that dollar grants be given to states whose medical plans insure the right to privacy for computerized medical systems.

tax data

The smaller the number of people with access to Americans' income tax forms the less the danger that information on the forms will be put to an improper use.

Some Files Linger On

What may be as startling as the breadth of the intelligence agencies' intrusion on privacy is the ease with which they slipped into abusive activity. As in Watergate, there never seemed to be anyone to say nay.

Snoopers Now On Every Side

"We haven't done the job unless we've found out and reported . . . if promiscuous . . . class of partners . . . possible homosexuality . . . dress . . . associations with opposite sex?"

"A lot of our investigations now are pre-employment checks, general backgrounders, and we do pre-marital checks. There's actually a need for this," Jerry Poth said.

"I'd say," Jerry Poth claimed, "we could tell you just about everything about yourself."

Even where I went after leaving the Tug Tavern?

"I'm sure."

That's the worst part about snooping. No one should be able to know what you can't even remember.

Repeal of No-Knock

Bank Accused Of Snooping

Midland Bank has been charged in a $250,000 lawsuit with intercepting and opening the mail of a man on whose business the bank had foreclosed.

"The improper procurement and use of medical information has had devastating effects upon unsuspecting individuals. Marriages have been ruined and reputations have been destroyed," he said.

- By 81 to 13 per cent, Americans believe overwhelmingly in the right "not to have one's phone conversations tapped for any reason, except with a court order."
- By 77 to 14 per cent, they assert the right "not to have one's mail opened by the government, except with a court order."
- By 80 to 12 per cent, they claim the right "not to be spied on by any kind of electronic surveillance, except with a court order."

Birth Control Bill

Data Banks

Anybody who has ever disputed an erroneous department store bill with the firm's computer must experience a thrill of horror at the information that 54 executive branch agencies of the federal government now possess no fewer than 868 data banks, containing more than a billion records on individuals.

The Fourth Amendment, we should remember, forbids only "unreasonable" searches and seziures. Reasonableness is a disputed term but over the years the courts have defined its main characteristics.

Financial Disclosure

surveillance

more than 50 federal agencies and 20,000 investigators were engaged in surveillance of individual citizens.

"I catch hell about this even when I go to church," Mr. Cooper reports, adding:

"A lot of folks, particularly small-town Southerners, figure it isn't anybody's business what their kin are up to. The reports are open to the public, for anyone who want to come in and look around."

Autonomy and Privacy

Rights to personal autonomy and privacy are nowhere expressly guaranteed in the U.S. Constitution. Yet in recent years the Supreme Court, and lower courts as well, have upheld both the claims of individual citizens to a generalized "right to be let alone" and more specific demands for greater control over the uses made of personal information. Judges and legislators have not always found it easy to balance rights of individual privacy and autonomy against competing interests, such as freedom of the press and the upholding of accepted community values. Here two scholars discuss these growing issues: A. E. Dick Howard examines autonomy and Kent Greenawalt looks at privacy.

THE SUPREME COURT AND MODERN LIFESTYLES

by A. E. Dick Howard

Constitutional litigation in America frequently mirrors the shifting moods and conflicts of the nation. Successive generations have developed a habit of bringing great policy issues to the federal courts for resolution, rather than looking only to legislative bodies. The results are not always predictable. In the early years of the New Deal, a stubborn Supreme Court lagged behind the rest of the country. In the historic school desegregation decision of 1954, the Court opened a new chapter in American race relations.

As often as not, the courts have been a special source of

redress for those persons and groups labeled "different"—such as members of racial, political, and religious minorities. If the Constitution was meant to create a representative democracy, it also established unmistakable anti-majoritarian restraints. Thanks to the Bill of Rights, the rights of free speech do not depend on the consent of a political majority. But sometimes, to uphold these individual rights, important competing interests must yield, as when society's interest in effective law enforcement conflicts with the Fourth Amendment's ban on unreasonable searches and seizures.

In the 1960s and 1970s, no social trend has been more publicized than changing personal "lifestyles"—new attitudes toward family roles, greater sexual permissiveness, unconventional manners and dress. The war in Vietnam and unrest on American campuses brought in its wake challenges to conventional morals and old ways. High school boys wanted to wear long hair; women sought unrestricted access to abortions; homosexuals talked of "gay rights."

Limits to Sovereignty

The debate over personal autonomy—over what is loosely called "doing your own thing"—did not originate in the 1960s. John Stuart Mill, hoping in the 19th century to reform English law, asked in his classic essay *On Liberty* (1859) whether there was a sphere of personal autonomy that the state and the law should respect: "What, then, is the rightful limit to the sovereignty of the individual over himself? Where does the authority of society begin?" Mill's answer: "The sole end for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."

Shades of Mill's thesis appear in modern efforts to change the laws to accommodate new lifestyles. One example is the American Law Institute's Model Penal Code, which proposes

A. E. Dick Howard, 44, a former Wilson Center Fellow, is White Burkett Miller professor of law and public affairs at the University of Virginia. Born in Richmond, Virginia, he received his B.A. from the University of Richmond (1954) and his law degree from the University of Virginia in 1961. He was law clerk to Justice Hugo L. Black (1962–64) and chief architect of the new Virginia Constitution (1968–70). Since 1974, he has been a consultant to the Subcommittee on Constitutional Rights of the Senate Judiciary Committee. His books include The Road from Runnymede: Magna Carta and Constitutionalism in America *(1968) and* Commentaries on the Constitution of Virginia *(1974).*

that homosexual conduct taking place in private between consenting adults no longer be a criminal offense. But state and national legislators are often slow to respond to such proposals to amend the laws, especially when a lifestyle conflicts with traditional notions of morality. Hence, those who seek the freedom to do what others may think unconventional or aberrational, or perhaps immoral, have often gone to court. In doing so, the petitioners have drawn on the now venerable American notion that one's personal preferences are a constitutional entitlement.

The Constitution says nothing about the right to an abortion, the right to wear one's hair the length he pleases, or the right of consenting adults to have sex in the fashion they prefer. So petitioners have invoked the "majestic generalities" of constitutional law—for example, notions of "liberty" protected by due process of law, an alleged right to privacy, and the Ninth Amendment (declaring that the Constitution's listing of certain rights does not imply that there are not other, unstated rights).

