COMMENTARY

THE RIGHT TO PRIVACY AND THE FREEDOM
TO KNOW: A COMMENT ON PROFESSOR
MILLER'S *THE ASSAULT ON PRIVACY*

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*The Assault on Privacy*¹ is an important book. It is also a very good one. Professor Miller's purpose is to examine the effect of the technological revolution of the last twenty years on individual privacy. He explores the astonishing progress in computer development, and the amazing feats of data collection, storage, retrieval, and computation and arrangement that are now or will soon be possible and describes the concrete uses to which those techniques can be applied. For example, in a time of conscious social restructuring, they may be used to assist the government in obtaining, ordering, and utilizing vast amounts of information about our burgeoning population; they have made possible the creation of regional credit bureaus, upon which the expansion of consumer credit relies; they have added new dimensions to a struggling educational system; and they have given industry a means for testing and evaluating an expanding workforce. Independent of Professor Miller's concern with the effect of these developments upon individual privacy, his description of the new computer technology and its possible applications in an increasingly complex world is of interest to anyone seeking to understand one of the crucial developments of the twentieth century.

Turning to the question of how society insures that the harnessing of this intimidating technology is not accompanied by a serious loss of human dignity, Professor Miller examines the federal government's current management of the enormous quantity of personal information that it has acquired. He then concisely traces the present legal framework—the so-called “law of privacy”—to which an individual aggrieved by an application of the new computer technology might turn for protection and redress, and concludes by outlining a new legal framework through which a fine balance between the need for technological effi-

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¹ A. MILLER, *THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS* (1971).

ciency and the dignity of the individual might be achieved. In this regard Miller describes the types of technological advances needed to improve the security of data collection and storage facilities and thus afford the individual more effective protection. Finally, he includes a lengthy and useful bibliography covering the entire range of questions raised in his book.

I. THE RIGHT TO ESCAPE FROM A RECORDED PAST

This is not a book about the *law* of privacy.² Focusing on the underlying technological framework and on the larger questions of social policy, the book is of significance to the lawyer not *qua* lawyer but *qua* educated and concerned man. The importance of this feature of the work is underlined by the unusually large amount of public discussion it has engendered.³ Although Professor Miller, like many of us, appears at times to long wistfully for the comparative simplicity of the pre-computer age, he is by no means a contemporary Luddite with the anti-technological attitude that is fashionable in some quarters. His purpose is to reconcile the technology necessary to meet the material needs of our growing population with the values to which our culture subscribes.

Public consciousness was briefly focused on the questions with which Miller is concerned by the abortive proposals made several years ago for the establishment of a national data bank,⁴ but no one has at this juncture satisfactorily resolved these difficult questions. Almost everyone would agree that a great many interests and values must be weighed and an accommodation reached that is at once morally, socially, and politically acceptable. The problem is defining an acceptable accommodation.

While the problem of individual privacy—the problem of protecting the life space of the individual in the name of human dignity—is not a new problem, Professor Miller believes that the new technology has materially increased the threat to the individual. Initially its advent makes the preservation of confidentiality more difficult. The transmission and storage of information by electronic means is subject to an increasingly sophisticated array of bugging devices, and the security

² Professor Miller has written a detailed exposition of the law relating to privacy elsewhere. Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1091 (1969).

³ The book has been favorably reviewed, *e.g.*, N.Y. Times, Mar. 14, 1971, § 7, at 3, cols. 1-8, an entire magazine has been organized around it, SATURDAY REV., Apr. 17, 1971, and it has been the subject of a number of commentaries on national radio and television.

⁴ The proposal and the controversy it aroused are discussed in A. MILLER, *supra* note 1, at 56-59.

problem is compounded by the use of time-sharing techniques through which many users of computer resources have access to a central computer for the storage and manipulation of data. Time-sharing is, of course, an important advance allowing relatively small consumers of computer time to use economically equipment otherwise beyond their means, but it accentuates the possibility that one user may intentionally or inadvertently obtain the confidential information of another. Because computers have the capacity to process and store enormous amounts of information, even small leaks in an information storage system become unacceptable.

But Miller is not concerned only with preserving the secrecy of confidential information. As the technical problems of computer information processing, storage, and retrieval are overcome, it becomes increasingly less expensive to maintain indefinitely vast amounts of information retrievable at will by those with access to the computer memory banks. The social dimensions of this advance are exceedingly complicated. A record of an individual's activities may now be maintained throughout his life, and, even though the information placed in a computerized file may be within the "public domain," the existence of the file creates a record from which the individual may never escape. The individual's vulnerability is compounded by the fact that some of the information may be inaccurate or, even if literally correct, subject to misleading interpretations. The sheer expense of fully investigating an individual, whose records could be scattered throughout county courthouses and the back issues of local newspapers, previously insured that most people would never have their entire public lives compiled, collated, and subject to casual examination by the curious. This is no longer true, however, and Professor Miller pertinently asks whether the aggregate of information about an individual should be considered confidential even though no single item is so denominated. In actual practice, of course, computerized files will often also intermingle confidential with nonconfidential information. In either case, Miller believes that the right of an individual to escape from his past deserves legal protection, and that even the demands of freedom of speech and inquiry cannot completely override this right.

I have no dispute with Professor Miller's perception of the technological questions, and I believe that he states very well the fundamental social questions that will require resolution as society grapples with the new technology. The question is, will these difficult questions be resolved by conscious social decisions or will the resolution of these questions be reached in default of conscious decision? Since I disagree with Professor Miller on where the proper line should be drawn in

accommodating the underlying and often conflicting social values that are involved, I feel that I can be of greatest service to the reader and to the general public debate, which Miller is hoping to encourage and assist by his book, if I raise clearly the ideological differences between us. In stating our differences, I hope to make clear the difficult questions of social policy that will have to be resolved if we are ever to reach a satisfactory solution to the social challenge presented by the new technology.

Given that the privacy of the individual requires greater protection in an era of unfolding technology, should that protection be afforded by the law? If, as I would like to believe that most men would agree, an individual should be able to escape from his past, how should the courts give effect to that sentiment in the absence of legislative or administrative regulation, or even regardless of any such regulation?

