

**WESTERN UNION, THE AMERICAN
FEDERATION OF LABOR, GOOGLE, AND
THE CHANGING FACE OF PRIVACY
ADVOCATES**

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INTRODUCTION

Law professors fondly observe that the law is always catching up with technology. What else could it do? Legislators could hardly be expected to anticipate scientific discoveries. Technological foresight is rarely a campaign promise or the basis for selecting elected officials. Judges are rarely experts in science and engineering. Gone are the days of Benjamin Franklin, Thomas Jefferson, and Benjamin Rush, when scientists and inventors were also lawgivers.

Is there, however, something insightful we can gather from the oft-noted, and facially obvious, observation that regulation follows invention? Perhaps by looking at why earlier invention sparked regulation, we can understand whether, or how, modern invention will produce legal limits.

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The question has particular relevance for the rapidly emerging methods of modern communication. The recent pace of development in communication technology leaves privacy interests in the new media considerably unprotected by comparison with traditional means of communication. The government must jump over considerably more legal hurdles to listen in on telephone conversations than it does to obtain e-mails or discover where a cell phone user traveled.¹

The gap between emerging technologies and laws protecting privacy interests in those communications is hardly new. Few technologies have seen explosions both in sophistication and widespread use as electronic communication. For America's first century, methods of communication did not change, though the speed and reliability of the ordinary mail improved substantially over the period.² Then, and almost overnight, communication technology took a great leap forward as telegraphs, and soon thereafter telephones, became commonplace in major cities. Roughly a century later, another revolution occurred in the way society communicates.

Lawmakers anticipated privacy concerns in e-mails, texts, and instant messages no better in the twentieth century than their counterparts in the nineteenth century. Nineteenth-century government investigators were able to obtain the contents of telegrams with simple subpoenas, subject to effectively no judicial supervision.³ Likewise, early twentieth-century police officers were not required to receive authorization to intercept telephone calls.⁴ However, the law did eventually "catch up" with technology as limits were placed on the government's ability to intercept telegraph and telephone communications.⁵

¹ Haley Plourde-Cole, *Back to Katz: Reasonable Expectations of Privacy in the Facebook Age*, 38 FORDHAM URB. L.J. 571, 589 (2010).

² Sharon K. Sandeen, *In for a Calf is not Always in for a Cow: An Analysis of the Constitutional Right of Anonymity as Applied to Anonymous E-Commerce*, 29 HAST. CONST. L.Q. 527, 536 n.24 (2002) (citing CARL H. SCHEELE, NEITHER SNOW NOR RAIN . . . : THE STORY OF THE UNITED STATES MAILS (1970)).

³ See Wesley MacNeil Oliver, *America's First Wiretapping Controversy in Context and as Context*, 34 HAMLINE L. REV. 205, 216 (2011).

⁴ *Id.* at 234-35.

⁵ *Id.* at 226-31 (describing protections in telegraph communications); Neal Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA*

It is not clear that the law will do the same in the twenty-first century. Much has changed since our last communications revolution roughly a century ago. The interest groups that shaped privacy expectations after our first communications revolution are not as powerful as they were a century ago. The American Civil Liberties Union, for instance, does not have the influence organized labor had in the early twentieth century. Corporate privacy advocates have also changed. Today, they come with unclean hands. Telephone and telegraph companies argued for their customers' privacy against government intrusion.⁶ Providers of modern communications services argue for their customers' privacy from the government, but while selling customers' information to advertisers for a fee.⁷ The history of communication technology, and its protection from the government's prying eye, is relevant to predicting how the law will regulate recent innovations. Telegraph communications offered the first alternative to the existing and quite slow method of getting messages from one place to another. Remarkably fast Pony Express riders could get letters from St. Louis to California in eight days, beating the pace of stage coaches by twelve days. Telegrams, by contrast, permitted messages to travel thousands of miles almost instantly.

I. HISTORY AND EXPANSION OF TELEGRAPH COMMUNICATION

Samuel Morse conceived of the electromagnetic telegraph in 1832, built an experimental one in 1835, and constructed a truly practical system in 1844.⁸ Telegraph technology achieved "commercial practicability" in major eastern cities between 1845

Surveillance Program: The FDR Precedent, 60 STAN. L. REV. 1023, 1041-47 (2008) (describing emerging protection of telephone privacy).

⁶ See *United States v. Babcock*, 24 F. Cas. 908 (E.D. Mo. 1876) (first of a number of cases in which Western Union challenged a subpoena for disclosure of the contents of telegrams); Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 598 (2009) (describing amicus brief of telephone companies in *Olmstead v. United States*, 277 U.S. 438 (1928)).

⁷ See Cade Schmidt, *Google Doesn't Do Data Mining; Er, Is That a Joke Too?*, REGISTER (Sept. 23, 2010), http://www.theregister.co.uk/2010/09/23/schmidt_on_colbert/.

