredited during the early postwar years by its association with Nazism and, later, communism and centralized state control.

However, by the mid-1960s, planning was coming to be seen as the key to sustaining the postwar economic conjuncture and rationally managing the evolution of complex societies, and it was in conjunction with this new interest in planning that information first emerged as a distinct policy concern for public officials at the federal, state, and local levels.<sup>28</sup>

Erhard's resistance to such planning was an important factor in his fall. A planning staff—which focused on social, rather than economic, planning—was established in the chancellor's office in early 1967, though it played only a minor role under Kiesinger, while the June 1967 Economic Stability and Growth Law marked the breakthrough of Keynesian macroeconomic planning in West Germany.<sup>29</sup> As we shall see below, in 1966 the coordinating body of federal and state police officials called for the creation of a national criminal information system to enhance the crime-fighting efficiency of the police in what was perceived as a period of rapid social and cultural change; in the social policy domain, the Labor Ministry was building a social database for planning purposes and laying the foundation for the computerization of the pension (and later the sickness) insurance funds; in 1968/69 officials in the chancellor's office began preliminary work on plans for a national database system to support their planning efforts; and, at virtually the same moment, administration officials were crafting plans to automate the population registration system.

Part I consists of a single chapter. The first two-thirds of chapter 1 address the postwar history of the population registration system, which was the most important source of personal information for both planning and policing. The plan to automate the local population registries and then to link them together—via a proposed national ID number—to create a national population information system for planning and administrative use was the most important state initiative in the informational domain. It was also the direct catalyst for both the politicization of privacy at the turn of the 1970s and the introduction of the Federal Privacy Protection Law. However, these plans were upset by growing privacy concerns at the very moment that the proposed population information system was assuming new importance for combatting terrorism, and the population registration law that was ultimately adopted by the Bundestag was informed by a privacy logic that was the antithesis of the logic of data integration that had inspired the original vision of a reformed and modernized population identification and information system.

The final third of the chapter turns back to the late 1960s to show how the new concept of informational privacy emerged as a response to the problems raised by the advent of integrated, electronic data processing. The most elemental functionality of such systems was to bring together information whose disclosure may have been appropriate, or even desir-

able, in one context, but which might take on a different meaning when linked with other information and used in new and unanticipated contexts. The new concept of informational privacy represented a counterconcept to that of data integration, and the initial privacy protection project represented an attempt to theorize and contain two problems associated with integrated information systems: the integration or transparency effect and the perceived loss of control over the disclosure of personal information within such systems. By increasing the informational asymmetry between the data subject and his communicative partners (including the state), both of these effects threatened to predetermine the possibilities of action and self-representation to such a degree that the person could no longer be considered a morally autonomous actor possessing that dignity whose protection was the cornerstone of the West German constitution. This line of thinking, which applied the fundamental rights codified in the country's Basic Law to the new forms of social communication and information exchange that were developing in the 1960s, provided the constitutional fulcrum for the subsequent development of privacy protection law in the Federal Republic. It also serves as the hinge connecting the history of population registration and integrated data processing to that of privacy protection law in part II.

Although plans for the different information or database systems had been set in motion during the Kiesinger administration, they came to fruition under the Social Democratic-Liberal coalition, which governed the country from October 1969 to October 1982. Not only did the new chancellor Willy Brandt (SPD) promise new policies toward East Germany and the communist bloc. He also challenged the legislature to "dare more democracy." However, the preconditions for the comprehensive social reform program through which this promise was to be redeemed were the modernization of the chancellor's office, the cabinet, and the public administration and the establishment of a comprehensive social planning mechanism. The personal information that was to be collected through the reformed population registration system was crucial to both these plans and the information and planning systems being constructed by all of the federal states at the turn of the 1970s.

The SPD was supported in this undertaking by the FDP, whose policies, electorate, and position in the country's party landscape were all changing rapidly in the late 1960s. Since its founding, the party had been an uneasy electoral home for two quite different strands of liberalism: a rather illiberal national liberalism, whose position on the national and German questions placed a number of the party's leaders at the far right of the political spectrum, and a more democratically minded constitutional liberalism that was the heir of the country's prewar progressive tradition.

Until 1966, the party had been held together by a shared commitment to pro-business policies, which reflected the economic and social interests of its main constituents. Although differences with Erhard over tax and budget issues had led the FDP to withdraw from its coalition with the CDU/CSU, at that point the party leadership still considered a coalition with the Social Democrats to be anathema, and after 1966 the party's future remained unclear. But after its exclusion from the government, the FDP began to pivot to the left in conjunction with a shift in the social composition of its constituency, and by the 1969 election the growing influence of the social liberal and civil libertarian wing of the party made a coalition with the Social Democrats appear more natural than it had in the past.<sup>30</sup> This political reorientation was confirmed by the party's 1971 Freiburg program, which provided the intellectual basis for the party's coalition with the Social Democrats, and deputy party chair Hans-Dietrich Genscher, whose own plans for making the public administration more modern and efficient overlapped with those of the SPD, was appointed interior minister in the new cabinet.

The interior ministry was led by liberal politicians through the entire span of the social-liberal coalition. As part of a cabinet reshuffling that followed upon Brandt's resignation in May 1974 and the election of Helmut Schmidt (SPD) as the new chancellor, Genscher became vice-chancellor and foreign minister, and he was succeeded as interior minister by the left-liberal law professor Werner Maihofer, one of the chief authors of the Freiburg Program. Like Genscher, Maihofer strongly supported the modernization of the police. However, Maihofer had the misfortune of serving as interior minister during the peak years of left-wing terrorism. While his continuous involvement in security matters prevented him from playing a major role in the drafting of the Federal Privacy Protection Law, he also incurred the odium of many of his erstwhile supporters for his role in the expansion of police surveillance. His implication in several major surveillance scandals, together with the diminishing influence of the social-liberal wing of the party, led to his resignation in June 1978. He was succeeded by Gerhart Baum, who, as we shall see, was both more sensitive to privacy questions than his predecessor and in a better position to put his convictions into practice.

Part II examines the postwar history of privacy law in West Germany. Although chapter 2 begins in the 1950s, it focuses on the articulation in the 1970s and early 1980s of a new conception of privacy in terms of the role-specific disclosure of information and strategic nonknowledge as a way of containing the transparency effect of data linkages in integrated information systems. The idea of a right to informational self-determination was originally put forth as a remedy to the loss of control over both the flow of

personal information and the meaning attributed to it by others, and this right coexisted uneasily with both the information access rights of others and their freedom to ascribe meaning to the information that they obtained in the course of social communication. As we shall see in greater detail in the final part of this introduction, many people have argued that the subjective nature of privacy rights has rendered the concept both incoherent and incapable of theorizing the social power generated by surveillance systems. In contrast, I argue that West German privacy theorists escaped these problems by showing how the individual personality unfolded in and through a reflexive, communicative process, and that they embedded their account of this communicative process in a broader analysis of the social interests and power structures that determined what information had to be disclosed, and what information could be concealed, in specific social roles and contexts.

In the following, I will use the term “privacy advocates” to denote the first generation of legal scholars, administrative scientists, and computer or information scientists who grappled with the problems arising out of the electronic processing of personal information. In contrast to Scott’s depiction of a modernizing state riding roughshod over a prostrate civil society, the early privacy protection movement was firmly rooted in the political establishment.<sup>31</sup> Unlike later social movements, which challenged the symbolic codes of industrial modernity, the early privacy protection movement was reformist and committed to working within the existing political system to find a proper balance between privacy and access rights.<sup>32</sup>

