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Development of the Right to Privacy in Montana Discourse and the Montana Constitution

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Development of Privacy Discourse in Montana: 1960-1979

In November of 2021, a prominent Republican Lawmaker stated, "There's no basis in our constitution to use the right to privacy to murder a baby[...]The courts have humongously failed and we need to throw out Montana's socialist rag of a constitution."[1] The state of Montana has proudly boasted some of the most fortified privacy protections in the United States since 1972. Yet even with the state's 50-year record of strong privacy rights, Montana has found itself in a fervent political battle surrounding that very issue. Currently, Montana legislators are debating whether to overturn the Montana State Constitution due to its protections of medical procedures, which has included abortion since Roe V. Wade. Montana's Constitution provides some of the most heavily fortified privacy protections in the United States, with an explicit right to privacy included in the state constitution, as dictated in Article II Section 10, which states, "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."[2] Since 1972, this clause has offered Montana residents some of the most iron-clad privacy protections in the United States. Yet, privacy has been included in this battle largely due to its precedent of protecting abortion rights, which has been a central issue in federal and state politics in recent years. To both assess and participate in this contemporary debate, it is essential that we understand where these privacy rights originate and how the state has come to interpret privacy. This issue has a rich history that fundamentally shapes how we understand privacy and its role in our lives. The 1960s and 1970s were key decades in the development and understanding of privacy rights as we know them today. This

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[1] Dietrich, Eric. "Prominent Republican Says Montana Should 'Throw out' State Constitution." Montana Free Press. *Flathead Beacon*, November 19, 2021. https://montanafreepress.org/2021/11/18/derek-skees-calls-for-replacing-montana-constitution/.

[2] Montana Constitution, art. 2, sec. 10.

study will center on the development of political and social discourse surrounding the right to privacy in Montana between 1960 and 1979. Ultimately, it will become clear that privacy experienced significant legal and popular change during these two decades. During the 1960s, Montana's residents were nearly unanimous in their support of strong privacy protections, especially as surveillance technology developed. During the 1970s, this consensus fractured as discussion around privacy diversified to include contentious issues of gender and bodily autonomy. Yet throughout both periods, federal policy played a critical role in shaping Montanans' perceptions of privacy. While significant research has been conducted on Montana's unique privacy rights, the 1972 constitution, and its legal implications, this paper tracks how privacy rights develop throughout two critical decades and the role federal politics plays in that development. This will provide a key understanding about how privacy has come to be a central pawn in Montana's political games and what its future may hold.

To begin, it is necessary to define privacy as a concept and how it would likely have been understood by Montana residents between 1960 and 1979. The concept of privacy is absolutely critical to the individualism and political awareness that was highly prevalent in Montana during this time period. Patricia A. Cain, legal scholar from the University of Iowa, argues that understanding privacy in the minds of Montanans is essential to understanding politics and discourse in Montana during this time.[3] By the 1960s, the concept of privacy came to be vaguely defined as, "everyone shall have the right to the free development of his personality, insofar as he does not infringe the rights of others."[4] However, by the 1970s, privacy took on a more specific connotation in Montana. According to Cain, privacy rights protect three general interests, consisting of "the right to be free from unreasonable search and seizures," "the right to

[3] Cain, Patricia A. "The Right to Privacy Under the Montana Constitution: Sex and Intimacy": 102 (n.d.).
[4] "The Right to Privacy Under the Montana Constitution: Sex and Intimacy": 103.

informational privacy," and "the right to make certain personal decisions free from government intrusion."[5] Notably, this indicates that Montana was further developing the concept of privacy to better meet the needs of its citizens and to prevent perceived government intrusion into private affairs. The emergent definitions of privacy during the 70s clearly builds upon previous, more ambiguous, understandings to achieve a more specific and comprehensive definition of privacy. Montana and its legislature obviously placed a high regard on the importance of privacy and how the government is to understand it. It is this emphasis on privacy as a value that must be remembered when discussing privacy, as it is clearly a key point of attention in Montana during this time period.

The consensus surrounding privacy would certainly come to affect politics, but the legal precedent regarding privacy rights prior to the 1972 Constitutional Convention must also be examined, as the legal context of privacy in Montana is critical to the study of its development. The first major decision of the right to privacy in Montana, amusingly enough, pertained to a man's whiskey. In 1921, a Montana resident's whiskey was seized with faulty warrants, which resulted in the case State ex rel. Samlin v. District Court. The Montana Supreme Court ruled that this was a violation of Montana's 1889 Constitution and its search and seizure clause.[6] According to the court, the 1889 Constitution was "expressive of the same fundamental principles and was intended to be equally as effective to prevent an invasion of the rights of the citizens of the state under the guise of law by the state government or any of its officers."[7] This did, however, set the precedent for the right to privacy in Montana, as the state Supreme Court utilized Samlin's case as the foundation for the first recorded decision pertaining explicitly to privacy in Montana. In the case State ex rel. King v. District Court, the state Supreme Court makes a direct connection