⁸ *The Morse Telegraph*, HISTORY WIRED: A FEW OF OUR FAVORITE THINGS, <http://www.historywired.si.edu/object.cfm?ID=306> (last visited Jan. 21, 2012).

and 1846.⁹ Messages could be conveyed across the Atlantic Ocean by this device by 1858.¹⁰ Telegraph messages, however, remained a tool for commercial transactions or highly important personal communications as these messages were billed at high rates by the syllable.¹¹ These messages were also, by definition, less than completely private. Regardless of any laws designed to ensure privacy of the customer's messages, it was inevitable that at least the operator and transcriber would know the contents.¹²

With the invention and widespread use of telegraph and telephone technology, it was initially assumed that the government had complete access to any message passed across these media. The sender revealed the contents of his message to a third party, the telegraph or telephone carrier, and thus lost his expectation of privacy in the message—at least he lost his expectation from government intrusion. High profile government intrusions on these forms of communication outraged the providers of these new forms of technology, as well as their customers, who had reason to fear that sensitive information might be intercepted.

II. GOVERNMENT INTRUSION OF TELEGRAPH TECHNOLOGY AND SOCIETY'S REACTION

Though telegraph technology was available from the mid-nineteenth century, it was expensive and rarely used. The Civil War awakened potential customers to the value of instantaneous communications. Military commanders used the wires to transmit orders and reporters used the wires to relay news.¹³ Civilian use of telegraphs increased dramatically after the war.¹⁴

⁹ Richard B. DuBoff, *Business Demands and the Development of the Telegraph in the U.S., 1844 to 1860*, 54 BUS. HIST. REV. 459 (1980).

¹⁰ This system, however, broke down after two works of operation and would only be restored after the Civil War. RICHARD F. SEKER, CIVIL WAR AMERICA 58 (2006).

¹¹ Oliver, *supra* note 3, at 234.

¹² See Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553, 577-78 (2007).

¹³ LEWIS COE, THE TELEGRAPH: A HISTORY OF MORSE'S INVENTION AND ITS PREDECESSORS IN THE UNITED STATES 51-65 (2003).

¹⁴ Richard R. John, *Recasting the Information Infrastructure for the Industrial Age*, in A NATION TRANSFORMED BY INFORMATION: HOW INFORMATION HAS SHAPED THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT 55, 81 (Alfred D. Chandler, Jr. & James W. Cortada eds., 2000); U.S. CONG., REPORT ON POSTAL TELEGRAPH 10 (1884).

The value of eavesdropping on this method of communication that came of age during the war was also quite apparent. Intercepting military messages became a matter of deadly sport. For obvious reasons, there was no expectation of privacy in these communications. Messages were sent in code because of the high likelihood of interception.¹⁵ The coded messages were often published in newspapers where the public's assistance in deciphering these messages was sought.¹⁶

After the war, government investigators quickly discovered the value of the medium that required information to be disclosed by the sender to the telegraph company. With the end of the hostilities, they did not have to be as crafty as the military spies who intercepted telegraphs. Permanent records of messages remained in the possession of telegraph companies.¹⁷ Investigators merely had to obtain access to these records to determine messages had been exchanged.

Investigations early in the telegraph era revealed that telegraph customers had considerably less expectations of privacy than postal customers. Some of these investigations were very low-tech. During the impeachment proceedings against President Andrew Johnson, Congressman Benjamin Butler sent private detectives to indiscriminately seize copies of thousand of telegrams passing in or out the telegraph offices in Washington and Baltimore.¹⁸ Some of the telegrams were seized to substantiate the charges against Johnson.¹⁹ Following his acquittal, Butler used the telegrams to support his claims that Kansas Senator Edmund Ross had been bribed to vote for acquittal.²⁰

¹⁵ DAVID HOMER BATES, *LINCOLN IN THE TELEGRAPH OFFICE 49-67* (Univ. of Neb. Press 1995) (1907).

¹⁶ TOM WHEELER, *MR. LINCOLN'S T-MAILS: THE UNTOLD STORY OF HOW ABRAHAM LINCOLN USED THE TELEGRAPH TO WIN THE WAR 100* (2006).

¹⁷ 1855 Pa. Laws 531 (requiring telegraph operators "to preserve the originals of all [telegraph] messages sent from such office . . . for at least three years . . ."); *see generally* MORRIS GRAY, *A TREATISE ON COMMUNICATIONS BY TELEGRAPH 115* (1885) (explaining the rights of action against telegraph companies because in order to be criminally liable under the statute there must be a right of action).

¹⁸ DAVID J. SEIP, *THE RIGHT TO PRIVACY IN AMERICAN HISTORY 30* (1978).