Privacy rights always impose limitations on the informational activity of the state, and in this respect it is possible to speak of privacy law (and the freedom of information laws, which were first mooted between the mid-1970s and the mid-1980s) as a mode of democratization and to distinguish it from more authoritarian positions, which privilege the informational prerogatives of the public administration. However, at times privacy legislation was supported by all of the major parties, and it is difficult to put a single social or political label on the early privacy advocates. In the 1970s and 1980s, the central figures in the privacy protection field included Spiros Simitis, the liberal Frankfurt law professor, longtime (1975–91) Hessian privacy commissioner, and the most systematic West German thinker on privacy matters; Hans Peter Bull (SPD), Hamburg law professor, the first federal privacy commissioner, and later interior minister of Schleswig-Holstein; the legal scholar Adalbert Podlech, the author of an influential essay on the constitutional foundations of privacy law, whose academic career was deflected by his sympathy for the anti-authoritarian movement; Wilhelm Steinmüller, one of the founders of the field of legal informatics, the lead author of one of the founding documents of German

privacy protection law, and ultimately a radical critic of state population surveillance; Otto Mallmann, the author of an important early monograph on privacy protection and later presiding judge on the Federal Administrative Court; Ulrich Dammann, the author of a number of influential essays on integrated data processing, planning, and privacy and longtime civil servant in the office of the federal privacy commissioner; Reinhard Riegel, who monitored the work of the security agencies for the federal privacy commissioner from 1978 to 1986 and who ultimately ran afoul of the conservative reaction; Ruth Leuze, who as Baden-Württemberg privacy commissioner was one of the most outspoken defenders of privacy rights in the 1980s; Herbert Fiedler, another of the early leading figures in the fields of legal and administrative informatics; Ernst Benda (CDU), federal interior minister (1968–69), the author of an influential 1974 essay on personality profiles and the private sphere, and presiding judge of the Constitutional Court at the time of the census decision; Eggert Schwan (CDU), a maverick conservative civil libertarian, whose warnings regarding the totalitarian character of the security laws proposed by the Kohl administration led to clashes with his party colleagues; and last, but by no means least, Herbert Auernhammer, Ministerialrat in the federal interior ministry and chief author of the Federal Privacy Protection Law.

Most of these men and women had been born between 1934 and 1945. They were about a decade younger than many of the politicians (including Benda and his successors as interior minister) and civil servants (Auernhammer and others whom we shall encounter) who already occupied important positions at the turn of the 1970s. On the other hand, they were slightly older than the generation of 1968, and many of them were already established academics by the time the movement reached its peak.

Its translated name notwithstanding, the Federal Privacy Protection Law, whose legislative history is the focus of chapter 3, was not simply, and not even primarily, a privacy law. Nor was it merely a code of fair information practices designed to ensure the accuracy, completeness, and confidentiality of electronically processed data. Rather, it represented an attempt to codify what were deemed to be socially adequate, substantive norms for information exchange and use. However, the juridification of these communicative practices was fraught with difficulties. The strategic decision—dictated by the reliance on the concept of informational self-determination—to indirectly protect privacy by regulating the processing of personal information made it impossible to specify in the abstract what information was to be considered personal and what uses constituted a misuse of this information. On the other hand, the use of the novel concept of “formatted files” to determine what information was to fall within the scope of the law highlighted the different kinds of power generated by

the collection, use, and exchange of this information. Ultimately, the reliance upon a number of elastic formulations to balance between competing interests deferred, rather than resolved, the conflicts on which the concrete meaning of the law depended. These compromises made the early amendment of the law unavoidable, and these reform efforts brought to the surface the systematic differences between the SPD and the FDP regarding the purpose of the law.

Widespread social protest and the rise of left-wing terrorism led to the rapid modernization and expansion of police surveillance capacity in the 1970s, which we will examine in part III, and, from the second half of the decade into the 1980s, the West German public was increasingly polarized by the expansion of state surveillance. All of these concerns coalesced in an entirely unexpected manner around the decennial census scheduled for April 1983. At the turn of that year, a boycott movement sprang up out of nowhere and set in motion a rapid learning process that, within a matter of months, made control over the collection and use of personal information into one of the central political issues of the 1980s and beyond. The impact of these events upon the country's privacy culture is the topic of chapter 4.

Although the protesters frequently compared the census with the population policies of the Nazis, I argue that the protests were a much more direct reaction to the new information technologies than they were to the Nazi past and that the language of the 1983 boycott echoed academic analyses of the ways in which computers were generating novel forms of normalizing, disciplinary power that diminished both the scope for the development of the personality and the freedom of the individual to participate meaningfully in the democratic process.

The 1983 boycott coincided with a major political realignment. Although the reform plans of the social-liberal coalition had originally rested on the optimistic belief that economic planning would make it possible to indefinitely prolong the postwar economic boom, in the fall of 1982 the FDP broke with the SPD over differences in economic policy, but remained in power as the junior partner in a new coalition led by the CDU/CSU.<sup>33</sup> Helmut Kohl (CDU) was elected chancellor in October of that year, and the new balance of political power was confirmed by the February 1983 Bundestag election. Baum was succeeded as interior minister by Friedrich Zimmermann (CSU). Zimmermann was a reactionary who would have been more at home as police minister in the 1870s than he was as interior minister in a democracy, and he contributed greatly to the polarization of the public debate over privacy and security in the 1980s.

The census had been challenged in the courts, as well as in the streets, and, two weeks before the scheduled start of the census, the Constitutional

Court (the Bundesverfassungsgericht) issued a temporary injunction blocking the count until the case had been decided on its merits. This was the first time that the Court had overturned a law that had been properly approved by the Bundestag. This decision stunned the Kohl administration, especially Zimmermann, who had made the suppression of the boycott a measure of both the authority of the state and the administration's ability to govern. In its December 1983 ruling on these challenges, the Constitutional Court codified a right to informational self-determination, which it argued was implicit in the country's constitutional commitment to human dignity and the free development of the personality, and personal data was to be protected as a means of securing these underlying values.

Although the Court overturned those portions of the census law that authorized the use of name-based or reidentifiable census data for administrative purposes, it upheld the census in principle. This set the stage for a second boycott, which was directed against a revised census law. These 1987 events forced the Greens, who had first entered the Bundestag during the 1983 boycott, to reflect on the party's position in the parliamentary system, while their analysis of both the impact of the new information technologies and the ways in which personal information was used to govern modern society became an important, though heretofore overlooked, element of the party's identity.

The census decision forced the federal and state legislatures to revise every major law governing the use of personal information within the public administration. These included the population registration, ID card, and passport laws; the federal statistical, census, microcensus, and archive laws; federal and state laws governing the police and the intelligence agencies; and the Code of Criminal Procedure, the Code of Administrative Procedure,<sup>34</sup> and, of course, the Federal Privacy Protection Law itself. To a surprising degree, these amendments transformed laws that in the past had governed specific domains of social or administrative action into information—that is, access and privacy—laws. This task, which defined to a large extent the domestic political agenda of the Kohl administration in the second half of the 1980s, is the focus of chapters 5, 7, and 9.

Chapter 5, which, like chapter 4, can be fully understood only when read in conjunction with the account of police surveillance in part III, examines both the Court's reasoning in the census decision and the long, arduous process, which stretched from 1977 to 1990, of amending the Federal Privacy Protection Law. The census decision has been hailed as the constitutional cornerstone of privacy rights and condemned as a defective juridical construct. I argue that it was both. There is growing unanimity in the literature that most of the problems of both the decision and subsequent privacy law can be traced to the Court's apparent construction of



the right to informational self-determination as a subjective individual right “to determine the conditions under which [one’s] personal information shall be disclosed and used.”<sup>35</sup> However, it is not clear that the Court actually understood the right in this manner. As I argue in chapter 2, most West German privacy advocates explicitly rejected such an individualist construction of privacy rights, and the Court had access to a body of literature that had shown that the development of the personality was a social, communicative process, which was shaped by the social interests and power relations of the larger society within which it was embedded. Unfortunately, the Court’s reasoning in the decision did not systematically integrate this literature or give adequate expression to its own best insights.

Although the ruling codified the new right to informational self-determination, the Court left it to the legislature to balance this right against the collective interest in welfare, security, and the efficiency of the public administration. In the post-1983 debate, the revision of the Federal Privacy Protection Law was linked to a controversial packet of security laws, and the debates over the law governing the Domestic Intelligence Agency (the Bundesamt für Verfassungsschutz) and the reform of state police law (chapter 9) played a central role in defining the concrete meaning of the privacy law. The views of the civil libertarian wing of the FDP, which insisted that individual freedom could be protected only by the limitation of state informational activity, were in many respects quite close to those of the federal and state privacy commissioners. However, the conservative parties espoused a more Hobbesian view and refused to countenance any limitations that they believed would impair the sovereignty of the state and the efficiency of either the security agencies or the civilian administration. Although these differences led to legislative deadlock, which dragged on from 1984 until the end of the decade, the main features of the revised privacy law and the amendments to the other major laws regulating the use of personal information in the federal government—all of which were approved on the eve of reunification—ultimately reflected the priorities of the conservative parties.

