Today's technology means that every aspect of your life can be collected—and disseminated—with incredible ease. Privacy *is* dead, as is

The Right to be Left Alone

By Robert S. Peck

The technological revolution is profoundly changing the American way of life, not only by creating new jobs and economic patterns, but by raising new social and legal issues. This revolution promises to bring a sea-change in the law that, while not unprecedented, is still highly significant.

The current metamorphosis of America into an information-based society, which uses an incredible range of highly sophisticated technologies, will bring forth novel problems that bear directly on the always precarious relationship between individuals and government. Perhaps nowhere will these issues be so important as in the area of privacy.

Today's new technology permits the collection and dissemination of personal information with ease. The computerization of society has important and possibly unsettling implications that invite a reexamination of the still-emerging constitutional right of privacy.

The right to privacy is much more than just a vague concept. To disparage this right is to disparage the personal autonomy that has flourished as a result of this nation's dedication to individual rights and the related concept of human dignity.

While some have asserted that people have nothing to fear unless they have something to hide, protection against unwarranted intrusions into personal matters means much more than safety from minor embarrassments, or even possible incrimination. Invasion of privacy has the potential to reveal one's associations, private enjoyments, and personal views, all of which others might look upon with a disdain leading to social ostracism.

The chilling effect of such a loss of privacy is an undesirable incentive to conform to societal norms rather than assert one's individuality. Ultimately, what is lost is not only the private emotional releases we all need but, most importantly, the creativity that leads to human achievement.

Privacy makes possible individuality, and thus, freedom. It allows us to cope with the larger world, knowing that there is a place where we can be by ourselves, doing as we please without recrimination.

The American public has also correctly recognized the privacy implications of today's technological advances. According to a 1983 survey by pollster Louis Harris, 48 percent of those questioned were "very concerned about threats to personal privacy." That is a 17 percent increase since 1978.

Seventy percent believed it "likely" that "a government in Washington will use confidential information to intimidate individuals or groups it feels are its enemies."

In addition, 58 percent thought it likely that the information "will be used to take away the privacy, the freedom and the liberty" of Americans.

Most strikingly, 84 percent of those polled agreed that "it would be easy, no problem at all, to put together a file on them that contains all their credit information, employment records, phone calls,

Medical sensory implants could help deprive you of control over your own body

where they have lived over the past ten years, their buying habits, their payment records on debts, [and] the trips they have taken."

Such fears are not unfounded. The federal government maintains an average of fifteen files on every American, and state and local authorities often have collected more information than is necessary for legitimate purposes. In New York, for example, a drunk drivers program required enrollees seeking reinstatement of their licenses to fill out a form that, for no apparent purpose, asked questions about their sex lives. Other requirements have been equally intrusive.

Today, information collected for one purpose may be shared with other agencies and used for entirely different purposes, since fragments of information about an individual that once might have been filed away in dozens of dusty storerooms now may be assembled into a complete personality profile at the touch of a computer button.

Also, government agencies have almost total access to privately collected information. A General Services Administration program designed to prevent fraud and abuse in federal programs will provide nearly 100 federal agencies with a 24-hour direct computer link to seven major credit reporting companies. The instantaneous access to frequently inaccurate credit reports may easily lead to their use for purposes other than checking the creditworthiness of loan applicants.

Moreover, the technology will soon exist for what has been called the "intelligent" or "smart" identification card, that will be more than merely computer readable. This type of card will contain a sophisticated microprocessor that, when plugged into a computer, will reveal personal data, including the medical files and financial records of its owner. It will also be capable of replacing the need for cash or current forms of credit cards by making electronic fund transfers at the point of sale for major purchases, such as appliances or stock, as well as minor purchases, such as groceries.

Other technological innovations with privacy implications include medical sensory implants and interactive cable television.

The implants, while serving the important medical purpose of monitoring body functions or providing periodic electrical or drug stimuli, could become a means of depriving an individual of control over his or her body.

The two-way capability of the new cable television systems, which allows viewers to participate in programs or make use of their television for non-programming functions, could also provide the programmer with a record of each viewer's television usage.