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[5] "The Right to Privacy Under the Montana Constitution: Sex and Intimacy": 104.
[6] Elison, Larry M, and Dennis NettikSimmons. "Right of Privacy." Montana law review 48, no. 1 (1987): 9
[7] Ibid.

between search and seizure laws and the individual right to privacy. The court opinion states, "The warrant must designate the premises to be searched and contain a description so specific and accurate as to avoid any unnecessary or unauthorized invasion of the right of privacy."[8] The common law right to privacy was reaffirmed by the state Supreme Court again in 1952, and once more in the 1960s, when it ruled against the court submission of evidence collected through wiretapping as a possible violation of the 4th amendment.[9]

Despite both the contemporary and legal understanding of privacy laws, the right to privacy in Montana saw fierce discussion during the 1960s. However, upon closer inspection, it seems that while discussion was fierce, there was little contention. Discussion and understanding of privacy rights in Montana during the 60s was deceptively simplistic. The 1960s saw a significant increase in discussion of the right to privacy itself, as by the mid 1960s more than 30 articles per year were published discussing the right to privacy.[10] However, the majority of discourse pertaining to privacy in these articles remains somewhat homogenous. Montanans are generally concerned with the protection of their privacy, and many Montana newspapers and editorials portray any undermining of privacy rights as a fundamental violation of personal freedom. Many articles describe practices such as wiretapping, using terms ranging from "impending calamity" to "snoopery." [11] The general discourse in Montana clearly seems to indicate that Montana is an ardent supporter of firm privacy rights, and newspapers are critical of federal policies that might restrict those rights. Newspaper editorials and persistent content pertaining to the fears of wiretapping imply that Montanans feel a skepticism, bordering on paranoia, that wiretapping will violate the sanctity of private conversations. Many feel that it

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[8] "Right of Privacy": 9.
[9]"Right of Privacy": 10
[10] "The Right to Privacy Under the Montana Constitution: Sex and Intimacy": 100
[11]Long, Edward V. *The Nation,* "Wiretapping: The Silent Intruder," *People's Voice*, August 31, 1962.
Holmes Alexander, "The Rising Indignation Against Snoopery," *Billings Gazette,* March 29, 1967

would be excessive for law enforcement to listen in on private conversations, even in the name of security. For example, *The People's Voice*, based in Helena, published an article in 1962 that strongly condemned policies that would expand the usage of wiretapping. The article points to a federal policy referred to as Section 605 that would allow state law enforcement to use wiretapping to legally gather evidence for trial. The Montana paper condemned this action as "insidious encroachment by men of zeal, well meaning but without understanding."[12] Discourse in the 60s tends to agree with this article, that while the intentions of law enforcement are likely altruistic, they are skeptical of the potential abuses and invasions of privacy that could result from wiretapping. This is particularly evident in an article published in 1967 by the *Montana Standard*. This article points out that while some believe that wiretapping could be a useful tool in crime control, many are concerned about the potential abuses that could result from the practice.[13] In part, the abuses concerning Montanans reflect politics of the time. The United States is entrenched in the Cold War, and suspicions about spies and intelligence gathering inhabit the popular zeitgeist, and Montanans express repeated concerns about the unreasonable gathering of information by federal officials and private citizens.[14] The article particularly highlights two cases on the Senate floor in Washington. One case would outlaw wiretapping and eavesdropping, while also preventing any evidence gained through wiretapping or eavesdropping to be used in court. The other would allow wiretapping in cases of national security, but would prohibit evidence gained through wiretapping to be utilized in court. These articles represent a significant hesitance, suspicion and hostility to wiretapping and privacy violations among Montanans.

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[12] "Wiretapping: The Silent Intruder," Page 7.
[13] "Wiretapping, right to privacy old dilemma," *Montana Standard*, April 15, 1967.
[14] Jules Loh, "Contemptible Snooping Continues Into Lives of All Americans," *Missoulian*, May 15, 1966.