Professor Miller refers approvingly⁵ to a famous case, *Melvin v. Reid*,⁶ involving a respectable housewife who had for a time concealed her ignominious past. Known as Gabrielle Darley, she had been a prostitute and a defendant in a notorious murder trial at which she was acquitted. According to her complaint, she completely changed her manner of life after acquittal. Soon thereafter, in 1918, she married and took her place as a respected member of the community. In 1925 the defendants released a motion picture advertised as the "true story" of Gabrielle Darley. The film's admittedly truthful revelation of plaintiff's previous life caused her to be ostracized by her neighbors and former friends. Relying upon the growing law of privacy⁷ and upon article 1 of the California Constitution, which declares that all men have certain inalienable rights, among which are those of "pursuing and obtaining safety and happiness,"⁸ the court held that she had stated a cause of action. Although the court records of the murder trial were open to public inspection and reproduction, the court felt that the use of the plaintiff's maiden name "was unnecessary and indelicate, and a willful and wanton disregard of that charity which should actuate us in our social intercourse, and which should keep us from unnecessarily holding up another to the scorn and contempt of upright members of society."⁹

Professor Miller regrets that courts do not seem to have followed *Melvin v. Reid*, noting in particular that in *Sidis v. F-R Publishing*

⁵ *Id.* 181-82.

⁶ 112 Cal. App. 285, 297 P. 91 (1931).

⁷ That there might be such a right was, of course, suggested by Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁸ CAL. CONST. art. 1 (1879).

⁹ 112 Cal. App. at 291, 297 P. at 93.

*Corp.*¹⁰ the Second Circuit refused to grant a remedy to a former child prodigy who was once the subject of considerable public discussion in the newspapers. Having lectured to distinguished mathematicians on four-dimensional bodies at the age of eleven and having been graduated from Harvard College at sixteen "amid considerable public attention,"¹¹ Sidis withdrew completely from public view and became "an insignificant clerk," living alone in "a hall bedroom of Boston's shabby south end."¹² *The New Yorker* published an article twenty-seven years later which, while not wholly unsympathetic to Sidis, described his untidy room, his curious mannerisms, and his enthusiasm for collecting street-car transfers and the lore of the Okamakamesset Indians.¹³ The court observed that Sidis would have been able to recover under the standards set forth in the germinal privacy article by Warren and Brandeis,¹⁴ but, as Sidis had been a public figure in his day, it was unwilling to play the role of censor and delineate the limits of legitimate public interest.¹⁵

Miller also recognizes that the retreat from *Melvin v. Reid* may, after *Time, Inc. v. Hill*,¹⁶ be constitutionally compelled. In that famous case, *Life* magazine incorrectly described a play, *The Desperate Hours*, as being an accurate reenactment of the experience of the Hill family that had been held captive by a group of escaped convicts. Neither the play nor the novel upon which it was based, however, mentioned the Hill family; moreover, both were clearly fictionalized accounts, falsely portraying the convicts as violent men disposed towards sexually abusive language. In reversing a judgment for the plaintiff resting upon New York's privacy statute,¹⁷ the Supreme Court assumed that if the *Life* article were a faithful description of the play no action would lie.¹⁸ Since the article was false, the Court, solicitous of preserving the freedom of the press, remanded the case for a determination whether the article was published "with knowledge of its falsity or in reckless disregard of the truth."¹⁹

Professor Miller hopes that *Hill* will not be used to completely undermine the utility of the privacy action.²⁰ In my judgment *Melvin*

¹⁰ 113 F.2d 806 (2d Cir. 1940).

¹¹ *Id.* at 807.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 809; see note 7 *supra*.

¹⁵ 113 F.2d 809.

¹⁶ 385 U.S. 374 (1967).

¹⁷ N.Y. CIV. RIGHTS LAW §§ 50-51 (1948).

¹⁸ 385 U.S. at 383, 391-94.

¹⁹ *Id.* at 388.

²⁰ A. MILLER, *supra* note 1, at 191-99.

v. Reid should be repudiated, as indeed it was in the pre-*Hill* case of *Barbieri v. News-Journal Co.*²¹ In that case a newspaper, reporting the introduction of a bill making whipping a mandatory punishment for certain crimes, mentioned plaintiff by name as having been the last person flogged in the state. Plaintiff contended that his name was of little importance and should have been omitted from the news account, but the Delaware court was unwilling to embark upon the task of deciding what about the story, which was admittedly one of public interest, was or was not necessary to the proper exercise of the public's right to know facts which were of public record anyway.²² I believe that this decision is correct. Some courts have attempted to resuscitate the privacy concept by allowing a cause of action upon a showing of malice,²³ but however much they may regret, as I do, that the press insists upon reporting personal information, I do not believe that there should be judicial intervention. I generally concur with Miller that a legislative solution would generally be preferable, but I am opposed to that type of legal intervention as well. I have serious doubts, for example, about the wisdom and constitutionality of statutes that prohibit the publication of the name, address, or photograph of rape victims and that provide criminal or civil sanctions for statutory violations.²⁴ More importantly, as will appear, I think such statutes are unwise.

II. DATA COLLECTION AND DISSEMINATION

Since the more important points of difference between Professor Miller and myself concern broader questions of social policy, I shall hereafter assume a general familiarity with the copious literature on the law of privacy and adopt a useful, if somewhat simplified, analytical framework.

Distinguishing collectors from disseminators of information, while not always feasible—many users of information are, of course, both collectors and disseminators, and some only disseminate information that they have themselves collected—will perhaps prove helpful. Where the government is the collector, the fourth and fifth amendments inhibit it from using impermissibly acquired information in criminal cases,²⁵

²¹ 56 Del. 67, 189 A.2d 773 (1963). See also Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 (1966) (pre-*Hill* criticism of development of tort of invasion of privacy).

²² 56 Del. at 73, 189 A.2d at 776.

²³ Text accompanying note 72 *infra*.