¹⁹ *Id.*

²⁰ *Id.* at 31.

Government investigators after the impeachment did not rely on such thuggish tactics to obtain telegrams. A subpoena *duces tecum* for telegrams provided the imprimatur of judicial authorization without any meaningful oversight of a court. Most states had statutes forbidding a telegraph company from disclosing the contents of a message to anyone but the intended recipient, but the statutes, on their face, largely left unclear whether these messages could be disclosed to criminal investigators or courts.²¹ Courts never construed these statutes to limit the scope of the subpoena power.

The use of a subpoena, as opposed to Benjamin Butler's methods, provided the nation's primary telegraph company an opportunity to object to the seizure of copies of telegrams before the fact. The first high-profile objection to complying with a subpoena for telegrams involved an allegation of political corruption. Federal prosecutors suspected that President Ulysses S. Grant's personal secretary, Orville Babcock, was tipping off St. Louis distilleries about raids to discover tax evasion.²² They obtained a subpoena for all the telegrams sent between Grant's secretary and a revenue agent in St. Louis for an eight-month period.²³ In modern criminal cases, we are accustomed to the defendant seeking to prevent the prosecution from using evidence on the basis that his privacy rights have been intruded upon.²⁴ In these early telegraph subpoena cases, the telegraph company

²¹ See HENRY HITCHCOCK, *INVIOABILITY OF TELEGRAMS: A PAPER READ AT THE SECOND ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION* 26 (1879) (observing that only Missouri and Indiana had laws prohibiting telegraph operators to divulge the contents of telegrams but expressly provided an exception when the information was requested by a court). Hitchcock's otherwise excellent research appears to have omitted at least one state, Pennsylvania, which had a similar exception. 1855 Pa. Laws 531.

²² ROY MORRIS, JR., *FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876* at 25-26 (2003).

²³ *United States v. Babcock*, 24 F. Cas. 908 (E.D. Mo. 1876).

²⁴ In fact, in the modern era the telegraph company would lack standing to object to even an illegal search that produced evidence against one of its customers. See *United States v. Payner*, 447 U.S. 727, 732 (1980) (even egregious trespass upon privacy and property interests of bank's employee does not provide remedy for bank's customer); see also Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 296-97 (1998) (criticizing *Payner* and three other cases that established a standing rule permitting the exclusionary rule to apply "only [to] the person whose Fourth amendment right" was disregarded).

itself objected to producing information that could be used to incriminate its clients.

Western Union, obviously attempting to assure its customers their privacy would be protected, objected to such a sweeping request for telegrams.²⁵ The telegraph company argued that the government had not shown the information they sought could be found within these documents. Their arguments dealt both with the degree of suspicion required to obtain the documents and the amount of specificity required of the request.²⁶ A vast amount of their customers' private communications would be delivered to the government with such requests. The federal court rejected Western Union's concern, requiring only that subpoenas identify needed telegrams "with that degree of certainty that is practicable[;]" a criterion the court found satisfied by the government's request in this case.²⁷

Three years later, a congressional committee investigating the Presidential Election of 1876 issued subpoenas for an untold number of telegrams identified only by parties and a wide range of dates.²⁸ With the election too close to call, and allegations of fraud and voter intimidation in Florida, Louisiana, and South Carolina, a congressional committee subpoenaed—among others things—all telegrams sent to or from eight prominent Louisiana Republicans, all suspected of involvement in voter fraud. The subpoenas for these men covered a four-month period.²⁹

As it had done in the *Babcock* case, Western Union opposed the subpoenas for the telegrams. The testimony of the telegraph operator assigned to the New Orleans office was read before the congressional committee:

I am instructed that a judicial or other *subpoena* couched in such general and sweeping terms would be in legal effect a *general warrant*, within the prohibition of the fourth amendment to the Constitution of the United States, and subject to the condemnation of the great

²⁵ Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1901 (1981).

²⁶ Oliver, *supra* note 3, at 221-22.

²⁷ *Babcock*, 24 F. Cas. at 909.

²⁸ 44 CONG. REC. H452 (daily ed. Jan. 5, 1877).

