THE SLOW EMERGENCE OF DATA PROTECTION IN BRITAIN

Colin Mellors and David Pollitt
School of European Studies
University of Bradford, UK

Abstract

The Data Protection Act, 1984, is the culmination of two decades of intermittent pressure for legislation. Ultimately, the legislation emerged as a consequence of commercial pressures and the need to ratify the European Convention. Civil liberties groups maintain that the Act fails to meet the threat to privacy, but have tended to shift their attention towards the more politically controversial issue of freedom of information. Some indication of the likely effectiveness of the legislation may be gained by reviewing the experiences of those countries which pioneered data protection controls.

Paper prepared for the Joint Session of Workshops of the European Consortium for Political Research on 'Confidentiality, Privacy and Data Protection', Barcelona, 25th - 30th March 1985.

The Slow Emergence of Data Protection in Britain

It is fitting that 1984 should have been the year in which Britain finally enacted legislation 'to regulate the use of automatically processed information relating to individuals'. The passing of the Data Protection Act in July perhaps gave some small credence to Mrs Thatcher's assertion in her New Year message that Orwell's gloomy foreboding about the year 1984 had been misplaced.[1] In other respects, however, the year did live up to expectations or, rather, some seemed to make every effort to exploit its notoriety. Journalists, not surprisingly, made much of the introduction of a new plastic, computer-readable, National Insurance Card complete with magnetic strip that could contain information invisible to the card holder. They similarly detected sinister motives in the story that infra-red cameras, connected to a computer capable of checking registration plates for stolen vehicles, had been installed on a motorway bridge north of London.[2] The Government also appeared intent upon fuelling public concern through its vigorous commitment to governmental secrecy, most clearly expressed in the separate prosecutions of two civil servants under the controversial Section Two of the 1911 Official Secrets Act. It is hardly surprising that 1984 should have been chosen for the launch of a new campaign against the Official Secrets Act in particular, and for more open government in general.[3] In the event, the ever-growing pressure for more freedom of information continues to be met by strong official resistance. In contrast, the demands for a data protection law, which stretch back over two decades, were finally conceded. In so doing, Britain came into line with those eight other European countries who had already legislated in this area.[4]

The Data Protection Act is not the first piece of British legislation designed to limit the disclosure of information: the Franks Committee noted over 60 statutes making it a criminal offence to disclose information, but most of these concerned government information.[5] Indeed, British law is littered with controls over specific aspects of privacy covering, for example, laws on trespass, nuisance, negligence, deformation, passing off, wilful infliction of physical harm, breach of confidence, contract and copyright. The Consumer Credit Act of 1974 had paved the way for individuals to contest and, if necessary, correct misleading information about themselves, but the Data Protection Act (DPA) is the first to cover the field of data handling in its widest sense. It reached the British statute books just nine years after the first government promise to legislate and, like similar measures in other countries, essentially attempts to reconcile the protection of personal privacy

in respect of the recording, storage and use of personal data with the administrative and commercial benefits associated with the development of electronic data banks. Of these two objectives, however, the promotion of commerce seems to have been rather more influential than the notion of protecting personal privacy in persuading the Government to legislate.

The Concern with Data Protection[6]

The issue of data protection is, of course, an adjunct to our growing concern with the concept of privacy. It is the difficulties which are associated with making a precise, legally-workable, and socially acceptable, distinction between an individual's 'private' and 'public' spheres which has tended to move the practical, as opposed to the theoretical, basis of the privacy debate towards the concrete issues involved in data protection.

Privacy itself is a recent concern and was not, for example, explicitly taken up in any early catalogues of basic human rights and liberties. The 'right to be let alone' was not specifically cited before the late nineteenth century largely because it was both assumed and not generally threatened. Privacy itself is not new - it is the concern that we may be losing it that is new. Thus, by the middle of the twentieth century, a respect for privacy had been enshrined in the Universal Declaration of Human Rights, the United Nations Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The concept of individual privacy assumes that there are areas of a man's life which he may legitimately seek to protect from intrusion by others. A need for private space is visible among many animals[7] and the Younger Committee even went so far as to suggest that mental stability may be affected if human privacy needs are not fulfilled.[8] Social and psychological needs of privacy do not, however, help the lawmaker. Moreover, the right to seclusion is inevitably qualified by the responsibilities of being a member of society since, as the Younger Committee concluded, an unqualified right to be let alone would be 'an unrealistic concept, incompatible with the needs of society'.[9] This balance between the individual's right of privacy and wider social needs was also recognised by the Justice Committee: 'There are innumerable examples of where the individual's desire to preserve his privacy has to yield to the greater needs of the community to regulate its affairs for the benefit of all its members.[10] In any case, the need for personal seclusion is firmly culture-bound, varying between societies, generations, individuals and even within individuals at different times.

Faced with the difficulties of giving legal precision to the concept of privacy, the debate moved towards the specific area of the handling of private information. Thus Westin has argued that privacy is 'the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others'.[11] In a similar vein, Miller suggested that the basic attribute of an effective right of privacy is 'the individual's ability to control the circulation of information relating to himself'.[12] It is not surprising that the privacy debate has focused on the specifics of handling personal data since it may be argued that it is the increasing appetite for personal data, and the new technology to fully exploit this data, which has posed the most potent threat to personal privacy.

Both public and private sectors have an increasing need for personal data, the main difference being that governments can frequently make the surrender of information an obligation, whereas a private organisation often has to persuade the individual to release data, perhaps in return for the services such an organisation might provide. The welfare state, in particular, has stimulated the Government's appetite for data, since social provision generally requires proof of social need. Such data may be surrendered by claimants (sick, unemployed etc) or be collected as a means of measuring wider social demands (census, pattern of disease, housing, transport requirements etc). In most cases the surrender of information causes little difficulty since those who collect the data - whether they be governments, banks, building societies or credit bureaux - enjoy the cooperation of the public. Personal information is divulged to those bodies in return for the benefits and services which are obtained as a result. There are, however, a number of implicit assumptions surrounding the release of this information, in particular that: the information is wholly necessary; the information is accurately recorded; the information is neither misused nor, accidently or deliberately, divulged to other persons; and, sometimes, that information is only retained for so long as is absolutely necessary. It is the fear that such principles are not always observed, and that public or private agencies misuse information collected without our permission, which is at the centre of recent concerns with privacy and data protection.

Not surprisingly, the more covert forms of data collection and public surveillance raise the gravest fears of civil liberty campaigners. It is often argued that the legitimate need for secrecy in some police and national security activities is carried to an unwarranted extent in Britain.[13] The threat to privacy through the handling of data was not seen to be limited, however, to the activities of police and national security agencies. It has long been argued that our awareness of the threat to privacy coincided with the advent of computer

technology.[14] Privacy is partly protected in manual record systems through the sheer bulk of the system which deters the excessive collection and retention of files. Perhaps more importantly, the interchange of data is difficult to accomplish in a manual system. Electronic equipment puts matters on a new footing: storage is much less of a problem and, more significantly, linking separate data stores, and thus realising the interactive potential of data, is a simpler task. It was, therefore, the advent of computers which firmly brought privacy and data protection into the political arena.

Principles of Data Protection

There is remarkable agreement about the principles which need to be met in order to ensure that an individual's privacy is not threatened through the misuse of personal data. Some countries - notably Sweden, United States and West Germany - were quick to legislate in this field. Others have followed and two international bodies, the OECD and the Council of Europe, have been especially influential in both formulating standards of protection and, subsequently, encouraging other nations to act in this matter. The OECD's interest in the matter stemmed in part from its concern to encourage the free flow of personal data and by 1980 had produced 'Guidelines Concerning the Protection of Privacy and Trans-Border Flow of Personal Data'. Significantly, these guidelines were intended to apply to both manual and electronic files. The following year, the Council of Europe produced its own guidelines, 'The Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data' (European Convention). Apart from the more limited scope of the Convention, ie the exclusion of manual files, the two sets of principles are very similar.

OECD Guidelines

(i) Collection limitation principle
(ii) Data quality principle
(iii) Purposespecification principle
(iv) Use limitation principle
(v) Security safeguards principle
(vi) Openness principle
(vii) Individual participation principle
(viii) Accountability principle

European Convention[15]

(i) The information shall be obtained and processed fairly and lawfully;

(ii) It shall be held for a specified and legitimate purpose;

(iii) It shall not be used or disclosed in a way incompatible with those purposes;

(iv) It shall be adequate, relevant and not excessive in relation to the specified purposes;

(v) It shall be accurate and, where necessary, kept up to date;

(vi) It shall be kept in name linked form for no longer than is necessary for the specified purposes;

(vii) The data subject shall have access to the information held about him and be entitled to its correction or erasure where the legal provisions safeguarding personal data have not been complied with;

(viii) Appropriate security measures must be taken against unauthorised access, alteration or dissemination, accidental loss and accidental or unauthorised destruction of data.

The manner in which these principles are applied through national legislation is dependent upon a number of key issues: the scope and method of regulation; the powers of regulatory authorites; the extent of subject access; the location of costs.

Two Decades of Pressure

Pressure for legislation in Britain goes back over twenty years. As long ago as 1961, Lord Mancroft presented a Bill 'to protect a person from any unjustifiable publication relating to his private affairs'. The specific concern with data protection came a few years later. In July 1967, a sub-committee of the Legal Research Committee of the Society of Conservative Lawyers was established to examine the effects of the computer on privacy in Britain. Eighteen months later it reported that existing law was insufficient to deal with the threat and new controls were needed to cover both computers and manual files.[16]

Kenneth Baker introduced a Data Surveillance Bill - which drew on the recommendations of the Conservative lawyers' report - in the House of Commons on 6th May 1969.[17] Although it applied only to computers, it covered both public and private sectors. Under the Bill, all computers storing personal

information were to be registered. The Registrar would not be able to refuse or revoke registration, but would be able to refuse to sanction certain uses of information. The register would be open to public inspection and would contain details of the location of the computer, its owner and operator, the information stored and reasons for its storage, those who would have access to it, security measures and technical specifications. Information would only be used if it was correct, fair, up-to-date and relevant to the declared purpose of the computer operator. The individual would be sent a copy of the stored information on him when a computer was established and would subsequently be sent copies on request and after payment of a fee. He would also be told how the information had been used and who had had access to it. He would be allowed to challenge any detail by appealing to the Registrar, and subsequently to the High Court. There would be exemptions for certain files used by the police, armed forces and security services. Although the Bill had all-party support it failed to get a second reading. Lord Windlesham re-introduced the Bill in the House of Lords on 26th June 1969 as the Personal Records (Computers) Bill but subsequently withdrew it.

Leslie Huckfield presented the Control of Personal Information Bill to the House of Commons on 2nd February 1971.[18] Based on a draft by Joseph Jacob of the National Council for Civil Liberties (NCCL), the measure was intended to apply to computers and manual files in both public and private sectors. Attention would initially be concentrated on stores containing details on more than 100,000 people and control would be through a tribunal with licensing powers. The individual would have the right to inspect and challenge information stored on him. The Bill was given a first reading in the House of Commons but was not allocated sufficient time to be given a second reading. The Bill was re-introduced under the Ten Minute Rule procedure on 8th February 1972.[19]

In November 1969, Brian Walden introduced the Right of Privacy Bill which was prepared in close consultation with the NCCL and based on a draft by Justice. It was designed to establish a general legal right to privacy and, although the Government refused to back the Bill, it was agreed during the second reading debate on 23rd January 1970 to establish a committee on privacy.[20] The Younger Committee, appointed on 13th May 1970 was to investigate the need to protect privacy against intrusion by private organisations and individuals.[21] Some of those approached to serve on the Committee refused to do so because the public sector was excluded.[22] James Callaghan, Home Secretary, argued that public bodies had been excluded because they were answerable to the electorate and the

scope of their operations was already governed by statute, but he would be willing to consider the implications which the Committee's recommendations might have for the public sector.[23] A change of Government the following June did not result in any change in the Committee's terms of reference.[24]

The Younger Committee reported in May 1972. The majority report rejected establishing a general legal right to privacy and concentrated instead on suggesting specific solutions to particular problems. The Committee reported that computers were simply a new stage in the development of existing methods of processing information[25], that threats to privacy could arise from computers and manual files and that, although certain recommendations were geared to the computer, they should be applied to all stores containing potentially sensitive personal information.[26] In general, the Committee took the view that computers posed a potential rather than an actual threat and that there was no immediate need for new legislation to deal with them.[27]

The Committee urged computer users to adopt voluntarily certain principles - based on the ideas of the British Computer Society - when handling personal information[28] and to consider likewise appointing a 'responsible person' to oversee the use of computers.[29] It urged the Government to appoint a standing commission to review the Committee's principles in the light of developments in computer technology, to examine the case for making it compulsory to adopt the principles and appoint a 'responsible person' and to consider the need for a licensing system. The commission, which would receive complaints from the public, would report annually to Parliament.[30] The Committee recommended the Government to consider placing public sector computers within the purview of the commission.[31] Although the commission was never established, the Younger principles were adopted voluntarily by many computer users in Britain and affected subsequent proposals in Britain and abroad.[32]

In 1969 the Civil Service Department announced it would try to create the conditions for easy transfers of information between the computers of central government.[33] In 1972 an inter-departmental working party reported on the details held, and likely to be held, on central government computers and the safeguards for privacy. This report was not, however, published. During the House of Commons debate on the Younger Committee report in 1973, the Home Secretary promised to produce a White Paper on public sector computers.[34]

The first legislation to deal with the specific problem of data protection came in the private sector. The Consumer Credit Act of 1974 established a licensing system for credit reporting bureaux and gave the Director General of Fair Trading the power to refuse or revoke a licence. Under the Act, an individual has the right to be told the name of a bureau which reports unfavourably about his credit-worthiness, and to demand for a 25p (now £1) fee a copy in 'plain English' of the information stored on him. The individual can challenge this information and, if the credit bureau does not confirm within 28 days that it has responded to the challenge, the applicant can add his own correction to the file in up to 200 words. A refusal by the bureau to accept such a challenge leads to an appeal to the Director General of Fair Trading. However, the bureaux are not required to tell the bodies to which they have passed information of successful challenges. If no new entries have been made on a file for seven years, then the file is supposed to be deleted, although there is no formal check on this.

The White Papers which were promised in 1973 did not, in fact, appear until two years later and after a change of Government. In Computers: Safeguards for Privacy[35], the Government summarised and updated the findings of the inter-departmental working party on central government computers and included, in addition, computers in local authorities, nationalised industries and other quangos. The White Paper contained statistics on the use of computers in Britain, details of the measures taken to protect privacy in the public sector, and a description of overseas practice. In Computers and Privacy[36], the Government stated its intention to legislate in Britain - it was the first such statement. An Act covering computers in the public and private sectors, was to be introduced when preparations were completed . . . and the parliamentary timetable and financial and manpower resources allowed.[37] The measure would set standards for dealing with personal information based on the Younger Committee's principles and establish a permanent statutory agency to oversee their implementation. The Data Protection Committee was set up to refine the objectives of legislation, the shape it should take and settle the form of the controlling body. In the interim, the Government undertook to preserve its administrative rules to protect privacy in the public sector until legislation was passed, and urged computer operators in the private sector to show similar restraint. Sir Kenneth Younger was made head of the Data Protection Committee early in 1976, but died in May of that year. Sir Norman Lindop, Director of Hatfield Polytechnic was appointed as the new chairman and the Committee held its first meeting on 27th July 1976. Its report was published in December 1978.[38]

The Data Protection Committee rejected the idea of a licensing system as being too expensive and time-consuming for the Data Protection Authority to make the necessary investigations and inspections. Instead, data stores in both public and private sectors (with some exceptions) should be registered with the Authority. To ensure maximum flexibility, different sets of rules would be negotiated to deal with different uses and these rules, or codes of practice, would have the force of law. Codes of practice would be based on seven principles[39], and most stores would be covered by one of about fifty codes. The only exemptions in the public sector would be stores concerned with national security. In the private sector the Authority could decide to exempt stores if registration was not thought 'necessary or helpful' in order to discharge statutory duties for data protection. Thus, if registration was not necessary to obtain information for drawing up codes of practice, detecting breaches of a code, ensuring the existence and main characteristics of a store were publicly known or bringing a code to the attention of those whom it concerned, the Data Protection Authority could decide that certain private sector stores need not be registered. Users required to register would pay a fee determined by the Data Protection Authority. Registration would be regularly renewable. The individual's right to inspect details stored on him might be refused if inspection would be too costly, or if control could be guaranteed by other means. In some cases, the right to inspect files would lie with the Data Protection Authority rather than the individual. The Authority would have a small team of inspectors empowered to investigate complaints, make spot checks and, with a magistrate's warrant, enter premises. Failure to comply with a requirment to register, or breach of a code of practice, would be an offence. Data Protection Authority members would be appointed by the Crown and would be directly responsible to Parliament. Complaints against the Data Protection Authority could be put to the Ombudsman or Council on Tribunals, or could be taken up through the courts.

The NCCL had complained when the Data Protection Committee was established that "a majority of the Committee consists of people professionally involved in collecting sensitive information about individuals. It is hard to believe it will properly appreciate the urgent need to control the collection and use of confidential information about individuals. It is more likely to be obsessed with technical aspects of computer security and the cost of protecting privacy".[40] The NCCL and British Computer Society had both called for the adoption of a system of licensing in their evidence to the Committee. On publication of the

report, the NCCL was concerned that the individual's right to inspect information stored on him was not firmly established.[41] Despite these criticisms, the NCCL was to compare Lindop's recommendations favourably with most other official statements on the topic over the subsequent five years.

