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## Book Review [Dossier: The Secret Files They Keep on You]

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## BOOK REVIEWS

DOSSIER: THE SECRET FILES THEY KEEP ON YOU. By Aryeh Neier. New York: Stein & Day. 1975. Pp. 216. Cloth. \$7.95.

*Reviewed by* JON L. MILLS\*

Americans' penchant for files has resulted in a system featuring dossiers that follow us from cradle to grave. Aryeh Neier, in *Dossier: The Secret Files They Keep on You*, presents a comprehensive catalog of the types of records currently kept on Americans. The book is replete with explicit examples of abuses of the system and suggestions for reform.

The author details the various records which are kept on Americans, including school records, military records, medical records, credit records, criminal records, and even political records. The key, as the author recognizes, is the purpose for which these files are used. In our society they affect the most important and fundamental aspects of our lives, from advancement in school, to employment, to credit.

It is interesting to recognize that the United States is a bit schizophrenic in its attitude towards information. While there is a movement toward more openness in government and in favor of such reforms as financial disclosure by political candidates, there is an equally strong movement to protect the rights of personal privacy. Followed from cradle to grave by a set of ever-expanding files gorged with fact, fictions and gossip, Americans are becoming increasingly anxious about the remnants of their "right to be let alone."<sup>1</sup>

A major problem caused by the proliferation of dossiers is that most people do not know what the files say about them. In Kafka's *The Trial*, the bewildered protagonist went through byzantine legal procedures without ever knowing the offense with which he was charged. In a sense, our system of secret dossiers is worse: often we do not even know that we've been accused.

More disturbing is the increased capacity for the production and use of personal information. In 1890 the landmark Warren and Brandeis law review article warned, "Numerous

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\* Executive Director, Center for Governmental Responsibility, Holland Law Center, University of Florida.

1. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) [hereinafter cited as Warren & Brandeis].

mechanical devices threaten to make good the prediction that 'what was whispered in the closet shall be proclaimed from the housetop.'"<sup>2</sup> This statement, made long before electronic bugging and wiretaps, was tragically prophetic. Technology makes dossiers easier to compile and computers ensure easy access. While computers are not the villain, as the author recognizes, they do facilitate use of dossiers to the extent that abuse becomes easier.

The author describes types of records kept, who keeps them on whom, the accuracy of records, and their impact.

School records may have a severe effect both on subsequent educational advancement and on employment opportunities. For example, Neier cites an example of a black girl in a sixth grade class for intellectually gifted children. The child was described as "eager to succeed in class—works very hard here at school assignments." A different teacher described her as "extremely hostile, anti-social behavior—does not socialize with children of other races or backgrounds."<sup>3</sup> Records kept in such typically anecdotal fashion invite abuse.

The Congress has made a recent attempt to ameliorate the problem of files. The Buckley Amendment to the Elementary and Secondary Education Act<sup>4</sup> says parents may review files which directly relate to their children, and are entitled to a hearing to challenge the content of the child's record. The Act also denies federal funds to any school which permits the release of records for problem students without the written consent of their parents.

Another record which may be created early is of juvenile offenses. According to Neier, laws relating to confidential juvenile records are routinely violated or circumvented. For example, the United States Army requires all enlistees to sign a statement allowing access to juvenile records.<sup>5</sup> As the author explains, juvenile records "hold vast amounts of information based on unreviewed observations of police or probation officers."<sup>6</sup> Among the offenses recorded on the so-called youth division or "YD" card of the New York City Police Department are pitching pennies, throwing snowballs, using profane language,

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2. *Id.* at 195.

3. *DOSSIER* at 21.

4. 20 U.S.C. § 1232g (Supp. 1975).

5. *DOSSIER* at 50.

6. *Id.* at 53.

and smoking. Even more interesting, a record is made for children who are victims of sexual assault.<sup>7</sup>

A precedent-setting dossier case in New York City resulted in a court order requiring expungement of the arrest records of a 14-year-old and a 15-year-old arrested during demonstrations. The court stated that since future employers would probably have access to these records, expungement was necessary.<sup>8</sup> However, it should be noted that once such records have been forwarded to the FBI, the court cannot order expungement of the file.

