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A Different View of Privacy

Albert Alschuler

A DIFFERENT VIEW OF PRIVACY

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Professor Countryman's Orgain Lecture[1] is an important addition to the growing literature of privacy. It presents a comprehensive picture of the threat that modern technology and organization pose to our sense of control over basic information about ourselves. Professor Countryman calls for action: We cannot leave the cause of privacy to the forces of laissez faire. I fully agree.

I believe, however, that Professor Countryman's lecture shares one defect with a number of lesser studies. It focuses too much of its energy on the mechanisms that now exist for compiling and distributing information, and not enough on the concept of privacy that it seeks to advance. In my view, Professor Countryman's study, like other recent writing in the field, does not put first things first. Before one can sensibly decide what to do about proliferating data banks, one must reach some judgment concerning the extent to which an individual should be able to control the use of information about himself. A precise, substantive concept of privacy should precede any procedural solution, and Professor Countryman's own concept of privacy is, in my view, too often implicit rather than carefully thought out and expressed.

The result, when it comes to solution, is a proposal that is essentially backward-looking. It seeks to recapture the era before the computerized personal dossier and the national data bank came into existence. Professor Countryman urges that except in cases of "actual need for a vital public purpose," data banks containing personal information should be abolished. Because the technological revolution that surrounds us has diminished our sense of privacy, Professor Countryman apparently sees technology, and organization itself, as our villains.

In my judgment, this proposal and others like it tend to go both too far and not far enough. By focusing on today's mechanisms of sharing information, they protect substantive privacy only haphazardly. At the same time, these proposals would impose gratuitous hardship on persons whose right to use and share information Professor Countryman does not challenge.

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1 Countryman, *The Diminishing Right of Privacy: The Personal Dossier and the Computer*, 49 TEXAS L. REV. 837 (1971).

Consider just one example. Under Professor Countryman's proposal, a department store contemplating an extension of credit apparently would not have access to the files of a consumer credit bureau. Professor Countryman would not, however, require the store to extend or deny credit in darkness or on the basis of an applicant's grooming and personal appearance. The store would apparently be free to seek information from the customer himself, from the references that he provided, and from other individuals and commercial institutions as well. As Professor Countryman puts it, the store would be "left to [its] own devices."

Under this regime, I suspect that most department stores would quickly adopt a "long form" credit application that would itself invade the customer's privacy. The form would require a substantial amount of time and energy for the customer to complete. Following this paperwork, the store would delay each application for a number of weeks while it contacted the customer's references and "verified" the information that he provided.

The customer would repeat this process with every credit application, for there would be no mechanism by which he could "waive" his right to privacy and permit the accumulation of personal data by a credit bureau. (If there were such a mechanism, it would be difficult to prevent an information gatherer from automatically requiring a "waiver" as a condition of extending credit. The present situation might therefore be rapidly duplicated.)

The central point is one that Professor Countryman recognizes: abolishing the consumer credit bureau would be inefficient—not only for the commercial institution but for the customer as well. Professor Countryman's proposal would tend to consume the consumer in paperwork and delay and discourage him from seeking services that he would otherwise obtain and value.

Professor Countryman argues that we must rid ourselves of "the misconception that whatever is efficient is desirable," and it is true that there are many situations in which free men must sacrifice efficiency to the cause of human dignity. But efficiency, though not the end of human existence, is a value nevertheless. I believe that we should receive something in return for our trade. If the invasion of privacy turns out to be the same in the end, it might as well be done efficiently.

I do not deny that there would be some gain to privacy under Professor Countryman's proposal. For one thing, there might be a

gain in the accuracy of the information used by department stores and other commercial institutions. I am not, however, entirely sure. A system which looked to the customer himself as the primary source of credit information would make it more difficult for a commercial institution to learn a third person's lies about him—at the same time that it made it easier for the customer to lie successfully about himself.