Official reaction to the Lindop Report was again one of delay. In January 1979, Merlyn Rees, Home Secretary, said the costs of controls needed further consideration before final proposals could be brought forward. Dismayed by the delay, Sir Norman Lindop warned that the country could suffer commercially if it did not legislate soon, because other countries might refuse to allow information to be handled on British computers.[42] The conflict between these two aspects - the costs of legislation and the potential commercial penalties of failing to legislate - came into sharper focus with the election of a Conservative Government in May 1979. The Conservatives' early priorities were to disestablish quangos rather than add to their number, and to reduce businesses' costs rather than increase them through having to conform to privacy safeguards, but information technology was a sector marked out for development by the Conservatives and they were obviously wary of more countries with controls banning the transfer of information to Britain.

During 1980 the Government received "a spate of complaints" from private industry about lost contracts because Britain had no data protection legislation: the computer industries and industrial consultancies were particularly harshly affected.[43] However, the Government still favoured allowing the Home Office to act as its own watchdog over public sector computers. As late as September 1981, the Home Office Minister of State was referring to the call for an independent data protection authority as "fundamentally objectionable".[44] In July that year, Sir Norman Lindop, frustrated at the lack of progress, had reconvened the Committee on Data Protection to issue a second report. By January 1982, the Government had made a 'U-turn' and come to accept the need for an independent authority. As a result, in April the Government finally published its White Paper specifying its proposed legislation: Data Protection: The Government's Proposals for Legislation.[45] The proposal fell short of Lindop's recommendations and again warned that there might be a delay in implementing the measure since "the public sector costs and manpower will have to be contained within existing planned totals, even if this means deferring application of legislation in this area".[46]

The explanation for the Government finally being prompted into action is, of course, to be found in two interrelated factors - influence from abroad and consequent commercial pressures. A failure to observe international guidelines, and especially the European Convention, would have resulted in considerable commercial losses. Indeed as early as 1975, the Swedish Data Inspection Board had halted further processing in Britain on Swedish citizens until Britain imposed more stringent rules.[47] Although Britain had signed the European Convention in May 1981 - an indication of intent - full ratification required legislative action (the Convention itself becomes active when it has been ratified by five member states). The 1982 White Paper noted that "without legislation, firms operating in the United Kingdom may be at a disadvantage compared with those based in countries which have data protection legislation". Similarly, the Home Office Minister of State later conceded that the legislation "goes far enough to allow us to ratify the European Convention which is important in itself . . . a great number of jobs are at stake".[48] Labour's spokesman, Roy Hattersley, put it more bluntly "there is only one principal purpose and that is to ensure that a new age of technology . . . is not handicapped by the refusal of our European partners to provide technological information to Britain because there is no protection here at all".[49] This sceptical view was later shared by Labour's new shadow Home Secretary during the passage of the Data Protection Bill: "the principle of the Bill is not to protect the privacy of the subject. It is about trade and about money".[50]

It had taken just a decade from the publication of the Younger Report to the eventual decision to introduce data protection legislation. In December 1980, the Select Committee on Home Affairs had criticised the Government for its "dilatory and complacent" attitude towards a number of reports. Two of the reports cited were those of Younger and Lindop. The attitude persisted until it became clear that complacency would incur commercial and financial losses. Civil liberties' groups maintained the pressure for legislation throughout this period, although, unlike the case in several other European countries, they were denied the opportunity to use a single issue (eg central population registering)[51] to focus public attention towards the more general subject of privacy and data protection. Instead it was left to professional and commercial lobbies - notably the British Computer Society, the British Medical Association and information technology industries - to bring the final pressure to bear. It was the need to protect Britain's position at the "crossroads of the international data highway" and to exploit the full commercial potential of the new information technologies, rather than a reaction to public fears about

privacy which caused the Government to act. As the Home Secretary admitted when introducing the first Data Protection Bill, it was intended to "safeguard the increasing number of concerns that depend on the free international interchange of computerised data and so safeguard the many jobs that exist in that area".[52]

The Data Protection Act

The first Data Protection Bill was introduced in December 1982. It fell with the dissolution of Parliament in May 1983 and a revived Bill with only minor modifications was published shortly afterwards. This received royal assent in July 1984 and becomes fully operational over the next two years.[53]

The Act applies to both public and private sectors, but excludes manual files, concentrating instead on data which is 'automatically processed'. The latter phrase could, of course, apply to a range of activities and 'computing equipment' is, as such, not specifically mentioned in the Act, but the Government made it clear that the legislation was aimed at such equipment. It is generally assumed that the definition of equipment is avoided so as not to make the definition redundant in an area of rapid advances. It is interesting also that it is the activity of 'processing' rather than 'holding' data which is the focus of the Act.

In line with the 1982 White Paper, and in contrast to Lindop's recommendations, data users (not individual data stores) and computer bureaux are required to register with the Data Protection Registrar. (Lindop had favoured licensing with a Data Protection Authority). The Registrar, besides maintaining the register of users, is empowered to investigate suspected breaches of the data protection principles which are set out in the Act. Supported by a judicial warrant, he has rights of entry to inspect premises. Breaches of the Act render the offender liable to a prosecution in the courts and, if successful, a fine and forfeiture of material. The Registrar himself has the power to issue enactment notices, transfer prohibition notices and, in the most severe cases of non-compliance with the data protection principles, apply a notice of de-registration. Data-users can appeal against decisions of the Registrar to the Data Protection Tribunal, a body of legal persons and lay members appointed by the Lord Chancellor and the Secretary of State respectively. Appeals against Tribunal decisions can only be made on points of law.

On the question of subject access, the Act gives the right to individuals (data subjects) to be informed by a data-user whether that user holds information on him and, if so, to be supplied with a copy of that information for a fee. In the event of such information being inaccurate, the data subject may seek to claim compensation for any damages which occur as a result. There is also a limited right to have inaccurate data rectified or erased but, unlike the 1974 Consumer Credit Act, this right is not directly enforceable but must, again, be sought via the Courts. In many ways, the Data Protection Act is more concerned with preventing malpractice rather than providing remedies.

All of these procedures are, however, subject to certain limitations in scope, and it is the extent of these limitations which has attracted much criticism. An important exemption has already been mentioned - manual files - which were excluded, according the the Government, because they did not generally pose the same threat as computer-based systems and because of their sheer number. One estimate puts this number at 125 million. Nevertheless, there is some evidence that people are most concerned about some files which are not always automated (eg medical records)[54] and, in any case, the distinction between manual and automated files is not always clear. Indeed, it is significant that some data protection authorities, although nominally limited to controlling automated files, have considered carrying the spirit of their legislation through to non-computerised systems.[55]

Even among automated systems there are a good number of exemptions on the grounds of national security, judicial administration, detection of crime and collection of taxes. Such exemption may cover whole or just part of the Act's provisions. Not surprisingly, these exemptions caused considerable disquiet among civil liberties groups and some tightening up of these provisions took place as a result of lobbying. This is one area, for example, in which the Act differs from the lapsed Bill. As late as April 1984, during the second Bill's Committee stage, the BMA secured, after a long campaign, a concession that computerised medical files would remain confidential. In other areas, however, public safeguards are less apparent. Besides those areas in which the Act gives no right of public access, Ministers also have the discretion of disallowing the right of access in a number of other areas including data on health and social work. The criticism of these exemptions was voiced succinctly by NCCL: "the (Act) . . . will be ineffective in safeguarding personal records, inefficient in operation and will not meet the requirements of our European trading partners".[56]

As yet the full financial implications of the Act are unclear. Initial estimates put the administrative costs of the Registrar and his staff at £650,000 in a full year with most of this being recovered by registration and other fees. (1982 figures). The direct costs of access provisions are difficult to calculate until the level of demand has been established; other European countries have found that it has taken some time before demand for access has built up. The fee to be charged for access is on the basis that the costs of granting subject access will be recovered. The costs to Government departments of developing hardware and software systems which comply with the Act were calculated at £5.5 million during the two year phasing-in period. An access rate of 0.1 per cent was estimated to cost £1 million per year. A further £9 - 11 million was expected to be incurred by local authorities and other public bodies in implementing the Act, with annual running costs of £13 million. No reliable estimate of costs has been made for the private sector.

An Effective Protection of Privacy?

Britain has been relatively slow to recognise the need for a measure to protect the handling of personal data. Indeed, some countries have already modified, or are in the process of modifying, their initial controls. A combination of rapid technological change and the inevitably unrefined nature of pioneering legislation has brought about the need for a modification of controls so soon after their introduction. Since British legislation comes within the second generation of data controls, however, we can look to European experience for some indications of the likely effectiveness of the new act. It is perhaps worth noting that 'effectiveness' in this context is interpreted as conforming to those principles of personal liberty and official accountability which were discussed earlier. A more pragmatic view of 'effectiveness' would be that of helping the Government pursue the commercial and administrative benefits of new technologies whilst minimising public protest.

The nature of the legislation itself is an obvious first indication of its likely effectiveness. British legislation does not differ fundamentally from the pattern which has developed among other European countries (see appendix). Most countries, like Britain, have limited their controls to automated files and only West Germany, and in certain instances France, includes stores of sensitive data in manual systems. The failure to provide protection for the latter caused considerable criticism during the passage of the Act, although it

might be anticipated that the significance of this omission will decline as more files become automated. The criticism that too many exemptions are allowed by the Act is less likely to be moderated by the passage of time. It is inevitable that the rights of access - which for many people are the most powerful disincentives to the abuse of data - will be modified in the areas of crime and national security. Nevertheless, the range of exemptions in Britain is thought by many to be unnecessarily wide. For example, whilst under the West German Federal Data Act, stores concerned with state security and crime need not be registered with the Federal Commissary, details of their type and purpose must be kept in a special register. By contrast, in Britain, all that is required to make data wholly exempt from the provisions of the Act is the certification of a Minister of the Crown that national security is involved. Such a statement is "conclusive evidence of the fact".[57] This approach is unlikely to comfort those who fear that privacy is most threatened through the data collection activities of the police and national security agencies. A further, less significant, concern is the limited staff resources which will be available to the Registrar.

As important as the letter of the law is its spirit. Besides the precise nature of the legislation, therefore, it is useful to consider both the intentions of the legislators and the political climate in which the measure was formulated. The intentions of the Government were fairly clear - they were to conform to European standards of data protection in order to exploit the commercial benefits of the new information technologies. As a consequence, the Act goes sufficiently far to allow Britain to ratify the European Convention. Even this, however, has been doubted by some, who point to the limited definition of personal data in the Act. The Bill had originally excluded data used for immigration control. This would almost certainly have controvened the European Convention and was, consequently, dropped by the Government. One manifestation of the relatively low priority given to the privacy aspect of data protection in Britain is the rapid decline of interest shown by the Home Office once the Act had reached the statute books. It is now the Department of Trade and Industry which is perhaps more concerned with the workings of the Data Protection Act through its interest, along with other OECD member countries, in promoting transborder data flows.[58]

On the question of the political climate, it is apparent that despite nearly two decades of intermittent pressure for data protection in Britain, and majority public support for such a measure[59], such demands have never turned the question into a major political issue. Similarly, it has failed to attract the level of powerful political support which the freedom of information campaign now boasts. Supporters of the latter include the leaders of three of the four major political parties, the immediate past head of the civil service, a former chief policy

advisor to the Prime Minister and two major civil service trade unions. In Britain, as elsewhere in Europe, the demand for data protection has been sustained but never approached fever pitch. The advocates of data protection in Britain also lacked a specific issue to galvanise and focus public support - something which proposals for central population registers did in Sweden, West Germany, Luxembourg, Netherlands and Denmark and which Section Two of the Official Secrets Act now provides for the freedom of information campaign in Britain. Indeed, in France, the authorities prompted legislation as a means of facilitating the adoption of new computers in the public sector. The greater the level the concern about data protection, the more data protection agencies are likely to feel under pressure to exercise maximum control. Similarly, the higher the number of requests for access to stores, the more likely data-users are to be scrupulous in their observance of the legislation. As yet, of course, there is no indication of what level of request for access is to be anticipated in Britain. European experiences suggest three things: demand takes time to build up; it is related to the controversiality of issues and the prevalent political climate; and it is, to some extent, culture-bound. On this basis, it is perhaps to be expected that the data protection agency in Britain will come under relatively public pressure unless, or until, a specific and controversial issue arise.

Finally, we may consider the importance of individuals in making legislation effective. It is asserted, for example, that the vigorous enforcement of data protection controls in West Germany and Sweden owes a good deal to the perceptions of key agency personnel in these countries. There is a parallel here with the legislation which created the office of Ombudsman in several countries. When Britain established a Parliamentary Commissioner for Administration (Ombudsman) in 1967, some criticised the restrained nature of our legislation. A particularly vivid contrast was made with the New Zealand Act which allows their Ombudsman to investigate a wide range of administrative failures, culminating in those which were simply considered wrong.[60] For a while, the PCA felt confined by the legal straitjacket of the parent Act, but over the years successive Commissioners have extended their roles. It is quite possible that, in time, data protection registrars might do likewise.

In 1984, Britain finally conceded the need for data protection controls. For those interested in privacy this was, however, only a minor landmark since the stimulus for legislation appears to have been rather more connected to commercial factors than any real concern for privacy. The privacy issue, as such, is now more visible as a facet of a rather broader, and politically more vociferous, campaign for Open Government in Britain.

Appendix

TABLE 1: DATA PROTECTION MEASURES IN THE EUROPEAN COMMUNITY AND SWEDEN

Country	Action Taken	Title	Date	Reference
Sweden	Law	Data Act	11.5.1973	-
West Germany	Law	Federal Data Protection Act	27.1.1977	Bundestag Drucks.7/5568, Bundesrat Drucks.422/76
France	Law	Data Processing and the Protection of Liberties Act	6.1.1978	Act No.78-17
Denmark	Law	Private Registers, Etc.Act; Public Authorities' Registers Act	8.6.1978	Act No.293; Act No.294
Luxembourg	Law	Act Regulating the Use of Computerised Stores of Information Containing Names	31.3.1979	Doc.Parl.No.2131,1977-1978 and 1978-1979 ordinary session
Netherlands	Prime Minister's Decree and Bills	Decree	12.3.1975	Nederlandse Staatcourant No.50
		(1)Personal Data Registrations Bill	30.11.1981	Bill No.17207
		(2)Interim Bill on Automated Personal Data Registrations	July 1982	Bill No.17498
Belgium	1) Bill (lapsed) 2) Revised Bill	Bill on the Protection of Certain Aspects of Privacy (lapsed with dissolution of Parliament, Oct 1981). New bill being reviewed by Conseil d'Etat	16.11.1977	Senate Document No.846/1 1975-1976 session
Ireland	Consultations and Preparation of Legislation	Round of consultations completed October 1982. Detailed proposals on automatic files in course of preparation.(see Dail Debates 15 July1982, Col.2846)		
Italy	'Bill imminent'	Commission Mirabelli has led to preparatory work on a bill likely to be presented shortly. Parliament is very active and recently completed a thorough review of European legislation.		
Britain	Law	Data Protection Act	12.7.84	1984,c.35
Greece	Working Party	Group is charged with preparation of draft legislation		

TABLE 2: SCOPE OF CONTROL

	Sweden	W.Germany	France	Denmark	Luxembourg	*Netherlands	*Belgium	Britain
Computers and manual		Yes						
Computers only	Yes		Yes(1)	Yes	Yes	Yes(1)	Yes	Yes
Public & private sector	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Public sector only								

(1) Includes manual files "in which sensitive data are systematically recorded or which are used for the dissemination of data to third parties".

* Proposed Legislation

TABLE 3: METHOD OF CONTROL

	Sweden	W.Germany	France	Denmark	Luxembourg	Netherlands*	Belgium*	Britain
Title	Data Inspection Board	1)Federal Commissary for Data Protection 2)Data Protection Representative; 3)Supervisory authority	National Commission for Data Processing and Liberties	Data Surveillance Authority	Government minister advised by Consultative C'tee (private sector) and Consultative C'tee (public sector)	Registration Chamber	Office for Protection of Privacy with Regard to Data Banks	Data Protecti Registra-
Method of appointment	by Government	1)by Government 2)by firms 3)by states	by Government Parliament and judiciary		by Government	by Crown	by Government	by Crown
Power to license or authorise stores, and to impose conditions	private sector		public sector	most private sector stores	private sector	Files containing personal or "sensitive" data (two categories are detailed)	Private sector stores, and public sector stores not established by law or decree	Yes
Registration or consultation only	Public sector	Yes	private sector	public sector (1)	public sector	"Non-sensitive" files	Public sector stores established by law or decree	
Powers of inspection	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Means of appeal against its decisions	Yes		Yes	Yes	Yes(private sector)	Yes	Yes	Yes

* : Proposed Legislation

(1) Government ministers ultimately responsible for control

TABLE 4: CONTROL BY THE INDIVIDUAL

	Sweden	W. Germany	France	Denmark	Luxembourg	Netherlands*		Belgium*	Britain
Publicity given to existence of store	Yes	Yes	Yes	Yes	Yes		Yes	Yes	Yes
Publicity given to conditions regulating its use	Yes	Yes	Yes	Yes	Yes		Yes	Yes	Yes
Regular notification of file contents at defined intervals	in some cases								
Notification of file contents at individual's request	Yes(1)	Yes	Yes(1)	Yes(1)	Yes		Yes	Yes(1)	Yes
Right to written extracts	Yes	Yes	Yes	Yes	Yes		Yes	Yes	Yes
Right to inspect file at its location	Yes	Yes							
Right to challenge	Yes	Yes	Yes	Yes	Yes		Yes	Yes	Yes(3)
Right to ensure corrections made			Yes		Yes		Yes		Yes(4)
Individual charged for access to stored details on him	free unless 'special reasons	Yes(2)	Yes(2)	Yes	Yes(2)		Yes	Yes	Yes

* Proposed Legislation

(1) Limitatations on number of requests which must be honoured

(2) Fees waived or reimbursed when access results in a successful challenge

(3) A data subject may be entitled to claim compensation from data user for damage resulting from inaccurate information

(4) This right is exercisable through the High Court or a County Court

Notes

1. Observer 8 January 1984

2. Guardian 12 January 1984

3. 1984 Campaign for Freedom of Information. See, D.Wilson (ed.) The Secrets File Heinemann, London 1984.