In addition to population registration and the healthcare field,<sup>36</sup> policing was the most important domain in which the meaning of privacy was contested and redefined. Part III will focus primarily on the Federal Criminal Police, the most important police agency under the direct control of the federal government and the fulcrum of its efforts to modernize policing. It was during the 1970s that the Federal Criminal Police was transformed from an antiquated agency that played only a subsidiary role in the security sector into one of the most modern, computerized police agencies in the world, surpassed only by the FBI.

In 2004, Klaus Weinhauer argued that it was time to approach terrorism from a broader, specifically historical perspective, which, in contrast to the studies by social and political scientists that had dominated the literature up to that point, would explore the social, cultural, and political dimensions of the phenomenon. However, he warned that this task could only be accomplished by situating such research in relation to a comparably conceived history of “internal security”—that is, in relation to the sociocultural, administrative, and political-parliamentary processes through which the West German understanding of “stateness” was constructed in the confrontation with terrorism.<sup>37</sup> In the intervening years, both parts of this agenda have been realized to a substantial degree—with state actors, counterterrorism, and, more recently, the transnational dimensions of both political violence and policing becoming an integral part of the broader history of West Germany during the 1970s.<sup>38</sup> Part III, which focuses more on the informational infrastructure and practices of the security agencies than on security policy, should be seen as a contribution to this literature.

All West German police laws charge law enforcement with protecting “public security” (*öffentliche Sicherheit*). But while the parameters of public security are defined by the Criminal Code, internal security (*innere Sicherheit*) is a political, rather than a legal, concept, whose content and rhetorical thrust vary according to time and place. As we shall see, the internal security regime that was established in the late 1940s was a quintessential product of the Cold War. It was defined almost exclusively by the fear of communist subversion from within, which, it was argued, posed an existential threat to the Federal Republic because it could be exploited to create the opportunity for military aggression from the East, and by a corresponding willingness to limit the civil liberties of those who were perceived as seeking to undermine the country’s “free, democratic order.” Although the Allies had been concerned primarily with the threat of resurgent Nazism, the reintegration of many former Nazis into the political system and the public administration under Adenauer, along with the deepening Cold War, transformed these exceptional powers into a weapon that was directed almost exclusively against the left. At the end of the 1960s, the Social Democratic-Liberal coalition initially sought to reconceptualize internal security as a social problem that could be combated by welfarist means as part of its broader project of social and political reform, but these plans were blocked and then overshadowed by the rise of domestic terrorism. As a result, the country’s internal security regime remained relatively unchanged until the late 1970s.

Chapter 6 begins with an account of internal security policy, the organization of policing, and a history of the terrorist groups that became the

objects of police surveillance in the 1970s. This section provides much of the context needed to understand the arguments made in part III (and, to a lesser degree, parts I and II). The remainder of the chapter describes the entangled history of police information processing and the joint impact of computerization and terrorism on the role of the Federal Criminal Police from the mid-1960s to 1972. Here I argue that the declining effectiveness of the Federal Criminal Police in the 1960s provides a classic illustration of both the process by which the traditional, paper-based information processing systems employed by the agency (and by other public and private organizations involved in the mass processing of personal information) were overwhelmed by the new demands placed on them and the ways in which integrated information systems promised to enhance the administrative power of the state and its ability to govern individuals and populations on a national scale.

However, capturing the gains in efficiency and effectiveness promised by such systems depended not only on automating the Federal Criminal Police itself, but also on building an integrated national criminal information network to link the agency's system with those being developed by the federal states. Work on such a network was stalled through the late 1960s by the institutional rivalries rooted in the federalist structure of the security sector. The January 1972 decision by the Conference of State and Federal Interior Ministers to construct the national criminal information system INPOL (*Informationssystem der Polizei*)—whose architecture was shaped in decisive ways by the federalist prerogatives of the states—was part of a cluster of security measures adopted between 1971 and 1973 to modernize the Federal Criminal Police, expand the agency's authority, and enable it to better respond to the threats posed by left-wing terrorism.

Chapters 7 and 8 both deal with the period from the early 1970s to the mid-1980s. Chapter 7 takes a more structural approach. It analyzes the build-out of INPOL, its integration with the main population information systems that were being constructed by the civilian administration, and the ways in which this nascent network facilitated the securitization of space, place, movement, and identity. While these developments enabled the state to govern the population in ways that had not been possible before and gave the exchange of data among these offices and agencies a new quality that could not have been foreseen, much less authorized, by legislators in the age of paper, this new surveillance infrastructure and the surveillance practices that it made possible also posed novel privacy problems. These were classic examples of how technological change was forcing the legislature to explicitly renegotiate the parameters of socially acceptable information exchange. Additional privacy concerns were raised by Herold's proposal, which was first mooted at the end of the 1970s, to

build a new version of INPOL, which he believed would solve the technical problems that plagued the still-unfinished network and constitute a major step toward the realization of his vision of the police as a fully informationalized, self-optimizing cybernetic system.

The second novel form of administrative power that was the topic of public concern during these decades grew out of the changing ways in which personal information was used to govern the welfare state. Since the end of the 1800s, the threshold for state intervention for welfare, security, and public health purposes had been the existence of a concrete danger. However, beginning in the 1970s, the modernization of the welfare state made it appear more urgent, more economical, and more rational to collect the information that would be needed to identify and preempt deviant behavior at the predelinquent or prepathological stage, before it had become a concrete danger whose occurrence could no longer be forestalled. This line of thinking justified the extension of state surveillance into what the Germans called the logical and chronological *Vorfeld* of concrete dangers. However, neither the potential causes of deviance nor the appropriate means for preventing them could ever be fully known, and the impossibility of perfect knowledge gave rise to two complementary modes of governing an uncertain future.

Chapters 8 and 9 analyze these two modes of governing the future, the forms of surveillance to which they gave rise, and their political import. Chapter 8 takes a chronological approach to the parallel histories of the formation of a counterterrorism surveillance regime centered on the Federal Criminal Police and the development of an array of new surveillance practices to map the radical milieu and track down terrorists, and later organized criminals, who relied on strategies and tactics that could not be defeated using the methods developed to combat “ordinary” crime. This chapter examines the criminalistic rationale for these practices, the ways in which they pushed against the boundaries of liberal police law, the ways in which the concept of privacy was employed to contest this expansion of police surveillance, and the role of these conflicts in determining the concrete meaning of both privacy and its mirror image, internal security.

The impact of these new surveillance practices would have been blunted in the absence of a unified apparatus to collect, analyze, and apply this information, and the chapter shows how terrorism provided the rationale for the grudging, limited, but nevertheless unprecedented centralization of power in the hands of the Federal Criminal Police between 1975 and 1977. However, the inability to prevent a new wave of political violence, the passage of the Federal Privacy Protection Law, the appointment of Baum as interior minister, and a growing sense that this new surveillance apparatus was itself becoming a threat to civil liberties and personal pri-

vacy precipitated both a Thermidorian reaction against the surveillance regime that had taken shape since 1975 and a broad public debate over whether the Federal Republic was being transformed into an authoritarian surveillance state (*Überwachungsstaat*).

The census decision forced the states to explicitly authorize, and delimit, the collection and exchange of personal information by the police, and the central point of contention in the reform of state police laws, which is the focus of chapter 9, was the codification of the new surveillance practices. Chapter 9 distinguishes between liberal and illiberal modes of governing an uncertain future, their respective logics of prevention and repression, and the distinctive forms of surveillance that they authorized. The liberal mode of governance, which was exemplified by Herold's conception of the "social sanitary" mission of the police, sought to tame this uncertainty by identifying the natural laws of social deviance and then using this knowledge to deploy (dis)incentives to alter the strategic calculations that led these persons to deviate from social norms. Illiberal governance arose at the limits of this liberal project. It involved the reassertion of sovereign power from within the social domain in order to repress deviant, criminal behavior by those who showed themselves unable or unwilling to respond to such incentives and thus incapable of being governed through freedom. This was the rationality that informed the new forms of surveillance that were to be codified in the reformed police laws of the 1980s.