The conflicting liberating and monitoring aspects of the new technology, while complicating the issues our society must face, do not necessarily require a societal choice between progress or individualism. A computerized society may provide great benefits in terms of increased efficiency, leisure time, and progress in mass communication and education. Despite the welcome prospects, the scientific advances in data accumulation remain a double-edged sword. If the new technology is properly used, society benefits; if it is abused, it can become a tool of enslavement by those who control the data flow: *1984* in 1994.

A number of states have been especially sensitive to the privacy needs of their citizens in this new information age. Several have constitutional provisions to protect privacy, including Alaska, Arizona, California, Florida, Hawaii, Louisiana, Massachusetts, Montana, South Carolina, and Washington.

New York and Wisconsin have gone the statutory route to recognize the right of privacy. In addition, many federal statutes also establish privacy policies, including the Con-

Robert S. Peck is staff director of the American Bar Association's Commission on Public Understanding About the Law. This article is adapted from an article that originally appeared in the Hofstra Law Review.

sumer Credit Protection Act of 1968, Right to Financial Privacy Act of 1978, Family Educational Rights and Privacy Act of 1974, Privacy Protection Act of 1980, and the Privacy Act of 1974.

The statutory approach, however, leaves loopholes that rapidly changing technologies can enlarge. For example, the federal wiretap law, enacted in 1968, fails to cover the interception of information transmitted by computerized "digital bits" that are being used more frequently in sophisticated communications and electronic mail systems. While statutes will remain an important source of legal protection in this area, the right of privacy will be secure only if recognized as a basic liberty within the constitutional pantheon. The degree to which privacy is valued becomes critical when we try to balance the benefits of data accumulation and accessibility against the potential threats to individual liberties. Only when the right to privacy is elevated to a fundamental constitutional principle will the interest of the individual in withholding personal information withstand the interest of the government in obtaining that information.

Public officials would then be obligated to consider the implications of their policies on individual privacy; courts would be required to consider the primacy of this right in deciding privacy questions that fall between the statutory cracks, and in developing appropriate remedies for invasions of personal privacy.

It is difficult to define privacy. Many observers agree that it is "the right to be left alone"—the definition coined by Warren and Brandeis in their seminal law review article of nearly a century ago. Others have written that privacy is another name for personal autonomy, a notion that captures the various libertarian strains that also equate freedom with personal sovereignty.

The new capacity to store and retrieve information has not so much redefined privacy as it has enhanced its importance. The rapidly changing world around us demands the need for determining constitutional doctrine. As Oliver Wendell Holmes declared, "the life of the law has not been logic: it has been experience." Chief Justice Warren also recognized the changing demands on the constitutional system. "Our system faces no theoretical dilemma," he wrote, "but a single continuous problem: how to apply to ever changing conditions the never changing principles of freedom." It is that challenge that faces us today in the privacy area.

Privacy was a theme that had great appeal to Brandeis. In an often-quoted dissent in *Olmstead v. United States* (1928), the significance of which was later recognized, Justice Brandeis wrote:

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect . . . they conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government

IRR MEMBERS APPOINTED TO ABA COMMISSION ON WOMEN

The Section of Individual Rights and Responsibilities is well represented on the new American Bar Association Commission on Women in the Profession.

Members of the commission, recently announced by ABA President Robert MacCrate, include:

- Elaine R. Jones, a member of the IRR Section Council; she is assistant counsel to the NAACP Legal Defense Fund and a member of the ABA House of Delegates.
- U.S. Bankruptcy Court Judge Lisa Hill Fenning of Los Angeles; president of the National Conference of Women's Bar Associations, she is co-chairperson of the IRR Committee on the Rights of Women and a member of the steering committee of the ABA's Women's Caucus.
- Lynn Hecht Schafran, director of the National Judicial Education Program of the NOW Legal Defense and Education Fund, and a program coordinator of the IRR Committee on the Rights of Women.

The ABA Board of Governors Liaison to the Commission is Martha Barnett, a senior partner with the Tallahassee, Fla., law firm of Holland & Knight, and former chairperson of the IRR Section.

In announcing the 11-member commission, MacCrate said: "More than 80 percent of women practicing law today entered the profession after 1970. Women entering the profession are largely responsible for the great growth in the number of lawyers over the past 15 years. They represent a rich new resource for the profession, but they are confronted by personal and professional problems on a scale no prior generation has faced. . . ."

The commission chairperson is Hillary Rodman Clinton, a partner in the Rose Law Firm of Little Rock, Ark.; she chairs the Children's Defense Fund, in 1978-80 was chairperson of the Board of Directors of the Legal Services Corporation, and was a counsel to the Impeachment Inquiry Staff of the U.S. House Judiciary Committee in 1974. Past ABA president William W. Falsgraf was named vice-chairperson.

The commission was directed to:

- Assess the current status of women lawyers and to identify their career paths and goals.
- Identify barriers preventing women lawyers from full participation in the work, responsibilities and rewards of the profession.
- Develop an educational program addressing discrimination against women in the justice system and the unique problems women encounter in pursuing their careers.

Other commission members include Barbara Mendel Mayden, an IRR Section member and former chairperson of the ABA Young Lawyers Division; Cory Amron, a former director of the Young Lawyers Division, and Randolph W. Thrower, president of the American Bar Foundation.

"The right to be left alone," wrote Justice Brandeis, "is the most comprehensive of rights and the right most valued by civilized men."

upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

When William O. Douglas was appointed to the Brandeis seat on the Court, he seemed to inherit the privacy cause. Douglas first articulated his vision of the constitutional standing in a dissent. "Liberty in the constitutional sense," wrote Douglas, "must mean more than freedom from unlawful government restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom."

Other rights, not specifically mentioned in the Constitution, have become well-accepted after a period of gestation. For example, the constitutional right of every citizen to travel freely from state to state, like the right to privacy, springs not from any specific constitutional language, but from the document's overall scheme.

Courts, since 1849, have experienced difficulty in attaching the right to travel to a particular constitutional provision. That inability, however, has neither diminished the right nor made it unusually difficult to apply.

Just as the right of privacy is not absolute even in one's home, since, for example, it must give way to warranted searches, the loss of the right outside the home is also not absolute. Thus, although one's property forms the strongest zone of privacy for government to overcome, it is paralleled by additional zones—concentric circles—where privacy protections become progressively weaker.

As one moves from the private realm to a more public one, it naturally follows that his or her expectation of privacy is reduced. Indeed, the courts, in attempting to apply the right of privacy, have placed substantial emphasis on a complainant's expectation of privacy. The Supreme Court has addressed the privacy issue in a number of cases.

• In *Griswold v. Connecticut* (1965), the majority of justices generally agreed that a disputed statute prohibiting doctors from advising married couples in the use of contraceptives, and the prohibition against use of those contraceptives, was offensive, but they disagreed as to the proper constitutional grounds for finding the statute invalid.

Justice Douglas, speaking for the Court, declared that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy." Douglas found a right of privacy implicit in the First, Third, Fourth, Fifth, and Ninth Amendments.

• In *Katz v. United States* (1967), the Court reversed a conviction that had been based on evidence obtained by unwarranted electronic eavesdropping on conversations conducted from a public telephone booth.

The Court declared: "One who occupies a [telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."

• In *United States v. Miller* (1976), the petitioner was defeated on expectations-of-privacy grounds when he challenged the admissibility of microfilmed evidence of checks, deposit slips and other records obtained by subpoena from the two banks maintaining the records.

The Court viewed the microfilm as bank business records rather than private papers, and found no Fourth Amendment violation.

The *Miller* decision illustrates the judicial reluctance to expand the privacy right to modern needs. A society that is becoming more reliant on computer-generated records maintained by third parties must recognize the privacy interests within that exterior circle, and the expectations of privacy that necessarily attend.

It is unlikely that government investigators will bother with the cumbersome procedures required

to obtain private papers directly, for law enforcement or other purposes, if they can obtain the papers more easily from third parties who have no privacy interest to assert.