Thus there would not necessarily be a net gain in the accuracy of information under Professor Countryman's proposal, but there might be a gain of a different sort. A financial institution could demand as much information about a customer's past under this proposal as it demands today; but if the customer himself were the primary source of this information, the inaccuracies in the final report would probably tend to favor the consumer rather than harm him. Whether our system of jurisprudence formally recognizes the fact or not, harm to the consumer is likely to be more painful than harm to the financial institution. A shift in the direction of the inaccuracies might therefore be desirable.

In addition to the danger of inaccuracy, a centralized data bank poses a danger that information given for one purpose may be used for another—for example, that friendly statements to a lady from the Welcome Wagon may, without the customer's knowledge or consent, be considered in passing on a credit application a few weeks or a few years later. Professor Countryman does not, however, rest his opposition to data banks primarily on the danger of inaccuracy and on the difficulty of confining access to information to the people we wish to have it. Even if the accumulated information were accurate and even if the rules limiting access to this information could be fully enforced, Professor Countryman would see the data bank as a threat to privacy. It is with this last proposition that I disagree. In my view, Professor Countryman has confused the medium with the message.

Under Professor Countryman's proposal, it would apparently be necessary to establish an impartial agency to review each accumulation of information to determine whether it served an "actual need for a vital public purpose." This agency might have an administrative power to order the destruction of files that did not meet its standards; or more likely, the agency might propose suitably detailed legislation to Congress or the state legislatures. (I note, in passing, that Professor Countryman's solution seems inconsistent with his earlier statement,

"With the present state of knowledge of the contents and the uses of dossiers, it seems unlikely that we can effectively define either the 'legitimacy' of the 'need' permitting access, or what information is 'relevant' to that need. Even less can we define the balance to be struck between the 'need' and a desirable preservation of privacy." Professor Countryman would strike the balance somewhat differently from the people he criticizes, but he attempts essentially the same task. I think that Professor Countryman was right the second time around, and that the task should be attempted.)

My own approach to the problem of safeguarding privacy would, however, be somewhat different. In one respect, I would carry Professor Countryman's proposal farther. My initial inquiry would not be what information should be contained in a data bank (a particular *means* of storing and coordinating information), but what information an individual or institution should *have* in making a particular decision. In other words, I would ask the substantive question first.

As early as 1949, the Commonwealth of Massachusetts made it an "unfair educational practice" for an educational institution "to cause to be made any written or oral inquiry concerning the race . . . color or national origin of a person seeking admission . . . ."[2] I would take this legislation as my model and direct my hypothetical "privacy agency" (which I would borrow from Professor Countryman) to focus on each of the major tasks for which public and private groups now accumulate personal information—such tasks as deciding whether to extend or deny credit, deciding whether to hire or fire, investigating crime, census-taking, and so forth. In each instance, the agency should ask what sort of information ought to be available in performing the task; and as Professor Countryman notes, the inquiry should encompass not simply the relevancy of the information, but the extent to which this information is properly viewed as private.

The final proposals of the agency might be either negative or affirmative in form: "An employer shall not make or cause to be made any inquiry into the race of an applicant for employment, into arrests or criminal proceedings involving the applicant which were not followed by convictions, into an applicant's political associations or beliefs [with an exception, perhaps, for a few "national security" positions and for organizations like the Republican Party and the NAACP which have avowed political purposes] . . . ." Or, "A person or organi-

2 MASS. ANN. LAWS ch. 151C, § 2 (1958).

zation which employs more than five persons may make only the following inquiries concerning a person seeking employment as an unskilled laborer . . . ."

The resulting "privacy code" would be neither short nor simple, and it would undoubtedly be necessary to draw some difficult distinctions. I believe, however, that an agency that studied the current practices of various public and private investigators, the forms currently used to gather personal information, and the character of the specific problems that emerged could arrive at a consensus that would better reflect our concern for privacy than today's passive system of laissez faire.

Once the substantive question of how much personal information should be available in performing each task had been settled, it would be necessary to turn from the "message" to the "medium." The fact that a department store might be entitled to know a customer's weekly income before deciding whether to open a charge account for him would not mean that the store could learn this information by installing an electronic eavesdropping device in his place of business. Some techniques for gathering and sharing information should be, and some have been,[3] outlawed; and other techniques should surely be confined and regulated.

