

# Michigan Law Review

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Volume 66 | Issue 5

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1968

## Westin: Privacy and Freedom

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### Recommended Citation

Stanley K. Laughlin Jr., *Westin: Privacy and Freedom*, 66 MICH. L. REV. 1064 (1968).  
Available at: <https://repository.law.umich.edu/mlr/vol66/iss5/12>

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PRIVACY AND FREEDOM. By *Alan F. Westin*. New York: Atheneum. 1967. Pp. xvi, 487. \$10.

Westin's book is more, thankfully, than just an inventory of the exotic hardware of present and future snooping, for as the writer of the book's foreword points out, "the need . . . to sound the tocsin in simplistic terms of alarm [is] thoroughly removed" (p. xi). The inventory is there and does make interesting reading, but most of the technical data has appeared elsewhere and even the newest technology is scarcely shocking in times such as ours. There will, however, be some surprises for most readers. For example, this reviewer

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was familiar with parabolic microphones that can pick up ordinary conversations at 500 feet but was unaware of a new device that can be focused on a windowpane over a mile away and monitor conversations behind the window by measuring the vibrations of the glass. Similarly, while I was aware that current computer science makes a national data bank a potential reality, I did not know that by utilizing the laser principle it soon may be possible to keep complete birth-to-death dossiers for every citizen on 100 reels of tape, nor was I aware that there is a polygraph that can be disguised as an ordinary chair and thus used without the subject's knowledge.<sup>1</sup> Nevertheless "the problems for privacy are at the present time not significantly posed by esoteric new discoveries. Rather, they are raised most sharply by the familiar and increasingly pervasive items: the miniature, battery-powered microphone, the extension telephone, the portable (and concealable) tape recorder, and the small, high resolution camera" (p. xi).

### I. ATTITUDES ON PRIVACY

On a television panel some time ago a police official and a civil liberties spokesman were debating the propriety of legalized taps on public telephones in light of the fact that such tapping necessarily results in the monitoring of conversations between persons not even remotely connected with suspected criminal activity. The libertarian asked if he should not be justifiably offended if a police tapper were to be discovered eavesdropping on a telephone conversation between him and his wife. The officer replied that from his point of view if he were not discussing anything illegal, he would not mind in the least. Whereupon, the libertarian lamented that his values were so far separated from those of the officer that a meaningful debate was impossible. The policeman's attitude, however, is not at all unique. With the proliferation of polygraph use, not only against suspected criminals, but for such noncompelling purposes as determination of an employee's secret attitude toward his boss or a viewer's "real" reaction to a proposed television series, it has been all but forgotten that Pope Pius XII flatly condemned the polygraph (even when used to detect crime) as a morally unjustifiable invasion of the individual's "inner domain" (p. 238).

Although Westin does fear that many people are dangerously indifferent to growing encroachments on privacy, he finds some ground for optimism in what he detects to be an emerging con-

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1. As might be expected, this device is generally conceded to be even less reliable than the traditional polygraph (p. 213). Polygraphs, psychological tests, and the data bank are part of a paradoxical undercurrent of the privacy problem; in many cases the threat is not so much from the possibility that these devices will expose the individual's secrets as it is from the probability that erroneous information about the individual will be developed and disseminated.

sensus on a "minimum position" in support of privacy that spans the entire political-ideological spectrum (p. 367). The best example which he offers in support of this observation is the case of psychological testing. The Right suspects that such tests are drawn up by people who consider rightist positions pathological. The Left thinks that the tests are designed to weed out eccentrics and to produce conformity. Even the Center fears that their own hidden unorthodoxies may be exposed. In fact, the tests seem to be defended only by that certain type of social psychologist who is capable of constructing a distinction between judging the reasonableness of a person's religious belief (which we are constitutionally committed not to do) and judging the same person's "mental health" *as evidenced* by his religious belief (p. 269). As a result, use of the tests in both the public and private sectors has been noticeably curtailed over the past few years.

