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PRIVACY LEGISLATION: PROTECTION OF INDIVIDUAL LIBERTIES OR THREAT TO A FREE PRESS?

The United States is rapidly developing into a country of data banks. Concern is growing over the violations of individuals' privacy and the serious repercussions which result from the massive and unchecked flow of information from, and between government agencies. Attempts have been made to remedy the situation through the enactment of privacy legislation. One ambitious piece of privacy legislation was recently proposed in the United States Senate but died while in committee. The contents of that defunct Senate bill are of interest because they may serve as a model for future proposals. The purpose of this article, however, is not to examine those contents. Rather, it is to examine the opposition to the legislation posed by members of the press, to determine whether such opposition was logically or constitutionally justified. Although the bill was not passed, the question still remains whether the enactment of privacy legislation is compatible with the exercise of the first amendment guarantee of freedom of the press.

1. A. Neier, Dossier 1-16 (1975).
2. For instance, there has recently been a rising furor over allegations that the Central Intelligence Agency (C.I.A.) may have been conducting a massive illegal domestic intelligence operation which has led to the accumulation of files on perhaps 10,000 American citizens. N.Y. Times, Jan. 16, 1975, at 1, col. 1. At hearings of the Senate Appropriations Committee, which has been investigating this matter, the possibility was raised that the C.I.A. was involved with other federal agencies, such as the F.B.I., as well. Id. at 30-31.
BACKGROUND

Particularly large and sophisticated intelligence systems have been developed by both state and federal governments to implement what are referred to as criminal justice investigative information systems. At the center of this information network is the Federal Bureau of Investigation (F.B.I.), which processes information received from and disseminates information to criminal justice agencies throughout the country. The information compiled by these agencies consists primarily of criminal records, prior arrest records and what is referred to as “intelligence data.”

Investigation into the procedures of record collection and dissemination followed by the F.B.I. has given rise to evidence that incomplete and inaccurate information is often indiscriminately released to parties outside the criminal justice system. Arguably, the release of information pertaining to criminal convictions, where guilt has already been judicially established, raises serious constitutional questions.

The constitutional problems are even greater, however, where there is dissemination of arrest records and so-called “intelligence data.” There is ample evidence that arrest records are generally incomplete, misleading and misused. When an agency such as the F.B.I. receives information of an individual’s arrest, there is often no follow-up attempted to

7. Information is fed through a computerized system called the National Crime Information Center (NCIC) which has been under F.B.I. control since 1970. See Comment, Arrest Records — Protecting the Innocent, 48 Tul. L. Rev. 629, 630-32 (1974). For a more in depth look at F.B.I. operations in this regard, see Menard v. Saxbe, 498 F.2d 1017, 1020-22, 1026-27 (D.C. Cir. 1974).
9. Although there is no evidence that the F.B.I. distributes its information directly to private agencies or persons, it is clear that it does not keep a careful check on the further distribution of information once it has released it. A. Neier, Dossier 107-108 (1976).
10. The argument against the release of prior conviction records is based on due process grounds and considerations of public policy. Testimony of Aryeh Neier, Executive Director, American Civil Liberties Union; Accompanied by John H. F. Shattuck, Staff Counsel, American Civil Liberties Union, Hearings on S. 2542, S. 2910, S. 2963 and S. 2964 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., pt. 1 at 245-46 (1974) [hereinafter cited as Testimony of Neier].
determine the ultimate disposition of the case.13 Where the arrest does not result in conviction or where the person arrested is subsequently exonerated, the retention of the arrest record by the F.B.I. is obviously misleading, and potentially damaging. In one of many documented cases,14 a black college student was arrested and acquitted of robbery charges in Washington, D.C. Since that time, police have on at least three occasions shown his photograph in neighborhoods where crimes were committed, presumably to have him identified as the criminal. Although there is no evidence that this man has ever committed a crime, he, his family and his friends have been subjected on numerous occasions to interrogation. There are many other instances of people being denied credit or employment, or losing jobs and respect in the community as a result of the transmission of information to credit bureaus, private employers and others.15 Very often the victim in such a case is not even aware that the information being used exists.16

Even more susceptible to misuse is information maintained by criminal justice agencies under the heading of “intelligence data.”17 There is no indication that such information is treated with any greater care with respect to accuracy or dissemination than are conviction and arrest records. It is readily apparent that a dossier compiled of prior criminal records, incomplete or inaccurate arrest records, and pieces of “intelligence data” will give