4. These are Austria, Denmark, France, Iceland, Luxembourg, Sweden and West Germany. Several others are at various stages of drifting legislation.

5. Report of the Departmental Committee on Section Two of the Official Secrets Act, 1911 Cmnd 5104, HMSO, London 1972.

6. This section is largely based on C. Mellors and D. Pollitt 'The Data Protection Bill', Political Quarterly, July 1984.

7. See A.F.Westin Privacy and Freedom, Bodley Head, London, 1967 pp 8-11 and J. Jacob Data Banks,The Computer, Privacy and the Law, NCCL, London (undated) p.2

8. Report of Committee on Privacy, Cmnd.5102 HMSO, London, 1972, para 109. See also R. Ingham 'Privacy and Psychology' and C Bryant'Privacy Privatisation and Self-Determination', both in J.B. Young (ed) Privacy, Wiley,London 1978.

9. Ibid.para 63

10. Justice Privacy and the Law, Stevens and Sons, London, 1970, p.4.

11. Westin op cit p.7

12. A.R. Miller The Assault on Privacy, University of Michegan Press, Ann Arbor, 1971, p25

13. The Police National Computer at Hendon has been a particular target of criticism. Similarly, in 1982, it was claimed that the security forces were compiling a data bank which would have an eventual capacity of twenty million people (New Statesman, 4 March 1982)

14. See for example, Jacob op cit; P. Sieghart Privacy and Computers, Latimer New Dimension, London 1976; M Warner and M Stone, The Data Bank Society, Allen and Unwin, London 1970; A.R. Miller 'Personal Privacy in the Computer Age' Michegan Law Review, 67.

15. Reproduced in Data Protection: The Governments Proposals for Legislation Cmnd 8539 HMSO London, 1982, para 6

16. Conservative Research Department pamphlet, Computers and Freedom, Conservative Research Department, London 1968.

17. Hansard, Vol. 783, Cols, 286-288.

18. Hansard, Vol 810, Col. 1465.

19. Hansard, Vol 830, Cols 1139-1142

20. Hansard, Vol 794, Cols 862-959

21. Cmnd. 5012, op cit

22. Madgwick and Smythe, op cit., p. 15

23. Cmnd. 5012, op. cit., para 4, p.2

24. Ibid., para 5,

25. Ibid., para 573,

26. Ibid, para. 251

27. Ibid., paras 619-620,

28. Ibid., paras 592-600,pp. 183-184, "i) Information should be regarded as held for a specific purpose and not be used, without appropriate authorisation, for other purposes, ii) Access to information should be confined to those authorised to have it for the purpose for which it was supplied, iii)The amount of information collected and held should be the minimum necessary for the achievement of a specified purpose. iv)In computerised systems handling information for statistical purposes, adequate provision should be made in their design and programmes for separating identities from the rest of the data. v) There should be arrangements whereby the subject could be told about information held concerning him vi) The level of security to be achieved by a system should be specified in advance by the user and should include precautions against the deliberate abuse or misuse of information. vii) A monitoring system should be provided to facilitate the detection of any violation of the security system. viii) In the design of information systems, periods should be specified beyond which the information should not be retained. ix) Data held should be accurate. There should be machinery for the correction of inaccuracy and the updating of information. x) Care should be taken in the coding of value judgements."

29. Ibid, paras. 623,624

30. Ibid, paras. 621-627

31. Ibid, para. 628

32. F.W. Hondius, Emerging Data Protection in Europe, North Holland Publishing Company, Oxford, 1975, p.52

33. The Times, 2nd August 1969

34. Hansard, Vol 859, Cols 1956-2057

35. Cmnd. 6354, HMSO, London 1975.

36. Cmnd. 6353, HMSO, London 1975

37. Ibid,para 4

38. Report of the Committee on Data Protection, Cmnd. 7341, HMSO, London 1978.

39. Ibid., para. 21.09 "1) Data subjects should know what personal data relating to them are handled, why those data are needed, how they will be used, who will use them, for what purpose and for how long; 2) Personal data should be handled only to the extent and for the purposes made known when they are obtained, or subsequently authorised; 3) Personal data handled should be accurate and complete and relevant and timely for the purpose for which they are used; 4) No more personal data should be handled than are necessary for the purposes made known or authorised; 5) Data subjects should be able

to verify compliance with these principles; 6) Users should be able to handle personal data in the pursuit of their lawful interests or duties to the extent and for the purposes made known or authorised without undue extra cost in money or other resources; 7) The community at large should enjoy any benefits, and be protected from any prejudice, which may flow from the handling of personal data."

40. New Scientist, 29th July 1976

41. Guardian, 6th December, 1978

42. Guardian, 25th January, 1979

43. Guardian, 26th September, 1980

44. Guardian, 16th September, 1981

45. Cmnd. 8539, HMSO, London 1982

46. Ibid, para 23

47. G Russel Pipe, 'At Sea Over Pirate Data Banks' New Scientist, 13th January 1977

48. BBC Radio World This Weekend 10th April 1983

49. Ibid

50. (Gerald Kaufman) House of Commons Debates 30th January 1984.

51. See C. Mellors and D. Pollitt 'Legislating for Privacy' Parliamentary Affairs Spring 1984 pp 199-215

52. House of Commons debates, 11 April 1983.

53. A useful guide to the aspects of the Act is N. Savage and C. Edwards: A Guide to the Data Protection Act 1984, Financial Training Publications, London 1984.

54. See NCCL Briefing: Data Protection Bill 1983, NCCL, London 1984

55. OECD: Synthesis Report on the Application of the Guidelines Governing the Protection of Privacy and and Transborder Flow of Personal Data. (DSTI/ICCP/83.17) October 1983. The Austrian Commissioner, for example, estimates that 80 per cent of complaints he receives concern manual files (see NCCL Briefing op cit)

56. Ibid.

57. Data Protection Act, 27(2)

58. A Statement of General Intent on this issue by OECD is imminent.

59. See, for example, the survey conducted by the Consumers Association (press release 27.1.84)

60. New Zealand Statutes, 1962, No. 10, s.19

European Consortium for Political Research-Workshop on Confidentiality, Privacy and Data Protection, Barcelona, 25-30 March, 1985

PERSONAL DATA INFORMATION AND THE RIGHT TO INFORMATION IN IRELAND

Liam O'Malley
Department of Law
University College Galway
Ireland

PERSONAL DATA INFORMATION AND THE RIGHT TO INFORMATION IN IRELAND

ABSTRACT

Experts in Ireland agree that there is a need to protect the privacy of personal data and to introduce a Freedom of Information Act. The lack of widespread demand for these measures is accounted for by the fact that the relatively smaller size of the country, the Ombudsman, and the contacts which the political system allows, softens the harshness of administrative action.

Problems nevertheless exist, and are getting worse. The growth of the public service and the progressive use of information technology have made the problem more serious. Ireland's archaic parliamentary procedures, the secretive and closed attitude of the public service, and the inadequacies of our administrative law are obstacles to a solution.

Under Ireland's present laws, the individual has no effective remedies by which to gain access to information or to protect personal data. Statute law is used to make the citizen disclose personal information without providing adequate or uniform safeguards to protect its confidentiality. Although Tort law can provide remedies for breaches of some aspects of privacy - it is almost powerless in controlling personal data banks. The fundamental rights guaranteed by the Irish Constitution may eventually evolve to protect privacy, but are at present so uncertain, and so hedged about by limitations, as to be virtually ineffective.

The Irish citizen cannot depend on International Law to protect these interests. The Universal Declaration of Human Rights is not part of Ireland's domestic law, and cannot be relied upon by an individual. The European Human Rights Convention is, likewise, not a part of domestic law and the scope of its protection of privacy (Article 8) and freedom of information (Article 10) are either too uncertain or too restricted to provide personal data protection or freedom of information.

Legislation seems to be necessary. A Data Protection Bill is promised but there is no sign of a freedom of Information Act. It is accepted that the Data Protection Bill is to be introduced for commercial reasons. It appears, regrettably, to be the case, that business interest is the agent of this change and not the desire to protect human rights or the future of democracy.

PERSONAL DATA PROTECTION AND THE RIGHT TO INFORMATION IN IRELAND.

Introduction

There has been no significant demand in Ireland for new laws to protect the privacy of personal data, or to make government information more freely available to the public. In contrast to the situation in the United Kingdom, personal data protection and freedom of information are not issues which give rise to great concern or interest among Irish people. One's first impression is that there is something odd about this, as both countries have similar legal and political structures. In the United Kingdom by contrast, these topics have been seriously debated public issues since the 1960s.(1)

Two reasons, among others, which account for this difference are the services provided by Ireland's public representatives and the smaller size of the country and its population. In the Irish political system, citizens expect their representatives to act as "contact men" with the public sector. With a comparatively large number of public representatives who live in their constitutencies, individuals can get information, prompt the authorities into action, or have their cases reviewed. Most people have some direct personal link with persons of standing in the community who will help them to remedy a greivance. As Professor Chubb has written

> "To some extent, lack of official information is compensated for by the fact that the country is small and homogeneous. The numbers of politicians,

administrators, journalists, and judges are small enough for them to be known to each other and for "horizontal" communications to be easy. Furthermore, journalists are both responsible and alert, although radio and television have been to some extent inhibited from exposing the shortcomings of public authorities or seeking out public scandals" (2)

The absence of widespread complaint does not, however, necessarily imply that there is no problem, nor does it necessarily mean that the situation is not getting worse. The Irish Ombudsman, Mr. Michael Mills, has recently called for the introduction of a Freedom of Information Act and the establishment of a press council. Public servants, he said, often felt that it was best that the public should not be made aware of decisions which were made, or were about to be made. (3)

A report commissioned by the Director of Consumer Affairs has recommended that Ireland should sign and ratify the Council of Europe Convention on Data Privacy. This Report on Consumer Credit raised certain doubts about inquiry agents who had contacts throughout the country and who could supply information on credit applicants on short notice. (4)

Mr. John Horgan, a lecturer on journalism, has written about the growing campaign for the introduction of a Consumer Information Act. This campaign has been endorsed by

the National Committee for Freedom in the Press and Broadcasting, whose President is Mr. Sean MacBride, and by the Association of Higher Civil Servants. In a feature article in the Irish Times last year, Mr. Horgan wrote:

> "Few objective observers could disagree that the situation in Ireland at the moment is parlous. There is still no Archives Act to govern access to public documentation of an historical or quasi-historical nature, and contemporary material in every conceivable category is protected not only by precedent but by various Official Secrets Acts, which are draconian in their language and extent. Many of them are frequently broken, and their breach does not often attract the attention of the authorities - or at least does not involve action by them. This is hardly a consolation, as the editors of various national newspapers have found out from time to time when they have unexpectedly found themselves in court.
>
> If one looks at an information map of Western Europe and the United States, Britain and Ireland together appear as a benighted archipelago, untouched by the slow but steady progress towards freedom of information that has characterised many democratic societies in the past couple of decades - and, in some cases for even longer". (5)

The publicity surrounding the trial of Clive Ponting in Britain, over the leaking of documents relating to the sinking of the Belgrano in the Argentinian war, has helped to focus attention on the Irish Official Secrets Act of 1963. This Act is substantially the same as the British one, and is also similarly in need of reform. The Sunday Tribune has called for the reform of the Official Secrets Act 1963 and the introduction of a Freedom of Information Act.

> "For our democracy to have any real contemporary meaning", it argues, "it is necessary for us to have access to as much information as possible in relation to our public affairs and thus the laws and ethos of secrecy which surround the workings of our government are entirely inappropriate.
>
> Section 3 of the Official Secrets Act is the most absurd manifestation of the pall of secrecy with which the actions of our masters are surrounded. It should be repealed. But that by itself would not suffice. There must be an entire change in the manner in which our public affairs are conducted, with an emphasis on openness and access to information."(6)

In addition Ireland has not escaped those developments which are common throughout advanced societies. The public service has grown over recent decades and government agencies are involved in almost every aspect of the citizen's life. The Fulton Commission's Report on the public service in England, like the Irish Devlin Report, discovered much the same type of changes; "The role of government has greatly changed. It's traditional regulatory functions have multipled in size and greatly broadened in scope. It has taken on vast new responsibilities. It is expected to achieve such general economic aims as full employment, a satisfactory rate of growth, stable prices and a healthy balance of payments.... It provides comprehensive social services and is now expected to promote the fullest possible development of human potential. All these changes have made for a massive growth in public expenditure. Public spending means public control. A century ago the tasks of government were mainly passive and regulatory. Now they amount to a much more active and positive engagement in our affairs." (7)

Information technology is being adopted in both the public service and in large business. These institutions are acquiring more and more information about citizens, and are using more sophisticated methods of data handling, thus adding a new dimension to the data privacy problem. At the same time their activities are hidden from public scrutiny. It seems inevitable that the issues of data protection and freedom of information will become increasingly important in Ireland in the future.

Irish Institutions and the Protection of the Citizen

Although Ireland has a written Constitution which guarantees fundamental rights to each citizen, the protection of personal data and the right to information are not adequately provided for. The reason for this is to be found in the nature of the state's institutions. Ireland's political institutions are for the most part modelled on those of Britain. Ireland's system of government, it's Parliament (called the Oireachtas), the relations between government ministers and their civil servants, the civil service itself, local government, the courts and our legal system, are all similar to British models. It is not surprising therefore that Ireland suffers from the same lack of access to public information and the same problems of privacy of personal data, as have been experienced in Britain. In Ireland the problems at parliamentary level are, if anything, more acute.

The methods used by the Oireachtas have been those evolved by the British Parliament in the 19th century. Professor Chubb has written that the Oireachtas is deficient in it's archaic procedures and techniques, in the staff and facilities available to members, and as regards the education and experience of many members and the views that they have of their job, which is primarily that of "contact man". Parliamentary debates are seen as inadequate to deal with policy proposals and indeed to render the executive accountable for it's actions.

These debates have been described as "gladiatorial set pieces conducted on party lines by politicians who are wedded to the concept of strictly competitive or "adversary" politics".(8)

The Irish civil service has many of the same strengths and weakness as the British civil service on which it is modelled. Although they are generally dedicated, non partisian, and anonymous in their work, civil servants are also passive rather than active and inclined to be over secretive. They have been characterised as being concerned with day to day performance rather than with the overall efficency of the service. The civil service suffers from some of the faults associated with all large bureaucracies. These include over-concern with precedent, remoteness and inaccessibility, poor handling of the public, lack of initiative and imagination, ineffectiveness, procrastination and an unwillingness to take responsibility or to give decisions.

It is also said, that public servants, particularly civil servants, are not accustomed to giving information freely. In fact they are not usually permitted to give information at all. One commentator has remarked, and it is accepted as being still true that "the traditional attitude has been to present as narrow a front as possible towards the public, since from that direction, there is little to be expected except mud and brickbats.

Consequently information is strictly controlled or channeled - sometimes to the point of ceasing to flow at all. It requires an effort to change so well established a position which has on the whole been advantageous to the defenders."(9)

The legal system likewise leaves a lot to be desired. In spite of the existence of a constitution, which guarantees fundamental rights, the citizen's remedies against the administration are quite limited. The explanation for this is to some extent historical. The Irish legal system is a common law system based on that of Britain. There is no sophisticated system of administrative law or any separate system of administrative courts. With the creation of the modern welfare state, the need for administrative review and appeals grow in number. This problem was met, not by the court system, but by providing for appeals to ministers or civil servants or to independent tribunals. In some cases further apppeals lay to the ordinary courts. But even under the ordinary court system, and under the constitution, there is only limited power to review administrative actions. As long as a government exercising administrative discretion keeps within its powers, the courts cannot interfere. An administrative tribunal can however be required to act judicially and in accordance with natural justice.(10)

A study group set up by the Devlin Commission in the late 1960s recommended a systematic scheme for reviews and appeals from the decisions of public authorities. They recommended that appeal tribunals should be set up in every major executive agency. "It goes without saying" they said "that these tribunals should meet the criteria of openess, fairness and impartiality. In addition the process of appeal should be cheap and, generally, free and it should be speedy. The executive agency itself should have the responsibility for providing the evidence necessary for the appeal and the scope of appellate jurisdiction should be unlimited".(11) These recommendations were never implemented. An ombudsman however, was eventually appointed under the Ombudsman Act 1980. The institution of the Ombudsman and greater activity by the courts helped the situation somewhat. But as Professor Chubb has written "the area of administrative discretion is still frighteningly large. In addition to discretionary powers in respect of matters such as aliens, passports, telephone tapping, and opening mail which all states seem to require, the Irish state has always had a battery of emergency and security powers."(12) These powers were made necessary by the problem of subversive organisations, notably the I.R.A. The continuing violence in Northern Ireland and its effects in the rest of the island have made the continuation of such powers a necessity.

