THE FREEMAN
IDEAS ON LIBERTY

Liberty and Privacy: Connections

by Joseph S. Fulda

If property is liberty's other half, privacy is its guardian. The right to privacy is essential to the preservation of freedom for the simplest of reasons. If no one knows what I do, when I do it, and with whom I do it, no one can possibly interfere with it. Intuitively, we understand this, as witness our drawing the curtains and pulling the window shades down when prowlers are about. The threat to freedom comes from both the criminal and the state, from any and all ways and means in which others forcibly overcome our will. Just as we do not want burglars casing our homes, we should fear the government's intimate knowledge of the many details of our daily lives.

Although equally critical to liberty, privacy rights, unlike property rights, are not enumerated in the Constitution (except for the fourth amendment's protection of "persons, houses, papers, and effects" from unreasonable searches), although throughout most of our history Americans have retained their right to privacy. Today, however, this right is insecure as the courts, except in a few cases, have been unwilling to find in privacy a right retained by the people as suggested by the ninth amendment's declaration and, despite *Lopez,*[1] have been unwilling to bar legislated invasions of privacy on the grounds that they are simply outside the scope of the few and well-defined powers granted by the Constitution to the Congress.

Nor is privacy from the snoop afforded that much more protection today. Few, indeed, are the invasions of privacy regarded as criminal, rather than tortious, and many are not actionable at all. Paradoxically, the argument has been that one has a liberty to invade the privacy of others, if there is no reasonable expectation for that privacy. That may sound reasonable, but it forms what engineers term a positive feedback loop: The more privacy is invaded, the less reason one has to expect privacy, and therefore the more it may be invaded. This faulty jurisprudential theory has single-handedly eviscerated tort law and rendered the only specific privacy protection in the Bill of Rights—that barring unreasonable searches—weaker and weaker. The proper response to this flawed reasoning is simple: People often expect, in the sense of justly demand, what they cannot expect, in the sense of predict. We may thus have a *right* to expect our privacy to be respected in the former sense, whether or not we may expect it to be respected in the latter sense. Expectations, in other words, must be defined against a *fixed* standard of reasonableness, not one programmed to continuously decay.

The most egregious governmental violation of our privacy lies with our tax system, which is frankly frightening, as the potential for the destruction of liberty arising from the reams of information returned annually to the government is vast. The government is told our family size, our occupation, our business associates—employers, employees, contractors, partners, and the like (and, if we report barter income, some of our friends, as well), our holdings (unless we realize neither profit

Joseph S. Fulda, a contributing editor of The Freeman, *has been published frequently in scientific journals, philosophical journals, mathematics journals, law reviews, and journals of opinion.*

nor loss from their transfer and, also, gain no income while we continue our ownership), our schooling (unless it is not relevant to our work), and our provisions for retirement. Although no one may expect such dire consequences, the potential exists for such diverse state initiatives as population control programs, mandatory occupational tracks, massive interference with freedom of association, and enforcement of any or all of these by threat of loss of our holdings. Without this tax-related information, such interferences would be impossible. It is no accident that totalitarian systems in which there is no freedom whatsoever also tolerate no privacy. For Big Brother to act, he must know, and state surveillance with spies everywhere was a staple of the now-fallen totalitarian regimes.

Nor are these concerns the idle musings of a libertarian alarmist. Buried deep in the pages of the Federal Register is news that the IRS is implementing a massive new initiative, styled Compliance 2000.[2] At the heart of the initiative is "a huge database" with "personal information on every American" gathered from records kept by "other federal agencies, state and local authorities, private organizations and the media." The regulation giving notice of this massive new database, composed of records from cyberspace as well as more traditional sources, stated that Compliance 2000 is "exempt from the notification, access, and content provisions of the Privacy Act [1974]." In other words, "[t]his means that the IRS doesn't need permission to get information, doesn't need to show it to you, and doesn't need to correct the information even if it's wrong." Privacy groups such as EPIC (Electronic Privacy Information Center) and business groups such as the DMA (Direct Marketing Association) strenuously opposed the initiative, but it went forward anyway. The IRS hopes to look at what is consumed as a check on the self-reporting of what is produced, but the potential for abuse and, according to the DMA, for chilling legitimate businesses is obviously vast.