²⁴ See, e.g., FLA. STAT. ANN. §§ 794.03, 794.04 (1965); S.C. CODE ANN. § 16-81 (1962); WIS. STAT. ANN. § 942.02 (1958). A very recent case with implications also suggesting the unconstitutionality of such statutes is *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

²⁵ See, e.g., *Katz v. United States*, 389 U.S. 347 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Boyd v. United States*, 116 U.S. 616 (1886).

and the first amendment prevents, absent the most pressing demonstration of need, the forcible extraction of information about ideological beliefs and political associations.²⁶ Miller, realizing that a wise government must exercise judicious restraint in seeking information from and about its citizens, proposes an independent administrative agency to supervise the federal government's data-collection and data-use procedures.²⁷ I think this is an excellent proposal. A definitive statutory solution would be premature at the present time, and a high-sounding, but overly vague, set of statutory principles to be applied by the courts with little additional guidance might do more harm than good. Such an agency must ensure that the individual is clearly advised that he need not comply with a request to voluntarily divulge personal data. The agency must also guarantee that disclosure of excessive information is not exacted as the price for a government benefit²⁸ and that justifiable expectations of confidentiality are honored.²⁹ Statutes reinforcing the common law obligation of private parties to keep as confidential information imparted under promises of secrecy or in the course of confidential relations and statutes strengthening criminal and civil penalties for eavesdropping, bugging, and theft of records would be widely supported. Indeed, the common law of privacy functions most impressively in the area of unauthorized intrusion, and the question of how to deal with the collector of information has therefore not been overly controversial. While the practical difficulties are many, most thoughtful persons would not have many serious reservations about seeking solutions along the lines just suggested. Nevertheless, although the problem of how to deal with the collector of information is not as difficult as is the problem of how to deal with the disseminator, it still has some very difficult aspects, and it is to these we must now turn before reaching the even more difficult problem of how to deal with the disseminator.

One about whom data has been gathered certainly has an interest in insuring that the information is at least accurate. The Fair Credit

²⁶ See, e.g., *Schneider v. Smith*, 390 U.S. 17 (1968); *Stanford v. Texas*, 379 U.S. 476 (1965); *Shelton v. Tucker*, 364 U.S. 479 (1960).

²⁷ A. MILLER, *supra* note 1, at 234-38.

²⁸ Cf. *Gardener v. Broderick*, 392 U.S. 273 (1968) (policeman cannot be compelled to give up privilege against self-incrimination in order to retain his job).

²⁹ One difficult aspect of the "confidentiality" problem has revolved around the question whether a conversation between a criminal defendant and an informer who has been invited into the defendant's home can be electronically recorded. The question with which the courts are wrestling is not whether such conversations can ever be recorded but whether a search warrant is necessary before such recordings can be made. As of the time of writing, the latest decision of the Court on the subject is *United States v. White*, 401 U.S. 745 (1971), a case involving the planting of a microphone on a government informer and the transmission of the conversations via radio to a recording device. In his dissent, Justice Douglas quotes from Professor Miller on the effect of electronic surveillance in a computer age. 401 U.S. at 757.

Reporting Act of 1970³⁰ reflects this concern, providing that an investigative consumer report, which may explore character and general reputation,³¹ cannot be prepared unless the consumer is notified by mail within three days of a creditor's request for the report.³² The consumer is then entitled upon written request to a "complete and accurate disclosure of the nature and scope of the investigation requested."³³ The Act also requires every consumer reporting agency, upon request, to disclose to the consumer "[t]he nature and substance of all information (except medical information) in its . . . files at the time of the request" and the sources of the information, with the exception that the sources used solely for the compilation of an investigative consumer report need not be disclosed.³⁴ The Act provides procedures for the correction of disputed consumer reporting agency records³⁵ and prohibits, in most circumstances, the furnishing of reports containing stale information, such as arrests, convictions, and judgments occurring seven years before the report, and bankruptcies antedating the report by fourteen years.³⁶ It is unfortunate that the federal government is unwilling to exercise such restraint in using its own employment security clearance forms. The Act further limits the categories of persons who can request reports.³⁷ Noncompliance with the Act's requirements constitutes both an unfair trade practice subject to the jurisdiction of the Federal Trade Commission³⁸ and a basis for civil liability.³⁹ While the Act is poorly drafted, thus inviting avoidance of its prohibitions,⁴⁰ and while it could

³⁰ Pub. L. No. 91-508, § 601, 84 Stat. 1128 (1970), *amending* Consumer Credit Protection Act, 15 U.S.C. §§ 1601-77 (Supp. V, 1970) (codified at 15 U.S.C.A. §§ 1681-81t (Supp. 1971)).

³¹ 15 U.S.C.A. § 1681a(e) (Supp. 1971).

³² *Id.* § 1681d(a)(1).

³³ *Id.* § 1681d(b).

³⁴ *Id.* § 1681g(a). The Act recognizes that by disclosing to the consumer the sources of information, an informant is stripped of some of his privacy. The Act therefore limits the liability of an informant to the consumer, in an action for defamation, invasion of privacy, or negligence, to situations where "false information [is] furnished with malice or willful intent to injure such consumer." *Id.* § 1681h(e).

³⁵ *Id.* § 1681i.

³⁶ *Id.* § 1681c. These limitations do not apply to credit or life insurance transactions involving \$50,000 or more, or to employment if the salary is to be in excess of \$20,000. *Id.* § 1681c(b).

³⁷ *Id.* § 1681b.

³⁸ *Id.* § 1681s.

³⁹ *Id.* § 1681n (willful noncompliance); *id.* § 1681o (negligent noncompliance). Punitive damages may be assessed for willful noncompliance, *id.* § 1681n(2), and reasonable attorney's fees are recoverable in successful actions for either willful or negligent noncompliance. *Id.* §§ 1681n(3), o(2).

In addition, an action may be brought in the federal courts without regard to the amount in controversy. *Id.* § 1681b.

⁴⁰ For example, to use an illustration which Professor Miller himself called to my attention during a recent conversation, § 605(a)(4) of the Act, *id.* § 1681c(a)(5), prohibits the furnishing of "obsolete" information and "[r]ecords of arrest, indictment, or conviction of crime which, from date of disposition, release, or parole, antedate the report by more than seven years." Since the statute refers to "records"

have aimed at a higher standard of consumer protection, most advocates of individual privacy, including Professor Miller⁴¹ and myself, would applaud the Act as a step in the right direction.