Although specific claims arise out of modern contexts, such constitutional arguments have earlier roots. In 19th-century America, conservative lawyers and judges looked for ways to give capital and industry judicial protection against reformist social legislation. They found the "due process" clause of the Fourteenth Amendment made to order. In an 1897 opinion (*Allgeyer* v. *Louisiana*), Justice Rufus W. Peckham defined "liberty," as used in the Fourteenth Amendment, to mean

> not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways, to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

Substantive due process was then used, above all, in defense of economic enterprise and laissez faire—for example, to strike down minimum wage and maximum hour statutes (as in *Lochner* v. *New York,* 1905). But the doctrine could be used to protect noneconomic rights, too, as when the Supreme Court in 1923 (*Meyer* v. *Nebraska*) struck down a Nebraska statute forbidding

THE SUPREME COURT AND AUTONOMY:

Griswold v. Connecticut (1965)
Invoking a right of marital privacy, the Court invalidated a Connecticut statute that forbade the use of drugs or devices for the purpose of contraception.

Loving v. Virginia (1967)
Declaring marriage to be one of the "basic civil rights of man," the Court unanimously struck down a Virginia statute prohibiting interracial marriages.

Stanley v. Georgia (1969)
Noting both privacy and First Amendment interests, the Court held that a state may not prosecute a person for possession of obscene material in his own home.

Papachristou v. City of Jacksonville (1972)
The Court unanimously invalidated a municipal vagrancy ordinance that was capable of being applied to people of nonconforming lifestyles.

Roe v. Wade (1973)
Interpreting the Fourteenth Amendment as a protector of "liberty," the Court held that a woman, in consultation with her doctor, has an absolute right to decide to have an abortion in the first trimester of pregnancy and a qualified right thereafter.

Planned Parenthood of Central Missouri v. Danforth (1976)
Reinforcing the right to an abortion declared in *Roe* v. *Wade,* the Court in *Planned Parenthood* invalidated several provisions of a Missouri statute enacted after *Roe,* including the requirement that, for an abortion, an unmarried woman under 18 must have her parents' consent, and a married woman of any age her husband's.

the teaching of foreign languages to young children.

Another spur to personal autonomy cases is the idea of legal protection for privacy. Perhaps the classic sense of privacy is that stated by Columbia University Professor Alan Westin: "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." Claims to the right to control information about oneself are, however, only one aspect of privacy as that term has come to be used in modern law. Sometimes an individual resists intrusions, not in order to restrict access to information about himself, but rather in the

IMPORTANT RECENT CASES

Doe v. Commonwealth's Attorney (1976)
Without giving reasons, the Court summarily affirmed the decision of a federal district court in Virginia, dismissing a challenge to Virginia's sodomy law by male homosexuals.

Kelley v. Johnson (1976)
Distinguishing the "liberty" interests recognized in cases such as *Griswold* and *Roe*, the Court held that a county police department need only show a "rational basis" in order to uphold a regulation limiting the style and length of policemen's hair.

Carey v. Population Service International (1977)
Finding a decision whether or not to bear or beget a child to be "at the very heart" of constitutionally protected rights of privacy, the Court struck down a New York statute that made it a crime (1) for any person to sell or distribute contraceptives to minors, (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons over 16, and (3) for anyone to advertise or display contraceptives.

Moore v. City of East Cleveland (1977)
Ruling that the Constitution protects the "extended" family, the Court found that a municipal ordinance violated the rights of a grandmother by preventing her from living with her two grandsons (who were cousins).

Beal v. Doe (1977); **Maher v. Roe** (1977); **Poelker v. Doe** (1977)
In *Beal* and *Maher*, the Court held that neither the Constitution nor federal legislation requires the states to fund nontherapeutic abortions for poor women. In *Poelker*, the Court rejected an attack on the refusal by the city of St. Louis to permit elective abortions in its public hospitals.

interest of being left alone, in having peace and quiet, or in not being an unwilling audience for unwanted messages or images (for example, music and advertisements piped into public buses and nude figures in sidewalk ads for pornographic movies). This is also the kind of "privacy" desired by people objecting to door-to-door solicitors or to obscene advertisements received in their mail.

Yet another kind of "privacy" claim turns out, on examination, to be a claim to personal autonomy or individuality—an assertion of the right to make choices as to one's behavior or lifestyle. Sometimes the behavior is private, such as the use of

birth control devices; sometimes it is public, such as the wearing of long hair or casual dress in public schools. In either instance there is a claim to do as one pleases, free of state interference.

Zones of Privacy

The cornerstone case in the modern Supreme Court is *Griswold* v. *Connecticut,* a 1965 decision overturning the criminal conviction of defendants, including a doctor, who had been charged under Connecticut law with giving information and medical advice to married persons on means of preventing conception.* A majority of Justices agreed in striking down the law, but their reasons differed. Justice William O. Douglas found a "zone of privacy" formed by "emanations" from explicit guarantees in the Bill of Rights. Other concurring Justices looked to the Ninth Amendment and to the due process clause of the Fourteenth Amendment.

Justice Hugo L. Black, who dissented, thought the Connecticut law "every bit as offensive" as did his brethren. But that, he said, did not make it unconstitutional. Remembering how judges of another generation had read their own economic philosophy into the Constitution, Black complained of the *Griswold* majority's excessive willingness to discover a right of privacy: "The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not."

Notwithstanding Black's sharp dissent, *Griswold* quickly became a standard citation for litigants hoping to bring other kinds of behavior within the zone of privacy. That *Griswold* was concerned with the intimacy of a socially approved institution, marriage, did not prevent the decision's being cited in support of a wide range of behavior—such as sexual conduct between consenting adults—having nothing to do with marriage.