Contemporary analyses of terrorism and organized crime figured the future as uncertain, unknowable, and threatening, and the search for security involved an open-ended process of risk discovery—that is, a search for "unknown unknowns" (rather than simply the expanded collection of information on known risks), the extension of surveillance further and further into the *Vorfeld*, and the reliance upon tacit knowledge, intuition, and context-based judgment by the security agencies.<sup>39</sup> As such, "precautionary" surveillance and intervention obeyed a dynamic, transgressive logic because they contained no intrinsic limits or criteria that would permit them to be subjected to legal norms or formal procedures. Consequently, there was a constant danger that such activity would hollow out the rule of law in the name of a postliberal security regime in which the distinction between law and exception was progressively obscured.<sup>40</sup>

The codification of these new surveillance practices represented a direct challenge to the basic principles of liberal police law, which had predicated the informational activity of the police on the existence of either a concrete danger or well-founded individual suspicion. Chapter 9 argues that privacy protection law served as the primary means for theorizing the problems arising out of the new police surveillance practices and for defending legal norms and a liberal economy of informational parsimony

against the transgressive logic of precautionary surveillance.<sup>41</sup> In this way, I argue, the end of the postwar paradigm of internal security was marked not only by reassertion of civil liberties and privacy rights against the state, but also by the emergence—and partial institutionalization—of an entirely new paradigm that was structured around the logic of precautionary surveillance.

## Surveillance and the Political Relevance of Privacy

Any account of privacy will remain little more than an academic exercise unless it succeeds in both explaining the precise nature of the harms entailed by the routine collection of personal information by large organizations and showing how the concept can be used to theorize and contest the administrative power generated by such surveillance.<sup>42</sup> However, many observers are skeptical of such an undertaking, and some critics have gone so far as to claim that the concept of privacy has no analytic purchase or political relevance in contemporary surveillance societies. Privacy, they argue, represents neither the “antidote” to surveillance nor its “ontological antithesis.”<sup>43</sup> They attribute the theoretical and political deficiencies of the concept to its subjective nature, to the impossibility of precisely defining its contours, and to the resulting tendency “to reduce surveillance to an individual matter rather than [to see it as] an inherently social concern.”<sup>44</sup> In the damning words of John Gilliom, the concept of privacy is “hyper-individualistic, spatial, legalistic, blind to discrimination, and, in the end, simply too narrow to catch the richness of the surveillance experience.”<sup>45</sup>

Although such arguments are not without their merits, in the 1970s and 1980s West German privacy advocates approached the question of informational privacy, or what came to be called *Datenschutz* (literally, though not entirely accurately, “data protection” [see chapters 2 and 3]), from a very different perspective. My goal here is to demonstrate the continuing political relevance of these early German reflections on informational privacy by showing that their efforts to think through the problems posed by both bureaucratic population surveillance and the use of the new information technologies to process this data drove a paradigm shift from the idea of a private sphere of seclusion *from* society to a concept of informational self-determination, which theorized both the social and power relations between individuals *in* society and the informational relations to which these social processes give rise. This approach, I argue, enabled them to avoid the contradictions of individualist conceptions of privacy and incorporate into their understanding of privacy an analysis of those forms of power whose ostensible neglect has been adduced by critics as the cause

of the political irrelevance of the concept. In this way, privacy became, as Sarah Igo has argued, one of the central salients through which citizenship has been defined in the modern world.<sup>46</sup>

Since the 1960s, George Orwell's *1984* (1949) and Jeremy Bentham's panopticon—as read through the lens of Michel Foucault's *Discipline and Punish* (1975)—have provided the most important frameworks for thinking about surveillance in contemporary society.<sup>47</sup> Orwell's book provided both a powerful language for describing the dangers posed by the invasion of the private sphere and a trove of epithets that could be hurled against the computer and the record-keeping state. However, both the nature of the power generated through physical or observational surveillance in a totalitarian state and the ways in which it shaped individual subjectivity are quite different from that produced by the routine, automated collection of personal information that was the focus of West German privacy theory in the 1970s.

The issue is somewhat more complicated with regard to Foucault.<sup>48</sup> In *Discipline and Punish*, Foucault argued that the correct training of malleable subjects depended on three technologies: hierarchical observation, normalizing judgment, and their combination in the examination, as well as the recording of the results of such examinations in disciplinary writing, which made it possible to classify, form categories, determine averages, and establish norms.<sup>49</sup> However, he never attempted to fit computers, databases, or paper filing systems into the framework that he had constructed in that book, and a substantial literature has grown up around what he left unsaid. A number of authors have argued that the new information technologies have led to the perfection of panoptic surveillance.<sup>50</sup> However, in recent years this position has come under attack from a number of directions. On the one hand, it is not clear whether surveillance in the postwar West (still) functions primarily as a mechanism for disciplining and normalization. For example, Gilles Deleuze has argued that, just as the disciplinary society succeeded the society of sovereignty, so too has the disciplinary society been succeeded by what he called the “society of control,” which governs not through the containment and normalization of difference, but rather through the modulation of the individual and the use of difference as a “motivational force.”<sup>51</sup>

The other defining characteristic of the panopticon, a unified hierarchy of surveillant visibility, which Foucault deemed essential to spatially fixing the individual objects of surveillance so as to better subject them to normalizing judgment, has also been called into question. Kevin Haggerty and Richard Ericson have argued that we are now witnessing the opportunistic convergence of otherwise discrete state and private-sector surveillance systems to form “surveillant assemblages.” These assemblages, they

argue, are energized by a range of motives, including control, governance, security, profit, and entertainment; they develop “rhizomatically” without the sovereign center and hierarchical structure that was essential to the disciplinary power of the panopticon; and they extend routine surveillance to populations that were not subject to such monitoring in the past and to nonhuman phenomena.<sup>52</sup>

These reservations regarding the usefulness of panopticism for theorizing the nature of electronic surveillance grow even greater when we look more closely at the structure and functioning of the database. According to Deleuze, the database serves not as a technology for making *individuals*, but rather for producing what he calls “dividuals,” who are created by the dispersion of the unified subject into the discrete, strategically important attributes or characteristics defined by those who determine the database fields in which this data is registered. This encoding, which is the antithesis of the disciplinary writing that records the progress of the individual toward the norm, makes possible, Deleuze argues, the modulation of individual action—that is, the authorization or denial of access to spaces, rights, and services—along as many dimensions as there are attributes.<sup>53</sup> Thus, even though electronic surveillance in the networked society may be increasingly comprehensive, its logic and political rationality are in many ways the opposite of those of the panopticon, and the differential visibility inherent in the functioning of the database makes it possible to govern individuals and populations by modulating, discriminating among, and “sorting” them in different ways.<sup>54</sup>

The shift from parsing the private sphere to the analysis of the context in which personal information is used has also provided the basis for the work of philosopher and information scientist Helen Nissenbaum, who has defined privacy in terms of the “contextual integrity” of informational practices. Nissenbaum argues that society is comprised of different spheres, or (sub)systems, where people engage in distinct activities, play specific roles, and obey the tacit norms that have evolved in tandem with these practices. Privacy is recognized, she argues, when informational practices conform to those norms that reflect the settled expectations of the community, and it is violated when they deviate from or challenge them.<sup>55</sup> While Nissenbaum’s arguments rest on the Burkean presumption that these “settled” practices can provide a norm by which to judge new uses, I argue that these practices can never be fully “integral” because communicative norms are themselves the product of prior political contestation and that, therefore, privacy can only be understood as the provisional outcome of the permanent conflict between the right to information and the right to privacy as it plays out at specific times in specific contexts. Seen in this way, the privacy protection legislation of the 1970s



and 1980s represented an attempt to politically renegotiate—in a period of accelerating cultural change, administrative modernization, technological advances, and political polarization—the parameters for the socially adequate exchange of information.