Whether the computerized data bank should be prohibited for most purposes seems to me to turn on the extent to which it augments the dangers of inaccuracy and of access for unintended purposes, and on the extent to which these dangers are offset by the affirmative uses of the data bank in sharing information. I am not nearly so pessimistic as Professor Countryman concerning the ability of governmental regulation to minimize the dangers.

Suppose, for example, that whenever a person or organization secured information from a consumer credit bureau, a statute required notice to the consumer of the identity of the information-user and of the information that he had obtained. Professor Countryman argues that this regulation might be evaded; a person who did not receive the required notice would usually be unaware that his rights had been violated. We could, however, test the credit bureaus' reporting practices through our own "dummy" requests for information; and even without this stratagem, it seems likely that any regular, systematic pattern of violation would eventually be discovered. Our sanctions could probably be made severe enough that the credit bureaus

3 *See* 18 U.S.C. §§ 2510-2520 (Supp. V, 1970).

would be unwilling to run the risk. Moreover, if necessary, we could move beyond the private lawsuit as our sole enforcement mechanism. We could, for example, physically inspect and test the credit bureau's computers to ensure that they had been programmed to give the required notice. Indeed, we might be able to enlist computers to perform this task. My purpose, of course, is not to argue for a particular form of regulation, but simply to illustrate the existence of a range of regulatory techniques short of the large-scale file-burning that Professor Countryman proposes.

In setting forth a scheme for resolving privacy problems different from Professor Countryman's, I have made the point that I started out to make. We should employ a two-step analysis, asking first what information is "none of the information-user's business" and then what methods should be available to collect, store, use, and communicate information that the user is reasonably entitled to have in making a particular decision. This scheme does not carry us very far, of course, toward an ultimate solution, and it may be appropriate to add a few words concerning the character of the inevitable balancing process—whether that process is focused on the information that should be contained in a data bank as Professor Countryman proposes, or on the information that a person or group should have in making a particular decision as I suggest.

Unlike Mr. Justice Black, dissenting in *Griswold v. Connecticut*,[4] I do not value my privacy as much as the next man—at least when the next man is Professor Countryman. An individual's concern for privacy is itself a private and subjective thing. Professor Bruno Bettelheim has written, "[P]rivacy is not a universal, absolute good, but belongs very much to a particular style of life—to a historical period, a social class—and is thus culture bound."[5] Professor Bettelheim notes that what one generation could discuss only in the carefully guarded privacy of a darkened psychoanalytic treatment room, another generation sets forth in family magazines and on the screen. The ideal of one generation may be a separate bedroom and bathroom for each child, but when the child grows up, he may choose a commune where a dozen people sleep, love, and live together in a single room.

Because our concern for privacy is ad hoc, subjective, changing, and culture-bound, the extent to which an individual should be able to control the use of information about himself cannot be determined

[4] 381 U.S. 479, 510 (1965) (Black, J., dissenting).

[5] Bettelheim, Some Comments on Privacy 2 (unpublished manuscript on file at the University of Texas Law Library).

"in the large." No universal solvent can, in a few words, resolve all privacy problems. It is for this reason that I have suggested that a governmental agency approach the problem of safeguarding privacy "in the specific," by focusing on the most common uses of personal information and by evaluating the propriety of each use. In this way, we may be able to give effect to general cultural sentiments concerning privacy—sentiments that, in Justice Holmes' phrase, may lie tangled beneath the surface without losing their validity. Professor Countryman's test of "actual need for a vital public purpose" would, in my view, confuse our inquiry rather than aid it.

Professor Countryman writes, "The only hope for substantial protection of privacy against the computerized dossiers . . . is that they not exist—at least that they not exist on the present scale." Professor Countryman does not, however, describe what a "computerized dossier" is, and his statement could have far-reaching implications.