The concept of a constitutional zone of personal autonomy received a further boost in 1969 in *Stanley* v. *Georgia,* when the Court reversed a conviction for knowing possession of obscene matter. State and federal agents, looking for evidence of bookmaking in Robert Eli Stanley's home in Fulton County, Georgia, had instead found three reels of pornographic movie film. Georgia, seeking to uphold the conviction, said in effect, "If the State

*Earlier challenges had failed when the courts ruled that the Connecticut law was not being enforced. However, in *Griswold,* a doctor at the Yale Medical School and the officers of Planned Parenthood in New Haven had openly defied the Connecticut statute by opening a birth control clinic in the city.

can protect a citizen's body, may it not also protect his mind?" To that the Court responded that "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."

The composition of the Supreme Court changed markedly after 1969. By January 1972, four Nixon appointees—Chief Justice Warren E. Burger and Justices Harry A. Blackmun, Lewis F. Powell, Jr., and William H. Rehnquist—had come to the bench. When they took their seats, the idea of constitutional protection for personal autonomy—as suggested by decisions like *Griswold* and *Stanley*—was largely untested, its underpinnings unsure, its contours unclear. One might well suppose that a tribunal in many ways more conservative than the Warren Court might be reluctant to expand the zone of personal autonomy and privacy. For one thing, the behavior for which protection was sought in some of the autonomy cases was often unconventional, even offensive to many citizens. Moreover, four justices appointed by a President proclaiming his belief in judicial "conservatism" might be slow to embark on an activist path of discovering new rights for which the Constitution offered no explicit textual support.

Nevertheless, some decisions of the Burger Court strongly endorse the thesis that there is an emerging zone of personal autonomy and lifestyle protected by the Constitution. By far the most remarkable opinion—as activist as any handed down by the Warren Court—is *Roe* v. *Wade* (1973), holding that the Fourteenth Amendment's due process clause protects a woman's right, as a matter of privacy, to decide whether to have an abortion. (Anti-abortion groups have reacted vigorously to *Roe* v. *Wade*, urging state statutes to limit its effects, congressional action to cut off federal funds for elective abortions under Medicaid, and a "right-to-life" constitutional amendment.)

Abortion and Vagrancy

The scope of the "privacy" right in *Roe* goes far beyond that declared in *Griswold*. For one thing, *Griswold* was more nearly concerned with privacy in the traditional sense, as the case involved the intimacy of the marital bedroom. What was at stake in *Roe*, on the other hand, was a claim of personal autonomy—the right to make and carry out the abortion decision without state interference. A further difference in the two cases lies in the nature of the competing state interest. In *Griswold*, the state was

hard pressed to show that a persuasive interest was served by regulating the contraceptive practices of married couples. In *Roe,* by contrast, the state could claim that in preventing abortions it was protecting an incipient life, that of the fetus.

The Burger Court has also decided several cases that give freer play to unconventional lifestyles. In a unanimous decision (*Papachristou* v. *City of Jacksonville,* 1972), the Court invalidated a locality's vagrancy ordinance under which, in the Court's words, "poor people, nonconformists, dissenters, idlers" might be required to comport themselves "according to the lifestyle deemed appropriate by the Jacksonville police and the courts." In another case (*Wisconsin* v. *Yoder,* 1972) the Court vindicated the preferred lifestyle of the Amish by upholding their challenge to Wisconsin's compulsory school attendance law. Even "hippies" had their day when the Court (in *U.S. Department of Agriculture* v. *Moreno,* 1973) invalidated Congress's exclusion from the food stamp program of households containing persons who were not related, an exclusion which the Court majority saw as aimed at preventing "hippies" and "hippie communes" from getting help under the federal program.

Undeleted Expletives

Modern modes in speech—including expressions that others find offensive or tasteless—have been given constitutional protection, though not without dissent from some of the Justices. When Paul Robert Cohen, an opponent of the Vietnam War, entered the Los Angeles Courthouse wearing a jacket bearing the words "Fuck the Draft," he was arrested and charged with disturbing the peace. Reversing Cohen's conviction, Justice John Marshall Harlan observed (in *Cohen* v. *California,* 1971) that "one man's vulgarity is another's lyric." In another case (*Eaton* v. *City of Tulsa,* 1974)—in which a defendant had been cited for contempt when he referred in his testimony to another person as "chicken shit"—Justice Powell commented, "Language likely to offend the sensibility of some listeners is now fairly commonplace in many social gatherings as well as in public performances."

Such decisions—some resting on due process of law, others on the First Amendment, still others on other provisions of the Constitution—give individuals greater freedom to behave in ways that society at large may find unconventional or distasteful. In some of these opinions, the supposedly "conservative" Burger Court takes personal autonomy and the protection of unconventional lifestyles beyond even the "liberal" Warren

Court. On reading such opinions, a little more than a hundred years after John Stuart Mill wrote *On Liberty,* one may readily suppose that the Justices of the U.S. Supreme Court have become Mill's disciples.

In fact, the Court has not gone as far as Mill. There are limits to the majority's willingness to find new applications of a right to privacy or otherwise to create zones of autonomy for the individual and his self-expression. Some critics argue that personal appearance—wearing one's hair or dressing as one pleases—ought to fall within the protected zone of personal autonomy. But the Court has had no difficulty upholding regulations limiting the length of policemen's and firemen's hair in the interest of discipline, appearance, and safety on the job. And the Court has steadfastly refused even to hear cases involving the length of students' hair. Some lower courts have upheld challenges to school hair regulations, but the Justices of the Supreme Court seem to agree with the late Justice Black, who once observed that "surely few policies can be thought of that States are more capable of deciding than the length of the hair of school boys."

Homosexuals have sought to have the Court bring their sexual preferences within the ambit of constitutional protection but have gotten short shrift. Some homosexuals attacked Virginia's antisodomy statute on the ground that, as applied to the private sexual conduct of consenting adults, the law violated their constitutional right of privacy. In 1975, in the federal district court, one judge, agreeing with the plaintiffs, read *Griswold* and *Roe* as establishing that "every individual has the right to be free from unwarranted governmental intrusion into one's decisions on private matters of individual concern." But that judge was outvoted by his brethren, who concluded that if Virginia, in the name of "morality and decency," saw fit to forbid homosexual acts even when committed in the home, it was not for the courts to say that the state lacked that power.

When the Virginia case was appealed, the Supreme Court (*Doe* v. *Commonwealth's Attorney,* 1976) summarily affirmed the lower court ruling, not even troubling to write an opinion. Nor have other homosexuals—such as a Washington State high school teacher who was dismissed for being a homosexual (he had not been accused of engaging in improper conduct)—had any success in enlisting the Court's sympathies.

The lifestyle and personal autonomy cases have important implications. In the first place, no general theory of autonomy has emerged from the decisions of the Burger Court. The cases

have an *ad hoc* quality about them. Certain specific areas—marriage, contraception, abortion, child rearing, and family life in particular—receive judicial protection as "fundamental rights." But the Justices have not generalized from these specifics nor tried to weave them into an overall theory of privacy or autonomy.

Strong arguments can be made for judicial protection of personal lifestyles. Choices about personal appearance, manner, sexual behavior, and other aspects of "personhood" can reflect one's individuality and aspirations, much as do free speech and free exercise of religion—activities expressly protected by the Constitution. As University of Virginia law professors J. Harvie Wilkinson III and G. Edward White have commented, "A compelling mission of the Constitution has been to protect sanctuaries of individual behavior from the hand of the state." In particular, where there is good reason to think that the state is using its power to impose conformity, the case for constitutional protection becomes even stronger.

The Decent Society

Lifestyle and autonomy claims invite attention to the social interest alleged to be served by the challenged law. Where school hair regulations have been upheld, it has commonly been on the finding that they are reasonably related to the school's need for discipline and an environment in which education can flourish. When homosexuals seek constitutional protection, it is easier to understand the state's interest in deciding who shall teach young children in the classroom than it is to articulate the state's interest in what individuals in the privacy of their own home do with other consenting adults.

Personal autonomy cases illustrate the interplay between law and morality. Lord Devlin, a distinguished British jurist, has argued (in *The Enforcement of Morals,* 1965) that society is entitled to use law to enforce its "common morality"—his answer to those who hope to see "victimless" crimes such as homosexuality and prostitution decriminalized. Lord Devlin appears to have his followers on the Supreme Court. When the Court ruled (*Paris Adult Theatre I* v. *Slaton,* 1973) that states may regulate the exhibition of obscene materials in "adult" theaters, Chief Justice Burger emphasized the public's interest in the "quality of life" and its right to "maintain a decent society."

Sketching the contours of personal autonomy is not merely a philosophical exercise. When claims to lifestyle are poured into constitutional vessels, decisions such as *Griswold* and *Roe*

WHAT THE CONSTITUTION SAYS

The constitutional language on which Supreme Court Justices have based many of their important decisions affecting personal autonomy and lifestyles is rarely self-revealing:

First Amendment "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Ninth Amendment "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

raise serious questions about the proper role of courts as arbiters of contemporary standards. Sometimes the Supreme Court is explicit about its role in charting changing social values. In capital punishment cases, for example, there has been near unanimity on the proposition that deciding what constitutes "cruel and unusual" punishment requires looking at society's evolving standards. Less obviously, but still inevitably, people with claims involving lifestyles and autonomy ask the Court, in effect, to declare as constitutional law the Justices' notions of contemporary morality and fundamental right.

What we have witnessed is a rebirth of "substantive due process." Once used by conservative judges to defend property and the right of contract, this judicial technique is now used to create new zones of privacy. Some scholars welcome such activism. Stanford University Law Professor Thomas C. Grey sees the courts as "the expounders of basic national ideals of in-

dividual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution." Others are more dubious of the legitimacy of the courts' translating judges' notions of morality into constitutional norms. Objecting to the Court's failure in *Roe* to ground its abortion decision somewhere in the Constitution, Harvard's John Hart Ely concluded in 1973 that, whatever the other merits of a principle, if it "lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it."

Justice Black once took strong exception to the notion that judges have a "natural law" power "to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental liberty and justice.'" Such warnings have fallen on deaf ears in *Griswold* and *Roe* and other "privacy" cases. The process of adding to the catalogue of protected "lifestyle rights" continues. In 1977, for example, the Court ruled (*Moore* v. *City of East Cleveland*) that due process protected the right of an "extended family"—a grandmother and her two grandsons (who were first cousins)—to live together, notwithstanding a municipal zoning ordinance designed to maintain "single family" neighborhoods. The Court, following the path of the late Justice Harlan, declared that "liberty" as protected by due process cannot be limited to "the specific guarantees elsewhere provided in the Constitution."

Whatever the cynics say, the Court does not follow the election returns. But its decisions have a way of reflecting the temper of the times. New patterns in family life, sexual mores, and self-expression have compelled judges to determine the limits to which society, in the name of morality, can restrict individual autonomy. Many will count it a clear gain that the judges have stepped in to dismantle outdated moral codes when legislatures have refused to act. But the way in which judges, lacking relevant constitutional language, have seemed to pick and choose among the lifestyles to be protected is cause for concern. Perhaps Justice Black was right in objecting to judges translating their personal predilections into constitutional law.

PERSONAL PRIVACY AND THE LAW

by Kent Greenawalt

During the last decade, the right to personal privacy has gained the status of a central social value in America. This new emphasis is, of course, related to the long-standing American belief in personal freedom and the basic dignity and worth of the individual. But the more immediate cause has been public anxiety about the increasing dominance of government, corporations, and other large bureaucratic organizations—and fears of what these organizations may do with the vast amounts of personal information they accumulate.

Americans, with their traditions of English common law, Protestantism, and reliance on constitutional protection, have tended to be less tolerant than their European brethren of surveillance by government, the church, and other authority. Among the chief irritants of British colonial rule in America were the official inspections carried out under "writs of assistance"—general warrants that authorized searches of someone's property, home, and place of business for evidence of customs violations. American merchants, to be sure, did engage in extensive smuggling to avoid paying taxes to the British Crown, and some thus grew rich. Nevertheless, these searches contributed to the resentment that led to the Revolution of 1776.

The Bill of Rights, which followed closely upon the original Constitution of 1789, contains three explicit protections of privacy:

> The Third Amendment prohibits the quartering of soldiers in people's homes during peacetime.
>
> The Fourth Amendment bars unreasonable searches and seizures.
>
> The Fifth Amendment contains the privilege against self-incrimination.

Many state constitutions have similar provisions. Yet, apart from these limits on the powers of government, and the traditional legal barriers against trespass and personal assault, American "law" played only a modest role in the protection of privacy through the 19th century.

At a basic level, privacy is a universal value. In all societies there is some compelling need for separateness and protection against encroachment. Yet, what is perceived as one's own, proper, personal space, and what are regarded as encroachments, vary greatly from one society to another.

Cultural anthropologist Edward T. Hall has noted, for example, that Germans tend to claim a larger sphere of privacy than do Americans or Englishmen—a demand epitomized by the German law that prohibits photographing strangers in public without their consent.[1] The English exhibit a certain reserve, which keeps others at a distance. The French appear to enjoy, or tolerate, physical contact in public places, but seldom permit outsiders to intrude upon the privacy of the home.

Beyond some minimal protection of personal space, the value attached to privacy is largely dependent on other varying social concepts. Marxist regimes preaching an anti-individualist ethic of social cooperation, not surprisingly, place little store on privacy. Liberal democracies, on the other hand, accord special privileges of privacy to the family, to religion, and to the sanctity of communication between doctor and patient, lawyer and client, and within the confessional.

Yet, in America, it was not always so. Our Puritan forefathers tried to regulate one another's activities with meticulous care. The Puritans allotted themselves quiet and solitude for private prayer, but church members also took seriously their mandate to expose one another's sins. Unmarried men and women, for example, were required to live within a family household so that they would not be free of observation and constraint. Even in later periods, despite our professed belief in liberty, we have tended to be intolerant of solitary eccentrics and suspicious of those holding minority views. Intense scrutiny of those with odd personal habits or unpopular political views

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Kent Greenawalt, 41, is professor of law at Columbia University Law School. Born in Brooklyn, he was educated at Swarthmore (B.A. 1958), Oxford (B.Phil. 1960), and Columbia (LL.B. 1963). He served as law clerk to Supreme Court Justice John Marshall Harlan from 1963–64 and as deputy solicitor general of the United States from 1971–72. He is the co-author (with Walter Gellhorn) of The Sectarian College and the Public Purse *(1970) and author of* Legal Protections of Privacy *(1975).*

has been, as during the McCarthy era, a forceful weapon in the suppression of deviance. And, as political scientist Alan Westin has indicated, a strong "populist" strain has nurtured the belief that democracy in America requires that political activity be open and that governmental bodies and associational groups have little legitimate claim to privacy.

The Sanctity of Solitude

Nevertheless, prevailing American conceptions have continued to attach importance both to individual and group privacy. The American notion arises from a set of needs present, if not always satisfied, in every society. At various moments, individuals seek solitude and intimate companionship. Privacy, in the most obvious sense, is freedom from outside interference, whether from a curious neighbor, a police officer, or from a radio blaring music from the apartment next door. In a more subtle, but perhaps even more significant respect, privacy can be invaded by intrusions into one's thought processes, as by brainwashing, psychosurgery, or, on a more mundane level, subliminal advertising.

A second aspect involves the protection of private information. Indeed, some scholars have gone so far as to define privacy solely in terms of the control that individuals have over information about themselves.[2] One can feel "penetrated" or "exposed" or "threatened" as much by the awareness that one's intimate thoughts and feelings are known by others as by an unwanted visitor. Our expectations of privacy of information extend to some facts that are initially public. If, for example, we attend a controversial political meeting, we may expect our presence to go unnoted. No doubt, many who attended a speech by black activist Eldridge Cleaver at Iona College in 1970 were disturbed to learn later that police officers had recorded their names and the license numbers of their cars.

There is a third aspect of what has become the modern conception of privacy: the freedom to make autonomous decisions about one's personal life without interference—to work out one's own form of sexual satisfaction, to use drugs, to wear one's hair long. Individuals are freer to make many of these choices if their private lives are not exposed to public view. Thus privacy of information supports the value of autonomy. If there were broader public tolerance of deviant personal habits and behavior, there would be less need for secrecy and some forms of privacy might be less important than they are now.

During most of the 19th century, since the main threat to

privacy was the curiosity of one's neighbors, there was little need or possibility of curbing intrusions through extensive legal controls. What has caused a radical transformation in the problems of privacy are such changes as the development of mass media; the urbanization of American society; the expansion of federal, state, and local bureaucracies; the growth of huge corporations; and the much-publicized advances in the technology of information acquisition, retention, and dissemination.

It was the thirst for gossip and scandal of the mass-circulation newspapers and journals in the heyday of "yellow journalism" that triggered the initial formulation of a right to privacy in a famous 1890 law review article by two young lawyers, Samuel D. Warren and Louis D. Brandeis.[3] "Gossip is no longer the resource of the idle and the vicious, but has become a trade, which is pursued with industry as well as effrontery," they wrote. Worried about exposure of private and family matters, they urged that the courts explicitly recognize the right of citizens to recover damages for unreasonable publicity.

The common law, they argued, granted "to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."

Newspapers, magazines, and now television seek to appeal to audiences with news about the lives of the very rich, the very famous, and the very powerful, whether they be politicians, rock singers, or tennis stars. They also give us vivid details of the lives of ordinary people, like Karen Quinlan, who become caught up in dramas of compelling journalistic interest.

The Limits of Unreasonableness

The law in most states has made a response to the argument made by Warren and Brandeis. Between 1890 and 1950, the common law principle of an individual's right to privacy was adopted by most states. The courts now routinely support the notion that damages may be recovered if one's name or picture is used for advertising or other commercial purpose without one's consent; one's private life is exposed to unreasonable publicity; one is placed in a false light by publicity; or one's seclusion is intruded upon.*

*Ralph Nader, in a suit settled out of court in August 1970 for $425,000, charged that General Motors invaded his privacy by interviewing acquaintances about his private life, tapping his telephone, having him followed by private detectives, and attempting to entice him into indiscretions with attractive women. In another noteworthy case, Jacqueline Kennedy Onassis in 1972 won the protection of a federal court from the attentions of an energetic free-lance photographer, Ron Gallela, who constantly lay in wait for her and her children in order to take candid photographs of them.

Ironically, the shakiest branch of this law is the one that concerned Warren and Brandeis most—the right to be free of unreasonable publicity. The difficulty lies in the First Amendment right of freedom of the press, which sets limits on what can be considered unreasonable publicity.

The Price of Anonymity

Other changes in society have been more complex than the development of the mass media, making appropriate legal responses more difficult to determine. A city environment brings people close together and thereby impinges on privacy, yet urban living is notoriously anonymous. In contrast to the gossipy folksiness of many small towns, big city people today frequently eschew involvement with others, even to the extent of ignoring pleas for help from victims of crime.* One typical aspect of city and suburban life is the separation of one's neighbors, work associates, and relatives. Even if neighbors acquire unwelcome information about one's personal life, it is not likely to be communicated to the persons one most cares about.

Paradoxically, this increased freedom is offset by a different form of intrusion. Prospective employers, banks, government agencies, and the like can no longer depend on the widely held knowledge of a person's character and circumstances that used to exist in the traditional small town. As a result, the collection of dossiers substitutes for personal acquaintance.

Because of the demands of public education, taxation, social security, welfare, and law enforcement, government agencies now acquire enormous quantities of information about people, including those who have never served in the military or been on the public payroll. A 1976 inventory showed that within 97 federal agencies there were 6,753 systems of records and 3.8 billion dossiers—many of them computerized—on individuals.

It is not sufficient to say that most information in public and private records is obtained from the subject or with his consent. Few people will forego the chance to obtain a job or other important benefit if that is the price of preserving privacy. What is needed is some fair assessment of whether the social value of information outweighs the cost to privacy.

The computerization of records poses a special problem. When a person supplies data about various aspects of his daily life—whether it involves banking, education, or whatever—he often does so with the hope or expectation that it will be held in a confidential manner by the collecting organization, used for a

* See, for example, A. M. Rosenthal, *Thirty-Eight Witnesses*, New York: McGraw-Hill, 1964.

specific purpose, and not released except as required by law or with the person's consent.

But record keepers—including corporations, insurance companies, hospitals, and credit bureaus—now routinely exchange information on a mutual basis. And computers can gather bits of information that, when assembled, may be used to support conclusions that would be impossible for those in possession only of the individual pieces of information. For example, if all of a person's personal checks are centrally recorded, an investigator with access to those records may be able to conclude that the person is living way beyond his normal income. Of course, the assumption that he has unreported income will sometimes be erroneous, as when he is spending savings or serving as a legitimate purchasing agent for a group. But even if the inferences drawn from records systems were uniformly accurate, the increased exposure of our lives to outside scrutiny would be disturbing.

Another fearsome feature of records systems—one symbolized by computers but not unique to computerized records —is their impersonality. Decisions affecting a person's credit, the availability of insurance, even access to a job may be influenced by records that are based on false or incomplete information. The problem is compounded when the individual involved has no ready access to the information filed and thus may be unaware of damaging data until he has already been victimized.

James C. Millstone, a highly respected assistant managing editor and former Washington correspondent for the St. Louis *Post-Dispatch,* was one victim. Only when his insurance was abruptly canceled did he discover that he was the subject of a consumer credit report filled with innuendo, misstatements, and slander. It cost Millstone a lawsuit in 1976 to compel the credit reporting company to reveal fully its derogatory and inaccurate dossier on him.

Truth in Spending

Civil libertarians and others are giving close attention to the implications of "electronic fund transfer" (EFT) systems now undergoing widespread testing by banks and retailers in California and the Midwest. With EFT, payment for purchases is made at the point of sale by using telecommunications and computers to transfer money automatically from the bank account of the buyer to that of the seller.

Justice William O. Douglas once observed: "The banking transactions of an individual give a fairly accurate account of

his religion, ideology, opinion, and interest . . ."[4] But the Supreme Court, in *U.S. v. Miller* (1976), recently rejected the argument that the confidentiality of personal banking transactions is constitutionally protected against federally imposed disclosure requirements.

"The Supreme Court decision," according to the July 1977 report of the Privacy Protection Study Commission, "comes at a time when electronic funds transfer services, and other developments in personal data record keeping, promise far-reaching consequences. . . ." The commission, which was created by the Privacy Act of 1974, worried that transformed EFT systems could become "generalized information-transfer systems." For example, as with credit cards, both the payer and payee under EFT are likely to want a written record of the date and place of purchase and a description of the items bought. Thus, the monitoring of electronic transactions "could become an effective way of tracking an individual's movements."[5]

Privacy Post–Katz

Record-keeping systems, of course, are not the only technological threat to privacy. Electronic eavesdropping and wiretapping have been especially useful to police, to federal security agencies—and to those engaged in industrial espionage. And both courts and legislatures have sought to bring electronic surveillance under some control.

The Supreme Court's most significant step came in *Katz v. U.S.* (1967). The Justices overruled a 1928 decision *(Olmstead v. U.S.)* in which a sharply divided Court had held that a wiretap was not an illegal search and seizure within the meaning of the Fourth Amendment. Four decades of scientific advance had produced miniature recorders and transmitters and a host of other electronic marvels with which it was possible to listen in on conversations without the awareness of those involved.

The Justice Department argued that Katz's conviction for illegal gambling—based on evidence obtained from an FBI wiretap of his conversations with bookies from a public telephone booth—was perfectly proper; there had been no physical penetration of the phone booth. The majority opinion, delivered by Justice Potter Stewart, held that "the Fourth Amendment protects people, not places," and that what a person seeks and expects to preserve as private, even in an area accessible to the public, may be constitutionally protected.

The Court decision left the government free to engage in court-ordered eavesdropping if law enforcement officials could

establish in advance, to a judge's satisfaction, that a wiretap or listening device would probably produce evidence of criminal activities. Prior to 1968, Section 605 of the Federal Communications Act had been interpreted to forbid wiretapping. But federal officials had done almost nothing to discourage wiretapping by local law enforcement officials, and the Justice Department asserted the right to wiretap as long as it did not disclose what it discovered. The result was federally authorized wiretapping against suspected foreign agents and domestic political activists, including civil rights leader Dr. Martin Luther King, Jr.