If disclosure to the consumer and giving him an opportunity to correct his record as compiled by a private entity are good things, affording the individual citizen the same rights against government seems logical. Indeed, Senator Bayh and Representative Koch have recently introduced a Citizen's Privacy Bill⁴² which would require the federal government to notify a citizen when it intends to open a record on him, to advise him whenever disclosure of any collected information is commanded by the Freedom of Information Act, to obtain his permission before divulging any part of that record to government agencies or private parties, and to allow him to inspect and correct the record. There are two troublesome exemptions to the protection accorded the individual: the provisions do not apply to records "specifically required by Executive order to be kept secret in the interest of the national security," nor to investigatory files compiled by law enforcement agencies except where "such records have been maintained for a longer period than reasonably necessary to commence prosecution or other action."⁴³ Since it seems unlikely that a President would exercise his discretion in a manner most favorable to the individual, the protection actually afforded by this or other legislation containing a similar exemption may be largely illusory. Nevertheless, if the government maintains national arrest records pursuant to an announced policy, I am unprepared to assert that the individual should not have a right to note on the record that his arrest was judicially determined to have lacked probable cause.⁴⁴

of "arrest . . . or conviction," the normal inference would be that only furnishing copies of the official records is proscribed. The reporting of the fact of the arrest presumably is not covered. It will be interesting to see what the courts are able to do with provisions like this.

⁴¹ See A. MILLER, *supra* note 1, at 86-88.

⁴² S. 975, 92d Cong., 1st Sess. (1971); H.R. 5974, 92d Cong., 1st Sess. (1971). The proposed bill was recently amended to impose an express obligation upon government agencies to correct records and to provide for a review board to hear complaints from aggrieved citizens. See 117 CONG. REC. S11,354-55 (daily ed. July 19, 1971). The bill is very similar to one first introduced by Representative Koch in 1969, H.R. 7214, 91st Cong., 1st Sess. (1969). See also A. MILLER, *supra* note 1, at 226-27.

⁴³ S. 975, 92d Cong., 1st Sess. § 552a(d) (1971); H.R. 5974, 92d Cong., 1st Sess. § 552a(d) (1971).

⁴⁴ Cf. *Menard v. Mitchell*, 430 F.2d 486 (D.C. Cir. 1970), where the court refused to affirm the grant of the government's motion for summary judgment in a suit raising the expungement issue and remanded the case for a hearing on the merits. On remand, Judge Gesell found that there was probable cause for the arrest, ruling that the crucial issue was not whether there was probable cause for the arrest but rather who could have access to the information. Accordingly, he enjoined the Attorney General from supplying Menard's arrest record to prospective private and state government employers but not to federal government agencies which might be considering employing him. *Menard v. Mitchell*, 328 F. Supp. 718 (D.D.C. 1971).

The Fair Credit Reporting Act professes to impose certain duties and prohibitions upon a "consumer reporting agency," defined as "any person which, for monetary fees . . . regularly engages . . . in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties" ⁴⁵ Some restraints are imposed on persons other than consumer reporting agencies. For example, "[a] person may not procure or cause to be prepared an investigative consumer report" unless "it is clearly and accurately disclosed to the consumer that an investigative consumer report including information as to his character, general reputation, personal characteristics, and mode of living . . . may be made" or unless "the report is to be used for employment purposes for which the consumer has not specifically applied." ⁴⁶ But only a consumer report, a report prepared by a consumer reporting agency, containing character and reputation information is reached. The notice and disclosure requirements thus do not apply to character data secured from other sources. Nevertheless, "[w]hen credit for personal, family, or household purposes" is denied on the basis of information obtained from "a person other than a consumer reporting agency," the user of the information must upon written request disclose the nature of the information and must advise the consumer of "his right to make such written request at the time [an] adverse action is communicated" ⁴⁷ The Act does not, however, attempt to restrict the information that can be directly collected by a creditor or any other person. Restricting such data gathering activities, as opposed to regulating the uses to which the fruits of such investigations are put, would severely limit the individual's freedom to know and would raise grave constitutional difficulties. Such restrictions would be particularly suspect with regard to information that is of public record and therefore within the public domain.

The underlying assumption of the Fair Credit Reporting Act—one shared by Miller—is that it is possible to demarcate and regulate activity which is purely commercial. Certainly legislation of this type could not apply to newspapers. It is well known, for example, that the New York Times and undoubtedly many other newspapers and national wire services prepare obituaries of many people well in advance of the inevitable. The Times' obituaries, which are supplied to other papers by the New York Times News Service, have not always been favorable to the deceased. It seems clear to me that one who suspects that he is

⁴⁵ 15 U.S.C.A. § 1681a(f) (Supp. 1971).

⁴⁶ *Id.* § 1681d(a).

⁴⁷ *Id.* § 1681m(b).

the subject of such an obituary should be given neither a right to know whether the Times has in fact prepared an obituary nor the opportunity to examine the biography with the attendant right to litigate its accuracy. Derogatory information in newspaper files is, of course, not limited to that contained in prospective obituaries. While the Act prohibits consumer reporting agencies from supplying information about stale bankruptcies, arrests, convictions, and judgments, a general circulation newspaper cannot be placed under such restrictions. One might argue that newspapers should be allowed to collect and supply such information only about newsworthy figures, but the Supreme Court has thus far, and I think rightly so, shown a marked reluctance to entertain any such limitation on the rights of the press. If the New York Times News Service is not a consumer reporting agency even though it regularly collects and supplies information about "consumers" to its subscribers for monetary consideration, what about a trade paper or magazine?⁴⁸ Could a private detective agency be a consumer agency? Apparently so. Since the Act includes information for which there is a "legitimate business need . . . in connection with a business transaction involving the consumer,"⁴⁹ a lawyer utilizing the services of such an organization so as to obtain evidence about the character of a witness or party might have to advise the affected party of that fact and, upon request, reveal the substance of the report. If detective agency reports are indeed covered by the Act, they could not contain the proscribed classes of stale information. Whether or not this result was intended and whether or not it could pass constitutional muster, I find this result undesirable.

The difficulties created by legislative proposals directed in large part against collectors are multiplied when we turn to deal primarily with disseminators of information, those who seek to disseminate information that they have not acquired by breaching any confidential relationship or by theft or other unlawful intrusion or practice. Indeed, many disseminators do not themselves collect information in the first instance, and even more, while they do collect information, also disseminate information that they have not themselves collected.

In the illustrative case of *Dodd v. Pearson*⁵⁰ two former employees of the late Senator Dodd, with the assistance of current employees, xeroxed files revealing that he had personally appropriated campaign funds, and turned over the copies to Drew Pearson. The

⁴⁸ Cf. *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433, 437-38 (3d Cir. 1971), which held that Dun & Bradstreet is not entitled, in a libel action, to the protections afforded by the Court to the press.