The dominant conception of privacy and privacy rights, which is grounded in a liberal, individualist anthropology, has been subject to numerous criticisms.<sup>56</sup> The most notable, and the most debilitating, of these criticisms focuses on the impossibility of casuistically resolving the antinomies created by the abstract juxtaposition of the private sphere and the public, and of the individual and society. Not only are judgments regarding the privacy or sensitivity of specific information indelibly subjective. The liberal commitment to the neutrality of the state in such matters also means that privacy rights can enjoy only relatively weak procedural protections. Critics have also argued that, to the extent that it represents an interest in preventing others from gaining knowledge of certain matters, the right to privacy amounts to nothing more than a right to conceal, to misrepresent oneself to others, and to manipulate them.<sup>57</sup> Others have argued in similar terms that the privatistic, inner-directed nature of privacy rights is incompatible with both democratic participation and communitarian commitments to the common good.<sup>58</sup>

These individualist foundations have always put the defenders of privacy on the defensive because, when conceived in this way, privacy rights have invariably been found to be of only secondary importance when weighed against other collective interests in information disclosure, such as security, welfare, the efficient functioning of both the public administration and the market, and free speech. Although Priscilla Regan has sought to put privacy rights on a firmer foundation by showing that they have a value to society that cannot be reduced to individual preferences or rights, her work remains grounded in the tradition of liberal privacy rights.<sup>59</sup>

Julie Cohen's *Configuring the Networked Self* (2012) is the most important attempt to shift the language of the debate.<sup>60</sup> Cohen traces all of the contradictions that have bedeviled privacy theory and policy to the attempt to ground privacy rights on the autonomous, presocial self presumed by liberal political theory. She argues that privacy cannot be understood as either a fixed condition or as an attribute such as seclusion or control. Instead, she argues that selfhood is the end product of a communicative, essentially social process, which is shaped by the anticipation of how Others will respond to the demands for social recognition articulated by the self, whose identity takes shape at the interface, and through the interplay, of the individual and the cultural and social systems into which the person is born and socialized. She argues that privacy must be understood as a form of active,

creative, playful, tactical, aleatory, and situationally determined “boundary management,” which enables the “capacity for self-determination” to develop by sheltering “dynamic, emergent subjectivity from the efforts of commercial and government actors to render individuals and communities fixed, transparent, and predictable.”<sup>61</sup> In this way, her focus shifts from subjective rights claims to what she calls the structural conditions for human flourishing—that is, the conditions that are necessary to preserve the space for play and choice in the construction of identity.<sup>62</sup>

While Cohen’s arguments point in important ways beyond the liberal paradigm, they are perhaps not as novel as she claims. In the chapters that follow, I will argue that in the 1970s and early 1980s West German privacy theorists had already developed a compelling account of the social nature of privacy. Cohen’s shift from subjective rights claims to the exploration of the objective, structural, or systemic preconditions for the preservation of the social space required for boundary management has much in common with German privacy theory, both then and now. However, when Cohen speaks of the development of the self as a process, she does so in rather abstract terms, and, in practice, she does not examine as closely as the more sociologically minded German privacy theorists the ways in which social interests and political power determine which boundary management practices can be employed in specific contexts.

In a central section of her book, Cohen explains that

choices about privacy are choices about the scope for self-articulation. . . . Choices about privacy are constitutive not simply of civil society, as some privacy theorists would have it, but of a particular type of civil society that prizes particular types of activities and particular types of subjects. . . . Privacy exemplifies a culture’s normative, collective commitments regarding the scope of movement, both literal and metaphorical, accorded to its members.<sup>63</sup>

These choices, however, are not made in a vacuum. The process by which new communicative norms were negotiated was an essentially political one, and, as Herold predicted, the information problem became one of the central points of contention in the West German culture wars of the 1970s and 1980s.<sup>64</sup> In the account of population registration, privacy law, and police surveillance in the chapters that follow, I will analyze both the ways in which German privacy theorists understood the potential harms and benefits that would result from giving (or denying) specific parties access to specific kinds of information for specific purposes and the process through which Germans sought to negotiate new collective norms to govern the use of personal information at the dawn of the information society.<sup>65</sup>

## Notes

1. Anthony Giddens, *The Nation-State and Violence* (University of California Press, 1987); Christopher Dandeker, *Surveillance, Power and Modernity: Bureaucracy and Discipline from 1700 to the Present Day* (Polity Press, 1990); James Scott, *Seeing Like a State* (Yale University Press, 1998); Jane Caplan and John Torpey, eds., *Documenting Individual Identity: The Development of State Practices in the Modern World* (Princeton University Press, 2001); and John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge University Press, 2000). Local, corporate, and ecclesiastical authorities were either bypassed by this process or instrumentalized by the state for its own purposes. See Anton Tantner, *Ordnung der Häuser, Beschreibung der Seelen. Hausnummerierung und Seelenkonkription in der Habsburgermonarchie* (StudienVerlag, 2007).
2. Pierre-Joseph Proudhon, *General Idea of the Revolution in the Nineteenth Century*, trans. John Beverly Robinson (Freedom Press, 1923), 294. Virtually all of these administrative practices or population technologies have their own historiographies, though for obvious reasons they are often entwined with one another. These literatures will be glossed in the appropriate places in the chapters that follow.
3. David Shearer, "Elements Near and Alien: Passportization, Policing, and Identity in the Stalinist State, 1932–1952," *JMH* 76 (2004): 835–81.
4. This argument was first made at length in Mark Poster, *The Mode of Information: Post-structuralism and Social Context* (University of Chicago Press, 1990); see also William Bogard, *The Simulation of Surveillance: Hypercontrol in Telematic Societies* (Cambridge University Press, 1996); Kevin Haggerty and Richard Ericson, "The Surveillant Assemblage," *British Journal of Sociology* 51, no. 4 (December 2000): 605–22; and the journal *Surveillance & Society*. Although there is a fourth school of surveillance studies, which focuses on the political economy of surveillance and information, these works seldom explicitly theorize privacy. The most important exception to this stricture is Shoshana Zuboff, *The Age of Surveillance Capitalism* (PublicAffairs, 2019). For an overview of the different approaches to the study of surveillance, see David Lyon, *Surveillance Society: Monitoring Everyday Life* (Open University Press, 2001), 107–25.
5. Beniger, *The Control Revolution: Technological and Economic Origins of the Information Society* (Harvard University Press, 1986); Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Harvard University Press, 1977); and Rule, *Private Lives and Public Surveillance: Social Control in the Computer Age* (Schocken, 1974). Two other works should also be considered in this context: Kevin Robins and Frank Webster, *Times of the Technoculture. From the Information Society to the Virtual Life* (Routledge, 1999), especially 87–127; and Paul Edwards, *The Closed World: Computers and the Politics of Discourse in Cold War America* (MIT Press, 1996), both of which emphasize the relationship between information, control, and representation, as well as the role of cybernetics in the functioning of the information society.
6. "Gesetz zum Schutz vor Mißbrauch personenbezogener Daten bei der Datenverarbeitung [Law for the protection against the misuse of personal data resulting from its processing]," *BGBI.*, 1977, 201–14.
7. Frank Webster, *Theories of the Information Society*, 2nd ed. (Routledge, 2002); and Webster et al., eds., *The Information Society Reader* (Routledge 2003).
8. These works include, but are by no means limited to, Toni Weller, *Information History: An Introduction* (Chandos, 2008); Alistair Black, Dave Muddiman, and Helen Plant, *The Early Information Society: Information Management in Britain before the Computer* (Ashgate, 2007); David Vincent, *The Culture of Secrecy: Britain 1832–1998* (Oxford University Press, 1998); Vincent, "Government and the Management of Information 1844–2009," in *The Peculiarities of Liberal Modernity in Imperial Britain*, ed. Simon Gunn and James Vernon

