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Computers, Privacy and Crime

THE ADVANCE of computer technology also advances a potential threat to the right of individual privacy. The same computer technology that makes possible the storage and dissemination of information on a vast number of medical disorders, for example, can also disgorge hundreds of unrelated—and possibly unreliable—snippets of data about millions of citizens. This material can then be used to a citizen's detriment, and often is, without his knowledge. It is for this reason that we are discouraged by the recent decision of Deputy Attorney General Laurence H. Silberman to permit the FBI to advance its centralized control of the storage and distribution of individual arrest information.

As matters now stand, the states have a grant from the Law Enforcement Assistance Administration to operate a system by which they can trade arrest information among themselves. That system called NLETS, would be replaced by an FBI "message switching" system that would have the states go through the FBI to reach each other for arrest information. The new system would be an addition to the FBI's National Crime Information Center.

The argument of Justice and the FBI for such a system is that it would be far more efficient than the system the states operate among themselves and would spare the states the expense of the computer system they now operate. On its face, that argument makes some sense. But it overlooks a number of troublesome questions concerning crime data, privacy and the role of the federal government in local law enforcement. These are questions, we think, that should have been resolved before the Department of Justice acted as it did.

The focal point for grappling with those questions is a piece of legislation before Sen. Sam Ervin's Constitutional Rights Subcommittee of the Judiciary Committee. Sen. Ervin and Sen. Roman Hruska, the Nebraska Republican, have been attempting (without any noticeable success) to get the Justice Department and FBI to agree to some form of legislative safeguard against the misuse of computerized arrest information. At a minimum they want to have established some basic standards for how such information is handled and distributed, especially in relation to the question of who should have access to it. The two senators have also proposed the creation of a citizen's board, appointed by the President with the approval of the Senate, to look into some of the long-range problems and oversee the computerization of crime information.

Before permitting the FBI to get further into the computer crime information business, the Justice Department would have been well advised to assist the Senate in shaping that legislation. Not long ago, Attorney General Saxbe, while expressing his dismay at the rise in the national crime rate, warned against the prospect of creating a national police force in response. Yet only weeks later, his deputy approved this program which has a very strong implication of moving in that direction. As much was said in criticism, in fact, by John M. Eger, acting director of the White House Office of Telecommunications Policy. Mr. Eger said he did not like the idea of any federal agency supervising the routing of crime information between states and localities. He properly warned against "an undesirable shift in the delicate balance between federal and nonfederal law enforcement agencies." And he told Mr. Saxbe the FBI program should not be put into effect without the passage of the privacy legislation.

Not everything that is efficient is necessarily desirable. When FBI Director Kelley appeared before Sen. Ervin to defend the FBI message switching concept on grounds of efficiency, Mr. Ervin said: "For one man to have control of crime might be more efficient. But this country was not based on the idea of efficiency so much. It was based on the idea of power diffused."

Since the authors of the Constitution did not anticipate the computer, it must be accommodated through the kind of thoughtful legislation Sens. Ervin and Hruska have been trying to frame. Instead of jumping ahead with more computerization, the Justice Department should help to see that legislation shaped into workable law.

George F. Will

The Expanding Right of Privacy

Justice William Rehnquist recently delivered a two-part lecture at the University of Kansas. Like the Justice, the title of the lecture was an agreeable blend of sobriety and wit: "Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement? Or: Privacy, You've Come A Long Way, Baby." The lecture contains, among other things, an argument against a particular way Americans argue about social policy.

Privacy, says Rehnquist, is "a concept going to the roots of our citizens' independence, dignity, and integrity." But privacy, like many concepts warmly and widely approved is, for that reason, not closely analyzed. So the idea of the "right of privacy" tends to expand like warm gas, obscuring the fact that "in most situations where claims to privacy are urged, there are two sides to the issue and, if the balance is struck in favor of 'privacy,' some other societal value will suffer."

The right to privacy was midwived by Louis Brandeis as "the right to be let alone." Brandeis helped expand that right into something more than a defense against just "intrusion on bodily integrity." It came to include "the right to exclude public observers from basically private events."

The Brandeis formulation responded to new technologies of surveillance which do not involve physical intrusion. But the Brandeis expansion of the right of privacy still did not go beyond the "core" concept of the Fourth Amendment's "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."

But recently the right of privacy has been expanded into something more than just a defense against the government's surveillance or physical intrusion. It has become a defense against certain kinds of government regulatory activities — specifically, against regulation of activities considered so intimate or otherwise important that government should be prohibited from touching them.

For example, the right of privacy has been construed as inconsistent with, and more important than, laws barring abortions (at least in the first three months of pregnancy) or laws restricting dissemination of birth control informaton and devices.

Rehnquist's point is not that the laws regarding abortions or birth control devices were good or bad. His point is that we should be able to discuss them as social policies without discussing them primarily as constitutional questions about the right of privacy.

And now, Rehnquist notes, the right of privacy is being asserted in a third way, not against government surveillance or physical intrusion, and not as a challenge to particular regulatory powers, but to restrict the methods by which government can perform functions the legitimacy of which no one disputes.

For example, many people now argue, persuasively, that governments, which unquestionably have the right to make arrests as part of law enforcement duties, should not have a right to disseminate individuals' arrest records to nongovernmental entities, or perhaps not even to other governments. The rub, as Rehnquist sees it, is that people carelessly argue that the dissemination of arrest records is wrong because it represents an infringement of the "right of privacy."

Rehnquist does not argue in his lecture for a particular policy concerning arrest records. But he does argue that an arrest is not by any stretch of the imagination a "private" matter.

He argues that law enforcement is a legitimate government function, that dissemination of arrest records helps government perform that function; but that, on the other hand, an individual can have a legitimate interest in restricting the circulation of his arrest record.

He says: "Just as in economic analysis we read the supply and demand curves in order to ascertain the optimal price level, we are faced with the task of reading curves representing private and governmental interests."

Americans are unfortunately gifted at the art of getting courts rather than legislatures to strike the balance between such conflicting interests. Our greatest governmental invention, judicial review, has become a bad habit. By carelessly expanding our increasingly fuzzy conceptions of constitutional rights, like privacy, we have made it easy to declare that constitutional rights are somehow at stake in most important social policy arguments. This forces courts to supplant legislatures as the arbiters of most important social policy arguments.

As we increasingly turn political arguments into constitutional arguments, our powers of political argument (as distinguished from constitutional reasoning) atrophy. And the Supreme Court—nine men appointed for life—becomes our most important legislature. "For myself," wrote Judge Learned Hand about extravagant reliance on judicial review, "it would be most irksome to be ruled by a bevy of Platonic Guardians." Rehnquist thinks he and his fellow Justices are being turned into Guardians, and he finds that irksome.