Even more frightening is the chapter in which the author describes "predelinquency" programs through which various agencies examine the *propensity* of children to commit crimes. Appropriately, the author suggests that this is reminiscent of the "social predestination room" in Aldous Huxley's *Brave New World*. The practice of making such determinations is profoundly offensive and the damage that could be done by the dossiers is frightening to contemplate.

Drug addiction records also pose a serious problem. For example, the New York City Transit Authority, a source of more than 42,000 jobs, refuses to employ any participant in a methadone program.<sup>9</sup> There have been several articles on drug addiction records which have discussed this problem in depth.<sup>10</sup> The commentators generally agree that drug addiction records should be treated like confidential medical files rather than criminal records. Some states, however, have laws requiring physicians to report treatment of addicts.<sup>11</sup> In addition, the Client Oriented Data Acquisition Process (CODAP) was adopted in 1971 to determine the extent of the drug abuse problem. The Comprehensive Drug Abuse Prevention and Control Act of 1970 and the Drug Abuse Office and Treatment Act of 1972 govern confidentiality of records of drug addicts in methadone programs, and the 1972 Act provides, with specified exceptions, that no such record may be used against a patient for criminal matters. There are, however, loopholes.<sup>12</sup>

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7. *Id.*

8. *Id.* at 49.

9. *Id.* at 59.

10. See, e.g., McNamara & Starr, *Confidentiality of Narcotic Addict Treatment Records: A Legal and Statistical Analysis*, 73 COLUM. L. REV. 1578 (1973); Symms & Hawks, *The Threads of Privacy: The Evolution of "Right to Privacy" and Current Legislative Trends*, 11 IDAHO L. REV. 11 (1974) [hereinafter cited as Symms & Hawks].

11. Comment, 20 VILL. L. REV. 800, 802 (1974-75).

12. See *id.* at 813-20.

The records of psychiatric hospitalization or treatment also present a problem. For example, the author reports that one court held that an individual could be refused admission to medical school based on the existence of mental hospital records. The judge concluded that while the fact that the applicant has once sought treatment in a mental hospital was not cause to deny admission, the sickness which led to treatment was.<sup>13</sup> The impact of the mere existence of psychiatric records can be testified to by Senator Thomas Eagleton, who was removed from the Democratic ticket in 1972 after reporters discovered records of shock treatments.

Military discharge records have a crucial effect on employment. Previously, discharge records carried a separation program or designation number. These numbers were codes indicating discharge for homosexual tendencies, being a shirker or being guilty of disloyalty or subversion. Another type, a "general discharge," is described by the Air Force manual as "a definite disadvantage to [a veteran] seeking civilian employment."<sup>14</sup>

Perhaps the most damaging records are those which relate to criminal offenses. Arrest records, like many others previously mentioned, have a severe effect on employment opportunities. The problem with arrest records is that they show only that a person has been detained, not that he has ever been convicted of wrongdoing. Some states are attempting to eliminate this unfair result. In Illinois, it is an unfair labor practice to deny a job on the basis of arrest,<sup>15</sup> and in New York, human relations boards have made it unlawful to ask questions based on arrest records.<sup>16</sup> One of the strongest actions was a Colorado Supreme Court decision in which the court ruled that police can retain the arrest records of persons not convicted of any crime only if the need to retain the record is adequately demonstrated.<sup>17</sup>

Conviction records are a somewhat different matter. As the author states, "Conviction records have the greatest probative value" of any of the records described.<sup>18</sup> However, serving a sentence is supposed to pay the debt to society. The

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13. DOSSIER at 70.

14. *Id.* at 89.

15. *Id.* at 99.

16. *Id.* at 102.

17. *Id.* at 105.