²⁹ *Id.*; MORRIS, *supra* note 22, at 175-85, 192-99, 203.

principles of personal liberty and private right established for all freemen of the Anglo-Saxon race by the celebrated judgments of Lord Camden in Wilkes's case, and the case of *Entick v. Carrington*³⁰

The committee rejected Western Union's argument, concluding that customers' privacy interest in the contents of telegrams did not defeat the superior interest of the government in discovering information.³¹ The committee further rejected the analogy to general warrants.³² The subpoena itself was beyond constitutional challenge, according to the committee's reasoning: "[I]n the hundreds of instances in which the *subpoena duces tecum* has been resorted to . . . the similarity which the witness supposes to exist between that writ and the 'general warrants' condemned by the constitutional provision cited by him has never yet been detected."³³ Of course, it was not the subpoena itself, but the use made of the subpoena, that Western Union claimed amounted to an indiscriminate search forbidden by the Constitution.³⁴

Western Union continued to argue against requests for all telegraph communications passing between identified persons.³⁵ In 1878, a state grand jury in St. Louis issued a subpoena for all the telegrams sent between four named persons over a fifteen-month period.³⁶ Western Union objected that such requests violated the federal and Missouri Constitutions' prohibition on unreasonable searches and seizures.³⁷ This time, the Missouri Supreme Court, in *Ex Parte Brown*, accepted Western Union's position.³⁸ The court concluded that Missouri's constitutional prohibition on unreasonable searches and seizures required that a subpoena:

[S]hall at least give a reasonably accurate description of the paper wanted, either by its date, title, substance, or

³⁰ 44 CONG. REC. H454 (daily ed. Jan. 5, 1877).

³¹ 44 CONG. REC. H603 (daily ed. Jan. 12, 1877).

³² *Id.* at 603-04.

³³ *Id.* at 604.

³⁴ *Id.* at 603.

³⁵ *Id.* at 604.

³⁶ *Ex Parte Brown*, 72 Mo. 83, 90 (Mo. 1880).

³⁷ *Id.*

³⁸ *Id.* at 93.

the subject it relates to To permit an indiscriminate search among the papers in one's possession for no particular paper, but some paper, which may throw some light on some issue involved in the trial of some cause pending, would lead to consequences that can be contemplated only with horror, and such a process is not to be tolerated among a free people.³⁹

The *Brown* particularity requirement, zealously advocated for by Western Union in a variety of settings, became the standard for telegram subpoenas throughout the nation.⁴⁰ The telegraph company's continued zealous advocacy led courts to fashion some protections from the government's ability to know the content of all telegraphed communications.

III. HISTORY AND EXPANSION OF TELEPHONE TECHNOLOGY

One might imagine that late-nineteenth-century legislatures anticipated the possibility (or probability) that government investigators would have a similar interest in discovering the contents of telephone calls. Yet laws meaningfully protecting privacy in telephone conversations did not accompany this innovation in communication technology.

The telephone, just a few decades behind the telegraph, both in invention and widespread availability, gave ordinary Americans access to immediate communications. Alexander Graham Bell's telephone was first displayed at the 1876 World's Fair in Philadelphia.⁴¹ Two years later, the first telephone exchange opened in New Haven, Connecticut, and within a few

³⁹ *Id.* at 94.

⁴⁰ See Desai, *supra* note 12, at 582 (observing that after *Brown*, courts generally required specificity in warrants analogous to that required by the Missouri Supreme Court). While the United States Supreme Court recognized in *Boyd v. United States*, 116 U.S. 616, 633 (1886), that the Fourth Amendment protected citizens from subpoenas for the production of their documents, subpoenas for telegraphed messages continued as those holding the records of those messages, either custodians of corporate records or telegraph offices, had no privacy or property interests in the contents of the messages. See *Wheeler v. United States*, 226 U.S. 478, 488 (1913); *Wilson v. United States*, 221 U.S. 361 (1911); *Ex Parte Gould*, 132 S.W. 364, 374-80 (Tex. Crim. App. 1910).

⁴¹ CHERYL GANZ, *THE 1933 CHICAGO WORLD'S FAIR: CENTURY OF PROGRESS* 79 (2008).

years, telephone service was available in every major city in the country.⁴² Customers were much more willing to use telephones to communicate than telegraphs.⁴³ Initially, subscribers were permitted unlimited use to encourage them to transfer to this method of communication from the telegraph service that billed by the message.⁴⁴ By the 1890s, callers paid for the amount of their individual usage.⁴⁵

Telephone conversations provided an immediate response, unlike the telegraph which required a chain of delivery and a wait period for a response. Telephones, at the turn of the twentieth century, had made instantaneous communications accessible to the masses.⁴⁶

IV. GOVERNMENT INTRUSION OF TELEPHONE TECHNOLOGY AND SOCIETY'S REACTION

Laws written to ensure privacy in telegraphs were poorly adapted to account for the new technology of the telephone. In New York, for instance, statutory provisions prohibited interception of telegraphs and forbade telegraph companies from disclosing the contents of a telegram to anyone but the intended recipient.⁴⁷ Telegraph companies were also forbidden to send messages that constituted or furthered a crime and were required to forward such messages to law enforcement authorities. With the development of telephone technology, the legislature simply added the words "or telephone" and "telegraph."⁴⁸ While it was theoretically possible for telegraph operators to identify criminal messages before sending them, it was simply not possible with the telephone. Late nineteenth-century lawmakers lacked even this

⁴² JOHN E. KINGSBURY, *THE TELEPHONE AND TELEPHONE EXCHANGES: THEIR INVENTION AND DEVELOPMENT* 267 (1915).