And, just as the state, in this initiative and more generally, threatens privacy, the market protects it. Consider the market institution of money. Money must be portable, durable, and limited in quantity but the value of money lies not only in what it can buy, but also in its protection of privacy. Under a barter regime, everyone I buy from knows what I produce, and everyone I sell to knows what I consume. In the cash economy, only my customers know what I produce and only those from whom I purchase know what I consume. That is why the black-market cash economies of the once-totalitarian regimes of Eastern Europe were synonymous with the bits and pieces of freedom that survived there. Of course, cash transactions protect privacy from the snoop as well as from the state. With my bank-issued MasterCard number, for example, any mail-order merchant can find out the sum of my purchases and cash advances, my last payment, my next due date and minimum amount due, and my credit line, for all it takes is the credit card number and my zip code, the former of which he must have to claim payment and the latter of which he must have to deliver the goods.

To a lesser extent, even the serial numbers on paper money abridge privacy, as those who engage in businesses the feds do not approve of, such as the drug trade, have found out. Bank holdings are even more vulnerable, because upon transfer of large amounts of cash from accounts (marked with an ever-present Taxpayer Identification Number), the government is immediately notified. The new industry now known as money-laundering provides nothing but privacy-protection services to the rather large market spawned by various federal prohibitions—and this simple fact holds, whatever one's opinion of the nature of the enterprises whose privacy is being protected.

Privacy is the great shield of freedom from interference. Everyone who savors freedom will champion the right to privacy. □

1. *United States v. Lopez*, 115 S. Ct. 1624 (1995). (Editor's note: see Eric Hagen, "Putting the Framers' Intent Back into the Commerce Clause," pp. 813-816 of this issue.)

2. The facts and quotes are from Farhan Memon, "Revealed: IRS Is Tracking You in Cyberspace," *The New York Post*, February 16, 1995, pp. 32, 38.

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The Southern Tradition: Implications for Modern Decentralism

by Thomas Woods Jr.

The American tradition of decentralism has attracted adherents on both sides of the ideological spectrum and from all sections of the country. William Appleman Williams, a man of the New Left, actually preferred the Articles of Confederation over the Constitution, and insisted that the "core radical ideas and values of community, equality, democracy, and humaneness simply cannot in the future be realized and sustained—nor should they be sought—through more centralization and consolidation. These radical values can most nearly be realized through decentralization and through the creation of many truly human communities." Students for a Democratic Society leader Carl Oglesby, in his book *Containment and Change,* pointed with approval to such right-wing partisans of the old republic as Howard Buffett and Garet Garrett, and went so far as to declare that "in a strong sense, the Old Right and the New Left are morally and politically coordinate."

While decentralist and even secessionist sentiment was widespread throughout the North at least through the early nineteenth century—recall, for example, that former Secretary of State Timothy Pickering twice garnered support for a plan by which New England and New York would secede—these principles remain most closely associated with the American South. And yet these principles, while securely grounded in the Constitution, found their salience for the average Southerner less in their cogency in the realm of abstract theory than in the natural loyalties he felt toward the persons and institutions closest to him. Nathaniel Hawthorne, himself a Southern sympathizer, once remarked that a state was about as large an area as the human heart could be expected to love, and that the local and particular would always possess a stronger claim on the individual's allegiance than such a distant abstraction as "the Union." John Greenleaf Whittier once wrote of that exemplar of the old South, John Randolph of Roanoke:

> Too honest or too proud to feign
> A love he never cherished,
> Beyond Virginia's border line
> His patriotism perished.

Thomas Jefferson, among the most forceful advocates of localism in early America, pointed in 1791 to the decentralist Tenth Amendment as the cornerstone of the American republic: "I consider the foundation of the Constitution as laid on this ground: That

Mr. Woods, a founding member of the Southern League, is a doctoral candidate in history at Columbia University. This paper was delivered in June 1996 at the E.F. Schumacher Society Decentralist Conference held at Williams College in Massachusetts.