⁴⁹ 15 U.S.C.A. § 1681b(3) (E) (Supp. 1971).

⁵⁰ 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969).

subsequent public disclosure in Pearson's newspaper column of the discreditable information irreparably damaged Dodd. He failed to secure his party's nomination to stand for re-election and was reduced to running unsuccessfully as an independent. The court held that Dodd had no remedy against Pearson since the latter had not been responsible for the theft and copying of the files and since the revelations bore on Dodd's fitness for public office. Dodd could seek recovery against those who had misappropriated his files, but the public's right to know prevented him from halting the dissemination of the information. Once the files had been stolen and wrongfully duplicated, the information in effect became part of the public domain.⁵¹ Professor Miller and others⁵² have viewed *Dodd* as an expansion of the law of privacy because the court "approve[d] the extension of the tort of invasion of privacy to instances of intrusion, whether by physical trespass or not, into spheres from which an ordinary man in plaintiff's position could reasonably expect that the particular defendant should be excluded."⁵³ The case undoubtedly is a welcome extension, though it seems to me that its enduring importance lies in its recognition that restrictions on collectors of information do not necessarily bind disseminators.

Any discussion of the rights and liabilities of the disseminator requires a working definition of what information is within the nebulous concept "public domain." I shall define information as in the public domain if the collector did not receive it in confidence and did not acquire it as the result of unlawful intrusion, including bugging telephones, planting microphones in private homes, and breaking and entering into places where files are stored. To take a concrete example, about twenty years ago a couple embraced at the Farmer's Market in Los Angeles, and a wandering photographer captured the moment on film. The photograph appeared shortly thereafter in several widely circulated magazines. The California Supreme Court denied recovery, holding that, because the couple acted voluntarily in public, they relinquished any right to prevent a photograph of their act from being

⁵¹ The theft of government documents poses a different problem. Insofar as they are clearly marked as government documents and bear a security classification, the government may have a right, generally unavailable to private persons, to impose a requirement of confidentiality upon persons who unwittingly come across such documents. At the very least, the government may possess the power to enforce that right by civil actions for damages, by criminal prosecutions, and possibly, in some limited situations where national security is at stake, by injunctive relief. Cf. *New York Times v. United States*, 403 U.S. 713 (1971).

⁵² A. MILLER, *supra* note 1, at 175-76; e.g., *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 574, 255 N.E.2d 765, 773, 307 N.Y.S.2d 647, 658 (1970) (Breitel, J., concurring).

⁵³ 410 F.2d at 704 (dictum).

published in a magazine.⁵⁴ Professor Miller disapproves of the case,⁵⁵ but I think the decision is the only correct one. I believe that anyone ought to be allowed to publish anything that is in the public domain. I therefore disapprove of the Fair Credit Reporting Act insofar as it restricts the right to disseminate facts of public record, such as bankruptcies, arrests, and judgments. The commercial-noncommercial distinction can support a right to correct information that one might hesitate to grant as against newspapers but not the suppression of true information that is a matter of public record. The Act is tolerable because it attempts to confine its operation to certain commercial relationships and does not restrict what one can discover on one's own. The Act is in this respect like proposals to "regulate" obscenity without trampling over free speech, for example, by making obscene literature expensive but not impossible to obtain.⁵⁶

I have chosen the Fair Credit Reporting Act for extended comment because, although it "simply does not provide us with adequate protection against possible misuse of the credit network of the future,"⁵⁷ even its partial protection is given at the expense of freedom of communication, and its expressed principles seriously conflict with the principles of free speech and inquiry. The computer with its capacity to accumulate large amounts of stale information admittedly can, as Miller describes so well, trap a man in the record of his past. I am not insinuating that people should anaesthetize themselves against the dignity-destroying conduct of their fellows until such time as society becomes more tolerant and forgiving, but I do suggest that, despite the inadequacy of self-regulation, legislation of this type excessively impinges upon freedom of communication.

Everyone recognizes that a large part of the problem is the disparity of power both among individuals and institutions and between government and the more fragmented elements of society. One might, thus, sympathize with a recent decision restraining the official printing and distribution of a House Committee on Internal Security report, surveying the honoraria given college speakers thought to be associated with allegedly subversive organizations, on the grounds that publication

⁵⁴ *Gill v. Hearst Pub. Co.*, 40 Cal. 2d 224, 229-30, 253 P.2d 441, 444 (1953).

⁵⁵ A. MILLER, *supra* note 1, at 185-86. Miller classifies the case under the pejorative heading "The Consent and Waiver Placebos." He feels that the court's concern that prohibiting the reproduction of the photograph might impede news-gathering activities was "a judicial red herring." *Id.* 185. I agree that "waiver" is a misnomer, but that is irrelevant because a man is free to photograph what he sees on public streets.

⁵⁶ See Kristol, *Pornography, Obscenity and the Case for Censorship*, N.Y. Times, Mar. 28, 1971, § 6 (Magazine), at 24, 114-16.

⁵⁷ A. MILLER, *supra* note 1, at 88.

would inhibit free speech and assembly.⁵⁸ The court felt, however, that it could not prevent the printing of the report in the *Congressional Record* or its dissemination in the course of the normal distribution of the *Record*.⁵⁹ The reproduction and distribution of the relevant pages of the *Record* by a private party presumably could not be constitutionally prevented. The court's solution is made even more troublesome if it is supposed that the Committee wished to distribute information that had already appeared in the press or that, unlike the actual case, copies of the report were not printed for free distribution but were only to be sold for a price approximating the government's out-of-pocket costs.

The power of government to collect information obtainable by curious private parties raises a great many difficult questions. Demonstrators engaging in sit-ins in a college president's office have unsuccessfully argued, for example, that state police could not photograph or otherwise record observations of their conduct, even though equivalent photographs and observations could be obtained from press clippings.⁶⁰ Such arguments are untenable, though there are official surveillance practices, such as the intensive observation of people who have never committed a crime and are unlikely to do so, that are less justifiable.⁶¹ While private parties might be able to observe others on the public streets, Miller suggests,⁶² and I most definitely agree, that such surveillance by public authorities interferes too much with human freedom and dignity.