The element of selective "ox-goring" in these positions must not be overlooked, however. The coalition against psychological testing is based, in part, on an uncertainty as to whom the testers are out "to get." If, for example, the tests were more reliable and the Right were firmly in control, one wonders if they would object to tests effectively designed to screen out those (and only those) with leftist tendencies. This same self-serving element is even clearer in the areas that Westin designates as "physical" and "data" surveillance.<sup>2</sup> Conservatives are quite concerned about electronic eavesdropping when it is used by the Internal Revenue Service, but approve of it in cases involving "national security," that is, snooping on left-wing individuals and groups. Right-wing groups are generally opposed to gun registration and to a national data bank, again because they see the federal government and the social scientists who would have access to the information as being "liberal." As a law professor, on the other hand, I am perpetually outraged by the incredible amount of snooping into the personal affairs of law students that is done by conservatively-oriented boards of bar examiners. It may be that workable political coalitions can be evolved in support of some "neutral principles" of privacy on the basis of common need and the desire of all people to keep some things to themselves—certainly we must hope for such a development—but Westin's own accounts of past

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2. Westin divides surveillance into three general categories:

*physical surveillance*, the observation through optical or acoustical devices of a person's location, acts, speech or private writing without his knowledge or against his will . . . *psychological surveillance*, the use of oral or written tests, devices, or substances to extract from an individual information that he does not give willingly, or does not know that he is revealing, or reveals without a mature awareness of its significance for his private personality . . . *data surveillance*, the collection, exchange and manipulation of documentary information about individuals and groups by data-processing machines (primarily computers). [P. 68, emphasis added.]

legislative attempts to control surveillance are certainly far from consoling.

Although Westin's treatment of the subject matter is comprehensive, there is an important aspect of the threat to privacy which he slights: the motives behind surveillance. They are, as they have always been, societal protection, personal gain, and curiosity. Westin seems to posit these motives as being fairly constant, changing only in relative degree of importance. Instant espionage and counter-espionage may seem a more pressing need since instant annihilation has become a possibility. Today there are more trade secrets to be kept and to be stolen. More aspects of curiosity have been legitimized in the eyes of some behavioral scientists. By and large, however, Westin seems to see the increased threat to privacy as a function of a rather constant desire to snoop plus a greatly advanced and advancing technology of surveillance (pp. 52-63). Consideration of current informed speculation by a variety of physical and social scientists and others on possible technical, political, and social trends in the last third of our century may help add another dimension to the question.<sup>3</sup> Some of these writers see surveillance and control of individual behavior increasing over the next thirty-two years to truly alarming proportions, but in their view the availability of advanced surveillance technology will only be an incidental factor. The crucial variables lie, they suggest, in other technical and social changes. Society will become dependent on an increasingly interrelated technology, vulnerable to sabotage at innumerable points. Weapons of great destructive capacity (even nuclear) will be miniaturized and available to private groups and individuals. The demise of the work ethic, the waning of the nation-state, and the failure of traditional icons with a resultant groping for new life values (already evidenced by the "hippie" and "New Left" phenomena)<sup>4</sup> may lead to a sort of "antipatriotism" and general trend toward anarchism. If these predictions prove true to any substantial degree, it is difficult to envision a workable political coalition in support of privacy emerging from our current political and social establishments. Instead, we might expect the rise of a technological elite who will insist on using surveillance technology to control the "antitechnocrats." Perhaps law could rebuild the walls that technology has "dissolved."<sup>5</sup> Behind law, however, is politics and in this area "politics as usual" offers as much to fear as to comfort.

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3. See H. KAHN & A. WEINER, *THE YEAR 2000: A FRAMEWORK FOR SPECULATION* (1967); *Toward the Year 2000: Work in Progress*, DAEDALUS, J. AMER. ACAD. ARTS & SCIENCE 639-988 (1967). See also H. M. McLuhan, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* (1964).