18. *Id.* at 113.

author argues that denial of employment "violates due process if lifelong."<sup>19</sup> Neier also notes that the critical period in the rehabilitation process is immediately after release from prison—often the time when the record of conviction has the worst effect. For example, the federal civil service previously refused to hire any person with a conviction more recent than two years.<sup>20</sup> A few states have attempted reforms in this area. For instance, Hawaii makes it unlawful to discriminate against ex-convicts,<sup>21</sup> while Montana, in 1972, enacted a state constitutional provision providing for full restoration of employment rights upon the completion of a criminal sentence.<sup>22</sup>

Credit records collected by commercial credit information companies can present a major problem for individuals. The author reports that those who collect credit data believe adverse information is more desirable than positive information and in fact occasionally fabricate reports to improve their "quality."<sup>23</sup> The credit files discussed by the author are more than descriptions of delinquent bills; they are gossipy and, as some credit compilers admit, occasionally false. A former investigator described an incident in which a Miami woman had been denied automobile insurance because neighbors identified her as a "lady of the evening." A later check with 10 neighbors revealed that the report was completely without foundation and had its source in a single interview with the "neighborhood nut."<sup>24</sup> The federal government recently has taken action to curb abuse of credit dossiers. The 1971 Fair Credit Reporting Act gives applicants a right to know contents of files, but only when credit is denied.<sup>25</sup> The Act requires that the person denied credit be supplied with the name and address of the credit company that supplied adverse information. One state has a similar law, in effect since 1910, which entitles a person to notice prior to a report on financial or credit standing.<sup>26</sup>

Political dossiers are perhaps the least supportable of all files in light of first amendment protections. Recent examples of political intelligence-gathering are legion, but perhaps the

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19. *Id.* at 114.

20. *Id.* at 111.

21. *Id.* at 117.

22. *Id.*

23. *Id.* at 139.

24. *Id.*

25. *Id.* at 137.

26. *Id.* at 144.

largest scale occurrence was in 1969. After several hundred thousand people went to Washington, D.C., in November, 1969, to protest the war in Vietnam, many of them having paid for their trips by checks made out to the Fifth Avenue Peace Parade Committee, sponsoring the rally, FBI agents visited the Committee's bank to look at the names on the checks. The FBI's political intelligence files are consulted by the federal government and by state and local governments when checking job applicants. The law relating to political dossiers is uncertain. In *Laird v. Tatum*,<sup>27</sup> for instance, the Supreme Court refused to enjoin Army intelligence-gathering activities despite the alleged chilling effect on first amendment rights.

A fact of particular interest is that, proportionately, blacks appear to accumulate more records than whites. In addition, younger persons are accumulating more records than older persons. As Neier demonstrates, dossiers tend to have a negative impact, and proliferation is no particular recommendation. The author makes a credible argument that the existence and use of dossiers on young blacks is a contributing cause of unemployment among them; the fact that these files—some accurate, some inaccurate—reflect undesirable information unquestionably contributes to the difficulty of a black obtaining employment.

*Dossier* does not focus on analyzing the law relating to information files, nor is the book a "how to" guide for victims of dossier abuses. The law is discussed as it applies to various types of dossiers. In the last chapter, the author examines constitutional principles dealing with privacy without speculating on future developments.

The right of privacy has not been precisely defined. One reason may be the subjective nature of privacy. The 1890, Warren and Brandeis article stated that "the common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."<sup>28</sup> That right was recognized by the Supreme Court in *Griswold v. Connecticut*,<sup>29</sup> the opinion by Justice Douglas drawing on the third, fourth, fifth, ninth and fourteenth amendments as bases for the constitutional right of privacy. Subsequently, the Court has shown little tendency to

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27. 408 U.S. 1 (1972).

28. *Warren & Brandeis*, *supra* note 1, at 198.

29. 381 U.S. 479 (1969).

expand the right.<sup>30</sup>

Because there appears to be little chance of the courts substantially extending the privacy concept to cover all the problems caused by dossiers, legislative reform may be necessary. But changes in laws are not the final answer since in many respects the availability of dossiers merely exacerbates already existing social problems, such as reluctance to hire drug addicts and ex-convicts. Even if dossiers no longer existed, it would be difficult to eliminate negative reactions to a criminal record, for example. In short, the law alone cannot cure abuses relating to dossiers.