Surveillance Without Warrant

In the 1968 Crime Control and Safe Streets Act, Congress banned all private electronic eavesdropping but permitted law enforcement agencies to eavesdrop under court order when investigating a broad range of serious criminal offenses, including, for example, all drug violations and illegal gambling. Whether wiretapping and roombugging should be allowed in ordinary criminal cases is the subject of recurrent debate, and many states continue to prohibit it. Advocates stress society's need for better weapons against organized crime; opponents argue that the net of electronic surveillance catches innocent as well as criminal conversations. Even if one accepts the need for some eavesdropping, the present act permits it, in my view, for too many crimes and for too long a period.

The 1968 act left open the legitimacy of surveillance without a warrant for national security purposes. But the Supreme Court in 1972 *(U.S. v. U.S. District Court)* rejected the Nixon administration's theory that "domestic subversives," such as radical political groups, should be subject to surveillance without a court order. The Court left unresolved the constitutional status of warrantless surveillance by federal officials for foreign intelligence and counterintelligence purposes both here and abroad.

Hearings on various proposals to curb national security wiretapping within the United States were held through the 1970s, spurred by intelligence agency abuses reported by the Senate Select Committee on Intelligence headed by Senator Frank Church (D.-Idaho). The committee found that: ". . . through the uncontrolled or illegal use of intrusive techniques—ranging from simple theft to sophisticated electronic surveillance—the government has collected, and then used improperly, huge amounts of information about the private lives,

political beliefs and associations of numerous Americans."[6]

Proposals have been made by both the Ford and Carter administrations for congressional legislation authorizing electronic surveillance for security purposes under court orders issued on the basis of a less stringent standard of "probable cause" than would be permitted in an ordinary criminal case.

Such legislation would impose a degree of regularity and control that is now absent, but some civil libertarians are made very uneasy by the idea that wiretapping should ever be explicitly authorized without prior evidence of crime.

Certainly one lesson of the Watergate era, and of the post-Watergate disclosures of CIA and FBI excesses, is that even when the legal restrictions are spelled out there is a danger that overzealous officials will disregard them. Throughout the 1960s and early 1970s, U.S. intelligence agencies conducted surveillance of thousands of American citizens. Most of these citizens were not themselves suspected of committing crimes or contemplating espionage, but the government wanted to know more about their *lawful* political activities, on the theory that such monitoring might uncover covert criminal activities or connections to groups threatening national security. Some agencies, like the Internal Revenue Service, went further and undertook tax audits intended to harass individuals and groups believed to be politically hostile.

Alternative Intrusions

While government wiretapping and eavesdropping represent the most dramatic threats to personal privacy, there is a more mundane problem posed by the growing use of lie detectors and intrusive questionnaires to monitor the honesty of existing employees and to screen prospective employees for sensitive jobs.

Obviously, banks, educational and medical institutions, law enforcement agencies, and the like must protect themselves and the public from people with physical or moral disabilities that could impair their performance. It is certainly appropriate to ask a prospective bank teller if he has been convicted of fraud, and to inquire whether a would-be drugstore delivery boy has been a narcotics addict. But questions that require the most personal revelations, and techniques that seek to lay bare the applicant's emotional responses, often bear too little relation to any genuine need to be justified. Occasionally courts have intervened against overly intrusive inquiries. For example, a Pennsylvania junior high school was stopped from instituting a

program designed to identify potential drug abusers by questionnaires that asked about the home life of students and their attitudes toward fellow students.*

Thus far, Congress has placed few significant limits on the kinds of personal information that either the government or the private sector may seek. Obviously it is difficult to deal with such matters by general legislation. And Congress has proved unsympathetic to creating an agency that could evaluate the justifications and drawbacks of particular screening systems.

It has, however, sought to control the retention and transmission of information once it has been acquired by federal agencies. After finishing its 1974 inquiry into federal data banks, the House Subcommittee on Constitutional Rights concluded: "Once information about an individual is collected by a Federal agency, it is likely that information will be fairly readily passed on to other Federal, State and local agencies."

The ensuing Privacy Act of 1974 was based on the following premises: Individuals should be able to find out what information about them is contained in federal records and how it is used; they should be able to prevent data given by them for one purpose from being used for another without their consent; they should be able to correct or amend records about themselves; and organizations handling identifiable personal data should assure its reliability and timeliness, and prevent its misuse.

Routine Abuses

The law has not been a total success. Government agencies have found various ways to avoid some of its strictures, most notably by defining very broadly the "routine uses" of information that are exempt from the limits on dissemination imposed by the act. For example, the IRS is perfectly free to exchange income tax data with state and local tax authorities. Nevertheless, the law has compelled most agencies to be more careful, and it provides a reasonably solid foundation upon which improvements can be built.

Some years ago, it seemed likely that the judiciary would use constitutional concepts of privacy and due process of law to oversee the fairness of records systems, but the Supreme Court has evidenced little zeal for being drawn into such matters, rejecting individual claims in cases involving records of banking transactions, abortions, and the use of sensitive prescribed drugs. A few state courts have been more responsive, but the

Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973).

burden of protection now lies mainly on legislatures.

A logical further step in federal and state legislation is the extension of legal controls to cover record-keeping systems in state government and in certain key business sectors. Federal restrictions already exist to protect the privacy of personal information kept by schools and colleges that receive federal funds. The 1971 Fair Credit Reporting Act provides for some access by individuals to data about their credit ratings, as well as procedures for challenging inaccuracies. But the records held by banks, insurance companies, hospitals, and telephone companies are not yet sufficiently protected. We can, and should, continue to seek sensible and workable rules for record keeping and dissemination of information that can be broadly applied to major private organizations as well as all public agencies.

Too often in the past, incursions on control of information and other invasions of privacy have occurred as an unconsidered by-product of the pursuit of other objectives. The last decade and a half have taught us a lesson that must not be forgotten. New technology should be evaluated in light of its perceived effects on privacy and should be developed in a way that is responsive to society's values; for in the end, oddly enough, the loss of privacy represents a loss of control over our very lives.

1. Alan F. Westin, *Privacy and Freedom,* New York: Atheneum, 1967, p. 29.

2. *Ibid,* p. 7.

