

1978

Privacy and the Law

Jethro K. Lieberman

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**PRIVACY
and the
LAW**

Lothrop, Lee & Shepard Company

A Division of William Morrow & Co., Inc.

New York

KF
1262
Z9
L53
1978

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Printed in the United States of America

2 3 4 5 6 7 8 9 10

Library of Congress Cataloging in Publication Data

Lieberman, Jethro Koller.

Privacy and the law.

Bibliography: p.

Includes index.

SUMMARY: Uses many case histories to trace the evolution of our privacy laws and to demonstrate the increasingly numerous and alarming ways our private lives can be and are invaded.

1. Privacy, Right of—United States—Juvenile literature. [1. Privacy, Right of. 2. Law] I. Title.

KF1262.Z9L53

342'.73'085

78-15156

ISBN 0-688-41866-X

ISBN 0-688-51866-4 (lib. bdg.)

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Why Is Privacy Important?

IN A LAND THAT TREASURES FREEDOM, THE RIGHT TO BE let alone—to enjoy privacy—is no less precious. Indeed, without privacy there would be little in life worth treasuring, and there would be no great meaning to freedom.

Suppose government officials—or anyone at all—could barge into your home at any time of night or day and demand to know what you were doing. Suppose your telephone calls were monitored, so that whatever you said would be overheard by someone you did not know was listening in. Suppose you were to discover that someone (you are not sure who) is following you everywhere you go. Or, again, suppose you have private thoughts about yourself and other people, your life, your plans for the future, which you want no one but yourself to know, and you write them down in a private diary—and someone comes along and reads that diary.

These things would no doubt annoy you. But they would do more. They would change the very way you live your life. If we are constantly watched, or afraid that we may be overseen or overheard at any moment, we will be inhibited. We will stop doing things we want to do. We will become self-conscious and guarded in our work or play.

And if we had to be wary and guarded because we had lost our privacy, America would be a very different place. People would become afraid to talk openly, to express opinions that might antagonize others. In short, we would become a conformist nation, surrendering that commitment to diversity that has kept us free for two hundred years.

So the right to privacy is an important matter, and yet it is one that most people take all too much for granted—naturally, because we generally enjoy it. But in America today there are serious threats to our privacy, and it is important to become aware of what those threats are and learn how to combat them. For unless the public understands that it is in some danger, it will not act to protect itself.

This is a book about privacy—about the privacy that we enjoy and the privacy that we are in danger of losing. Because it is a book about privacy it is also a book about our legal system, for the link between the right of privacy and the law is a close one.

That is because law is the fundamental means by which we Americans protect those valuable things we call "rights." All rights that we as a free people cherish can be spelled out somewhere in the laws of each of the fifty states and in the laws of the United States as a whole. Many of our most important rights (like the right to

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speak and worship freely) are specifically mentioned in the United States Constitution and the Bill of Rights. Yet, curiously, the right of privacy—at least a general right of privacy—is not mentioned anywhere in the Constitution or the Bill of Rights. The word “privacy” itself does not appear in those basic laws. Nor does it appear in the laws of many states.

This may seem curious. How could our privacy have been protected all along if it is not enshrined in our Constitution or other laws? The answer lies in the spirit that led Americans to seek their independence: America has always had a deep respect for the individual, and therefore for his or her privacy. But in recent times, with the development of modern machines and modern business and modern government, that respect for individual privacy has been breaking down. The threat this poses to our people is a new factor that must be reckoned with; how our privacy is threatened and what legal measures we can take to counter those threats is the subject of this book.

In the past, privacy was respected because of a moral sense common to most people. Our sense of decency and fair play tell us that it is wrong to read other people's mail, listen in on their private conversations, or spy on them. We respect everyone's privacy, as we expect everyone to respect our own, because we respect each individual as a person. But, as we will see, it was also more difficult in the past to invade someone's privacy than it is today. New machines, new processes, new techniques make it much easier to enter a room, eavesdrop, spy, collect and transmit data about people. And new kinds of warfare, commercial enterprises, financial systems, and government programs seem to give more people more

reasons for invading our privacy than ever before.

So, because it is considerably easier to interfere in the private lives of others and because there seem to be many more reasons for doing so, we need laws to protect the right of privacy today.

But when we turn to law to protect our rights we run into many problems. Laws interfere with our freedom to act, and so it is important that they say exactly what they mean and no more. Usually when we think of laws, the picture that comes to mind is a straightforward one. If the residents of a town think that cars are traveling too fast down their streets, posing a danger to pedestrians and other drivers, they can easily enough fashion a law that will restrict the speed and control the danger. Of course, merely writing down a law will not keep people from speeding. But if they know that the police will enforce the law and hand out tickets to those who violate it, most people will slow down.

But it is not possible to protect our personal privacy with a simple law like that because it would be much too narrow. For example, you could write a law that says: "No one may enter a person's home without his or her permission." But there would be difficulties with such a law. For one thing, it would conflict with other values. Suppose there were a fire and the owners were away. Would firemen be unable to go into the house in order to put it out? Suppose a burglar went inside. Would a policeman be unable to follow? More importantly, the law would not apply to other kinds of invasions of privacy, which would mean that there would need to be a whole series of other laws.

You might, then, suggest that the answer is to broaden the law. Instead of limiting it to a simple case, make it

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apply to all possible cases. For instance, it could read: "It shall be unlawful to intrude on any person's privacy." But such a law is much too broad. It might mean that you could refuse to tell anyone anything about yourself, your family, or your possessions. Such an absolute right to privacy would cause a great many complications. There could be no way for the government to raise taxes under such a law. Many kinds of crimes could be hidden under the protection of such a law. Moreover, it would not tell us much of what we as individuals could do. It would not tell us whether we could follow friends down the street, or tape-record our own telephone conversations, or photograph faces in a crowd, or write stories about people we have known, or do any of hundreds of other things. To make "privacy" into a legal right raises all kinds of practical but very difficult problems.

If we wish to have a useful law of privacy, therefore, it will have to be somewhere in between a narrow statement that prohibits specific acts (like walking into a house) and a sweeping statement that would make it impossible for anyone to move around at all. To find this middle ground, however, we cannot simply turn to some genius who has thought out all the possibilities. Life is too complicated for that. No one can foresee everything that might happen, everything that people might want to do. As Oliver Wendell Holmes, Jr., the great justice who served on the United States Supreme Court from 1902 to 1932, once wrote: "The life of the law has not been logic; it has been experience." The law is not written down at any one time and in any one place. Law evolves, through a process in which actual cases are considered one at a time. And that is how, in the chapters to come, we will try to understand the law of privacy in America.