While wiretapping is absolutely a pressing concern for many residents of Montana, as demonstrated by the sheer frequency of its mention in Montana's newspapers and editorials, it is not the only concern expressed. The 60s partially characterize themselves by a growing concern for how emerging technologies could affect the private lives of Montana residents. At times, these concerns appear to border on irrational or hysterical. For example, the *Missoulian* published an article in 1966 titled, "Contemptible Snooping continues into Lives of All Americans". The article was republished by multiple Montana newspapers and came complete with an editor's note warning residents to check their olives as they may be "bugged."[15] The article expresses the hidden dangers of wiretapping and eavesdropping as eroding the sanctity of private life, endangering women, and threatening people with unwelcome advances from overeager salesmen. As the article puts it, "An ever multiplying horde of surreptitious snoopers is gnawing away at the privacy of citizens today with the eagerness of an army of cornborers turned loose in Iowa."[16] Obviously, these concerns were largely unfounded and strayed into paranoia. Concerns about bugged olives and horde's of snoopers clearly did not present a reasonable threat to society at the time. This article, in particular, quickly begins to devolve into tones of fear mongering, as it points out that anything, including a shirt button, could be used as a wireless transmitter to invade the private lives of innocent people. Articles such as this one should obviously not be taken as a factual accounting of the general opinion of Montana's people or true events. However, these collections of news sources from the 1960s do provide some insight into the mindset of people at the time. There is clearly some demand for information about wiretapping and privacy, and certainly some concerns, as expressed by Montana's citizenry. Although hysterical, paranoia and hysteria can have a tremendous impact on policy and

[15] "Contemptible Snooping Continues Into Lives of All Americans,"
[16] Ibid

public perceptions. These papers demonstrate that privacy is an issue that would cause readers to pick up the newspaper and would incite a response, which inherently implies the importance of privacy as a value in Montana during this time. Clearly, the 1960s was a time where much of the discourse pertaining to privacy in Montana was deeply concerned with wiretapping, search and seizure, and emerging technologies that threaten privacy rights.

Additionally, legal understandings of privacy during the 1960's may have contributed to some of Montanans' hysteria regarding privacy. Prior to the drafting of the new constitution in the early 70s, the right to privacy was based around common law precedent that implied the right to reasonable privacy, rather than the explicit guarantee as a citizen's right. This understanding of privacy likely contributes to Montana's understanding of privacy rights. The fact that there is no constitutional guarantee of privacy may contribute to some of the dramatic statements made in newspapers across the 1960s. Privacy was obviously a key value to many citizens in Montana during this decade, yet one with little codified protection. One can easily see that a value like privacy, perceived by Montanans as a natural right, would elicit a response when threatened by legislation such as Section 605, which expanded the practice of wiretapping on the federal level. This understanding is especially true when we consider the fact that there was no guarantee of privacy in Montana's legal precedent during the 60s. Analyzing the content and tone of Montana's newspapers, federal politics, and the legal precedent on privacy rights prior to 1972 suggests that Montana's understanding of privacy was deeply informed by the political environment and trends well outside of the average citizen's daily experience. Still, the discourse of those same men and women appears deeply informed by an understanding that the right to privacy was influenced by factors beyond their control, whether that be politics on the federal level or the generations before them.

The 60s also represent a growing understanding in privacy, where Montana understands privacy as a way to cope with changing times on the federal level. Technology is developing at an incredibly rapid pace, especially in the fields of information and crime control. Montana views this rapid change in society as a possible invasion of privacy. This is, in large part, the reason for such a degree of paranoia and hysteria in the news. As technology was sprinting forward, many of Montana's residents were scared and angry. The idea espoused by some papers that even the olives in your martini or the buttons on the salesman's jacket could be listening devices deeply support this hypothesis. These are not ideas that we would consider reasonable today, but for some, were genuine fears of the time. Montana papers and their contents bordered on hysterical. Clearly, this is a critical insight into the fears and passions of the people those papers were marketed to. The paranoia and skepticism discussed earlier furthers our understanding of Montana's perception of privacy, implying that this value was partly a way of coping with a changing country.

However, these issues represent a broad trend of federal politics that must be acknowledged when studying privacy rights in Montana. Montana's discussion of privacy during this period is intrinsically linked to federal politics. Discussion of privacy in Montana began to spike drastically following the drafting of Section 605, which would expand the state powers of wiretapping outside of cases involving national security in 1962.[17] However, these trends are absolutely related to broader political forces. Between 1962 and 1969, the national crime rate was on the rise and the United States was in the middle of the Cold War.[18] Wiretapping was absolutely at the center of national attention as a method of increasing security, and Montana was continuing the discussion. Montana's discourse was clearly and fundamentally shaped by fears of

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[17] "Wiretapping: The Silent Intruder."
[18] Wiretapping Debate, *Congressional Quarterly,* "Battling Espionage and Crime," *Missoulian,* April 11, 1967.

government overreach and abuse. While the notable lack of dissenting opinions with regards to privacy in Montana indicate a firm value of privacy in the state, that makes it all the more telling that federal politics deeply influenced the public discourse and understanding of privacy in Montana. The concerns posed in many of these articles continue to illuminate the fact that privacy from government and unlawful search and seizure is a fundamental value for much of Montana.

