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Privacy and Freedom

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Privacy and Freedom. ALAN F. WESTIN. New York: Atheneum. 1967. Pp. xviii, 489. $10.00.

This book might have been called *Privacy, Technology, and Law,* for it was the interrelation of those three that occasioned the study from which the book derives. Once again, the profession is indebted to the imagination and the sense of public responsibility of the Association of the Bar of the City of New York. Nearly a decade ago, the Association established a Special Committee on Science and Law. In 1962, when the Committee began to make its comprehensive investigation into "the impact of modern technology on privacy," it chose Professor Westin as research director for the project—and that happy choice is now reflected in a book largely devoted to issues raised by the new technology but entitled *Privacy and Freedom.*

The title, I think, is significant, because it emphasizes that the various forms of privacy serve an instrumental role, protecting values and interests so diverse that they can only be brought together under a heading as abstract as "freedom." Indeed, one of the book's chief merits is that Professor Westin has carefully separated the very large number of questions that composed the Special Committee's general subject of inquiry, reducing the questions to manageable proportions and analyzing them according to the various and disparate interests involved.

Usually it makes no difference whether we classify an interest as "primary" or "instrumental." Of course there is a sense in which all rights, all interests, are instrumental. But privacy as a concept of legal doctrine can profit from such scrutiny. For there are, from time to time, suggestions that the inquiry should be broadened, not narrowed —that the real claim at stake is the claim of the "right to be let alone." Thus it is said:

> A person may be asserting his right of "privacy" when he dresses in in an unorthodox way or when he "loafs" in a public park. A person may claim the right to be let alone when he acts publicly as when he acts privately. Its essence is the claim that there is a sphere of space that has not been dedicated to public use or control.[1]

If Professor Westin had gone in that analytical direction, perhaps we should have had a book entitled simply *Freedom,* for the "right to be let alone" is as vast as freedom itself. Although some purposes are served by recognizing the kinship of privacy issues to other issues in-

[1] Konvitz, *Privacy and the Law: A Philosophical Prelude,* 31 LAW & CONTEMP. PROB. 272, 279-80 (1966) (footnotes omitted).

volving individual freedom, I think that Professor Westin and the Special Committee wisely decided to focus on privacy itself—on the disclosure of information. As this book shows, that subject is quite large enough to justify a major inquiry and analysis.

The book begins with a collection from the work product of the social sciences on the functions (psychological, social, political) that the various forms of privacy serve in our society, along with marginal comparisons to other societies. The new technology of privacy invasion is then catalogued in truly fascinating detail. (Here Professor Westin cheerfully notes that the fascination of snooping is something we all feel, and he properly concludes that there are real values on the side of curiosity and investigation.) Finally, through the use of "case studies,"[2] Professor Westin approaches the legal and institutional questions that prompted the study.

The legislative proposals are necessarily sketchy; this is not the place for a draft of a model statute. The book's most important contribution consists not in these proposals, but rather in Professor Westin's analysis of the interests that should be taken into account in regulating the acquisition of information claimed to be private. In fact, some of his legislative proposals are simply charters for judicial or administrative elaboration of rather general expressions of concern for privacy; the legislative choices, in other words, are left to case-by-case evaluations of the competing considerations in different contexts.

What are Professor Westin's criteria for decision? In his concluding section on "Policy Choices for the 1970's," he bears down most heavily on these:

—"the seriousness of the need to conduct surveillance"
—"alternative methods to meet the need: the burden of proof"
—"reliability of the instrument"
—"the issue of consent: expressed, implied, or coerced?"
—"capacity for limitation and control" (of surveillance operations).

This analysis is a privacy-oriented version of the familiar legislative balancing that is the essence of the lawmaker's function, whether he be the draftsman of a statute, a judge deciding an issue of due process,

2 The "case studies" (really, problem-area studies) begin with the problem of eavesdropping, about which we have learned much from Professor Westin over the years. Succeeding chapters deal with the polygraph, psychological testing, subliminal advertising, and the storage of personal data. On the latter point, I wish that Professor Westin had been more concerned with the problem of improving the accuracy of data files, a problem that seems to me more critical in the long run than the companion problem of regulating access to the files.

or a police chief issuing regulations to govern his force. It is exactly the kind of inquiry that the Supreme Court properly made in reaching its recent eavesdropping decisions—with appropriate citation to Professor Westin.[3]

But this inquiry, as delineated by the factors listed above, seems incomplete. With the exception of the penultimate one, the factors are concerned exclusively with the state's-interest side of the balance. To put it another way, Professor Westin's concluding analysis creates the impression that the principal variables in this decisional process are on the side of the justifications that may be asserted for invading the interest in privacy. Such a conclusion would fail to do justice to Professor Westin's own careful work at the outset of the book, where he has catalogued the various interests in privacy. The point is simply a cautionary one: there are variables on both sides of the legislative balance, and the balance may be struck differently according to the kind of interest that is invaded. The danger is that lawyers who read the book, in their occupational prejudice toward proposals for action, will treat the analysis of privacy's many non-faces as simply a preliminary to the book's real point. To the lawyer's general motto of "Read On," we must add a caveat: "Reread."

In the context of this book's accomplishment, that last concern turns out to be a quibble. The Special Committee's study and the book it produced were needed, first, to put the whole social question of privacy invasions before us, but, second, and in the long run more important, to raise the question piece by piece, not as an exercise in defining terms, but as a series of disparate issues of social control. That latter function is rarely a crowd pleaser. But it is the essence of the lawyer's craft, and Professor Westin has done his work well.

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3 Berger v. New York, 388 U.S. 41, 47 (1967). *See also* Katz v. United States, 389 U.S. 347 (1967).

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