It can be concluded, therefore, that the character and organisation of Irish institutions (excluding the Ombudsman) hamper rather than facilitate the flow of information, and that political and judicial controls over the executive are not capable of making essential information available to the disadvantaged citizen. Legal remedies, as we shall see in the next section, are similarly inadequate to protect the privacy of personal data being increasingly accumulated in institutional data banks.

Controls on Confidential Data.

There are numerous Irish statutes which authorise the state to collect personal information. These statutes require the disclosure of information in certain types of situation. Information can be required on the happening of a specified event, such as the making of an income tax return. Secondly an obligation to disclose can arise when the individual wishes to avail of a statutory right to a benefit, or to participate in a regulated type of activity. Thirdly personal information is also required by the government for statistical purposes. It has been shown by Marc MacDonald [13] that the commonly accepted principles and rules of personal data protection are rarely applied in such statutes. The Income Tax Act 1967 places a duty on officials not to make improper disclosure of the personal data they receive. The act provides for numerous offences, and defines penalties in respect of each of these. There is no safeguard by which the taxpayer is assured that the information supplied will not be used for other purposes. The taxpayer is not given any civil right of action for wrongful disclosure, nor is he allowed to access the data stored about him, or to correct false data held on his file. Worse still is the situation under the Social Welfare Acts. In order to obtain a benefit, the citizen must supply personal information to the presiding officer. There are, however, no provisions in the act obliging the minister or his servants or agents not to disclose information received to anyone except authorised persons. There are no penalties prescribed for breaches of the act. An obligation of secrecy is placed on the officers responsible under the Statistics Acts. There is however no general offences clause

in the Act and it therefore appears that breaches of the relevant duties may be actionable at civil law. But in this case also the individual is not entitled to information about what is stored about him,or as to where it is stored,or to whom it is communicated, neither has he the right to erase data which is incorrect.

There are clearly, variations in the amount of protection provided by various statutes for the confidentiality of personal data. The revenue commissioners and various tax officers have a good reputation for respecting confidences. It has been argued however, that the reason for this is not any great respect for human rights or privacy. The explanation is that the revenue departments require our public cooperation in order to function with any degree of efficiency. Respect for the confidentiality of personal data is therefore a necessity. In other departments of state and in private business, if an individual wants a benefit or licence he must provide personal data and no guarantees are given as to what use will be made of that data. The difference in treatment has nothing to do with the sensitivity of the information but is a matter of which is the more effective. Where it is useful to exchange information about people, it will be often exchanged.[14] In short therefore, statutory law is used to prise personal data from individuals, but does not protect the confidentiality of the data obtained.

Rights in Tort Law

Doubts have been expressed about the usefulness of the concept of "Privacy" in Tort law. Some writers think the term is too unwieldy and vague to be of any practical usefulness.(15) Other writers argue that there is something special about the concept of privacy which is not covered by other torts. What is special is that the violation does not typically take the form of a direct attack on liberty, although of course it may do that. Its typical form is that of affronting certain sensibilities, giving rise for example to feelings of shame, of embarrassment or of a loss of self respect in the victim.(16) What is agreed, is that outside of the United States, common law jurisdictions including Ireland, do not have a clearly defined tort of privacy. In spite of this some of the traditional torts cover a substantial part of the same ground. Some writers suggest that all that is required is for the courts to adopt a sympathetic and imaginative approach for the remaining grievances to be remedied.(17)

In England, in spite of the rapid growth of tort law, no official right to privacy is recognised. Indeed in the opinion of some, such a right would be neither necessary or especially useful. The Report of the Committee of Privacy in 1973 (18) came to the conclusion that if there is a need at all to protect privacy, the existing action for breach of confidence answers that need. Other scholars strongly disagree. The problem seems to be that firstly,

not everybody agrees what is meant by privacy, and secondly many types of invasions of privacy are indeed covered by traditional torts but not all of them. The reality seems to be that an incoherent patchwork of statutory and common law rules exists which protects some aspects of the private sphere of life but leaves others unprotected.(19)

Some privacy violations are similar to breaches of confidences or to defamations but yet there is something fundamentally different about some other privacy claims.(20) Some doubts have also been expressed as to whether control of the storage of personal data is a part of the law of privacy. It is agreed, in any event, that in common law countries, other than the United States of America, there does not appear to be any common law principles which prevent the mere possession or storage of private data about others. The common law focuses instead on the positive acts of surveillance or disclosure. Professor Gibson concluded an article with the words "since the common law is unwilling and apparently unsuited to provide this type of protection, legislative action is probably necessary if the picture is to change." (21)

Irish tort law provides much the same protection as is provided by tort law in other common law countries. Thus while our laws are sufficient to protect the individual from some kind of infringement of privacy, they are not adequate to protect confidential personal information. Where the information disclosed is true, or where it is untrue and does not injure the reputation of the plaintiff, no action may be brought in defamation or for injurious falsehood. The owner of a computer disk, tape or manual file

holding personal data could sue in trespass where there has been an intereference with the file medium, but such a right belongs to the owner of the file medium only, and not to the data subject.

The equitable doctrine of breach of confidence could be used where there has been a wrongful disclosure of confidential information. To qualify for protection the information must have the quality of confidence about it, and must have been given to the data user in circumstances importing an obligation of confidence. The reach of the law of confidentiality seems, therefore, to be extensive. All the cases to date however, provide protection only when the information has been provided on the basis of some initial voluntary reliance by the plaintiff on the discretion of some other person. It is of no assistance at all to the individual in helping him to discover what files are being kept about him or in giving him access to the information stored about him on such files. In such circumstances, personal information can be transmitted from one user to another user without any adequate precautions to safeguard the interests of the data subject.

Other problems also arise in relation to breach of confidence. In many cases, the bringing of a legal action before the courts of law requires information of a confidential type to be publicly disclosed and discussed. Pre-trial discovery procedure allows a client to get access to relevant information from the other party to any action. Here the

law must balance two conflicting interests. On the one side, damage may be done by the disclosure of the information, and on the other, the interests of justice requires that the information be disclosed. In some cases discovery is granted on the understanding that the information be confined to the solicitor and counsel on the plaintiff's side and to expert witnesses. In English Law it was held to be an implied undertaking by those obtaining discovery that they would not improperly or collaterally use the information discovered. (22)

A similar balancing of the interests of freedom of information and individual privacy arises in the case of government documents. It is now left to the court to decide whether a particular government document should be produced to the plaintiff in an action or not.(23) Conversely, the court will be reluctant to order a data user to disclose confidential information to a state agency. In a recent case, the court refused to order an insurance company to disclose personal information given by an applicant for insurance, even though the information was required by a garda inspector under powers given by a statutory instrument. The judge held that the instrument in question did not clearly show an intention to breach the insurer's duty not to disclose, nor was it in accordance with the spirit and scope of the parent statute. The judge also considered it relevant that no special circumstances should exist whereby disclosure would be detrimental to the data subject. (24)
It may be concluded therefore that, although tort law provides

some protection against the abuse of personal data, it is not in itself capable of providing the safeguards required.

Constitutional and Human Rights Guarantees.

The extent to which the Irish Constitution guarantees privacy to the individual is uncertain. So far the right to privacy has been positively declared "only in the special context of the privacy of the marriage relationship" arising from the case of McGee v. Attorney General.(25) Judicial pronouncements in the case of Norris v. Attorney General indicate that a right of individual privacy does exist but it is one which is not absolute. State security, public order or morality, or "other essential components of the common good" may limit the right. The judges of the Supreme Court expressed different views on the privacy issue and the case did not make it necessary for the court to explore its many aspects.(26) An expert on constitutional law has concluded that, "in such a state of divided judicial opinion, the theory of privacy, as an individual's personal right, remains unclear". (27)

This does not mean that the Supreme Court will not at some future date establish a personal right to the privacy of personal data. It has been suggested by one writer that the right to the non-disclosure of confidential information is one of the unspecified personal rights guaranteed by Art. 40.3 of the Constitution.(28) The decision of the German Federal Constitutional Court in December 1983 which found the Census Act partially unconstitutional suggests that his remarks may be well founded. Linked to the guarantee of the dignity of man, the German court established a personal right to "informational self-determination," which guarantees the authority of the individual

to decide for himself whether or not his personal data should be divulged or processed. Limitations on this right are allowed, but only if a "predominant public interest" can be shown, and provided procedural and substantive safeguards are provided. (29)

The Irish Constitution also guarantees liberty for the exercise, subject to public order and morality, of the right of the citizens to express their convictions and opinions. This statement of the liberty is followed by a substantial qualification of it. The state is obliged to ensure that this right should not be used to undermine public order or morality or the authority of the state. The freedom of expression provision has not been judicially considered in any detail, and it is accepted that substantial statutory and common law limitations on the freedom of expression exist. These limitations relate to the interest of state security, the interest of official privacy which allows for example the existence of the Official Secrets Act 1963, and a variety of other limitations. At present therefore, the Constitution is of very little assistance to the citizen in helping him to gain access to information in either the public or private domain. (30)

International Agreements

Other sources of possible protection of the individual's privacy and of his right to information, are those international instruments and conventions which Ireland has ratified. Article 12 of the Universal Declaration of Human Rights states (among other things) that "no one shall be subjected to arbitrary interference with his privacy", and that everyone has the right to the protection of the law against such interference. This declaration which was proclaimed in December 1948 was accepted and ratified by Ireland in February 1953. There are some doubts about the juridicial status of the Declaration,but there are substantial grounds for saying that it constitutes a binding obligation on member states of the United Nations. There is some basis for saying that it may even be part of customary international law and be therefore binding on all states. (31) The European Convention of Human Rights guarantees the right to respect for a person's"private and family life" (Article 8), and guarantees the right to freedom of expression (Article 10). Ireland signed this Convention in November 1950 and ratified it in February 1953.

Under Article 29.3 of the Irish Constitution, Ireland accepts the "generally recognised principles of international law and it's rules of conduct in it's relations with other states". Judicial pronouncements do not always agree on the effect of this provision - one suggests that it imports principles of international law into municiple law, another that it merely recognises these principles as a guide in Ireland's relations with other states.(32) It has been interpreted in any event, as conferring no right on individuals.(33)

It has also been held that the Declaration of Human Rights is not a part of Ireland's domestic law.(34) Article 29.6 of the Irish Constitution states that no international agreement shall be part of the domestic law of the state "save as may be determined by the Oireachtas" (i.e. the national parliament). Neither of these international agreements

have been determined to be part of the domestic law of Ireland.[35] The rights conferred by the European Human Rights Convention cannot therefore be relied upon as part of the municipal law of the state. It has been held that an Irish court"cannot give effect to the Convention if it be contrary to domestic law or purports to grant rights or impose obligations additional to those of domestic law." [36] It seems that no presumption that the Constitution is compatible with the Convention arises, or that the court need concern itself with the consistency of Irish law with the Convention.[37]

European Human Rights Convention

Any rights which the individual has, therefore, under the European Human Rights Convention, he must pursue by application to the Commission, and thence to the Court of Human Rights in Strasbourg. Such applications are also confined to complaints against the state, and in addition, domestic remedies must have been exhausted. Having passed these hurdles, the applicant may still be faced with disappointment, as the extent to which the Convention protects the privacy of personal data and guarantees freedom of information is uncertain, and does not appear to be extensive.

The threat posed to privacy by the computers and data banks has long been recognised. In 1972 Rene Cassin wrote that the new capacities of computer science make it capable of violating "the privacy and the individual freedom of citizens and of disturbing the balance between public authorities and social groups".[38] Similar views have been expressed by many writers since then.[39] The Convention's provisions

were framed without our present awareness of these threats of computer technology. The protection provided tends therefore to be of an indirect and peripheral nature.

Right to Privacy

Article 8.1. states that "everyone has the right to respect for his private and family life, his home and his correspondence". This provision is aimed at protecting the individual from arbitrary interference by public authorities. It also imposes some positive obligations on the state such as the obligation to make the courts effectively accessible to anyone who wishes to pursue the rights referred to. (40) "Private life" implies, in addition to protection from unwanted publicity, the "right to establish and develop relationships with other human beings, especially in the emotional field, for the development and fulfillment of one's own personality". (41) In the context of personal data protection, however, the Article's scope is uncertain. Jacobs has commented that "the scope of the protection of privacy under the Convention remains largely unexplored in the caselaw". He suggests that it should protect the individual from (among other things) being spied upon, watched, or harrassed, and from the disclosure of information protected by the duty of professional secrecy. (42) If that is the extent of its range, it offers no greater protection than that provided by Irish tort law.

In addition Article 8 (2) allows substantial interference by a public authority with the rights given "in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for

the protection of health or morals, or for the protection of the rights and freedoms of others". Such interference must be only such as is in accordance with law and is necessary in a democratic society to protect the above interests. Although the European Court of Justice has emphasised that the provisions limiting fundamental rights must be narrowly interpreted,(43) and although the legal basis for these restrictive measures and their necessity have been narrowly defined by the Court, they still constitute a serious diminution of the right to privacy. (44) It has been suggested that, perhaps, because of these legitimate interfences, the practice by the European institutions has tended "to restrict rather than enlarge the scope of this right." (45) The potential scope of this right to privacy is therefore uncertain and whatever about the prospects of its expansion, it does not seem to offer much practical help to a data subject who believes his rights to privacy are breached by the operators of data banks.

Right to Freedom of Information.

The European Human Rights Convention Article 10(1) states that "everyone has the right to freedom of expression." This right, it states, shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this freedom, is stated in Article 10 (2) to carry with it duties and responsibilities, and is subject to a list of ten restrictions and limitations. These include the interests of national security, prevention of disorder or crime, protection of morals, reputation, and rights of others, the prevention of disclosure of confidential information, and the maintenance of

the authority and impartiality of the judiciary. These restrictions and limitations must be prescribed by law (i.e. must not be arbitrary) and must be necessary in a democratic society to protect the interests specified. If these latter requirements are strictly construed, the limitations on the right can be narrowly interpreted. (46)

The Convention guarantees therefore freedom of information, at least where the information is in the public rather than the private sphere. It guarantees the right to hold opinions, and the right to express and to receive information and ideas. It guarantees the press the right to inform the public and the public the right to be properly informed,subject of course to the specified restrictions. (47) Where information is sought from the authorities, however, or where it is kept in private data banks, the Convention is of little use. It does seem to guarantee the right to actively seek information from generally accessible sources, but it does not impose an obligation on the authorities to provide information. It has been held that freedoms do not necessarily give rise to a right to positive state action. (48) Whereas Article 10 gives no general right to obtain information, it may include in certain circumstances, a right of access to documents which are of particular importance to the person seeking them.(49)

It can be concluded then that whereas, there may be some possibility of obtaining information where a person has a special interest in the data sought, and provided he is not defeated by the many limitations on his rights, the Convention is otherwise of limited usefulness. It can do little to help

a person gain access to files held about him - if he knows of their existence to begin with - nor does it facilitate open government by giving the public access to government files.

Proposed Personal Data Protection Legislation.

It would seem from the above examination of the general absence of personal data protection and freedom of information in Ireland, that these rights which are important to the individual's well being and for the survival of democracy should be protected by statute. The present coalition government seems to be committed to the introduction of a data protection bill so as to enable Ireland to implement the Council of Europe Convention for the Protection of Individuals with regards to Automatic Processing of Personal Data (1981) and the OECD Guidelines Governing the Protection of Privacy and Trans-border flows of Personal Data (1980).[50] Before coming into office in June 1981, Fine Gael the dominant party in the present coalition government, promised the enactment of a Freedom of Information Act. This promise seems to have been forgotten and would, in any event, be insufficient unless accompanied by a reform of the Official Secrets Act 1963.

The progress made to date on the data protection legislation is of some interest. The views of interested parties on the implementation of the Conention and the OECD guidelines were sought by the Minister for Justice as early as September 1981. In the following December a Conference on Privacy and Data Protection was held in Dublin by the Irish Computer Society at which Robert Cochran, an expert with the National Board for Science and Technology, made suggestions for an Irish Privacy Bill.

The major computer users and interest groups, as well as legal opinion, were invited to make their observations on the implementation of the European measures. These included the legal departments of the universities, the Incorporated Law Society of Ireland and the Bar Council. Submissions were made on behalf of the Irish Computer Society, the Irish Computer Services Association, and the Irish Confederation of Computer Users. Various government departments made submissions, as most of them are major users of personal data files, e.g. National Manpower, the revenue commissioners, the department of social welfare and the garda siochana. It is said that a "strong" submission was made be a state-sponsored insurance company. The overwhelming view of these submissions has been that Ireland should ratify both documents. The pressure to ratify is not however for human rights reasons, but on purely commercial grounds. Ireland in recent years has invested heavily in electronic technology and software development. It is felt that foreign business may be lost unless the privacy of personal data is guaranteed in Ireland. Thus the prime motivation for the introduction of personal data protection in Ireland is admitted to be a pragmatic and economic one. This coincides with the experience in the United Kingdom. (51)

Progress on legislation remains painfully slow. The proposed Bill has "relative priority" but always seems to be next in line to somethimg more important. It seems also that the Department of Justice have difficulty in deciding on the method of enforcement to be adopted and as to what exemptions to allow.

Considerable reservations have been expressed regarding the United Kingdom model and it seems that the Department has considered previous Dutch proposals as well as something along the lines of the Irish Consumers Affairs Office. The precise form of the legislation is as yet unknown and probably not finalised. One effect of the delay is that the major personal data bank operators are aware of the impending legislation. Some data users such as the banks, who have branches in the United Kingdom are getting first hand experience of the system there. Other Irish data bank users are already adjusting the type of data held and the way it is held in anticipation of the requirements of the Data Bill.