After suggesting several ways of handling the problem, Mr. Neier concludes that the best solution would probably be to burn the files. However, he does recognize the practical and political barriers which would probably preclude this alternative. Other alternatives include the sealing of files, notification of the party on whom files are kept and prohibition of the use of files for certain purposes. Mr. Neier suggests the best alternative would be a combination of the above. Another solution to dossier problems is possible. Abuse of dossiers may be lessened by discouraging misuse by individuals who have custody of them. To protect ourselves from abuses of the private sector, courses of action in tort could be pursued. As regards the public sector—police and public officials—civil sanctions might be an effective deterrent to misuse.

Mr. Neier gives primary recognition to the need to protect the right to work. The ability to seek a job without unnecessary or unjustified interference has almost the stature of a property right. In Warren and Brandeis' classic article on privacy, they suggested that privacy is a corollary of the right to life and the right to be let alone, and they continually alluded to property rights. The right to privacy, when coupled with the right to work, suggests a stronger constitutional protection than either alone.

The difficulty in creating legal alternatives for solution to the dossier problem is that not everything can be legislated. As stated above, societal attitudes are a major problem. Even if the files were destroyed, the information they would have contained may be obtained from other sources, and the results might be the same. Such fundamental problems as the employability of an ex-convict cannot be resolved by destruction of

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30. See Symms & Hawks, *supra* note 10.

files alone. What is important about the use of files, Neier emphasizes, is what society believes is forgivable and unforgivable. The existence of information in a file which society treats as forgivable will not irreparably harm an individual; however, when society considers something unforgivable, the existence of that fact in a dossier can harm a person permanently.

Charles Fried has said that the right to privacy is the right to control information about oneself.<sup>31</sup> The technological society has precluded that total control if we choose to participate in society. As Professor Arthur Miller stated in his article "Privacy in the Corporate State: A Constitutional Value of Dwindling Significance," the "group person" will support the overriding interests of the state over an individual right to privacy.<sup>32</sup> He concludes that the state's compelling interest will always take precedence over individual rights, citing language in *Roe v. Wade*.<sup>33</sup>

It appears that if individuals are to be protected from abuses resulting from the existence of dossiers, the state and the society must acknowledge a right to privacy and define its limits. It has been shown that such a right will not be and has not been absolute in the modern corporate state. Despite the constitutional doctrines and common law rationale cited by Warren and Brandeis, the right to privacy has been circumscribed, and as a society we have acquiesced.

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31. Fried, *Privacy*, 77 YALE L.J. 475, 482 (1968).

32. Miller, *Privacy in the Corporate State: A Constitutional Value of Dwindling Significance*, 21 J. PUB. L. 3, 21 (1973).

33. 410 U.S. 113 (1973).

SOCIAL SECURITY: THE FRAUD IN YOUR FUTURE. By Warren Shore. New York: Macmillan Publishing Co., Inc. 1975. Pp. x + 238. \$7.95.

Reviewed by MORTIMER GETZELS\*

A widely distributed government booklet, *Your Social Security*, states:

The basic idea of social security is a simple one: During the working years employees, their employers, and self-employed people pay social security contributions which are pooled in special trust funds. When earnings stop or are reduced because the worker retires, becomes disabled, or dies, monthly cash benefits are paid to replace part of the earnings the family has lost.

For forty years Americans have accepted this statement without question. In *Social Security: The Fraud in Your Future*, Warren Shore, former consumer affairs editor of *Chicago Today*, demonstrates that much of it is "either wholly wrong, partially wrong, or intentionally misleading."<sup>1</sup> He then proceeds with hard facts and disquieting figures to make out a case against the present Social Security system.

The first hard fact is that there is no "trust fund" and there hasn't been one in years. A fund should grow to keep up with the increase in the number of beneficiaries it is intended to protect. It should have sufficient reserves to pay benefits in any given year using only a fraction of its assets. It should be "owned" by those who contributed or persons they designate.