3. S. Warren and L. Brandeis, "The Right to Privacy," 4 *Harvard Law Review* 289, 1890.

4. *California Bankers Association v. Shultz,* 416 U.S. 21, 94 S. Ct. 1494, 39 L. Ed. 2d 812 (1974).

5. Privacy Protection Study Commission, *Personal Privacy in an Information Society,* Washington, D.C.: Government Printing Office, 1977, pp. 101–118.

6. Quoted in *Congressional Quarterly,* Dec. 31, 1977, p. 2697.

BACKGROUND BOOKS

AUTONOMY AND PRIVACY

The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily or *mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest.*

This doctrine, set forth by John Stuart Mill in **ON LIBERTY** (London, 1859; Norton, paper, 1975), was, as he put it, "anything but new." But it is from Mill's stout defense of the individual's rights versus those of society, and from his concise discussion of the range of issues involved, that the modern debate over the relationship between law and morality can be seen to flow.

First to rebut Mill (with something of the same strength of argument) was Sir James Fitzjames Stephen, in **LIBERTY, EQUALITY, FRATERNITY** (London, 1873; Cambridge Univ. Press, 1968). Finding Mill's fundamental error to be "too favourable an estimate of human nature," Sir James characterizes liberty as "both good and bad according to time, place, and circumstance." He holds that the punishment of immoral behavior is an objective as legitimate as that of preventing harm to others.

A view of personal liberty developed a century after Mill is expounded in Baron Patrick Devlin's collection of essays, **THE ENFORCEMENT OF MORALS** (Oxford, 1965, cloth; 1970, paper). "The criminal law as we know it is based upon moral principle," he writes, and he emphasizes a common morality as the cement of society. Thus marriage is both part of the structure of society and the basis of a moral code that condemns fornication and adultery.

Although he apparently leans more toward Stephen than toward Mill, Lord Devlin at the same time sees the rights of the individual as a competing interest that must be taken into account: "As far as possible, privacy should be respected."

H. L. A. Hart, in **LAW, LIBERTY, AND MORALITY** (Stanford, 1963, cloth & paper), undertakes a modified defense of Mill's position. He agrees that any restriction of freedom is an evil per se. However, there may, in his view, be grounds for justifying the legal coercion of the individual apart from the prevention of harm to others. Hart recognizes one form of paternalism—protecting people from inflicting harm upon themselves—as a permissible basis for making certain conduct illegal.

In his classic work, **THE LIMITS OF THE CRIMINAL SANCTION** (Stanford, 1968, cloth & paper), Herbert L. Packer argues that "the law's ultimate threat" should "be reserved for what really matters." Packer sees the enforcement of morals as "a costly indulgence."

A passionate plea for the invalidation of laws regulating sexual behavior—in particular, homosexuality—is made by Walter Barnett in **SEXUAL FREEDOM AND THE CONSTITUTION: An Inquiry into the Constitutionality of Repressive Sex Laws** (Univ. of New Mexico, 1973). Exploring constitutional attacks that can be made on "morals" laws, Barnett hopes to see the state "expelled from a sanctuary to which it should never have been admitted in the first place—the intimate private lives of its citizens."

Alan F. Westin's **PRIVACY AND FREEDOM** (Atheneum, 1967), considered

by many scholars to be the best general treatment of problems of privacy, is unfortunately out of print. It offers five interesting case studies on polygraphs, on personality testing, electronic eavesdropping, subliminal suggestions, and the "information revolution," as well as a 1960s status report on relevant law at the time Westin was writing.

DATABANKS IN A FREE SOCIETY: Computers, Record-Keeping and Privacy (Quadrangle, 1972, cloth; 1974, paper) by Alan Westin and Michael Baker is a careful study of the effects of computerization on privacy. The authors conclude that computers have made less difference than many Americans once feared but that modern technology nonetheless poses significant dangers. They recommend legal protections for individualized records. A related appraisal of computer technology is Arthur R. Miller's **THE ASSAULT ON PRIVACY: Computers, Data Banks, and Dossiers** (Univ. of Mich., 1971, cloth; NAL, 1972, paper). Miller describes possible protections for records systems. And James B. Rule's **PRIVATE LIVES AND PUBLIC SURVEILLANCE: Social Control in the Computer Age** (Schocken, 1974), a study of five such systems in the public and private sectors, shows how large enterprises actually handle a variety of kinds of records.

Three useful collections on privacy and autonomy for the general reader are Richard A. Wasserstrom's **MORALITY AND THE LAW** (Wadsworth, 1970, paper); **PRIVACY** (Atherton Press, 1971), edited by J. Roland Pennock and John W. Chapman; and John H. F. Shattuck's useful **RIGHTS OF PRIVACY** (National Textbook, American Civil Liberties Union, 1977). Wasserstrom provides extracts from Mill, Devlin, and the dialogue sparked by Lord Devlin's lectures in England and the United States. Pennock and Chapman assemble essays by fellow social scientists and by philosophers, as well as lawyers.

The Shattuck textbook on problems of privacy and autonomy includes excerpts from key Supreme Court opinions. Concerning recent legal trends in abortion, homosexuality, and other issues of autonomy, little nonpolemical literature exists as yet outside the dense pages of the law reviews, and Shattuck is also a good source for these articles.

Lest the reader who chooses to browse through these pages of legalese should conclude that they raise principles not noticed by Britain's John Stuart Mill in the mid-19th century, or facts not known to every kid on the block until the 1970s, one more background book of quite a different sort is recommended: David H. Flaherty's **PRIVACY IN COLONIAL NEW ENGLAND** (Univ. Press of Va., 1972).

Under early American laws, Flaherty reminds us, informing was an integral part of the justice system. Informers got a share of the fines that were levied. "Whereas religion may have served as an incentive for the elect," he notes, "money was more stimulating to the unregenerate. Some remarkable individuals broke the liquor laws and informed on themselves in order to claim a share of the fine"—usually collecting extra money by reporting on friends as well.

All in all, Flaherty's book is a bracing study of our ambiguous Puritan heritage. It illustrates the gap between moral codes and the lasting realities of human nature.

EDITOR'S NOTE. *Most of the above titles were suggested for background reading by the authors of the preceding articles, A. E. Dick Howard and Kent Greenawalt.*