Freedom of Information Legislation.

No early progress is expected in relation to freedom of information or the reform of the Official Secrecy legislation. This is to be regretted as it may be more important to the survival of democracy in the long term. As John P. Humphrey has written

> "However we may classify human rights and freedoms and whatever names we may give to them, it will be agreed that freedom of information is a somewhat, although not exclusively, political right. It is a political right of a very special kind; for, among other things, it's exercise makes possible the criticism of government and exchange of information without which there can be no democracy ." (52)

In his book, The Government and Politics of Ireland, Professor Basil Chubb observed that the role of our public representatives, the more creative attitude of the judges,

and the mediation of the Ombudsman "all contribute to softening the administration of public services and lubricating the abrasive edge of government where it bears upon the administré". These developments hide the problem from the eyes of the casual observer, for as he observes, "above all Ireland badly needs a freedom of Information Act, which would give members of the public and journalists the right to see official files".(53) Bentham's remarks about the desirability of public trials could, with a few modifications, be applied also to the public service

> "Publicity is the very soul of justice, it is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial".(54)

REFERENCES

1. The National Council for Civil Liberties (N.C.C.L.) published Donald Madgewick's "Privacy Under Attack" in 1966; Justice Report, "Privacy and the Law" (1970); Walden Bill; Younger Report of the Committee on Privacy (1973) Cmnd-5012; Franks Committee Report (1972); Lindop Report of the Committee on Data Protection (1978) cmnd. 7341.

2. Basil Chubb, "Government and Politics of Ireland" (1982), pp. 316, 325.

3. Irish Times, 13 Nov. 1984.

4. Irish Times, 18 July 1984;

5. 28th January 1984.

6. 17 February 1985.

7. Report of Fulton Commission, Cmnd. 3638, para. 7.

8. B. Chubb see ft. (2) 214-5,333.

9. D. Roche, "The Civil Service and Public Relations", Administration, 11 (1963), 108. Joseph Jacob has written that "probably a greater reason ... for the lack of candour shown by Government with the public is that Government-Civil Servants - has the feeling that to involve the public is to court trouble".
"Some Reflections on Governmental Secrecy" in Public Law, (1974) 43.

10. B. Chubb, see ft (2), 321-3; John Kelly, "Administrative Discretion", Irish Jurist, n.s. (1966), 210.

11. Report of the Public Services Organisation Review Group, 1966-69, Dublin 1969, para. 5.3.3.

12. B. Chubb see. ft. (2) 324.

13. Marc McDonald, "Some Aspects of the Law on Disclosure of Information", 14 Irish Jurist, n.s. (1979) 229-236.

14. Joseph Jacob, "Some Reflections on Governmental Secrecy", Public Law, (1974) 33-4.

15. Raymond Wacks, "The Poverty of 'Privacy'", 96 Law Quarterly Review (1980) 73ff; Walter F. Pratt, "The Warren and Brandeis Argument for a Right to Privacy" (1975) Public Law 161 ff.

16. Samuel Stoljar, "A Re-examination of Privacy", (1984) Legal Studies 67 ff; Andrew Martin, "Privacy in English Law", Privacy and Human Rights, ed. A.H. Robertson (1973) 95ff.

17. D. Gibson, "Common Law Protection of Privacy, What to do Until the Legislators Arrive", in Lewis Kear, ed., Studies in Canadian Tort Law (1977) 344.

18. Younger Report, Cmnd. 5012, paras 87, 659.

19. Andrew Martin, see ft. (16), 105.

20. Samuel Stoljar, see ft. (16), 87

21. D. Gibson, see ft. (17), 358.

22. Home Office v. Harman /1982/ 1 All. E.R. 532; Ian Eagles, "Disclosure of Material Obtained on Discovery" 47 Modern Law Review 284 ff.

23. Murphy v. Corporation of Dublin, 1972 I.R. 215; J. Kelly, The Irish Constitution (1984) 242-246.

24. Murphy v. P.M.P.A. 1977/5395, unreported, Doyle J., High Court 21 Feb. 1978; M. McDonald see ft. (13) 244-246.

25. 1974 I.R. 284; 108 ILTR 29; J. Kelly, see ft. (23) 481.

26. Supreme Court, unreported, 22 April 1983.

27. J. Kelly, see ft. (23) 483.

28. M. McDonald, see ft. (13) 247.

29. Eibe H. Riedel, "New Bearings in German Data Protection-Census Act 1983 partially unconstitutional" (1984) Human Rights Law Journal, 67-75.

30. J. Kelly, see ft. (23) 563 ff.

31. Paul Sieghart, "The International Law of Human Rights (1983) 54-5.

32. Henchy J., The State (Sumers Jennings) v. Furlong, 1966 I.R. 183; O Byrne J., Saorstát and Continental Steamship Co. v. de las Morenas, 1945 I.R. 291, 79 ILTR 139; see J. Kelly ft. (23) 183-4.

33. In re Ó'Láighléis, 1960 I.R. 93; 95 ILTR 92; State (Summer Jennings) v. Furlong, 1966, I.R. 183; J. Kelly, see ft(23) 182-183.

34. Application of Woods, 1970 I.R. 154; J. Kelly see ft. (23) 191.

35. See Andrew Z. Drzemczewski, European Human Rights Convention in Domestic Law, (1983) 170-175.

36. In re Ó'Láighléis, see ft. (33); J. Kelly see ft (23) 190-191.

37. Norris v. Attorney General, Supreme Court, unreported 22 April, 1983.

38. "Science and Human Rights", in (22) Impact of Science on Society (1972) 335.

39. See e.g. G.B.F. Niblett, "Computers and Privacy", 170 ff and R.V. Jones "Some Threats of Technology to Privacy", 157 ff; in A.H. Robertson ed. Privacy and Human Rights (1973); Simon Nora and Alain Minc, The Computerisation of Society, MIT (1980) 64-5, 116-18.

40. Airey v. Ireland 6289/73, Judgement 2 EHRR 305; P. Sieghart, see ft (31) 312; Dimitrios Evrigenis, "Recent Case-Law of the European Court of Human Rights on Articles 8 and 10 of the European Convention on Human Rights", in 3 Human Rights Law Journal (1982) 121, 136.

41. P. Sieghart, see ft. (31) 313; X v. Iceland 6825/74, Decisions and Reports (abbreviated to "DR" hereafter) 5, 85; X v. Switzerland 8357/78 DR 13, 248. Dudgeon v. U.K. 7525/76, judgement 22 Oct. 1981.

42. F. Jacobs, The European Convention of Human Rights (1975) 126; see also Louise Doswald - Beck "The Meaning of the Right to Respect for Private Life" under the European Convention on Human Rights, in 4 Human Rights Law Journal (1983) 283-309. The closest the Commission came to personal data files was in the case of X v. Austria (8170/78, DR 16, 145) where the police maintained a file on the applicant who was an Austrian student. The issues were not considered in depth because the intereference with privacy was held to be necessary for the prevention of crime.

43. Sunday Times Case, 6538/74, judgement 26 April 1979, 2 EHRR 245, A, 30; Klass v. Federal Republic of Germany (5029/71) judgement, 6 Sept. 1978, 2 EHRR 214, A, 28;; D. Evirgenis see ft. (40) 129, 131 f.

44. Handyside case, 5493/72, judgement 7 Dec. 1976, 1 EHRR 737, A, 24, para 49.

45. Richard B. Lillich, "Civil Rights", in T. Meron, ed. Human Rights in International Law (1984) 148-9.

46. P. Sieghart, see ft. (31) 88-89.

47. Sunday Times Case see ft.(43) Series A 30,40 para. 65.

48. Giorgio Malinverni, "Freedom of Information in the European Convention of Human Rights and in the International Covenant on Civil and Political Rights, in 4 Human Rights Law Journal (1983) 448-9.

49. X v. Federal Republic of Germany, 8383/78, DR17, 227, pp. 228-9; G. Malinverni, see ft. (48) 450.

50. The government's intention to enact legislation has been announced in Seanad Eireann (Senate) by the Taniste (Deputy Prime Minister).

51. R.C. Austin, "The Data Protection Act 1984; The Public Law Implications", in Public Law (1984) 618, 619. (The U.K. Government openly proclaimed in the House of Commons that the Convention was being ratified for sound commercial reasons).

52. T. Meron ed. see Human Rights in International Law

53. B. Chubb see ft (2) 325, 327.

54. The Rationale of Judicial Evidence (1872)2, 523

(DRAFT: Not to be cited without the permission of the authors.)

SOCIAL SCIENCE AND THE DATA PROTECTION ISSUE IN NORWAY: A CASE OF ACCOMMODATION TO CONFLICTING GOALS

Ørjar Øyen
University of Bergen

Thore Gaard Olaussen
Norwegian Social Science Data Services

A paper prepared for the Joint Session of Workshops of the European Consortium for Political Research (ECPR) on "Confidentiality, Privacy and Data Protection", Barcelona, 25-30 March 1985

BEFORE THE BEGINNING

Looking back upon the early developments prior to the enactment of data legislation and the establishment of the Data Inspectorate in Norway we find that the social science community was largely unprepared for what lay ahead. There had been very little anticipation of a political movement having the aim of placing considerably tighter restrictions upon the production and use of information about individuals. The social scientists felt that the free access to information needed to do social research was a fundamental right that could not be questioned by anyone.

We are not suggesting that the social science researchers were insensitive to the need to protect the interests of those who supplied the primary data for research. On the contrary, they were keenly aware of the necessity to impose strict principles of confidentiality, not only for obvious ethical reasons, but also in order to maintain a situation of trust and confidence, which would in turn secure data access to enable research in the future. These self-imposed standards were assumed to be sufficient, and there was no documented case of a breach of these standards in the entire history of Norwegian social science. Thus, it was difficult to see any real need for legislative action that would, in the opinion of the social scientists, have a damaging effect upon their work. And even though it was becoming rather obvious that most social research was controversial in some sense, and often constituted a threat

to the interests of some groups in society, it was felt that on balance society had good reasons to appreciate the research that was being done, and therefore even improve the conditions for its efficient execution.

These views, held on behalf of social science, were indeed somewhat provincial. Once the data protection movement gained momentum the interests of social science research turned out to be only a tiny little corner of the very extensive and heterogeneous field being subject to regulation through new legislation. It required some time to learn that lesson.

THE AWAKENING

Several nations experienced simultaneous movements toward the introduction of restrictions upon the privilege of compiling, utilizing and storing data files containing information about identifiable individuals. There was an almost parallel development of data legislation in several European countries as well as in the United States and Canada. The coming of age of the electronic computers, and the ease with which strings of information could be tied together, created concern. The producers of official statistics had become accustomed to a reliance upon a delicate mutual trust between the suppliers of primary data and the users of statistical information. This balance now seemed threatened. The census bureaux had to move with great care in order to utilize the new electronic technology for more efficient monitoring of social, demographic, and

economic trends. At the same time the computer specialists were discovering the wider potentials of their new tools.

In Norway some concrete events served to precipitate the political concern and caught the attention of the public, leading to considerable debate in the mass media as well as in political decision-making bodies. Social science researchers were alerted to the potential dangers to their ideals of free and unrestricted social science research. We believe that the involvement of social scientists in the ensuing debates had some impact upon the formulations of the relevant provisions of the Data Act.

Norwegian social scientists predicted disaster. They foresaw a return to armchair research. They feared that there would be so many restrictions upon data collection and analysis that empirical research of the more traditional type simply could not be done.

Against this background the case of Norway may perhaps be regarded as an interesting one. Although the rules and regulations that have been introduced may cause extra work and sometimes produce delays, and on rare occasions even insurmountable barriers, we feel that the practical and technical implementation of data legislation has had significant positive effects upon the restructuring of the entire field of data production, data access, and data analysis. Thus, without underestimating the drawbacks, we feel that the developments precipitated by the legislative action have served to improve the overall conditions under which Norwegian social scientists

conduct their work. We would like to suggest that the outcome to a large extent is due to fortunate circumstances enabling "instrumentalists" to take over where the "emotionalists" had conducted some important groundwork.

THE ACTION

Sensitizing the Public Mind

In 1964 the Central Bureau of Statistics introduced the person identification code, expected to produce considerable improvements of the bookkeeping operations and to facilitate the linkage of census data with the continuous influx of information about births, marriages, deaths, changes of residence, occupational status, etc., from local registers. The news about the eleven-digit code and some speculations about its potentials stirred up some concern in the public debate. But another and simultaneous event had perhaps more emotional impact. An extensive sociological research program designed to follow an age-cohort of males from age 11 through a longitudinal study lasting perhaps 20 years or more, and to be conducted in the metropolitan areas of Copenhagen, Helsinki, Oslo and Stockholm, encountered strong negative reactions in some school-districts in Oslo. Analysis of the reactions indicated that an emerging image of social science constituted a threat to values of privacy and secrecy (Hoem, 1968; Øyen, 1965, 1966).

Since then the person identification code has been adopted for a wide range of purposes in the public as well as in the

private sector. Tax and insurance records, driver's licences, passports, bank accounts, social welfare and medical records all contain the person identification code, and whenever an individual approaches a public or other agency for help or assistance the most efficient way of securing access to records is through the code. The expansion of the code's utilization and in particular its function as a key to the linkage of files apparently have been watched very closely by the Data Inspectorate.

The longitudinal study, however, became a fatality of the debate, rather than the data legislation. It is a matter of some consolation that the research program has had success in other Nordic capitals.

Social Science Strikes Back

While social scientists felt quite strongly that their own principles for the protection of the integrity of individuals were sufficient in view of the basic premise that social research must be performed, they pointed to a number of risks inherent in the movement toward stricter regulation. They feared that the proposed Data Inspectorate might become a censorship agency, notably since the criteria of relevance and utility were to be considered prior to making a decision to grant or to deny a concession to establish a register. And perhaps the researchers might be tempted to oversell utility, making basic research more unlikely. Funding agencies might tend to make their decisions about research grants contingent upon the real or anticipated

views of the Data Inspectorate. The cumulative nature of the research process might be impeded. While there is always a need to revise research instruments through pilot studies, series of pretests of questionnaires, etc., the prior decision of the Data Inspectorate to allow the establishment of a register might simply preclude such a process.

It was feared that the pressure toward utilizing anonymized information about individuals would make panel studies and longitudinal studies far more difficult, and it might become virtually impossible to conduct follow-up studies, or to check conclusions of earlier research, on the basis of research materials already on file.

While it was predicted that there would tend to be a shift from empirical to more speculative, theoretical research, it also was feared that the conditions for the training of research recruits might deteriorate. The processing of an application for data concession would necessarily take some time, and the time available for graduate study and for doctoral training programs is limited.

Social scientists also pointed to the possibility that stricter rules would tend to make it easier for public as well as private agencies to protect their own interests rather than the interests of their clientele, in turn making it more difficult to protect society's need to gain improved knowledge about its own functioning and shortcomings (Kjønstad and E. Øyen, 1980).

The emphasis upon the view that through social research society is aided in understanding itself, was a key issue in the debate, and also may have had some effect upon the formulations laid down in the regulations adopted under the Act. In addition, the distinction between on the one hand administrative data enabling decisions about individuals and on the other hand data used for statistical purposes such as to assess relationships and trends, was strongly emphasized and apparently understood. Then, as the more pragmatically oriented lawyers and social scientists joined forces and worked together successfully, through the universities and through bodies such as the Norwegian Research Council for Science and the Humanities, the result was the adoption of principles which turned out to have a number of positive consequences for social science research in Norway.

The nature of the debate has been reflected more fully in a series of articles and other documents (Øyen, 1976, 1977; Brosveet and Øyen, 1979; Rokkan, 1977a, 1977b). The Norwegian debate to some extent was spurred on by the debate which had been going on in Sweden, where data legislation had been introduced a few years earlier (for a review of the situation, see Janson, 1979), and also showed many similarities to arguments which had come to the fore in the extensive international debate (for reviews of arguments, see for example Reynolds, 1975; Mochmann and Mueller, 1979).

Two Committees--One Act

The Norwegian government appointed two committees, one

chaired by Helge Seip (who later became Director of the Data Inspectorate), the other was chaired by Professor Tore Sandvik. The Seip committee was mandated to review the use of personal information in the public sector; the Sandvik committee had the task of reviewing the situation within the private sector. Both were to propose legal statutes.

In the reports of the two committees (Ministry of Justice, 1974, 1975) one finds reviews of problems related to the electronic processing of information about individuals, the purposes of such processing, existing and related relevant legislation, and current practices at the time of the studies. The committees recommended that two separate statutes be enacted, one for the public and one for the private sector.

However, the Government thought differently. In 1977, when the proposition was tendered to the Storting, the recommendations of the two committees had been molded into one draft statute (Ministry of Justice, 1977). Most of the provisions contained in the draft did not differentiate between the private and the public sector, although some special provisions were made for the private sector in order to regulate credit information, data processing enterprises, direct mail, and opinion research. As the proposition was considered by the Storting in May 1978 these distinctions were removed. The politicians wished to have one act, applying to all categories of personal data, and accepted no special treatment for the public sector.

