

THE BOUNDARIES OF PRIVACY IN AMERICAN SOCIETY

Commission III: Private Data-Gathering Activities
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If any one theme can be observed in all the papers for this conference, surely it is that the boundaries of privacy in American society have not remained stationary. Rather, they have been pressured and intimidated by the developments of our increasingly complex society. Expansions in technology (especially the computer), government, communications, and the economy have necessitated a contraction of individual privacy. But it has been shown that not all of the changes that have evolved from these developments are desirable. Thus it is time, indeed past time, to begin to rethink our conceptions of privacy.

Nowhere are the effects of the twentieth century "modernization" felt more acutely than in the private sector. Here the need for non-governmental data-gathering activities has produced such effects as massive consumer investigative agencies which appear to be the prerequisite for our credit economy, a plethora of electronic devices and covert agencies for surveillance, and the ability of the media to obtain and transmit overwhelming amounts of data on virtually anything.

Our commission has investigated the various aspects of invasion of privacy by non-governmental data-gathering activities. The major obstacle, paradoxically, has been the obtaining of information in this field--the private sector's activities are so diversified and to a large extent removed from public awareness, that there has been little significant research into this area. In spite of this, we tried to choose the most important areas, and thus the topics for our conference papers included the following: The Consumer Reporting Industry, Physical and Psychological Surveillance, and the Communications Industry. Accordingly, this paper is organized the same way.

The Consumer Reporting Industry

Although the public seems to be vaguely aware that a consumer reporting industry exists, there has been a lack of awareness on the extent to which individual privacy is affected. The industry is composed of "organizations whose business is the gathering and reporting of information about consumers for use by others in making a decision concerning whether to grant credit, underwrite insurance, or employ the subject of such reports."¹

Within this industry, however, there are two types of operations: on the one hand there are credit bureaus that are primarily responsible for credit ratings, and on the other hand are investigative reporting agencies which are involved with insurance and employee reporting. Because of these different orientations, there are important differences in the types of information obtained, how it is obtained, and the consequential invasions of privacy.

1. Freeman, Betsy, "The Consumer Reporting Industry and the Invasions of Privacy," WWSPIA, November 18, 1971, p. 1.

The credit bureaus serve the financial and business communities and need to garner data on whether the subject will pay his bills if granted credit. To a large extent, the efficiency of these agencies has fostered the development of our credit economy. In recent years the tendency has been toward more centralized, highly computerized credit bureaus. To counter-balance the emergence of the "super-bureau" (TRW Data, which had at least 27 million files on persons in 1967), the more than two thousand small bureaus have organized the Associated Bureaus of America, through which they have purchased computers and continually exchange information.

These bureaus are interested primarily in factual data on a person such as his name and the vital statistics on he and his family, his employment record, data from the public record, and information on his credit record.¹ At the present time, there is no legal restriction against obtaining this kind of "hard" data, and the bureaus generally do not release their data to the public. Thus, this commission does recognize that there are some moral objections to the existence of credit bureaus, but it concludes that their service to society, combined with their largely circumspect operation provide a counterbalance to these objections at the present time.

The real issue in the consumer reporting industry is not the invasions of privacy by the credit bureaus, but the invasion by the investigative reporting agencies. These agencies are typically looking for more information than just the "hard" data mentioned above--they want information on personal habits (i.e., drinking, driving), health history, reputation, and interests.² Without question, this is much more sensitive data than the credit bureaus' data.

Just as significant is the way that this data is obtained: mainly through interviews with persons who have had some contact with the subject, including neighbors, employers, and friends. Thus much of the information is highly "subjective" with a great probability of error and misinterpretation resulting. Indeed, these files have the likelihood of being further adulterated by the use of investigators with questionable training and quotas on the minimum amount of derogatory information that the investigators can report.

Especially distressing is the provision in the Fair Credit Reporting Act in which "Consumer Reporting Agencies are protected from defamation suits by a qualified privilege to make a defamatory statement to protect the subject of recipient of the information."³ And finally, it has been shown that in most cases where information is needed (i.e., insurance), it is not used to disqualify the person, it merely determines the risk. Yet we believe that, for example, the determination of whether a person drinks and/or drives recklessly should be not be left to the whims of his neighbors, but that it should be derived from the public records.