Instead of growing, the Social Security fund has dropped. In 1947 the reserves were sufficient to guarantee 17 years of payments. By 1966 the fund could pay benefits for about 13 months, and in 1975 for only 8 months. Ten percent is regarded as a safe reserve for private insurance. The total of \$1.8 trillion of private insurance in force in 1973 was backed by reserves in excess of 10 percent, amounting to \$208 billion. The reserves for \$2.9 trillion in Social Security obligations in 1974 amounted to \$44.5 billion—less than 1 percent. In 1972 private insurance paid out 9.7 percent of its reserves in benefits, Social Security 97 percent. Social Security benefits paid in 1974 amounted to

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\* Attorney in Charge, Brooklyn Office for the Aging, The Legal Aid Society of New York.

1. W. SHORE, SOCIAL SECURITY: THE FRAUD IN YOUR FUTURE 6 (1975).

133 percent of reserves.

The position of the board of trustees of Social Security appears to be that only token reserves are needed because a compulsory insurance system guarantees continuing income from more and more workers coming into the program. But this is predicated on an increasing birthrate, full employment and an expanding economy. The present reality is a declining birthrate, unemployment and business recession.

Social Security holds itself out as a government insurance plan whereby, in return for a contribution or premium, the worker has a legal right to benefits, with the same recourse to the courts for payment available with private insurance. The hard fact is that the "premium" is actually a tax collected by the Internal Revenue Service (an amount which is also taxable to the worker as income!) and the vaunted "coverage" it buys is riddled with escheats, forfeitures, gaps, limitations and exclusions.

A glaring difference from ordinary insurance is that the worker does not have the right to designate his beneficiary, and that upon death, no money is automatically paid to anyone. A wife, as such, is not entitled to benefits; she must be caring for dependent children if she is under 62. If Social Security determines that the worker left no dependents, what he paid in is lost. All workers under age 46 must contribute for at least 10 years to acquire the right to any retirement benefit, and if there is less than 40 quarters of coverage there is no return of what was paid in.

Shore cites the case of Ephraim Nestor, a naturalized citizen who lived in the United States 43 years, for 20 of which he and his employer paid into the Social Security system. In 1956 Nestor was denaturalized and deported after he admitted being a member of the Communist party between 1933 and 1939. The Supreme Court held that he forfeited his Social Security pension, and his wife lost her share by the same attainder.

Private insurance pays off on the basis of fixed premiums. Social Security benefits are based on average taxable earnings. By the averaging rule, less than maximum benefits may be paid even though maximum contributions were paid in the year of death or disability. And the longer the worker is in the system the lower the benefit is likely to be, because more low tax years are averaged in.

The earnings limitation imposed on Social Security recipients, whereby \$1 in benefits is lost for every \$2 earned in excess

of \$200 per month, inflicts economic hardship and damage. The effect on a surviving widow, for example, is to drive her out of the labor market, which both depresses her standard of living and lowers income tax revenues.

In the chapter entitled "We've Got You Covered," Shore compares Social Security and private insurance protection as it would affect the hypothetical Williams family, consisting of Richard, age 35, a salesman who has always paid maximum Social Security tax, and his wife Mary who cares for their two children, aged three years and four months, in the home. If Richard, who has worked since 1962, died in 1975, the government estimates the value of the death and survivors' benefits payable over the years at \$213,762. There would be a lump sum payment of \$255, and Mary and the children would receive \$651.60 per month until the younger child reached 18, for a combined total of \$138,394. Mary's benefit would stop at that point, but the children would continue to receive \$558.40 per month until the older child reached 22, assuming he remained a full time student. Then a \$279.20 per month single student's benefit would be paid for the younger child. Mary can apply for a widow's benefit of \$266.20 per month as early as age 60. If she survives to 78, her annuity would be \$57,499.20. Thus total death and survivors' benefits of \$213,762.20 would be payable on \$1,544 in Social Security taxes contributed by Richard and his employer in 1974.