- (University of California Press, 2011), 165–81; Oz Frankel, *States of Inquiry: Social Investigations and Print Culture in Nineteenth-Century Britain and the United States* (Johns Hopkins University Press, 2006); Alex Wright, *Cataloging the World: Paul Otlet and the Birth of the Information Age* (Oxford University Press, 2014); Markus Krajewski, *Paper Machines: About Cards & Catalogs, 1548–1929* (MIT Press, 2011); Nicholas Popper, “An Information State for Elizabethan England,” *JMH* 90 (September 2018): 503–35; Ann Blair, *Too Much to Know: Managing Scholarly Information Before the Modern Age* (Yale University Press, 2011); Randolph C. Head, *Making Archives in Early Modern Europe: Proof, Information, and Political Record-Keeping, 1400–1700* (Cambridge University Press, 2019); Jacob Soll, *The Information Master: Jean-Baptiste Colbert’s Secret State Intelligence System* (University of Michigan Press, 2009); Christopher Bayly, *Empire and Information: Intelligence Gathering and Social Communication in India, 1780–1870* (Cambridge University Press, 1996); and Andreas Boes, Tobias Kämpf, and Thomas Lühr, “Von der ‘großen Industrie’ zum ‘Informationsraum.’ Informatisierung und der Umbruch in den Unternehmen in historischer Perspektive,” in *Vorgeschichte der Gegenwart*, ed. Anselm Doering-Manteuffel et al. (Vandenhoeck & Ruprecht, 2016), 57–78.
9. Colin Bennett and Charles Raab, *The Governance of Privacy: Policy Instruments in Global Perspective* (MIT Press, 2006), xxii–xxiii. Daniel Solove, *Understanding Privacy* (Harvard University Press, 2008), 1, calls privacy a “concept in disarray,” and in this book he attempts to reconstruct the concept by arguing that it should be understood as a label that is applied to a number of discrete “privacy problems” that share a family resemblance, but no common core concern.
  10. On the three dimensions of privacy, see Beate Roessler, *The Value of Privacy* (Polity, 2004). Part of the reason why Solove, *Understanding Privacy*, concludes that the concept of privacy is in such theoretical disarray is that he lumps together the distinct problems raised by each of these strands, though without being able to fall back on the integrating concept of personality rights that is at the core of German thinking on the topic (chapter 2 below). Roger Clarke, “Information Technology and Dataveillance,” *Communications of the ACM* 31, no. 5 (May 1988): 498–512, coined the term “dataveillance” to capture the shift from observational surveillance to the automated surveillance of persons by means of their personal information—that is, “via their records and transactions.” Gary Marx’s claim that the distinguishing characteristic of the “new surveillance” is the use of technology to “extract or create” information that is not accessible by the unaided senses retains both Clarke’s emphasis on technology and his shift in focus from the direct observation of reality to its digital emulation, but does not address the personal nature of this information. See Marx, *Windows into the Soul: Surveillance and Society in an Age of High Technology* (University of Chicago Press, 2016), 20; and Marx, “What’s New About the ‘New Surveillance’? Classifying for Change and Continuity,” *Surveillance & Society* 1, no. 1 (2002): 9–29.
  11. David Murakami Wood, ed., *A Report on the Surveillance Society* (Surveillance Studies Network, 2006; <https://ico.org.uk/media/about-the-ico/documents/1042390/surveillance-society-full-report-2006.pdf>), 4.
  12. Giddens, *The Nation-State and Violence*, 2, 14–15. In *Policing the Risk Society* (University of Toronto Press, 1997), 55–56, Richard Ericson and Kevin Haggerty define surveillance as “the bureaucratic production of knowledge about, and risk management of, suspect populations” in order to “efficiently format, and make available, detailed knowledge about people in the hope that it will come in handy in the system’s future dealings with them, or, more often, in the dealings other institutions (credit, welfare, insurance, health, education, and so on) might have with them.” Although this definition reflects their understanding of the mutation of the police from an institution for the production of social order into one dedicated to the production of knowledge for a compliance regime, the focus of part III of the present book remains individual offenders and the

- “hard edge” of crime control, prosecution, and punishment, which plays, they argue, an increasingly residual role in the policing of the risk society.
13. Scott, *Seeing Like a State*; and Leon Hempel, Susanne Krasman, and Ulrich Bröckling, “Sichtbarkeitsregime: Eine Einleitung,” in “Sichtbarkeitsregime—Überwachung, Sicherheit und Privatheit im 21. Jahrhundert,” special issue, *Leviathan* 25 (2010): 7–24.
  14. The tension between control for solicitude, entitlement, and protection and control for the repression of dangers is one of the central themes of Amy Fairchild, Ronald Bayer, and James Colgrove, *Searching Eyes: Privacy, the State, and Disease Surveillance in America* (University of California Press, 2007); the same point is made in Lyon, *Surveillance Society*, 3; and Sarah Igo, *The Known Citizen: A History of Privacy in Modern America* (Harvard University Press, 2018), especially her discussion of Social Security (55–98).
  15. “Privacy protection” and “data protection” (i.e., *Datenschutz*) are not equivalent expressions. The most careful analysis of the relationship between data and privacy protection in European law is Gloria Gonzáles Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Springer, 2014). However, Gonzáles Fuster’s terminological inquiry is only able to cleanly distinguish between the two by declining to investigate the concrete nature of the rights that are to be protected by means of the protection of personal data. In contrast, I use the term privacy as a label or umbrella term for these interests and argue that in Germany the privacy of the private sphere and the privacy of personal data or information were both grounded in the same constitutional principles. Conversely, Neil Richards, “Reviewing *The Digital Person: Privacy and Technology in the Information Age*,” *Georgetown Law Journal* 94 (2006): 1087–140, argues (1094, 1133–39) that the term privacy is “cognitively limiting,” especially with reference to databases and routine data collection, and that, unlike “privacy,” “data protection” does not—by definition—make it impossible to focus on the intermediate zone between “private” and “public.” However, my definition of privacy as a social relationship shows that the term need not be understood in the manner implied by Richards. My use of “privacy,” rather than “data protection” (which, it should be noted, suffers from its own limitations and ambiguities), to define the focus of this book is more than a mere personal preference, and the validity and usefulness of this choice will ultimately depend on the way the content of this concept is fleshed out in the following chapters.
  16. Giddens, *The Nation-State and Violence*, 12, 17, 19.
  17. Giddens, *The Nation-State and Violence*, 178, 181, 309.
  18. Edward Higgs, *The Information State in England* (Palgrave, 2004), popularized the title term of his work. I will use the terms “information society” and “information state” interchangeably to denote a secular social formation whose distinguishing feature is the increasing importance of personal information as a medium of social governance. The body of this book, however, deals primarily with the use of personal information by the state and the public administration. This is partly a matter of choice and partly a result of the available sources. Josh Lauer, *Creditworthy: A History of Consumer Surveillance and Financial Identity in America* (Columbia University Press, 2017), 9–10, 34, 180, argues that the private sector played “the leading role” in the formation of the modern surveillance society. David Lyon, “Situating Surveillance: History, Technology, Culture,” in *Histories of State Surveillance in Europe and Beyond*, ed. Kees Boersma et al. (Routledge, 2014), 32–46, notes (41) that “in the longer historical sweep, it is hard to say which came first, state or commercial surveillance. And of course, they may well have been intertwined.” Igo makes a similar claim in *The Known Citizen*, 15–16.
  19. Giddens, *The Nation-State and Violence*, 310ff.
  20. Interview with Herold, “Die Polizei als gesellschaftliches Diagnoseinstrument,” in *Die neue Sicherheit. Vom Notstand zur Sozialen Kontrolle*, ed. Roland Appel et al. (Kölner Volksblatt, 1988), 65–92, citation 89.