4. See Laughlin, *LSD-25 and the Other Hallucinogens: A Pre-Reform Proposal*, 36 GEO. WASH. L. REV. 23, 29-39 (1967).

5. Chapter eight of *Privacy and Freedom* is entitled "Dissolving the Walls and Windows."

## II. LEGAL MEASURES TO PROTECT PRIVACY

Westin devotes a great deal of thought to the detailed policy decisions involved in the many types of legal controls that *could* be imposed (given a willing legislature) on many of the potential sources of privacy invasions. For example, he opposes (quite correctly, I believe) the present Supreme Court position on "one party" eavesdropping and recommends that future statutes consider such eavesdropping to be a "search" requiring legal controls (p. 390).<sup>6</sup> He also discusses the mechanics of "locking" computers, requiring two or three officials acting simultaneously to open certain memory banks (a technique used to control the firing of nuclear weapons). The constantly recurring weakness of these approaches, however, is the necessity to repose trust in a fairly large group of officials. Westin frequently refers to the release of information being "limited" to the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Department, or some other agency (pp. 324-25, 376, 390-91). Such suggestions are disquietingly close to the assurances that we often hear from those engaged in snooping: that the information will only be used by "authorized" persons, as if that were equivalent to the confidentiality of the confessional.

Westin's suggestions for increasing the available legal sanctions against privacy breachers appear more promising. For example, he suggests that information about an individual could be treated as that individual's property, thus giving him access to all the criminal and civil remedies for misappropriation or other misuses of such "property." As Westin himself notes, however, this approach to protection of privacy could create serious questions concerning free speech and press. A most provocative idea is that a contractual obligation be implied against landlords and innkeepers to prevent them from cooperating in an invasion of the privacy of tenants. This would indeed strike at a pervasive method of eavesdropping.

Westin, then, sees new surveillance technology as having "dissolved the walls," allowing the traditional impetuses for surveillance to cause serious encroachments on privacy. Cautiously optimistic, he nevertheless sees a consensus emerging on a "minimum position" in

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6. The Supreme Court has upheld the use of evidence of a conversation surreptitiously taped or transmitted by one party to the conversation, or monitored on a telephone line with the consent of one such party. The rationale behind such admissibility is that since a speaker traditionally runs the risk that a party present or addressed may testify to the conversation in court, he should not be heard to object to the verification of that testimony by a tape or third party. *Osborn v. United States*, 385 U.S. 323 (1966) (taped); *Lopez v. United States*, 373 U.S. 427 (1963) (taped); *Rathburn v. United States*, 355 U.S. 107 (1957) (monitored on an extension telephone); *On Lee v. United States*, 343 U.S. 747 (1952) (transmitted). As Westin points out, "This has been the basic charter for private-detective taps and bugs, for 'owner' eavesdropping on facilities that are used by members of the public, and for much free-lance police eavesdropping" (p. 390).

support of privacy.<sup>7</sup> Although recognizing that delicate policy decisions and carefully designed techniques will be required, he believes this consensus can effectively exert itself through public and private channels to restore the balance between privacy and necessary surveillance. A more pessimistic prognosis might see a continuation of the current legislative deadlock brought on by the unwillingness of a majority to agree on a common distinction between "my privacy" and society's need to know about "your behavior and attitudes." Simultaneously, there could emerge a technological elite, using surveillance to an ever-increasing degree to control an anomic, "anti-patriotic" populace. Meanwhile, any legal controls that happen to emerge from legislatures or courts might be seriously compromised by unsympathetic public officials.<sup>8</sup>

### III. PERSONAL STRATEGIES AGAINST INVASIONS OF PRIVACY

If the pessimistic view is at all plausible, it would seem wise to consider personal strategies to combat encroachments on privacy.<sup>9</sup> Privacy, as Westin demonstrates, has both personal and social functions. On the personal level, he sees a need for privacy in order to maintain mental stability, to facilitate intimate relationships, and to encourage creativity. These assumptions are based upon an implicit observation that in our society (and perhaps most societies) nonconformity, when discovered, will result in legal, economic or social sanctions. On the social or practical level, privacy is needed to preserve the confidentiality of business, military, and political techniques and strategies, as well as to facilitate negotiation. Negotiation (on all levels from international relations to collective bargaining) may be hamstrung if the negotiators' constituents are aware of every exploratory probe.