SOME FEATURES OF THE DATA ACT

The Data Act (Lov om personregistre m. m.) was passed by the Storting on 9 June 1979 and became effective on 1 January 1980. In the English translation the law is entitled "Act Relating to Personal Data Registers Etc.", and its Article 1 states the scope of the Act as follows:

> "The Act is applicable to personal data registers and to other facilities whereby personal information is utilized in certain types of activities.
>
> The term 'personal information' shall mean information and assessments which are, directly or indirectly, traceable to identifiable individuals, associations or foundations. The term 'personal data registers' shall mean registration files, records etc. where personal information is systematically stored so that information concerning an individual person may be retrieved.
>
> The Act is applicable to personal data registers in central or local government institutions as well as in private enterprise, societies or foundations."

The Act stipulates a government concession requirement to be administered by an official agency, the Data Inspectorate, under the direction of a Board of seven members appointed by the King. The concession requirements are formulated as follows (in Article 9):

> "Permission of the King (government concession) is required for the establishment of personal data registers which are to utilize electronic aids. Such permission is also required for the establishment of other personal data registers if they are to include
>
> 1) information referring to race or political or religious beliefs,
>
> 2) information on whether a person has been a suspect, indicted or convicted in a penal case,
>
> 3) information referring to the state of health or abuse of intoxicants,

4) information concerning sexual life,

5) other information concerning family affairs than those referring to family relationships or family status, property settlements between spouses and breadwinner status."

Registration of information falling into the above five categories may not be undertaken unless necessary (Article 6). In general:

> "The registration of personal information must be justified on objective grounds, having due regard to the administrative and operational activities of the institution or enterprise undertaking such registration."

An important distinction pertaining to research interests is contained in Article 7. The following quotation is from Section 1 of this article:

> Everyone shall have the right to be informed of the types of information concerning himself which are stored or processed by means of electronic aids. This right to be informed shall nevertheless not apply to registers which are only used for statistical, research or general planning purposes."

Clearly, the Act does not apply to absolutely all registers. We read in Article 1 that

> "the King may determine that the Act shall not apply to certain types of personal data registers."

The possibility of making exceptions appears elsewhere too. As we read the various articles of the Act we find that the King may assign additional duties to the Ministry of Justice or to the Data Inspectorate; the King may issue specific rules; the King may further restrict, and so forth.

Thus, in ordinary language the Act is a general statute through which the Storting has provided the principles whereby the adoption of specific rules and regulations becomes the responsibility of other decision-making bodies. The Data Inspectorate is a branch of the Ministry of Justice. It has been argued that the Inspectorate ought to be organized as an independent agency divorced from the Ministry of Justice, thus facilitating the implementation of the Act even within the domain of the Ministry.

FINDING WORKABLE SOLUTIONS

After reviewing the conceivable potential dangers that data legislation might inflict upon social research, and after pointing to the apparent crisis into which data legislation had thrown Swedish social research, a few instrumentally inclined social scientists realized that some constructive action had to be taken in order to secure the optimal conditions under which empirical social research could continue to exist. It is apparent in retrospect that the social science community has good reasons for gratitude to a group of legal experts who made invaluable efforts in finding solutions. (For some of the legal literature, see Blekeli and Selmer, 1977, and Bing and Selmer, 1980).

Professor Stein Rokkan's efforts had seminal importance and soon pointed in the direction of a clearing-house or brokerage function interposed between the social science research community and the Data Inspectorate. He urged all major research insti-

tutions to join forces to protect the researchers' need for access to information regulated under the new Act and outlined a scheme whereby this could be achieved (Rokkan, 1977). A special committee appointed by the Norwegian Research Council for Science and the Humanities and chaired by Jon Bing, furnished a thorough analysis of the major issues of principle which were at stake (Research Council, 1979). Responding to the studies that had been made and the various solutions that had been suggested the Research Council in 1980 made a decision to establish a Secretariate for Data Protection Affairs (hereafter called the Secretariate). This new agency became affiliated with the organization called The Norwegian Social Science Data Services (hereafter called NSD, an acronym for Norsk samfunnsvitenskapelig datatjeneste), located in Bergen, and immediately initiated negotiations with the Data Inspectorate.

Two major issues had to be clarified. The first, of course, was to ensure that measures taken to protect privacy and the integrity of individuals would not seriously impede researchers' access to data about individuals. The second issue had to do with the system of archiving data registers that had already been used and which ought not to be destroyed or depersonalized.

THE GENERAL CONCESSION

The negotiations gave rise to an agreement between the Data Inspectorate and the Research Council that the Secretariate was to be mandated to provide regular reports to the Data Inspectorate about all research projects funded through the

Research Council and for which concession was required in accordance with the provisions of the Act (Data Inspectorate, 1981).

The researcher applying for permission to establish a register for which concession is required has to provide, through a special form, certain informations to the Secretariate. The Secretariate then makes a judgment on the basis of information about data collection, the plans for the processing of the data, data security means which are foreseen, and the plans concerning storage and utilization through re-analysis at a later stage. With its report the Secretariate then encloses a letter of recommendation as to the concession decision. And normally the Data Inspectorate replies, in a letter directed to the project manager and a copy to the Secretariate, that the concession has been granted. Should particular questions require clarification the Data Inspectorate makes contact with the Secretariate before granting concession. Apart from some adjustments in the method of obtaining data the Data Inspectorate so far has honoured the recommendations of the Secretariate, and no concession recommended by the Secretariate has been denied as yet (cf. Olaussen, 1984a, 1984b).

One of the important advantages of the reporting system for the research community is that the processing of applications for concession normally will not delay the research project. When an application for funding is made to the Research Council the Secretariate will be responsible for the evaluation of the application from the viewpoint of the Data Act and the terms laid

down in the general concession agreement. If contact is needed between the applicant and the Secretariate in order to make clarifications or adjustments judged to be necessary, the applicant will have as a counterpart a person who is competent in methodology of social research rather than an employee in the Data Inspectorate. The latter may be an excellent legal expert but not always in a position to assess the possibilities of making the appropriate adjustments in the research design. The record indicates that adjustments in the questionnaire or in data handling procedures often may be made without loss to the research design, and closer scrutiny of the design sometimes may lead to improvements.

The Data Inspectorate has expressed that the reporting system holds advantages. The Inspectorate submits a report to the Storting annually. In the report for 1981 we find the following conclusion:

> "The arrangement entails, in our judgment, a considerably better control to the effect that concession for the individual research register is requested, rather than a system of individual applications for concession from each researcher who establishes a register. Furthermore, the system gives the Data Inspectorate a better general view of how the research registers are treated while the research project is in progress as well as after its eventual completion" (our translation, Datatilsynet, 1981:31).

General concessions, similar to the agreement between the Data Inspectorate and the Research Council (and for which the Secretariate is the executive branch), have been granted by the Data Inspectorate to the Institute for Applied Social Research and the Institute for Hospital Research.

According to the Data Inspectorate the general concessions granted to research organizations do not significantly reduce the workload of the Inspectorate. However, the arrangement may save much time for the applicants (Ministry of Justice, 1983, p. 10).

STORAGE OF RESEARCH REGISTERS

In seeking to develop a system of archiving research data after the completion of the research project the Secretariate has had to cope with the provision of the Act which stipulates that data having personal identification must be destroyed as soon as the data are no longer needed for the execution of the research project. Article 11 of the Act contains the following statement:

> "When permission is granted in pursuance of Article 9, rules shall be prescribed for the personal data register (....). In particular, consideration should be given to prescribing rules on . . . . (10) the deletion or non-use of data after a certain lapse of time, and whether the register should be transferred to the general archive system . . . . (11) security measures and destruction of data material."

In accordance with these provisions of the Act the Data Inspectorate and the Research Council adopted the following rule:

> "Upon termination of the project all data registered by electronic aids or other media shall be properly destructed" (our translation, Item 4.8.2, Agreement, 1981).

In principle, once the project has been completed the concession has automatically been rendered invalid. And as long as it has not been clarified whether research data are to be transferred to the general archive system the data do in fact have to be destroyed.

Without going into a discussion of the unreasonableness of this requirement at this point, let us describe the arrangements which have in fact been established. A system was proposed whereby the researcher rather than destroying or depersonalizing the data is offered the opportunity to deposit them in a central research data archive. The NSD was proposed to have the responsibility for the central archive for such data while the Secretariate would organize the routines.

The final agreement, reached in 1981, accepts a system of a central data archive for research registers. The agreement states that personal data registered by electronic or other meansmay be transferred to the Norwegian Social Science Data Services, provided there are reasons to presume usefulness in future research. The agreement contains some limiting conditions. A researcher requesting storage of personalized data must establish an acceptable likelihood that the data will prove useful in future research. Furthermore, a committee appointed by the Research Council is entrusted with the authority to decide which registers are to be kept in the archives and which registers are to be destroyed or anonymously. The same committee also is to make decisions about reuse and to whom and for which purposes reuse is granted. A report about such decision is to be sent to the Data Inspectorate.

At first glance the system may seem somewhat bureaucratic. But it must be remembered, first of all, that the Data Inspectorate and the Secretariate have a joint interest in

finding solutions which function smoothly. Secondly, the committee of overseers appointed by the Research Council, has delegated some decisions to the Secretariate. Thus, the balancing of partly conflicting goals, that of securing protection of privacy and that of defending the interests of research, has been achieved in a manner which so far appears to be satisfactory.

OTHER SOURCES OF RESEARCH DATA

Access to Data in Public Agencies

So far we have described the system which applies when a researcher conducts a survey or compiles data dependent upon thecooperation or consent of individuals providing the information. We now turn to a discussion of the procedures necessary to gain access to administrative data files in public agencies. Such data may be needed in order to supplement data collected through interviewing, or they may be needed for independent analysis.

The handling of data files in public administration is regulated by a special act covering procedures of management in the public sector ("Forvaltningsloven"). This act regulates researchers' access to data files or information primarily used for administrative purposes (cf. Frihagen, 1979, pp. 225-241). Whenever a researcher wishes to secure access to micro level information being subject to ethical secrecy requirements permission has to be obtained from the appropriate ministry,

unless informed consent may be obtained directly from the individuals with whom the particular information is concerned. The ministry will not grant access unless the researcher has presented convincing reasons to believe that the research program has merits in terms of usefulness and seriousness, and that it would have been difficult to obtain the necessary information by other means.

In such instances the researcher has to go through at least two steps. An application has to be submitted to the ministry, and normally a special committee for secrecy and research is asked to evaluate the application and give advice relating to the decision. In case the project manager is not aware of the rules which apply and the procedures to be followed the Secretariate will give advice. Following procedures similar to those which apply when the researcher needs to collect primary research datathe Secretariate may play a role of mediator between the applicant and the particular ministry. Next, an application has to be sent to the Data Inspectorate to obtain the concession to establish the register. The procedures may require time and considerable effort, but at least possibilities for data access do exist.

Data from Statistical Agencies

One very important supplier of data needed for social research is the Central Bureau of Statistics. According to the Statistics Act the Bureau has the right to secure data about individuals (e.g., census data). The Bureau also conducts

surveys and has a special division for interview studies. The surveys are based on representative samples of Norway's population. In accordance with the Data Act the Data Inspectorate has granted a general concession to the Central Bureau of Statistics. The concession also contains some general rules concerning researchers' access to the Bureau's data.

Census data may be used for research purposes externally, but some requirements have to be met: (1) The data must be anonymized, but only to a level still making the research possible. (2) The researcher must have concession from the Data Inspectorate prior to obtaining the data. (3) The data shall be used for statistical purposes only.

Survey data may also be made available for research purposes. The above conditions apply, in addition to the requirement that for the identification to be maintained therespondents must give their consent. The consent requirement may constitute a problematic barrier, but it must be viewed against the rules under which the Bureau's data collection is carried out. Also, the research community realizes that the Bureau is a very important partner for social science research efforts and provides several kinds of services, from drawing a sample of the population to conducting the entire survey.

Therefore, a close cooperation between the Bureau and the NSD has been established. The Bureau provides anonymized survey data for the researchers through the NSD. Such data transfer does not, because of the removal of identification, violate the

conditions laid down by the Data Inspectorate.

MERITS AND SHORTCOMINGS

The Role of the Secretariate

In our opinion, the unique feature of data protection in Norway is the fact that it has been possible to establish a clearing-house which functions as mediator, broker, and buffer between the research community and the agency in charge of the implementation of data legislation.

The role played by the Research Council through NSD and the Secretariate for Data Protection Affairs in achieving the rather favourable conditions has been highly significant. The Research Council has been willing to earmark special funds for the execution of the tasks of the Secretariate. Following negotiations between the Research Council and the NorwegianCouncil of Universities the arrangement has been expanded and strengthened through a budget sharing agreement whereby the Research Council now defrays half the cost of the operations while the universities foot the other half of the bill. The annual budget is approximately NOK 700 000.

It is necessary for the Secretariate to maintain a close relationship to the Data Inspectorate and to perform so as to avoid conflicts and rebuttals, while at the same time facilitating the efficient handling of the researchers' data needs.

We feel that the Norwegian research community respects the function of the Secretariate, and we have not been able to find cases in which researchers have seriously challenged the position that the Secretariate has taken toward the Data Inspectorate.

Problems of Data Storage and Reuse

The provisions for placing research registers in secure archives are in principle the responsibility of the institutions conducting the research or being responsible for the research operations. But there can be no question that the centralization of this function through NSD and the Secretariate often provides advantages beyond the obvious point of finding optimal solutions to satisfy the Data Inspectorate. The registers are handled, stored and secured according to high professional standards, and presumably the later retrieval of data may become as efficient as technically possible.

Clearly, the pressure exerted upon the research community to utilize data registers from which the identification has been removed, is a condition with which social researchers somehow have to live. Yet, the existence of the Secretariate appears to increase the probability that an identification key may be retained, and under secure conditions.

Researchers know that a set of data that has been collected, often at considerable expense, potentially holds possibilities of analysis and utilization in addition to those foreseen by the particular research design for which the register was initially

established. Sometimes the conclusions of a researcher may be questioned and re-analysis of the data becomes necessary. Imagine, for example, a candidate for the doctor's degree being shielded against further probing of the data by having been requested by the Data Inspectorate to discard the data register. In many instances data may be well be anonymized and still utilized in future analysis. Yet, sometimes the addition of one extra variable or more may be necessary in order to achieve reliable re-analysis. Follow-up studies often furnish an efficient way of throwing new light upon old problems. Panel studies and longitudinal studies are among the most useful research strategies of social scientists, and data which have been collected for the purpose of a study at one point in time, may turn out to be potentially very attractive as a point of departure for studies over time.

A recent recommendation of the European Science Foundation proposes a revision of the "ESF Statement Concerning the Protection of Privacy and the Use of Personal Data for Research"(adopted in 1980). Referring in particular to the needs of epidemiological studies the ESF now proposes the following formulation concerning data storage and retrieval:

> "Once the specific research purpose for which personal data have been collected has been achieved, these data should be depersonalised and the necessary measures should be taken for their secure storage. However, it should be possible again to personalise the data, should a research need arise" (ESF, 1984).

Predictability and Serendipity

It is in the nature of social research as in fact in all research that one does not know at the outset what to look for or what measures to take. Data legislation presupposes that an applicant for concession to establish a register is in a position to know exactly what the variables are going to be. The application must furnish information about which questions are to be used, and the Data Inspectorate must decide if and when some illegal trespassing is likely to occur, in which case concession will be denied.

We have already mentioned the need to conduct pilot studies and perhaps make several pretests of the observational instruments. Clearly, during this process of trial and error one may need to pose new questions and experiment with new combinations of questions. The construction of indices must necessarily be part of the research process itself, and could not possibly be completed at the time of applying for funding and for concession to establish a register.

Thus, the formalities surrounding the concession requirementmay tend to introduce a rigidity which ought to be alien to the research process itself.

Very often, as we know, the researcher constructs fundamental dimensions or factors on the basis of perhaps rather superficial observations. Through factor analysis or through

latent structure analysis the researcher is able to assign values or scores to individuals, and an individual's reading on such a variable may be considerably more "sensitive" in terms of personal integrity than the knowledge about the answers to particular questions in a questionnaire. The interesting question from the viewpoint of data legislation is whether or not the data authorities ought to be in a position to make the appropriate evaluations and to claim the right to grant concession for the composite variable rather than for its components. At the present this is only a theoretical question and we do not know the answer.

In some social science environments there is a plea for more qualitative research as opposed to the allegedly hard-boiled quantitative approaches to social behaviour. The point to be made here, and without entering into a discussion of the merits of different methodological approaches, is that data collection procedures recommended by proponents of qualitative research preclude the construction of standardized, structured questionnaires. Questions are open-ended, intensive probing is necessary, the interviewer must be able to interject herself into the totality of the situation or the views being explored, the contextual setting of a statement must be pursued and, in short, the observational scheme makes it impossible to specify inadvance what informations the observation protocol will hold. And of course, there is no way of specifying in advance the type of information required by data authorities to enable concession decisions.

This situation makes it even more important that provisions be made for a well qualified mediator between the research community and the data authorities. Such a mediator must be able to argue in terms of the principles laid down in the data legislation, but also in terms of the principles governing the research process. Once the communication breaks down, social science is in great trouble.

Unless the legislators wish to eradicate certain methodological approaches to social behaviour by expecting structure where the lack of structure may perhaps--and sometimes--provide a key to a deeper understanding of social life, it may be necessary to favour rules for the handling of data rather than rules for data content.

The Diffusion of Data Protection Norms

One would expect a time lag between the introduction of the Act and the point at which social researchers have acquired sufficient knowledge about the data protection rules applying whenever they wish to establish a research register. From the viewpoint of the Data Inspectorate the mediator role of the Secretariate and other holders of general concessions would seem to be an advantage by promoting a wider diffusion of the formal requirements. And in particular, since the Secretariate is in aposition to monitor projects financed by or through the Research Council, and now also is the official data protection clearing-house of the Norwegian universities, the Data Inspectorate may expect conformity within reasonable limits.