Because technology has expanded the accessibility of records once kept at home, the law must equally expand the available protections. If it does not, all information concerning an individual may become available for government inspection, and privacy could become a hollow concept. Despite the result in *Miller*, it is clear that informational privacy will remain on court dockets as new informational demands and new data retrieval techniques continue to generate litigation.

Perhaps it is too easy to dismiss the *Miller* case as a product of the present Court's hostility to the use of the protection against unreasonable search and seizure in order to withhold clear evidence of criminality when the government's conduct is not patently offensive; nonetheless, privacy issues that are outside the realm of criminal procedure may receive different treatment.

• In 1977 the Supreme Court, in *Whalen v. Roe*, demonstrated great sensitivity to the privacy needs of an information-based society in upholding a statute requiring that centralized computer records be maintained on all persons who purchased certain lawfully prescribed drugs for which there was also an illicit market.

The statute at issue required that a system be established to protect the records against disclosure, and that the data be destroyed after five years. In addition, public disclosure of a patient's identity was expressly prohibited. The Court found that the security precautions required by the statute sufficiently protected the information against disclosure and thus did not violate the constitutional right to privacy. The Court was satisfied that a "carefully designed program [with] numerous safeguards intended to forestall the danger of indiscriminate disclosure" would protect personal information gathered for a legitimate state purpose.

Yet, without such statutory attention to constitutionally protected privacy interests, it is not clear that the statute could have passed muster. And it should not have. This statute, without its privacy safeguards, might have identified law-abiding citizens as users of illicit drugs, jeopardizing their employment and community standing.

Any violation of personal privacy is a serious affront to individual freedom. The right to privacy should require no less judicial protection than do other constitutional rights. The courts have an obligation to step into the vacuum created between the constitutional principle and the inadequacies of statutory language.

• To enforce the constitutional right to privacy, the Supreme Court declared in *United States v. United States District Court* (1972), "our task is to examine and balance the basic values at stake," weighing "the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression." Applying that test, the Court in *District Court* concluded that judicial approval is required before the government may engage in domestic surveillance of persons thought to pose a threat to national security. If judicial authorization is necessary where the government seeks to investigate acts of subversion, it certainly should be necessary for lesser investigations, and an individual should have a cause of action if the government infringes on his or her right of privacy.

When the infringement is perpetrated by state or local governments, a cause of action under Section 1983 of the Civil Rights Act is available "where official policy is responsible for a deprivation of rights protected by the Constitution."

When the federal government is the source of the offensive conduct, a federal cause of action should be inferred directly from the Constitution, as in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971).

(Please turn to page 50)

The federal government maintains an average of 15 files on every American citizen

crucial in correctional settings, said San Francisco County Sheriff Michael Hennessey. Two inmates have died of AIDS while in custody in the San Francisco County Jail, and five deputy sheriffs have died of the disease, he said. Policy issues thus revolve around the fears of co-workers as well as concern for inmate safety and the AIDS-diagnosed employee.

"AIDS hysteria is an epidemic itself," Hennessey said, "and it threatens to harm the very effectiveness of that important function of government, that of public protection."

Public service personnel should not only deal with AIDS, but with the issue of homophobia, Sheriff Hennessey said. "Homophobia is an emotional response we cannot tolerate," he said. "AIDS is caused by a virus, not by a lifestyle." San Francisco County Sheriff's Department policy states that refusal to work with a suspected AIDS victim constitutes insubordination, Hennessey said.

Mandatory AIDS testing for prisoners would give the scope of the problem in jails and would allow for segregation, Hennessey noted. But practically speaking, AIDS-related segregation is impossible due to overcrowding, he said. In addition, most inmates would be out of custody before the jail received test results. Other problems could arise, Hennessey said: "Does your mandatory testing program create a duty to treat?"

Law enforcement professionals have a special duty to understand AIDS, Hennessey said. "We must not be fooled by the promise of isolation or quarantine," he said, "for it is us who are going to be isolated and quarantined with those people and who must enforce that set of rules."