Should the courts intervene to enjoin such surveillance where no prosecution or other official action is contemplated? My answer—and here again I must disagree with the approach Professor Miller seems to

⁵⁸ *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C. 1970). On the question of official "misuse" of arguably publicly available information, see *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), in which the Court struck down a statute pursuant to which the local chief of police could forbid the sale of liquor to certain people by posting their names in all retail liquor outlets without notice or a hearing. The chief of police of appellee's home town had, without hearing, done just that, thus not only embarrassing her but also making the sale of liquor to her by these establishments illegal.

⁵⁹ 318 F. Supp. at 1179.

⁶⁰ *Anderson v. Sills*, 56 N.J. 210, 217-18, 265 A.2d 678, 682-83 (1970), *rev'g* 106 N.J. Super. 545, 256 A.2d 298 (Sup. Ct. 1969). The suit was brought for declaratory and injunctive relief against the use of a reporting system claimed to have been instituted as the result of the distribution by the New Jersey Attorney General to local officials of a memorandum entitled *Civil Disorders—the Role of Local, County and State Government*. Certainly, as the lower court pointed out, the range of possible surveillance would cover most forms of political activity. 106 N.J. Super. at 556-57, 256 A.2d at 304-05.

⁶¹ More recently, U.S. District Court Judge Constance Baker Motley of the Southern District of New York issued an injunction ordering the New Rochelle, N.Y. police department to stop the surveillance of persons "neither suspected of criminal activity nor engaged in criminal activity." N.Y. Times, June 23, 1971, at 47, col. 8.

⁶² A. MILLER, *supra* note 1, at 200-02.

favor—would be no for several reasons. First, it is difficult for courts to weigh all the relevant considerations necessary to impose a solution upon the investigatory agencies. The public mood, moreover, is inconstant. There have been too many assassinations of public figures in recent years, and no one who has lived through these times is unaware of the outrage that the assassins were not under prior observation. It does not do the fabric of society much good to have the courts charged with having been instrumental in causing the death of a President. A second more important reason against judicial intervention is the possibility that the relationship between the branches of our governmental system would be strained. A President will always authorize the surveillance of those believed to imperil national security and, in response to what may be considered to be unrealistic judicial demands, disguise surveillance activities or refuse to admit to them. This would be a spurious triumph of law.

The legislatively established administrative agency that Miller so strongly recommends⁶³ would be a more appropriate body to handle the problem. Such an agency could develop workable criteria, and its performance could be subjected to continuing oversight by the appropriate Senate and House committees. This may, however, be an area where specific statutory criteria for governmental participation in surveillance of private citizens would be the best solution. Such a statute could provide civil and criminal penalties for flagrant breaches of its policy, though whether a particular subject of surveillance is likely to commit a crime must in large measure be entrusted to the discretion of law-enforcement authorities. It would be unfair in most instances of mistaken judgment to impose a crippling financial or personal burden on an individual officer. The seriousness and likelihood of a possible crime are each relevant factors as to the possibility of physical danger. If the crime is a serious one or involves a risk of physical danger to the public, surveillance might be justified when the likelihood of its commission would not justify surveillance for a less serious offense or one involving no risk of physical danger to the public. One of the prime values in enactment of a statute is that it could provide a basis for incisive congressional oversight and judicial review by establishing categories of surveillance requiring a high degree of justification, such as surveillance of political rallies or of civilians by military personnel,⁶⁴ and by requiring regular reports to the Congress on the number of occasions in which law-enforcement authorities have engaged in such activity. Any statute

⁶³ See text accompanying note 27 *supra*.

⁶⁴ Senator Ervin's Subcommittee on Constitutional Rights of the Senate Judiciary Committee is currently investigating the Government's surveillance policies and has made the Army's now-discontinued surveillance of civilians a major subject of inquiry.

governing surveillance activities should address itself to the question of the possible uses of gathered information, restricting the uses of information obtained by surveillance in cases where the justification is dubious rather than attempting, perhaps futilely, to compel the complete abstention from surveillance.

III. FREE SPEECH AS AN ULTIMATE VALUE

It should be clear that I have been applying to the problem of privacy doctrines and principles that seem to be present, at least implicitly, in the Supreme Court's decisions in the libel area. Professor Miller suggests that the analogy between libel and privacy is not particularly apt.⁶⁵ Recognizing that the Court did treat *Hill* as a libel case, he hopes that the Court will not completely assimilate the two. Miller sees the difficulty in asserting that liability for making true statements should be equivalent to or greater than that imposed for making false statements, but he believes that disparate treatment can be justified because of the different rationalizations for the two torts.⁶⁶ Libel remedies have been materially reduced by the Court in the name of freedom of speech. Perhaps one reason for this reduction is use of the Millian justification for freedom of speech that truth will predominate in the long run.⁶⁷ In the privacy area, however, it is the truth that hurts, and therefore Millian justifications for free speech are irrelevant. As far as I know, the Court has never accepted the Millian rationale for free speech.⁶⁸ I hope it never does. It is not at all clear to me that truth will prevail, and, indeed, I feel fairly confident in asserting that, considering that contemporary newspaper reports are a major source for historians, the only certitude is that the truth will be impossible to ascertain. But even were the Millian argument correct, I believe that free speech is a fundamental value in our society and should be as immune from erosion in the name of privacy as it is from the principles of libel, if not more so.

⁶⁵ A. MILLER, *supra* note 1, at 192-93.

⁶⁶ *Id.* 193. The position that invading another's privacy with true speech should receive less protection than false speech has also been put forth in Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968). Nimmer's position is criticized in Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?*, 18 U.C.L.A.L. REV. 371, 382-83 (1970).

⁶⁷ I have described this position as "Millian" because it is a customary label given to this view. Obviously, John Stuart Mill's position cannot be completely stated in a few words, and I am making no attempt to do so. Mill contended that only where discussion is free will truth win out and recognized that truth can be suppressed by persecution, perhaps even permanently. J. S. MILL, *ON LIBERTY* 24-39 (The World's Classics ed. 1966).