1. Ibid., p. 7.
2. Ibid., p. 18.
3. Ibid., p. 25.

Therefore, on the issue of investigative reporting agencies, our commission concludes that the moral right to privacy has been severely breached. Moreover, we feel that this invasion of privacy cannot be justified--the companies now using this "supplementary" data could still function without it. In this light, we recommend the following legislation to fortify the Fair Credit Reporting Act:

1. Restrict the types of data which can be assembled by the consumer reporting agencies to the types of "hard" data used by the Credit Bureaus.
2. "Limit the type of enquires which can be made to authoritative sources such as employers, doctors, and public records."¹ (To facilitate enforcement, we also recommend the required disclosure of sources of data upon demand of the subject of the file.)
3. Establish a relevancy requirement to prevent the collection of data which is not needed. (A similar provision was part of the original act, but was dropped in passage.)
4. Rescind the conditional privilege which these agencies now possess to make them subject to libel and defamation suits.

Physical and Psychological Surveillance

In his book, Privacy and Freedom, Alan Westin wrote that the "private use of hidden surveillance devices can be divided into eight main areas of American life in which surveillance has become sufficiently widespread to warrant serious concern: business affairs, labor relations, professional life, personal affairs, governmental agencies, and surreptitious research operations."² If he is right, and from the evidence, he seems to be, then there is almost no area of life in which surveillance devices are not widespread. With all the elements of the "evesdropper's arsenal" combined with the fantastic growth of the private investigation industry since World War II, it has become a fact of life that surveillance and evesdropping capabilities are available to anyone that wants them. Moreover, it is obvious that this is a blatant violation of personal privacy.

As a response to this problem, the Federal Crime Control and Safe Streets Act was passed in 1968 to prohibit the use of wiretapping and surveillance devices by the private sector. Specifically, it forbade "the manufacture, distribution, possession, or advertising of any device whose design renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications, and with the knowledge that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce." Although this is a step in the right direction, there appears to have been little enforcement. We, therefore recommend that federal enforcement of this Act be increased.

Some states have taken actions similar to the federal government on either evesdropping or wiretapping, or both, but we think that all states should follow this lead with legislation for intrastate activity. We would also encourage strict enforcement of these laws once they are

1. Ibid., p. 30.
2. Westin, Alan, Privacy and Freedom, New York, Atheneum, 1967, p. 104.
3. Wolf, Robert A., "Physical and Psychological Surveillance in the Private Sector," WWSPIA, November 18, 1971, p. 8.

passed. And to insure the continuing effectiveness of the law to cope with this problem, all feasible measures should be taken to improve public awareness and education on this issue.

Another significant aspect of the physical surveillance problem is the use of the polygraph, or lie detector. This device simply records physiological responses from the body which are known to vary when someone is not telling the truth. It is the test examiner, however, who draws the inferences from the data. Given trained examiners, a suitable test environment, and adequate pretesting (to adjust for nervousness, forced responses, etc.), the polygraph is fairly accurate.

The difficulty arising from the use of the polygraph is the result of the "reading" of the device, and not from a failure of the device itself. Because there has been only a slight effort to control the examiners by licensing and training requirements, there have been abuses of the polygraph and many states have prohibited its use. However, its use has been extremely successful in the private sector, primarily as a deterrent for theft by employees. With respect to invasions of privacy, it has been found that judicious use of the device has done at least as much to protect the innocent as to detect the guilty. Thus this commission wishes to retain the benefits which can be derived from the polygraph, yet we wish to prevent its abuse. Accordingly, we propose that: (1) All states which now prohibit the use of the polygraph, rescind these laws, (2) All states require adequate training of polygraph examiners and license them. (In addition, we want to encourage the examiners, as a profession, to take steps to develop a code of ethics.), (3) All states pass laws which "prevent discrimination in hiring and dismissal on the basis of compliance with an employer's request to take a polygraph test."¹

The final area found to be of major importance in the realm of physical and psychological surveillance is the use of personality tests in the private sector. Nourished by the demands of our industrial society and the developments in the behavioral sciences, personality tests are heavily used in both educational institutions and in industry. Yet, when viewed in the light of individual privacy rights, serious questions appear such as how are the questions scored and by whom or what, how are the results used and are they kept, and what is the nature of the questions on the test?

