Case Western Reserve Law Review

Volume 22 | Issue 4

1971

The Assault on Privacy: Computers, Data Banks, and Dossiers, by Arthur R. Miller

Bernard A. Berkman

BOOK REVIEWS

THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS. By Arthur R. Miller. Ann Arbor: The University of Michigan Press. 1971. Pp. xiv, 333. $7.95.

The Assault on Privacy[1] is a little book on a big and troublesome contemporary subject. Professor Miller has written a well documented, tightly reasoned, and frightening analysis of the clash between individual privacy and information-gathering technology in a computer age.

He describes in alarming detail the cybernetic revolution that has engulfed our society and the product of that revolution — the computers and data banks of the most sophisticated kind that are "dramatically increasing man's capacity to accumulate, manipulate, retrieve, and transmit knowledge."[2] Professor Miller respectfully depicts the awesome performance and increasing use of the new computer-based data networks, and enthusiastically portrays the substantial benefits to mankind that may result from harnessing their massive information-gathering and storing capacities. But he warns of the inherent threat that laissez-faire information and communication technology poses to societal freedom and individual privacy, and urges that its abuses be effectively curtailed by thoughtful and imaginative judicial flexibility and inventiveness, legislative controls, and administrative self-restraint. Since this technology is still in its infancy and its sophisticated devices are not yet in widespread use, the author argues that there is still time to impose meaningful restraints to inhibit the invasion of the privacy of our citizens.

The book is logically organized. Professor Miller first describes, in graphic detail, the emerging problem: The growth, efficiency, and capacity of the information-gathering, cataloguing, and storing networks have increased to the point that the anonymity of the individual, preserved by past inefficiencies, is relentlessly stripped away. Next, he examines the common law of privacy and the constitutional questions involving freedom of communication in a search of useful legal principles to control the technological assault on individual privacy without inhibiting necessary data gathering. Finally, he examines the techniques for controlling the information equipment and its human caretakers. His examination considers the effective-

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

[2] *Id.* at 1.

ness of mechanical controls on the machinery, statutory limitations, and administrative regulations as means of achieving control of the accuracy and limiting the excesses of the factfinding and dissemination process. If his proposals for solution of the problem are not as concrete, as incisive, or as sharply drawn as his detailed delineation of the dangers of an uncontrolled computer society, perhaps the immensity of the problem rather than the author is at fault.

In this reviewer's opinion, the most effective portion of the book is the detailed examination of the rapidly developing computerized information-gathering techniques and the way in which they are being used to create dossiers on all our citizens at a maddeningly increasing tempo. He describes first the explosive development of computer "hardware" (the physical elements of the machine), memory devices that enable the computer to retrieve data in *billionths* of a second (a billionth of a second bears the same relation to a full second as 1 second bears to 30 years), and exotic storage media that use such devices as lasers and complex chemical solutions that permit the indefinite storage of billions of bits of information in such a small space that "it may be possible to store the medical records of every American in the space of a cold capsule."[3] He next considers the operational instant communication data networks, remote-access computers, and other means of transmitting masses of information great distances at breathtaking speeds.

Professor Miller's portrayal of the federal government as by far the largest user of data processing equipment is disquieting. Some 20 federal agencies are already computerized, and their current excesses beyond existing statutory and regulatory controls are duly noted by the author. The Census Bureau's disclosures of confidential data to unauthorized recipients and the deliberate circumvention of existing privacy safeguards by other federal agencies are graphically depicted. Moreover, the defeat of attempts to centralize all federal data gathering in a National Data Center is viewed by the author not as a victory for privacy, but rather as an impetus to proliferation of unregulated but interconnected data centers, a cure "more dangerous than the disease."[4]

The author then directs his attention to the computerized data networks of the private credit bureaus, describing the pervasive surveillance and fact-gathering techniques that have permitted the compilation and indiscriminate dissemination and sale of personal finan-

[3] TIME, Sept. 29, 1968, at 51, *quoted in* A. MILLER, *supra* note 1, at 12.

[4] A. MILLER, *supra* note 1, at 66.

cial information about some 50 million Americans. Professor Miller then considers the computerization of personality and I.Q. tests, the proliferation of raw data that requires, but seldom gets, professional interpretation, and the effect of such data dissemination upon the economic, educational, and social mobility of the subjects. And he deals as well with the growing depersonalizing information and surveillance technology in educational institutions.