15. Although there is no evidence that the F.B.I. directly transmits information to such private sources, see note 9 supra, distribution is so loosely controlled that information may eventually find its way into the possession of credit bureaus, private employers, and the like. See Comment, Arrest Records — Protecting the Innocent, 48 Tul. L. Rev. 629, 632-33 (1974). The ramifications of this situation are well documented in A. Neier, Dossier 133-45 (1975).
17. “Intelligence data” has been defined as the “raw material” of an investigation. Testimony of Neier, supra note 10, at 249. It may consist of information relating to conduct such as religious or political activity or hearsay statements and other “uncorroborated information.” Id. at 249-50. See also N.Y. Times, Feb. 28, 1975, at 11, col. 2.
rise to a rather distorted and misleading picture and, when released indiscriminately to employers or to credit companies, will likely result in serious injury.

Even those concerned with the abuses of sophisticated criminal justice information systems concede that these systems do serve a legitimate purpose in aiding law enforcement. In recognition, however, of the serious invasion of privacy resulting from those abuses, there has been an enormous amount of activity on both the state and federal levels to investigate and control the situation through legislation.

Attempts have also been made, through the judiciary, to protect individuals from the indiscriminate and injurious use of criminal justice information. The courts have generally, however, "[s]crupulously avoid[ed]" the larger constitutional issues presented by the collection and dissemination of information, by basing their decisions on statutory grounds.

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18. S. 2963, 93d Cong., 2d Sess. § 201 (1974); Address by William H. Rehnquist, Associate Justice of the Supreme Court, Nelson Timothy Stephens Lectures, University of Kansas Law School, at 3, Sept. 26 and 27, 1974, on file in Hofstra Law Library [hereinafter cited as Address by Rehnquist]; cf. A. NEW, NOSIER 119-32 ("Maintenance and dissemination of records appears to be a larger part of the cause than of the solution for crime." Id. at 129).

19. The following is a partial list of bills and resolutions introduced in the first session of the 94th Congress in January, 1975, to deal with the intelligence operations of government agencies: S. 84; H.R. 142, 265, 559 (to prohibit surveillance of civilians by the Armed Forces); H.R. 1185 (to define military authority to collect, distribute and store information concerning civilian political activity); H.R. 61, 62 (security of criminal justice information); H.R. 388 (authorize exchange of criminal record information); H.R. 1084 (establish information - gathering practices of federal agencies); H.R. 1098 (inform individuals of records held by government agencies); H.R. 550, 1005 (regulate disclosure of information to government agencies); H.R. 533, 616, 955, 1779 (restrict authority for inspection of income tax returns); H.R. 662, 721, 869, 1404 (prohibit sale by federal agencies of mailing lists); H.R. 563 (destroy F.B.I. files on members of Congress).

Between Jan. 8 and Feb. 28, 1975, the following bills were introduced in the 198th session of the New York State Legislature: A.2994 (to make it unlawful for any public licensing agency to inquire about or act upon information concerning an arrest of an applicant which has not been followed by conviction); S.2726; A.3487 (to require that people have access to confidential information contained in records of public or private agencies); S.1191-A; A.2175-A (personal records under control of police agencies, state department or political subdivision shall be confidential and not subject to inspection or review without police officers' permission); S.729; A.1218 (to prohibit police officer or agency from releasing information pertaining to criminal record of arrested person or defendant, other than to law enforcement personnel and agencies).


In *Sims v. Fox*, a reserve officer brought suit to enjoin the Air Force from discharging him without a hearing, after he had pleaded nolo contendere to charges of indecent exposure. In addition to his claim that this discharge deprived him of property, Sims argued that he had suffered a loss of liberty. Although Sims' discharge papers would show that he had been "honorably discharged," an accompanying code would reveal that he had been discharged for "unfitness, unacceptable conduct, or in the interest of national security." The Court of Appeals for the Fifth Circuit held that "[t]he mere presence of derogatory information in confidential files is not an infringement of 'liberty'" where the truthfulness of the information was not denied, despite the fact that there was evidence that the retention of such information would, under Air Force regulations, have the effect of "blacklist[ing]" the ex-officer from future service in the Air Force, Air Force Reserve or Air National Guard.

In *Menard v. Saxbe*, appellant Dale Menard brought an action to have his arrest record expunged from the files of the F.B.I. Menard, a nineteen year old college student, was arrested by Los Angeles police who had received reports of a prowler in the neighborhood. Although no criminal complaint was ever filed against him and there was no evidence that any crime had ever been committed, Menard's fingerprints and a report that he had been arrested were forwarded to the F.B.I. The Court of Appeals for the District of Columbia recognized that:

Although Menard cannot point with mathematical certainty to the exact consequences of his criminal file, we think it clear that he has alleged a "cognizable legal injury" . . . [T]he unlawful maintenance of records of arrest results in "injuries and dangers" that are "plain enough" . . . and . . . "this threat is not dissipated, or rendered insubstantial or illusory, by the fact that

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23. 505 F.2d 857 (5th Cir. 1974) (en banc).
24. Id. at 862.
25. Id. at 863.
26. Id. at 866 (Tuttle, J., dissenting).
27. 498 F.2d 1017 (D.C. Cir. 1974). For fuller treatment of the facts of this case, see A. Neier, *Dossier* 96-97 (1975); Address by Rehnquist, *supra* note 18, at 10-12.
the arrest was not followed by a prosecution." [citations omitted].

The court went on to explain that arrest records are often used outside the field of criminal justice, and that they often prove to be a “substantial barrier” to employment.\(^{29}\) While maintaining that it was “not now called upon to evaluate these practices of the F.B.I.,”\(^ {30}\) the court adopted the district court’s findings of fact\(^ {31}\) from which it concluded that the F.B.I. system of collecting and disseminating arrest records was “out of effective control.”\(^ {32}\) The court found that there are “no controls” over the accuracy of information received from outside agencies and “little supervision and control” over the uses to which information disseminated by the F.B.I. is put.\(^ {33}\) In Menard’s case, however, the F.B.I. had, shortly after the commencement of the law suit, changed its records to indicate that Menard had been “detained,” rather than arrested.\(^ {34}\) The court ruled, then, that the F.B.I. had no statutory authority to retain a record of a mere “encounter with the police” in its criminal files\(^ {35}\) and ordered expungement. The F.B.I. could, however, maintain Menard’s fingerprints in its “neutral,” non-criminal files.\(^ {36}\)

In *Tarlton v. Saxbe*,\(^ {37}\) the Court of Appeals for the District of Columbia was again faced with a request for expungement of information from F.B.I. files. Tarlton, alleging both past and future injuries, sought to have his F.B.I. criminal file expunged because it contained records of arrests and convictions which were incomplete and inaccurate. Basing its opinion once again on the statutory authority of the F.B.I. to maintain criminal files,\(^ {38}\) the court concluded that Congress could not have intended to grant the F.B.I. the authority to collect and disseminate inaccurate information, so as to injure, libel or possibly invade the consti-

\(^{29}\) *Id.* at 1024.

\(^{30}\) *Id.* at 1026.

\(^{31}\) *Id.* at 1020-22, 1026-27.


\(^{33}\) *Id.* at 1026.

\(^{34}\) *Id.* at 1020.

\(^{35}\) *Id.* at 1030.

\(^{36}\) *Id.*

\(^{37}\) 507 F.2d 1116 (D.C. Cir. 1974).

tutional rights of private citizens. Ruling that the F.B.I., within “practical limits,” has an affirmative duty to maintain its records accurately, the court remanded the case to the district court to determine the extent of that duty. Specifically, the Court of Appeals “suggested” that the lower court inquire into such questions as how the F.B.I. should be required to keep its files accurate and up to date, and whether the F.B.I. should grant individuals the right to discover and rebut information kept about them.

Judge Wilkey dissented vigorously from the approach taken by the court in Tarlton, regarding it as an encroachment of legislative perogative. The court’s actions should, however, be lauded as far-reaching and responsive to an urgent problem. Nevertheless, there remains a pressing need for comprehensive Congressional review and revision of the entire system of data collection and dissemination throughout the criminal justice network. Indeed, the majority in Tarlton recognized this need when it stated that it “would welcome legislative action designed to meet the issues discussed in [its] opinion.”

There is much merit to the view that the uses and abuses of criminal justice investigative systems are best dealt with by the legislature. There has recently been much activity on both the federal and state levels dealing with the problems caused by the apparently widespread intrusion by government agencies into the privacy of American citizens. The result of this activity has been the proposal and passage of numerous privacy statutes which are designed to protect individuals from invasion of their constitutionally guaranteed rights. The privacy legislation which re-

39. Tarlton v. Saxbe, 507 F.2d 1116, 1122-23 (D.C. Cir. 1974). The court concluded that the grant of such authority would raise “the gravest constitutional issues.” Id. at 1123.
40. Id. at 1127.
41. Id. at 1129-30.
42. Id. at 1131-32 (Wilkey, J., dissenting)(“The court here is obviously using Tarlton’s complaint to undertake a full-scale legislative inquiry of national scope.”) See also A. Neier, Dossier 188 (1975).
44. See note 19 supra and accompanying text.

In addition, there has been a large amount of legislative activity in the general area of privacy rights. See note 19 supra and accompanying text.
ently died in a Senate subcommittee was specifically directed at the operations of agencies within the criminal justice intelligence system. The bill not only provided for the right of individuals to discover and refute information kept about them, but it also attempted to place limits on who could receive such information. The statute also provided for criminal sanctions against those within the criminal justice system who provided information to persons or entities unauthorized to receive it. Clearly, private members of the public — the press included — would not have been considered authorized recipients of such information.

There is irony in the fact that the press, which has been instrumental in focusing attention on the possibly unconstitutional activities of agencies such as the C.I.A. and F.B.I., would object to legislation designed to protect individuals from those very activities. Some members of the press have expressed the fear that their constitutionally guaranteed rights are in jeopardy as a result of what they perceive as years of hostility from the administration in Washington. They seem, therefore, to view with distrust anything that hints at government intervention with the rights of a free press. The major objections posed by the press to privacy legislation in general, and the defunct Senate bill in particular, are that (1) such legislation constitutes an impermissible intrusion into the constitutionally guaranteed right of free press by hampering the access of the press to informa-

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46. S. 2963, 93d Cong., 2d Sess. (1974). Congress did, however, pass the Privacy Act of 1974, Pub. L. 93-579, which is designed to protect against the invasion of privacy resulting from abuses in information processing by federal agencies. The Act is essentially identical with the now defunct S. 2963, supra, in every respect except that it specifically excludes criminal justice agencies from its scope.


48. S. 2963, 93d Cong., 2d Sess. § 201 (1974) (“Dissemination, Access and Use—Generally”). Section 201(b) provides: “Except as otherwise provided by this Act access to criminal justice information shall be available only to authorized officers or employees of the criminal justice agency which maintains such information.”


51. Address by Homby, supra note 5, at 1-2.

52. Id. at 12.

53. Testimony of Anderson, supra note 5.
tion; (2) the legislature is impermissibly "balancing' the rights of free press against the rights of privacy; and (3) this legislation promotes and fosters government secrecy under the "guise" of protecting the right to privacy. This paper will analyze each of these claims made by the press to determine whether privacy legislation does indeed infringe upon the first amendment guarantee of freedom of the press.

I. PRIVACY LEGISLATION AS AN IMPERMISSIBLE INVASION OF A CONSTITUTIONAL RIGHT OF ACCESS TO INFORMATION.

A. In Search of a First Amendment Guarantee of Access to Information.

Members of the press have urged for years that the first amendment, which guarantees them the free and unhampered right to publish, must necessarily include the right to gain access to information. Because the proposed Senate legislation had provided for criminal sanctions against those within the criminal justice system who gave information to persons unauthorized to receive it, the effect, it was argued, would be to "dry up" sources of information. This restriction on sources of information would presumably represent impermissible interference with the constitutional protection offered the press.

It is established that a primary objective of the first amendment is to secure and protect the free flow of information. While the Supreme Court has ruled that the first amendment does protect the right to disseminate and receive information, it has consistently refused to expand that premise to include an unlimited right of access to information.

56. Testimony of Anderson, supra note 5.
In Zemel v. Rusk,\textsuperscript{61} appellant argued that the Secretary of State's refusal to validate his passport for travel to Cuba was violative of the first amendment, in that it infringed upon his right to travel abroad to acquaint himself firsthand with facts pertaining to United States foreign policy. The Supreme Court, in upholding the Secretary's constitutional authority to take such action, stated:\textsuperscript{62}

We must agree that the Secretary's refusal to validate passports for Cuba renders less than wholly free the flow of information concerning that country. While we further agree that this is a factor to be considered in determining whether appellant has been denied due process of law, we cannot accept the contention of appellant that it is a First Amendment right which is involved . . . The right to speak and publish does not carry with it the unrestrained right to gather information.

Although the first amendment makes separate mention of rights of speech and rights of press,\textsuperscript{63} courts have consistently combined both within the concept of "freedom of expression."\textsuperscript{64} In regard to the gathering of information the Supreme Court has again failed to attribute significance to the separate mention of press and speech, when it stated:\textsuperscript{65}

It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.

The press' claim to a constitutional right of access to information has been raised in cases where reporters have sought to establish a constitutional privilege to preserve the confidentiality

\begin{flushleft}
\textsuperscript{61} 381 U.S. 1 (1965).
\textsuperscript{62} Id. at 16-17.
\textsuperscript{63} The first amendment reads, in part:
\begin{quote}
Congress shall make no law . . . abridging the freedom of speech or of the press . . .
\end{quote}
U.S. CONST. amend. I.
\textsuperscript{64} Note, The Right of the Press to Gather Information, 71 COLUM. L. REV. 838, 840-42 (1971).
\textsuperscript{65} Branzburg v. Hayes, 408 U.S. 665, 684 (1972) (dicta). In Branzburg, the Supreme Court cited United Press Ass'n v. Valente, 308 N.Y. 71, 77, 123 N.E. 2d 777, 778 (1954) which upheld a court order excluding the general public and the press from a courtroom. Although the press does not have a special right of access to information, it is entitled to at least the amount of access afforded to the general public. See Estes v. Texas, 381 U.S. 532, 541-42 (1965) (access to trials). See also Comment, The Rights of the Public and the Press to Gather Information, 87 HARV. L. REV. 1505, 1521 n.96 (1974).
\end{flushleft}
of their sources.\textsuperscript{66} In \textit{Branzburg v. Hayes},\textsuperscript{67} the Supreme Court, in a 5-4 decision, cited \textit{Zemel v. Rusk} with approval and refused to acknowledge any special right of access secured to the press by the Constitution. The Court distinguished between the infringement on the freedom of the press arising out of the requirement that reporters divulge their sources of information from that which arises from an intrusion upon the actual content of expression:\textsuperscript{68}

\begin{quote}
[T]hese cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. . . . The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law.
\end{quote}

The Court in \textit{Branzburg} noted that the press is often excluded from such events as grand jury proceedings and trials where "such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal."\textsuperscript{69} In so doing, the Court cited with approval\textsuperscript{70} a decision by the Court of Appeals for the Third Circuit\textsuperscript{71} which held:

\begin{quote}
We think that this question of getting at what one wants to know, either to inform the public or to satisfy one’s individual curiosity is a far cry from the type of freedom of expression, comment, criticism so fully protected by the first and fourteenth amendments of the Constitution.
\end{quote}

Although the judiciary has deferred to Congress the task of delineating reporters’ rights on the question of withholding sources of information,\textsuperscript{72} the issue of whether the first amendment guarantees the press a special right of access to information is by

\begin{footnotes}
\item[67] 408 U.S. 665 (1972).
\item[68] \textit{Id.} at 681-82.
\item[69] \textit{Id.} at 684-85.
\item[70] \textit{Id.} at 684.
\item[72] \textit{Id.} at 885.
\end{footnotes}
no means dead. It has been argued that the Court's pronouncement in Zemel that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information" (emphasis added) gives rise to the "necessary implication . . . that some right to gather information does exist." It has been observed, moreover, that courts since Branzburg have chosen to interpret that decision broadly so as not to foreclose the possibility that a constitutional right of access to information does exist.

B. Access to Information and Privacy Legislation

Whether or not a right to gather information does exist, it appears that the press' claim that proposed privacy legislation would impermissibly interfere with that right, is not well founded. One of the defects of the now defunct Senate bill was that it was written in overly-broad language. For instance, the section providing for criminal penalties read:

Whoever willfully disseminates, maintains, or uses information knowing such dissemination, maintenance, or use to be in violation of this Act shall be fined not more than $5,000 or imprisoned for not more than five years, or both.

This section, however, when read in the context of the entire bill, was aimed at government officials who illegally transmit information to unauthorized persons. The drafters could (and should) have included a provision stating that nothing in the statute might be construed as authorizing the abridgement of the right of the press to publish. Such a provision would not have affected the meaning of the statute, and would have made clear that penalties could not be imposed upon the press. Within the context of privacy legislation, therefore, the press would still be free to gather information from any willing source, including govern-

78. See Testimony of Anderson, supra note 5, at 422 (remarks of Senator Ervin).
ment officials not deterred by the threat of criminal sanctions. In Branzburg, the majority justified compelling reporters to disclose their sources of information by stating:79

The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

The Court's contention that the use of confidential sources by the press is not restricted by the denial of a testimonial privilege is open to debate. The threat of a civil contempt citation80 is likely to discourage a reporter from seeking out access to confidential sources.81 The Court's reasoning can be successfully applied, however, to the position of the press with respect to privacy legislation. In that context, the press would in no way be prevented from soliciting information from persons within the criminal justice system and no adverse consequences would attach to the use of such information by the reporter. The press would still be free to print and disseminate whatever information it did receive. In New York Times Co. v. United States,82 Justice Douglas noted in his concurring opinion that the statute in question in that case83 prohibited persons with unauthorized possession of information detrimental to national defense from wilfully communicating it to persons not entitled to receive it. Justice Douglas stated that "Congress has been faithful to the command of the First Amendment in this area," because there was a specific caution within the Act: it was not to be construed as authorizing an infringement upon freedom of press or speech.84 Again, such a provision would be essential to any good privacy legislation.

In addition, the press would still be free within the context

81. In his dissenting opinion in Branzburg v. Hayes, 408 U.S. 665, 731-33, Justice Stewart points out that compelling reporters to testify will have the effect of causing them to cease investigating and publishing information.
82. 403 U.S. 713 (1971).
84. 403 U.S. 713, 722 (1971).
of privacy legislation to go to the primary sources of information—for example, court records and police blotters. In light of the inherently suspect and inaccurate records currently being kept by criminal justice agencies, it would seem to enhance the spirit of the first amendment to encourage the press to gather its information from more reliable sources.

II. Does Privacy Legislation Impermissibly Balance Rights of Press Against Rights of Privacy?

A. Privacy Rights v. Rights of Press: The Balancing Test

Another major objection which had been posed by members of the press against the Senate bill was that their first amendment rights were being invaded for the sake of, or under the “guise” of, protecting privacy rights. The approach used by courts in cases where the rights of the press are seemingly in conflict with other fundamental rights has been to weigh and balance one interest against the other. In *NAACP v. Button,* the Supreme Court noted that:

The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State’s constitutional power to regulate can justify limiting First Amendment freedoms . . .

Thus, compelling reporters to disclose their sources of information has been justified by the overriding public interest in “ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all

86. See, e.g., T. Emerson, *The System of Freedom of Expression,* 634 (1970), (controls may “introduce honesty, decency and openness” into our system and therefore “expand rather than contract freedom of expression.”).
90. Id. at 438.
other persons." Similarly, the right to exclude the press from judicial proceedings has been upheld in deference to the need to maintain absolute fairness in such proceedings. Another area in which the rights of the press have been balanced against other legitimate state interests is the area involving alleged endangerment to national security. In New York Times Co. v. United States, for instance, the Supreme Court refused to grant an injunction against the publication of such information on the grounds that the government had not met the burden of showing justification for the imposition of prior restraint.

The "weighing and balancing" approach to restrictions on constitutional rights has been severely criticized by both members of the press and members of the judiciary. In New York Times Co. v. Sullivan, the Supreme Court devised the test by which the press is liable for damages in a libel action brought by public officials when it publishes with "actual malice or reckless disregard for the truth." Two concurring Justices were of the opinion that "an unconditional right to say what one pleases about public affairs is . . . the minimum guarantee of the First Amendment." And in New York Times Co. v. United States, two Justices argued that the first amendment provides the press absolute protection against prior restraint.

Since New York Times Co. v. Sullivan, the Supreme Court has employed the balancing approach to weigh the rights to the press against the right of individual privacy. In Time, Inc. v.
Hill, the Court applied the New York Times test of "actual malice ... or ... reckless disregard for the truth" to the publication of "false reports of matters of public interest." In his concurring opinion, Justice Black attacked the weighing and balancing approach as a "Constitution-ignoring-and-destroying technique." He amplified by stating that:

The prohibitions of the Constitution were written to prohibit certain specific things, and one of the specific things prohibited is a law which abridges freedom of the press. The "weighing" doctrine plainly encourages and actually invites judges to choose for themselves between conflicting values, even where, as in the First Amendment, the Founders made a choice of values, one of which is a free press.

If judges have, however, by their own fiat today created a right of privacy equal to or superior to the right of a free press that the Constitution created, then tomorrow and the next day and the next, judges can create more rights that balance away other cherished Bill of Rights freedoms.

Justice Black predicted that the balancing approach as employed in Time, Inc. v. Hill was "bound to pass away as its application to new cases proves its inadequacy to protect freedom of the press from destruction in libel cases and other cases like this one." This prediction has not been borne out, however, as the Supreme Court, in Gertz v. Robert Welch, Inc., reaffirmed the use of the weighing and balancing approach. The Court ruled, in Gertz, that the state could, short of imposing strict liability, apply a less stringent standard than that used in New York Times in determining the liability of those who publish defamatory falsehoods about private individuals. In addition, the Supreme Court recently held a newspaper liable for invasion of privacy on the ground that the evidence was sufficient to establish that the


102. Id. at 387.
103. Id. at 388.
104. Id. at 399.
105. Id. at 399-400.
106. Id. at 398.
108. Id. at 347.
newspaper had published with actual knowledge or reckless disregard for the truth.\textsuperscript{109}

\textbf{B. Balancing of Interests and its Application to Privacy Legislation}

Against this background of the rights of the press being pitted against the right to privacy, members of the press objected to privacy legislation as one more way in which their first amendment freedoms were being eroded.\textsuperscript{110} Attention must be given to two important considerations before this claim can be analyzed.

Although the Supreme Court has, on a number of occasions, recognized that a "zone of privacy" is protected by the Bill of Rights,\textsuperscript{111} the parameters of that "zone" are unclear.\textsuperscript{112} It has been argued, therefore, that:\textsuperscript{113}

The problem of reconciling First Amendment rights and privacy rights, where they conflict, is . . . one of defining the constitutional boundaries of the privacy system.

In addition, a distinction must be made between the act of intruding into the zone of privacy and the publication of information obtained from within that zone of privacy. The Supreme Court cases involving the press have dealt primarily with the issue of publication of such information.\textsuperscript{114} While the majority approach has been to strike a "balance" between free press and privacy,\textsuperscript{115} the argument has been made that the first amendment guarantees an absolute and unconditional right to publish which may not be made subject to or diminished by any other right or interest.\textsuperscript{116}

Where there is intrusion into the zone of privacy, however, courts have ruled that such activity is not protected. The distinc-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{110} Address by Hornby, \textit{supra} note 5.
\item \textsuperscript{111} Roe v. Wade, 410 U.S. 113, 152 (1973); Griswold v. Connecticut, 381 U.S. 479, 483-85 (1965). \textit{See also} Address by Rehnquist.
\item \textsuperscript{112} \textit{See} Parker, \textit{A Definition of Privacy}, 27 Rutgers L. Rev. 275, 275-76 (1974). \textit{See also} A. Neier, \textit{Dossier} 186-89 (1976).
\item \textsuperscript{113} T. Emerson, \textit{The System of Freedom of Expression} 549 (1970).
\item \textsuperscript{115} \textit{See} note 88 \textit{supra} and accompanying text.
\item \textsuperscript{116} \textit{See} note 96 \textit{supra} and accompanying text.
\end{enumerate}
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tion between the act of intrusion and publication of information was well articulated in *Pearson v. Dodd.*

[In analyzing a claimed breach of privacy, injuries from intrusion and injuries from publication should be kept clearly separate. Where there is intrusion, the intruder should generally be liable whatever the content of what he learns. An eavesdropper to the marital bedroom may hear marital intimacies, or he may hear statements of fact or opinion of legitimate interest to the public; for purposes of liability that should make no difference. On the other hand; where the claim is that privileged information concerning plaintiff has been published, the question of whether that information is genuinely private or is of public interest should not turn on the manner in which it has been obtained . . . .]

The right of the press to publish information it receives was reiterated in *Cox Broadcasting Corp. v. Cohn.* In that case, the Supreme Court ruled that the state cannot impose sanctions upon one who publishes the names of rape victims obtained from public records. Once again, the Court distinguished between the content of publication — which the state may not interfere with — and conduct involved in acquiring such information. While asserting that:

> We mean to imply nothing about any constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records. . . .

the Court nonetheless suggested that if the publication of matters arguably within the zone of privacy is to be prevented, the state should “respond by means which avoid public documentation or other exposure of private information.”

Because of the nature of the dossiers prepared and disseminated by criminal justice agencies, they are, *taken as a whole,* within the zone of privacy protected by the Bill of Rights. While these dossiers include matters of public record such as conviction

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117. 410 F.2d 701, 705 (D.C. Cir. 1969), *cert. denied,* 395 U.S. 947 (1969) (newspaper columnist who received copies of documents removed by others from plaintiff's office was not liable for conversion of the physical documents).
119. Id. at 4352, n.26.
120. Id. at 4352.
121. See notes 8-13 *supra* and accompanying text.
and arrest records, the information contained therein is marred by both the inclusion of so called "intelligence" data and the frequent omission of vital follow-up information. These records, filed under an individual's name, create a composite view of that individual which is in no sense "public." In addition, it does not necessarily follow that because bits and pieces of information have been collected by a government agency, that those bits and pieces do not remain very much within the constitutionally protected zone of privacy. To take an extreme example: there have been reports in the press that the F.B.I. has been collecting information about the sexual habits of some public officials. If the F.B.I. received information concerning the sex life of a private individual, it can hardly be argued that this information automatically becomes part of the "public record."

Clearly then, the constitutionally protected right of privacy is essential in ensuring that at least some aspects of an individual's life remain private. It is that privacy right which bills such as the now defunct Senate bill are designed to protect. Privacy legislation does not close off matters which have always been on the public record, as the press maintains, since conviction and arrest records may still be found in court records and on police blotters. Such legislation does not restrict the press in its attempts to gain access to information; it does, instead, provide for sanctions against those government officials who intrude upon an individual's zone of privacy by transmitting "private" information to persons unauthorized to receive it. Carefully drafted legislation would not interfere with the freedom of the press to gather information from any willing source and, most importantly, the press would still be free to print and disseminate any information it did receive.

III. DOES PRIVACY LEGISLATION PROMOTE AND FOSTER GOVERNMENT SECRECY?

A free and independent press is inherently repelled by any evidence of secrecy, especially in government. Some members of the press have expressed the fear that privacy legislation, while it purports to protect the individual, is actually intended to promote and foster government secrecy. If the privacy legislation

122. N.Y. Times, Feb. 28, 1975, at 1, col. 2.
123. Address by Hornby at 12.
124. Id. at 6.
is well drafted and well executed, however, there appears to be no danger of this. The Senate bill not only provided for access by individuals for the purpose of discovering and challenging records kept about them,125 but would also have established an administrative board126 to oversee the operations of criminal justice agencies. Each criminal justice agency would have been required to make periodic disclosure of its mode of operation and the kinds of activities which it pursues.127 Clearly, such legislation would not have entitled an agency to withhold information about its own operations, but it would have barred that agency from indiscriminately releasing damaging information concerning an individual. Rather than provide criminal justice agencies with a cloak behind which to hide, privacy legislation may well afford us the much-needed opportunity to look within those systems which for too long have shut the public and press out.

IV. CONCLUSION

We are still in the process of discovering the facts about the criminal justice investigative intelligence systems and their operations. Clearly, steps must be taken to remedy what is apparently a very dangerous situation and to protect against future abuse. This article has focused upon one proposed Senate bill because (1) it is quite certain that very similar legislation will be introduced in the near future128, and (2) it may serve as a useful model on which to base such future proposals. It seems certain, as well, that when such legislation is reintroduced, the press will raise objections similar to the claims examined in this article.

The concerns expressed by the press in reaction to privacy legislation are real and important. It is certainly in our best interest to ensure that the rights of the press are not infringed upon so that the press may continue to view with healthy skepticism and to criticize government agencies and their actions. It is equally important that individuals be protected from the serious invasion of privacy resulting from abuses of the criminal justice investigative intelligence systems. It appears, upon examination,
that well drafted privacy legislation would meet both of these vital objectives.

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