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From Court to Country: A Legal, Social and Political Analysis of Privacy in the U.S., 1965-1974

Rachel Brady

Macalester College, rbrady@macalester.edu

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From Court to Country:
A Legal, Social and Political Analysis of Privacy in the U.S., 1965-1974

Rachel Brady
Patrick Schmidt, Advisor
Department of Political Science
Macalester College
Submitted May 1, 2007

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Chapter 1: Introduction

In a characteristically audacious opinion, the Supreme Court in 1965 declared privacy a fundamental right in its opinion for *Griswold v. Connecticut*. Despite its audacity, this assertion went largely unnoticed in most segments of society. But nearly a decade later, Congress declared privacy a fundamental right in the highly-anticipated Federal Privacy Act of 1974. Though the two statements were equally potent and legally binding, each focused on disparate aspects of the right to privacy and sought to regulate in independent realms. Why was this, and how did it happen? This project seeks to explain what happened during those nine years to propel privacy from the deeper social consciousness into mainstream discourse and gave it the vitality it needed to command a response from the legislature. Whatever this momentum, it gave privacy the life it would need to pervade society today, more than thirty years later.

I argue that it was exactly this—the independent development of privacy in separate spheres, each with different intentions—that allowed privacy to take on a life of its own. This research analyzes privacy’s legal development in *Griswold* and *Roe v. Wade* in 1973, and then shifts to focus on privacy’s social and political path to fundamentality during the same time period. I conclude that the steady increase in privacy activity and awareness between 1965 and 1973 worked to put increasing pressure on something of a privacy dam—a blockade that prevented complete understanding or regulation of privacy. In 1973, two key events occurred in separate realms which caused the dam to break entirely, resulting in the 1974 Privacy Act.

First, this project follows privacy’s path in the legal sphere by examining Court opinions, case briefs, and trends in legal argument and analysis. After a discussion of

Griswold and its aftermath, this thesis traces the ten cases before *Roe* in which the Court mentions privacy. It then touches on the Court's composition and the presidential politics involved in judicial appointments pertinent to privacy, discusses trend change and continuity between the Warren Court and the Burger Court, and concludes with an in-depth discussion of *Roe v. Wade*. In short, it asserts that the Court struggled to define the concept of privacy between 1965 and 1973. Its privacy cases centered largely around criminals and deviants, and with the exception of Justice William O. Douglas, the justices refused to apply their new concept of privacy in most of these cases. Still, it took the first steps toward a systematic breakdown of privacy's individual components by examining it as specifically applied to criminal justice, tax evasion, and sexual deviance. Though it denied privacy in the majority of these cases, it still began a trend of breaking down privacy and comparing it to other fundamental rights. Douglas' persistent defense of privacy came to fruition in *Roe v. Wade*, with the Court's declaration that privacy irrefutably existed in the Constitution. The question was no longer whether a right to privacy existed, but whether or not it included abortion.

Next, the thesis traces privacy's political growth, by discussing White House behaviors, legislative activity, media responses, and public opinion data. Through the use of Congressional committee publications, proposed legislation, newspaper articles and secondary sources, it presents privacy in both a legal and sociopolitical realm in an attempt to explain privacy's path. It begins with a discussion of privacy in Lyndon B. Johnson's presidency. It begins with a discussion of the Federal Bureau of Investigation's (FBI) spying practices, discusses the unusual liaison between the White House and the FBI, and the resulting press coverage, and last follows the Congressional

backlash to the illicit executive behavior, and the public's reaction to the influx of unusual governmental activity. The thesis then conducts a similar reconstruction of media, legislative and public activity under Richard Nixon's administration until news of the Watergate scandal hit the front pages. These chapters argue that Congress, unlike the Court, seemed unconcerned with criminal and reproductive privacy. Instead, in the early 1960s, it began to examine privacy from governmental intrusions. Beginning when J. Edgar Hoover and the F.B.I began spying on domestic organizations like the Black Panthers, the Ku Klux Klan, and politicians themselves, Congress became motivated to investigate the FBI's behavior. Along the way, it discovered myriad other agencies that were blatantly invading citizens' privacy. Even without a particular definition of privacy, it was clear that the federal government had crossed a line. As Congress learned more and more about federal intrusions, it publicized its findings. Politicians, the media and the scholarly elite engaged in a discourse about privacy rights and how exactly they could protect those rights. Despite the media and political attention, though, the general public remained largely unmotivated to work for its own privacy rights. In other words, the public was upset and fearful about the government investigating it, but did very little about it. After 1965, this discourse slowly filtered down to the public until 1973 when President Nixon's Watergate scandal hit the public full-force and the Court handed down *Roe v. Wade*.

Last, this thesis argues that the two-pronged attack on those who would reduce privacy rights, from *Roe v. Wade* and the fallout from Watergate, produced a flood of privacy related activity that left Congress with little choice but to pass the Privacy Act of 1974. It was in 1973 that the public was bombarded with the reality of the privacy

situation: the federal government was compulsively gathering information on innocent individuals and the Court was in a position to take away privacy rights not from criminals or deviants, but from everyday women. Even though the Court had declared privacy to be a fundamental right in 1965, it still had full authority to define the right. In 1973, it threatened to constrict its broad right to an idea that could otherwise be found in the text of the Constitution. At last, the public was motivated to act. The dam had broken and the torrent of privacy-related activity followed. In late 1973 with the public fully mobilized and the media relentlessly pursuing stories on governmental privacy invasions, Congress began to take the necessary steps to dissect and protect privacy. Congress formed a host of committees designed with the sole purpose of researching privacy invasions, used privacy protection as its national platform, and proposed over 250 pieces of legislation protecting the right. Within a year, Congress passed the Federal Privacy Act, which declared privacy a fundamental right and laid out guidelines for protecting it. It was a problematic makeshift solution to what had become a nationwide problem, but it was a solution, nonetheless. With the combination of the Court's application of privacy to everyday women and Congress' work to ensure future protection of privacy, the surge of activity began to recede and America began to return to a more stable state. Nevertheless, the idea of a fundamental right of privacy became engrained in the American psyche and continued to increase throughout the gay-rights movement, the September 11 terrorist attacks, and the war on terrorism, and even today shows no signs of retreating.

In sum, I argue that the differing approaches, reflecting a social argument conflicting with the concept, give privacy full-fledged salience in contemporary

American society. Because privacy began as a commonly understood and constitutionally supported right to personal property, and then took diverging paths between the Court, which largely dealt with criminal, deviant, and reproductive privacy, and the legislature, which dealt with privacy intrusions by the government, it filtered through to society from two entirely different directions. The multiple-fold influence on the public eye has given privacy particular potency today.

Still, this discussion begs the question of privacy's importance as a source of concern. Do we not have more pressing legal and political matters with which to occupy our time and energy? In fact, we do not. A surprising number of issues past and present fall under privacy's reach, including those which do not seem like privacy issues at all. In fact, privacy subsumes nearly every civil liberties issue we face. It encompasses relationships, the body, the mind, the home, and the family. It determines how a family can school its children, what a person can look at and where he can look at it, and whether a criminal can be convicted with the evidence presented. Put differently, privacy is a defense for many other fundamental liberties. It is both the starting ground and the ending point for many different breeds of rights talk. For example, abortion, same-sex marriage, sodomy all began with privacy claims and became more narrowly-tailored from there. Wiretapping, religion, property and self-incrimination all end up at an individual's right to privacy. In other words, privacy exists in nearly social realm: the body, the mind, the home, and the family. Also, privacy is unique because it can only be granted at the expense of other liberties. If we feel entitled to it or want to discuss it, we must understand that something else will have to give in order for privacy to prevail. This creates a unique clash of fundamental rights, tied together by privacy.

What made *Griswold's* legal argument plausible is that so much of what we know as concrete within the Bill of Rights does indeed share some philosophical touchstones with a concept of privacy. It can be legally connected to four of the first ten amendments, five of the first fourteen, and the “emanations from penumbras” of the entire Bill of Rights. Throughout the 1960s and 70s, the Courts determined that the First, Fourth, Fifth, Ninth and Fourth Amendments all give foundation to various facets of privacy. The First Amendment can protect our “ideas” privacy. With several important exceptions, it gives us privacy to practice the religion we want, to say what we want, and to believe what we want. The Fourth Amendment protects our physical privacy in our homes and on our bodies. Our thoughts are also protected by the Fifth Amendment, under which we do not have to disclose what we know. All other privacy-related rights not specifically enumerated by the Bill of Rights emanate from the Ninth Amendment, and courts and legislatures generally agree that the Fourth Amendment’s protection of our liberties through due process of the laws protects our right to privacy. In these amendments alone we can see that privacy exists implicit in the words of the Constitution. Any other applications have grown as a result of privacy’s 250 year old foundation. Today, those applications cross institutions, eliciting discussion from all branches of government and numerous social realms, and still provide different interpretations and areas of focus within those separate realms.

Of Property and Privacy: Historic Beginnings

We might not have anticipated this salience from the first known scientific discussion of the right of privacy—Samuel Warren and Louis Brandeis’ historic 1890

Harvard Law Review article asserting that privacy is the right “to be let alone.”¹

Scholars and judges reacted to this article favorably, citing it amply in articles and opinions in following years.² Despite their analysis of this claim, privacy remained ambiguous. Congress and the courts were unsure how to regulate or protect privacy, and there is little indication that they wanted to protect it at all in the first half of the 20th century. Perhaps this is because legislatures and courts did not view “privacy” issues as we view them today. Instead, they were largely property based, as evidenced most famously in *Lochner v. New York* (1905).³ Today, though scholars credit *Lochner* as a case in which the Court refused to interfere with the privacy of an employer/employee relationship,⁴ the actual opinion was more comprehensive. The Court declared that an employer and an employee have a constitutionally protected right to make a contract, even if the state deems it unfair. While the state can have an interest in regulating the work conditions of its citizens, the employer’s right to purchase labor can be classified as a fundamental right to property. From *Lochner* on, the government conflated “property” and “privacy,” creating a broad concept of private property which it could easily regulate.

The Court and the legislature collaborated on property matters for two reasons. First, the courts and legislatures shared a common goal of American economic advancement, with the common assumption about the economic order that the economy began with private property. But this is not the end of the story. But also, as one scholar

¹ Warren, S. D., & Brandeis, L. D. (1890). The Right to Privacy. *Harvard law review*, 4(5), 193-220.

² See e.g., A new phase of the right to privacy.(1896). *Harvard law review*, 10(3), 179-180; *Marks v. Jaffa* 26 N.Y. Sup. 908 (1894), Right to privacy again (1894). *Harvard law review*, 7(7), 425-426; and Larremore, W. (1912). The law of privacy. *Columbia law review*, 12(8), 693-708.

³ *Lochner v. New York*, 198 U.S. 45 (1905).

⁴ See e.g., Gavison, R. (1980). Privacy and the limits of law. *The Yale law journal*, 89(3), 421-471; Gillman, H. (1993). *The Constitution besieged*. Durham: Duke University Press; and Cloud, M. (1996). The Fourth Amendment during the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory. *Stanford law review*, 48(3), 555-631.

notes, property should be understood as a “bundle of sticks.”⁵ Like privacy, it is a collection of diverse interests, the most important of which is the right to exclude other people from one’s personal property.⁶ When a person is on his private property, he has a certain privacy interest which he is entitled to enforce through the legal system. Therefore, we can see a clear interplay between the legislature, which creates the property statutes and the courts, which judge them.

Even early cases we commonly reference as privacy cases, like *Olmstead v. US* (1928),⁷ in which the Court held that evidence obtained by a wiretap on a public phone was admissible as evidence in trial, are most strongly overlaid with the period’s conception of property as the central force in rights. For decades, the Court had approached it as a property issue, reasserting the 1886 decision of *Boyd v. United States*, in which the Court acknowledged that the Fourth and Fifth Amendments protect an individual’s property from governmental intrusion, acknowledging the importance of privacy.⁸

Olmstead, Justice Brandeis attempted to distinguish privacy from property, stating that the Founders “conferred as against the government the right to be let alone, the most comprehensive of rights and the right most valued by civilized man.” The other justices ignored this dissent, ruling that the Bill of Rights, and the Fourth amendment in particular, did not prevent the use of wiretaps on public phones because the public phone was not *Olmstead*’s private property.

⁵ Finn, J. E. (2006). Privacy—the early cases. *Civil liberties and the Bill of Rights* lecture series. Chantilly, Virginia: The Teaching Company.

⁶ *Ibid.*

⁷ *Olmstead v. United States*, 277 U.S. 438 (1928).

⁸ *Boyd v. United States*, 116 U.S. 616 (1886).

Both property and privacy refer to larger notions about what it means to be an individual, to follow the American dream, and to flourish as a human being not on one's own terms, but in a larger community of other individuals with other individual rights. Governmental agencies saw property as the boundary between the individual and society. However, legal trends between the 1920s and the 1960s veered away from this notion,⁹ under the influence of technology that enabled privacy intrusion outside the context of property and the changing dynamic of how and whom the government chose to investigate.¹⁰ By 1965, property no longer operated as the boundary between the individual and society. It would be replaced, in part, by privacy.

Unlike property, which is clearly tethered in multiple sections of the Constitution, privacy is an entirely different matter. "Those rights that we call 'privacy rights' are entirely a function of judicial imagination."¹¹ To call them a judicial creation is to assume that these rights do not exist in the Constitution. To say that the Court inferred them is to assume that they are explicitly implicated in the Constitution. A middle position is to see the legal foundation of privacy in shades of gray. Calling them a product of judicial imagination implies that the Court was willing to be both flexible and creative with its interpretation of the Constitution's words. It was not until *Griswold v. Connecticut* in 1965 that the Court claimed a Constitutional basis for the fundamental right of privacy, though it was divided in its decision. Still, privacy existed as an autonomous right, rather than as one subsumed by a more legally solidified right, like

⁹ Finn, J. E. (2006). Privacy—the early cases. *Civil liberties and the Bill of Rights* lecture series. Chantilly, Virginia: The Teaching Company.

¹⁰ United States. Congress. House. Committee on Government Operations. Special Subcommittee on Invasion of Privacy. (1967). *The computer and invasion of privacy*. New York: Arno Press.

¹¹ Finn, J. E. (2006). Privacy—the early cases. *Civil liberties and the Bill of Rights* lecture series. Chantilly, Virginia: The Teaching Company.

property or contracts. Because privacy drifted around constitutional doctrine and lacked a substantive basis, it was still a function of the judicial imagination. In many ways, it still is today.

Scholars do agree that since privacy took on a legal form in *Griswold*, the American public has appropriated the term into regular conversation but cannot necessarily define it. It is used in common language such that the American public has disconnected it from its philosophical foundations. It garners the most public attention when meddled with by the state, even with the increase in technology and information accessibility.¹² Even among experts it is debated. Harvard Law Professor Ruth Gavison contends that when Americans use the word “privacy,” they usually mean, “being completely inaccessible to others [the state included].”¹³ This definition includes what scholars like Gavison and Gerald Dworkin agree are central themes of privacy: secrecy, anonymity, solitude and autonomy.¹⁴ Privacy expert Alan Westin also includes intimacy.¹⁵ Westin suggests that when Americans say they want “complete privacy,” they actually want “complete inaccessibility to others.” Such privacy would entail complete withdrawal from society, often resulting in loneliness and lack of safety and discipline. Therefore, “[t]he individual’s desire for privacy is never absolute, since participation in society is an equally powerful desire.”¹⁶ Also, the individual does not actually want total noninterference by the state. Rather, he wants state interference in the form of legal protection against other individuals, and noninterference with personal

¹² McClellan, G. S. (1976). *The Right to privacy*. New York: H. W. Wilson Co.

¹³ Gavison, R. (1980). Privacy and the Limits of Law. *The Yale law journal*, 89(3), 422.

¹⁴ See e.g., Gavison, R. (1980). Privacy and the Limits of Law. *The Yale law journal*, 89(3), 421-30; and Dworkin, G. (1976). Autonomy and behavior control. *The Hastings Center Report*. 6(1), 23-28.

¹⁵ Westin, A. (1967). *Privacy and Freedom*. New York: Atheneum.

¹⁶ *Ibid.*

decisions.¹⁷ It then becomes the job of the legislature to provide an appropriate amount of protection without infringing on personal decisions.

This potency has only increased since the *Roe* era. Studies collected by The Roper Center¹⁸ and Harris Polling¹⁹ between 1974 and 2006 demonstrate that Americans' concerns with threats to their personal privacy, both sexual and informational, continually increased, while the numbers of Americans who are not concerned at all about privacy rapidly dropped. Congressional hearings, too, indicate that privacy is at the top of citizens' list of political concerns.²⁰ Furthermore, "[i]n the years since 9/11, Americans have become less willing to sacrifice their civil liberties—even to combat terrorism."²¹ Immediately following the terrorist attacks, nearly half of Americans were willing to sacrifice their privacy rights in order to combat terrorism, but within nine months, two-thirds of Americans objected to privacy violations to combat terrorism.²² That is, Americans' views on privacy rights have returned to their pre-September 11 state. This indicates unwavering public support for the right of personal privacy that, in the decades surrounding its inception, had questionable origins in the Constitution.

Among studies about the relationship between the Supreme Court and the public, some scholars espouse a bottom-up approach as the most apt for discussing legal change.

¹⁷ Young, John B., ed. *Privacy*. New York: John Wiley & Sons, 1978.

¹⁸ *Survey by Roper Organization*. Retrieved November 19, 2006 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. <<http://www.ropercenter.uconn.edu/ipoll.html>>.

¹⁹ *Survey by Harris Polling*. Retrieved November 19, 2006 from the Harris Interactive Databank, Harris Polling, Rochester: New York. <http://www.harrisinteractive.com/harris_poll/index.asp?PID=671>.

²⁰ United States. House. Committee on Government Reform. Subcommittee on Government Management, Information, and Technology. (2001). *A complete examination of privacy protection*. Washington: G.P.O.

²¹ *Survey by The Gallup Organization*, Retrieved November 19, 2006 from the Gallup Poll Online Database. The Gallup Poll, Gallup University. <<http://www.galluppoll.com>>

²² *Ibid.*

In this model, scholars examine the broader, more public instigators in change and trace their effects through interest groups to Congress and courts. For example, Epstein and Kobylka state the three main proponents in legal change: “the Court, the political environment, and organized pressure groups lobbying the Court,”²³ where political environment includes elected representatives and public opinion. They, along with scholars like Charles Epp, argue that legal change initiates in activist groups and from lawyers. It then works its way up to the legislature and eventually the Court.²⁴ Other scholars agree, stating that Court sponsored change comes from the people: “By all arguable evidence the modern Supreme Court appears to reflect public opinion as accurately as other policy makers.”²⁵ In their discussion of privacy, these scholars maintain that the revolution initiated in the grassroots.

I do not believe this to be the case. On the contrary, I advocate a top-down approach to privacy’s rapidly changed legal and political status. This approach, opposite to the bottom-up approach, credits the upper echelons and elites with becoming aware of privacy invasions, generating more widespread interest in it, and sending it to the media, which then filtered it down to the general public. In typical cases of legal or social change, for example the Civil Rights movement, the people were the ones experiencing the discrimination and advocating for change. The same is true for the women’s rights movement. The privacy movement is unique in this sense because the general public was unaware that their rights were being abused. As a result, the “bottom” was unable to instigate the movement because it did not know there was a problem. Until Congress and

²³ Epstein, L., & Kobylka, J. F. (1992). *The Supreme Court and legal change : abortion and the death penalty*. Chapel Hill: University of North Carolina Press, 9.

²⁴ Epp, C. R. (1998). *The rights revolution : lawyers, activists, and supreme courts in comparative perspective*. Chicago: University of Chicago Press.

²⁵ Marshall, T. R. (1989). *Public opinion and the Supreme Court*. Boston: Unwin Hyman.

the media caught wind of the privacy intrusions and disseminated information to other areas of society, those intrusions remained private. This top-down approach is therefore unique to situations in which the public is unaware of or unable to act on the problem at hand.

As this research demonstrates, privacy-talk originated and remained in an elite discourse for nearly a decade before the public took any action toward it. It took continual pressure from the government and the Court and two monumental events to elicit a chartable public response to privacy. In fact, with the exception of the American Civil Liberties Union, there was little continuity amongst the lobby groups espousing privacy rights, both informational and reproductive. This was true even after *Roe*, at which point many pro-privacy interest groups turned their focus to abortion.²⁶

Numerous scholars have studied privacy using a compartmentalized approach, or examine a particular aspect of privacy in the government, Court, or society. For example, the work of Alan Westin, a prolific privacy scholar, details the threats to public privacy through changing technology in the government.²⁷ David M. O'Brien and Priscilla Regan trace different elements of privacy's development in the legislature.²⁸ Myriad scholars discuss the philosophical state of privacy today, as it is understood or misconstrued by lawmakers and the citizens.²⁹ Still, current scholarship leaves unanswered several important questions about the reasons for privacy's salience today.

²⁶ Epstein, L., & Kobylka, J. F. (1992). *The Supreme Court and legal change : abortion and the death penalty*. Chapel Hill: University of North Carolina Press.

²⁷ Westin, A. (1967). *Privacy and Freedom*. New York: Atheneum.

²⁸ See e.g., Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press.; and O'Brien, D. M. (1979). *Privacy, law, and public policy*. New York: Praeger Special Studies.

²⁹ See e.g., Posner, R. (1979). The uncertain protection of privacy by the Supreme Court. *The Supreme Court Review*; Gavison, R. (1980). Privacy and the Limits of Law. *The Yale law journal*, 89(3), 421-30; and Dworkin, G. (1976). Autonomy and behavior control. *The Hastings Center Report*. 6(1), 23-28.

While the ample privacy-related scholarship examines the disparate developments of privacy in America, it neglects to study privacy as a multidimensional issue with divergent and mutually reinforcing histories. The privacy that Americans envision today did not originate from one place. Rather, it developed as a result of two key seemingly unrelated influences. That said, we can now look at privacy's independent and divergent journey to fundamentality in the Court and the legislature to determine the reasons for its vitality today.

Chapter 2: “The Least Dangerous Branch”³⁰

To begin the discussion of the evolution and fortification of the “right to privacy” in the American consciousness, we must first assess the different directions from which it emerged. The legal discussion that was limited strictly to privacy began in 1965 when the Supreme Court declared privacy to be a fundamental right.³¹ Once the Court initiated the legal discourse about privacy, it would spend the next decade grappling with the concept in relation to the Constitution, and more specifically, the Bill of Rights. Meanwhile, privacy would gain a foothold in the other areas of society, but for entirely different reasons. Because privacy emerged from many different corners of America simultaneously, it was particularly fit to become a topic of great social, legal, and political concern.