⁴³ *Id.* at 473.

⁴⁴ *Id.*

⁴⁵ *Id.*; see also MORRIS, *supra* note 22, at 23 (explaining that prepaid message requirements were likely to be considered a reasonable telegraph company regulation).

⁴⁶ See AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *TELEPHONE STATISTICS OF THE WORLD* 8-13 (1912) (describing that telephone use in the first decade of the twentieth century increased nearly ten times more rapidly than telegraph use).

⁴⁷ See N.Y. PENAL LAW § 641 (McKinney 1881).

⁴⁸ 1895 N.Y. Laws 518 (current version at N.Y. PENAL LAW § 250.35(1) (McKinney 2008)).

basic insight and had not learned other—more subtle—lessons from investigations involving telegrams. It should have been foreseeable that law enforcement would have an interest in learning the contents of telephone conversations, just as it had an interest in discovering the contents of telegrams. The laws nevertheless forbid any interception, whether by law enforcement or others.

Despite these laws, just as with telegraph technology, government officials initially assumed there were no limits on their ability to intercept conversations passed along the wires. The New York City Police Department maintained a wiretap squad from 1895 that operated in secret.⁴⁹ None of the evidence it obtained was ever introduced in court. Information obtained from the wiretaps was used only to aid in investigations, which kept the program from ever coming to light.⁵⁰

A high-profile dispute in 1916 between the mayor of New York and the Catholic charities of New York ended the secrecy of what appears to have been this country's first wiretapping program.⁵¹ In an effort to demonstrate that priests were attempting to avoid testifying before a committee investigating their use of city funds, Mayor John Purroy Mitchel ordered the police department to intercept the calls of priests who were to testify.⁵² A Catholic member of the wiretap squad, having second thoughts about eavesdropping on a priest, revealed the mayor's

⁴⁹ *Seymour Wires Tapped on Order Given By Woods*, N.Y. TIMES, May 18, 1916, at 1 ("The practice of wiretapping . . . goes back as far as 1895 The company . . . interpreted the law to mean that it was its duty to aid and assist the public officials in apprehending and detecting crime" (quoting John L. Swayze, general counsel of the New York Telephone Company)).

⁵⁰ STATE OF NEW YORK, MINUTES AND TESTIMONY OF THE JOINT LEGISLATIVE COMMITTEE APPOINTED TO INVESTIGATE THE PUBLIC SERVICE COMMISSIONS 103 (1916) (testimony of Police Commissioner Arthur Woods), available at <http://www.archive.org/stream/cu31924083762942#page/n15/mode/2up>.

⁵¹ See EDWIN R. LEWINSON & JOHN PURROY MITCHEL: THE BOY MAYOR OF NEW YORK 179-80 (1965); Meyer Berger, *Tapping the Wires*, NEW YORKER, June 18, 1938, at 41.

⁵² Daniel Trucano, *The Public Charities Controversy and John Purroy Mitchel, Mayor of New York City, 1914-17* (Apr. 10, 1970) (unpublished master's thesis, St. Francis College) (on file with author).

actions and thus the existence of the entire wiretapping program.⁵³

The disclosure of the previously secret police wiretap squad attracted considerable public attention.⁵⁴ There was an immediate fear that every New Yorker's telephone conversations were being overheard. The police were able to convince the public that they were sufficiently competent at investigation and that the phones of few, if any, innocent persons were ever tapped.⁵⁵ Police Commissioner Arthur Woods explained that the New York City police were not the bumbling constables Benjamin Cardozo described from the Framing Era.⁵⁶ He explained that his professional police department had expertise in identifying criminals and was rarely wrong when it engaged in an intrusion as serious as a wiretap.⁵⁷

For the most part, Police Commissioner Woods's claim that the New York Police Department should be trusted to determine who to wiretap seemed to satisfy New Yorkers.⁵⁸ Charges against city officials for conducting the wiretapping were dropped.⁵⁹ Though laws were proposed in the legislature that year to limit the ability of police to decide when to eavesdrop on telephone calls, none passed.⁶⁰ The mayor who ran against Mitchel's clearly politically motivated wiretapping implemented only modest reform. Under his administration, police only had to obtain the approval of a prosecutor to conduct requested wiretapping.⁶¹ Self-regulation of wiretapping thus appears to have been largely in the

⁵³ Michael W. Clark, *Mayor Mitchel, Wire-Tapping, and the Catholic Vote of 1917 in New York City* 28-29 (1965) (unpublished master's thesis, St. Francis College) (on file with author).

⁵⁴ See Oliver, *supra* note 3, at 239 n.207.

⁵⁵ *Id.*

⁵⁶ See *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926). Of course police in the 1920s were not the constables of the Framing Era. They were considerably more powerful, with considerably more power and incentive to consciously disregard civil liberties than the colonial-era title constable suggested. See Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850-1940*, 62 RUTGERS L. REV. 447, 505 n.319 (2010).

⁵⁷ Oliver, *supra* note 3, at 241-44.

⁵⁸ *Id.* at 244-45.

⁵⁹ *Acquit Kingsbury for Wiretapping: In Ordering Defendants Freed Court Says Evidence Did Not Indicate Bad Faith*, N.Y. TIMES, May 25, 1917, at 20.

⁶⁰ Oliver, *supra* note 3, at 245.

⁶¹ *Id.*

Progressive Era, a period when the public was willing to place extraordinary trust in the police.

The famous, or infamous, Prohibition Era Supreme Court case *Olmstead v. United States* considered whether the Fourth Amendment placed limits on the power of the government to intercept telephone calls.⁶² Not surprisingly, several telephone companies filed amicus briefs contending that intercepting a telephone call amounted to a search or seizure within the meaning of the Fourth Amendment. Much like telegraph companies before them, they had an interest in reassuring their customers that their privacy was being protected.

The efforts of these telephone companies were unsuccessful. A closely divided Court held that the Fourth Amendment does not protect the sounds that callers transmit from their homes.⁶³ The holding was destined to be short-lived. The trust the public was willing to place in the police during the Progressive Era would not survive Prohibition. Law enforcement during Prohibition proved itself to be incompetent at best and hopefully corrupt at worst. At the federal level, the United States Supreme Court quickly reversed the effect of the *Olmstead* decision, holding that the Communications Act of 1934 prohibited wiretapping, though the language the Court was interpreting could hardly be read to require—or even suggest—that conclusion.⁶⁴ In New York State, an unlikely interest group joined the fight against unregulated wiretapping—organized labor.

Organized labor's connections with organized crime made it a target for prosecutorial investigations, prompting labor's keen interest in civil liberties.⁶⁵ In the 1930s, organized crime began to

⁶² 277 U.S. 438 (1928).

⁶³ *Id.* at 463-65.

⁶⁴ Robert A. Pikowsky, *The Need for Revisions to the Law of Wiretapping and Interception of E-Mail*, 10 MICH. TELECOMM. & TECH. L. REV. 1, 28-31 (2003) (observing that the Supreme Court in the 1930s interpreted the Telecommunications Act of 1934 to forbid wiretapping and that Congress did not modify the statute to permit wiretapping until the late 1960s).

⁶⁵ See Oliver, *supra* note 56, at 521-22. William Nelson has described labor's support for limits on wiretapping and searches as part of a struggle between elites for order and non-elites for security from the elite's order-restoring apparatus. William E. Nelson, *The Changing Meaning of Equality in Twentieth Century Constitutional Law*, 52 WASH. & LEE L. REV. 3, 22 (1995). The linkage between organized labor and organized crime seems to provide a tighter explanation.

infiltrate labor unions. Before Prohibition, gangs sold violence. The use of violence and its linkage to organized crime was certainly foreseeable, as alcohol became a legal product again. Arnold Rothstein, the infamous gangster alleged to have fixed the 1919 World Series, made a business of selling muscle to contending sides in labor strikes.⁶⁶ In the Garment Worker's Strike of 1926, he sold his product to both sides of the strike. Prohibition then created an easy and profitable market for contraband alcohol and made large criminal networks possible.⁶⁷

Prohibition both distracted organized crime from the violence racket and made criminal organizations much more sophisticated. The end of Prohibition took away the easiest source of their income but did not destroy the criminal organizations. Bootleggers became mobsters; former peddlers of contraband infiltrated legitimate businesses. For a variety of reasons, organized labor became an easy target for mob infiltration.

For legitimate and illegitimate reasons, labor was opposed to wiretapping. Trade unions were infiltrated by organized crime in the 1930s.⁶⁸ In New York, mob-busting prosecutor Thomas Dewey focused on these groups.⁶⁹ Corrupt unions obviously opposed his efforts to ferret out their wrongdoing. Legitimate unions objected to the unwelcomed government eavesdroppers itching to cobble together probable cause for an indictment.

Labor groups specifically asked the New York Constitutional Convention of 1938 to forbid wiretapping except when judicially authorized.⁷⁰ Their fear of government intrusion extended beyond eavesdropping. They asked the convention to include a provision that excluded illegally obtained evidence from criminal trials.⁷¹ Labor interests were so powerful that not only did the New York

⁶⁶ DAVID PIETRUSZA, *ROTHSTEIN: THE LIFE, TIMES AND MURDER OF THE CRIMINAL GENIUS WHO FIXED THE 1919 WORLD SERIES* (2003); BENJAMIN STOLBERG, *TAILOR'S PROGRESS: THE STORY OF A FAMOUS UNION AND THE MEN WHO MADE IT* 138 (1944).

⁶⁷ STOLBERG, *supra* note 66, at 138.

⁶⁸ EDWARD BEHR, *PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA* 238 (1996); SELWYN RAAB, *FIVE FAMILIES: THE RISE, DECLINE, AND RESURGENCE OF AMERICA'S MOST POWERFUL MAFIA EMPIRES* 37 (2005).

⁶⁹ MARY M. STOLBERG, *FIGHTING ORGANIZED CRIME: POLITICS, JUSTICE AND THE LEGACY OF THOMAS E. DEWEY* 50-51 (1995).

⁷⁰ 4 STATE OF NEW YORK, *REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK* 3441 (1915).

⁷¹ *Id.*

Constitution of 1938 require judicial authorization for a wiretap, but the proposed provision to make the exclusionary rule part of the Constitution barely failed in the convention.⁷² The exclusionary rule has, of course, been one of the most popularly maligned rules of criminal procedure, comparable only with the public's distaste for the warnings arrestees must be given under *Miranda v. Arizona*.⁷³

At the national level, a variety of labor groups similarly argued that Congress should forbid wiretapping. In 1941, a variety of labor groups—including the American Federation of Labor (AFL) and the Congress of Industrial Organizations (who were separate groups at this point)—joined a host of other labor organizations including the Brotherhood of Railway Trainmen, the American Newspaper Guild, the United Federal Workers of America, and the Steel Workers Organizing Committee in opposing wiretapping.⁷⁴ Like their labor counterparts who advocated limits on wiretapping in the New York Constitution a few years earlier, these labor organizations raised generic concerns about the power of the government to eavesdrop on its citizens.⁷⁵ The American Federation of Labor additionally observed that unions had a unique concern. The government, as the AFL observed, may assert an interest in strike busting in an actual, or claimed, interest in national security.⁷⁶ Highly influential labor groups thus joined the logical opponents of wiretapping—telephone companies—in opposing the power of government to intercept telephone calls.

V. THE NEXT COMMUNICATIONS REVOLUTION

As we enter our second communications revolution, no group has emerged with the influence of organized labor in the 1930s, or with the purity of interest of Western Union in the 1870s. As before, and predictably, a gap exists between the new technology

⁷² WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS AND IDEOLOGY IN NEW YORK, 1920-80*, at 125-27 (2001).

⁷³ 384 U.S. 436 (1966).

⁷⁴ *To Authorize Wiretappings: Hearing on H.R. 2266 and H.R. 3099 Before the H. Comm. on the Judiciary*, 77th Cong. 34, 75, 100, 131, 171, 237 (1941).

⁷⁵ *Id.* at 34-35, 76-77, 91-94, 131-32.

⁷⁶ *Id.* at 35.

and the law that will protect the privacy of customers using the new technology. However, it is not clear that the gap will be filled this time. Under the Electronic Communication Privacy Act of 1986, the government can obtain access to e-mails, mobile location information, information stored in computer “clouds,” and information in social networking sites by demonstrating that the information is merely “relevant” to a criminal investigation.⁷⁷

As the social world moves from telephones to cell phones, e-mails, texts, and instant messages, it is hardly satisfactory to say that the degree of privacy varies with the manner of technology chosen. As the world evolves to cell phones, the land-line holdout cannot expect to be a part of a business and social world that now expects everyone to carry telephone and e-mail service in a pocket or purse.⁷⁸ As text messaging replaces cell phone calls, the person who cannot or will not use text messaging is left out. To do business, or be social, we must use technology not yet protected from the government’s prying eye. Insisting on a manner of communication with greater legal protections for ordinary conversation is reminiscent of the television sitcom spy Maxwell Smart’s constant insistence on using the awkward and inconvenient cone of silence to prevent interception.⁷⁹

The use of new technology is thus, on some level, essential. Legislative innovations to protect privacy in these technologies is,

⁷⁷ See 18 U.S.C. § 2511(2)(i)(III) (2006) (“It shall not be unlawful under this chapter for a person acting under color of law to intercept the wire or electronic communications of a computer trespasser transmitted to, through, or from the protected computer, if . . . (III) the person acting under color of law has reasonable grounds to believe that the contents of the computer trespasser’s communications will be relevant to the investigation . . .”).

⁷⁸ Justice Kennedy recognized that:

Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own.

City of Ontario v. Quon, 130 S. Ct. 2619, 2630 (2010).

⁷⁹ *Biography for Don Adams*, IMDB, <http://www.imdb.com/name/nm0010915/bio> (last visited Jan. 22, 2012) (documenting that NBC hired Don Adams to star as Maxwell Smart, the “bumbling yet intrepid secret agent,” in the Mel Brooks and Buck Henry spy spoof *Get Smart* in 1965).

however, certainly not inevitable. The degree of privacy we enjoyed from government interception of telegraphed messages (enjoyed before Western Union sent its last telegraph, that is), and enjoy from government intrusion on telephone calls, did not accompany these new technologies from their inception. The new forms of communication were not initially covered by laws limiting older forms of communication. Despite Western Union's arguments, telegraphs were not regarded to have inherited the legal protections afforded items sent through the mail. Despite statutory prohibitions on any interception of telephone calls, government snoops were believed to have limitless powers to tap telephones wires. Powerful advocacy groups convinced lawmakers to extend the privacy protection to new forms of communication. No similar groups appear on the horizon to ensure that privacy interests in these new modes of media technology will be protected.

No technology provider is poised to do the advocacy work of a nineteenth-century Western Union or an early-twentieth century Atlantic Telegraph and Telephone Company. Presently an organization called Digital Due Process is lobbying Congress to update the Electronic Communications Privacy Act (ECPA) to require greater protection from government intervention in new technologies.⁸⁰ The group includes unlikely partners like America Online, Apple, Americans for Tax Reform, the American Civil Liberties Union, and AT&T (to take a demonstrative sample whose sole common characteristic seems to be preserving alliteration in the list).⁸¹

There are reasons to believe this unlikely collection of actors will not be successful. Unlike Google or AOL, neither Western Union nor AT&T came to legislators or courts with unclean hands.

⁸⁰ *ECPA Reform: Why Now?*, DIGITAL DUE PROCESS, <http://digitaldueprocess.org/index.cfm?objectid=26802940-3840-11DF84C7000C296BA163> (last visited Jan. 22, 2012) (discussing the latest news on ECPA reform and related issues); *see also* Gautham Nagesh, *Sen. Leahy Introduces Update to Digital Privacy law*, HILL (May 17, 2011, 1:54 PM), <http://thehill.com/blogs/hillicon-valley/technology/161691-sen-leahy-introduces-update-to-digital-privacy-law>.

⁸¹ Other high profile members of this organization include eBay, Facebook, Google, IBM, and the Newspaper Association of America. *See Who We Are*, DIGITAL DUE PROCESS, <http://www.digitaldueprocess.org/index.cfm?objectid=DF652CE0-2552-11DF-B45500C296BA163> (last visited Jan. 22, 2012).

Google, AOL, and others examine the content of e-mail messages to sell IP addresses to manufacturers interested in selling me quality barbeque sauce and single barrel bourbon, for instance.⁸² Google, AOL, and others then are not the best champions of liberty when they ask Congress to place limits on the government's ability to acquire information about drug dealing or terrorist plots.

Similarly, there is no consumer group positioned to take over the role that organized labor played in the privacy debates. Unlike Western Union in the late 1800s or AT&T in the early 1900s, organized labor's hands were far from clean, though they may not have been as thoroughly dirty as Thomas Dewey suggested. Organized labor did, however, have influence in Congress and state legislatures that the ACLU could never boast.⁸³

Finally, and perhaps most importantly, there seems to be less public concern over privacy at the turn of the twenty-first century than there was at the turn of the twentieth century. Corporations do not expect protecting privacy to be essential to retaining existing customers and attracting new ones. Qwest alone resisted the government's requests to tap the international calls of its subscribers as part of the National Security Agency's highly controversial wiretap program during the presidency of George W. Bush.⁸⁴

With Facebook and Twitter, Americans themselves have grown accustomed, not necessarily to government eavesdropping, but to broadcasting virtually every detail of their lives to anyone who cares to surf the web. When a telegraph operator in the nineteenth century read a message he conveyed, it was not because the sender desired him to know the contents. When a telephone operator, or nosey member of a party line, listened in on a conversation in the early twentieth century, it was not because the parties to the conversation wished to broadcast their

⁸² See, e.g., Schmidt, *supra* note 7.

⁸³ See *generally About the ACLU*, ACLU, <http://www.aclu.org/about-aclu-0> (last visited Jan. 22, 2011) ("The ACLU also works to extend rights to segments of our population that have traditionally been denied their rights, including people of color; women; lesbians, gay men, bisexuals and transgender people; prisoners; and people with disabilities.").

⁸⁴ See Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY, May 11, 2006, at A1.

discussion. In modern society, discussions that are seemingly relevant to only two people appear on publically viewable Facebook walls or Twitter feeds. Companies like Facebook, AOL, and Google introduced us to the ability to broadcast every detail of our lives and feed our addiction to do so.

We are no longer a private people. We live out loud. Perhaps quite naturally, there is no one poised to vigorously represent privacy concerns in these new technologies.