In the beginning of the 1970s, the concerns of Montana's citizens came to a head in one of Montana's most important events of the century. The 1972 Constitutional Convention produced one of the most progressive and comprehensive constitutions in the country This document contained a bill of rights that attempted to end discrimination, guaranteed the right to a clean environment, and offered Article 2, Section 10, which provided for a guaranteed right to privacy.[19] Section 10 explicitly states, "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."[20] Not only did Montana's Bill of Rights include provisions specifically protecting Montanans' right to privacy, but the contents of the new constitution also spurred discourse and informed our understanding of how Montanans view the right to privacy. The Constitutional Convention of 1972 clearly furthers the understanding that Montanans view privacy as a value, rather than a mere political issue. Additionally, the Constitutional Convention demonstrates that Montanans were concerned with addressing federal policy issues within their own state politics.

While isolated to state politics, privacy and the Constitutional Convention in Montana were still affected by the course of federal policy, just as in the 1960s. The Montana Constitutional Convention came to a close in March, 1972, when 100 delegates gathered to sign

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[19] Montana Constitution, art. 2, sec. 10.
[20] Ibid

a document that contained Montana's first constitutional right to privacy.[21] Article 2, Section 10 of the Montana Constitution states, "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."[22] This is a key turning point for privacy in Montana. During the 60s, through editorials and letters, Montanans clearly expressed privacy as a central value for its citizens. But in 1972, the right to privacy was enshrined in Montana's Bill of Rights as a constitutional right.

This explicit statement of privacy as a right certainly demonstrates the importance of privacy in its political discourse, especially regarding how federal policy affected such discourse. As explained by legal scholar, Patricia Caine, "The delegates at the Constitutional Convention expressed their support for strong privacy rights again and again. They believed privacy was so important that Montana should offer greater protections to individuals than the federal government provided."[23] It's been established that Montana expressed significant concerns about the increasing prominence of wiretapping on the federal scale. Montana newspapers wrote prolifically about Section 605, which relaxed prohibitions on wiretapping at the state level outside of national security cases, "snoopery," and government overreach.[24] The fact that this sentiment carried so strongly into the Constitutional Convention is a firm indicator that federal policy and the fears that followed in Montana are a driving force in the state's politics and discourse. After a decade of discourse condemning the federal government's lack of privacy protections, Montana explicitly took action to provide stronger privacy protections than that of the federal government. The state constitution, as supported by Patricia Caine, is inextricably linked to politics and discourse on the federal level and the state's reaction to it.

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[21]Montana State Legislative Committee, *Montana Constitutional Convention Verbatim Transcript Vol. VI*, Editing and Publishing Committee, Helena MT, 1981, University of Montana, Jameson Law Library.
[22] Montana Constitution, art. 2, sec. 10.
[23] "The Right to Privacy Under the Montana Constitution: Sex and Intimacy": 102.
[24] "Wiretapping: The Silent Intruder," Page 7. "The Rising Indignation Against Snoopery"

Nevertheless, Montana's privacy politics were far from a monolith. The Constitutional Convention's discussion of privacy was characterized by an overarching question of scope, as they react to federal policy and the necessity of law enforcement. Section 10 of the constitution was a source of significant contention, but it is important to recognize that this contention is not about the importance of privacy, but rather how to structure its direction for the courts.[25] At the Constitutional Convention, the main dissent pertained to the lack of interpretive guidance for the courts. This sentiment is expanded by Delegate Ask, "I don't know for sure how the court would interpret that, whether they'd interpret it with Section 11; I don't know how. Now, I don't know how either, but are we going to put something into the Constitution that we don't know how the courts are going to interpret it? Shouldn't we put something in there that's clear?"[26] Privacy was still widely accepted in the convention as a necessity based on the demand of the people, but significant questions remained about its scope. In regards to adding a state interest clause, Delegate Ask is quoted in the constitution as saying, "I think we're creating problems. I'm not against the right of privacy, but I think we're creating more legal problems if we don't give some direction."[27] Delegate Ask was concerned with the possible ramifications of making privacy an absolute right on par with religious liberty. He believed that this could create challenges in legal interpretation by creating an ever-expanding definition of privacy that would inhibit state government and law enforcement from advancing legislation and promoting security. However, there were several dissenting voices within the Constitutional Convention, such as Delegate Kelleher, who argued, "Mr. Chairman, I think that with the words 'without the showing of a compelling state interest', that the thing is made meaningless. With the addition of those words,

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[25] *Montana Constitutional Convention Verbatim Transcript Vol. VI*: 1,852.
[26] Ibid
[27]Ibid

it's meaningless."[28] Others, such as Delegate Harper, argue that the inclusion of the state interest clause could possibly open individuals to potential exploitation. These delegates point out that the pressing state interest clause could allow for the government to trample on individual rights to privacy if it is deemed in the state interest, undermining the whole intent of the clause. However, even those who argued against universal privacy rights did so, at times, because they believed that broader privacy could be distorted by bureaucrats and corporations to exploit individuals.[29] Critics of universal privacy rights argued that powerful individuals and corporations may be able to use privacy rights to avoid sanction and public regulation using their power and resources.[30] The fear of creating legal loopholes for powerful individuals who might exploit the right to privacy was a common theme of discourse both before and during the convention. The Constitutional Convention ultimately ended with the inclusion of the state interest clause, which gives the government license to violate individual privacy upon a pressing state interest. Despite this clause, Montana's Constitution gave its citizens a constitutional right to privacy that would require a pressing state interest that could be proven before a court in order to violate. This set the stage for future discussions of privacy and of how to guarantee this liberty for Montana's people.