Although admittedly some researchers may not yet know what is expected, there may be a tendency among other researchers to be excessively cautious. In order to maintain a trustful relationship to the respondents in a survey, or to be absolutely certain of not trespassing into forbidden territory, project managers may abandon the use of registers of identifiable individuals, thereby precluding data linkages that might have rendered the analysis more efficient and less costly.

The wider diffusion of what is in fact, or perhaps rather, what is alleged to be the formal requirements, apparently promotes a "commercialization" of survey and interview services. Researchers show an increasing tendency to have private opinion polling agencies or the survey division of the Central Bureau of Statistics assume the responsibility for the data collection.

Of course, several factors may account for this development. The professional agency may offer the researchers various kinds of services, e.g., preparing the interview schedule or questionnaire, conducting the interviewing, processing the data, and even performing the initial analysis. The agency will agree to do the job for a fixed price and within a specified time limit. And also, the agency will handle the more bureaucratic elements of the data collection process and thus assume the responsibility for the handling of data concession requirements. Although this development toward a commercialization and professionalization of data collection holds many advantages, and might have occurred even without the anxiety created by data

legislation, there seem to be some disadvantages. A very important part of the research process is being removed from the research institutions in charge of the studies in question. This in turn may make it difficult for the sociologist, political scientist, psychologist, etc., to exercise critical assessment of the quality of the data. The training of graduate students and research recruits through active participation in the data collection of large-scale surveys becomes nearly impossible. A further difficulty is the provision of the Data Act applying to opinion polls and market investigations and whereby the agency is under obligation to de-identify the data within a time limit of six months following the interviewing (Article 33).

Thus, while we have pointed to the positive effects of the Data Act in terms of a restructuring of the entire field of data handling, we also see some negative consequences. And in short, there is a certain pressure in the direction of divorcing the researcher from the data and separating him or her from the direct and close contact with the human beings who deserve to be fully understood.

Hopefully, the work of the Secretariate and other agencies now interposed between the Data Inspectorate and the research community will be of even greater assistance to the individual researchers who feel uncertain about the possibilities for collection, handling and storage of research data within the limits set by the Act and the regulations adopted in conformity with the Act.

CONCLUDING REMARKS

On the whole, the development toward data legislation in Norway showed features quite similar to those which appeared elsewhere. Of course, there was no way of arresting the movement toward stricter formal rules governing the compilation, use and storage of data about identifiable human beings. Even though social scientists had strong misgivings about what they considered to be the potential effects of data legislation upon their research opportunities and were quite active in voicing their views, they also, as their own practice had already shown, accepted the interest in securing the personal integrity of individuals and recognized a need to grant individuals the right to have a kind of ownership relation to information about themselves.

In fact, social scientists in Norway as elsewhere had seen many reasons to be concerned about he kinds of data apparently on file in agencies in charge of secrices in the interest of national security etc. Such agencies een among the few to be fully exempted from the principles pdata legislation. And one further point needs to be mentioned here. Social scientists and the medical researchers had common interests in protecting data access and use. Yet, the social scientists often have aligned thems with the patients' or clients' interest in having some insighnd control over the ways in which members of the medical pralt with information that was felt to be the proper property and clients.

Thus, at the time when the enactment of data legislation was inevitable the social science community saw many good reasons for co-option rather than the maintenance of conflict and confrontation. We feel that the Norwegian accommodation to conflicting goals in large measure was due to the constructive efforts of an alliance of lawyers and social scientists who saw possibilities for a modus vivendi within the framework laid down by through the passing of the Act.

The fact that Norwegian social science was relatively well established, had a reasonably high prestige, and was being recognized by the authorities as providing through research an important basis for decision-making, may have been one of several decisive factors.

Also, the existence of the Norwegian Social Science Data Services, possessing the capacity required to take appropriate action and to organize the linkages between the research community and the Data Inspectorate, is a circumstance without which the whole effort might have collapsed at the outset.

In our opinion the system has functioned well. The general concessions granted by the Data Inspectorate made provisions for an efficient reporting system which appears to have considerable advantages for the social science community as well as for the Data Inspectorate. We have seen significant developments in the direction of an archiving system which is compatible with the intentions of the Data Act while at the same time providing opportunities for reuse of data under conditions of acceptable

data security.

We have suggested that the arrangements developed so far have had the incidental yet very important effect of improving standards for the collection, handling, analysis, storage, and presumably also reuse of data about identifiable individuals. The professional standards of social science have become higher. Unfortunately the formal demands may sometimes tend to favour a kind of rigidity in research design which may in turn place unacceptable restrictions upon the freedom to utilize experimentation, nontraditional observational methods, some element of trial-and-error, all of which are salient features of the innovative research process, be it in social or other science.

In order to protect the true nature of research as a search for what cannot be known in advance one may wish to promote adherence to strict rules for the handling of data and to some extent relax the standards whereby content somehow has to be the subject of a detailed approval in advance.

However, provided we judge the behaviour of politicians correctly, they are not very likely to pass laws or adopt rules providing special privileges to accommodate the serendipity elements of social or other research. Realistically, and basing the judgment upon the situation in Norway, the social science community has no alternative to that of maintaining a situation of mutual trust and confidence between the data authorities and the researchers. We feel that the present situation hold some promise in this regard.

Through its initial proposals the research community tried to obtain a situation of a somewhat higher degree of delegated authority once the clearing-house function of the Secretariate for Data Protection Affairs had been established. So far the Data Inspectorate has retained the authority to make the final concession decision for each individual application, following the preparatory work of the Secretariate. This is an area where some change could be expected. But clearly, the authorities must be fully convinced that the social scientists are able to manage their own house in the sense of accepting and respecting the letter as well as the spirit of the Act. We have noted that the Ministry of Justice in its commentaries to the Data Act foresaw a somewhat higher degree of delegated authority, giving the Data Inspectorate the right and obligation to intervene on the basis of the Secretariate's reports whenever deemed necessary (cf. Ministry of Justice, 1980, p. 32).

The Data Inspectorate is in the process of considering amendments to the the Data Act (Føyen, 1983). Clearly, the technological development is moving very rapidly, and many situations arise that were not anticipated when the present Act was being drafted. The social science community in Norway has every reason to hope that it will be possible to retain the rather favourable conditions which have developed since the Act went into effect five years ago.

REFERENCES

Bing, Jon, and Knut S. Selmer, eds.
1980 A Decade of Computers and Law. Oslo: Universitets-forlaget.

Blekeli, Ragnar Dag, and Knut S. Selmer, eds.
1977 Data og personvern. Oslo: Universitetsforlaget.

Brosveet, Jarle, and Ørjar Øyen.
1979 "Privacy Legislation and Social Research in Norway." In Mochmann and Mueller, 1979, 48-63

Data Inspectorate
1981 Rammekonsesjon for NAVF (23 April 1981).

1982 Datatilsynet: Årsmelding 1981. Oslo: Universitets- forlaget.

European Science Foundation (ESF)
1984 Communication to the Director of the Norwegian Research Council for Science and the Humanities, December 1984.

Frihagen, Arvid
1979 Taushetsplikt etter Forvaltningsloven. Oslo: Forlaget A. Frihagen.

Føyen, Arve
1983 Utredning om endringer i personregisterloven. Oslo: Universitetsforlaget.

Hafli, Tor
1977 En komparativ studie av datalover. Institutt for privatrett, Universitetet i Oslo.

Janson, Carl Gunnar
1979 "Privacy Legislation and Social Research in Sweden." In Mochmann and Mueller, 1979, 27-47

Kjønstad, Asbjørn, og Else Øyen
1980 Taushetsplikt i sosialsektoren. Bergen: Universitetsforlaget.

Ministry of Justice
1974 Persondata og personvern. NOU 22. Oslo: Universitetsforlaget.

1975 Offentlige persondatasystem og personvern. NOU 10. Oslo: Universitetsforlaget.

1977-78
Om lov om personregistre m.m. Ot. prp. nr. 2.

Ministry of Justice
1980 Document containing (1) "Lov om personregistre m. m. av 9. juni 1978 nr. 48"; (2) "Forskrifter i medhold av personregisterloven gitt av Justisdepartementet 21. desember 1979"; and "Kommentarer til lov og forskrifter".

1983-84
Datatilsynets årsmelding 1982. St. meld. nr. 14.

Mochmann, Ekkehard, and Paul J. Mueller, eds.
1979 Data Protection and Social Science Research. Frankfurt/ New York: Campus.

Norwegian Research Council for Science and the Humanities
1979 Forskningsetikk og personopplysninger. Report of the "Bing Committee".

Olaussen, Thore Gaard
1984 Norwegian Data Legislation and Research: Implications for Data Access, Data Collecting and Data Archiving. Paper presented at the IASSIST '84 Conference, Ottawa.

1984 "Personregisterloven og behovet for datavern." Humanistiske data, 3:38-44. The Norwegian Computing Centre for the Humanities.

Øyen, Ørjar
1965 "Encounter with the Image of Sociology." Sociologiske Meddelelser, 10:47-60.

1966 Social Class, Conservatism, and Submission to Longitudinal Research: The Reaction to Project Metropolitan in Norway. Paper presented at The 6th World Congress of Sociology, Evian.

1976 "Social Research and the Protection of Privacy: A Review of the Norwegian Development." Acta Sociologica, 19: 249-262.

1977 "Personvern og behovet for data til samfunnsvitenskapelig forskning." Pp. 3-15 in Personvern og samfunnsforskning. A seminar report. Norwegian Social Science Data Services.

Reynolds, Paul Davidson
1975 Value Dilemmas Associated with the Development and Application of Social Science. A Report Submitted to the International Social Science Council. UNESCO.

Rokkan, Stein
1977 "Norsk samfunnsvitenskapelig datatjeneste og den kommende datalov." Pp. 39-43 in Personvern og samfunnsforskning. A seminar report. Norwegian Social Science Data Services.

1977 The Production, Linkup and Communication of Social Science Data: A Survey of Developments in Norway. Unpublished manuscript. University of Bergen.

CONFIDENTIALITY, PRIVACY AND DATA PROTECTION: ISSUES FOR POLITICAL SCIENTISTS

Charles D. Raab
University of Edinburgh

Paper prepared for the Workshop on "Confidentiality, Privacy and Data Protection", European Consortium for Political Research Joint Sessions of Workshops, Barcelona, 25th-30th March 1985.

Introduction

Anyone turning the pages of British newspapers in recent years would find no lack of issues concerning the gathering and use of information in ways that bear upon questions of confidentiality and individual privacy, and in ways that affect fundamental communications between government and citizen in a democratic polity. Court cases have involved civil servants on charges of breaching Section 2 of the Official Secrets Act 1911 which deals with unauthorised disclosures of official information. In one, Sarah Tisdall, a low-ranking civil servant was convicted and jailed for having leaked to the Press a document about the emplacement of Cruise missiles; in another, Clive Ponting, a senior Ministry of Defence official was acquitted of the charge that his sending of documents concerning the sinking of the General Belgrano in the Falklands War to a Member of Parliament constituted unlawful disclosure under the terms of the Act.

The Ponting case has sent ripples through the system of confidence and confidentiality that lies at the heart of British government: had Ministers deliberately misled Parliament about the events surrounding the sinking of the ship? had Ponting violated the confidence Ministers place in civil servants not to reveal information? was Ponting now carrying the violation further by seeking to publish a book about the affair? should civil servants explicitly subscribe to a code of ethics? had Michael Heseltine, the Defence Secretary, in turn breached the confidentiality of civil servants' discussions with Ministers by telling Parliament, after Ponting's acquittal, the details of what Ponting had advised a year before? was there now an irreparable breach between Neil Kinnock, the Leader of the Opposition, and Mrs. Thatcher as a result of Kinnock's disbelief of the Prime Minister's explanation that she had not personally instigated the prosecution of Ponting?

Second, the fear that the Official Secrets Act might come to bear led to the cancellation of a television documentary programme about the way MI5 allegedly spies upon members of organisations in Britain, such as the Campaign for Nuclear Disarmament and the National Council for Civil Liberties, who are thought to represent potential dangers to the security of the State. The question of Ministerial control of the activities of the security apparatus was scarcely laid to rest, and was in fact pointed up more sharply, by the extreme rapidity with which a judge's investigation subsequently concluded that Home Secretaries over a number of years had not authorised such surveillance. The delivery of the judge's report came in the same week that Parliament was to give a Second Reading to a Government Bill on the Interception of Communications, regarded in many quarters as a minimalist attempt, at best, to provide safeguards against telephone tapping and interception of postal communications, and at worst, a weakening of the citizen's position.

On another level, the doctrine of "informed consent" gained some headway in

a British context in a case involving the question of how far a doctor is obliged to tell a patient of the risks involved in surgical operations. In the education field, legislation at the beginning of the decade was passed requiring local education authorities to publish detailed information about individual schools, including statistics of examination performance, in order that parents and pupils might more intelligently exercise a newly-granted right to choose a school. And yet, except in a few local education authorities including Leicestershire, the Borough of Brent, and the Inner London Education Authority, parents' and pupils' access to pupils' school records has not yet been granted generally in Britain, and parents are also pressing for access to education authorities' financial information in order to learn the basis upon which decisions about school closures are being made. The Schools Inspectorates in Britain, on the other hand, have instituted the practice of publishing their reports on individual schools, an innovation which has irritated a number of Conservative politicians because some reports have criticised certain local authorities under Tory control.

Further still, it was only last year that legislation was put onto the statute books, in the form of the Data Protection Act 1984, regulating the use of automatically processed information relating to living individuals. This enactment culminated a long saga, stretching back more than twenty years, in which some degree of protection of individual privacy had been sought by a wide variety of interest groups and persons. As with access to official information, there may be few votes to be gained or lost by political parties in the issue of data protection, but the legislative process proved to be a protracted affair which generated a great deal of controversy in and out of Parliament. Yet such a culmination has been only a beginning, and the scene has shifted away from the legislative arena and the front pages to the thousands of organisations, up and down the country, who are now actively involved in translating the complexities of statute into operative procedures for compliance both with what the Act says and with what the Data Protection Registrar deems to be satisfactory. Meanwhile, paperback guides to the Act are proffered on the bookstalls and are read---as personal anecdote can verify---by the 'data user' on the Clapham omnibus. And beyond the protection of personal data held on computers, the Campaign for Freedom of Information was launched in 1984 to bring together, however loosely, a wide variety of strategically-placed individuals and groups representing national and local interests in seeking further protection of individual privacy as well as open government. It has gained respectability for a pressure-group effort to keep information issues not only on the political agenda in a general sense but on the agenda of Parliament, promoting legislation on access to manual personal files, to local authority meetings and papers, and to meetings of water authorities, and pressing for the repeal of Section 2 of the Official Secrets Act 1911 and its replacement by a Freedom of Information Act.

Beyond these items, Mrs. Thatcher's government has been pre-occupied at

times over the past few years with getting its message across to the British public, a self-conscious concern to put forward a united Cabinet by preventing embarrassing leaks and by avoiding slipping on 'banana skins'. A Times leader said: "Mrs. Thatcher's government has been beset---like governments before, but more acutely---with problems of presentation. To present---to sell---can require skills of imaginative advocacy." [The Times, 1st March 1985, p. 17]. Indeed there has been a great deal of comment voiced publicly in political and media circles about 'presentation' as a discrete category of governmental activity, as a criterion by which government may be evaluated (even by its own backbench MPs), and as an area for policy-making and institutional innovation above and beyond the traditional substantives of policy (e.g., defence, foreign policy, housing, health, etc.) Thus a Government itself may provide its own information issues (' how to present our policies'; 'how to stop leaks'; 'how to organise our information machinery') as counterpoints to those pressed onto the agenda by citizens and organised groups.

Examples such as these may give a sense of déjà vu to people in some countries where these matters have for a longer time been subjects of legislative and policy activity. On the other hand, in still other countries, the outlines of a public politics of information may not yet be clearly discernible. It is not necessary to multiply illustrations and anecdotes in order to make the point that information-related problems, and responses to them, are now prominently to the fore in Britain as social and political concerns in the broadest sense, even though various fields---governmental accountability to the electorate, the maintenance of public order, the conduct of social research or the official data-gathering processes, etc.--- have generated conflicts of interest and other problems related to information for a long time. Indeed, information issues are rooted in the human condition; but their occurrence in political systems, the factors that affect the way they are coped with, and the strategies adopted, are among many matters that require investigation.

In this paper I want to raise for discussion the question of what political scientists can contribute to these investigations, since it appears that---on this side of the Atlantic at least---the discipline has not yet taken cognizance of the issues involved as a subject for study, except in a few instances, and that there is a good deal of work to be done in analysing and synthesising empirical and theoretical material. This is not the place to worry away about academic boundary demarcations, especially since the study of these topics is multidisciplinary, and the definition of 'political science' is loose. Yet power and policy are among the central foci in political analysis, and there is much in the eclectic tradition of political science (which has developed, in part, through appropriations from law, history, philosophy and sociology, at least) that has to do with the relationship of information to power-practices. It would be worthwhile to see what in that tradition, and in its contemporary extensions, can be exploited for the study of confidentiality, privacy and data protection; and

conversely, what in these topics can enrich our understanding of the relationsnip of information and communications to politics, and of the nature of politics itself.