Shore points out, however, that the real potential value of the offer to the Williams family is only \$107,143 and the risk that Richard will die at 35 is less than three chances in 1000 actuarially. For Richard to guarantee his family total future payments of \$213,762.20, he would need an estate of \$107,143 in the year he dies. At age 35 he could buy that amount in life insurance for a premium of \$544.50 and Mary would receive immediately \$107,143 in cash, tax free. Invested in savings certificates at 7-½ percent, the monthly interest would be \$670, with the principal intact. Under Social Security, benefits would drop as each child reached 22 and would be suspended for three years until Mary was eligible for widow's benefits at 60. In comparison, the private plan would have paid a total of \$201,000 without interruption by the time Mary reached 60, with the original capital of \$107,143 intact for the purchase of an annuity. While private interest and annuity income are subject to income tax, Mary would still be \$137,000 better off than with tax free Social Security benefits. It is difficult to refute the

author's charge that the difference between the value of what is paid into Social Security and what is offered in return "amounts to the largest-scale swindle in financial history."<sup>2</sup>

Without begrudging older Americans their entitlements, the author sees Americans under 40 as a generation of victims. A 22 year-old in 1975 expecting to earn a middleclass salary during his working life will pay at least \$289,000 into the system. A worker retiring in 1975 could not have paid more than \$13,736 (including employer's share) at a tax rate of 2.48 percent—an average of \$30 per month—for at least \$316 per month in benefits. His benefits at retirement are more than twice what he could have purchased for himself by investment. To pay for this, the 22-year-old will be taxed at an average rate of 6.4 percent and receive for a return 24 percent less than he could buy for himself.

Another prime victim is the working wife. She arrives at retirement eligible for her own worker's retirement and a wife's benefit based on her husband's earnings. On the basis of the rule that whenever a worker is eligible for two benefits, the higher is paid, her personal benefit (since she probably earned less than her husband) gets cancelled out and whatever she paid is lost.

The author proposes, as a way out of the morass, a plan he calls "The New Generation Compact," which would retain the Social Security concept of one generation of workers paying for the benefits of the preceding generation, but without victimizing the younger generation. His scheme is a gradual changeover from Social Security to a private social insurance system. Within a period of two years the insurance industry would offer a package of life, retirement and disability coverage to those entering the job market, who would be compelled to elect either the present law or the private offer. For each new worker who elects private coverage, the insurance carriers would assume the obligation to pay benefits to one newly retired worker, beginning a year later. The premium for each plan would be the same for every worker earning the same taxable income, but the coverage categories would vary to suit the individual situation. In the case of the single or childless person, for example, a higher percentage of the premium would go for retirement. The retirement portion would be fully deductible for

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2. *Id.* at 56.

income tax purposes, for which there is precedent under the laws providing for the individual retirement account and the Keogh Plan. The earnings limitation and the two-benefit exclusion would be eliminated. Workers electing to remain under Social Security would have the benefit of the proposed reforms, especially the revised tax status of the retirement portion. Based on the usual methods of private insurers for financing debt, the new plan would be generating net income within seven to nine years and operating at a profit before the eleventh year.

Intrinsic flaws are not readily apparent in this scheme. Yet the idea of phasing out to private enterprise a compulsory program that affects the lives and futures of millions of people in the most fundamental way stirs a gut reaction. Even the author recognizes that "the American government cannot casually transfer its right to collect taxes."<sup>3</sup> The mind boggles a little at the prospect of the Internal Revenue Service becoming a premium collector for the insurance business. More seriously, converting federal social security to private insurance contracts with a myriad of carriers would mean subjecting claimants to the varying interpretations of Departments of Insurance, Claims Boards and courts in 50 or more jurisdictions.

Regardless of the feasibility of the New Generation Compact he proposes, Warren Shore has rendered a genuine service in exposing Social Security shortcomings and its outright deceit. He has written a good and valuable book. It merits the widest possible audience, particularly among those who have the power to bring about change.

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3. *Id.* at 130.