One strategy that can be implemented to protect privacy on the social or practical level is the use of counter-surveillance measures. These range from measures as elaborate as specially constructed security rooms, electronic "sweeps" for eavesdropping equipment, and laser-beam communications to measures as simple as the writing of key words and phrases on slips of paper (passing them in a manner to conceal them from hidden cameras) when one suspects that a conversation is being monitored. While such measures may be suffi-

7. He candidly admits that "some might read the record differently . . ." (p. 367).

8. The Justice Department, the F.B.I., and most state and local police agencies consistently ignore the clear holding of the Supreme Court in *Nardone v. United States*, 302 U.S. 379 (1937), that § 605 of the Federal Communications Act of 1934 [47 U.S.C. § 605 (1964)], prohibiting interception and divulgence of any communication (except where authorized by the *sender*), applies to state and federal officers. Not only has the Justice Department refused to abide by the Act as construed, it has said that it cannot "in good conscience" prosecute state officials under it (pp. 174-79).

9. "I'd face it as a wise man would, And train for ill and not for good." A. E. HOUSMAN, *A SHROPSHIRE LAD* 108 (1896).

cient for the protection of "practical privacy," which is normally needed only sporadically and at times when the parties are consciously aware that deliberate protection of privacy is advisable, they are hardly adequate for the protection of personal privacy. In the personal sphere, being constantly on guard against surveillance would be self-defeating. The object of surveillance is often to deter rather than detect certain types of conduct, such as where closed-circuit television is installed in industrial plants to prevent employee pilfering and malingering. Fortunately, constant surveillance of a very large portion of the population is impractical since it would require better than a one-to-one ratio of surveillancers to surveillances. Even if technology were available to tape and film most of the activities of every citizen, someone would still have to review the tapes and films. If the day arrives when computers are able to perform this evaluation, the Big Brother state in its pristine form will be possible.<sup>10</sup> In the meantime, the threat of spot checks may nevertheless be enough to destroy the personal functions of privacy. For psychic damage, the possibility that we *may* be under surveillance is sufficiently disruptive.

The right of privacy, of course, is not designed to facilitate criminal conduct (at least not serious criminal conduct). The reluctance with which the exclusionary rule was elevated to a constitutional status is proof enough of that.<sup>11</sup> The most important area where privacy and surveillance collide involves what Westin calls "permissible deviation." Such behavior consists of actions that are not illegal (or at least not usually prosecuted)<sup>12</sup> but the disclosure of which would likely subject the actor to economic or social sanctions. I would like to suggest tentatively that a serious counterstrategy might be temporarily to ignore invasions of privacy in such cases. I do not mean to say that we should tolerate the voyeuristic policeman who bugs the marital bedroom. I do mean to say that perhaps we should eschew those social or economic opportunities that may hinge upon whether or not everything we do is entirely conventional.

If we may return for a moment to practical privacy, Westin dis-

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10. Automated evaluation is possible to a very limited degree today, as where devices are installed on production machines to evaluate the operator's performance. Westin suggests that use of devices which react to certain sounds may soon make it possible for computers to sort out conversations in which particular words are used (p. 87).

11. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Wolf v. Colorado*, 338 U.S. 25 (1949).

12. These enforcement-free violations would presumably include such things as gambling with friends in the home and proscribed sexual conduct between marriage partners. Westin suggests that one of the legitimate functions of privacy is that it permits the state to ignore inconsequential offenses without bringing disrespect upon itself. This seems to overlook the fact that these laws are occasionally enforced for political reasons, blackmail, or personal malice. A much more direct approach would be to remove these "morality" crimes from the statute books.

misses quite summarily our Wilsonian rhetoric about "open covenants, openly arrived at" as patently impractical. Perhaps he is right. But I was disappointed that he did not consider more thoroughly the ramifications of the quite valid argument that government business today is carried on in an atmosphere of too much rather than too little secrecy (p. 51).<sup>13</sup> The preoccupation with protecting and stealing trade secrets that currently pervades American business should also lead us to consider whether a more serious problem might not be the diseconomy associated with a system that puts such a high premium upon concealing useful knowledge. Similarly, Westin expressly recognizes that to a large extent our personal vulnerability to snooping is a function of "role-playing" and the resultant need for periods of privacy during which we can release a bit more of our true selves (pp. 34-37). Yet he has virtually nothing to say about whether we could reduce the amount of psychological "role-playing" in our everyday lives—an important question which preoccupies a significant portion of our population today.<sup>14</sup>

Our affluent society offers the individual an extraordinary degree of choice in this regard. If one decides that he will forego that type

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13. Westin quotes Adam Yarmolinski on the importance of government secrecy in international crises (such as the Cuban missile affair) to facilitate the delicate process of "signaling" intentions to foreign powers. "Signaling" is one of those terms currently tossed around by diplomats that are unsettling to me; somehow I wish that the world's leaders could communicate more explicitly when the threat of nuclear holocaust is high.