These are formidable tasks beyond the scope of a snort contribution; moreover they are probably better seen as collaborative tasks undertaken in the foothills because synoptic, Olympian perspectives are suspect. Thus I will note and briefly comment on a few approaches that could shed light upon information isues and processes, without attempting to define or to mark out the perimeter of an emerging academic sub-speciality within which fruitful analytical lines of investigation could be identified and developed; that is an appropriate job but it should be done more systematically. But the perimeter of the 'real world' of issues and processes is amorphous as well: is there in fact any coherence among the range of topics highlighted above---data protection, freedom of information, individual privacy, etc.--- or are we still in an early phase of mapping the terrain? Coherence may be given through a 'problem-solving' approach, in which particular topics are identified in relation to a particular referent---for example, to the problem of defending and extending civil liberties; or to the problem of maintaining and improving the security of the polity or the efficiency of the governing processes. Yet it is not clear how far this approach is consistent with the intellectual coherence needed for proper academic study. It is obviously very useful to take some of our problems from the world of practice and to investigate the issues thrown up by political and legal conflicts. But there are topics beyond these, and perhaps even brought to light by these, which need to be addressed so that the practical processes and issues of governments or of citizens can be better understood, whether or not contributions can be made to their solution.

However, at least it could be said that the shape of the amorphous terrain becomes clearer insofar as data protection and freedom of information are joined in discussions rather than separated by different worlds of discourse or practice (e.g., law, computing, social research, public administration, social theory) or treated as the province of different 'single issue' interest groups who have little to do with each other. In addition, coherence may be promoted through clarifying and reformulating the concepts typically used, such as privacy, confidentiality, secrecy, and information itself; and through the organising power of additional concepts, some of which are less frequently given a central place, such as truth, trust, confidence, accountability, power and knowledge. Nevertheless, as is made evident by current and recent research, important studies need not await a clear delimitation of the terrain. Issues can be selected and research organised according to any number of well-known criteria of relevance in political science.

International and Comparative Approaches

For example, there is already a wealth of material describing in great

detail situations and developments in a large number of countries where problems of personal data protection and freedom of information, and well-defined issues within these (such as the problems faced by social researchers), have been addressed by legislation, by administrative mechanisms such as regulatory agencies, or by professional self-regulation. Only a few need illustrative citation here (e.g., Flaherty 1979, Flaherty 1984, Burkert 1983, Rowat (ed.) 1979, Mochmann and Mueller (eds.) 1979). The primarily country-by-country, descriptive, surveying emphasis differs from a comparative, analytical approach. But the documentation they provide is indispensable for addressing the fruitful questions generated by the latter approach, and there are many such attempts to come to grips---even in the works cited---whether evaluatively or in an explanatory way, with the differences and similarities of several countries' responses to information issues.

Comparative research in a policy-related mode seeks to appraise the variety of these responses, and often attempts to recommend 'best practice' to those countries or to groups within them (e.g., professions who provide personal services) which have yet to formulate their policies or which are considering the revision of existing ones. In an explanatory mode, it is also possible to use much the same research material to move towards the generation and testing of theory which would enable us to understand why and how information policies and processes have taken the shape they have done, and to account for cross-national or cross-sectoral variations. The relative importance of cultural, political, organisational, technological, legal, economic and other factors need to be assessed. Alongside these, the part played by certain individuals or groups---perhaps particularly in the early stages before information-related policies have become translated into matters of institutional routine---in determining agendas and outcomes is evident in the descriptive studies. Likewise, certain events, crises or scandals have often been crucial in focusing public or governmental attention on information issues and in moving action into further phases of the political process. The three levels of analysis (factors, persons, events)need to be brought together more systematically in theories and models of political and administrative change.

Here it may be relevant to observe that no country is re-inventing the wheel for itself. There has been a great deal of diffusion of both the salience of issues and of practical innovations in data protection and in open government amongst countries, through channels of official, academic, and pressure-group communication. Furthermore, and perhaps more powerfully, the inputs made by supra-national organisations (e.g., Council of Europe, European Commission on Human Rights, OECD, European Science Foundation) have been extremely important in bringing pressure to bear upon countries where legislation or administrative change has been lagging. This has been particularly evident in data protection where the Council of Europe's Convention and its potential implications for commercial interests involved in trans-border data flows have been acknowledged as powerful stimuli for

the enactment of data protection in Britain, to take only one example. Likewise, decisions of the European Court and the standards set by the European Convention on Human Rights have been relevant to current discussion and to legislative proposals on the Interception of Communications in Britain.

In another international context, the active involvement of scientific communities and networks in developing procedures for professional self-regulation concerning problems that include confidentiality and linkage of research data exemplifies the proliferation of milieux within which information issues are being canvassed above the national level. One example is the work of the International Statistical Institute's Ethics Committee in considering the question of a professional code for statisticians (Jowell 1981, Jowell in Raab (ed.) 1982).

It is not being cynical to suggest that all forms of international action, pressure and example in the information sphere have a symbolic importance as well as a potential practical effect. Pointing to what is done elsewhere can be a useful way not only of practical learning but of criticising domestic inaction in the face of (superior) foreign example. Thus comparative academic research may become part of the political process and may even be to a considerable extent intended as such. In Britain it has often been argued that, if not only the Swedes and the Americans can make great strides in protecting privacy and providing access to government information, but also the Australians and Canadians (whose political and legal systems share the same basis with the British), then why should the Mother of Parliaments drag her feet? The effectiveness of such invidious comparisons against Governments that are not easily embarrassed, however, should not be assumed; especially when government itself draws lukewarm conclusions from its own detailed and informative survey of other countries' statutory provisions for open government (Civil Service Department 1979).

At the international level one finds on the landscape a profusion of high-minded exhortations enshrined in conventions, sets of principles, declarations, and codes of various sorts. Their relationship to similar guidelines proposed or adopted at the national level and within specialised sectors, and the multiple purposes they serve, both practical and totemic, seems an important area for analysis. Some of them play the role of ideals to which legislation is designed to conform, and may be written into the substance of the law (e.g., the British Data Protection Act 1984). They provide a sense of the 'spirit' of the law in circumstances where the sheer complexity of regulations, and the likelihood that the latter will be overtaken by rapid technological and organisational change, might otherwise obscure the rationale behind legislation. They are more easily disseminated as rules-of-thumb to those---potentially everyone---who may need to modify their information processes to conform to the law. But in addition, codes of practice may be substitutes for binding legislation amongst groups who argue that self-regulation is more appropriate to their activities than more

stringent legislative regimes; or codes may become part of a regulatory system established by legislation, as was proposed in Britain by the Lindop Report but rejected by the Government. In any case, studying the effect of such codes, principles, and the like upon administrative and public behaviour may help us to understand better the prospects for successful policies, and is part of a policy-studies approach to the analysis of information problems.

Policy Studies

The study of public policy-making has burgeoned in the past twenty years, fruitfully bringing specialists in a variety of social-scientific and allied disciplines within sight of each other's empirical and theoretical work. (A very selective bibliography of early and influential basic approaches would include Braybrooke and Lindblom 1963, Simon 1957, Dror 1968, and Etzioni 1968.) There is no uniformity about approaches to 'policy studies', and certainly the earlier assumptions of some writers about the policy process' approximation to rational and sequential decision-making---whether as an ideal or as a description of political and governmental or organisational reality---are no longer made. Interestingly, from the standpoint of studies of information problems, rational models of policy processes underemphasise the costs and overemphasise the availability of information that would be necessary for broad, deep, and long-run understanding of the consequences of a vast number of policy options from which decision-makers choose in making policies in substantive areas. The opposite end of the continuum, however, is no more comfortable a place to be, for there lies the assumption that policy-making cannot be better than it is; that policy-makers can only stagger from decision to decision without the ability to choose intelligently, or to evaluate the effects of previous choices; and that there is little point in trying to improve the quality, quantity, or usage of information in policy processes because such improvement will have little effect on the success of policies.

In the middle of these polar assumptions about the relationship between power and information lie a variety of models which cannot be considered in detail here. However, they are regarded by students of public policy as attempts to treat the messy reality of political and organisational forces, the intellectual difficulties faced by participants in policy-making processes of understanding the substantive problems which public policies try to solve, and the welter of environmental uncertainties, not as irreducible givens but as constraints which better procedures can realistically try to overcome. Overcoming them depends, in part, on improving the processes by which administrative and research data are oriented, as resources, to making better policies. Thus the conditions under which information circulates between parts of the bureaucracy, the extent to which researchers have access to official information for analytical purposes, and the willingness of the public to give information to government on the assumption that privacy will be safeguarded, are all

relevant areas for more precise investigation of the prospects for improving public policy.

On the other hand, the role of information and the rationale for solving confidentiality/privacy issues in order to affect policy processes can too easily fall into what Habermas has called, disparagingly, the 'technocratic model' in which scientific expertise supplants political decision in the name of the rationalisation of power (Habermas 1971). The 'pragmatistic model' for which Habermas argues is particularly important from the standpoint of the public availability of policy-related information, for this model embodies the discourse of citizens whose mediation between experts and political leaders is essential for the true rationality of power in a democracy. If one were to take this argument further, it could be argued, perhaps consistently with Dewey and Popper, that the procedures for political accountability are identical with those for scientific explanation, since they both involve the equality of all participants in employing information in order to construct and debate alternative accounts of action (McPherson, Raab & Raffe 1978). If so, then arguments for open government (and, indeed, open research data-banks) on the grounds of citizens' rights, or on the more functional grounds of better policy-making, are joined by arguments on the grounds of reason and of the reconstitution of the public realm. In any case, this seems to be an area in which the analysis of political institutions and policy processes and the development of political and social theories can be mutually reinforcing.

Moving further along the line in policy studies, whilst the various 'stages' of the policy process do not form a tidy linear sequence, they denote useful categories for observing what happens in a given policy area. If we take data protection as an example, a simple three-fold distinction can be made between policy-formation, implementation and evaluation. Each of these is a crucial focus of attention in studying the trajectory of policy-making with regard to data protection. Let us confine our remarks to some points about implementation, whilst recognising, but putting on one side, conceptual problems concerning the relationship between implementation and other aspects of policy-making (see Rein 1983, ch.7; Barrett & Fudge 1981, Parts 1&3).It is worthwhile asking, and comparing across countries, to what extent the difficulties of implementation were foreseeable and were foreseen in the stage of formation when, for example, legislation was drafted and put through the legislative machinery. Is such foreknowledge more difficult in the field of information policy than in other policy fields? Likewise, the provisions made for systematic evaluation of the effectiveness of data protection regimes, whether by governmental agencies themselves or by outside evaluators, are important items for research into the processes of policy-making, and these provisions can be built into the legislation as wel as into the procedures for implementation.. The use to which evaluations are put by data protectors in seeking to improve their regulatory action can tell us a lot about the way organisations become aware of themselves in relation to the phenomena they seek to control, and become aware of the

limitations upon their activities as they continue to implement legislation in the face of a very changeable set of circumstances.

If we consider, briefly, the British situation in this connection: with the 1984 Act on the statute books, there is now a timetable on which various provisions take effect (e.g., registration, subject access). Having eschewed Lindop's preference for a relatively strong Data Protection Authority in favour of a Registrar and a Data Protection Registry, and having put commercial considerations and the practical aspects of ratifying the Council of Europe's Convention uppermost in devising the legislation (Mellors and Pollitt 1984), the implementation agenda seems fairly clearly set to favour similarly minimalist efforts to put the law into practice. The legitimacy of more expansive discretionary interpretations, going further in the direction of safeguarding the citizen would seem to be constrained, although a great deal will depend upon the way the Registrar, with very limited resources, and dependent upon the consent and compliance of vast numbers of data users for the effectiveness of the protection afforded, handles the situation.

Rein's observations, in another context, are particularly germane. Quoting a (sexist) passage from Heclo, he says, "...policy implementation is a matter not only of power but of puzzlement, of 'men collectively wondering what to do.'"(Rein 1983, p.117), and describes implementation as "an attempt to reconcile three potentially conflicting imperatives: what is legally required, what is rationally defensible in the minds of the administrators, and what is politically feasible in striving for agreement among the contending parties with a stake in the outcome." (Rein 1983, p.116) Implementation, in this view, has to do with 'administrative learning' and the capacity to do this cumulatively and collectively, and in this regard one might look at data protection as a learning process. The 'learning curve' for this did not stop with the Royal Assent in 1984; both for the Registrar and for all those he seeks to regulate it shows no signs of levelling off. Some passages of the letter he sent on 21st February, 1985 to all those on his mailing list provide a nice illustration of how the Registrar-as-teacher attempts to shape the learning process. The letter accompanies extracts from a forthcoming Guideline which has been delayed:

> "I had hoped to have the first Guideline in your hands during February. The objective was to give a first brief introduction to the Act. However, it became increasingly apparent from discussions with Data Users that a more comprehensive document would be most valuable. The Guideline now being processed...reviews all parts of the Act and seeks to answer many of the more common questions being asked. ...discussions have taken place with about forty trade, professional and other organisations about the implementation of the Act. Consultations have also taken place on first ideas for the registration process and revised proposals, taking account of the generally supportive comment received, will shortly be circulated. In addition some eighty organisations will be piloting the use of the registration form and guidance notes during March."

National implementation and learning thus involves the Registry in a large

amount of negotiation, pre-testing, and (probably) bargaining in which effectiveness may be traded off against simplicity or against other criteria, all within the severe constraints of limited time, staff and money. But it is also likely that such activity has become an important part of the operations of the thousands of organisations in Britain who, as data users or as groupings of data users, need to align themselves with the legislative requirements. Much of this activity is taking place in connection with the Registry but there may be activity (and learning) of varying degrees of intensity in different milieux, depending upon their organisational complexity and upon the difficulty of translating the Act and the Principles into adequate domestic procedures for data protection.

Universities may be a case in point, although how representative their implementation problems and processes are is difficult to say without detailed research. To comply with the law, universities must clarify their concepts and categories: who is a 'researcher' and what is 'research'? are visiting staff covered by the university's registration? under whose jurisdiction are staff who are jointly funded by the university and by an outside body like the Health Service? can teaching and research be clearly separated? They may also need to invent procedures for fixing responsibility upon various officers within the university: what are the responsibilities of heads of academic departments vis-a-vis other members of staff, undergraduate and postgraduate students, visiting staff, and others who are using personal data held on computers? do the established procedures for health and safety measures provide a relevant precedent for setting up a data protection regime in the university?

The university itself may have to become an agent on the national learning network for data protection, communicating relevant guidelines from the Registrar to those who work in the university, developing not only its own guidelines for local use but also the institutional arrangements for negotiating, monitoring, advising, and for dealing eventually with subject access; these jobs may involve committees and new roles. An urgent necessity is to conduct an internal census of data users; the dimensions of this task may be formidable and the time available is very short for deciding on the mechanisms through which such information can be gathered, but a detailed census will form the raw material for the university's omnibus registration as 'the' data user. In addition, three universities (London, Liverpool and Edinburgh) are among the Registrar's eighty piloting organisations for testing out registration forms; for these institutions it is an additional piece of learning as well as being an occasion for further negotiation with the Registrar in order to modify standard registration forms which were not devised with the often very unstandard uses and practices of universities in mind. These negotiations and discussions, as well as a great deal of the implementation-and-learning activities mentioned before, also involve the national Committee of Vice-Chancellors and Principals, which represents the universities to government and which has taken an active part in co-ordinating a University view on questions of data protection.

The university illustration is useful in helping us to focus upon the policy process and upon implementation in particular, although we should bear in mind the general point made by Barrett and Fudge:

> "...where policy stops and implementation starts depends upon where you are standing and which way you are looking. To some politicians, policy is synonymous with the party manifesto and everything that follows is implementation. For executive officers involved in local service delivery, administrative procedures may well appear to be policy in so far as they comprise the framework governing the scope for action. ...How far do detailed frameworks for action---legislative, administrative, procedural---reflect or relate to original intentions; that is, what exactly is being implemented? If what is being implemented is different from the original policy intention, is this 'good', for example, demonstrating that policy was flexible enough to be tailored to the local circumstances, or 'bad' in that the original policy goals have been distorted in the process?" (Barrett & Fudge (eds.) 1981, pp. 11-12)

Perspectives on Information, Control, and Trust

Systems models of politics and government are perhaps too well-known to require much comment here. However, information processes and their relationship to control is inherent in them and thus within our purview. Such approaches have reorientated political scientists' thinking about large areas of political and governmental life, and have given us important concepts and perspectives from which to understand relationships between government and the governed, and within government itself (see Easton 1965; Deutsch 1963). Yet these approaches have been absorbed and, if used at all in empirical research, employed very selectively, such that the information processes and problems which lie at the heart of systems and cybernetic models have not been made the principal element. It may be true that the effects of confidentiality, privacy and data protection upon the information and communication aspects of political systems were not a major topic in the theories and models relating information to control. Nevertheless, it might be rewarding to consider these approaches afresh from the standpoint of these effects.

Likewise, it is no longer fashionable to consider 'propaganda' as a governmental activity, although perhaps the term has been replaced by euphemisms ('disinformation'; 'media manipulation') to avoid the wartime atmosphere of a generation ago when propaganda studies linked psychological, political and linguistic analysis in the investigation of mass communications. And yet it may be worthwhile to refurbish our understanding of this. Hood has recently invented a metapnor which takes a step beyond Deutsch's 'nerves of government' (Hood 1983). Government is a 'tool-box' which uses a variety of instruments for taking things from, and giving things to, its environment. Government deploys tools for detection, by means of which it gathers information through a repertory of devices which

include, among others, interrogations and surveillance as well as obligations to notify (such as registrations and returns). On the other hand, government also uses 'effectors' to act upon the world, and among these are advice, information and persuasion. