

# PRIVACY, ORTHODOXY AND DEMOCRACY

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In considering the matter of protection of privacy, it is fair to ask not only why it should be protected in the first place, but also why it is so important that protection be forthcoming at this particular time. One way in which the significance of this modern need can be understood is to consider the influence exerted by freedom of speech when coupled with modern communications technology. Can the effect of freedom to invade privacy, in the same technological milieu, be any less profound?

Freedom of speech became a cornerstone of our law at a time when the influence of the spoken word was limited to the range of the unaided human voice, and the impact of what could be disseminated beyond that range was confined to the four corners of the printed page. It cannot be denied that the extension of this traditional protection to communications transmitted via radio, motion pictures and television has, over the last fifty years, put us through the most radical reshuffling of social certainties, and individual and collective values ever experienced by any society.

Back in the sixteenth and seventeenth centuries when constitutional cornerstones were being laid, privacy was something that was not even considered. It has been distinguished from that day to this by its almost uniform absence, not only from the stuff of the law reports but also from the very lexicon of our legal categories.

In retrospect, this policy of the common law—or lack of policy—is quite understandable. Until a system had been developed for exploiting the power that could be gained from the invasion of privacy, there was no significant threat against which the legal protection of privacy could be directed. Such a system could not exist without the sophisticated communications, the specialized division of labour, and the vertical and horizontal economic integration of the contemporary industrial state.

If it is true to say that the traditional protection given speech,

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when coupled with modern communications media has resulted in dramatic changes in the way in which we define ourselves and society, it is also no less true to say that a perpetuation of the historic lack of protection given to privacy will, in the world of today and tomorrow, result in equally sweeping changes in the fabric of our lives.

Speech is not protected so that a demagogue can rise to power on the strength of an electronic image, or to ensure that everyone has equal access to naughty words or to make the selling of soap more efficient. These are simply the fallout from a concept that is of fundamental political importance.

The need to protect privacy, similarly, is not based on the interest in safeguarding Boston Brahmins from the yellow press or assisting deadbeats in obtaining credit—although whether privacy should be given legal protection is often debated in these terms. It may be no less than the central fact of the remaining three decades of the century that privacy and its protection are every bit as important to the maintenance of the fragile vessel of democracy as is freedom of speech.

Historically, the concept of a constitutional democracy has presupposed individual privacy in its widest sense. This has always been such a fundamental proposition that it has never really been necessary to formally articulate it—like the assumption, valid for most of our history, that there would always be pure air to breathe and clean water to drink. It is becoming clear, however, that the political system that could not have been built without privacy cannot now endure without its protection. The same technological revolution that has so dramatically fostered the free communication of ideas and so radically changed our society can, through its capability to extinguish privacy, put the goals of social justice and true egalitarianism forever beyond our grasp, just at the time when they are becoming concrete possibilities rather than abstract ideals.

The loss of privacy is not only capable of freezing these essential aspects of society's forward motion. When coupled with today's and tomorrow's information systems, those energies that, since the advent of the electronic media, have accelerated us towards the logical conclusions of democracy's premises, will be harnessed in the effort to isolate and neutralize the individual—the basic unit of the democratic order. To date, it has been the inherent, residual uncontrollability of the individual that has given us the potential for social, political and economic growth. This is the potential upon which the new freedom in the exchange of ideas has been able to operate.

"Autonomy" is a useful concept with which to describe this aspect of the individual personality that lies, protected by a cur-

tain of privacy, beyond the reach of government and institutional manipulation. Now, however, the instruments exist with which to pierce that curtain, and to neutralize the autonomous individual. This diminution of the sphere of personal privacy is capable of altering our world as profoundly and as rapidly as has the communications revolution.

Privacy, then, is not just an individual interest, but is first and foremost a political value of the highest order. The creation now of a conceptual rubric under which privacy can be protected, both legally as well as ethically, will be as important to the functioning of western democracy at the end of the twentieth century as was the existence of a viable concept of freedom of speech at its beginning.

It is fashionable in some quarters today to dismiss the interest in protection of privacy as simply another predictable manifestation of the sway exercised by middleclass values, and the reaction that occurs when they are threatened. The forces that instinctively resist social advancement are now said to be directed against the efforts of the technocrats—themselves happily free from bourgeois instincts—to bring us to the brave new world.