21. Elizabeth Harvey et al., eds., *Privacy and Private Life in Nazi Germany* (Cambridge University Press, 2019); Paul Betts, *Within Walls: Private Life in the German Democratic Republic* (Oxford University Press, 2010); and Orlando Figes, *The Whisperers: Private Life in Stalin's Russia* (Penguin, 2008), have all argued that the totalitarian state never fully succeeded in politicizing and absorbing the family and its private life, while Andreas Glaeser, *Political Epistemics: The Secret Police, the Opposition, and the End of East German Socialism* (University of Chicago Press, 2011), and Oleg Kharkhordian, *The Individual and the Collective in Russia: A Study of Practices* (University of California Press, 1999), both explore theoretically the dynamic driving state penetration of the private.
22. Recent scholarship has argued that the Gestapo lacked the manpower to actively surveil the general population and that it depended instead on denunciations from a public that was mobilized behind the ideology of a racial national community. See Gisela Diewald-Kerkmann, *Politische Denunziation im NS-Regime oder die kleine Macht der "Volksgenossen"* (J. H. W. Dietz Nachfolger, 1995); Robert Gellately, *The Gestapo and German Society: Enforcing Racial Policy, 1933–1945* (Oxford University Press, 1990); and Klaus-Michael Mallmann and Gerhard Paul, "Allwissend, allmächtig, allgegenwärtig? Gestapo, Gesellschaft und Widerstand," *Zeitschrift für Geschichtswissenschaft* 41 (1993): 984–99. While the introduction to Harvey, *Privacy and Private Life in Nazi Germany*, 25, foregrounds spatial and decisional privacy, I have analyzed the Nazi use of personal information as a surveillance mechanism in Frohman, "Population Registration in Germany, 1842–1945: Information, Administrative Power, and State-Making in the Age of Paper," *Central European History* 53, no. 3 (September 2020): 503–32.
23. Rüdiger Bergien, "Programmieren mit dem Klassenfeind. Die Stasi, Siemens und der Transfer von EDV-Wissen im Kalten Krieg," *VfZ* 67, no. 1 (2019): 1–30; Bergien, "'Big Data' als Vision. Computereinführung und Organisationswandel in BKA und Staatssicherheit (1967–1989)," *Zeithistorische Forschungen* 14 (2017): 258–85; and Christian Booß, "Der Sonnenstaat des Erich Mielke. Die Informationsverarbeitung des MfS: Entwicklung und Aufbau," *Zeitschrift für Geschichtswissenschaft* 60 (2012): 441–57.
24. For Germany, see Frank Bösch, ed., *Wege in die digitale Gesellschaft. Computernutzung in der Bundesrepublik, 1955–1990* (Wallstein, 2018); Armin Nassehi, *Muster. Theorie der digitalen Gesellschaft* (C. H. Beck, 2019); David Gugerli, *Wie die Welt in den Computer kam. Zur Entstehung digitaler Wirklichkeit* (S. Fischer, 2018); Martin Schmitt, Julia Erdogan, Thomas Kasper, and Janine Funke, "Digitalgeschichte Deutschlands. Ein Forschungsbericht," *Technikgeschichte* 83, no. 1 (2016): 33–70; Thomas Kasper, "'Licht im Rentendunkel': Die Computerisierung des Sozialstaats in Bundesrepublik und DDR," dissertation, University of Potsdam, 2018; Bergien, "Programmieren mit dem Klassenfeind"; Corinna Schlombs, *Productivity Machines: German Appropriations of American Technology from Mass Production to Computer Automation* (MIT Press, 2019); Michael Homberg, "Mensch/Mikrochip. Die Globalisierung der Arbeitswelten in der Computerindustrie 1960 bis 2000—Fragen, Perspektiven, Thesen," *VfZ* 66, no. 2 (2018): 267–93; Hannes Mangold, *Fahndung nach dem Raster. Informationsverarbeitung bei der bundesdeutschen Kriminalpolizei, 1965–1984* (Chronos, 2017); Julia Fleischhack, *Eine Welt im Datenrausch. Computeranlagen und Datenmengen als gesellschaftliche Herausforderung in der Bundesrepublik Deutschland (1965–1975)* (Chronos, 2016); and Jürgen Danyel, "Zeitgeschichte der Informationsgesellschaft," *Zeithistorische Forschungen* 9, no. 2 (2012): 186–211.
25. As Shoshana Zuboff, "Big Other: Surveillance Capitalism and the Prospects of an Information Civilization," *Journal of Information Technology* 30 (2015): 75–89, has written (75), "'big data' . . . is not a technology or an inevitable technology effect. It is not an autonomous process . . . It originates in the social, and it is there that we must find it and know it." Robins and Webster, *Times of the Technoculture*, 91, make a similar point: "The 'Information Revolution' is inadequately conceived . . . as a question of technology

- and technological innovation. Rather, it is better understood as a matter of differential (and unequal) access to, and control over, information resources.”
26. Jon Agar, *The Government Machine: A Revolutionary History of the Computer* (MIT Press, 2003).
  27. Frieder Günther, “Rechtsstaat, Justizstaat oder Verwaltungsstaat? Die Verfassungs- und Verwaltungspolitik,” in *Hüter der Ordnung. Die Innenministerien in Bonn und Ost-Berlin nach dem Nationalsozialismus*, ed. Frank Bösch and Andreas Wirsching (Wallstein, 2018), 381–412, especially 401–2.
  28. Gabriele Metzler, *Konzeptionen politischen Handelns von Adenauer bis Brandt. Politische Planung in der pluralistischen Gesellschaft* (Schöningh, 2005); Alexander Nützenadel, *Stunde der Ökonomen. Wissenschaft, Politik und Expertenkultur in der Bundesrepublik, 1949–1974* (Vandenhoeck & Ruprecht, 2005); Michael Ruck, “Ein kurzer Sommer der konkreten Utopie: Zur westdeutschen Planungsgeschichte der langen 60er Jahre,” in *Dynamische Zeiten. Die 60er Jahre in den beiden deutschen Gesellschaften*, ed. Axel Schildt (Hamburg, 2000), 362–401; Special issue on planning, *Geschichte und Gesellschaft* 34, no. 3 (2008); Elke Seefried, *Zukünfte. Aufstieg und Krise der Zukunftsforschung, 1945–1980* (De Gruyter, 2015); Seefried and Dierk Hoffmann, eds., *Plan und Planung. Deutsch-deutsche Vorgriffe auf die Zukunft* (De Gruyter 2018); Michel Christian et al., eds., *Planning in Cold War Europe: Competition, Cooperation, Circulations 1950s–1970s* (De Gruyter, 2018); and Larry Frohman, “Network Euphoria, Super-Information Systems, and the West German Plan for a National Database System,” *German History* 38, no. 2 (2020): 311–37.
  29. Winfried Süß, “‘Wer aber denkt für das Ganze?’ Aufstieg und Fall der ressortübergreifenden Planung im Bundeskanzleramt,” in *Demokratisierung und gesellschaftlicher Aufbruch. Die sechziger Jahre als Wendezeit der Bundesrepublik*, ed. Matthias Frese et al. (Schöningh, 2003), 349–77.
  30. On the political realignment of 1969, see Manfred Görtemaker, *Geschichte der Bundesrepublik Deutschland* (C. H. Beck, 1999), 437–525; and, on the reorientation of the FDP, see Heino Kaack, “Die Liberalen,” in *Die zweite Republik. 25 Jahre Bundesrepublik Deutschland – eine Bilanz*, ed. Richard Löwenthal and Hans-Peter Schwarz (Seewald Verlag, 1974), 408–32.
  31. Scott, *Seeing Like a State*, 4–5.
  32. It can be described in much the same terms used by Andrei Markovits and Philip Gorski, *The German Left: Red, Green, and Beyond* (Oxford University Press, 1993), 100–1, to characterize the early 1970s citizens’ initiatives.
  33. Görtemaker, *Geschichte der Bundesrepublik*, 563–96; and Andreas Wirsching, *Abschied vom Provisorium, 1982–1990* (Deutsche Verlags-Anstalt, 2006), 17–33.
  34. The relatively obscure *Verwaltungsverfahrensgesetz*, which was passed in 1976, codified for federal and state government the principles of administrative law that had developed over the previous century. The law, which had long been opposed by the defenders of a more conservative, étatistic conception of the role of the public administration, was regarded as an important step toward increasing both the transparency of the administration and the legal rights of individual citizens in their interaction with it.
  35. BVerfGE 65, 1 (43).
  36. I have examined the changing meaning of privacy in the healthcare field in Frohman, “Medical Surveillance and Medical Confidentiality in an Age of Transition: The Debate over Cancer Registration in West Germany,” *Social History of Medicine* (forthcoming); and “Redefining Medical Confidentiality in the Digital Era: Healthcare Reform and the West German Debate over the Use of Personal Medical Information in the 1980s,” *Journal of the History of Medicine and Allied Sciences* 72, no. 4 (October 2017): 468–99.
  37. Weinbauer, “Terrorismus in der Bundesrepublik der Siebzigerjahre. Aspekte einer Sozial- und Kulturgeschichte der Inneren Sicherheit,” *Afs* 44 (2004): 219–42; and Weinbauer, “Staatsmacht ohne Grenzen? Innere Sicherheit, ‘Terrorismus’-Bekämpfung und