For example, Professor Countryman and I were both opposed to the confirmation of G. Harrold Carswell as a Justice of the Supreme Court. The battle over the Carswell nomination began, for all practical purposes, when a newspaper reporter discovered an interesting piece of personal information about Judge Carswell. A full generation before his nomination, Judge Carswell had said, "I yield to no man . . . in the firm, vigorous belief in the principles of white supremacy, and I shall always be so governed."

The reporter found this statement in a newspaper "morgue," which, of course, is an old-fashioned word for data bank. The newspaper files had not been placed on a computer tape, but I cannot believe that the newspaper's reliance on a manual filing system could make a critical difference. I, for one, am not distressed that the government had not combed through these files a dozen years earlier and discarded all material not shown to serve an actual need for a vital public purpose. Judge Carswell lost control over a bit of information about himself, but the right of privacy of a public figure with respect to his public statements should, I think, be very limited. Indeed, I believe that it would be unconstitutional to forbid a newspaper from maintaining a "morgue" unless the government agreed that it served an actual need for a vital public purpose.

A newspaper itself is a data bank, full of personal information, yet a newspaper surely could not be required to justify itself in terms of Professor Countryman's standard. My point is that file-burning is not very different from book-burning; the difference between a file

and a book is simply a printing press. There are, of course, instances in which the media should be restricted in the interest of preserving privacy, and there are instances in which file-compilers should be restricted as well. In both situations, our traditional concern for openness should argue for caution and restraint.

The history of the Carswell nomination illustrates one other point. The uses of information are contingent and unforeseeable. Today's idle curiosity may become tomorrow's actual need for a vital public purpose. Even the Massachusetts statute forbidding educational institutions from asking the race of applicants for admission has had an unforeseen impact. At the time that this statute was passed, the perceived danger was that schools and colleges would discriminate against the members of minority races. More recently, many schools have favored applicants from minority races—in the interest of securing greater balance among their student bodies, in the interest of advancing the status of members of these races in society at large, and in recognition of the possibility that traditional admission criteria may not adequately measure the abilities of many minority group students. This new educational policy has been hampered by the legislatively decreed absence of racial inquiry on college admission forms. Of course the policy of the Massachusetts statute can still be defended, and the current approach of the educational institutions can be criticized. Nevertheless, the legislative restriction has had an effect that was probably unintended. This restriction has impeded a program that the legislators themselves might have considered valuable, had they thought about it.

The standard of "actual need for a vital public purpose" seems to me, not only to underrate the virtues of information-sharing, but to oversimplify a difficult problem. I doubt that even actual need for a vital public purpose could justify some compilations of information—for example, any compilation achieved through non-governmental electronic surveillance. Yet even curiosity might justify a compilation of the published speeches of a public figure. It is necessary to focus, not only on the character of the need, but on the character of the information and the methods used to obtain it. Among the factors which we should consider are the relevancy of particular information to particular tasks, the extent of the need for this information, the extent to which the information is commonly viewed as private, the ability of particular techniques to supply the information accurately, the availability of substitute techniques, the extent of the intrusion

produced by each technique, the likelihood of use for unintended purposes, whether the individual has in any way consented to the intrusion or the information-sharing, and the character of the consent that he has given.[6]

A paper of this sort inevitably contains more criticism than praise. The extent of my agreement with Professor Countryman may therefore not be apparent. My goal is certainly not to minimize the dangers that Professor Countryman has set forth in graphic detail, nor to denigrate the need for prompt governmental action.

It has been suggested that the computer may expand man's ability to know and reason to greater extent than the automobile expanded his mobility; and this development, hopeful though it is, poses a serious and ever-growing threat to privacy. We confront a difficult problem of planning with, I think, very little idea of how to go about it.[7] Professor Countryman's remarks have prompted me to formulate one tentative approach to this important task, and I hope that they will have the same effect on others. As Professor Countryman says, the time for inquiry is overdue. We must begin the job now if the future is to be governed by our actions rather than our defaults.

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6 *See generally* A. WESTIN, PRIVACY AND FREEDOM (1967).

7 *See generally* NAT'L ACADEMY OF SCIENCES, TECHNOLOGY: PROCESSES OF ASSESSMENT AND CHOICE (1969).