The section in which Professor Miller examines the law of privacy — "a thing of threads and patches"[5] — searching for clues in the common law for the control of technical monsters never imagined by the judicial minds that formulated the rules, is a fascinating, yet solid, accomplishment. Tracing the law of privacy from an article in an early *Harvard Law Review*[6] to its current constitutional dimension,[7] Professor Miller considers the applicability of some common law principles to computer abuse, although the case law arose in entirely different factual contexts. For example, cases involving the appropriation of photographs and likenesses without the subject's consent are compared to unauthorized use of computerized personal information.

But despite valiant efforts to adapt existing legal principles to a computer society, the author concludes that private tort actions for invasion of privacy cannot effectively protect society's legitimate interest in anonymity for its citizens. Costs of protracted litigation, in many instances with the federal government as antagonist, problems of sovereign immunity, low visibility of the computer's invasion of privacy (so that the victim may be unaware of the damage to his personality until the expiration of applicable statutes of limitation), and the potential aggravation of the injury by litigation that would further publicize what the victim seeks to keep private, all suggest that private tort litigation is an imperfect remedy for society's computerized illness.

Moreover, the conflict in constitutional policy between the free speech guarantees of the first amendment and the constitutional protection of individual privacy drawn from the penumbra of the Bill of Rights, exemplified by such Supreme Court decisions as *Time, Inc. v. Hill*[8] and *New York Times v. Sullivan*,[9] further complicates

[5] *Id.* at 169.

[6] Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[7] *See* Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965).

[8] 385 U.S 374 (1967).

[9] 376 U.S. 254 (1964).

the attempt to fashion a remedy for computerized snooping. The constitutionally protected right to disseminate information conflicts with the constitutional right of the individual to be let alone in ways that require delicate balancing of the competing interests. Professor Miller suggests the need for strengthening the constitutional support for privacy as computerization makes further inroads upon our individuality, lest we "find ourselves confronted by something akin to the Chinese Communist Party's program to register and monitor every household in China."[10]

Professor Miller's struggle to offer solutions leaves the reader with little hope. The author despairs that Congress has neither the experience with data centers and computer networks nor the will to enact sound and comprehensive national legislation to protect individual privacy under the pressure of rapid technological change. He finds the judicial revision of the common law to meet cybernetic challenge too slow a process to keep pace with computerization. But he finds, surprisingly in view of his bleak description of the current performance of the computerized federal agencies, that administrative self-regulation offers the most effective controls. His suggestion that an independent federal agency, as an information ombudsman, oversee privacy requirements in the data dissemination industry seems more hopeful a prospect than the available data, reported by Professor Miller himself, rationally supports.

All in all, this is a valiant first attempt to describe the problem of the computerization of America in terms that will arouse to thought and action that segment of society, including lawyers and their professional associations, that has real concern for preserving "the right to be let alone — the most comprehensive of rights and the right most valued by civilized men"[11] — in the rapidly approaching cybernetic age.

The extensive notes and selected bibliography alone are worth the price of the book.

BERNARD A. BERKMAN*

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[10] A. MILLER, *supra* note 1, at 205.

[11] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis J., dissenting).

* LL.B. Western Reserve University, member of the Ohio Bar, and currently serving as General Counsel for the American Civil Liberties Union of Ohio.

DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION. By Joseph L. Sax. New York: Alfred A. Knopf. 1971. Pp. xix, 252. $6.95.

Over 20 years ago the Ohio General Assembly wisely opined that not all was well with the waters of the state. The Cuyahoga River, albeit not yet the national joke it has subsequently become, nevertheless stunk mightily when the temperature was right and the wind was wrong. Many other rivers and streams were not far behind. It was time for action, and the Water Pollution Control Act[1] was the result of that recognized need. Although the Act is a masterpiece of obfuscation, it did attempt to preserve Ohio's waters, for it vested in a Water Pollution Control Board broad powers[2] to prevent pollution and to punish polluters.[3] The future was bright.

In June 1969, 18 years after the promulgation of the Water Pollution Control Act, the Cuyahoga River caught fire, causing considerable damage before it was extinguished.[4] While the Cuyahoga's incendiary qualities are admittedly unique, the 20-year stewardship of the Water Pollution Control Board has managed to achieve less dramatic but equally distressing results in most of Ohio's other waters. The choler of even the most sanguine observer may be excused in the face of this reality. In view of the obvious public policy implicit in the Water Pollution Control Act, and considering the broad powers the Act gives to the Water Pollution Control Board to implement that policy, why is it that the last 20 years have marked an accelerating deterioration in the quality of Ohio's waters?[5] To narrow the question to its nub, why are Ohio's waters becoming less useful to more people, or, conversely, why are they increasingly suitable only for industrial uses?