The available answers to these questions have not satisfied this commission that these tests are justified invasions of privacy. From our research, two primary issues evolve. First, the questions are often of a highly personal nature and include topics as religion, sexual tendencies and desires, and personal feelings and relationships. And secondly, there has been much disagreement over whether the tests do in fact provide a reasonable assessment of one's personality. It is the opinion of the commission that in almost all circumstances, the administration of these tests is not essential. Consequently, we recommend the prohibition of tests which include questions on the topic mentioned above. Allowable exceptions would include tests in areas of intense "public interest" (e.g., air controllers, pilots, etc.), and in schools where a professional psychologist (with MA degree) could assist an obviously disturbed child. In this latter case, the test could only be given with the permission of the parents.

1. Ibid., p. 22

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We are not saying--and this must be made clear--that all work on personality testing must stop. But we are cautious of the spectre of scientific ways of probing the conscienceousness, and we feel that this is too great an invasion of privacy. Thus, we conclude that the personality tests should be restricted to the research clinic, for the present time, with only the few exceptions mentioned above.

The Communications Industry

In the private sector, the communications industry has the greatest potential for invading the individual's privacy. This conclusion is inescapable when one considers all of the various forms of print and broadcast media that constantly confront us, and the fact that thousands of decisions must be made daily as to what is a "legitimate" invasion of privacy and what is not. Indeed, it was primarily due to the abuses of yellow journalism that privacy issue first emerged as a thorny legal problem.

Up to the present, the legal system in this country has had great difficulty dealing with the question of invasions of privacy by the media. For many years, "The Right to Privacy," by Warren and Brandeis was held to be the leading view, and this concluded that the right to privacy was an outgrowth of common law. However, in more recent times, cases such as Time v. Hill have come before the court, begging for more definitive distinctions on this issue.

It appears to our commission that the legislative and judicial apparatus is unable to answer the crucial problems of media invasion of privacy. To do so would, first of all, require the Congress to legislate a definition of privacy which cannot be feasibly done because the parameters of privacy in our society are too dynamic. But also, attempts to severely regulate the media would run afoul on the media's First Amendment rights. With regards to the judicial capability, it is clear that the courts can only make decisions on individual cases, after the occurrence, and these decisions must deal with the specific issues of the case. Thus the courts must perform a balancing act as they did in Time v. Hill, and while this is their necessary function, they are ill able to provide leadership in areas such as "newsworthiness", and appropriate media morality.

Rather, this commission concludes that prime responsibility for the media must lie with the media. As an industry, it must realize that its primary responsibility is to the public; that "freedom carries concomittant obligations; and that the press, which enjoys a privileged position under the Constitution, is obliged to be responsible to society for carrying out certain essential functions of mass communication in contemporary society."¹ Furthermore, it should be the media that determines the appropriate standards for "newsworthiness" and "legitimacy" (not legality) in light of this quasi-public position. This must be accomplished principally through improved ethical codes for the media, yet we agree that Eugene N. Alienkoff was correct in saying that there must be definite "invasions of privacy in which the

1. Theodore, J. Michael, "Communications Industries and the Invasions of Privacy," WWSPIA, November 18, 1971, p. 15.

media would have no privilege: invasions of privacy connected with malice, electronic invasions (bugging, wiretapping), invasions of private persons in private places, and invasions committed for commercial purposes."

The question of what is to induce the media to behave in this manner is very much in order. In response, we have found that the answer must lie in the greater professionalization of the media. To a large extent, this has already occurred in the case of the print media, but the broadcasting media is relatively immature and must move more vigorously in this direction. In addition, provisions for better education for journalists and other communications personnel, as well as greater competition among the media will provide some incentive for professionalization.

Especially when one considers the actual and potential technological development within the communications industry, this professionalism, along with the development of improved ethical codes, must rise to the task of protecting the individual's right to privacy, while still performing this needed public service. And, more than ever before, there will be a corresponding need for independent public organizations to monitor and report on the media.

Conclusion

We have thus presented our findings and recommendations which we think can do much to resolve the problems of invasion of privacy by the private sector. Believing that these recommendations are both necessary and feasible, we urge their acceptance by the conference.