However, this dialogue still adheres to one key detail. Montana's Constitutional Convention consistently agrees that Montana should provide stronger privacy protections than the Federal Constitution. Montana consistently maintains that a reasonable right to privacy under precedent and case law is not enough. Even the dissenting voices in the privacy debate maintain that the explicit right to privacy in the Bill of Rights is necessary. Privacy in Montana is ahead of its time with regards to information privacy, but Montana's privacy rights remained stagnant for

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[28] *Montana Constitutional Convention Verbatim Transcript Vol. VI*: 1,852.
[29]Letter From the Editor, "The Right to Privacy," *Great Falls Tribune*, February 15, 1976.
[30]Ibid

some time when applied to autonomy. For example, Section 38 of the Montana Constitution, if enacted, would have ruled that "Private sexual acts between consenting adults do not constitute a crime."[31] One would think, considering Montana's vehement insistence on privacy as imperative to the state's interest, that this clause would have been added to Article 2 of the state constitution. Yet, that was not the case. This clause was overwhelmingly voted down by a margin of 53 votes.[32] This article would have essentially outlawed sodomy prohibitions that perpetuated the pernicious discrimination against homosexuality in the state of Montana, and it would have done so on the basis of privacy for consenting adults.[33] It is important to acknowledge that for all of Montana's focus on the importance of privacy, that emphasis did not seem to extend to a socially unpopular group, likely due to religious motivation. This belief is furthered by a quote from the discussion of Section 38 at the convention: "Our present sodomy statute provides that every person who is guilty of the infamous crime against nature committed with mankind or any animal is punishable by imprisonment in the state prison not less than 5 years. In other words, you can get life imprisonment under our present statute."[34] This shows that while the convention agrees on the importance of privacy in Montana's legislation, they also overwhelmingly agreed to strike down a clause that would extend that privacy to consensual, private actions and that would prevent possible life sentences for such actions. Montana's privacy discourse at the time seems to end at the bounds of wiretapping and informational privacy at the time of the convention.

Ultimately, the 1972 constitution showed that Montana required clear individual protections for Montanans against government overreach and information gathering, while also

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[31] *Montana Constitutional Convention Verbatim Transcript Vol. VI*: 1,848.
[32] *Montana Constitutional Convention Verbatim Transcript Vol. VI*: 1,850.
[33] *Montana Constitutional Convention Verbatim Transcript Vol. VI*: 1,849.
[34] Ibid

providing stronger protections than that of federal policy. These provisions were clearly designed to prevent government overreach in a way that still allowed flexibility for the perceived needs of security. They were specific enough to guide courts toward individual protections and to aim to protect Montana from powerful actors in the state. However, these protections still fell short of autonomy issues by the point in question. While these privacy laws would ultimately come to encompass issues of bodily and sexual autonomy, the issues were decisively dismissed at the time of the convention. Such discourse absolutely characterizes the time and provides a developmental marker in the discussion of privacy in the state. Additionally, Montana has once again shaped itself in the image of external political events, as Montana deliberately seeks to construct a stronger, more specific constitution for its citizens than its federal counterpart. Montana has characterized itself through federal reactionism and relative unity.

The Constitutional Convention was certainly a pivotal event in defining privacy in Montana. Article 2, Section 10 of the state constitution offered stringent privacy protections for Montana residents. As a result, privacy encompasses a much broader band of issues, leading to a significantly more diverse spectrum of issues and controversies included in Montana's discourse. During the 1970s, discussion of Montana's privacy policy expanded to include gender issues and autonomy rights, in addition to issues of informational privacy. What became clear in the 1970s is that privacy discourse in Montana did not change, so much as it grew in the face of both new federal policy and expanded definitions of privacy under immense controversy.

The 1970s saw a significant expansion of diversity in topics relating to privacy in Montana. However, this is likely due in large part to events taking place on the national stage. For example, the 1970s saw a significant advance in gendered policy issues such as Roe V. Wade and the Equal Rights Amendment. The ERA was passed by the United States Senate and passed

to the states for ratification in 1972, and the Supreme Court's decision on Roe V. Wade took place in early 1973.[35] In 1974, Montana saw a significant change in discussions of privacy regarding autonomy and gender.[36] By 1974, there was notable discussion of how privacy contributes to the decision of Roe V. Wade; however, this discussion is also notably limited. An editorial from 1974 sheds light on Montana's interpretation of abortion with regards to privacy. This editorial states that while controversial, Montana's constitutional right to privacy should cover abortions as a newly legal medical procedure following the decision on Roe.[37] Prior to May of 1974, performing or submitting to an abortion was a crime in the state of Montana under Sections 94-401 and 94-402 of Montana's legal code.[38] This is significant because, as is indicated by this article, not only is Montana's legal protocol with regards to abortion outdated, but the state legislature has also failed to act to create updated legislation to address the issue of abortion. At the time of the article, Montana was legally treating abortion as any other medical procedure, which would be heavily regulated by the right to privacy. However, this discussion was deeply controversial in the state of Montana. While there were arguments that the state should update access to abortion to match Roe's ruling, there were others who compared the right to have an abortion to the right to own slaves, arguing that while both were technically matters of autonomy from the government, neither should be morally acceptable.[39] Abortion is a topic that, upon further research, appears to be approached with some hesitance by many Montanans. Roe V. Wade is a case that would appeal greatly to the heavy emphasis on privacy in Montana, yet it conflicted with a heavily religious population. However, opinion resources about

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[35]"Equal Rights Amendment." Encyclopædia Britannica. Encyclopædia Britannica, inc., March 20, 2023. https://www.britannica.com/topic/Equal-Rights-Amendment.

"Roe v. Wade (1973)." Legal Information Institute. Legal Information Institute. Accessed April 23, 2023. https://www.law.cornell.edu/wex/roe_v_wade_%281973%29.

[36] "The Right to Privacy Under the Montana Constitution: Sex and Intimacy": 104.

[37] Editorial, "Legislature Should Obey Court Abortion Ruling," *Missoulian*, January 22, 1974.

[38]Ibid

[39]Editorial, "One Man's Opinion," *Billings Gazette*, June 3, 1973.

Roe V. Wade are far more sparing than wiretapping in the 1960s. This is suggestive of a change in Montana between the 1960s and 70s. Montana was not only discussing privacy from a lens other than information privacy, regardless of its commonality, but the apparent consensus on privacy in the state appears to have been disrupted by federal policy. The federal government once again displayed its role in driving discussions of privacy in the state of Montana, almost creating an argument for autonomy-based privacy in this case. During the 1960s, many Montanans seemed to concur that privacy is critical to the state's interest and that greater individual privacy protections are imperative. Yet following the decision on Roe V. Wade, the few resources we have on public opinion regarding bodily privacy in the 70s suggest that this consensus had fractured, leaving some Montanans unsure of how to proceed. This is indicated by conflict on the editorial page and a conspicuous lack of inaction from the state legislature of addressing the outcome of Roe V. Wade in the state. While there may be few resources regarding opinion on public discourse for Roe V. Wade, significant evidence on the political stage further demonstrates the contention surrounding abortion in Montana. By 1974, there was significant activity that suggested the level of contention in the political discourse surrounding abortion. Republican senators in the state of Montana put forth two legislations that did not prohibit abortions but placed significant restrictions and regulations on the procedure, such as requirements for a husband's signature and significant medical counseling for alternative procedures.[40] Additionally, activist groups in Montana argued vigorously against privacy as the justification for abortion, such as the Right to Life group in Montana.[41] Right to Life argued that a fetus' survival superseded the right to privacy, and that Montana policy should reflect this. However, this group continued to face impassioned controversy from dissenters. Critically, both

[40]Carol Van Valkenburg, "180 Abortions Done Here After Legalization" *Missoulian*, February 17, 1974.
[41]Local Commoent, "Abortion Foes Accused of Dishonest Tactics", *Missoulian*, August 16, 1974

sides continued to frame their argument in terms of the United States Supreme Court. Proponents for Right to Life vehemently argued that the Supreme Court was fundamentally wrong and that Montana should reject their decision in any way possible, while others continued to argue that the Supreme Court had merely conducted a ruling that further protects the rights of privacy and autonomy for the citizens of Montana.[42] Federal policy consistently presents itself in Montana's politics as a driving force in the discussion of privacy in the state.

The 1970s is deeply significant to this discussion, as a change in federal policy fundamentally shifted privacy discourse in the state of Montana by injecting an issue that had previously been absent from the public sphere. The political landscape of the state was fundamentally altered by forces outside of the state's control, and this is critical to our understanding of this dialogue, partly because of the controversy involved. Wiretapping in the 1960s presented a relatively unified front on the issue of privacy; however, in the 1970s, public and political discourse fractured into controversy. The issue of abortion is founded on the concept of privacy in a legal context, but in this case, the value of privacy fundamentally clashed with other values held dear to many Montanans. We need to understand this shift as we discuss privacy in the state, because the controversy over abortion is directly contradictory to Montana's discussion of privacy in the past, although it aligns with previous actions. Montana discusses privacy as an imperative value for citizens; but in practice, privacy is an imperative value unless it concerns unpopular issues. Montanans still valued privacy with regards to informational privacy, such as protections from wiretapping and investigation, yet the state continues to ignore or reject discussions of privacy with regards to autonomy and gender. The Constitutional Convention voted overwhelmingly to exclude a provision that would provide greater bodily and sexual autonomy for all Montana citizens, but most critically for LGBTQ+ members of society.

[42]Ibid

Montana upheld sodomy laws until 1997, long after other conservative states like Texas.[43] This same principle is demonstrated in Montana through the political discourse of the abortion ruling. While there are certainly those who defend abortion under the principle of privacy, the controversy in Montana is significant, and the political stage in Montana in 1974 certainly favors greater restriction for abortion in Montana.[44]

The 1970s discussion of abortion indicates a critical insight, one that was shared with the 1960s regarding how Montana views privacy. Privacy is understood as a way to deal with change and representative of the state's opinion towards the government. Both of these periods in Montana's privacy discourse take place during times of tremendous change, yet each handle the issue differently. The 1970s are a critical contrast to the 1960s. Montana's reactions to the issues concerning privacy policy were wildly different in the two decades. During the 1960s, the importance of privacy almost appeared as a unified consensus, yet despite the overwhelming support for Section 10 of the Montana constitution, Montana rejected the defense of abortion on the grounds of privacy. The unifying factors in understanding this are Montana's discussion of privacy in terms of change and a consistent wariness of the federal government. Skepticism of the federal government is a consistent thread in the discussion of privacy in Montana. In the 1960s, Montana believed that the federal government's allowances and uses of wiretapping was a fundamental threat to free society. In 1972, there was consensus regarding the importance of creating significant privacy protections that would protect Montanans from government exploitation to a greater degree than the federal Constitution. In the years that followed, the Supreme Court made a decision that protected abortion on the grounds of privacy, and all accounts indicate that Montana's consensus on privacy seems to shatter. A dichotomy emerges

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[43] "The Right to Privacy Under the Montana Constitution: Sex and Intimacy": 104.
[44]"Abortion Foes Accused of Dishonest Tactics"

between morality and policing issues in Montana. Issues of policing and investigation continue to merit widespread condemnation under the grounds of privacy, yet issues that concern religious or moral implications are far more contentious. Across this time period, privacy remains rooted in reactionism and paranoia, which merits a deep emotional response from the people of Montana, and we cannot truly understand the development of privacy policy and its implications without taking into account Montana's reactionism and inconsistency.

Furthermore, the 1970s do not merely center around abortion policy in Montana's privacy discussions, and this is another critical component of the changes that occurred in the 1970s. In the 1960s, the vast majority of issues discussed pertaining to privacy were directly related to wiretapping and informational privacy. Deviation from this pattern was minimal in Montana newspapers. However, the 1970s saw a greater stratification in the issues that were deemed relevant to privacy. Informational privacy was still a present force; however, there was also discussion of how privacy contributes to the Equal Rights Amendment, possible abuses of privacy laws, and continued discussion of abortion.

Privacy became a key component in the arguments of Montanans who opposed the Equal Rights Amendment. The argument was that the Equal Rights Amendment's provisions to collect data on gender demographics in the workplace and other public facilities would be a fundamental violation of privacy.[45] Advocates of this belief asserted that, among other reasons, Montana should not ratify the ERA partly because of its potential to undermine privacy in the state.[46] Dissenters to the passage of the ERA argued that information collection by the state is in fact a form of discrimination on the basis of gender, which is a violation of the state constitution and immoral.[47] Privacy has once again become a major point of contention around federal policy in

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[45]"Should Montana Adopt the ERA?", *Independent Record,* January 6, 1974.
[46]Ava R. Walters, Letter to the Editor,, "A Gross Misinterpretation", *Daily Interlake*, January 9, 1976
[47] "Should Montana Adopt the ERA?",

Montana, but this time, along a line of argument attacking the ERA. Along with discussion of abortion in Montana, this is another critical instance of gendered issues being included in the discourse pertaining to privacy that serves as another stark contrast to the 1960s. However, the concerns about wiretapping and informational privacy still exist. Montana residents consistently remain concerned about the expansion of law enforcement's capacity to conduct search and seizures and collect information. One example of this lingering concern is the Supreme Court ruling in 1978 that, "Passengers in someone else's car have no right of privacy that would stop police from searching it."[48] Additionally, Montana remains concerned with the prevalence of listening devices that could threaten personal privacy.[49] This diversification is a clear illustrator of the changes that took place in Montana's privacy policy between 1960 and 1979.

Federal policy and the rapid changes that took place during these two decades served as key drivers of how Montana understood and discussed privacy. Many of the key themes, developments, and arguments surrounding privacy between 1960 and 1979 occurred as a direct result of changes in federal policy. On a more abstract scale, many Montanans appear to utilize privacy as a framework to deal with change and government suspicion. Much of the discourse during this period continues as a foil to the trajectory of government policy at the time in question. As the federal government loosens its restrictions on wiretapping and information gathering, the discourse of Montana's public centers on the idea that wiretapping and listening devices are an existential threat to American liberty.[50] As the Constitutional Convention came to a close in 1972, Montana agreed to create some of the most iron-clad protections of individual privacy in the United States. Yet, Montana refused to lift legal prohibitions of private sexual acts among consenting adults of the LGBTQ+ community. As abortion became a central issue of

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[48] *Washington Star*, "Supreme Court gives police wider auto-search powers", *Billings Gazette*, December 6, 1978.
[49] Alan Barth, "Freedom from Search and Seizure", *Missoulian*, November 16, 1975.
[50] "Wiretapping: The Silent Intruder," Page 7.

contention in Montana in 1974, privacy seemed to become a secondary concern to Montana's legislature. As a concept, privacy ebbs and flows in the current state of Montana politics in a way that is inseparable from trends in federal politics. Despite Montana's apparent and prevailing political skepticism of the federal government, discussion of privacy revolves almost entirely around proceedings on the national stage, at times bordering on paranoia. The contradictory nature of Montana's privacy policy in these two decades demonstrates the fact that the most central factor in the creation of Montana's understanding of privacy is not Montana itself, but rather how federal politics interact with Montana's individualism.

Ultimately, there are several conclusions to be drawn from this narrative. First, the development of privacy during this time supports the conclusions of legal scholar, Patricia Caine. Second, federal politics are the most fundamental force in the creation of Montana's privacy policy. Finally, Montana's unique politics, fears of exploitation, and seeming wariness of the federal government create fascinating contradictions in the unfolding of privacy policy in the state.

Patricia A. Caine, from the University of Iowa, maintained that Montana's definition of privacy has diversified over time to include autonomy rights and informational privacy, in addition to initial protections against search and seizure. While my period of study encompassed only the very beginning of the development of autonomy rights, the evidence thoroughly suggests that Patricia Caine was correct. Between 1960 and 1979, one can see a clear fortification and diversification of privacy rights. Montana does begin to understand privacy as a multifaceted construct to protect against the government, to control one's personal information, and to make certain bodily decisions free of reprisal. This was especially prevalent within the Constitutional Convention, when Montana's delegates decided that freedom from unreasonable

search and seizure was not sufficient, and that Montana needed a guaranteed right to individual privacy. This development wholly supports Caine's conclusions regarding the development of privacy.

Furthermore, the development of Montana's privacy policy over these two decades illustrates tremendous progress, hypocrisy, and independence. Montana was entirely and fundamentally swayed by the actions of the federal government, as is the nature of a federalist state. But this influence and discourse served to shape an environment that created one of the strongest protections of individual privacy in the country. While these policies absolutely excluded certain groups, this is merely another indication of how privacy continued to grow in the state. Privacy, even when influenced by an outside party, remained a fundamental component of politics in Montana during a time of immense change. It is this understanding that must be kept in mind throughout the study of privacy during this time. The privacy of a highly individualist state served as a framework for the people of Montana to adapt to change and was a major contributor to the development of privacy in the state.

Finally, privacy is once again a source of tremendous contention in Montana today. Following the overturning of Roe V. Wade, privacy has been reinserted into Montana's political dialogue, as the Governor and Attorney General hope to overturn the 1999 landmark decision which determined that Montana's right to privacy covers access to abortion and other bodily autonomy issues.[51] This effort by the state government comes as pivot from an unpopular discussion about overturning the entire state constitution due to its strong protections of privacy. Beyond even the state borders, in an era of data mining and the selling of private data, privacy

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[51]Amy Beth Hanson, "Montana seeks to overturn court ruling on abortion access," *Associated Press*, January 20, 2022, https://apnews.com/article/abortion-us-supreme-court-health-right-to-privacy-legislature-e648588ae33162de7b54252e9fe7261e.

will continue to be a pivotal issue in the coming years. Montana is an example of how privacy can not only develop and fortify itself, but also be pushed aside by the will of the people. Privacy grew from precedent to a constitutional right, and it continued to grow all the way through the 1990s. Montana demonstrates that a prevailing effort by the people to secure greater privacy can truly come to fruition, but that it requires awareness and foresight to prevent discrimination against marginalized groups and exploitation in the future.