⁶⁸ *Cf.* *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971). In this case the Court reversed a libel judgment entered against a small-town newspaper which had printed a false story indicating that Damron had been charged with perjury. Damron, mayor of the town and a candidate for county tax assessor, had not been so charged,

Lower courts, recognizing, as it seems to me they must, that penalizing truthful speech cannot be made as easy as penalizing false speech, will undoubtedly attempt to amalgamate privacy and defamation to permit recovery for invasion of privacy where a libel or slander action would lie were the statements false. This was, for example, the approach of the Supreme Court of California in the recent case of *Briscoe v. Reader's Digest Association, Inc.*⁶⁹ The facts of the case were as follows: The plaintiff, in his complaint, admitted that in 1956 he and another man hijacked a truck in Kentucky. He claimed that he had since "abandoned his life of shame" and had become entirely rehabilitated. Eleven years after the incident the defendant published an article entitled *The Big Business of Hijacking*, in which appeared the following sentence: "Typical of many beginners, Marvin Briscoe . . . stole a 'valuable-looking' truck . . . and then fought a gun battle with the local police, only to learn that [he] had hijacked four bowling-pin spotters."⁷⁰ Plaintiff alleged that his daughter and friends, learning of the incident for the first time, "scorned and abandoned him."⁷¹ The court, while repeating many of the arguments made forty years earlier in *Melvin v. Reid*, remanded the case with cautious instructions to determine "(1) whether plaintiff had become a rehabilitated member of society, (2) whether identifying him as a former criminal would be highly offensive and injurious to the reasonable man, (3) whether defendant published this information with a reckless disregard for its offensiveness, and (4) whether any independent justification for printing plaintiff's identity existed."⁷² Although the court indicated that a publisher always has reason to know that identification as a former criminal is highly offensive,⁷³ it is questionable whether the plaintiff will meet the high standards of proof and succeed on the merits. Nevertheless, even if plaintiff's victory is only a Pyrrhic one, the case is disturbing. In any defamation action the plaintiff must initially overcome the defense of truth and, if the action is against the press, must then show actual malice in the sense of a culpable disregard for the truth. In a privacy action, where truth is conceded, the plaintiff's only obstacle in an action against the press is the actual malice (moral offensiveness)

but he nevertheless lost the election held two weeks after the story's publication. In reversing, the Court extended the reasoning of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), concluding that since Damron was clearly a public figure actual malice on the part of the newspaper must be shown. The Court could not have failed to realize that in such situations, even if the truth does win out, it may be too late to help the plaintiff.

⁶⁹ 4 Cal. 3d —, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

⁷⁰ *Id.* at —, 483 P.2d at 36, 93 Cal. Rptr. at 868.

⁷¹ *Id.* at —, 483 P.2d at 36, 93 Cal. Rptr. at 868.

⁷² *Id.* at —, 483 P.2d at 44, 93 Cal. Rptr. at 876.

⁷³ *Id.* at — n.18, 483 P.2d at 43-44 n.18, 93 Cal. Rptr. at 875-76 n.18.

requirement with its accompanying "newsworthiness" components. Though I hesitate to make an absolute judgment, I can only conceive of a right to bring an action for invasion of privacy in situations of the type in *Melvin v. Reid* and in *Briscoe* where there is the clearest possible proof of a deliberate intention to injure. Any lesser standard would materially conflict with our society's commitment to a free press.

Fortunately, however, although I would not discount the social value of rhetoric, there is more than rhetoric available to meet the demands for greater protection of individual privacy. The effect of stale information can be mitigated by regulating the uses to which that information can be put. We could provide that, absent convincing evidence that those arrested but never convicted are materially worse credit or insurance risks, such information cannot justify refusing credit or insurance seven years later.⁷⁴ Any palpably increased risk could be reflected in an increased charge rather than by a complete denial of the service. The criteria that employers use in evaluating prospective employees could be regulated to prohibit reliance upon obsolete information or information concerning an individual's personal life style.⁷⁵ Legislative and administrative regulations can be molded to appreciably protect the individual without impinging upon the freedom to speak freely and to seek knowledge. To seek reform in the privacy area by attempting to regulate speech itself rather than the uses to which it can be put requires a confidence that freedom of speech will not be suppressed and that Miller's terms, "offensively intimate facts"⁷⁶ and "independent contemporary significance,"⁷⁷ can be effectively employed by the courts to achieve the proper balance between privacy and free speech. I do not have that confidence.

⁷⁴ Although almost never discussed in the privacy context, one of the most unfair uses of stale information is the use of "old" convictions to impeach the credibility of witnesses. This use of stale information makes it very difficult and often impossible for a previously convicted criminal defendant to escape conviction in a case where his defense rests largely on his own testimony.

For a statute preventing the use of a prior conviction for impeachment purposes more than ten years after the expiration of the sentence imposed for the witness's most recent conviction, see District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, §133(b)(2)(B), 84 Stat. 551, *amending* D.C. CODE ANN. §14-305 (1967). This statute, although a tremendous improvement over the practice still followed in many jurisdictions, overruled the doctrine announced in *Luck v. United States*, 348 F.2d 763, 767-69 (D.C. Cir. 1965), which was more flexible and probably more favorable to criminal defendants.

⁷⁵ Cf. *McConnell v. Anderson*, 316 F. Supp. 809 (D. Minn. 1970) (state university cannot constitutionally reject an applicant for a position as a librarian on the grounds that he is a homosexual). See also *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970) (employer's policy of rejecting applicants who have been previously arrested but not convicted held unlawful under the Civil Rights Act of 1964, when the effect was to discriminate against blacks).

⁷⁶ A. MILLER, *supra* note 1, at 193.

⁷⁷ *Id.* 196-97.

A textbook illustration of the balancing which the courts would be asked to undertake is presented in *Commonwealth v. Wiseman*.⁷⁸ Wiseman obtained official permission to make an educational documentary film of the Massachusetts Correctional Institute at Bridgewater. The permission was subject to certain conditions designed to protect the privacy of the inmates and patients.⁷⁹ Wiseman produced a film about the criminally insane entitled *Titicut Follies*, and, as one who has seen it, I can testify that it is a moving portrayal of conditions at Bridgewater. The film is not without sympathy for the staff, who were struggling with excruciatingly difficult problems in an obsolete institution with inadequate resources, or for the depressing plight of the inmates, but it shows inmates in pathetic and embarrassingly indecent situations. Unknown to the Massachusetts authorities, the film was shown at two film festivals, in one of which it won first prize as the best documentary film of the year. Wiseman contracted for the commercial distribution of the film, and it was first shown in New York where it was advertised as making " 'Marat Sade' look like 'Holiday on Ice.' " ⁸⁰ The Attorney General of Massachusetts, concluding that the film went beyond the scope of the consent granted by the Massachusetts authorities and that the film was an unauthorized invasion of the inmates' privacy, brought suit to enjoin future exhibitions.

The Supreme Judicial Court of Massachusetts agreed with the trial court that Wiseman had not adequately complied with the conditions of the permission to make the film, one of which was to photograph only inmates legally competent to sign releases. Treating Wiseman as primarily a collector of information who had breached the conditions under which he was allowed to make the film, I have no difficulty with the legal system's providing remedies to protect the interests of the inmates. Furthermore, regardless of the conditions that were or were not imposed, perhaps a court should hold that no one may grant permission to photograph mentally incompetent inmates within a state institution unless the photographs are necessary for treatment of the patients or would aid in the efficient administration of the institution, such as for identification purposes. It is disturbing to note, however,

⁷⁸ 356 Mass. —, 249 N.E.2d 610 (1969), *cert. denied*, 398 U.S. 960 (1970). For a discussion of the *Wiseman* case and its background, see Comment, *The "Titicut Follies" Case: Limiting the Public Interest Privilege*, 70 COLUM. L. REV. 359 (1970). The film contains scenes of forced nose feeding, skin searches of naked patients, and pathetic attempts of prisoners to hide their genitals.

The denial of certiorari must be read cautiously because the Court apparently found an independent state ground, namely Wiseman's failure to comply with the conditions imposed when he received permission to make the film. 398 U.S. at 960 (Harlan, J., dissenting).

⁷⁹ 356 Mass. at —, 249 N.E.2d at 612.

⁸⁰ Comment, *supra* note 78, at 361.

that the appellate court modified the trial court's decree that the film be destroyed, in order to permit exhibition to specialized audiences, such as "legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these or related fields, and organizations dealing with the social problems of custodial care and mental infirmity,"⁸¹ provided that "a brief explanation that changes and improvements have taken place in the institution"⁸² be included in the film.

Professor Miller states that "[a]lthough the decision is vulnerable to criticism for other reasons, its balancing approach should be applauded since it enabled the court to protect privacy to a considerable degree while preserving the free flow of information thought necessary to protect the public interest."⁸³ It is precisely this balancing that I find most disturbing. I also find distasteful the court's order, which implies that some people's right to know is better than others'. An earlier federal district court decision⁸⁴ quite properly denying relief to guards at Bridgewater who sought to enjoin the film's showing in New York may have prompted Professor Miller to state that he is "far from certain that the common law's response ever will be sufficiently flexible to achieve the desired goal. Indeed, the deficiencies of the current doctrines may increase as public and private sector data systems mushroom and integrate."⁸⁵ For this reason he believes legislative and administrative regulation is necessary. Recognizing the difficulty of formulating administrative and legislative controls that can withstand constitutional challenge, covering disseminators, Professor Miller reluctantly suggests that part of the solution may be to permit the media certain privileges that the rest of us do not possess.⁸⁶ I, however, do not believe that freedom of speech can be exercised by a surrogate on the individual's behalf and would prefer to have the area of free exchange of information and discussion expanded for all rather than contracted.

CONCLUSION

The state should and does protect the individual against the unauthorized commercial exploitation of his name or picture and, to a large extent, against intrusion into his home and the bugging of his

⁸¹ 356 Mass. at —, 249 N.E.2d at 618.

⁸² *Id.* at —, 249 N.E.2d at 619.

⁸³ A. MILLER, *supra* note 1, at 208.

⁸⁴ Cullen v. Grove Press, Inc., 276 F. Supp. 727 (S.D.N.Y. 1967).

⁸⁵ A. MILLER, *supra* note 1, at 209.

⁸⁶ *Id.* 198-99. The press has on occasion asserted that it does indeed possess privileges that others do not. *See, e.g.,* Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971) (right of reporter to refuse to appear before grand jury even when granted a qualified privilege to protect confidentiality of the sources of his information).

telephone. The law can insure that information supplied to public or private agencies under promises of confidentiality is kept secret. I am also prepared to assert that the state should insist that records about an individual are complete, accurate, and, to the extent possible, not subject to misinterpretation, although I hesitate to assert that those rights should be enforceable against newspapers or the government's national security files. The law of libel presently affords some protection against the dissemination of false information, and, insofar as it is possible to distinguish between commercial and noncommercial uses of data, I favor extending liability for furnishing inaccurate information when special damages can be shown. I strongly support measures that place the burden on credit and insurance companies of proving that certain personal data is material to their risk and that, if such proof is offered, authorize only an additional charge rather than a denial of service. Finally, the range of factors declared by statute to be irrelevant to employment should be expanded.

Beyond this, I am reluctant to make any concession to the computer. I do not want to suppress information merely because people might feel better if certain publicly available facts could not be disseminated; I would restrict the uses of information that might tangibly harm an individual but not the right of others to know. I do not think that an effective distinction can be drawn between mere "idle curiosity" and an interest in "newsworthy" events; what a person wants to know is for that person to decide and regulation in this area should be left to self-policing, public opinion, and economic pressure. I endorse Professor Miller's proposal for an independent federal agency to coordinate the government's information-handling activities and procedures, and I concur with him that an omnibus privacy statute would inevitably be shot through with national security and foreign policy exceptions that would make it nothing but a set of pious platitudes. Specific statutes directed at the government's surveillance activities would, however, be desirable, particularly if congressional review of those activities were provided. For the rest, I see no alternative to a hope—foolish as it may be—in the moral betterment of man that will reflect itself in a greater concern for responsible government and respect for one's fellows.

I can only conclude by urging the reader of this Commentary to read *The Assault on Privacy*. It is a scholarly and encyclopedic study of an extremely important social issue, and though Professor Miller does have a certain moral predisposition, it does not affect the objectivity of his presentation. Indeed, on a subject as controversial as this one, he owed it to his readers to let them know where he stands. There is a great deal to ponder in his book. I have barely scratched

the surface. The question of individual privacy is, unlike the questions usually pursued in law reviews, one upon which most men will have to take sides. Some accommodation must be made between the need for individual privacy and the need of free men to seek the truth and to say what they please. Miller clearly and vividly describes the framework in which this accommodation will have to be made. He also suggests where that accommodation should be made. On this point, men can differ, and I do differ with Miller. The reader must, of course, decide the matter for himself, and he must do so with full knowledge that Miller and I have not exhausted the range of possible decisions. One could not do better than to read Professor Miller's book and to use the factual material and policy arguments contained in it as a point of reference for his own exploration of the area.