14. See, e.g., E. BERNE, *GAMES PEOPLE PLAY* (1964); N. BROWN, *LIFE AGAINST DEATH* (1959); A. CAMUS, *THE REBEL* (1954); S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* (1930); E. FROMM, *BEYOND THE CHAINS OF ILLUSION* (1962); J.-P. SARTRE, *SAINT GENET* (1952); A. WATTS, *PSYCHOTHERAPY EAST AND WEST* (1961). See also Laughlin, *supra* note 4. To the limited degree Westin does discuss this aspect of the problem, he seems to assume that a sharp division between public posture and private thoughts and behavior is a *sine qua non* of social organization:

The greatest threat to civilized social life would be a situation in which each individual was utterly candid in his communications with others, saying exactly what he knew and felt at all times. The havoc done to interpersonal relations by children, saints, mental patients and adult 'innocents' is legendary. [P. 37.] Yet there is an abundance of psychological opinion today to the effect that interpersonal relations are suffering more from a lack of candor than from an abundance of it.

In a similar vein Westin seemingly merges two uses of the term "role-playing"; sociological role-playing (that we must all serve as lawyers, teachers, students, etc.) and psychological role-playing (masking one's true feelings). "On any given day a man may move through the roles of stern father, loving husband, car-pool comedian, skilled lathe operator, union steward, watercooler flirt, and American Legion committee chairman . . ." all of which are, according to Westin, "roles that life demands" (pp. 34-35). Of course, life does not demand that one be a water-cooler flirt or an American Legion committee chairman unless one is so inclined. Note that no adjective of affectation is attached to the social roles of "skilled lathe operator" or "union steward." Being a comedian is not usually required to gain admittance to a car pool and forced attempts at comedy will generally be unappreciated by fellow riders. Finally, a husband will be "loving" in a meaningful sense only if he feels love for his wife and his attitude toward his children should, according to most current theories, be as emotionally honest as possible.

of employment, social position, or political influence that requires him to hide too much of his true nature, the odds are still good that he will not starve. Perhaps by his example such conduct will tend to lose its status as a condition precedent to economic, social, and political advantage. In any event, the adoption of such an attitude has its own rewards. A little over a year ago a group of "New Left" youths set the formidable House Un-American Activities Committee to rout.<sup>15</sup> These witnesses openly defied inquisitors who, in earlier days, had terrorized the high and the mighty. The surprising result of their audacious behavior was a general condemnation of the Committee itself, even by conservative political figures.<sup>16</sup> Watching this apparent paper tiger being tormented, one wondered how it had for so many years pilloried the powerful and influential. The answer, in part, is that those earlier witnesses' very vulnerability lay in their conception of their own power and influence. For political or economic reasons, they thought it necessary to keep intact an impeccably strong anti-communist image, and any implications to the contrary which the Committee could create were feared as momentous embarrassments. The new witnesses were not concerned with their images and while most of us would agree that at least some of them went far beyond the bounds of propriety, we nevertheless should wonder whether they did not hit upon something that earlier witnesses had overlooked.

By this point a number of quite cogent questions will no doubt have occurred to the reader. It may be suggested that these young witnesses have condemned themselves to lives of political and economic ineffectiveness, but it remains to be seen whether they are better or worse than the more timid witnesses of the fifties, and in any event, it must be remembered that the witnesses voluntarily accepted that risk. Next it might be argued that the Committee is checked by an infrastructure of liberty preserved, in part at least, by those same types of liberals of the fifties who struggled to hold on