Right to be left alone

(Continued from page 21)

In *Bivens*, the Court created a cause of action for damages to remedy a Fourth Amendment violation where several agents of the Federal Bureau of Narcotics, acting under color of law, entered the plaintiff's apartment, allegedly without a search or arrest warrant, and manacled him in front of his family while conducting a sweeping search of his home. Similar causes of action must exist for individuals deprived of their privacy by official action.

• In *York v. Story* (1963), the Ninth Circuit moved in this direction by permitting a Section 1983 action for damages against police officers who took and distributed photographs of the plaintiff in the nude under the pretext that the pictures were necessary evidence to investigate the assault charges she had filed. The court found sufficient basis for the lawsuit in the privacy protections afforded by the due process clause of the Fourteenth Amendment.

Similarly, the Fifth Circuit has allowed a private right of action under Section 1983 against the state of Florida for abridging the privacy rights of people who had given personal information to the state attorney's office after having been assured that their testimony was absolutely privileged under Florida law.

The court declared that "[an] intrusion into the interest in avoiding disclosure of personal information will thus only be upheld when the government demonstrates a legitimate state interest which is found to outweigh the threat to the plaintiff's privacy interest."

• In *Plante v. Gonzalez* (1978), the Fifth Circuit upheld, on privacy grounds, a challenge by five state senators to certain financial disclosure requirements, declaring that "[the] constitutionality of the amendment will be determined by comparing the interests it serves with those it hinders."

A weapon stronger than statutory invalidation and private damage actions may be necessary to protect privacy rights. In the criminal context, the judicially created exclusionary rule vindicates an accused's privacy rights by excluding unconstitutionally seized objects from evidence. An extension of the Fourth Amendment, the rule is designed to deter illegal searches by denying use of the illegally obtained evidence. A civil version of the exclusionary rule, which would deny the government use of the improperly gathered information, may be appropriate to combat egregious conduct. Like its criminal counterpart, a civil exclusionary rule would seek to force officials to consider the privacy ramifications of their actions by removing all incentive to disregard them.

The adoption of a civil exclusionary rule would prevent the government from using information gathered properly for one purpose but used for another, and would likewise apply to abuses of power.

Still, even a civil exclusionary rule may prove insufficient to induce the government to observe constitutionally protected privacy rights. The extent of those zones of privacy and the protections which they are to be accorded must evolve with changing technology. They must also change with the uses made of that technology.

Courts may be able to protect fundamental constitutional values only by denying new technology to

CRIME VICTIM ACT SUPPORTED

The American Bar Association has told Congress that federal funding is needed to continue compensation and assistance programs for victims of crime.

Testifying before the House Judiciary Subcommittee on Criminal Justice, David T. Austern—chairperson of the ABA Criminal Justice Section Victims Committee—called for reauthorization of the 1984 Victims of Crime Act. Austern said the legislation has worked well to support state efforts aimed at helping victims cope with the financial and emotional consequences of crime.

the government unless its use serves an important state purpose and is accompanied by adequate technical and procedural safeguards.

Justice Brennan suggested as much in his concurrence in *Whalen v. Roe* (1977), where he commented that "the Constitution puts limits not only on the type of information the State may gather, but also on the means it may use to gather it. The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology."

Justice Brennan's statement poses interesting dilemmas for the courts in coming to terms with the new technology. While it is impossible to presuppose the types of technologies that will come into being, or the uses to which they may be put, the movement in technological innovation is toward the more intrusive.

Banning the use of certain technologies is an extreme measure, particularly when those bans would apply only to government and not to foreign powers or private industry. That remedy may be the only means of forcing the government to adopt adequate privacy safeguards.

Privacy is a fundamental freedom guaranteed under our constitutional system of government. This freedom must evolve further as legal doctrine to respond to the new demands placed upon it by the technological advances of our information-based society.

As in so many areas of the law, the role of the judiciary will be critical in preserving our liberty. The courts must assume a leading role in addressing newly emerging issues in order to reach a rational accommodation between the benefits of technological progress and the attendant threats to individual freedom.

Statutory solutions cannot meet the rapid need for change. The remedies needed to protect privacy may be more far-reaching than ever imagined if technology is to serve, rather than erode, the cause of liberty. hr