Professor Joseph Sax knows the answer. What is more, in *Defending the Environment: A Strategy for Citizen Action*, he tells what can be done about it. Listen and learn.

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[1] OHIO REV. CODE ANN. §§ 6111.01-.99 (Page 1953).

[2] *Id.* § 6111.03 defines the Board's powers. When this section is read with section 6111.03(N), which authorizes the Board "[t]o exercise all incidental powers necessary to carry out the purposes of sections 6111.01 to 6111.08, inclusive, and sections 6111.31 to 6111.38, inclusive," of the *Revised Code*, the full sweep of the Board's powers is apparent. Unfortunately, these are paper powers, for, at least until recently, the Board has seldom chosen to flex its muscles.

[3] *Id.* § 6111.99 provides for both a fine of up to $500 and/or imprisonment for up to 1 year for violations of various provisions of the Act.

[4] Cleveland Press, June 23, 1969, at 1, col. 2.

[5] For a complete documentation of this claim regarding the continuing deterioration of Ohio's waters, see Reitze, *Wastes, Water and Wishful Thinking: The Battle of Lake Erie*, 20 CASE W. RES. L. REV. 5 (1968).

As Professor Sax sees it, most administrative agencies charged with management and protection of public resources fail to consider those alternatives which would preserve the maximum number of potential uses for the resources concerned. Instead, resource allocation tends increasingly to favor those interests best organized to espouse their desires. This means, with respect to water quality control, for example, that industrial water use will be given priority over other uses. Therefore, a body of water traditionally suited for many uses — recreation, fishing, navigation, drinking water — is stripped of all but one of its suitable applications. The industry whose activities are so blessed pays nothing to the public in return for the diminished value of the latter's property. What Professor Sax characterizes as the "insider perspective" soon permeates the regulatory functions of the administrative agency.[6] The agency, with every good intention, soon loses sight of all policy considerations save those finding favor with the most vociferous and importunate lobbyists. And ultimately, Professor Sax is careful to explain, it is with the policy-making functions of administrative agencies that environmental litigants are concerned, rather than with the traditionally narrow range of discretionary, technical considerations with which administrative agencies are admirably designed to deal.[7] That administrative agencies *do* make policy decisions of sweeping moment is irrefutably documented.[8] Frequently these policy decisions bear no relation to the policy stated or implied in the enabling legislation which created the agency.

Having determined that administrative agencies[9] do in fact make

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[6] Although the "insider perspective" is not subject to empirical verification, the observer is likely to intuit it at work after he attends a number of Ohio Water Pollution Control Board meetings. The wrath of the Board seems to fall most often on those who fail to send in necessary papers on time. Large corporations, whose legal staffs wisely keep abreast of paper work requirements, rarely receive the ire of the Board even though Board members will admit in private that these entities are gross polluters. It has thus become more important to the Board to function smoothly than to function effectively. Recent actions of the Board, however, indicate a stiffening of its approach.

[7] J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 107 (1971).

[8] In Parker v. United States, 309 F. Supp. 593 (D. Colo. 1970), for example, a citizens' group successfully enjoined the Forest Service from selling to private lumber companies vast tracts of a forest which, by the terms of the Wilderness Act, would have been eminently suitable for designation as a "wilderness area." Here, obviously, the Forest Service was exercising its discretion not in an area where it had unique technical expertise, but in formulating a policy with devastating implications for the public.

[9] For convenience I refer throughout to the activities of administrative agencies. This is not to say that legislatures themselves do not often participate directly in the rape of public resources. *See, e.g.*, Illinois Central Railroad Company v. Illinois, 146 U.S. 387 (1892), the landmark public trust case, wherein the Illinois Legislature

independent policy decisions and that those decisions are often detrimental to public interests, Mr. Sax raises the question of what can be done to restore a balance. The public trust is his proposed panacea.

As Professor Sax propounds it, the public trust doctrine is disarmingly simple. It is derived from Roman and common law notions that governmental authority is to a certain extent circumscribed with respect to public trust property by the following constraints: First, the trust property must be held available for use by the general public; second, the property may not be sold, or, if sold, must be sold subject to the trust; and third, the property must be maintained for particular types of uses.[10] For purposes of simplicity, public trust property can be described as all that property traditionally held by the sovereign for the benefit of the public: parks, national forests, navigable waterways, and the like. The public trust doctrine is merely one way of saying that persons having a beneficial interest in the continued existence of publicly-owned property ought to be accorded the full use of the judicial machinery to protect that interest. Thus Professor Sax directly and, one thinks, successfully assaults one of the most anomalous situations in American law. Describing the "mind-forged manacles of law," he observes:

> One seeking to protect his private interests has full access to the courts. It is only those who seek relief on behalf of public rights, in their role simply as members of the public entitled to clean air and water and other such common resources, who have been denied the opportunity to obtain judicial intervention.[11]

The main thrust of the public trust approach is to confer upon the beneficiaries of that trust a means by which the trust fiduciaries can be checked when their administration of the res fails to protect the interests of those beneficiaries. What behavior or lack thereof constitutes a failure to protect those interests? Although one of the drawbacks of the public trust approach is that such a question can only be answered on an ad hoc basis, Professor Sax and the courts which have recognized the public trust obligation suggest some guidelines. A court would properly be amenable to citizen-instituted litigation when it appeared that an administrative dispo-

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had magnanimously sold to a private company the commercial waterfront of Chicago. That they subsequently reneged on this generous grant was the only saving aspect of the whole sordid affair.

[10] Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970). Most of the ideas touched upon in *Defending the Environment* are discussed with a more thorough legal analysis in this scholarly article.

[11] J. SAX, *supra* note 7, at 122.

sition of trust property was stigmatized by one or more of the following "symptoms" of the "insider perspective":

> 1) Public bodies will no longer control the area in question.
> 2) The area in question will no longer be devoted to public purposes or open to the public.
> 3) The diminution of the trust property will be a significant fraction of the whole.
> 4) The public uses of the remaining trust property will be destroyed or greatly impaired.
> 5) The disappointment of those members of the public who may desire to boat, fish, hike, or hunt in the area to be sold is likely to be greater than the benefits which accrue to the public as a result of the sale.[12]

Although these criteria — particularly the last — are necessarily subjective, they do suggest that the public trust doctrine requires that a court only provide a forum for the weighing of broad policy determinations, not that it become enmeshed in the narrow technical questions wherein administrative agencies claim, with some slight justification, a unique competency.

Having determined that the citizen-litigant has made out a prima facie breach of a fiduciary duty, the court is faced with a choice of available relief. On rare occasions the disposition of the trust property will be so patently offensive as to be deemed a nullity. Thus in *Illinois Central Railroad Co. v. Illinois*,[13] the United States Supreme Court held that a state may not "divest itself of authority to govern the whole of an area in which it has responsibility to exercise its police power."[14] The usual administrative disposition, however, will involve no such blatant corruption, and a court will be properly loathe to reverse the agency out-of-hand. There are alternatives. One such, favored in Massachusetts, involves the creation of a judicial presumption to the effect that the legislature would not normally intend that an administrative agency deal with public trust property in such a way as to deprive the public of beneficial use thereof. Thus "the Massachusetts court has developed a rule that a change in the use of public lands is impermissible without a clear showing of legislative approval."[15] A frank appraisal of the Massachusetts approach makes it evident that the courts are indulging in judicial policy-making,

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[12] These indicia are adopted from guidelines promulgated by a Wisconsin court in the case of State v. Public Service Commission, 275 Wis. 112, 118, 81 N.W.2d 71, 73 (1957).

[13] 146 U.S. 387 (1892).

[14] Sax, *supra* note 10, at 489; *see* 146 U.S. at 452-57, 460.

[15] Sax, *supra* note 10, at 492.

however salutary. In *Sacco v. Department of Public Works*,[16] for example, the court held that the Department of Public Works could not fill a public pond to build a highway, notwithstanding the extremely broad language of the statute under which the department claimed authority.[17] This was twisting statutory construction beyond recognition, but it achieved its desired end. Henceforth, an agency seeking to make a change in the nature of public trust property such that there will be an appreciable lessening in the beneficial uses of that property must obtain specific and overt approval from the legislature. Not only must the legislature clearly evince its willingness to alter the nature of the trust property, it must also show unmistakably that it has considered the loss of beneficial uses which will result and has reason to believe the benefits which accrue to the public are great enough to justify the loss. Thereby the court insures that "low-visibility" decision-making will not be allowed to serve the proponents of narrow-use projects to the detriment of the public. The legislators, in turn, are inclined to become remarkably ecologically-oriented when they are not allowed to delegate to the "backroom gang" (administrative agencies) the wholesale capitulation to the various lobbies.[18]

The public trust doctrine has received judicial recognition in several other states,[19] with varying degrees of sophistication. Professor Sax examines illustrative approaches and fully documents his claim that the public trust doctrine is a uniquely flexible approach to problems of environmental control. Unfortunately there is not sufficient space to explore here the full extent of the public trust doctrine, which Professor Sax has so well revealed. Equally unfortunate, perhaps, is the inescapable conclusion that Professor Sax has seriously jeopardized his credibility by overstatement. Had he been content to develop his theory and then claim no more for it

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[16] 352 Mass. 670, 227 N.E.2d 478 (1967).

[17] *Id.* at 672 n.4, 227 N.E.2d at 480 n.4.

[18] In the *Sacco* case, for example, the legislature, having the whole mess thrown back in its lap, suddenly decided the Department of Public Works did not need all that land anyway, and the Governor announced he would not approve the transfer of the requisite parkland. *See* Sax, *supra* note 10, at 500 n.86.

[19] The Ohio Water Pollution Control Board seems ripe for a public trust attack. Under authority of permits granted by that agency, industrial polluters have rendered vast stretches of public trust waters suitable only for industrial use. A possible starting point for such an attack may be found in the sister cases of State v. Metals Applied, Inc. No. 893450 (Cuy. Co. Ct. C.P., April 27, 1971) and State v. International Salt Co., No. 893451 (Cuy Co. Ct. C.P., April 23, 1971), wherein the court recognized that the waters of the state are held in trust for the citizens thereof. *See also* OHIO REV. CODE ANN. § 123.03 (Page 1969); State v. Cleveland & P.R.R. Co., 94 Ohio St. 61 (1916).

than that it could be one more valuable tool in the environmentalist's arsenal, all would be well. Professor Sax, however, is anything but modest in his claims for his pet. Indeed, his postscript informs us that the public trust doctrine will not only erase our environmental ills, but it will also resolve the "problems of housing and welfare, . . . the proliferation of shoddy merchandise, and the miserable charade that too frequently passes for public regulation of business and the professions." That's silly. Similarly inane is Professor Sax's claim that "the ultimate object of environmental cases is to activate the democratic process."[20] The ultimate object of environmental cases is to improve the quality of the environment. Very often democratic decision-making runs diametrically counter to intelligent environmental planning. Witness the profusion of automobiles choking the highways while mass transportation goes bankrupt. Professor Sax cannot truly believe that the masses give a damn whether an isolated forest is converted into a parking lot. When the Sierra Club or the Environmental Defense Fund is added to the list of those opposing the highway lobby, they are very likely running completely counter to the wishes of the masses. To believe otherwise is to fall into the very trap of romanticism which Professor Sax wisely warns us against at the outset.

Nor is overstatement the whole of Professor Sax's lacunae. His work is marred at least as much by omission. Nowhere, for example, does he point out that the real jeopardy to the environment lies in our insatiable demands for more and more material goodies. Nowhere does he suggest that the concerned citizen can start the fight at home by radically revising his life style.[21] Instead, he makes this appallingly simplistic and inaccurate statement which cannot go unchallenged: "Environmental questions are pre-eminently problems caused by powerful and well-organized minorities who have managed to manipulate governmental agencies to their own ends."[22] This is the boogy-man view of history in full flower. It is dangerous in the extreme, for it misleads the gullible into thinking that the environment can be protected by catching sneaky in-

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[20] J. SAX, *supra* note 7, at 189.

[21] A small way of implementing this revision in life style is by using recycled paper. Professor Sax's book was not printed on recycled paper. Since it takes approximately 17 trees to produce 1 ton of paper, and since *Defending the Environment* weighs approximately 1 pound, an initial printing of 10,000 copies would eliminate 85 trees, a small forest. Hopefully, they were martyred for the greater good. Anyway, can I chide, since likewise this periodical doesn't appear on recycled paper? By way of confession and avoidance, I plead a smaller printing. *Mea culpa.*

[22] J. SAX, *supra* note 7, at 239.

dustrialists. Further, since by anyone's definition the Sierra Club or the Environmental Defense Fund are "powerful [we hope] and well-organized minorities" who will at least *attempt* "to manipulate governmental agencies to their own ends," Professor Sax is not accurately stating the problem; rather, he is stating one solution to that problem.

The battle for a cleaner environment would be much much easier if the lines were drawn as Professor Sax would have it. Unfortunately, while there certainly are many bad guys, there are not many good guys. Very few of us lead the kind of lives we must lead if we are to pass on to our successors a cleaner world. Professor Sax — who, I am sure, is closer to being a good guy than most of us — has offered us one tool of limited, but real, efficacy; he has not, however, provided a correspondingly useful watchword. He forgot the words of Pogo: "We have met the enemy, and they are us."

MAYNARD F. THOMSON