To be a reactionary in an age of progress is an uncomfortable thing. It may be no more than logical to suppose that those who would protect the people's privacy at all costs are similar to those who would protect their morals. It may be a new breed of blue-stockings that is pamphleteering to shield the susceptible masses against the seduction of the glitter of the cashless society, where efficiency will rule and scientific quantification of human qualities will replace the present sloppy scheme of hunches, guesses and shots in the dark. Arguing for protection of privacy in the face of the promise of the new order may sound to some like the statements of those to whom government without the divine right of kings was unthinkable, or those to whom agreements without absolute freedom of contract could not be law.

The answer to this position is that the lure of the bright vision of tomorrow is not really a seduction at all, since that involves some concept of choosing whether or not to yield to the temptation. As privacy is diminished, however, so is the freedom of choice. What we are seeing is not seduction, it is rape. There can be no doubt that the age of cybernetics has given this generation the chance to experience a dramatic alteration in the socio-political structure. One does not, however, have to be a counterrevolutionary, or even a reactionary, to recognize that such chances, while rare, are not necessarily good.

Two simple privacy-related themes may be cited as rational bases for apprehension. The first is that Canadian society, through *laissez-faire* treatment of privacy, has fallen behind in the three-

hundred year struggle to make the holders of power truly accountable to the people, and subject to their control. This is a fact.

The second is a speculation: John Austin pointed out that in many areas of human conduct it was obvious that the thunders of the law were impotent and the whispers of morality were ineffective. His conclusion was that institutions, both human and divine, were forced to leave these particular fields of human conduct unregulated. The speculation is that Austin's conclusion is no longer valid—that there now are ways, grounded in the invasion of privacy, in which to close the meshes of behavioural restraint—and that we therefore stand on the threshold of an age of “radical orthodoxy”.

Turning to the first of these, it is apparent that the historical thrust of due process of law has not only been applied to control governments, but also, to reduce the manipulative abilities of the private powerholders: the employer, the landlord, the money-lender and even the spouse. Sir Henry Maine summed up this trend when he incisively observed that societies progress from status to contract. In other words, that which in former days was taken by the established ordering of society from some and conferred upon others now, increasingly, must be bargained for.

There is, however, a new status—that of the information manipulators of the modern intelligence system. They are almost unchecked by law and, collectively, wield as much power as any government. No constitution established by the people constrains them and their invisibility, coupled with the lack of legal recourse, makes them virtually unaccountable to anyone. Their influence is now most strongly felt in the economic sphere in credit granting, and in employment and insurance reporting. This influence will increase, in the absence of viable norms enabling people to control the dissemination of information about themselves, until the dossier, and not the individual, becomes the basic unit of society.

If a person has a disputed debt with a merchant, we recognize that both the vendor and the purchaser possess certain legal rights. Due process of law, which will determine whether or not the debt is due, dictates that this issue be resolved in that target of much recent fashionable criticism, the adversary hearing. Suppose, however, that the merchant, rather than serving a writ, sends instead a letter, perhaps typed by a computer, informing the putative debtor that if the money claimed is not paid forthwith, a report of this merchant's version of this gross dishonesty will be entered into an international dossier system. There will be no appeal from this decision and no legal right to challenge the version of the facts supplied by the merchant. The issue is no longer one between two persons, each of whom possesses legal rights, but rather becomes a simple application of power, all of which is on one side.

Whether the power can legally be exercised is never determined, since the procedure avoids any forum ruled by due process of law. No doubt this procedure will be resorted to more in the future than in the past, as the position of the holder in due course is weakened, making it more difficult to enforce bargains for the sale of shoddy merchandise, and as the credit and character-reporting systems become more pervasive and sophisticated.

The little coercion just described can be worked through the local credit bureau, and the behaviour involved is nothing more than the payment of one disputed debt. The big coercion comes from those organizations that ferret out and report on an individual's whole life style. Many companies are involved in this. The largest, and the one about which most information has been discovered by the determined investigators in the American Senate, is the Retail Credit Company. Despite its name, it says in its *Manager Manual*: "Our function is primarily the making of character reports on individuals." The second largest such company is the Hooper-Holmes Bureau, described by Professor Arthur Miller as "a mysterious organization . . . which is said to specialize in collecting and vending derogatory information".<sup>1</sup>

Retail Credit has been doing some thousands of character reports per year on Canadians, and probably has several million Canadian dossiers. It is estimated, for all North America, that it now has files on some forty-five million people, and it is of course only one of the companies in the business. Hooper-Holmes is a poor second here, with files on no more than nine or ten million individuals.

