Book Reviews

Richard H. Seeburger

Stanley W. Greenfield

Book Reviews

THE ASSAULT ON PRIVACY. By *Arthur R. Miller.*† Ann Arbor: University of Michigan Press, 1971. Pp. xiv, 333. $7.95.

In June of 1970 I was fortunate enough to attend the Biennial Conference of the American Civil Liberties Union. Once every two years delegates from the various ACLU affiliates convene to discuss broad policy and "frontier" issues. I must confess I was bewildered by the delegates' concern about data banks. I left there unconvinced that the computer presented a civil liberties issue.

Ironically, while I was reading Miller's book about computers, data banks and dossiers, Dr. Strangelove came on the tube. The subtitle was, you may recall, "How I Stopped Worrying and Learned to Love the Bomb." At that point I was reading Chapter 7 of Miller's book, entitled "How to Live with the Computer Without Becoming Neurotic —Safeguarding the Privacy of Computerized Information." By then, I was convinced that not only was the chapter title apt, it was inevitable. I now am deeply concerned about computers.

What Miller does, he does well. He begins in the prologue with the confession of bias:

> I am one who believes that although the new information tech-
> nology has enormous long-range beneficial consequences for soci-
> ety, we must be concerned about the axiom—so frequently verified
> since the industrial revolution—that man must shape his tools lest
> they shape him. The computer is not simply a sophisticated index-
> ing machine, a miniaturized library, or an electronic abacus with
> a gland condition; rather, it is the keystone of a new communica-
> tions media that eventually will have global dimension and an
> enormous impact on our lives and those of generations yet to
> come.[1]

He explains clearly to the neophyte basically how computers work. He then talks about the time sharing of computers, the risk of simultaneous exposure of several distinct bodies of data in one information system so that one user might have access to another's files either by accident or by design, all complicated by remote access techniques leading in-

---

† Professor of Law, University of Michigan Law School.
1. A. MILLER, THE ASSAULT ON PRIVACY 7-8 (1971).

evitably to a nationwide network of centralized data. The problem is larger than just creating a national computer "utility," because Miller foresees the ultimate amalgamation of computer and communications technologies. We have, with melodramatic McLuhanesque overtones, two giant industries on a path of confluence. Presently, each seems to be creating a demand for the other and the future may well be an almost biological merger. In any event, as information recording processes have become cheaper, the appetite for data has intensified according to Parkinson's Law.

The threat to privacy is obvious. The threat comes not just from broadcasting information about an individual, nor from a bad actor deliberately seeking to harm someone with false information. The injury can be quite unintended. The information divulged might be factually true but erroneous in context. Thus a person described as a "felon" might simply be a conscientious objector who could not meet the requirements for exemption from the military service on the grounds of religious belief that existed at the time he refused to be inducted. Similar problems exist today when a person's arrest record shows that he was arrested for disorderly conduct. In the good old days there was an opportunity to tell the recipient of the information either that the arrest did not result in a conviction or that if it did it was for civil rights activity in the South. Centralization of records and increased access to them render such correction difficult.

The threat to personal privacy is not solely in the dissemination of information which might be erroneous. It is also in the very collecting of the information while we might be unaware of it. (*E.g.*, consider computers collecting and storing knowledge about our airplane reservations, car rentals and charge accounts.) There is an even more obvious psychological impact from the collecting of information about certain public activities such as political speech. There is a real risk that people increasingly might base their decisions and fashion their behavior in terms of enhancing their record image in the eyes of those who may have access to it in the future. As Professor Miller states, quoting Vance Packard, "The Christian notion of redemption is incomprehensible to the computer."[2]

Professor Miller, however, is not a Luddite and does not urge the smashing of machines, and not just because such a course of conduct would be ineffectual, but because he believes that the computer

---

2. *Id.* 50.

if properly controlled is of great value to the future of man. After a
moving plea for privacy, a succinct survey of the current law of privacy
including constitutional limitations on protection thereof, and a dis-
quieting survey of the current practices such as the Army's collecting
of information on political protestors, Professor Miller moves on to
make his proposals for control of the computer. I quite agree with him
that a property theory of privacy wherein the common law would pour
old wine into new bottles to afford protection is unworkable. One of
the difficulties with the current practice is that nobody knows when a
file is being maintained on himself, thus, individual enforcement of
the right would be impossible. Furthermore, credit bureaus, employers,
governments, etc. would probably be successful in getting individuals
to "waive" their rights. Further, with such a national problem there is
probably little room for the luxury of fifty different approaches as
devised by fifty different states. Professor Miller suggests variations on
the federal legislation proposed by Senator Ervin to provide for the
following prerequisites to conducting a voluntary survey:

> (1) an administrative presentation of a clear and significant need
> for the data; (2) a showing that the data have not been secured by
> other federally conducted surveys; (3) a demonstration that the
> data are not available as a result of state, local, or private informa-
> tion gathering efforts; (4) a determination that the sampling
> group is no larger than is necessary to obtain the requisite data
> base; (5) an articulated and persuasive administrative finding
> that the questions are not intrusive or violative of individual
> privacy; (6) a demonstration that the individual responses will be
> protected against risks of privacy invasion and unnecessary dis-
> semination.[3]

The voluntary survey is only the tip of the iceberg. Another proposal
involves requiring computer manufacturers to incorporate safeguards
into the hardware to maintain the integrity of personal information.

Professor Miller is not satisfied, however, that in an age of rapidly
changing technologies a single piece of legislation can cope with all
the potential abuses and misuses. Rather, he prefers an administrative
approach with the creation of some new federal agency. He feels the
FCC would be in a conflict of interest position ideologically since its
primary concern is the efficient and useful exploitation of the nation's
communications technology. He recognizes, however, that any agency
will have to work hard to avoid becoming a captive of the governmental

---

3. *Id.* 222.

or private interests that have a stake in information networks, but he has some hope, because the Government Accounting Office seems to have achieved an independent watchdog rule.

Unfortunately, he has done too good a job describing the disease for me to buy any of the suggested cures. He candidly recognizes their shortcomings. While technological failsafe devices might make it much more difficult for there to be unauthorized access to information, there can be no guarantee they will be effective. Ultimately, any system will depend upon the ethical sensitivity and integrity of the information managers. Therefore, "computerniks" should be trained with a view to their wider responsibility, and, conversely, traditional policy making groups should develop appreciation for the technology so as to minimize their abdication of responsibility to computer specialists. Some sort of professionalization and code of ethics is necessary, perhaps through an expensive licensing procedure, by which the sanction is the loss of the license. No "system" can guarantee individual dignity unless those in the system think it is important. Professor Miller fears self-regulation will be ineffective because unlike the physician or lawyer the computer operator does not have the face to face dealings with the people whose life history he processes to engage his sympathies or remind him of the importance of discharging his duties properly. I disagree. The realities of the medical or legal "business" are not as he supposes. I see no alternatives except to become a Luddite and smash the machines.

RICHARD H. SEEBURGER*

TRIAL DIPLOMACY. By *Alan E. Morrill*.† Chicago: Court Practice Institute, 1971. Pp. xxix, 1174. $17.50 (Paperback).

In recent years, undoubtedly in part because of trends in the criminal process, there has been a studied impetus by educators, judges, and experienced attorneys for development of the long neglected art of trial advocacy among the law students and young lawyers. Law school courses to this end are now as commonplace as they were rare a short ten years ago.

---

* Professor of Law, University of Pittsburgh School of Law.

† Member of the Bar of Illinois; author of ANATOMY OF A TRIAL (1968); faculty member and lecturer in trial technique at John Marshall Law School.

Presumably to serve both as an instructive text in the law school and as a primer for the young lawyer, Alan Morrill of the Illinois Bar has put together a mammoth work which is slightly inadequate for either. *Trial Diplomacy* with text, cases, and illustrations is too vast in scope, attempting to encompass trial preparation from investigation to appeal and including at the same time, nineteen trial cases replete with testimony, full page exhibits, four appendices, four bibliographies, and a medical glossary, all within one cover.

The idea of a single volume is laudable and certainly convenient, but Morrill proves that we can't possibly marry all that is appropriate to trial advocacy education for the law student with all that may be necessary for the practicing lawyer. The result, at least here, is at once too superficial for the practitioner and, in many respects, irrelevant for the student. The sections on general investigation of a case, videotape depositions, wiretap considerations, together with a capsulized recitation of federal law, a sample brief for use in a FELA case, a medical glossary, one appendix of medical abbreviations and another for medical visual charts, medical and legal bibliographies, and sample letters to clients in preparation for a deposition, all would seem remotely suited for the student and in any event, much too broad brush for any practitioner about to be involved, for example, in a wiretap defense.

The section dealing with discovery, having extensive interrogatory forms, the one on motions, listing 184 possible motions, (though I take it an infinite variety of motions is possible), and the host of mini-illustrations, on the other hand, all would be useful to student and practitioner alike.

The problems based on actual cases would be valuable to student and practitioner as illustrations of advocacy in a given situation (as the foreward indicates). However, since the scenario is fully set out (testimony, exhibits, etc.), it is difficult to imagine what more the student really can do in the classroom. In short, it's all done, and any possibility of ingenuity in presentation and argument would appear to have been virtually eliminated. Yet, the problems do have the virtue of showing "how to."

In reading *Trial Diplomacy* one gets the feeling that Morrill is trying desparately to put everything to which a trial lawyer *or* student might ever meaningfully be exposed within an assigned space of one volume.

Undertaking an objective of such enormity comes off, predictably, as too enterprising.

Stanley W. Greenfield*

* Adjunct Professor of Law, Duquesne University School of Law.