Griswold v. Connecticut

In 1961, the United States Supreme Court faced a potentially divisive decision. The nine justices needed to issue a decision on *Poe v. Ullman*,³² a case questioning the constitutionality of an 1879 Connecticut statute prohibiting married couples the use of contraceptives and prohibiting doctors from advising about contraceptives. When the plaintiffs were refused consultation about contraceptives because of the statute, they

³⁰ Hamilton, A. (1788). The Federalist No. 78. *Independent Journal*.

³¹ The Court did, indeed, address the idea of privacy before *Griswold*. Warren and Brandeis’ *Harvard Law Review* article originally discussed privacy as what scholars call “true” privacy. That is the privacy I address in this study. However, the courts saw many cases relating to privacy as a tort, which delineated into four categories. “True” privacy is only one of them. Other privacy torts fall under the classification of “false light” privacy torts, intrusion torts, or appropriation torts. Under false light privacy, for example, a person’s complaint is not about his personal information being investigated, but if the information discovered portrays him incorrectly, or in a false light. The Court dealt with such privacy torts thoroughly between 1890 and 1965, but did not grapple with the idea that privacy could be a fundamental right. Rather, they handled privacy like a “haystack in a hurricane.” There was no attempt to declare it a constitutionally protected right or define it. Courts only attempted to apply it on a case-by-case basis. Because these dealings did little to crystallize privacy in the American mentality, I do not address them here. See Prosser, W. L. (1960). Privacy. *California law review*. 48(3): 383-423.

³² *Poe v. Ullman*, 367 U.S. 497 (1961).

challenged it. Given that the law had never been enforced, however, the Supreme Court dismissed the controversial *Poe v. Ullman* on the grounds that it was unripe. The Court was able to dodge the issue in 1961, but understood the necessity of tackling it in a more legally appropriate case. As soon as the Court issued its decision, Connecticut's Planned Parenthood branch began devising a case on which the Court would have to issue an opinion.³³

The test case involved Estelle Griswold and Dr. Lee Bruxton, two of the architects of *Poe*, opening a Planned Parenthood clinic and publicly giving instruction, information and advice about contraception to married individuals. They were promptly arrested and taken to court for violating the Connecticut statute. The Court of Appeals to the Sixth Circuit affirmed the lower court's guilty-finding in *Griswold v. Connecticut* and the Connecticut Supreme Court also affirmed.³⁴ Griswold and Planned Parenthood applied to take their case to the United States Supreme Court.

In 1965, the Supreme Court claimed six justices who were recognized as some of the most liberal in history: Earl Warren, Hugo Black, William Brennan, William Douglas, Abe Fortas and Arthur Goldberg. The more conservative justices: John Marshall Harlan, Potter Stewart and Byron White regularly favored constriction of civil liberties,³⁵ yet even so, are not regarded as so conservative as those in the 1930s or 1980s. The justices undoubtedly had their ideological agendas for the formation of the Court's docket. Chief Justice Warren, who was known as particularly amiable and unifying,³⁶

³³ Bartee, A. F. (2006). *Privacy rights : cases lost and causes won before the Supreme Court*. Lanham, Md: Rowman & Littlefield Publishers.

³⁴ Epstein, L., & Kobylka, J. F. (1992). *The Supreme Court and legal change : abortion and the death penalty*. Chapel Hill: University of North Carolina Press.

³⁵ *Ibid*, 14.

³⁶ Dixon, R. G. (1965). *The right of privacy : a symposium on the implications of Griswold v. Connecticut*, 381 U.S. 497 (1965). New York: Da Capo Press, 1971, 60.

effectively marshaled these agendas into the Court's docket. Leadership was necessary, and chief justices historically have had such power to shape the Court's direction.³⁷ Their decisions and influences on other justices are intensified by large numbers of amicus briefs, government involvement, typically found in successful Supreme Court appeals.³⁸ *Griswold* lacked in any of these areas. Aside from the conflicting opinions in lower courts and its unresolved history, many courts would have seen no particular urgency to this case. Chief Justice Warren, however, recognized it as a vital issue in civil liberties adjudication. The other eight justices agreed. With very little discussion, all nine justices voted to grant *Griswold* certiorari.³⁹ The Court saw it as *Poe*, round two, and an opportunity to issue a contraception holding once and for all. As one of Warren's clerks said, "It is clear that the issues are significant."⁴⁰

The Planned Parenthood Federation hired Yale Law School Professor Fowler V. Harper, the veteran of *Poe v. Ullman*, to argue *Griswold*. Harper initially wanted to frame his argument around First Amendment freedoms of speech, including the right to give advice, as he had with *Poe*.⁴¹ However, "[a]fter spotting a 1962 law review article written by Norman Redlich, he (and others working on the case) rethought this plan."⁴² Redlich's article suggests a fundamental right of privacy inherent in the Ninth

³⁷ Bartee, A. F. (2006). *Privacy rights : cases lost and causes won before the Supreme Court*. Lanham, Md: Rowman & Littlefield Publishers.

³⁸ Bartee, A. F. (2006). *Privacy rights : cases lost and causes won before the Supreme Court*. Lanham, Md: Rowman & Littlefield Publishers, 46.

³⁹ Dixon, R. G. (1965). *The right of privacy : a symposium on the implications of Griswold v. Connecticut, 381 U.S. 497 (1965)*. New York: Da Capo Press, 1971, 800.

⁴⁰ Garrow, D. J. (1994). *Liberty and sexuality : the right to privacy and the making of Roe v. Wade*. New York; New York: Macmillan Pub. Co., 229.

⁴¹ Harper briefly stated that the Connecticut statute violated the "privacy of the citizen...[and] the privacy of the home," in his *Poe v. Ullman* brief to the Court, but was deterred from this as a legal argument, as his fellow attorneys claimed it would not be deciding. The dissents written by William O. Douglas and John Marshall Harlan picked up on Harper's privacy argument and would become a strong foundation for the Court's ruling in *Griswold*. See, Weisberg (article on Roraback).

⁴² Epstein, L., & Kobylka, J. F. (1992). *The Supreme Court and legal change : abortion and the death penalty*. Chapel Hill: University of North Carolina Press, 158.

Amendment: “The Court could hold that the Ninth and Tenth Amendments reserve to a married couple the right to maintain the intimacy of the marital relationship without government interference,” and that such marital intimacy qualifies as a private right based on the intimations of privacy in the dissents for *Poe v. Ullman*.⁴³

However, Harper did not discard the First Amendment claim entirely. Instead, he reshaped his argument to incorporate three different legal arguments. In addition to building his argument around the idea that Planned Parenthood’s free speech rights had been infringed, he incorporated into his argument the Due Process Clause of the Fourteenth Amendment, asserting that those seeking advice on contraceptives had their rights to liberty and property violated without due process of the law. Based upon Redlich’s article, though, Harper most importantly argued for a right to marital privacy not enumerated but allowed by the Ninth Amendment. In the end, this was to be the crux of his argument. Before he was able to argue the case, however, Harper died. Yale Law School professor Thomas Emerson took over Harper’s role in the case and, while acknowledging the privacy argument, filed an amicus brief centered on the Due Process Clause argument, maintaining that the Connecticut statute constituted an unwarranted invasion of privacy and therefore violated due process.⁴⁴

Meanwhile, the Supreme Court was preparing itself with the benefit of six amicus curiae briefs.⁴⁵ The difficulty in formulating a response to the question was identifying a

⁴³ Redlich, N. (1962). Are there ‘certain rights retained by the people.’ *New York University Law Review*. 37(788), 809.

⁴⁴ Epstein, L., & Kobylka, J. F. (1992). *The Supreme Court and legal change : abortion and the death penalty*. Chapel Hill: University of North Carolina Press, 158.

⁴⁵ 3 of the 6 briefs of amici curiae urged reversal. They were filed by Whitney North Seymour and Eleanor M. Fox for Dr. John M. Adams et al.; by Morris L. Ernst, Harriet F. Pilpel and Nancy F. Wechsler for the Planned Parenthood Federation of America, Inc.; by Alfred L. Scanlon for the Catholic Council on Civil Liberties, and by Rhoda H. Karpatkin, Melvin L. Wulf and Jerome E. Caplan for the American Civil

constitutional source for its holding. “While all of the [nine] brethren believed the Connecticut law was absolutely asinine, the tough question was whether it was unconstitutional,”⁴⁶ one political scientist has written. Unsurprisingly, then, the Justices’ 7-2 holding in favor of *Griswold*, declaring the Connecticut statute unconstitutional, merely reflects one point of agreement among the Justices’ differing lines of constitutional argument. In the opinion of the Court, Justice Douglas envisions a penumbra formed by the rights guaranteed in the Bill of Rights, with the first eight amendments providing “emanations” or zones of privacy that could support the holding. Yet, he maintains that that marital privacy is particularly protected by the First Amendment right to association stating, “We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage...is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.”⁴⁷

Justices Goldberg, Warren and Brennan grounded their support in the Ninth Amendment. In the notes from the Court in conference, Warren initially states, “I can’t balance, use equal protection, or use a ‘shocking’ due process standard. I can’t accept a privacy argument,”⁴⁸ but he eventually joins with Goldberg and Brennan supporting a doctrine that would enable privacy as a right in the future. They state that the effect of this decision will leave available a legal path to classify difficult cases using a broad

Liberties Union et al. See Garrow, D. J. (1994). *Liberty and sexuality : the right to privacy and the making of Roe v. Wade*. New York; New York: Macmillan Pub. Co.

⁴⁶ Ball, H. (2002). *The Supreme Court in the intimate lives of Americans : birth, sex, marriage, childrearing, and death*. New York: New York University Press, 46.

⁴⁷ Kauper, P. G. (1965). Penumbra, peripheries, emanations, things fundamental and things forgotten: the *Griswold* case. *Michigan law review*, 64(2), 244.

⁴⁸ Dickson, D. (2001). *The Supreme Court in conference, 1940-1985 : the private discussions behind nearly 300 Supreme Court decisions*. Oxford England ; New York: Oxford University Press, 800.

range of privacy liberties. It could increase areas of judicial support by applying privacy to less cut-and-dry situations or in other hard to classify cases, which, despite their vagueness, should be retained by the people in a democracy committed to preserving individual liberties.⁴⁹

Justices Harlan and White base their opinions in the substantive protections of the Fourteenth Amendment's Due Process Clause. Harlan found that restricting the use of contraceptives violates a value "implicit in the concept of ordered liberty."⁵⁰ That is, he states that the ability to regulate one's own sexual and family life is a liberty, but leaves privacy out of the debate. Justice White, in concurrence, states that the issue of overbroad legislation cannot be avoided by using a privacy argument, asserting that the Connecticut statute was overbroad to regulate "illicit sexual relationships"⁵¹ and refusing to apply privacy.

The two dissenters, Justices Black and Stewart, dissented on the grounds that privacy is nowhere to be found in the Constitution, despite their claims that they were not "anti-privatists."⁵² Justice Black was the only justice to stress the fact that "'privacy' is a broad, abstract and ambiguous concept,"⁵³ too broad to read into the words of the Constitution. "Privacy is broader than any one amendment because several of the specific guarantees are designed in part to protect something that might be called privacy, but

⁴⁹ Dixon, R. G. (1965). *The right of privacy : a symposium on the implications of Griswold v. Connecticut*, 381 U.S. 497 (1965). New York: Da Capo Press, 1971, 11.

⁵⁰ *Griswold v. Connecticut* 381 U.S. 479 (1965).

⁵¹ *Griswold v. Connecticut* 381 U.S. 479 (1965).

⁵² Dixon, R. G. (1965). *The right of privacy : a symposium on the implications of Griswold v. Connecticut*, 381 U.S. 497 (1965). New York: Da Capo Press, 1971, 11.

⁵³ *Ibid*, 13.

each guarantee is also broader than privacy,”⁵⁴ and should therefore be more narrowly tailored.

Modern-day scholars agree on the gravity of *Griswold*'s legal impact.⁵⁵ At the time, however, it was not a watershed case. Practically, *Griswold* did nothing more than declare unconstitutional Connecticut's out-moded anti-birth control statute. However, the constitutional principle grew between 1965 and 1973, when the Court issued its *Roe v. Wade* opinion. By that time, privacy had become a fundamental part of Constitutional doctrine. From there, it became the landmark case of *Griswold v. Connecticut*. Period scholars disagreed on its immediate implications and emanations, an understandable debate due to the Court's unclear position.⁵⁶ Some argued that it did not expand Constitutional rights or fundamental rights theory, but merely continued its logical extension of them; others, that “the role of the Court as guardian of individual rights [was] both solidified and advanced.”⁵⁷

Lacking a unified vision from the Court, legal scholars immediately post-*Griswold* asserted that the scope of the right to privacy was relatively narrow. Some surmised that a statute regulating the sale and manufacture of contraceptives would still be permissible under the newly articulated privacy.⁵⁸ “It [was] conceivable that in future cases the Court [would] limit the doctrine to the marriage relationship, or even refuse to

⁵⁴ *Ibid*, 13.

⁵⁵ See e.g., *Ibid*; Kauper, P. G. (1965). Penumbrae, peripheries, emanations, things fundamental and things forgotten: the *Griswold* case. *Michigan law review*, 64(2), 235-258; McKay, R. B. (1965). The right of privacy: emanations and intimations. *Michigan law review*, 64(2), 259-282; and Sutherland, A. E. (1965). Privacy in Connecticut. *Michigan law review*, 64(2), 283-288.

⁵⁶ Dixon, R. G. (1965). *The right of privacy : a symposium on the implications of Griswold v. Connecticut*, 381 U.S. 497 (1965). New York: Da Capo Press, 1971.

⁵⁷ Emerson, T. I. (1965). Nine Justices in search of a doctrine. *Michigan law review*, 64(2), 219-234.

⁵⁸ See e.g., *Ibid*; Kauper, P. G. (1965). Penumbrae, peripheries, emanations, things fundamental and things forgotten: the *Griswold* case. *Michigan law review*, 64(2), 235-258; McKay, R. B. (1965). The right of privacy: emanations and intimations. *Michigan law review*, 64(2), 259-282; and Sutherland, A. E. (1965). Privacy in Connecticut. *Michigan law review*, 64(2), 283-288.

extend it beyond the precise facts of the Connecticut case”⁵⁹ University of Michigan Law School professor Paul G. Kauper noted that *Griswold* produced no major change in Constitutional theory and, consistent with Bill of Rights development at the time, merely takes the already in-place expansion of fundamental rights one small step further. It was nothing revolutionary, but rather a reassertion of Court’s ability to protect fundamental rights.⁶⁰ Other scholars, on the other hand, noted the potential for an expansive right of privacy, anticipating potential application of the privacy to sexual conduct outside of marriage, family planning, abortion, electronic eavesdropping, government subpoenas, search warrants and lie-detectors.⁶¹

The analytical confusion scholars faced was a direct result of confusion within the Court. Even the justices were unsure about privacy’s future applications. Justice White argued that privacy was so vague and standardless as a right that it could be expanded or restricted at will. He warned that Douglas’ opinion would inevitably endanger rather than strengthen the individual liberties explicitly enumerated in the Bill of Rights.⁶²

Also, Kauper notes that while the holding itself did little more than declare the Connecticut statute unconstitutional, its implications were great:

The larger significance of the case, however, is the contribution, if any, that it makes to general constitutional theory respecting fundamental rights, the relationship of these rights to the specifics of the Bill of Rights, and the standard to be employed by the Court in passing on the constitutionality of legislation allegedly impinging on fundamental rights.⁶³

⁵⁹ Emerson, T. I. (1965). Nine Justices in search of a doctrine. *Michigan law review*, 64(2), 231.

⁶⁰ Kauper, P. G. (1965). Penumbrae, peripheries, emanations, things fundamental and things forgotten: the *Griswold* case. *Michigan law review*, 64(2), 237

⁶¹ Emerson, T. I. (1965). Nine Justices in search of a doctrine. *Michigan law review*, 64(2), 219-234.

⁶² Dickson, D. (2001). *The Supreme Court in conference, 1940-1985 : the private discussions behind nearly 300 Supreme Court decisions*. Oxford England ; New York: Oxford University Press.

⁶³ Kauper, P. G. (1965). Penumbrae, peripheries, emanations, things fundamental and things forgotten: the *Griswold* case. *Michigan law review*, 64(2), 237.

Despite legal commentators' disagreements about the implications of the holding, scholars agree that what resulted from *Griswold* was a legally, precedentially and theoretically ambiguous concept of privacy which had questionable grounding in the Constitution. In 1965, legal theorist Robert D. McKay summarized the confusion well:

Except for the fourth amendment holdings, the talk about privacy rights was not supported with judgments in vindication of privacy rights until *Griswold*.... The right of privacy is not to be limited narrowly to the facts of *Griswold*, but is meant to foretell broad protection for the dignity of man and the inviolability of his rights of personality.... Far more important than the result on the narrowly special facts of *Griswold* is the question whether the principle there announced can have these important collateral consequences. It is certainly more than a bare possibility.⁶⁴

The Court struggled largely with privacy's implications over the next eight years. By *Roe v. Wade*, it had churned meaning out of privacy in a number of areas. The Court cited *Griswold's* privacy principle in eighteen opinions in the period between *Griswold* and *Roe*. However, the majority did not consistently rely upon *Griswold* every time it might have been used.⁶⁵ Particularly in light of its changing personnel, the Court was bitterly divided on the existence or derivation of a constitutional right to privacy. What follows is a summary of the court cases which refer to the newly articulated right of privacy between *Griswold* and *Roe*.

Between the Landmarks

Immediately following *Griswold*, the Court attempted to define privacy more specifically through case law. In doing so, the Court generally contained its discussion of privacy to cases involving criminals and deviants: drunk drivers, corrupt officials, robbers, gamblers, gangsters, murderers, and sexual deviants. This would become vital

⁶⁴ McKay, R. B. (1965). The right of privacy: emanations and intimations. *Michigan law review*, 64(2), 277.

⁶⁵ *Roe et al. v. Wade*, 410 U.S. 113 (1973).

in mobilizing public opinion during *Roe v. Wade*, as it was the first landmark case to link privacy rights and everyday wives and daughters.

The Court saw its first opportunity to define privacy rights less than one year after *Griswold*. In *Schmerber v. California* (1966), the defendant was hospitalized after a drunk driving accident. Medical personnel suspected that he was intoxicated, and a doctor took a urine sample and blood test without the patient's consent, which police submitted as evidence. Schmerber sued to suppress the evidence as a warrantless search, also claiming that his constitutional right to privacy had been violated. In a 5-4 decision, the Court held that Schmerber's constitutional rights were not violated and that the right to privacy did not apply to this situation. Justice Douglas dissented on the grounds that the conviction violated the due process clause of the Fourteenth Amendment as established in *Griswold*, and that the compulsory blood test clearly invaded the right of privacy protected by the Fourth and Fifth Amendments.⁶⁶

Later that year, the Court heard a case regarding secret taping of private conversations. In *Osborn v. United States*, a police officer submitted a tape recording of an attorney bribing a jury, taken while the office was undercover, without authorization from the District Court. The attorney claimed his right to privacy had been violated. The Court held in a 7-1 decision that no rights at all had been violated. The majority based its opinion on the Fourth Amendment's explicit permissions, neglecting to acknowledge any privacy emanations. Again citing *Griswold*, however, Justice Douglas again dissented on the grounds that Osborn's right to privacy as granted by the penumbra of the Bill of Rights was violated. He expressed concern for the implications of the liberties the state took with Osborn: "We are rapidly entering the age of no privacy, where everyone is

⁶⁶ *Schmerber v. California*, 384 U.S. 757 (1966).

open to surveillance at all times; where there are no secrets from government. The aggressive breaches of privacy by the Government increase by geometric proportions. Wiretapping and ‘bugging’ run rampant, without effective judicial or legislative control.”⁶⁷

At this point, the Court had explicitly denied privacy rights in the Fourth Amendment field—searches, seizures and wiretapping. However, Justice Douglas was quickly establishing a theme of unflinching support for the right to privacy, fearful about government infringements on individual rights. When forced to evaluate one fundamental right over another, though, even Justice Douglas placed free speech protection above privacy protection. In its next privacy case, the Court would deny privacy rights in the field of libel.

The following year, the Court heard *Time, Inc. v. Hill*.⁶⁸ In this libel case, the plaintiff, a playwright and public figure, brought suit against *Life* magazine, claiming that the magazine had violated his right to privacy under New York law when it published a slanderous article about a personal family event. A 6-3 Court held that because he was a public figure, the plaintiff relinquished some of his privacy rights and eventually remanded the decision to the lower court. The majority and dissenting opinions agreed that the New York statute would not, in most cases, allow for infraction of freedom of speech, even at the expense of privacy rights. This holding was consistent with the precedent set forth in *New York Times v. Sullivan*⁶⁹ (1964), when the Court ruled that freedoms of speech and press allow publication of criticism of official conduct.

⁶⁷ *Osborn v. United States*, 385 U.S. 323 (1966).

⁶⁸ *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

⁶⁹ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

Criminal rights remained the most common place to see assertions of privacy. In *Warden, Maryland Penitentiary v. Hayden* (1967), the Court again ruled against a plaintiff's right to privacy. In this suit, police chased a man suspected of armed robbery into his home and seized articles of his clothing while they were there to use as evidence against him. The Court held 8-1 that the evidence obtained in this manner without a warrant did not violate Bill of Rights or the suspect's privacy. Again, as the sole dissenter, Justice Douglas argued on the grounds that the suspect's privacy had been violated:

This right of privacy, sustained in *Griswold*, is akin to the right of privacy created by the Fourth Amendment. That there is a zone that no police can enter -- whether in 'hot pursuit' or armed with a meticulously proper warrant.... I would adhere to them and leave with the individual the choice of opening his private effects (apart from contraband and the like) to the police or keeping their contents a secret and their integrity inviolate. The existence of that choice is the very essence of the right of privacy.⁷⁰

Also in 1967, the Court heard *Katz v. United States*, the first case after *Griswold* in which the Court voted to grant personal privacy rights. In this case, the defendant was convicted of transmitting wagering information via public telephone by evidence obtained with a wiretap on the public phone booth. The tap was placed without a warrant. Contrary to its previous trend, the Court held that such wiretapping was unconstitutional because one carries a right to privacy on his person rather than on his location. This acknowledgement of a right to privacy stemmed only from the Fourth Amendment's emanations and neglected the Fourteenth Amendment. As the lone dissenter, Justice Black vehemently deplores the Court:

Thus, by arbitrarily substituting the Court's language, designed to protect privacy, for the Constitution's language, designed to protect against unreasonable searches

⁷⁰ *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967).

and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy.⁷¹

That the anti-privacy dissent cites a standard Court acknowledgement of privacy at least in the Fourth Amendment indicates a general consensus on the existence of privacy rights within the Constitution. This indicates that the Court does acknowledge and seek to protect a right of privacy. It had the opportunity to prove this support in a landmark case two years later.

In *Stanley v. Georgia* (1969), the Court grappled with privacy and obscenity. In this case, police obtained “obscene” material from the defendant’s apartment while in search of materials implicating him in bookmaking activity and arrested him for violating a Georgia statute prohibiting the possession of obscene materials. In writing a unanimous opinion, Justice Marshall held that the statute violated First and Fourteenth Amendment protections of obscenity. “For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.” Three justices concurred, holding that the seizure violated the Fourth and Fourteenth Amendments, but did not include a right to privacy argument. Though, they did not deny the majority’s privacy argument, indicating a latent agreement with the opinion.⁷² This decision is still viewed as a groundbreaking event for privacy rights, as it was the first after *Griswold* in which every justice acknowledged an individual’s right to privacy.

The Supreme Court saw a spike in privacy-related cases in 1971. During this year, the Court faced multiple pressures to recognize privacy, particularly from Justice Douglas. After the Court’s back-to-back pro-privacy decisions, it ruled consistently with

⁷¹ *Katz v. United States*, 386 U.S. 954 (1967).

⁷² *Stanley v. Georgia*, 394 U.S. 557 (1969).

its previous warrantless search cases, and refused to extend its newly codified concept of privacy to a scenario in which they had previously denied it. In *Wyman, Commissioner of New York Department of Social Services v. James* (1971), the defendant was denied government aid when she refused to allow a caseworker to visit her house. She claimed the visit was an unreasonable search under the Fourth Amendment. The Court ruled against her, and most importantly it articulated that the Fourth Amendment can exist as insurance against unreasonable searches and seizures but does not necessarily imply a fundamental right to privacy.⁷³

The Court followed up with another holding constraining privacy in *United States v. Vuitch* (1971). Here, the plaintiff challenged a District of Columbia statute making it illegal to receive an abortion unless continuing the pregnancy would result in harm to the mother. While the majority intimated that the lower courts did not give close enough scrutiny to the statute based on precedent set forth by *Griswold* and refused to consider abortion a privacy issue, Justice Douglas dissented, stating that “[a]bortion touches intimate affairs of the family, of marriage, of sex, which in *Griswold v. Connecticut*, we held to involve rights associated with several express constitutional rights and which are summed up in ‘the right of privacy.’”⁷⁴ He was ahead of his time in his opinion, taking stand in a position the Court would soon follow.

Again, in *Palmer v. Thompson, Mayor of the City of Jackson* (1971), in which Justice Douglas argued for privacy, the Court ignored the contentious idea. After federal litigation had declared unconstitutional a Mississippi town operating four swimming pools for whites and one for blacks, the town closed every swimming pool. Black

⁷³ *Wyman, Commissioner of New York Department of Social Services, et. al. v. James*, 400 U.S. 309 (1971).

⁷⁴ *United States v. Vuitch*, 402 U.S. 62 (1971).

plaintiffs sued for the town to reopen desegregated pools. The opinion was devoid of mention of privacy or *Griswold* save for Justice Douglas's dissent, which does not embrace a privacy argument but nonetheless states: "Thus the right of privacy, which we honored in *Griswold*, may not be overturned by a majority vote at the polls, short of a constitutional amendment."⁷⁵ By this time, Justice Douglas had begun to see privacy at every turn, whenever rights were implicated, seemingly, including in the Fourteenth Amendment.

When the Court issued its opinion for *Coolidge v. New Hampshire* (1971), it recognized (though did not employ) a right to privacy for only the third time since *Griswold*. In this case, a murder suspect's wife turned over his guns and clothing without knowing her husband was being investigated for murder. The police used the evidence to gain a warrant from a biased magistrate, and confiscated the accused's vehicle, using it as evidence gain the eventual conviction. Though the majority did not rely on privacy in its opinion, it held that because the magistrate was biased, the evidence was impermissible. In the dissent, though, Chief Justice Warren introduces privacy. "The broad, abstract, and ambiguous concept of 'privacy' is now unjustifiably urged as a comprehensive substitute for the Fourth Amendment's guarantee against 'unreasonable searches and seizures,'"⁷⁶ regarding the Court's skewed interpretation of the Fourth Amendment.

In 1972, the Court faced *Eisenstadt v. Baird*. In a key holding, the majority overturned the conviction of a Connecticut man who distributed contraceptives without a doctor's license. The majority first stated that privacy is not applied to a married couple as an independent unit, but rather to each individual within the couple. The opinion

⁷⁵ *Palmer et al. v. Thompson, Mayor of the City of Jackson, et. al*, 403 U.S. 217 (1971).

⁷⁶ *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

concluded with the memorable statement, “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child [italics in original].”⁷⁷ Privacy’s shift from applying to a married couple or a family to an individual person was an extremely important precedent. It set the stage for a discussion of privacy rights as applicable to both individual partners within a marriage. This enabled discussion of women’s and men’s independent privacy rights. In other words, while the Court maintained a relatively closed approach to privacy in the years following *Griswold*, this opinion opened the door for a much broader range of applications—like abortion.

In 1973 when the Court faced its last pre-*Roe* privacy-related case, the Court again turned its back on the emerging right. *Couch v. United States* involved a restaurateur whose accountant refused to disclose her tax records during an IRS investigation, and, after receiving a summons, transferred the documents to an attorney. The restaurateur claimed disclosing her private documents would be incriminating and was therefore free from doing so under the Fifth Amendment. The Supreme Court upheld her conviction on the grounds that once she gave up her taxes to an accountant, she forfeited her rights to privacy and against self-incrimination; the transfer from accountant to attorney was void as it had transpired after the state issued its summons. The two dissenters, including Justice Douglas maintained that one’s privacy extends to himself, his property and his documents; it protects people rather than places based on the

⁷⁷ Eisenstadt v. Baird, 405 U.S. 438 (1972).

Fourth Amendment.⁷⁸ Following is an analysis of the cases and their impact on privacy principles.

Privacy Defined

The Warren Court Fumbles the Concept

Immediately following the legally muddled and doctrinally confused *Griswold*, and with the *Griswold* membership of the Court still intact, the Court had the opportunity to more clearly articulate its position on privacy. In the year following the *Griswold* opinion, the Court issued two decisions denying the potentially vast extensions of privacy rights. Despite its liberal tendencies, it took a rather strict constructionist approach, refusing to acknowledge penumbras and emanations, and instead granted only those rights expressly enumerated in the Bill of Rights. Justice Douglas dissented on privacy grounds, even though the majority opinion did not engage the idea of privacy. It was not until late 1967 when a majority opinion again applied the *Griswold* privacy principle to protect an entire person and his or her conversations, rather than a place.⁷⁹ While this was not a direct claim to a right to privacy, it reinforced that the Fourth Amendment created a zone of privacy. By the time the Court issued its *Katz* opinion, it had appropriated the “right of privacy” as defined by *Griswold v. Connecticut* into the regular syntax of its opinions. It was no longer a parenthetical remark, off-handed citation or footnote reference. While Justice Douglas incorporated the right to privacy in his previous dissents, this was the first case in which the right to privacy was a central argument for both the majority and the dissent. In other words, Court members did not discuss the emanations from the Bill of Rights, but instead engaged privacy directly. The

⁷⁸ *Couch v. United States*, 409 U.S. 332 (1973).

⁷⁹ *Katz v. United States*, 386 U.S. 954 (1967).

existence of a right to privacy was no longer in question; the question remained, however, as to how to define and apply it since in these cases, the Court had neither defined privacy nor set a uniform standard by which it could be applied.

Interestingly, earlier that year in *Time, Inc. v. Hill*, the Court argued that the defendant, a public personality, had a right to privacy but that it had not been violated. Perhaps because the Court did not have to defend or define the defendant's privacy right, but merely stated that it existed but was not violated, it was easier to include in the opinion as fundamental.

The Burger Court Attempts a Retreat

When Chief Justice Warren announced his intent to retire in 1968, the Court had already seen four cases which acknowledged privacy in some way. Warren hoped to continue this trend. Suspecting that Richard Nixon would become the next President of the United States, and hoping for a liberal replacement, Chief Justice Earl Warren announced his intent to retire while Lyndon B. Johnson was still in office. It was not to be. Johnson's nomination of his friend, Abe Fortas, stalled in the election-year politics of 1968; presidential-hopeful Richard Nixon went to great lengths to ensure that Fortas was not confirmed as Chief Justice. Nixon and his political cohorts initiated a mudslinging campaign about "cronism" between Fortas and then President Lyndon Johnson. When Fortas was not approved to the position, Johnson tried several other routes, but Nixon and his followers thwarted them all. In fact, during his presidential campaign, Nixon explicitly stated that as President he would appoint strict constructionist judges and ones who would not "encroach on areas belonging to Congress and the President," and that he

wanted to restore order to the United States.⁸⁰ As a result, Johnson's presidency ended before he could successfully install a new Chief Justice.

After Nixon was elected, he continued to make his intentions for the Court explicit. In his 1968 presidential acceptance speech, he stated:

Tonight it's time for some honest talk about the problem of order in the United States. Let us always respect, as I do, our courts and those who serve on them, but let us also recognize that some of our courts in their decisions have gone too far in weakening the peace forces as against the criminal forces in this country.⁸¹

Leaving little room for misinterpretation, Nixon publicly announced his goals for the new Supreme Court. Despite this, Earl Warren still intended to retire; he issued his official letter of resignation in 1969 during Nixon's first term as president, giving Nixon his first chance to realize his vision of a stricter, more conservative court.

Nixon nominated Warren Burger, a judge from the D.C. Circuit Court of Appeals. Nixon saw Burger as the ringmaster to lead a counterrevolution against Warren's liberal policies. He was a renowned dissenter on the "famously liberal" United States Court of Appeals for the District of Columbia. Perhaps in response to the judicial and political mayhem during Johnson's lame duck period, Congress approved Burger with only three dissenting votes.

Responding to the "cronyism" scandal, Justice Fortas announced his retirement later in 1969. After two failed appointees, Nixon discovered what he thought a suitable candidate. Harry Blackmun was a longtime friend of Warren Burger and a judge on the Eighth Circuit Court of Appeals. Blackmun was moderate on civil rights, conservative

⁸⁰ Wasby, S. L. (1976). *Continuity and change : from the Warren Court to the Burger Court*. Pacific Palisades, Calif: Goodyear Pub. Co, 12.

⁸¹ Epstein, L., & Kobylyka, J. F. (1992). *The Supreme Court and legal change : abortion and the death penalty*. Chapel Hill: University of North Carolina Press, 14.

on criminal rights and civil liberties, and an advocate of judicial restraint and conservatism.⁸²

In 1971, Justices Black and Harlan also announced their retirements, and Nixon had two more opportunities to appoint his ideal justice. Of the two, Black was a stronger liberal and supporter of privacy rights, while Harlan was a voice of conservatism and opponent of privacy rights. Nixon first appointed and had confirmed William Rehnquist, a staunch conservative, segregationist, and strict constructionist. The Senate also confirmed Lewis Powell, a more moderate conservative who supported gradual change and did not support civil rights or civil liberties leaders.⁸³ During Nixon's first three years in office, then, three consistent liberals and supporters of privacy rights and one conservative had been replaced by four conservatives who were thought to be opponents of a broad conception of personal liberties.

Many scholars agree that Burger's court provided a more closed version of Warren's policies. It was stronger on law and order issues and was much less apt to grant liberties without clear constitutional, precedential, or doctrinal grounding. However, one legal analyst disagrees.

There has indeed been change [in the Court's direction]. However, the importance of maintaining earlier rulings has been under-estimated, areas of noticeable continuity have been missed, and areas where the Burger Court has advanced along the paths first marked by Earl Warren and his brethren have been set aside. Growth has been ignored, while the amount of erosion has been played up.⁸⁴

⁸² Yalof, D. A. (1999). *Pursuit of justices : presidential politics and the selection of Supreme Court nominees*. Chicago: University of Chicago Press, 112-114.

⁸³ Epstein, L., & Kobylka, J. F. (1992). *The Supreme Court and legal change : abortion and the death penalty*. Chapel Hill: University of North Carolina Press.

⁸⁴ Wasby, S. L. (1976). *Continuity and change : from the Warren Court to the Burger Court*. Pacific Palisades, Calif: Goodyear Pub. Co, 7-8.

The trend of reproductive privacy rights showed particular certainty. Privacy would not be extended into criminal areas, to be sure, but the Burger Court remained relatively consistent with the Warren Court's acceptance of sexual privacy cases (sexual and marital privacy, reproductive freedoms, and obscenity) into its docket. The Burger Court focused on pulling back on criminal rights, asserting its position as a "law and order" court,⁸⁵ but Nixon's ambitions were only partially realized. This "law and order" Court would eventually open the flood gates for public confusion and turmoil regarding its privacy rulings as evidenced by the cases citing the *Griswold* privacy precedent. As the Court refused to hand down an overarching definition of privacy, it dealt with each issue independently. It handled each issue as it came up rather than upholding a vague and unenforceable sweeping definition. It predicated its decisions on the particular circumstances or issues within a case. Still, the Court was reticent to extend the right of privacy to criminals and deviants. The majority of privacy-related cases it took into its docket dealt with criminals and deviants, but despite Justice Douglas' ability to see privacy issues in myriad other cases, the majority frequently acknowledged its existence but denied its relevance.

Nonetheless, all of the cases dealing with privacy issues between *Griswold* and *Coolidge v. New Hampshire* cite *Griswold* as the legal foundation for fundamental privacy. Despite that a right of privacy was not explicitly written into the Constitution, the *Griswold* opinion was the first to give it legal salience in the Bill of Rights. But by the time the Court issued its opinion on *Coolidge v. New Hampshire*, it had stopped citing *Griswold* and simply relied on the common understanding that privacy was a

⁸⁵ *Ibid.*

fundamental right. That common understanding would be taken to an extreme in *Roe v. Wade* and *Doe v. Bolton* (1973).

Roe v. Wade

Very soon after *Griswold* there emerged a clear debate about what a right to privacy in contraception meant for abortion services. Pre-*Roe* scholars debated whether the privacy argument initiated by *Griswold* would hold water in the abortion debate.⁸⁶ Cyril Means, a key participant in the formation of the *Roe* argument stated, “no *Griswold*-style constitutional challenge to abortion statutes had any credible chance of success.... Judges are much more likely to accept a historical argument” than any privacy-oriented reasoning that a woman’s individual choice was a fundamental liberty.⁸⁷ However, in the late 1960s when Planned Parenthood, the National Organization for Women (NOW), and the American Civil Liberties Union’s (ACLU) Association for the Study of Abortions (ASA) began formulating the ideal abortion case (as Planned Parenthood had done with *Griswold*), privacy was a key feature of their thinking, but it was still not treated as a fundamental right.

Later, in 1969 after the Hot Springs ASA conference, obstetrics and gynecology professor Edmund Overstreet stated that *Griswold* “is being quoted increasingly frequently as a manifesto which points the right of the individual woman to decide against pregnancy even though abortion is involved.”⁸⁸ That same year, Norma McCorvey, a poor, unwed pregnant woman sought an abortion in Texas. Her physician refused to help her under a Texas statute prohibiting abortions, and after visiting a Dallas

⁸⁶ Garrow, D. J. (1994). *Liberty and sexuality : the right to privacy and the making of Roe v. Wade*. New York; New York: Macmillan Pub. Co., 350-6.

⁸⁷ *Ibid*, 357.

⁸⁸ *Ibid*, 358.

abortion clinic which McCorvey felt was dangerous, she sought legal help. McCorvey became Jane Roe, and her attorneys brought the class action suit *Roe et al. v. Wade* to the Supreme Court.

Despite that the Court in *Vuitch* refused to consider any privacy arguments based on *Griswold*, *Roe* attorneys, with little insight as to how the Court would accept a similar argument brought under different circumstances, still brought the case under the Fourteenth Amendment's implicit right to privacy.⁸⁹ Medical organizations like the American College of Obstetricians and Gynecologists filed amicus briefs emphasizing the association and privacy rights a woman has with her doctor. Planned Parenthood and the American Public Health Association also filed briefs advocating a privacy-centered abortion defense.⁹⁰

Particularly interesting are the ways in which litigants brought privacy arguments before the Court and the ways in which the Court applied them. The *Roe* attorneys centered their arguments on Douglas' "penumbras" theory articulated in *Griswold*; they tried to base it in as many amendments as they could, including the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth. First, the First Amendment protects one's freedom to associate with whomever she chooses, including her physician. Next, attorneys Weddington and Coffee argued that limiting abortion rights invades the woman's and physician's rights to privacy in the medical office, as protected by the Fourth Amendment. Also citing *Griswold*, the attorneys further asserted that the Fifth Amendment's creation of zones of privacy protected women's bodies from government intrusion. Further, the attorneys strayed from the *Griswold* outline and included a

⁸⁹ Epstein, L., & Kobyłka, J. F. (1992). *The Supreme Court and legal change : abortion and the death penalty*. Chapel Hill: University of North Carolina Press., 167.

⁹⁰ Craig, B., & O'Brien, D. (1993). *Abortion and American Politics*. NJ: Chatham House.

“poignant” defense in the Eighth Amendment, arguing that denying a woman an abortion was cruel and unusual punishment. Despite their reticence about using an unfamiliar Ninth Amendment argument, Coffee and Weddington also cited Justices Douglas and Goldberg’s use of the Ninth Amendment to create a general right to privacy. Interestingly, the two attorneys acknowledged the argument that denying a woman’s right to control and privacy over her body was denying her life, liberty and property under the Due Process clause of the Fourteenth Amendment, but omitted it from their oral arguments. They chose instead to use it as a fall back contestation.⁹¹

Scholars agree that the oral arguments in *Roe* did very little to influence the justices’ decisions. Likely, they had formulated their opinions before the case was heard. The principal question was one which the justices had already considered. The justices had only to decide in which Amendment they would ground their opinions.⁹² Similar to *Griswold*, the Court based its legal reasoning in many different places. The Court held that “a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”⁹³ Because this core principle was clear, *Roe* was written and signed by all the liberal justices and three of Nixon’s prized conservative appointees. Writing the opinion of the Court, Blackmun found the right to privacy inherent in two places. First, he saw it in the Fourteenth Amendment’s concept of personal liberty derived from the Due Process Clause. Second, he found it the Fourth, Fifth and Ninth Amendments, though he never explicitly states where the concept actually exists.

Essentially, the heart and soul of Blackmun’s opinion lies in his statement that the right to

⁹¹ Faux, M. (1988). *Roe v. Wade : the untold story of the landmark Supreme Court decision that made abortion legal*. New York: Macmillan, 75-6.

⁹² Epstein, L., & Kobylka, J. F. (1992). *The Supreme Court and legal change : abortion and the death penalty*. Chapel Hill: University of North Carolina Press.

⁹³ *Roe et al. v. Wade*, 410 U.S. 113 (1973).

privacy may be found somewhere, but wherever it is, “it is broad enough to encompass a woman’s decision whether or not to terminate a pregnancy.”⁹⁴ Ultimately, he intimates that the existence of a right to privacy is not in question, eradicating *Griswold*’s skepticism about the existence of the right, at all. Only Justices White and Rehnquist dissented, on two grounds. First, White and Rehnquist argued that abortion laws should be left to the states. Second, without addressing the existence of a right to privacy, White complained that “the court had simply announced a new right without scarcely any reason or authority for its action.” He does not deny privacy, but instead criticized the means by which the majority acknowledged the right. Rehnquist also responded, “the privacy right in *Roe*, whatever its dimensions, had little or nothing in common with the Court’s earlier privacy cases.” Like White, Rehnquist does not deny the existence of a right to privacy, but rather that it was misapplied in this case.

What resulted from the holding was that the vision of privacy set forth in *Roe* was significantly expanded from the one asserted in *Griswold*.⁹⁵ One legal scholar at the time stated that *Roe* clearly was “at least far more explicit than *Griswold* in its protection of the autonomy interest in privacy.”⁹⁶ Implicit in the words of *Griswold* was the notion that legislation regulating or prohibiting the sale and manufacture of contraceptives would be permissible. In *Roe*, however, the Court elevated privacy to the level requisitioning strict scrutiny, asserting that the states must have a compelling interest in infringing upon privacy rights. That is to say, however restrained the Burger court was in other areas, it was nearly as activist as the Warren court when it came to reproductive privacy. The Burger Court produced, in *Roe v. Wade*, a 7-2 opinion in favor of a solid

⁹⁴ *Roe et al. v. Wade*, 410 U.S. 113 (1973).

⁹⁵ Baker, T. (1974). *Roe and Paris: does privacy have a principle*. *Stanford Law Review*. 26(5). 1162.

⁹⁶ *Ibid*, 1166.

and unambiguous right to privacy. It now had judicial support, significant policy content, and implications beyond the curious law invalidated in *Griswold*.

Conclusion

This development would prove to be essential in the solidification of privacy rights in the 1970s. Because privacy gained a strong foothold in legal thought during the decade following *Griswold*, it gathered significant momentum in the greater social and political discourse, with *Roe v. Wade* as the catalyst that thrust Court-conceived privacy into the mainstream. While non-legal discussions largely neglected the legal conceptions of privacy, Constitutional privacy remained a constant force, chipping away at the retaining wall that kept back the flood of privacy understanding, activity, regulation, and discussion. That privacy had become solidified in one branch of America contributed to its strength to break the dam in later years.

Chapter 3: The Johnson Administration

Though the Court after 1965 was toying with its newly minted legal concept of privacy, that right was still misunderstood and occasionally ignored in other areas of society, particularly during President Johnson's administration. Yet, other conceptions of privacy remained latent in the undercurrents and deeper consciousness of America. This chapter details the political and social development of privacy during Johnson's term in the White House as a part of a wider attempt to account for the multi-layered codification of privacy in later years. It was during this time that privacy began to emerge as a political issue as well as a legal one,⁹⁷ although it was emerging out of an ambiguous concept that was as difficult for the Court to articulate as it was to regulate. While it might seem that privacy would easily delineate into simple origins and foundational principles, its pre-1970 history was actually quite complex. It would be difficult to credit any one event or agency with "starting" to break the privacy dam in American society; cracks seemed to surface from many points at the same time. However muddled, these intertwined developments are essential to help understand the flood of privacy in the public and political eye during later years.

While the Court sat in one corner intrigued by its new conceptual tool, the elected branches were awakening to its possibilities. Each handled privacy in a way that dealt almost exclusively with criminals and deviants. The President took advantage of the technological advances that allowed him to gain political leverage by spying on his opponents and political enemies, but publicly he championed personal privacy protections. Congress intensified its committee work to calm the rumblings of

⁹⁷ It is important to note the distinction between "concept" and "issue." In this context, "concept" is used to represent an amorphous idea of which people are aware, and "issue" is used to mean a concept about which people are concerned.

discontentment with spying and information collection. The media, for its part, helped by the executive and legislative branches, covered privacy developments, reacted to events, and provoked awareness and activity. Each equally-footed player slowly expanded their individual cracks. By the end of Johnson's presidency, these cracks would begin to coalesce, ready to crumble before the concept of personal privacy.

In the last corner sat the Federal Bureau of Investigation, unfazed by the political concept. When the FBI transformed in 1956, from an institution working to protect the public from communism into a seemingly out-of-control agency that was endangering public peace and security by breaching assumed rules of privacy, privacy rose from the depths of social awareness and into the limelight. If not for the radical and superfluous FBI investigations, it would be difficult to see a substantial first crack in the privacy issue.

That is, while Johnson entered the presidency with some concern about personal privacy, his political eye began to shift toward it both by invading it and working to protect it, but only after the FBI began wielding its investigatory power in a manner that alarmed Johnson, Congress and the media. From Johnson's response to the FBI, the media ran away with perceived governmental intrusions on the public's privacy. Congress responded contemporaneously by organizing committees, conducting hearings and proposing legislation to protect individuals' privacy. Once Congress published its committee hearing findings and began to speak out against privacy infringements, the public became more concerned. In response to the public's concern, President Johnson and Congress strengthened their work to protect personal privacy, creating an upward

spiral of privacy discourse. In other words, what began as a powerful federal agency using its power to invade domestic privacy eventually became a national political issue.

It seems, interestingly, that different groups were concerned with different aspects of privacy. The general public was becoming more aware of privacy because of its fears of electronic intrusions from the government. The average man was most concerned that his phone conversations were being listened to. The government, on the other hand, was more attuned to it because of its limited ability to act against criminals, which conflicted with its desire to match public outcry against eavesdropping and tapping. It could not be strict on law and order while frivolously granting privacy rights. The Supreme Court was becoming more aware of privacy largely because of its legal ambiguity in sexuality and marriage cases. While Congress and the public were more concerned with the salient privacy issues that affected everyday people, the Court was concerned with its obfuscated version of privacy, centering on intrusive statutes that were rarely enforced and were therefore not a source of public concern. This multidirectional dialog played significantly into gaining privacy national force in later years.

Privacy Invaders: The Federal Bureau of Instigation

As far back as the 1920s, a handful of government agencies had used various mechanisms such as illegal wiretaps to combat perceived threats to American stability. With the rise of new technologies like wiretaps and computers, numerous government agencies began collecting and cataloging information on employees, other government agents, and regular citizens. The more aggressive investigators included the Treasury Department, the IRS, and the Post Office. Yet, with its increasing autonomy and power, the Federal Bureau of Investigation (FBI) was responsible for the worst intrusions on

citizens' private information. Its autonomy and extensive use of surveillance both exploited Americans' fears. First, the domestic enemy of crime had increased in America after World War II leading to political demand for protection. Second, the external threat both took advantage of Americans' fears and led many to desire more zealous FBI action. Due to the prowess of FBI director and public relations genius J. Edgar Hoover, the public was particularly enamored with the FBI, which would enjoy decades of clout as the front-line defense against both threats.

Congress initially handled these matters. But, by the early 1950s, internal security and investigation matters were "to be removed from political, and particularly legislative, arenas...."⁹⁸ An executive pronouncement known as The Truman Directive explicitly granted the FBI control of "investigative work in matters relating to espionage, sabotage, subversive activities and related matters,"⁹⁹ but did not define any of these terms. The FBI took the directive as a go ahead for drastic internal security measures and intrusions on Americans' privacy.¹⁰⁰ Initially the public supported this behavior. Hoover acted as a guardian and was politically savvy in crafting his public message by emphasizing that the elected had the power to "curb crime by getting tough," and that the Supreme Court and the Justice Department were to blame for the increase in crime."¹⁰¹ To be sure, Hoover used sophisticated strategies. He encouraged the public to view his activities as patriotic and politically impartial, claiming to protect their personal

⁹⁸ Keller, W. W. (1989). *The liberals and J. Edgar Hoover : rise and fall of a domestic intelligence state*. Princeton, N.J: Princeton University Press, 33.

⁹⁹ White House statement signed by Harry Truman entitled, "Information Relating to Domestic Espionage, Sabotage, Subversive Activities and Related Matters," July 24, 1950, vol. 15, 1950, "B. FBI," ACLU.

¹⁰⁰ Keller, W. W. (1989). *The liberals and J. Edgar Hoover : rise and fall of a domestic intelligence state*. Princeton, N.J: Princeton University Press., 49.

¹⁰¹ Powers, R. G. (1987). *Secrecy and power : the life of J. Edgar Hoover*. New York; London: Free Press; Collier Macmillan, 401.

privacy.¹⁰² Interestingly, the American Civil Liberties Union initially supported this power transfer. Communism, it felt, was more of a threat to civil liberties than FBI power. As such, ubiquitous fear of communism prohibited any widespread critique of investigation practices.

In addition to relinquishing its investigation duties, Congress designated additional resources for the Federal Bureau of Investigation. However, as the FBI began to adopt unscrupulous or illegal investigation practices, Congress became worried that it would begin to infringe on citizens' First Amendment rights. Soon after, Congress cut many of its ties with FBI; meanwhile, the FBI increased its vigor in seeking out spies and Communists.¹⁰³ The FBI's prowess and relentlessness was successful largely due to J. Edgar Hoover, who could exact such loyalty because, during the 1950s and 1960s, there was no outside review of his policies.¹⁰⁴ By 1964, one author has argued, the FBI could be said to have "passed through and beyond the model of a political police," viewing itself as responsible for "disrupting the activities of indigenous American groups, in particular, the Ku Klux Klan, that had no connection either to the Communist party or to the agency of a foreign power."¹⁰⁵

For example, their "Cointelpro" (counterintelligence program) mission was total reporting of financial information, phone records, and political affiliations, amongst other things. Cointelpro was based only on the approval of the FBI director, and operated without congressional oversight. The FBI was also adamant about demonstrating its

¹⁰² Theoharis, A. G., & Cox, J. S. (1988). *The boss : J. Edgar Hoover and the Great American Inquisition*. Philadelphia: Temple University Press, 266.

¹⁰³ Keller, W. W. (1989). *The liberals and J. Edgar Hoover : rise and fall of a domestic intelligence state*. Princeton, N.J: Princeton University Press, 35.

¹⁰⁴ *Ibid*, 26.

¹⁰⁵ *Ibid*, 71.

discoveries under Cointelpro. For example, it sent anonymous postcards to 6,000 Klan members stating such things as, “Klansman, trying to hide your identity behind your sheet? You received this—someone knows who you are.”¹⁰⁶ What’s more, Hoover also turned on the labor movement, African Americans and pro-civil rights groups contending that “The infiltration, exploitation, and control of the Negro population has long been a [Communist] party goal and is one of its principal goals today.”¹⁰⁷

Autonomy had other forms. For example, the FBI exempted itself from rules and regulations of the Civil Service Commission, an agency intended to arbitrate and oversee the public sector. The FBI would occasionally leak information to the press and fabricate stories to further its agenda. As it took increasingly extralegal approaches to investigations, the FBI’s infractions became egregious: spying, ordering wiretaps on anyone, particularly government and high profile officials, and taking records without consent or knowledge. Thus, “it was only a matter of time before liberals and their sometime friends—like Senator Sam J. Ervin [D., N.C.]—with strict constitutionalist leanings would recognize the new internal security environment and take steps to contain it.”¹⁰⁸

By the end of the 1960s, the FBI had immunized itself from outside scrutiny with blackmail and unscrupulous practices. Hoover flatly refused to turn over FBI records to the National Archives and destroyed many other records. The FBI was also having trouble retaining employees because of the nature of the personal and private information it kept on them. Despite the great lengths Hoover took to ensure that details of the FBI’s

¹⁰⁶ Baumgardner, F. J. to Sullivan, W.C., “Proposed Postal Cards for Mailing to Known Klan Members/Counterintelligence—Klan,” April 20, 1966.

¹⁰⁷ *U.S. News & World Report*, May 4, 1961, p. 33.

¹⁰⁸ Keller, W. W. (1989). *The liberals and J. Edgar Hoover : rise and fall of a domestic intelligence state*. Princeton, N.J: Princeton University Press., 115.

behavior were not leaked to the news media, stating that information needed to remain confidential to protect citizens' personal privacy,¹⁰⁹ major national news media publications picked up on this behavior. The enormous amount of illegal surveillance came to the public light when an illegal investigate government agencies FBI bug was discovered in a Las Vegas gambler's office. "This led to a series of court-ordered revelations of illegal federal surveillance involving some 50 or more cases,"¹¹⁰ which set back federal surveillance practices until Richard Nixon took over the White House. *The Nation* bluntly but not inaccurately stated: "Under Hoover's administration the FBI has assumed practically unlimited investigative powers. It can investigate almost anyone it wants to investigate, by almost any methods it sees fit."¹¹¹

As the press tapped into FBI misbehavior, the FBI became vulnerable to political attack. First, it could exercise hegemony over internal security matters only as long as it maintained its liberal constituency. But as the relationship with its liberal allies eroded, so too did its staying power. Second, its staying power depended on controlling and keeping its files secret from the public eye; as long as the public did not know what they were doing, they were free to do it. When these files were leaked to the mass media, its insularity was impaired. Last, the agency's reputation was closely tied to its director. When the public began to see Hoover as a threat rather than a protector, it also turned on the FBI.

¹⁰⁹ Theoharis, A. G., & Cox, J. S. (1988). *The boss : J. Edgar Hoover and the Great American Inquisition*. Philadelphia: Temple University Press.

¹¹⁰ Chief Justice Earl Warren Conference on Advocacy in the United States. (1974). *Privacy in a free society : final report : annual Chief Justice Earl Warren Conference on Advocacy in the United States, June 7-8, 1974*. Cambridge, Mass: Roscoe Pound-American Trial Lawyers Foundation, 41.

¹¹¹ *Nation*, July 11, 1966, p. 37.

By 1968, the FBI had decreased its investigations and dossiers. Three factors had influenced Hoover's decision to curtail his surveillance and intrusive behavior. First, Hoover had become such an outlier in the Justice Department that he was pushed into compliance with the department's pressure. Second, the 1968 Crime bill provided that FBI directors after Hoover would have to be appointed by the president and approved by the Senate.¹¹² Last, "shifts in legal and public opinion made it more dangerous for the Bureau to continue many intelligence-gathering methods of the past...."¹¹³ With Hoover and the FBI seeming to shape up, the government would at last have the unobstructed ability to act on these new privacy issues.

An Unusual Relationship: LBJ's Duality

If anyone in a position of power was aware of the FBI's practices, it was President Lyndon B. Johnson. During this time, Johnson also engaged dishonest behavior. While he publicly urged more protections for citizens' privacy, he was eavesdropping and snooping behind closed doors. While he was vice-president, Johnson was told "more government secrets than any of his predecessors,"¹¹⁴ and used the willing FBI for political espionage. Like some of his predecessors, "he comfortably used it to gain information on other rivals...;"¹¹⁵ he requested and received over twelve hundred files concerning the activities of his political foes.¹¹⁶

¹¹² Powers, R. G. (1987). *Secrecy and power : the life of J. Edgar Hoover*. New York; London: Free Press; Collier Macmillan, 402.

¹¹³ *Ibid*, 437.

¹¹⁴ Nash, J. R. (1972). *Citizen Hoover; a critical study of the life and times of J. Edgar Hoover and his FBI*. Chicago: Nelson-Hall, 155.

¹¹⁵ Bernstein, B. J. (1976). The Road to Watergate and beyond: The Growth and Abuse of Executive Authority since 1940. *Law and contemporary problems*, 40(2, Presidential Power: Part 1), 74.

¹¹⁶ Nash, J. R. (1972). *Citizen Hoover; a critical study of the life and times of J. Edgar Hoover and his FBI*. Chicago: Nelson-Hall, 155.

Johnson also sought to appear strict on criminal justice and promote an atmosphere of law and order, which complicated his stance on privacy. This interesting duality resulted in part from Johnson's unique relationship with J. Edgar Hoover. The two were close friends. Johnson commissioned Hoover to "covertly—and, of course, illegally,"¹¹⁷ investigate threats of communism and to the safety of him and his family. Though Hoover worked to protect Johnson, he also gathered blackmail material on Johnson.¹¹⁸ Therefore, Hoover had the power both to protect LBJ from physical harm and political mudslinging, and to destroy LBJ. Johnson did not leave this power unchecked. His awareness of Hoover's illegal behavior gave him leverage against Hoover. One scholar puts it simply: "Johnson and Hoover seem to have developed a cozy, though uneasy, relationship: two men of power courting, exploiting, and mistrusting each other."¹¹⁹ This would create yet another leak of privacy issues and, eventually, the scandal that broke the dam.

LBJ also privately condoned the FBI's investigations of the Ku Klux Klan, but publicly opposed them. To the public, the only reason for an invasion of privacy was to protect society from deviants and criminals. A series of incidents portrayed LBJ to the public as a pillar of personal privacy protections. In 1964, President Johnson defended congressional action to investigate government agencies and in 1965 he announced a ban on federal agencies wiretapping without a warrant. Also in 1965, Johnson issued several memoranda expressing his distaste for eavesdropping and his firm commitment to the

¹¹⁷ Theoharis, A. G., & Cox, J. S. (1988). *The boss : J. Edgar Hoover and the Great American Inquisition*. Philadelphia: Temple University Press, 354.

¹¹⁸ Hoover also gathered information on legislators for blackmail purposes.

¹¹⁹ Bernstein, B. J. (1976). The Road to Watergate and beyond: The Growth and Abuse of Executive Authority since 1940. *Law and contemporary problems*, 40(2, Presidential Power: Part 1), 73.

right of privacy.¹²⁰ Additionally, at new Attorney General Ramsey Clark's induction, Johnson departed from his prepared text to highlight their mutual determination to end governmental wiretapping and eavesdropping, stating, "Every man should know that his conversations, his correspondence and his personal life are truly private."¹²¹ Two years later in his State of the Union address, Johnson recited a well-received passage: "We should protect what Justice Brandeis called the 'right most valued by civilized men' – the right of privacy. We should outlaw all wire-tapping—public and private—wherever and whenever it occurs, except when the security of the nation is at stake—and only then with the strictest safeguards."¹²² Congress and the public were fairly quick to respond to Johnson's encouragement of privacy protections, but the media, now aware of his hypocrisy regarding privacy intrusions, honed in on them. The grave FBI privacy infractions compiled with executive abuses of power prompted significant media attention. Johnson's personal investigations and public façade advocating privacy protection sent mixed signals from the White House on how exactly the rest of the country should approach invasions of privacy. Once the press became more heavily involved, it left little room for further public confusion, forming yet another crack in the privacy dam.

The Media

Elite authors, intellectuals, and journalists have sometimes seen more clearly, and earlier than others, the privacy issues at stake in their future. Already in 1948, George Orwell foretold of a world under constant surveillance from the government and

¹²⁰ Westin, A. (1967). *Privacy and Freedom*. New York: Atheneum.

¹²¹ Graham, F.P. (1967). Johnson, at Clark swearing-in, vows drive on crime, *The New York Times*, 1.

¹²² Westin, A. (1967). *Privacy and Freedom*. New York: Atheneum, 206.

consigned to the futility of resisting “Big Brother.”¹²³ In Orwell’s wake, writers published a litany of books and articles exploring privacy. While few foresaw a world as extreme as Orwell’s, technology and privacy were represented in a “literature of alarm” that was instrumental in placing these issues into the public’s imagination. These works included fiction like Aldous Huxley’s *Brave New World* (1966), and non-fiction books like Samuel Dash, Richard Schwartz, and Robert Knowlton’s *The Eavesdroppers* (1959), Myron Brenton’s *The Privacy Invaders* (1964), Vance Packard’s *The Naked Society* (1965), Alan Westin’s *Privacy and Freedom* (1967), and Jerry Rosenberg’s *The Death of Privacy* (1969), to name a few, greatly increased the public’s fear of privacy invasions.¹²⁴ Prolific privacy writer, Alan F. Westin in particular became a main propagator in publicizing privacy intrusions and an instigator of privacy protection movements.

By the end of the 1960s, these themes reached the wider audiences of television. Documentary programs, such as ABC’s “Big Brother is Listening,” and NBC’s “The Big Ear,” and PBS’s “Bugging in the Automobile World,” “Telephones and Intercoms,” and “Out in the Open, But Not Safe,” highlighted the many ways in which citizens’ privacy were being violated by private bodies and the government.¹²⁵ While there was previous published opposition to privacy rights, it was largely grounded in esoteric academic and governmental language and did not actualize the public’s fears of a *1984* type world. Rather, it largely circulated amongst academics and media elites, the majority of whom already supported personal privacy protections. Television programs and literature helped raise general public awareness of privacy intrusions, and another crack formed in

¹²³ Orwell, G. (1992). *1984*. New York: Knopf.

¹²⁴ Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press.

¹²⁵ Westin, A. (1967). *Privacy and Freedom*. New York: Atheneum, 196.

the privacy dam. The percentage of the American public that was familiar with or aware of wiretapping rose from less than 30% in 1944 to more than 60 percent in 1966.¹²⁶

Interest groups like the American Civil Liberties Union (ACLU) published materials to promote open dialogue about privacy policy. The ACLU worked with computer and technology experts in the field of personal information privacy, and worked mostly with other civil liberties advocates during the debates about passage of a particular section of the Omnibus Crime Control and Safe Streets Act of 1968 dealing with privacy rights. However, because these issues remained on the congressional agenda for years, the ACLU's evidence did not offer an open-and-shut case. There was still clear opposition to the ACLU's position.¹²⁷

The news media continued to contribute to raising public awareness of eavesdropping and wiretapping. Interestingly, these opinions spanned the entire spectrum of American political involvement, from the *Nation*, the *New Republic*, and the *New York Post*, on the left to H.L. Hunt's *Life Line*, *U.S. News and World Report*, and the *National Review* on the right. The threat of federal invasion of privacy brought liberals and conservatives to a common position.¹²⁸ Westin surveyed more than 300 newspaper editorials on electronic eavesdropping and privacy during 1964-66, finding virtually unanimous agreement that "control measures were needed and that both private and public-official eavesdropping had reached proportions unbearable for a free society."¹²⁹

¹²⁶ Dutton, W.H. and Meadow, R. G., *A Tolerance for Surveillance: American Public Opinion Concerning Privacy and Civil Liberties* in Levitan, K. (1987). *Government infostructures: a guide to the networks of information resources and technologies at federal, state, and local levels*. Westport, Connecticut: Greenwood Press.

¹²⁷ Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press.

¹²⁸ Westin, A. (1967). *Privacy and Freedom*. New York: Atheneum.

¹²⁹ *Ibid*, 198.

Contemporary databases make further inquiry into media coverage of privacy both feasible and illuminating. I performed an additional study of attention given by the *New York Times* to privacy was an historical news search of *New York Times* articles in which three directions. First, the appearance of the phrase “right to privacy” or “right of privacy” in the citation, document text, or abstract of articles every month between January 1, 1965 and January 1, 1975 was searched.¹³⁰ Second, the articles were scanned for relevancy, discounting any biographies of individuals that mention the individual’s love of privacy, for example. Last, the number of times the pertinent articles appeared on the front page of the newspaper and also noted the length of the articles were noted.

The study was repeated, but searched for the appearance of the word “privacy” in the citation or abstract. A content analysis was performed to ensure relevancy to the study. The study was repeated one more time, but searched for the phrase “right to privacy” or “right of privacy” in the citation or abstract during the same time period. A content analysis was also performed in this study, but based on the search criteria, no articles needed omission. The results below discuss press coverage of privacy between 1965 and 1970, roughly while the Johnson administration policies were taking place.

¹³⁰ The phrase “classified ad” was excluded form all searches.

Table 3.1—*New York Times* Privacy Coverage per Quarter: 1965-1969

Quarter	Number of Articles with "Right to Privacy" or "Right of Privacy" in text	Number of Articles with "Right to Privacy" or "Right of Privacy" in Citation or Abstract	Number of Articles with "Privacy" in abstract or citation
Jan-Mar 1965	17	2	15
Apr-Jun 1965	25	2	13
Jul-Sep 1965	25	0	9
Oct-Dec 1965	19	3	16
Jan-Mar 1966	11	1	6
Apr-Jun 1966	17	1	12
Jul-Sep 1966	16	1	13
Oct-Dec 1966	29	2	13
Jan-Mar 1967	22	2	14
Apr-Jun 1967	18	1	16
Jul-Sep 1967	15	0	11
Oct-Dec 1967	20	1	15
Jan-Mar 1968	24	1	16
Apr-Jun 1968	25	1	8
Jul-Sep 1968	17	1	11
Oct-Dec 1968	15	0	7
Jan-Mar 1969	19	3	15
Apr-Jun 1969	21	1	14
Jul-Sep 1969	15	0	7
Oct-Dec 1969	33	3	10

The results of this study bear significantly on privacy's chronological development within different aspects of the government and society. Attention given strictly to "right to privacy" issues markedly increased between 1965 and 1975. While newspaper articles mentioning privacy in the early 1960s dealt largely with ad hoc issues of privacy in foreign countries, biographies of people who "loved their right to privacy," and the "right to privacy" in real estate sales, as privacy became more of an issue both publicly and in the courts, the newspapers depicted the shift by focusing their privacy articles on the Court and the government's treatment of privacy. Interestingly, the *New York Times* articles approached privacy mainly from a security from wiretapping and eavesdropping angle, and tended only to deal with marital/reproductive privacy in an

abortion context. There was very little printed about the right to marital privacy or familial privacy.

New York Times articles addressing the “right to privacy” or the “right of privacy” delineate into five major thematic categories—marital privacy, familial privacy, eavesdropping and wiretapping, obscenity, courts and individual states, the first three of which emerged chronologically. The latter two appeared regularly throughout the time period. First, articles covered marital privacy, which was likely a response to *Griswold*. This trend was short-lived; articles focusing on governmental (CIA and FBI) wiretapping and eavesdropping quickly replaced those dealing with the seemingly less pressing right of marital privacy. Beginning in early 1966, privacy articles focused increasingly on FBI and CIA intrusions on individuals. The number of wiretapping and eavesdropping articles notably increased in 1967, likely in conjunction with *Katz v. United States*. With *Katz* as the exception, articles only occasionally mentioned a Court nomination or state court holding. There was little focus on the Court again until 1968. Rather, most coverage was based on eavesdropping, perhaps because wiretapping and eavesdropping directly affected more people than marital privacy issues. Although laws regulating marital privacy may have had broad opposition if enforced, statutes invading marital privacy were rarely enforced and therefore did not generate concern within the general public. The newspapers abandoned a more specialized version of privacy, then, and centered on actual infractions on everyday private conversations. Focus on wiretapping and eavesdropping did not decrease, but the *New York Times* began including articles about obscenity and privacy in late-1968, likely in anticipation of *Stanley v. Georgia*.

Within this timeframe, the *New York Times* gave relatively constant attention to courts and their members. This includes coverage of Supreme Court decisions, judicial nominees, and judges' ideologies. Coverage of individual states' behavior toward privacy agencies, committees, cases and legislation also ran consistently throughout this period. The number of titles or citations containing the phrase "right to privacy" or "right of privacy" increased at approximately a one-to-one ratio with the number of titles or citations using the word "privacy." This means that there was little distinction made between the phrase "right to privacy" and the word "privacy," perhaps indicating that the press would rather have stressed privacy itself rather than the right. This could also indicate that public consensus was that privacy was clearly a right and did not need to be articulated as such. There was an initial spike in May and June of 1965 immediately following the *Griswold* opinion. The number of articles dropped again until 1969, when the Court released its opinion for *Stanley v. Georgia*.

Upon closer examination, the Court does not appear to be the only reason for privacy coverage. Additionally, *New York Times* coverage seems to follow trends within the legislature and other media. That is, coverage and peaks were initially related to issues the Court chose for its docket, but were substantively based on which issues were most pressing to Congress and on television. For example, the Court's coverage of marital privacy lasted for only three months following *Griswold*. On the other hand, the *New York Times* latched onto governmental eavesdropping and wiretapping in tandem with Congressional committee publications and television media interest, initially after 1966 and much more substantially after 1970. In other words, the *New York Times* privacy coverage was largely reactive to both Court and political happenings. It covered

events and ideas after they happened, and stressed the relationship between privacy invasion and deviants. Alternatively, fiction books and television media were largely provocative. They captured ideas before they became mainstream, which appears to have spurred political and public reaction.

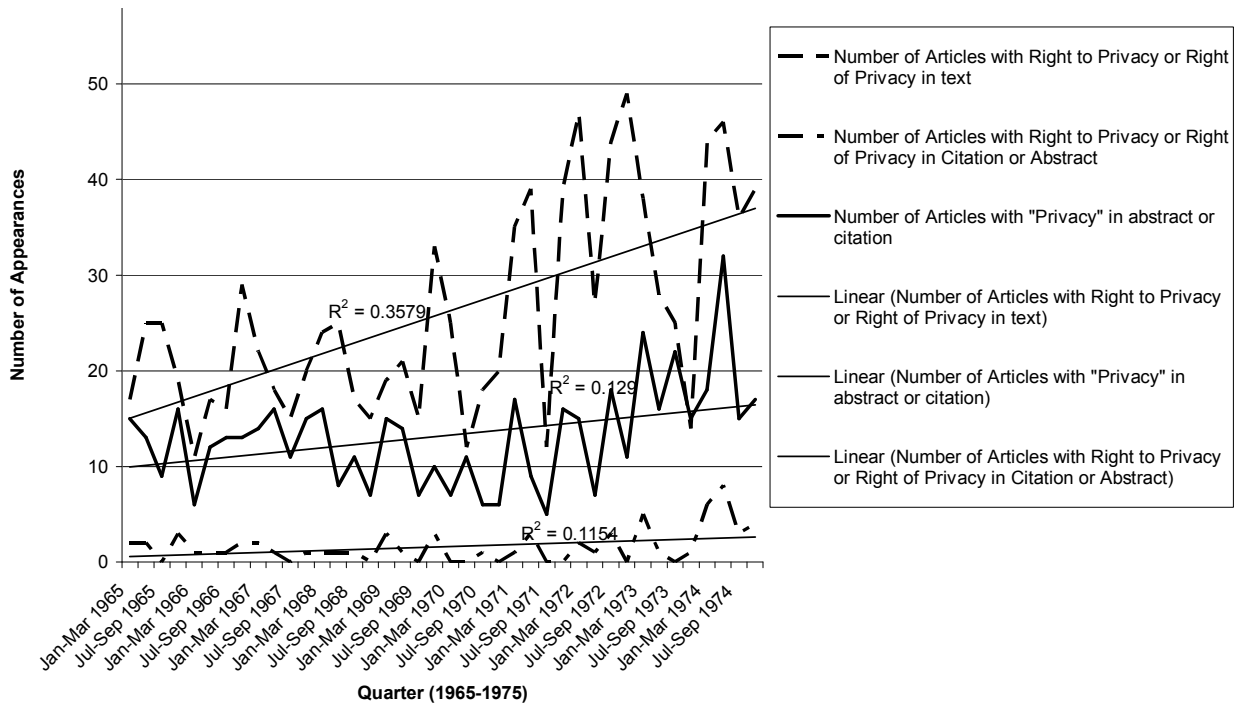
Despite the press' vast discussion of privacy issues, the public was still largely unmotivated to act.¹³¹ While its awareness assuredly increased, the active discourse largely remained within the social and political elite. The early press attention failed to turn social or political attention toward reproductive or marital privacy yet began to increase political awareness and public attention about information and technology privacy,¹³² creating new cracks and egging-on others in the dam that held back the surge of privacy issues.

¹³¹ Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press.

¹³² Information and technology privacy is a broad label for citizens' personal information: family history, identification information, bank records, credit card statements, etc.

Privacy's Appearance in The New York Times

Chart 3.1—*New York Times* Privacy Coverage per Quarter



The Political Reaction

Out of the growing awareness for privacy interests, Congress worked diligently to combat the FBI’s behavior. Liberal senators, in particular, found themselves at odds with the FBI over personal privacy intrusions. One scholar argues that “[p]erhaps the greatest [political] controversy during this time...centered on the issue of wiretapping and electronic eavesdropping....”¹³³ As a caveat, though, Congress also needed to remain steadfast on promoting law and order views that were coalescing into a salient political issue for upcoming elections. Polls indicate that Americans would still relinquish some

¹³³ Keller, W. W. (1989). *The liberals and J. Edgar Hoover : rise and fall of a domestic intelligence state*. Princeton, N.J: Princeton University Press, 121.

of their privacy rights to protect them from criminal activity.¹³⁴ To the public, privacy was a right granted to everyone but criminals and deviants. Public opinion and the broad law and order views Congress was coalescing into a salient electoral issue complicated Congress' position as an advocate for non-criminal privacy protections. Although they acknowledged privacy as a value needing regulation, policymakers were unsure about how to legislate it given the conflicts between personal demands and societal good.

The policy process began with an emphasis on the value of privacy, and much of the policy debate was framed in terms of an individual interest—privacy—in conflict with a social interest—government efficiency, law enforcement, and an honest work force.... Missing from the debates was an explicit recognition of the social importance of privacy.¹³⁵

Policymakers therefore faced conflicting demands between calls for stronger privacy protections and the public's right to know about criminal behavior and governmental activity.¹³⁶

Still, in 1964, Senator Edward Long's (D-Mo.) Senate Subcommittee on Administrative Practices and Procedures, also known as the Long Committee, began hearings about federal intrusions and surveillances, tapping and eavesdropping. While the Long Committee investigated the Treasury Department, the IRS, and the Post Office,

¹³⁴ *Survey by Roper Organization*. Retrieved November 19, 2006 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. <<http://www.ropercenter.uconn.edu/ipoll.html>>.

¹³⁵ Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press, 22-3.

¹³⁶ One scholar notes that among the three issues that influence Congressmen's behavior (reelection, good public policy, and influence within the chamber), the most influential is re-election. In general, she notes, privacy issues "do not provoke great electoral support." Congressmen are unlikely to champion privacy protections merely because they think it will gain them electoral support. Those congressmen who did avidly pursue privacy legislation did so for other, more ideologically sound reasons. This could explain one reason that, although privacy issues gained salience during the 1960s, few elected officials took any serious action until the 1970s. It was not until the 1970s that privacy became such a fundamental issue that representatives were willing to take action to protect it, even without an immediate electoral return. See e.g., Regan, P. (1995). *Legislating privacy*. Chapel Hill: University of North Carolina Press.

it avoided the FBI in its first year,¹³⁷ wanting to begin by taking on smaller, less powerful agencies. Still, they found pitifully little hard evidence that the government had engaged in worrying behavior, and when asked, departments such as the General Accounting Office fabricated responses or avoided the questioning. Between 1964 and 1966, as the above study indicates, the media began the Committee's work, giving its findings some front-page newspaper coverage and prime-time television spots across the country; they also stimulated hundreds of alarmed editorials expressing shock at federal practices and calling for remedial action. Senator Long helped to keep the issue bubbling by rising on the floor of Congress and reading into the *Congressional Record*, as his 'Big Brother item for today,' a variety of news items, editorials, and articles about electronic-eavesdropping activities."¹³⁸

Despite its difficulty breaking through the bureaucracy's obstructions, by 1965 Congress had begun to show "nervous but unmistakable signs of finally wanting to assert its long-dormant control over the Bureau."¹³⁹ It began investigating the FBI, and subpoenaed many FBI and government employees and officers, including J. Edgar Hoover himself. As the Long Committee began uncovering more information, Hoover worked harder to keep the FBI's wiretapping, bugging, mail interception, and break-in practices secret.¹⁴⁰

With the help of FBI employee witnesses and whistleblowers, by 1966 the Committee had uncovered significant evidence incriminating Hoover and the FBI.

¹³⁷ Westin, A. (1967). *Privacy and Freedom*. New York: Atheneum.

¹³⁸ See e.g., *Congressional Record*, July 26, 1965, Temp. Ed. 17591; Feb. 7, 1966, Temp. Ed. 2131.

¹³⁹ Powers, R. G. (1987). *Secrecy and power : the life of J. Edgar Hoover*. New York; London: Free Press; Collier Macmillan, 402.

¹⁴⁰ Theoharis, A. G., & Cox, J. S. (1988). *The boss : J. Edgar Hoover and the Great American Inquisition*. Philadelphia: Temple University Press, 362.

However, as Senator Long himself was under investigation for alleged ties to organized crime, he agreed to keep the information under wraps. Cartha DeLoach, one of Hoover's minions, prepared an official release for Long stating that the FBI had not acted illegally or without Justice Department supervision. Long did not agree to release it, however, as he feared other members of the subcommittee would leak the wrongdoing. DeLoach went to work on the entire subcommittee, and eventually the Long Committee threat collapsed.¹⁴¹

In addition to the Senate's Long Committee, the House of Representatives established a Special Subcommittee on Invasion of Privacy, mainly due to Representative Cornelius Gallagher's (D, N.J.) request. Suggesting a vision of the future straight out of Orwell, Gallagher warned, "It is our contention that if safeguards are not built into such a facility, it could lead to the creation of what I call 'The Computerized Man.' 'The Computerized Man,' as I see him, would be stripped of his individuality and privacy."¹⁴² Similar to the Long Committee, the House Privacy Committee held hearings and sponsored investigations on illegal government investigatory practices. These hearings were intended to raise public concern about possible privacy abuses resulting from technology developments.

Like the Senate, though, the House Privacy Committee could take only small steps to stop the FBI's behavior. Occasionally, the Attorney General and his assistants would ignore accusations against the FBI entirely, for fear of what would happen if they pursued them. One scholar notes, "There was also little desire to pry into such matters, to risk uncovering the unpleasant, or to do combat with Hoover.... In each case, there was

¹⁴¹ *Ibid.*, 365-8.

¹⁴² United States. Congress. House. Committee on Government Operations. Special Subcommittee on Invasion of Privacy. (1967). *The computer and invasion of privacy*. New York: Arno Press, 2.

danger in combat, so it was better not to know.”¹⁴³ The latent concern with privacy, however, grew into yet another crack in the dam that held back the influx of privacy development in later years. It continued to grow as congress published as much as it could.

Congress’ chipping away at the dam eventually took its toll. Despite the danger in taking-on the FBI, nearly fifty congressional hearings and reports investigated a range of privacy issues including federal agency practices, use of personality tests and lie detectors, wiretapping, use of census information, and access to criminal history records. From 1965 through 1970, over 200 bills related to privacy were introduced, with the passage of only the Freedom of Information Act, the Omnibus Crime Control and Safe Streets Act of 1968 and the Fair Credit Reporting Act of 1970.¹⁴⁴

Following a ten-year campaign in Congress, in which the news media played a leading role, Congress passed the Freedom of Information Act, its first major piece of privacy legislation. Under the FOIA, the public has the right to know what information and records the government holds. It provides that “‘any person’ has a right, enforceable in court, to access to all ‘agency records’—generally, any record in the possession of a federal agency,”¹⁴⁵ except in one of nine specified circumstances including national security issues, trivial information, trade secrets, etc. This way, information once confined strictly within government agency walls was available to the public, making it seem as though the FOIA was actually a further infringement on individuals’ privacy rights.

¹⁴³ Bernstein, B. J. (1976). The Road to Watergate and beyond: The Growth and Abuse of Executive Authority since 1940. *Law and contemporary problems*, 40(2, Presidential Power: Part 1), 58-86, 73.

¹⁴⁴ Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press, 7.

¹⁴⁵ Bouchard, R. F., and Franklin, J. D. (1980). *Guidebook to the Freedom of information and Privacy acts*. New York, N.Y: C. Boardman Co, 8.

Despite its shortcomings, the FOIA was essential to information privacy reform. Once people knew what information the government actually kept, they could work to protect themselves.

Data collection became even more of an issue in further hearings with the Social Science Research Council and the Budget of the Bureau. The two agencies proposed a National Data Center to investigate major social and economic problems. This would require storing and cataloging vast information on United States citizens.¹⁴⁶ Alarmed by its reach, both chambers of Congress rejected proposals for a National Data Center twice.¹⁴⁷ Yet, Representative Gallagher did not oppose the Data Center entirely. He suggested that the Bureau of the Budget reform its proposal to ensure that the Center's data would be purely aggregate and would contain no information on individuals in hopes that compromise would enable stronger privacy protections in the future.¹⁴⁸

In response to the changing climate on privacy, the Interstate Commerce Commission (ICC) issued a statement on privacy. Less than one year after the Supreme Court issued its legally ambiguous privacy holding in *Griswold*, and despite the government's disagreement on the fundamentality of privacy, the Commission published that it would neither encourage nor tolerate governmental eavesdropping due to the fundamental right of privacy.

We have decided that...we should not sanction the unannounced use of listening or recording devices merely because one party to an otherwise private conversation is aware that the conversation is in fact no longer private.... We agree that the ordinary risk of being overheard is converted into another risk

¹⁴⁶ Carter, L. J. (1969). National Data Bank: Its Advocates Try To Erase "Big Brother" Image. *Science*, 163(3863), 160-162, 160.

¹⁴⁷ Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press.

¹⁴⁸ Carter, L. J. (1969). National Data Bank: Its Advocates Try To Erase "Big Brother" Image. *Science*, 163(3863), 160-162.

entirely when the electronic device is made the instrument of the intruder.... We are commanded by the Communications Act to 'encourage the larger and more effective use of radio in the public interest.'...Upon reflection, we do not believe it to be consistent with the public interest to permit this new product of man's ingenuity to destroy our traditional right to privacy.¹⁴⁹

This implies that many different branches of the government acknowledged a fundamental right of privacy and took steps to protect it.

The pivotal year in development of a federal wiretapping policy was 1967, "during which the issue was the subject of the report of a presidential commission, statements from the president, two Supreme Court decisions, and congressional hearings."¹⁵⁰ Because privacy was still only an idea, (and it is difficult to legislate ideas,) policy-makers needed to tease out the specific functional facets that would make it a more easily regulable concept.¹⁵¹ For example, following the ICC's statement and in attempts both to appear strict on criminal issues and to protect individuals' privacy, Congress struggled to pass the Omnibus Crime Control and Safe Streets Act of 1968. Title III of the Omnibus Act prohibited private telephone eavesdropping and required a court order for governmental eavesdropping, except in cases involving national security or in which one party consented to the eavesdropping. Because it was the first case to acknowledge that the fundamental right to privacy applies to a person and his conversations, *Katz v. United States* was also credited as an inspiration for this legislation.¹⁵² Interestingly, this was the first piece of political work to bridge the gap between the Court's dealings with privacy and the government's activity toward it.

¹⁴⁹ See FCC Docket No. 15262, 31 *Red. Reg.* 339 (1966).

¹⁵⁰ Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press., 120.

¹⁵¹ *Ibid*, 15.

¹⁵² *Ibid*, 8.

The Public

During the early years of privacy regulation, a conversation emerged among scholars, politicians and media elites. Little evidence suggests that a similar discussion was taking place among mass publics. The nascent public awareness of privacy infringements was insufficient to incite public action, as the public felt that some privacy invasions were acceptable to protect it from criminals and deviants.¹⁵³ In fact, despite the extensive publicity privacy issues received, public opinion was growing at this time. In October, 1965, after the Long Committee had begun hearings and the Court handed down *Griswold*, 92% of Americans responded that they felt personally satisfied that they had a right to privacy.¹⁵⁴ In the same poll, Americans ranked the “right to privacy” in the top half of the rights most important to them, though only 13% of Americans felt that the right of privacy was the most important right,¹⁵⁵ indicating that although people believed they had the right, it did not inspire political action at this time. By Westin’s account, as Congress, the president and the press continued to put privacy on the public agenda, though, public awareness increased. “Public concern over electronic eavesdropping was buttressed by congressional hearings and public debates over the impact on privacy of lie detectors and personality testing, making the issue of ‘vanishing privacy’ and ‘Big Brother’ a far more general problem than wiretapping by itself had ever become in earlier

¹⁵³ *Ibid.*

¹⁵⁴ It is important to note that public support for laws to protect personal privacy has been consistently high. However, those who are most concerned with threats to their personal privacy are also those who are most distrustful of the government and its agencies and are less likely to participate in public opinion polls. This has the potential to skew public opinion data to show a lower interest in privacy than there actually was. It is possible that public interest in privacy was actually substantially higher than polls indicate.

¹⁵⁵ *Survey by Roper Organization, October, 1965*. Retrieved November 19, 2006 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. <<http://www.ropercenter.uconn.edu/ipoll.html>>.

decades.”¹⁵⁶ Like the slogan “guns don’t kill people, people kill people,” technology doesn’t invade privacy; agencies using technology do. Congress, knowing this, found agency behavior to be a functional facet of privacy which it could regulate.

By the end of Johnson’s administration, a complex relationship between public opinion, the media, Congress and the realities of LBJ’s ties with the FBI had developed. The FBI’s pushing too hard on the privacy issue ended up causing multiple other cracks in the dam that had previously held back significant privacy discourse. For the public as well as the legislature, privacy rights triggered conflicting emotions: people wanted privacy for themselves, but not for criminals; they wanted safety but not to be listened to. Also, the National Data Center proposal was a particular threat to the privacy of individuals’ personal information, as it would have created nationalized databanks to catalog information on millions of individuals held by hundreds of agencies.¹⁵⁷ The information held by government agencies like the FBI attracted public concern because of the sensitivity of the information the agencies collected. Meanwhile, the literary culture chipped away at the dam by increasing its coverage by publishing books warning of a *1984* type world and expanding its privacy coverage to include the Court, the president and the legislature. In response to this and questionable agency behavior, Congress became interested in the privacy issue, as well.

Conclusion

As polls and public action toward Congress’ handling of privacy indicate, the public became more aware of and willing to take action to protect their own privacy

¹⁵⁶ Westin, A. (1967). *Privacy and freedom*. New York: Atheneum, 196.

¹⁵⁷ Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press, 8

rights during the 1960s. It demanded more stringent protections of their newly acquired and still legally tenuous fundamental right to privacy. That there is scant data flagging an exact time public opinion reached a drastic turning point against government intrusions on privacy, though, indicates a gradual progression toward nationwide awareness rather than a sharp shift in public ideology. The public's gradually increasing political activity throughout this time, in other words, indicates a burgeoning awareness and willingness to take action that would balloon throughout the early 1970s.

Although the Court's early dealings with legal privacy had less effect on public opinion than FBI behavior and government legislation, the public still looked to it as a source for privacy protection. Westin writes, "...the eyes of the press and informed citizens remained fixed on two basic sites [for privacy protections]—Capitol Hill and the United States Supreme Court building."¹⁵⁸ This would set the stage for the next phase in privacy development: Nixon's administration and the Burger Court.

¹⁵⁸ Westin, A. (1967). *Privacy and freedom*. New York: Atheneum, 206.

Chapter 4: Nixon's Privacy

With many small cracks beginning to form in the wall that retained a surge of privacy awareness and activity, events under Nixon's presidency continued to weaken it. The spread of governmental privacy intrusions, press coverage and Congressional investigations had expanded to the point that, by mid-1973, the public was fully aware of and engaged in the discourse. The combination of press militancy, Congressional fervor, ceaseless government intrusions, and a newly mobilized public at last enabled privacy to become a statutorily recognized fundamental right, albeit nearly a decade after the Court declared it a fundamental right. The path that privacy followed in the last stage before it became statutorily fundamental was tumultuous.

First, the executive government continued to alienate the public, increasing its unscrupulous privacy intrusions. Engaging newly-created governmental entities to aid him, and dissolving those that countered him, President Nixon was unrestrained in his ardor to gain leverage on his political opponents by wiretapping, spying, and stealing classified information. After the highly publicized *Pentagon Papers* trial, in particular, the general public became aware for the first time that the government was obsessively spying on American citizens. The trial generated such interest that the press became focused on exposing government misdeeds, publicizing every instance of government spying and privacy intrusion it could document. The press drastically changed both the content and scope of its privacy coverage. It shifted its focus from Court-related privacy happenings to privacy activity in the executive branch, and increased its coverage of this activity three-fold. Congress simultaneously separated itself from executive behavior, working to expose executive actions and protect citizens from these actions. The number

of Senate and House subcommittees dealing with privacy ballooned before 1973 to further educate the public about government spying and exacerbate public distrust. This resulted in a dramatic increase in public awareness of privacy issues in general, and the privacy-movement finally gained the momentum necessary to mobilize the public. The change in the public's mood and underlying assumptions, if already skeptical because of Vietnam, turned decidedly cynical in a very short period following the *Pentagon Papers*' publication.¹⁵⁹

The only player absent from the increasingly pressurized privacy dialogue was the Supreme Court. Though it remained in its own realm handling the privacy of criminals and deviants, and abstained from the dialogue about governmental intrusions on citizens' privacy, it still played a key role in advancing privacy's momentum in the 1970s. First and more obviously, it advanced the canon of case law relevant to a litany of civil liberties issues such as obscenity, criminal justice and social deviance. Second, the Court's general inaction toward privacy unless it pertained to criminals or deviants compounded the justices' refusal to specifically guarantee absolute privacy rights (even from the government). This mobilized Congress and the press, which in turn further awakened the public. As only one example of a prominent theme in academic thought, one scholar notes that the Court still played a fundamental role in privacy's development over time.

Personal privacy, particularly informational privacy, emerged in the 1970s as an issue of public policy, partly because judicial policies and constitutional interpretation failed to promote legal recognition of and protection for individuals' claims that their right of privacy entails safeguards against abuse of personal information collected, maintained, and utilized by the government. Development of public policies relating to personal information and, more generally, to information control within the federal government, are partially a

¹⁵⁹ Nye, J. S. (1997). In government we don't trust, *Foreign Policy*, (108), 102.

response to the Court's failure to legally recognize individuals' privacy interests and claims with regard to personalized information held by third parties, in both the public and private sector.¹⁶⁰

In other words, unrelated actions by the press, the government and the Court combined to give privacy potency in American dialogue. This chapter explores privacy's developments in the seemingly disparate realms of American politics as they compounded each other to give privacy the momentum it needed to surge into American life.

Nixon Pre-Watergate

Before he even came to the White House, Richard Nixon engaged the issue of privacy. On April 29, 1966, in his only Supreme Court appearance, private attorney Richard Nixon argued for an individual's right to privacy in *Time, Inc. v. Hill*. Nixon argued that the plaintiff, who claimed that *Life* magazine falsely reported about a new play portraying a traumatic event for the plaintiff and his family, was protected from the media's intrusion on his right to personal privacy. He chose to represent the Hill family based on his own personal conviction that Justice Brandeis was correct—that there was a “right to be let alone.”¹⁶¹ To Nixon's dismay, the Court held that because Hill's experience was public knowledge, he was not entitled to privacy protections, and Nixon lost the case. In 1966, it was not an unusual opinion, but Nixon did not take the decision lightly. Nixon blamed himself for the loss, thinking he could have presented better arguments. “In a lengthy memorandum written the next day..., Mr. Nixon critiqued his own effort, exploring in detail what other points he might have raised using the Ninth and

¹⁶⁰ O'Brien, D. M. (1979). *Privacy, law, and public policy*. New York: Praeger Special Studies, 203.

¹⁶¹ Interestingly, as I detail later, Nixon seemed to believe that this right of privacy was to be let alone from other citizens, not from the government.

Tenth Amendments ‘to give redress to private citizens where they are injured by other private citizens.’”¹⁶² Before he ran for the presidency, Nixon clearly felt a strong affinity for citizens’ privacy from other citizens, which foreshadowed his public action to protect the right. However, this ambiguous concept conflicted with his desire for law and order, and political advantages. Once he took office, he had the opportunity to reconcile these differences.

Over these years, Nixon learned a great deal from the way Johnson treated personal privacy. Amongst other things, he adopted Johnson’s use of the FBI and other investigatory agencies to further his political ends while publicly behaving like a crusader for personal privacy protection. To the public, still recoiling from Johnson and the FBI, Nixon was a champion of personal privacy protection. Much of his behavior was comforting to the public, despite that he had taken few actions to evidence his claim. Like Johnson, Nixon spoke publicly in favor of personal privacy but acted to restrict privacy rights by implementing his own eavesdropping and wiretapping policies. He also self-consciously chose justices whom he believed would restrict criminal rights and civil liberties in an effort to maintain a law-and-order ethos.¹⁶³

During this time, Nixon continued to spy, illegally under *Katz* (1967),¹⁶⁴ on political opponents, social deviants, criminals, and anyone else he felt could be a threat to his country or his career. Like Johnson, Nixon was a clever political craftsman. During a time of heightened public fear of attacks wrought by the Cold War and communist infiltration, the administration pushed a national security agenda to ease the concern.

¹⁶² Safire, W. (1973, May 21). To be let alone. *New York Times*. pp. 33.

¹⁶³ Yalof, D. A. (1999). *Pursuit of justices : presidential politics and the selection of Supreme Court nominees*. Chicago: University of Chicago Press, 98.

¹⁶⁴ Safire, W. (1973, May 21). To be let alone. *New York Times*. pp. 33.

Using the public's desire for protection to his advantage, Nixon committed many privacy invasions under the guise of national security protection. Between 1969 and 1971, Nixon had placed wiretaps on 13 government officials and four newsmen who he felt might be leaking highly classified national security information regarding the Vietnam War. In actuality, the wiretaps were used to gather dirt on his political opponents, as evidenced by Nixon's refusal to remove the taps after the officials left their government positions.¹⁶⁵

Unsatisfied by the scope of the information he collected, Nixon ordered the creation and implementation of a Domestic Intelligence Plan in 1970. Though this operation was to be entirely confidential, he still had to give the impression to those involved that he was working for national security. Nixon planned to commit acts and use methods that, as he tried to deny were illegal or unconstitutional, to gather information on American citizens to further his political ends. He involved directors of the FBI, CIA, Defense Intelligence Agency, and National Security Agency, asking for suggestions and options for methods of spying and information gathering. Nixon authorized breaking and entering, opening of personal mail, and electronic eavesdropping. His targets included anti-war demonstrators, black extremists, and demonstrators in general.¹⁶⁶ Again, to those involved, Nixon claimed both executive authority to protect national security and behavior of previous presidents to justify this behavior. That is, because he faced some internal opposition, Nixon still had to defend what he was doing whether or not it was public. J. Edgar Hoover and Attorney General

¹⁶⁵Dobrovir, W. A. (1974). *The Offenses of Richard M. Nixon : a guide for the people of the United States; bribery, and other high crimes and misdemeanors*. Washington: Public Issues Press, 17-18.

¹⁶⁶ *Dean testimony 1073 before the Ervin Committee, interview with the president's draftsman, Charles Houston*. 93rd Cong., 1st-2nd Sess (1973).

John Mitchell adamantly voiced their objections to the Plan, and Nixon rescinded his orders five days later.¹⁶⁷

Rather than scrapping the entire idea, Nixon replaced it in late 1970 or early 1971 with the newly-created Interagency Evaluation Committee. Before this agency began to function, Nixon became interested in I.R.S. collections of “valuable intelligence-type information...as a result of their field audits.”¹⁶⁸ Still dissatisfied with the lack of information collected, Nixon set up his own specialized investigation unit known as the “Plumbers.”¹⁶⁹ Between June and August of the following year, the White House used information gathered by the Plumbers to develop a list of its political opponents and “enemies.” According to White House Counsel John Dean’s testimony to the Ervin Committee, the White house “maintained...an enemies list, which was rather extensive and continually being updated.”¹⁷⁰ The White House would send lists of these names to the IRS and have them investigated.

The depth of Nixon’s invasions of legality and trust are well-known but fundamental to the watershed moment for privacy. Indeed, Nixon relentlessly and illegally worked to ensure his reelection in 1972. The Committee to Re-Elect the President (CREEP), “went beyond political ‘tricks’ to sabotage the Democratic candidates. It undertook a wiretapping and break-in program to spy on the opposition, without precedent in American campaigns, and which subsequently set off a national

¹⁶⁷ Dobrovir, W. A. (1974). *The Offenses of Richard M. Nixon : a guide for the people of the United States; bribery, and other high crimes and misdemeanors*. Washington: Public Issues Press, 23-6.

¹⁶⁸ *Ibid*, 21.

¹⁶⁹ *Ibid*, 29-31.

¹⁷⁰ *Dean testimony 914, 915, 957-59, 1073 before the Ervin Committee, interview with the president’s draftsman, Charles Houston. 93rd Cong., 1st-2nd Sess (1973).*

scandal.”¹⁷¹ As the 1972 election approached, Nixon’s administration launched yet another massive campaign against antiwar leaders and Democratic officials. “The White House embarked upon a calculated, systematic assault on the integrity of the American electoral process for the purpose of assuring Richard Nixon’s reelection in 1972.”¹⁷² Working with top-agents G. Gordon Liddy, E. Howard Hunt, and James McCord, all under Nixon’s awareness,¹⁷³ five CREEP agents were arrested for breaking into the Democratic National Committee headquarters in the Watergate hotel in Washington, D.C. Days later, seven more were arrested and jailed. Immediately after the CREEP agents were arrested, Nixon’s administration began a massive cover-up. Nixon officials destroyed evidence, offered false testimony, paid over \$450,000 to keep burglars and conspirators silent, and blackmailed FBI and CIA agents.¹⁷⁴ All the while, President Nixon tape-recorded all the conversations that took place in the Oval Office; he was successful in covering-up the scandal for over a year. To further encourage Nixon, his “systematic assault” appeared vindicated when he was reelected by a 520-18 electoral margin.

Nixon actually hit his first major stumbling ground with the publication of the Pentagon Papers and the resulting highly publicized 1973 trial. *The Pentagon Papers* were a compilation of US government documents detailing the United States’ political and military involvement, and pending failure in Vietnam. They reflected quite poorly

¹⁷¹ Dobrovir, W. A. (1974). *The Offenses of Richard M. Nixon : a guide for the people of the United States; bribery, and other high crimes and misdemeanors*. Washington: Public Issues Press, 38.

¹⁷² *Ibid*, 37.

¹⁷³ *Dean testimony 914, 957-59 before the Ervin Committee, interview with the president’s draftsman, Charles Houston. 93rd Cong., 1st-2nd Sess (1973).* .

¹⁷⁴ Dobrovir, W. A. (1974). *The Offenses of Richard M. Nixon : a guide for the people of the United States; bribery, and other high crimes and misdemeanors*. Washington: Public Issues Press, 44.

upon Nixon and his predecessors.¹⁷⁵ They show utter disregard for the loss of human life, both American and Vietnamese, and deep cynicism toward the public. They express the administration's awareness that the United States had very little chance of winning the war, and were intended to be strictly confidential within the State Department.¹⁷⁶ When one scrupulous government official, Daniel Ellsberg, felt the documents needed to come forward, he illegally submitted them to the *New York Times* for publication.¹⁷⁷ Within twelve days, Nixon had suspended publication of the documents, claiming that they were private classified government information and that their release would pose a national security threat. It is likely that Nixon did not want the papers released because of the negative political impact they would have had, but once again claimed national security interest. In fact, current scholarship indicates that Nixon only opposed the publication because he feared a trend in the press that would eventually expose his own personal misbehaviors.¹⁷⁸ Still, the *New York Times'* decision to continue printing these government assessments of the war, despite Nixon's opposition, was challenged by the White House. The Supreme Court ordered that the First Amendment allowed the *New York Times* to continue printing.

The White House responded again with legal retaliation. The Justice Department indicted Ellsberg and his collaborator, Anthony Russo, for theft and espionage.¹⁷⁹ In Ellsberg's highly-publicized trial, Nixon and his right-hand man, John Ehrlichman, sent the Plumbers to break-in to Ellsberg's psychiatrist's office and illegally obtain

¹⁷⁵ Lewis, A. (2004). *Inside the Pentagon Papers*. Lawrence, Kansas: University Press of Kansas.

¹⁷⁶ Herring, G. C., (Ed.) (1993). *The Pentagon Papers*. New York : McGraw-Hill.

¹⁷⁷ Salter, K. W. (1975). *The Pentagon papers trial*. Berkeley: Editorial Justa Publications.

¹⁷⁸ See e.g., Ellsberg, D. (2004). *Secrets: A Memoir of Vietnam and the Pentagon Papers*. New York: Viking, 423; and Lewis, A. (2004). *Inside the Pentagon Papers*. Lawrence, Kansas: University Press of Kansas, 76-7.

¹⁷⁹ Herring, G. C., (Ed.) (1993). *The Pentagon Papers*. New York : McGraw-Hill, xix.

information. This break-in proved crucial to the case when presiding Judge Byrne declared a mistrial, asserting that the evidence was illegitimate. Byrne stated that he likely would have accepted the information had it been legally obtained, and reprimanded the administration for dishonest evidence-gathering. Meanwhile, the press continued to increase its coverage of the White House, publicizing as much information about the scandal as it could.¹⁸⁰ This helped bring Nixon's illegal privacy-practices to the public eye.¹⁸¹ As a result, Nixon came to consider the press his enemy.¹⁸² Still, because publications exposing dirt on the administration generated such public interest, the press became increasingly aggressive in its coverage of government misdeeds. This had two key effects. First, it began to raise citizen distrust of the government. Second, it set the press on its path to persistently follow Watergate developments as they occurred based on the public's newly solidified right to know.¹⁸³ By the time Watergate details started to pour from the press, the increasingly distrustful public was particularly apt to absorb them. One scholar notes that *The Pentagon Papers* ordeal laid the foundation for Watergate. *The Pentagon Papers* "ushered in a new era of press militancy in which journalists would see their primary function as exposing government sins rather than simply reporting what government said and did. Indeed, it is possible that without *The Pentagon Papers* exposure of Watergate would not have occurred."¹⁸⁴ Thus, the resulting incident added yet another significant crack to the dam that held back privacy. Unbeknownst to anyone involved, it had but two years before it would breach entirely.

¹⁸⁰ Lewis, A. (2004). *Inside the Pentagon Papers*. Lawrence, Kansas: University Press of Kansas.

¹⁸¹ Dobrovir, W. A. (1974). *The Offenses of Richard M. Nixon : a guide for the people of the United States; bribery, and other high crimes and misdemeanors*. Washington: Public Issues Press, 34-6.

¹⁸² Lewis, A. (2004). *Inside the Pentagon Papers*. Lawrence, Kansas: University Press of Kansas, 75.

¹⁸³ *Ibid*, 188.

¹⁸⁴ Herring, G. C., (Ed.) (1993). *The Pentagon Papers*. New York : McGraw-Hill, xix.

The Media

Fueled by the *Pentagon Papers* scandal, the press publicized the administration's privacy violations with increasing fervor. But even before the scandal arose, the press had increased its coverage of privacy-related events. Interestingly, *Life* magazine and the *Washington Post* were involved with illegal wiretapping. Investigative reporters used private taps to further their own ends, though they still published stories on the government's eavesdropping and illicit use of wiretaps.¹⁸⁵ Results from the *New York Times* study discussed in Chapter 3 tell a great deal about privacy post-1970. While the content of the articles increased gradually in depth and substance between 1965 and 1970, frequency, length, and focus of coverage exploded in 1970, as seen in Graph 3.1. Of the 47 total front page references to privacy, 41 (93.6 percent) of them occurred in 1970 or later. The articles became focused on privacy or the "right to privacy," rather than merely mentioning it. As indicated in the graph below, the number of citations or abstracts containing the word "privacy" nearly doubled between 1965 and 1975. Similarly, the number of articles with the phrase "right to privacy" or "right of privacy" in the abstract or citation more than tripled between 1965 and 1975, but increased by more than 3.5 times between 1970 and 1975.

Privacy coverage reached an all time high immediately following *Stanley*, but dipped into the lowest it had been since 1966. Coverage rebounded in 1971 when the Court issued four privacy-centered holdings. The number of privacy-related articles rose again most dramatically between 1971 and 1973, during the *Pentagon Papers* scandal. In fact, 63 percent of front page articles occurred in or after 1972. At the end of the scandal, the militant press also published Watergate-related information as soon as it could. With

¹⁸⁵ Lasky, V. (1977). *It didn't start with Watergate*. Boston: EP Dutton.

such information coming to the limelight, the public was primed to receive the *Roe* opinion when the Court handed it down in 1973.

Post-1970 press attention increased social and political awareness of reproductive and marital privacy, particularly in the months leading up to and immediately following *Roe*. As limitations on abortion were much more easily enforced than those regulating sexual conduct behind closed doors, it seems logical to assume that people felt their sexual privacy rights were in jeopardy. In addition to piquing public interest on reproductive privacy, post-1970 press attention began to increase political awareness and public attention about information and technology privacy, likely because the common citizen had few other outlets to learn about these issues. Whereas the elite and the government were engaged in a privacy dialog before 1970, general public awareness and activity likely increased along with press attention.

Table 4.1—*New York Times* Privacy Coverage per Quarter: 1970-1974

Quarter	Number of Articles with “Right to Privacy” or “Right of Privacy” in text	Number of Articles with “Right to Privacy” or “Right of Privacy” in Citation or Abstract	Number of Articles with “Privacy” in abstract or citation
Jan-Mar 1970	25	0	7
Apr-Jun 1970	12	0	11
Jul-Sep 1970	18	1	6
Oct-Dec 1970	20	0	6
Jan-Mar 1971	35	1	17
Apr-Jun 1971	39	3	9
Jul-Sep 1971	12	0	5
Oct-Dec 1971	39	0	16
Jan-Mar 1972	47	2	15
Apr-Jun 1972	27	1	7
Jul-Sep 1972	44	3	18
Oct-Dec 1972	49	0	11
Jan-Mar 1973	38	5	24
Apr-Jun 1973	28	1	16
Jul-Sep 1973	25	0	22

Oct-Dec 1973	14	1	15
Jan-Mar 1974	44	6	18
Apr-Jun 1974	46	8	32
Jul-Sep 1974	36	3	15
Oct-Dec 1974	39	4	17

Congress and the Public

Congressmen and their staffs also played a vital role in the dissemination of truths about privacy, developing an increasing interest in regulating governmental privacy intrusions. Leadership in these movements came from chairs of myriad congressional committees and subcommittees. In the Senate, Senator Sam J. Ervin, Jr. (D.—NC) led the brigade because of the thousands of complaints that he, as committee chair, received on a range of issues, “including polygraphs, background checks, and census questions.”¹⁸⁶ In 1970, he initiated a four-year study on government information banks of private personal information.¹⁸⁷ Senator Ervin also chaired the most prominent and persistent privacy committee, known as the Subcommittee on Constitutional Rights. Ervin dedicated the committee’s work to provide “the first public forums for an incipient privacy community” in 1971. He responded both to concerned citizens and because he recognized the need for a legislative body to take charge of the issue and make the public aware of government activities.

In building congressional support for legislation, Senator Ervin acknowledged the importance of providing detailed information on agency practices and their effects on individuals. The thousands of complaints that the subcommittee received increased Senator Ervin’s commitment to the issue. He also routed the complaints of citizens to the senators who represented them, which worked to broaden the Senate’s interest in and concern about the federal government’s information practices.¹⁸⁸

¹⁸⁶ Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press., 204.

¹⁸⁷ *Ibid*, 74.

¹⁸⁸ *Ibid*, 191.

The Ervin Committee study found more than 858 data banks in 54 agencies containing more than 1.25 billion files on individuals.¹⁸⁹ Ervin's committee made these findings public, which assuredly provoked informed citizens. As indicative of the new mood developing on Capitol Hill, Congress passed the Fair Credit Reporting Act of 1971 which established that an individual should be informed of the "nature and substance" of information held about him and could amend the information to ensure its accuracy.¹⁹⁰

This public activity grew from a latent to a real interest in privacy, where the now informed public was no longer willing to passively stand by.¹⁹¹ Growing elite public interest and key behind-the-scenes participants in formation of these subcommittees aided the trickle-down to the general public. People like Alan Westin, director of Washington, D.C.'s branch of the ACLU Privacy Committee, Hope Eastman, Arthur Miller, and Ervin's Subcommittee staff were all critical in making the elite discourse general public knowledge.¹⁹² As the discourse filtered from the elites to the common citizen, a policy community of citizens and legislators began to form, calling for (but not yet demanding) specific regulations.¹⁹³

When they began to arise in the 1960s, privacy policy issues did not fit easily into the existing policy subsystem. Within a policy subsystem, one scholar argues, is an established community of specialists, "researchers, congressional staff, interest-group

¹⁸⁹ Holden, C. (1975). Privacy: congressional efforts are coming to fruition. *Science*, 188(4189), 714.

¹⁹⁰ Fleet, G. A. V. (1976). Judicial construction of the Fair Credit Reporting Act: cope and civil liability. *Columbia law review*, 76(3), 80.

¹⁹¹ Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press.

¹⁹² Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press..

¹⁹³ *Ibid*, 18.

advocates, academics, and government analysts.”¹⁹⁴ But because privacy was such a fresh issue in American discourse, it was too new to have an established subsystem and was too amorphous to warrant enforceable, overarching regulations. Therefore, new systems had to be developed. Two types of policy systems emerged from this gap in privacy support. One core policy community began with interest in “general privacy issues” and existed alongside other “specialized privacy communities, or advocacy coalitions,” which were concerned with specific aspects of privacy. The two types of communities worked with legislators by formulating position papers and policy alternatives, discussing ideas, holding meetings to develop consensus, and drafting legislative proposals to create enforceable privacy regulations.¹⁹⁵ Also because the privacy issue was so new, many individuals with diverse perspectives and ideas came together to put further pressure on Congress to regulate privacy.¹⁹⁶ This activity portended the flood.

The Citizens’ Commission to Investigate the FBI, the most prominent leftist activist group, took a stand against FBI wiretapping. In 1971, several members broke into a Pennsylvania FBI office and absconded with over 1000 classified documents detailing the FBI’s involvement in the Cointelpro operation. They mailed the documents anonymously to several major American newspapers. While many newspapers declined to publish the Commission’s findings, WIN Magazine, a journal associated with the War Resisters League published the documents in their entirety in 1972. The press and public were outraged, and demanded a change.¹⁹⁷

¹⁹⁴ Kingdon, J. W. (1995). *Agendas, alternatives and public policies*, New Jersey: Addison-Wesley Educational Publishers, 122-28.

¹⁹⁵ Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press., 20.

¹⁹⁶ *Ibid*, 20-1.

¹⁹⁷ Cunningham, D. (2003). The patterning of repression: FBI counterintelligence and the new net. *Social Forces*, 82(1), 209-240.

Also in 1972, two important studies were published for citizen consumption. First, Alan Westin and Michael Baker wrote *Data Banks in a Free Society*, pointing out the computer's new capabilities and calling for new legislative, administrative and judicial measures to "define and assure rights of privacy and due process."¹⁹⁸ The study highlighted profiles of governmental, commercial and private organizations that keep information records on citizens. It also discussed public policies necessary to keep up with burgeoning technology and amplified suspicion and curiosity.¹⁹⁹ The second study, *Records, Computers, and the Rights of Citizens*, sponsored by the US Department of Health, Education and Welfare and conducted by the Secretary's Advisory Committee on Automated Personal Data Systems, recommended that record-keeping organizations, particularly governmental ones, adhere to five fundamental principles of "fair information practices" as outlined in the FOIA. This statement of principles gives us a measure of the thinking at the time. The principles were first that there must be no personal data record-keeping systems whose very existence is secret; second that there must be a way for an individual to find out what information about him is in a record and how it is used; third that there must be a way for an individual to prevent information about him that was obtained for one purpose from being used or made available for other purposes without his consent; fourth that there must be a way for an individual to correct or amend a record of identifiable information about him; and fifth that any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take precautions to

¹⁹⁸ Project on Computer Databanks, Westin, A. F., & Baker, M. A. (1972). *Databanks in a free society; computers, record-keeping, and privacy; report*. New York Quadrangle Books.

¹⁹⁹ *Ibid.*

prevent misuse of the data.²⁰⁰ In short, these principles emphasized a particular “right to know” relationship between the citizen and the government. Essentially, trends demonstrated Congressional insistence that the public had both a right to know what the information the government kept and a right to ensure its accuracy. Congress took these regulations very seriously, as they would appear in several pieces of later legislation.

In response to this legislative and public pressure, the FBI ceased its Cointelpro operation, and the Federal Establishment of Wiretapping Jurisdiction—the single most significant privacy invader—cut its wiretap usage by 25% (from 281 wiretaps in 1971 to 210 in 1972,) and again by 35% (from 210 wiretaps in 1970 to 130 wiretaps) between 1972 and 1973. Combined, from 1971-1973, the central federal wiretapping agency cut its wiretap usage by over 50%.²⁰¹

Conclusion

This rapid, substantial decrease in federal privacy intrusion was no small affair. Not only did it exemplify a marked increase in federal valuation of citizens’ privacy, but it indicated the effectiveness of Congress and the press to produce results. Whether the push came from the legislature or the press and eventually the public, things began to change. Pressure came from Congress, which relentlessly investigated federal government privacy infringements. By forming numerous committees and holding hundreds of hearings to find out the truth, it began taking the necessary steps to solve the privacy problem. Likewise, the press took great interest in publicizing as much

²⁰⁰ United States. Dept. of Health, Education, and Welfare. (1973). *Records, computers, and the rights of citizens; report*. Washington U.S. Dept. of Health; for sale by the Supt. of Docs: Education & Welfare; U.S. Govt. Print. Off., 41.

²⁰¹ Chief Justice Earl Warren Conference on Advocacy in the United States. (1974). *Privacy in a free society : final report : annual Chief Justice Earl Warren Conference on Advocacy in the United States, June 7-8, 1974*. Cambridge, Mass: Roscoe Pound-American Trial Lawyers Foundation, 47.

governmental privacy activity as it could find, relating to the federal privacy invaders, Congress and the Court. Gradually, the information from Congress and the press began to filter down to the American public, still remaining largely in an elite discourse but slowly gaining salience in the general public. By 1973, the combination of Congressional pressure and increasing public awareness left privacy with little chance of remaining in the deeper areas of the American mentality. It would soon come to the forefront of American legal, social and political thought, demanding regulation and protection.

Chapter 5: The Flood of 1973

With pressure mounting from multiple directions, the government, and the media all made American society more attuned to privacy and contributed to growing public sensitivity toward the new public issue. In 1973, two seemingly unrelated events provided the pressure that enabled an all-inclusive privacy discourse. Not only did both of these events involve privacy, but they incorporated numerous other issues that gained them national salience. They each included discussions of federalism and deviance, which brought additional attention to their inherent privacy debates. First, the Court handed down its opinion for *Roe v. Wade* (1973), which returned privacy to the forefront of legal thought, this time with significant press and public attention. It made a clear statement about reproductive privacy and the fundamentality of the privacy right. This time, it was not criminals' and deviants' privacy that was under siege; the privacy of everyday women was also in jeopardy of being officially denied by the federal government. Wherever it could be found in the Constitution, the Court argued, privacy encompassed the right to an abortion.

Second, the Watergate scandal enabled rapid dissemination of news about information privacy invasions. While governmental privacy intrusion was easily overlooked by the average non-newspaper reading citizen, the Watergate scandal brought awareness of government misdeeds to nearly everyone. Though Watergate did not violate the average citizen's privacy, it prompted a public loss of trust that even the White House was no longer capable of discretionary power.²⁰² Once the public has lost trust in the administration, it was primed to absorb news of governmental privacy invasions.

²⁰² Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press.

Any average American could have been under the executive looking glass, and because of Watergate, every average American was aware of that fact. The White House's misdeeds made the public vulnerable so that when Congress disseminated its committee findings and the press publicized what the government was doing, people were finally ready to believe it.

It is no surprise that the separate interpretations of privacy, one regarding sexuality and the other regarding information, affected different behaviors in the Court and Congress. Interestingly, though, the two also complemented one another. Where Congress lacked in its coverage of reproductive privacy, the Court took over. And where the Court neglected to deal with information and technology privacy, Congress excelled. Whichever direction an inquiring citizen looked, whether toward the Court or toward the legislature, privacy was there; it was virtually unavoidable. Because of multiple-fold activity from two different branches of government about two dissimilar areas of privacy, which gave privacy extreme vitality in many areas of society, Congress was highly pressured to actually protect privacy. At last, privacy could be broken down into its component parts—reproductive, criminal, and informational—to the point that each part could be regulated. As a result of its Watergate and *Roe v. Wade*, the privacy dam, which resulted from confused inaction toward the right, crumbled. Between 1973 and mid-1974, Congress proposed (but did not pass) hundreds of pieces of privacy legislation, the press tripled its coverage of a range of privacy issues, the public engaged in the civic discourse.²⁰³ The President echoed this activity in his speeches and calls for legislation. In an effort to pass a comprehensive and satisfying piece of legislation in the term

²⁰³ Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press.

following *Roe* and Watergate, Congress hastily passed the Federal Privacy Act on December 31, 1974.

Table 5.1—Timeline of Relevant Events

October 11, 1972	<i>Roe v. Wade</i> oral arguments
January 22, 1973	<i>Roe v. Wade</i> decided
January 30, 1973	Former Nixon aides G. Gordon Liddy and James McCord Jr. convicted of conspiracy, burglary and wiretapping in Watergate incident
April-October, 1973	Nixon's top White House staffers, H.R. Haldeman and John Ehrlichman, and Attorney General Richard Kleindienst resign over Watergate, others are fired
May 11, 1973	Ellsberg trial dismissed
June 3, 1973	Nixon officials tell Watergate investigators that he discussed the Watergate cover-up with President Nixon at least 35 times
July, 1973	The Department of Health, Education, and Welfare publishes <i>Records, Computers and the Rights of Citizens</i>
July 23, 1973	Nixon subpoenaed to relinquish Oval Office tapes
January 30, 1974	Nixon gives editorializing State of the Union address urging privacy protections
February 2-3, 1974	Ervin and Department of Justice introduce two proposals to protect privacy
March, 1974	National Bureau of Standards holds privacy conference
July 9, 1974	Annual Chief Justice Earl Warren conference held on privacy
August, 1974	Nixon resigns
November 21, 1974	House and Senate override President Ford's veto and pass the FOIA amendments
Dec 11-22, 1974	Senate and House pass versions of the Privacy Act
December 31, 1974	Finalized Privacy Act passes

Roe v. Wade

When the Court handed down its opinion for *Roe v. Wade* in January of 1973, it was an outlier for three reasons. First, it was riddled with highly controversial and divisive content. Also, it threatened to close the door, federally, on privacy of not criminals and deviants, but of everyday wives and daughters. For those who were willing to ignore the Court's previous privacy decisions because they had no commonplace

applicability, privacy finally began to have bite. Unconcerned that the Court was not willing to frame the rights of a sexual deviant or a murderer, as privacy issues applied to all women, the public suddenly took interest. Last, though the Court previously hinted at a birth of a comprehensive concept of privacy, it was at last willing to extend the right in *Roe*. Not only did it acknowledge the right, but it neglected to grapple with the right's origin and scope. Because *Roe* was an anomaly, its deviation from Court norms compiled with its inflammatory content generated heavy publicity. It left political and academic elites with a feeling of incompleteness.²⁰⁴ After the Court acknowledged that the ethereal privacy right subsumed the right to an abortion, which was a narrowly-tailored and quite specific statement, it could have brought to light the myriad vacancies in privacy recognition. Put differently, though the Court acknowledged that privacy itself could be broad, it only applied it to one specific issue. This narrow view could have brought attention to a vacancy in the privacy right that was still unprotected.

Because it was an unclearly established point, *Roe* was highly divisive and unsatisfying to both sides. One scholar notes that Americans “on both sides of the issue were astonished by the decision,”²⁰⁵ in the sense that neither side found the legal precedent it sought in *Roe*. *Roe* encouraged everyone, pro or anti-legalization, to have an opinion, those opposed to abortion rejected the notion that the opinion was just or fair, and those that supported abortion worried that the decision was legally unsound. One scholar notes that the heart of *Roe*'s resulting public debate revolved around the fact that

²⁰⁴ Ely, J.H. (1973). The wages of a crying wolf: a comment on *Roe v. Wade*. *Yale law journal*. 82(5), 920, 940-43.

²⁰⁵ Faux, M. (1988). *Roe v. Wade : the untold story of the landmark Supreme Court decision that made abortion legal*. New York: Macmillan, 304.

the abortion right was grounded in the larger “more encompassing privacy rights.”²⁰⁶ Though anti-abortionists would have embraced privacy if it helped to protect a right to school prayer, for example, they charged that the Court had “overstepped its bounds” and created a new right that did not exist anywhere in the Constitution. “Nowhere in the Constitution, they insisted, was there anything—neither a word nor a phrase—to suggest a right of privacy and by association the right to abortion....”²⁰⁷ Interestingly, as the pro-life contingent came to realize that it also supported the privacy right as applied to school prayer and information privacy, it also rescinded its argument that privacy did not exist. Instead, they reluctantly accepted the privacy argument, stating that it still did not encompass the right to an abortion. One scholar notes that the *Roe* debates veered away from the privacy realm and became purely about abortion. “As for justification of the privacy right, advocates claimed that privacy, like liberty, ran throughout the Constitution rather than being located in any one place within it... Beaten back by the fact that most Americans wanted to believe in a right to privacy, antiabortionists argued that abortion was still not about privacy.”²⁰⁸

Despite that it had been clouded by debate about the rights of the fetus, the main issue remained one of a woman’s right to privacy. The president of the Planned Parenthood Federation of America, Dr. Alan Guttmacher, who framed the debate with privacy as its foundation, hailed the ruling as “a wise and courageous stroke for the right of privacy....”²⁰⁹ Those who had lost sight of the key issue and looked at *Roe* as an abortion case rather than a privacy case were quickly reminded that *Roe* was indeed a

²⁰⁶ *Ibid*, 305.

²⁰⁷ *Ibid*, 307.

²⁰⁸ *Ibid*, 307-9.

²⁰⁹ Craig, B. H. & O’Brien, D.M. (1993). *Abortion in American politics*. Chatham, New Jersey: Chatham House Publishers, 32.

case securing the right to privacy in Constitutional thought. *Roe* had made its mark. “Allegiance to the privacy precedent established in *Griswold* and solidified in *Roe* became ‘a litmus test for membership in the ‘mainstream of constitutional thought.’”²¹⁰ It had been “enshrine[d]...as a ‘fixed star in our constitutional firmament.’”²¹¹ Once the Court audaciously declared privacy a fundamental right, the least dangerous branch perhaps unknowingly opened the doors for *Roe v. Wade*, which would become one of the twentieth century’s most socially and politically divisive and mobilizing cases. Due to its highly controversial nature, coverage of several legal issues, and deviation from Court trends, it gained remarkable publicity for the privacy discussion. This publicity helped push privacy into the mainstream of American discourse.

Watergate Breaks and the Water Gate Breaks

Meanwhile, in the White House, Nixon was reveling in his 1972 election victory and the apparent success of the Watergate cover-up. As a trend that would eventually lead to his political demise, though, “leaks...became the order of the day.”²¹² These leaks became so severe that the privacy dam had little chance of survival. The well-known tale glorifies the *Washington Post*’s Bob Woodward and Carl Bernstein for publishing information about Watergate from a White House official who called himself Deep Throat. Not only did they publicize, but they played a key role in initiating Watergate coverage in other areas.²¹³ They regularly published news of the Watergate

²¹⁰ Barteo, A. F. (2006). *Privacy rights : cases lost and causes won before the Supreme Court*. Lanham, Md: Rowman & Littlefield Publishers, 205

²¹¹ Garrow, D. J. (1994). *Liberty and sexuality : the right to privacy and the making of Roe v. Wade*. New York; New York: Macmillan Pub. Co., 672

²¹² Ball, H. (2002). *The Supreme Court in the intimate lives of Americans : birth, sex, marriage, childrearing, and death*. New York: New York University Press, 16.

²¹³ Woodward, B., & Bernstein, C. (2005). *The secret man : The story of Watergate's Deep Throat*. New York: Simon & Schuster

cover-up, and influenced other press members to do the same. Such adamant press coverage further contributed to the changing public mood toward the administration. Beginning with the *Pentagon Papers* scandal and continuing through Watergate, the public's trust in the government greatly declined,²¹⁴ making it more susceptible to further coverage of privacy intrusions.

In June 1973, CREEP officials L. Patrick Gray and James McCord testified before the Senate Judiciary Committee tying high-ranking White House officials to the Watergate break-in. Their testimonies blew the cover on the Watergate cover-up. Leading newspapers finally caught up with Woodward and Bernstein, printing daily articles tying increasingly high-ranking White House officials to the scandal. Later that year, three of Nixon's closest officials resigned, and John Dean made public the president's involvement in Watergate. Within months, a grand jury subpoenaed Nixon to relinquish the tapes taken of his Oval Office conversations.²¹⁵ This was the beginning of the end for President Nixon but was just the beginning for privacy's life in the United States.

The instant that speculation of a Watergate scandal came to the public eye, President Nixon changed his public stance on privacy. While he previously opposed citizens intruding on other citizens' privacy, it was not until he was in danger of being exposed that he took any serious action to legally protect individuals' rights to privacy from government intrusions. In his 1974 State of the Union address, Nixon championed privacy.

²¹⁴ Lang, G. E. & Lang, K. (1980). Polling on Watergate: The Battle for Public Opinion, *The Public Opinion Quarterly. Polls and the News Media: A Symposium*. 44(4). 530-547.

²¹⁵ Ball, H. (2002). *The Supreme Court in the intimate lives of Americans : birth, sex, marriage, childrearing, and death*. New York: New York University Press..

One measure of a truly free society is the vigor with which it protects the liberties of its individual citizens. As technology has advanced in America, it has increasingly encroached on one of those liberties--what I term the right of personal privacy. Modern information systems, data banks, credit records, mailing list abuses, electronic snooping, the collection of personal data for one purpose that may be used for another--all these have left millions of Americans deeply concerned by the privacy they cherish.

And the time has come, therefore, for a major initiative to define the nature and extent of the basic rights of privacy and to erect new safeguards to ensure that those rights are respected.

I shall launch such an effort this year at the highest levels of the Administration, and I look forward again to working with this Congress in establishing a new set of standards that respect the legitimate needs of society, but that also recognize personal privacy as a cardinal principle of American liberty.²¹⁶

Though he found the idea ideologically compelling, perhaps Nixon had such a difficult time respecting privacy in practice because he sought to gain quite a lot from spying. Most likely, Nixon wanted to support the right against privacy intrusions from everyone but himself. He called for legislation and publicly condemned governmental snooping but continued to snoop himself. Though it would be difficult to isolate what caused the shift in his stance, there are two possible motivating factors. First, it is possible that he translated his desire to protect himself from further governmental intrusions into his private behavior into a desire to protect all citizens from governmental intrusions. Or, perhaps Nixon shifted his opinion in a last-ditch effort to regain the public's trust and affection. Regardless of why Nixon changed his stance, as speculation turned into fact, the righteous Senator Ervin started a committee on Presidential Campaign Activities, also known as the Watergate Committee, to investigate and publicize Nixon's indiscretions. Also by the time of Watergate, the pressures on the FBI would be too significant for it to avoid a full disclosure about its illegal activities with the

²¹⁶ Richard Nixon's Address on the State of the Union Before a Joint Session of Congress. Delivered January 30, 1974. Available at <<http://www.presidency.ucsb.edu/ws/index.php?pid=4327>>.

President to Congress. The Second Article of Impeachment, “Improper Use of Intelligence Agencies,” made available every unseemly detail about Nixon’s romp with the FBI that the public did not already know.²¹⁷ Still, it would take Congress and the courts the next year to organize their approach to the Watergate issue. Nixon continued the presidency as normal, with privacy as a new cause. Still, the momentum from more than a decade of build-up pushed privacy to a point of no return.

The Flood

Privacy flooded the press in January 1974, perhaps in response to President Nixon’s incendiary State of the Union address drawing attention to the need for more privacy protections and the Watergate scandal.²¹⁸ Prior to the 1974 peak, it appears that spikes in *New York Times* coverage of privacy issues are largely Court related; they covered Court cases and subjects as they became relevant. Interestingly, between 1972 and 1975, only 9 of the 34 articles with “privacy” in the citation or abstract mentioned Watergate somewhere in the document text. In other words, only about ¼ of the articles the *New York Times* wrote about privacy were explicitly connected to Watergate. This low number of articles linking Watergate and privacy indicates that press interest in privacy developed independently from but simultaneously with the Watergate. But the spike in privacy-related articles during this time indicates an overall growing interest in

²¹⁷ Keller, W. W. (1989). *The liberals and J. Edgar Hoover : rise and fall of a domestic intelligence state*. Princeton, N.J: Princeton University Press, 115.

²¹⁸ Richard Nixon’s Address on the State of the Union Before a Joint Session of Congress. Delivered January 30, 1974. Available at <<http://www.presidency.ucsb.edu/ws/index.php?pid=4327>>.

the issue. This further supports that Watergate fueled interest in privacy but did not become tangled in the privacy discourse. By 1973, privacy had a “life of its own.”²¹⁹

A flood of congressional interest in the privacy issue also surged after the FBI came forward and Watergate became household information. Committees that had no prior interest in privacy dedicated at least some of their work to investigating and attempting to regulate privacy. Some of these committees included the Joint Committee on Atomic Energy, Senate Appropriations Committee, Senate Armed Services Committee, Preparedness Subcommittee to the Armed Services Committee, Senate Judiciary Committee, House Judiciary Committee, Senate Committee on Labor and Public Welfare, Subcommittee on Labor Management Relations of the Senate Committee on Labor and Public Welfare, Senate Foreign Relations Committee, and the Senate Subcommittee on Internal Security. All the different committees interested in privacy were having difficulty coordinating schedules for hearings and meetings. Rather than consolidating their efforts, then, they published many different reports with similar findings. This explosion of published revelations disturbed the public and mobilized a broader range of supporters. Ervin’s committee and Gallagher’s committee actually “competed for ownership of the privacy issue,” which further publicized congressional interest.²²⁰ Hearings also made public the human-interest stories and anecdotal accounts of privacy invasions, which made them newsworthy. The publicized human element made issues more real to the public. They also inclined the public to take the side of the individual over the societal benefits of information gathering. The Department of Health, Education, and Welfare published *Records, Computers, and the Rights of Citizens*, a key

²¹⁹ Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press.

²²⁰ *Ibid*, 204.

study on privacy and technology. It held that even though technology had exploded during the 1970s, it was not the culprit; it merely gave agencies a more convenient method to catalog information on citizens.²²¹ This suggestion likely converted anyone who still blamed privacy intrusions on technology to the alternative frame that the people in power were abusing the technological advancements. By this time, the public was fully mobilized to participate in the democratic process by writing congressmen and participating in the civic discourse.²²²

Proposals for privacy protections emerged from all imaginable corners of Congress. In fact, the Nineth Congress came to be called the ‘Privacy Congress,’ principally because of the vast number of bills introduced between 1973 and 1974. Congress discussed approximately 250 bills relating to the Omnibus and the Fair Credit Reporting Acts, criminal justice information, bank records, and wiretapping.²²³ The Privacy Congress enacted two major privacy statutes— the Family Educational Rights (the Buckley Amendments) and Privacy Act of 1974. At its most basic level, nearly all proposed legislation called for citizens to know when and if information was held on them. Nearly as many would have required that citizens could access the information held about them and check it for accuracy. From there, some bills called for federal oversight, others called for state agency protection, and others still would have formed personal citizens’ committees to monitor information practices. Congressional studies found that the variance between various privacy policies were frequently crosscutting or

²²¹ Ware, W. H. (1973). *Data banks, privacy, and society*. Santa Monica, Calif: Rand Corp.

²²² Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press, 207.

²²³ Larsen, K. S., Domestic Council (U.S.) Committee on the Right of Privacy, Council of State Governments, & Seminar on Privacy, Washington, D.C. (1976). *Privacy, a public concern : a resource document based on the proceedings of a Seminar on Privacy sponsored by the Domestic Council Committee on the Right of Privacy and the Council of State Governments*. Washington: U.S. Govt. Print. Off., 80.

contradictory, rendering them ineffective. These conflicts necessitated the attempt at a nationalized privacy policy.²²⁴

Realizing this, Nixon worked even harder for such a policy. In his 1974 State of the Union address, Nixon called for a “major initiative” to safeguard individuals’ “rights of privacy.” Less than two days later, the Justice Department jumped forward with a proposal for a feasible bill. Senator Ervin came forward with an even more restrictive bill. The Department of Justice bill would have required that citizens could review the information held about them, check it for accuracy, and sue anyone who improperly disclosed it. The proposal would also have required that personal records be sealed after a certain time period. Ervin’s bill went one step further. He proposed to place the entire criminal justice data system under the supervision of a nine-man board. While neither bill passed in its entirety, each had bi-partisan sponsorship and contained principles the majority of congressmen could support.²²⁵

By early-1974, privacy had both exploded in American discourse and become a bi-partisan concern. At the National Bureau Standards Conference in March of 1974, Congressmen gathered to discuss a national privacy policy. As the participants noted, the purpose of the conference was to enact action-oriented programs which would ease “the problems of data confidentiality and computer security.”²²⁶ Congressman Edward I. Koch (D-NY) said, “If there is any legislation that I believe requires the support of everyone...it’s legislation to ensure the right of privacy.” Congressman Barry M.

²²⁴ O'Brien, D. M. (1979). *Privacy, law, and public policy*. New York: Praeger Special Studies, 206.

²²⁵ Bouchard, R. F., and Franklin, J. D. (1980). *Guidebook to the Freedom of information and Privacy acts*. New York, N.Y: C. Boardman Co.

²²⁶ Renninger, C. R., & United States. National Bureau of Standards. (1974). *Approaches to privacy and security in computer systems; proceedings of a conference held at the National Bureau of Standards, March 4-5, 1974*. Clark R. Washington National Bureau of Standards; for sale by the Supt. of Docs., U.S: Govt. Print. Off., xi.

Goldwater, Jr. (R-CA) also urged congressional action toward a nationalized privacy statute. After the conference, Congressmen Koch and Goldwater co-sponsored a new bill, HR 14163, to define information practices to protect personal data files held by both the government and the private sector.²²⁷

Later on June 7-8, 1974, at the Annual Chief Justice Earl Warren Conference on Advocacy in the United States, scholars, former law enforcement officers and organization leaders of all political persuasions gathered to discuss protection from governmental intrusions on personal privacy. Just two months after the National Bureau of Standards Conference, privacy conferences had become commonplace. At this gathering, the conferees concurred that the most basic “informational” privacy a person can have is control over the “collection and use of personal information about themselves.”²²⁸ They agreed that no type of governmental electronic eavesdropping or information gathering should be allowed without a warrant. “A substantial majority recommended that no surveillance for intelligence purposes be permitted.”²²⁹ The conference almost unanimously agreed on two recommendations to the government, asserting that it should not be allowed to continue its current practices.

[First,] every government agency should be barred from collecting any data concerning political activity, association, or expression—protected under the First Amendment—and should destroy any such data now in existence in both legislative and executive agencies. [Second] there should be no use and placement of a human agent for surreptitious surveillance, except upon court order based on probable cause and subject to the same restraints and restrictions

²²⁷ Renninger, C. R., & United States. National Bureau of Standards. (1974). *Approaches to privacy and security in computer systems; proceedings of a conference held at the National Bureau of Standards, March 4-5, 1974*. Clark R. Washington National Bureau of Standards; for sale by the Supt. of Docs., U.S: Govt. Print. Off., viii.

²²⁸ Chief Justice Earl Warren Conference on Advocacy in the United States. (1974). *Privacy in a free society : final report : annual Chief Justice Earl Warren Conference on Advocacy in the United States, June 7-8, 1974*. Cambridge, Mass: Roscoe Pound-American Trial Lawyers Foundation, 28.

²²⁹ *Ibid*, 10.

as the use and employment of the surreptitious electronic eavesdropping devices and techniques now provided for by the Omnibus Crime Bill.²³⁰

Clearly these concerns arose out of fears that the government would continue to intrude in the way it had over the last fifteen years. Interestingly, many conferees did not wish to extend stringent privacy protections to criminals,²³¹ implying that only people not deserving of the fundamental right to privacy were criminals and deviants. As they made no mention of law-abiding women or intimate privacy, for example, we are to assume that the conference favored privacy protections for everyone else. As a result, by late 1974, the government used wiretaps to eavesdrop on little more than gamblers and criminals. This drop in government snooping was not enough to keep Richard Nixon from resigning the presidency in August of 1974. Though a less aggressive Gerald Ford took Nixon's place, the privacy issue had gained such force in society that nothing could stop the insurgence of privacy activity.

The Court's responsibilities for issuing the warrants and hearing the claims of invasion of privacy and illegal surveillance gave it a key role in these discussions. This conference stated that the government was to assume there was enough evidence to convict a person before installing the tap. The courts were therefore hesitant to convict people charged using illegally-obtained evidence. Less than 1/3 of illegal taps resulted in a conviction, even though they supplied incriminating evidence, which indicates that courts were acquitting people that would likely have been found guilty without illegally-

²³⁰ *Ibid*, 21-2.

²³¹ *Ibid*, 32.

obtained tap evidence.²³² Even so, the Court remained focused largely on reproductive/marital privacy and citizens' privacy protections from other citizens.

In response to mounting pressure from all areas of society, Congress took two steps to protect individuals' rights to privacy from the government. First, it updated the FOIA, overriding President Ford's veto, and second, it proposed the Federal Privacy Act of 1974. The 1974 version of the FOIA and the Privacy Act demonstrated a congressional attempt to balance an individual's right of privacy with the preservation of the public's right to Government information.²³³

In an effort to pack privacy legislation into 1974, on December 31, Congress passed the Privacy Act of 1974. *Records, Computers, and the Rights of Citizens* and the FOIA's "five points" provided the initial framework for the Privacy Act. After extensive hearings in both chambers, both the Senate and the House passed the bill. Because Congress passed the Privacy Act in such haste, it was highly problematic. First, the House of Representatives and the Senate passed two different versions of the bill, whose differences included the creation of a Privacy Protection Study Commission, rule-making processes, damage recovery policy, standards for data collection, and provisions for mediating conflicts between the FOIA and the Privacy Act.²³⁴ Members of the House and the Senate compromised, and legislation was signed into action on December 31, 1974. Interestingly, the final version of the bill did not actually protect an individual's "right to be let alone." It instead gave a citizen access to the information held about him and a degree of power to change that information. The Privacy Act recognized that, while the government was still entitled to hold information on citizens, it should do so in

²³² *Ibid.*, 47-8.

²³³ O'Brien, D. M. (1979). *Privacy, law, and public policy*. New York: Praeger Special Studies, 206.

²³⁴ The Privacy Act of 1974. Congress S. 3418, and Congress H.R. 16373. 93rd Cong. (1974).

a public and fair way. The Privacy Act also indicated that electronic eavesdropping violated the Fourth amendment, giving privacy roots in the Bill of Rights. While the Privacy Act grants individuals rights to access their own personal files kept by government agencies and to keep them from being disclosed except for the purposes of a case-specific investigation, the 1974 FOIA allows citizens to access all federal agency records. If a conflict between the Privacy Act and FOIA arises, for example when personal records protected by the Privacy Act are requested under FOIA, the conflict is reconciled by Section 552a(b)(2) of the Privacy Act, which gives the public's right to know precedence over its right to keep information secret.²³⁵ Yet despite its shortcomings and contradictions, the act most importantly declared: "The right of privacy is a personal and fundamental right protected by the Constitution of the United States."²³⁶

The Privacy Act was only the beginning. It created the Privacy Protection Study Commission to investigate its efficacy, and impact, and the need for further federal legislation.²³⁷ It also influenced the founding of numerous other Congressional committees to investigate the future of privacy in America, and spurred major journalistic interest, including the founding of *The Privacy Journal*.²³⁸ It also required each governmental agency to publish an annual notice describing each of its information-gathering systems, follow strict guidelines to protect subjects' information and alert the subjects of the information held on them and allow the subject to check for accuracy, and limit its record-keeping to "information necessary to accomplish an agency function

²³⁵ Rotenberg, M. (2001). *The privacy law sourcebook*. Chicago: EPIC Publications.

²³⁶ The Privacy Act of 1974. Congress S. 3418, and Congress H.R. 16373. 93rd Cong. (1974).

²³⁷ *Ibid.*

²³⁸ Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press., 193-4.

required by law or Presidential order.”²³⁹ In other words, Congress had taken many steps ensure that privacy intrusions would no longer plague the American system. The people would have their constitutionally, legally and statutorily protected rights to privacy. Privacy had become an institutionalized revolution.

Conclusion

It is clear that by the time the Privacy Act passed in 1974, the dam that held back the surge of privacy activity had crumbled. Privacy was no longer amorphous or overlooked in society. It was protected, supported, and talked-about. This was true not only with information and technology privacy, but with marital and reproductive privacy, as well. Interestingly, this protection resulted from a two-pronged push, both intentional and unintentional, for privacy legislation. One push stemmed from the Court, which specialized in criminal and reproductive privacy. The other stemmed from Congress, which concentrated on information and technology privacy; there was very little overlap between the two. The only overlap stemmed from debates about criminal justice issues, which Congress rarely linked back to privacy. The Congressional Record indicates that legislative interest in privacy revolved solely around information and technology privacy as understood from the lack of Congressional discussion about reproductive or marital privacy rights.²⁴⁰ Even in years in which the Court issued landmark privacy cases, Congress only discussed the right to informational privacy. During *Roe v. Wade*, Congress published absolutely no material pertaining to the Court’s version of privacy.

²³⁹ Larsen, K. S., Domestic Council (U.S.) Committee on the Right of Privacy, Council of State Governments, & Seminar on Privacy, Washington, D.C. (1976). *Privacy, a public concern : a resource document based on the proceedings of a Seminar on Privacy sponsored by the Domestic Council Committee on the Right of Privacy and the Council of State Governments*. Washington: U.S. Govt. Print. Off., 80.

²⁴⁰ Selections from Congressional Record Daily Digest, 88th-93rd Cong. (1965-74).

Government publications during the early 1970s dealt solely with issues of computer privacy, privacy of federal employees, banks, criminal justice, data banks, financial records, etc.,²⁴¹ but the House Subcommittees on Postal Operations and Postal Facilities and Mail did hold two hearings regarding sexually explicit or “obscene” information sent through the mail. This concern focused on the post and obscenity rather than the privacy, though.²⁴² Similarly, the Court rarely dealt with issues of information and technology privacy. Instead, it left those issues to Congress to regulate. The two disparate areas of privacy interest created gaps that the other could fill and combined to form an overarching and compartmentalized privacy that could easily be regulated.

We can attribute a portion of this somewhat surprising lack of overlap in approach to the different parties informing the Court and Congress. The set of interest groups that filed amicus briefs in cases like *Griswold v. Connecticut*, *Katz v. United States* and *Roe v. Wade* was largely distinct from the set of groups that testified to Congress in its committee hearings before it passed the Federal Privacy Act of 1974. The Court saw significant interest from state attorneys general in its privacy related cases, like *Griswold*, *Stanley v. Georgia*, and *Katz v. United States*, in addition to receiving briefs from many individual attorneys. In its abortion-specific cases, it received briefs from Planned Parenthood Federation of America, human rights organizations, religious organizations, and several medical associations.²⁴³ Congress, on the other hand, called upon technology innovators, experts, and individuals involved with governmental-sponsored spying to

²⁴¹ United States Government Publications Monthly Catalog, U.S. Government Printing Office, 1971-1976.

²⁴² United States Government Publications Monthly Catalog, U.S. Government Printing Office, 1971.

²⁴³ For example, amici included Human Rights for Women, Inc., the American Medical Association, American College of Obstetricians and Gynecologists, the American Ethical Union, the Right to Life Committee, etc. See e.g., *Roe et al. v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and *Katz v. United States*, 386 U.S. 954 (1967).

testify at its committee hearings.²⁴⁴ The American Civil Liberties Union was the only group appealing to both the Court and Congress. This lack of overlap reinforces the extent to which privacy was a fractured issue area. That different facets of privacy had different constituencies in society—pushing simultaneously, but pushing for different protections from different institutions. As the press and public joined the debate, they added particular voices and emphases to the deliberations in Congress. With pressure mounting, Congress had little choice other than to pass something, but the specifics may have been less certain.

²⁴⁴ Congressional Record, 93rd Cong. 1st- 2nd sess. (1974)

Chapter 6: Conclusions and Implications

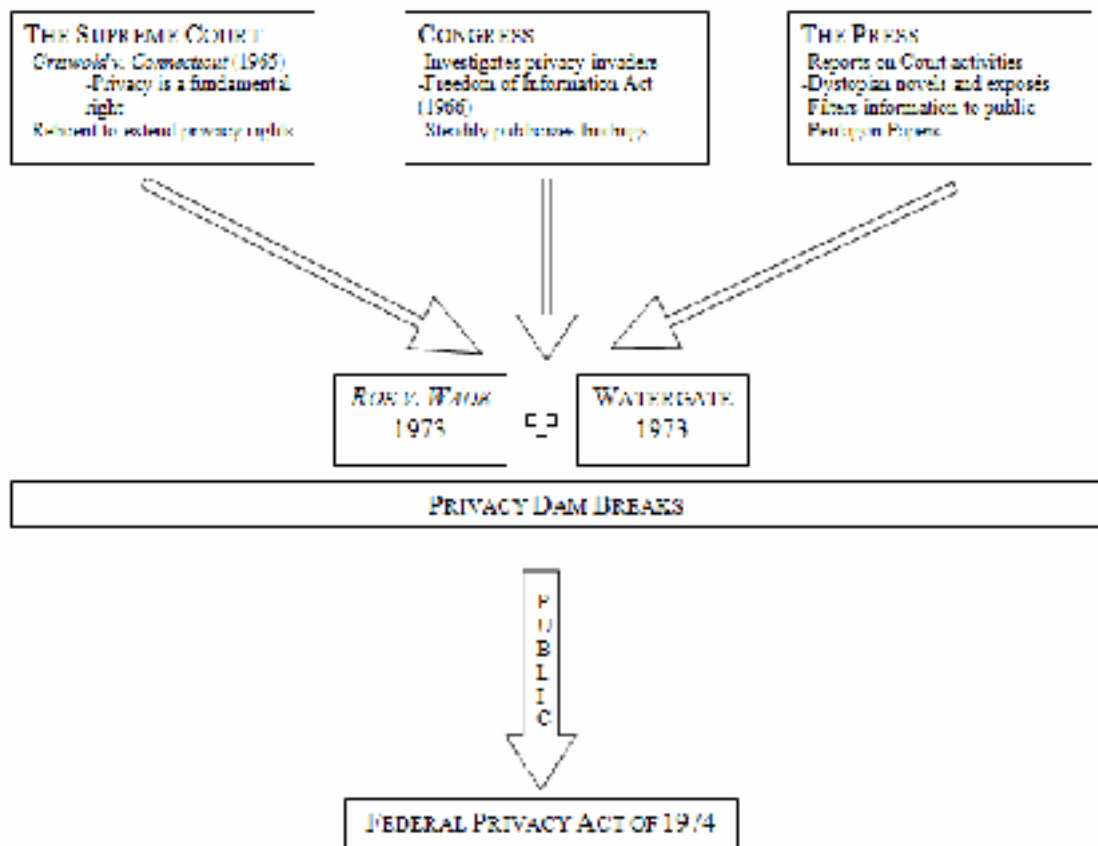
Though the Court started taking stabs at defining and applying privacy immediately after *Griswold* in 1965, the legislature only began to systematically dissect privacy after *Roe* and Watergate hit the limelight. The two-pronged influence that pushed privacy to the forefront—one stemming from the Courts and one stemming from the press and the government, with the public in support of action in both realms—practically forced the Privacy Act into existence. Until 1974, privacy was too ethereal to elicit sweeping regulation. With numerous failed prior attempts to regulate privacy, the Federal Privacy Act required further research and development of privacy's many components and thus further paved the way for the privacy that we understand today.

Beginning in the early twentieth century when the Court's and Congress' interpretations of privacy began to diverge, the concept became less and less clear. As the Court and Congress applied different interpretations of the privacy right to different situations, privacy became broader and less easily broken-down for analysis. Because the Court and Congress struggled to consistently apply the right to an array of situations, it became more difficult to define and regulate. Therefore, more than half a century of such confused inaction or misaction toward privacy erected something of a privacy dam—a blockade that prevented any institutional definition or systematic regulation. Privacy became more obscured by misconception and lack of definition, and America was instilled with an idea about an ambiguous right “to be let alone” that had no substantive support.

In general, America did not have a secure enough understanding of privacy to take the necessary steps to protect it. The American public assumed this mysterious right

would endure but did not feel the need to take the necessary steps to protect it. Those steps would include a systematic breakdown of privacy's components, narrowly tailored regulation, and creation of specialized agencies to track and enforce it.²⁴⁵ Even if Americans wanted to protect privacy, it would have been difficult to regulate such a general right. Legislation would be overbroad and nearly impossible to enforce because few people understood it. The Court's declaration of privacy to be a fundamental right in 1965, though, formed the first crack in the dam. In the decade following, as shown in figure 6.1, cracks began to form a result of pressure from the Court, the government, intellectual and media elites, and later, the public.

Figure 6.1: The Privacy Story



²⁴⁵ Regan, P. M. (1995). *Legislating privacy : technology, social values, and public policy*. Chapel Hill: University of North Carolina Press.

First, the Supreme Court pulled the rest of the country along behind its proactive privacy holding while it grappled with defining and applying the concept. Though it consistently refused to grant privacy rights to criminals and deviants, the Court captured the public by potentially threatening the privacy of regular, non-criminal women. The Justices held that reproductive and marital privacy was fundamental, and garnered support from pro-choice organizations, women's rights organizations, and medical organizations. With little regard from Congress, the Court expanded these views in *Roe v. Wade*, which solidified the Court's position as the sole arbiter of sexual privacy. Simultaneously, privacy was pushed into mainstream thought by the FBI and privacy invasions in the White House, Congress, the press and the public. Congress was aware of FBI and executive behavior, which it publicized to the press and the public. Slowly, the public gained awareness of governmental privacy invasions, which the *Pentagon Papers* and Watergate scandals greatly exacerbated. It is no coincidence that the public was more apt to internalize news about governmental privacy invasions only after it had lost faith in the White House as a result of the Watergate scandal. The media also contributed by generating unease about the reality of government privacy intrusions. To combat this, Congress dealt almost exclusively with information and technology privacy—the area of greatest public and media concern.

Pressure to regulate privacy coalesced from the push, the pull and the divergent interpretations of the privacy right. Each source mounted pressure until 1973 when the combination of *Roe v. Wade* and Watergate broke the dam entirely, resulting in a flood of privacy discourse, legislation and litigation from disparate realms of jurisdiction. *Roe*

was especially notable because it was an anomaly in the Courts. First, it deviated from the Court's trend of not applying the right to privacy in most cases. Second, it deviated because it threatened not to grant the fundamental right to everyday women, where it had previously threatened not to grant the right to criminals and deviants. Watergate gained attention because it provided, through the press, the hard-hitting realization for the American public that the White House was capable of vast indiscretion and was therefore untrustworthy.

After 1973, privacy had become so salient in both the marital and the informational realms that it begged analysis, classification, and the protection, resulting in the Federal Privacy Act of 1974—an act that would be only the foundation for a litany of privacy-related legislation in years to come. The Privacy Act was a direct result of the two-pronged pressure for privacy regulation. Together, the Court and Congress created a comprehensive fundamental right to privacy.

It is interesting to speculate about the existence of a Privacy Act absent one or both of these prongs. Without the Court's opinion in *Roe v. Wade*, Congress likely would still have created the Privacy Act; it did not specifically protect the Court's version of privacy, after all. Without Watergate, Congress would likely have developed the Act eventually, as well, but assuredly not with the same haste or gravity. Doubtless, political musterings would have evolved into a substantial piece of privacy legislation, but it is unlikely that it would have been as comprehensive or provocative for future government action. But because Watergate facilitated awareness of the extent to which the government could violate its citizens, inspired Nixon to speak out against government intrusions on people's privacy, piqued Congressional interest in the scope of government

misdeeds, and turned the public mood against the administration, the resulting Privacy Act was virtually unavoidable. The Watergate and *Roe* combination heavily expedited the legislative process, which resulted in a hastily drawn piece of legislation. At a minimum it was a starting place for a privacy with separate component parts that multiple levels of society and politics could discuss, monitor, and further regulate.

This tale indicates several possible themes regarding rights-talk in the United States. First, though issues may be latent in the public consciousness, introduction of a catalyst enables the issue to rapidly take-hold. If the public is unaware of the problem, that catalyst can originate from scholarly, media and political attention, which, given enough concern, can filter down to the public. Regardless of the issues that circulate amongst political and academic elites, they must enter the public mind in order gain full salience. Absent media attention, which made the privacy issue palatable to everyone, the public would likely not become aware of privacy issues and Congress would not have made it a fundamental right with such speed or seriousness. This interpretation of privacy's tumultuous history has revealed and illustrated an example in which legal change can emanate out of awareness of a problem that first appears to those at the highest level of politics. In this situation, the impetus for change has flowed from the top, down. I have argued that privacy began in an elite governmental and scholarly discourse and gradually filtered down to the public from two directions; first, as press publication of and congressional attention to increasingly invasive governmental privacy investigations heightened privacy became more salient, and second, as the Court issued an anomalous, more widespread holding, the people became more aware. Essentially, I argue that privacy emerged as an elite discourse and percolated down to the public

through Congress and the press from two disparate origins—marital/reproductive privacy and information/technology privacy. This model is unique to the privacy movement, as the scholarly and political elites were the only ones aware of the privacy problem. It was their consistent attention that pushed privacy into the mainstream.

Some scholars prefer a bottom-up approach to legal and political change, in which they credit citizens, activists and interest groups with initiating legal, political or social change movements.²⁴⁶ This approach could be (and is) applied to privacy in the 1960s and 70s. Perhaps it was the same interest groups filing amicus briefs and providing test cases to the Court that generated media attention and petitioned Congress to statutorily protect their privacy. Though it is entirely possible that grassroots organizations provided the necessary incentive to both the Court and Congress to finally tackle the privacy issue, this does not appear to have been the case. Privacy is an anomaly in this way because invasions were just that—they were private. It is possible that if privacy invasions had been common knowledge, the public would have initiated the movement. Instead, the public was unaware of the extent to which the government was intruding on privacy rights, and remained out of the movement until they became fully aware of the problem.

Also, this story sheds some light on the role of institutions within political systems. Though seemingly independent, all political institutions have one thing in common: the public. As long as someone passes information to the public, institutions can be held accountable for their actions. That is, once the public becomes aware of

²⁴⁶ See e.g., Epp, C. R. (1998). *The rights revolution : lawyers, activists, and supreme courts in comparative perspective*. Chicago: University of Chicago Press.; and Epstein, L., & Kobylka, J. F. (1992). *The Supreme Court and legal change : abortion and the death penalty*. Chapel Hill: University of North Carolina Press.

institutional activity, it can provide the necessary, back-end leverage for social, legal, and political change.

Privacy Today

Presently, the Court deals more extensively with physical privacy—one's rights to his body, home and marriage—that is most easily protected by the penumbras found within the Bill of Rights. It falls to the policymakers, then, to make rules about informational privacy—the privacy which was not as easily found within the first ten and fourteenth amendments. In other words, “judicial policies failed to foster a framework for and legal safeguards for ensuring privacy interests with respect to mandatory nonassociational and nonincriminatory disclosures of personal information, governmental access to personal information held by third parties, and governmental storage and disclosure of personal information.”²⁴⁷ Between the Court's mixed interpretations of the privacy right and the legislature's protection of privacy pertaining to different realms of society, scholars, both past and present, disagree about the actual state of privacy. Still, we can see that current governmental dealings with privacy developed as a result of different views on private property rights in the 1920s. From that point on, the Court and Congress diverged in their interpretations and applications of privacy, growing apart throughout the 1960s and '70s when they each declared the right to be fundamental, but applying it to the different realms we see today.

In 1891, Justice Cray commented in *Union Pacific Railway Company v. Botsford* that “[n]o right is held more sacred, or is more carefully guarded by the common law than the right of every individual to the possession and control of his own person free from a

²⁴⁷ O'Brien, D. M. (1979). *Privacy, law, and public policy*. New York: Praeger Special Studies, 204.

restraint or interference of others unless by clear and unquestionable authority of law.”²⁴⁸

Several decades later, Justice Brandeis articulated privacy’s importance with the same fervor, stating that privacy is the “most comprehensive of rights and the right most valued by civilized men.”²⁴⁹ Clearly, privacy was important to these men. But more than a century later, we still glorify and herald our fundamental right to privacy. While its definitions and applications have morphed throughout the decades, it still exists steadfast in the American psyche. And it was a two-pronged, top-down influence that set privacy on its complex journey to fundamentality from the Court to the country.

²⁴⁸ *Union Pacific Railway Company v. Botsford*, 141 U.S. 250 (1891)

²⁴⁹ *Olmstead v. United States*, 277 U.S. 438 (1928).

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