These character reports are not just a record of whether a person pays his bills—rather, they are complete profiles on where and how he lives, whether he is in "a peace movement or other subversive group", whether his neighbours think he drinks too much, whether he is mentally ill, his relationship with his wife and family, his drug habits, his sexual eccentricities—in other words, everything that his friends and enemies care to say about him, can be tricked into revealing about him, or which can be learned about him from supposedly private files, government records, and the data recorded in the individual's dossier in other interlocking intelligence systems.

Unlike the more or less factual material kept on file by the credit bureau, the character-reporting companies evaluate the individual according to their own standards, whatever those may be. Investigators are required to report opinions on such subjective

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<sup>1</sup> Miller, *The Credit Networks: Detour to 1984*, from *The Nation*, June 1st, 1970, reprinted in *Hearings Before the Subcommittee on Consumer Affairs of the Committee on Banking and Currency, House of Representatives*. 91st Cong., 2nd Sess., on H.R. 16340, at p. 628.

factors as whether a person has a "poor attitude toward authority", determined no doubt by reference to some officially proper attitude set down somewhere that all right-thinking persons possess. "Type of associates" is another factor for the dossier upon which conclusions are required, as are "morals" and "excesses". These reports are made by field operators who, according to Professor Miller, are usually poorly paid, relatively unsophisticated, frequently insensitive and work on a quota system.<sup>2</sup> Retail Credit investigators average twelve reports a day, containing as much derogatory information as possible, and which are probably every bit as realistic, reliable and free from observer bias and racial, religious and ethnic distortions as one might expect under these terms and conditions.

These companies compete with each other to discover "protective" and "declinable" information—that is, a subject's character deficiencies which, when reported to their clients, will allow them to protect themselves by, for example, increasing premium rates, or by declining to hire or promote the individual or to confer some other benefit upon him. Within the last year, one large company congratulated its Montreal office for producing reports thirty-five point seven per cent of which contained protective information and sixteen point one per cent of which contained declinable information.

Presumably those sixteen point one per cent of the people in Montreal who did not get the job, or who were not promoted, or who were not granted insurance were not informed of the fact, true of all these companies and frankly admitted in Retail Credit's *Manager Manual*, that "most of our information is hearsay". Even if they knew of this, they would never have been allowed to see their dossiers. Had they been able to do so, they still would have had no explicit legal right to correct them, to give their version of events, or to enter any explanation into the system. Most people in fact know nothing more than that they have somewhere, sometime failed to conform their behaviour to someone else's view of propriety, and that this information, the nature and source of which is unknown to them, is being used against them by some anonymous and powerful agency.

A specific example of the nature of one kind of hearsay that is secretly collected, filed and sold by these companies is furnished by the following instruction distributed to field offices by the Retail Credit Company in March, 1972:

We Haven't Done the Job Unless We've Found Out and Reported—

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<sup>2</sup> *Op. cit.*, *ibid.*

## Current marital status—

If divorced—when, why, whose fault?

If separated—how long, cause, divorce planned?

*Past and present moral reputation—*

If promiscuous—extent, class of partners?

If particular affinity—how long, criticized, partner beneficiary?

If living with partner—how long, children, stable home, criticized, is there living undivorced spouse?

If illegitimate child—how old, circumstances, favourable reputation regained, living and working conditions?

## Possible homosexuality—

How determined—living together, demonstrates affection for partner in public, dress and/or manner, criticized, associates with opposite sex?

Concern has often been expressed, both in the United States and Canada, about the possibility of the establishment of a national data centre where the government can keep its own dossiers. Political sensitivities have prevented this so far. Given, however, the present arrangements between governments and the investigative reporting companies, a national data centre will probably never be created. The fact of the matter is that the federal and provincial governments in Canada, like their counterparts in the United States, are clients of the Retail Credit Company. No government need ever risk the political embarrassment involved in spying on its citizens when it can achieve the same thing by becoming, for example, client number 156-500 of the Retail Credit Company. That happens to be an agency of the Quebec Ministry of Revenue—but there are others.

The police are part of the system too. To quote again from the *Manager Manual*: “The company cooperates with federal authorities of the United States and Canada . . . . [R]equests usually come from F.B.I. men, and investigators from the intelligence units of the Internal Revenue Service of the U.S. Treasury Department in the United States; and from R.C.M.P. and other federal departments in Canada.” Whereas the subject is never to be shown his file, these government agents are allowed to take photostats. The manager is instructed to get as much reciprocal benefit as he can by making “such notes from what you learn from the inquiring authority as will help on future investigations . . .”.

No one can doubt that the network linking together employers, police, insurance companies, governments and the marketplace represents massive, hidden, -anonymous, arbitrary power. The

individual is isolated—completely alone and absolutely vulnerable when he comes up against this system. No law protects him, no court can help him. The system affects him in many ways where his welfare and opportunities are concerned, particularly in his employment. It is not, however, the economic sanction that threatens so much as it is the psychological one. Without the refuge of privacy, creativity is displaced by dogmatism, spontaneity by behaviour for the record and autonomy by the overwhelming sense of powerlessness. The neighbour becomes a potential informer, the acquaintance at the workbench, a hazardous confidant. Without legal power to know what is being said about him, to find and confront the faceless bearer of tales, without the right of privacy, in short—the only refuge is in radical orthodoxy.

Opinions once freely expressed will remain unspoken. Political views will tend to become popular and conformist. Assertion of legal rights, particularly against the government and others who are on the information network, will be able to be done only at the risk of being classified by the system as “a troublemaker”.

Even such ordinary confidences as the doctor-patient relationship will fall into the shadow of the intelligence system. According to a 1971 bulletin of the Retail Credit Company, its investigators now, for twenty dollars, can gain access to patients' records in no less respectable an establishment than the Mayo Clinic. The company also keeps lists for its field investigators of physicians who can be counted on to co-operate. Perhaps some day these physicians will be recording the same psychiatric diagnosis as has found recent favour in the Soviet Union: schizophrenia evidenced by delusions of the possibility of social or political change.

It is, of course, obvious that people of ordinary prudence are going to co-operate with the intelligence system, in the same way that immigrants, because of apprehension and a sense of vulnerability, used to support the oppressive political machines in New York and Boston. The new machine, however, is no longer confined to city hall. If it is in the Mayo Clinic today, it will be everywhere tomorrow. And when that happens it will not be a particular local ethnic group espousing the virtues of playing ball and keeping your mouth shut, it will be all the citizens of North America.

There is, unfortunately, no preordained plan that guarantees the survival of the substance of democracy, as well as the form. There is only the individual. Break him and government by the people will be irretrievably lost.

We have heretofore lived under a system in which, generally speaking, social, political and economic norms have been established through experimentation, free exchange of ideas and popular usage. New developments in this marketplace of the people have



constantly come forward in the process of the evolution of democracy. If a new concept has seemed to be more coherent than the old, or more appealing to the conscience, or more consistent with our professed ideals than has been the contemporary conventional wisdom, then it stood a good chance of being accepted. These developments have often been delayed or resisted in the bastions of the privileged, but nothing has ever prevented the eventual establishment of an idea that has won its place in the minds of the majority of the electorate.

If the systems for the invasion of privacy are allowed to fulfil their capabilities in the next two or three decades, this process will undergo a profound alteration. Through control of the individual, this popular melange will be replaced by authoritative normative doctrines, imposed and enforced by a subtle blend of compulsion, conformity and collaboration. Deviationism will become the new society's greatest enemy, and gray orthodoxy, its highest civic virtue. By declining to create effective controls to protect our privacy, we are in fact surrendering our ability to determine our destiny, and inviting the creation of a new form of despotism.

Such a regime does not necessarily have to be repressive in the conventional sense of the word. Indeed, once control is firmly established, lapses from the norm will probably be met with the concerned intervention of a whole range of helpful persons—persons, incidentally, whose own records would look bad if a subject in one of the dossiers for which they were responsible showed signs of serious unorthodoxy. Backsliding could be met by ideological indoctrination, and criminology replaced by benign guided social adjustment, all with the full co-operation of the deviant. This, after all, would not be too far removed from the present condition of certain sectors of our population that have already lost autonomy through loss of privacy: persons whose social assistance benefits depend upon satisfying the expectations of their case-workers; prisoners whose chance for parole turns on a psychologist's assessment of the correctness of their attitudes; and mothers who live in that particular milieu of poverty and powerlessness wherein it is the common expectation that asking to see a search warrant will be met with a veiled reference to the interest that the children's aid society would take in the conditions of the invaded home. They co-operate now. Soon, so may we all.

This, then, is the evil against which protection of privacy must stand: the vision of the future which Ivan Illich has likened to one large school or one large hospital—essentially no different from one large prison.

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