- die bundesdeutsche Gesellschaft der 1970er Jahre," in *Rationalitäten der Gewalt. Staatliche Neuordnungen vom 19. bis zum 21. Jahrhundert*, ed. Susanne Krasmann and Jürgen Martschukat (Transkript, 2015), 215–38.
38. Karrin Hanshew, "Beyond Friend or Foe? Terrorism, Counterterrorism and a (Transnational) *Gesellschaftsgeschichte* of the 1970s," *GuG* 42 (2016): 377–403.
  39. Christopher Daase and Oliver Kessler, "Knowns and Unknowns in the 'War on Terror': Uncertainty and the Political Construction of Danger," *Security Dialogue* 38 (2007): 411–34; and Ulrich Bröckling, "Prävention: Die Macht der Vorbeugung," in *Gute Hirten führen sanft* (Suhrkamp, 2017), 73–112.
  40. Udo Di Fabio, "Sicherheit in Freiheit," *NJW* 61, no. 7 (2008): 421–25; Günter Frankenberg, *Staatstechnik. Perspektiven auf Rechtsstaat und Ausnahmezustand* (Suhrkamp, 2010), 119–23; and Giorgio Agamben, *State of Exception* (University of Chicago Press, 2005), 14.
  41. On security as a motif in West German history, see Christoph Wehner, *Die Versicherung der Atomgefahr. Risikopolitik, Sicherheitsproduktion und Expertise in der Bundesrepublik Deutschland und den USA, 1945–1986* (Wallstein, 2017); Martin Diebel, *Atomkrieg und andere Katastrophen. Zivil- und Katastrophenschutz in der Bundesrepublik und Großbritannien nach 1945* (Schöningh, 2017); Martin Geyer, "Security and Risk: How We Have Learned to Live with Dystopian, Utopian, and Technocratic Diagnoses of Security since the 1970s," *Historia* 396 5, no. 1 (2015): 93–134; Special issue on security and the demarcation of historical epochs, *GuG* 38, no. 3 (2012); Christopher Daase et al., eds. *Sicherheitskultur. Soziale und politische Praktiken der Gefahrenabwehr* (Campus, 2012); Eckart Conze, "Sicherheit als Kultur. Überlegungen zu einer 'modernen Politikgeschichte' der Bundesrepublik Deutschland," *VfZ* 53, no. 3 (2005): 357–80; Conze, *Die Suche nach Sicherheit. Eine Geschichte der Bundesrepublik Deutschland von 1949 bis in die Gegenwart* (Siedler, 2009); and "Forum: Surveillance in German History," *German History* 34, no. 2 (2016): 293–314.
  42. Neil Richards, "The Dangers of Surveillance," *Harvard Law Review* 126, no. 7 (2013): 1934–65.
  43. Dietmar Kammerer, *Bilder der Überwachung* (Suhrkamp, 2008), 14; Bennett, "In Defence of Privacy: The Concept and the Regime," *Surveillance & Society* 8, no. 4 (2011): 485–96 and the forum (497–516) on Bennett's essay. The citations here are from Gilliom, "A Response to Bennett's 'In Defence of Privacy,'" *Surveillance & Society* 8, no. 4 (2011): 500–4, citation 502; and Stalder, "Privacy is Not the Antidote to Surveillance," *Surveillance & Society* 1, no. 1 (2002): 120–24.
  44. Lyon, *Surveillance Society*, 4.
  45. Gilliom, "A Response to Bennett's 'In Defence of Privacy,'" 501.
  46. Igo, *The Known Citizen*.
  47. Daniel J. Solove, "Privacy and Power: Computer Databases and Metaphors for Information Privacy," *Stanford Law Review* 53, no. 6 (July 2001): 1393–462; and the discussion of these and other models and metaphors in David Lyon, *The Electronic Eye: The Rise of Surveillance Society* (Polity, 1994).
  48. Rob Boyne, "Post-Panopticism," *Economy and Society* 29, no. 2 (May 2000): 285–307; Kevin Haggerty, "Tear Down the Walls: On Demolishing the Panopticon," in *Theorizing Surveillance: The Panopticon and Beyond*, ed. David Lyon (Willan Publishing, 2006), 23–45; David Murakami Wood, "Beyond the Panopticon? Foucault and Surveillance Studies," in *Space, Knowledge and Power: Foucault and Geography*, ed. Jeremy Crampton and Stuart Elden (Ashgate, 2007), 245–63; Greg Elmer, "Panopticon—Discipline—Control," in *Routledge Handbook of Surveillance Studies*, ed. Kirstie Ball et al. (Routledge, 2012), 21–29; Elmer, "A Diagram of Panoptic Surveillance," *New Media & Society* 5, no. 2 (2003): 231–47; and Bart Simon, "The Return of Panopticism: Supervision, Subjection and the New Surveillance," *Surveillance & Society* 3, no. 1 (2005): 1–20.
  49. Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage Books, 1979), 170–94.
  50. The argument is summarized in Lyon, *The Electronic Eye*, 67–71, 166.



51. Deleuze, "Postscript on the Societies of Control," *October* 59 (Winter 1992): 3–7.
52. Haggerty and Ericson, "The Surveillant Assemblage."
53. Foucault, *Discipline and Punish*, 170; Deleuze, "Postscript on the Societies of Control"; and Haggerty and Ericson, "The Surveillant Assemblage," 619.
54. David Lyon, ed., *Surveillance as Social Sorting: Privacy, Risk and Automated Discrimination* (Routledge, 2002); and Oscar Gandy, *The Panopticon Sort: A Political Economy of Personal Information* (Westview Press, 1993).
55. Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford University Press, 2010), especially 129–57. In her subsequent work, Nissenbaum has paid greater attention to the historicity of informational norms and the power relations that underlie them. See, for example, Nissenbaum, "Contextual Integrity Up and Down the Data Food Chain," *Theoretical Inquiries in Law* 20 (2019): 221–56, especially 226–27, 233–34. There are important similarities between Nissenbaum's arguments and those advanced by Ari Ezra Waldman in *Privacy as Trust: Information Privacy for an Information Age* (Cambridge University Press, 2018), especially his understanding of privacy as a social concept and his jurisprudential argument that the definition of informational privacy in terms of trust in the adherence to context-based informational norms can provide the basis for a robust tort-based defense against the routine violation of these norms.
56. On this liberal "privacy paradigm," see Bennett and Raab, *The Governance of Privacy*, 3–28; and Bennett, "In Defence of Privacy."
57. Richard Posner, "An Economic Theory of Privacy," *Regulation* 2, no. 3 (May/June 1978): 19–26; and Posner, "The Right of Privacy," *Georgia Law Review* 12, no. 3 (Spring 1978): 393–422.
58. Amitai Etzioni, *The Limits of Privacy* (Basic Books, 2000), 203, 215, argues that common goods should most always take precedence over individual privacy.
59. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (University of North Carolina Press, 1995), 212–43, argues that privacy is a *common* value, which is shared by all individuals, even though they may differ on the precise nature of privacy rights; that it is a *public* value, which is necessary for the functioning of a democratic society; and that it is an inherently *collective* value because technology and market forces make it impossible for any single person to enjoy privacy rights without securing a minimal degree of privacy for all individuals. These ideas are further developed in Regan, "Privacy and the Common Good: Revisited," in *Social Dimensions of Privacy*, ed. Beate Roessler and Dorota Mokrosinska (Cambridge University Press, 2015), 50–70; Kirsty Hughes, "The Social Value of Privacy, the Right of Privacy to Society and Human Rights Discourse," in *Social Dimensions of Privacy*, 225–43; and Joshua Fairfield and Christoph Engel, "Privacy as a Public Good," in *Privacy and Power: A Transatlantic Dialogue in the Shadow of the NSA-Affair*, ed. Russell A. Miller (Cambridge University Press, 2017), 95–128.
60. Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (Yale University Press, 2012).
61. Cohen, "What Privacy Is For," *Harvard Law Review* 126, no. 7 (May 2013): 1904–33, citation 1905; and the corresponding passage in Cohen, *Configuring the Networked Self*, 149–50.
62. Cohen, *Configuring the Networked Self*, 223ff.
63. Cohen, *Configuring the Networked Self*, 149.
64. On the 1970s as a period of contestation, see Thomas Mergel, "Zeit des Streits. Die siebenziger Jahre in der Bundesrepublik als eine Periode des Konflikts," in *Geschichte denken. Perspektiven auf die Geschichtsschreibung heute*, ed. Michael Wildt (Vandenhoeck & Ruprecht, 2014), 224–43.
65. Solove's deconstruction of existing theories of privacy in *Understanding Privacy* results in a series of dualisms, which authorize the empiricist or nominalist taxonomy of pri-

vacuity harms that is the heart of his defense of privacy rights. In contrast, I argue that these dualisms can be largely resolved if we follow the early German privacy theorists in viewing privacy as a social relationship, that is, as the outcome of a political process in which contextually based informational norms are being continuously (re)negotiated by individuals and groups, and if we view the individual information privacy harms identified by Solove as different ways in which dignity and the development of the personality are harmed by informational practices that violate these communal norms.