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15. The hearings opened on August 15, 1966 in defiance of a federal court injunction (dissolved on appeal) for the asserted purpose of considering a bill introduced by Representative Joe Pool of Texas, the acting committee chairman. The second day of the hearings was marked by the forcible ejection from the hearing room of a witness' attorney and the subsequent withdrawal of seven other attorneys and two witnesses in protest over the incident. 34 CONG. Q. 1843-45 (1966); N.Y. Times, Aug. 17, 1966, at 1, col. 1, 24, cols. 1-4. Ten hostile witnesses did remain to testify during the tumultuous hearings that continued through the nineteenth. They were described by the *New York Times* as "[y]ouths of the New Left, seemingly unafraid of contempt convictions . . ." N.Y. Times, Aug. 19, 1966, at 1, col. 5. As the *Times* noted, "[t]he pattern in the past had been for accused communists to invoke their constitutional right against self-incrimination and refuse to answer questions about their beliefs and affiliations. The ten youths of the New Left who appeared this week used the hearings as their first national forum to express their views." N.Y. Times, Aug. 20, 1966, at 1, col. 7. No contempt citations followed.

16. Senator Dirksen said, "[t]his spectacle can do the Congress no good." 34 CONG. Q. 1844 (1966).

to their reputations and hence political effectiveness. It may be further argued that such passive aggression and naive innocence as the "New Left" witnesses displayed will play into the hands of potential Big Brothers or more traditional fascistic elements.

Clearly, if the Committee had summary powers to imprison or execute these witnesses and the will to do so, their openness would have done them precious little good. In such a case, however, secretiveness would have probably done them little better. All nonviolent (in the broadest sense) political and social strategies<sup>17</sup> depend in some degree on the existence of human conscience and self-restraint (even where it is established by a balance of power). When conscience and restraint are absent in the rulers, the only alternatives are submission on the one hand or violent resistance on the other. The question of which strategies will be most effective in preserving and strengthening that conscience and restraint is thus one of the utmost importance. I would like to suggest the strategy of openness; totalitarians operate best in secrecy while liberty flourishes in the sunlight.

Marshall McLuhan views the world as irrevocably transformed into a global village by the electronic age,<sup>18</sup> and, as in any village, we are inextricably involved in the lives of the other villagers. If that be so, it still need not necessarily be a requiem for privacy. Such a condition could in fact foster voluntary abstention from invasions of privacy. The urban phenomena that newspapers regard, perhaps too simply, as a callous lack of concern for others may in fact be a groping in the direction of establishing an interpersonal balance between the need to show an interest in others and the need to respect their privacy. As the opportunity for observation increases, the drive of voyeurism diminishes. Topless night clubs would hardly prosper in a society where bosoms are customarily not covered. If 1984 were to come about, monitoring Big Brother's television eyes would, in a very short while, become an exceedingly dull job. The point is that in anything approaching a democratic, free society with an advanced surveillance technology one's vulnerability to snooping bears a direct ratio to the number of items that the society (and the individual) deems damaging. If a significant number of talented people in a society refused to submit to offensive psychological job tests and refused to worry about ultra-paranoid security checks, the resulting "brain drain" might bring about a revision of these practices. It would require many cooperating technicians to run Big Brother's society. Perhaps, then, the best way to begin revising society's attitude is by revising one's own. In fact, this personal re-evaluation

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17. "Non-violent political strategies" is used here to mean all political strategies that do not openly involve force or violence. The term is not limited here to that special type of political action that relies heavily on picketing, public demonstrations, or passive civil disobedience.

18. H. M. McLuhan, *supra* note 3.

might already be taking place. It may well be that those who try this course will become a hopeless minority of martyrs, but if that be so, I doubt that any federal or state statute or court decision will provide effective protection for privacy. It seems appropriate here to paraphrase Learned Hand's famous statement:

In a society so riven with voyeurism and intolerance that the spirit of openness is gone, no law can save the right of privacy. In a society where openness and tolerance flourish, very little legal protection will be needed. In a society that evades its responsibility by relying solely on the law for protection of the right of privacy, that right in the end will perish.<sup>19</sup>

#### IV. EPILOGUE

I do not mean to suggest that all of the problems posed by electronic eavesdropping and other modern incursions on privacy can be obviated by throwing down one's guard and acting as if one were oblivious to the threat. Under certain circumstances such a course of action would amount to no more than a docile walk of sheep to slaughter. If one were to find oneself in the position of, say, the political or ethnic enemies of Hitler, the best strategy might be total secrecy, concealed identity, and covert armed resistance.<sup>20</sup>

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19. The original quotation is: "[T]his much I think I do know—that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish." L. HAND, *The Contributions of an Independent Judiciary* in *THE SPIRIT OF LIBERTY* 181 (Dilliard ed. 1952). Concededly, the reviewer has somewhat modified the intent as well as the application of Hand's epigram. Hand was positing the alternative of the society expressing itself through legislative bodies; I am questioning even the efficacy of statutory laws in this particular area. There is, of course, the strong possibility that no such statutes would be enacted in a society riven with voyeurism and intolerance.

20. In *Eichman in Jerusalem*, however, Hannah Arendht discusses a popular rationalization of Germans who knew about the extermination of Jews but failed to act. Acting meant certain death. These Germans say they would have paid that price if it would have accomplished anything, but they point out that the Nazis carefully avoided allowing resisters to become public martyrs; such people just quietly disappeared. Yet Arendht asserts that the stories of those few Germans who did rebel against the genocide program generally filtered out, as it epitomized by the case of Anton Schmidt, a German sargeant executed for aiding Jews, who is a folk hero in Israel today. H. ARENDHT, *EICHMAN IN JERUSALEM* 210-12 (1953). One great irony of the "final solution to the Jewish problem" is that while it was central to Nazi theory, it was carried out in extreme secrecy. E. NOLTE, *THE THREE FACES OF FASCISM* (1965). This was not merely dictated by world opinion (which Nazis generally flouted) but also involved important domestic considerations. Under Nazi theory virtually every ethnic, political, and nationality group the world over was seen as an enemy of the Reich—yet the Reich was to endure for a thousand years. This paradox was explained by blaming the Jews for turning the world against the Nazis. If that were so, exile would only exacerbate the problem and genocide was the only solution. Yet only the most fanatic of the Nazis could carry their beliefs to this logical conclusion. Public disclosure of the genocide program would have forced the more "decent" Nazis to face up to the

What I do wish to point up is that it is impractical to isolate one aspect of the unprecedented social and technological revolution in which we are now living and try to deal with it as if other aspects of modern life were virtually static.<sup>21</sup> The current crisis in privacy seems to me to be a result of the fact that we are currently suspended somewhere between McLuhan's electronic village and a Victorian attitude that sees the value of privacy chiefly in terms of an opportunity to release emotions bottled up for the sake of public prudery and orthodoxy. I am suggesting that we probably cannot put effective legal checks on invasions of privacy so long as we draw so many sharp distinctions between what is permissible in private and what in public, that is, so long as we believe in liberty only insofar as its exercise is successfully hidden. In such a climate the advantages to be gained by snooping will continue to be too great.<sup>22</sup>

Westin carefully marshalls the evidence for his finding of a "minimum position" consensus in support of privacy and painstakingly formulates the detailed policy decisions involved in a maximum program against privacy invasions. Both jobs are well done. But the wide gap between the maximum program and the "minimum position" coalition that is to support it results in a functional flaw in an otherwise splendid effort.

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inconsistencies of their position. Thus it could be said that lack of free speech and free press was the primary factor that allowed the program to succeed.

21. Obviously, speculation about long-range future trends in a world as volatile as ours is a tenuous business, as most of those engaged in the business are the first to admit. Kahn and Weiner, for example, call their speculations "surprise-free" predictions. KAHN & WEINER, *supra* note 3. Yet they note that this is itself a built-in error, for the trends strongly indicate that a number of major surprises will no doubt occur in the next thirty-three years although there is by definition no way of taking them into account. Still it seems futile today to consider long-range legal reforms without such speculation.

22. It is axiomatic that the effectiveness of a deterrent is closely related to the countervailing inducements for the performance of the undesired act. In some areas criminal proscriptions may even indirectly increase the inducements. In illicit narcotics traffic, for example, criminal proscription makes an inherently cheap product very dear, and thus increases the inducements to those who are willing to run the risk of criminal penalties for high profits. The risk can also be minimized by careful organization and in some cases by bribing public officials. See generally A. LINDESMITH, *THE ADDICT AND THE LAW* (1965).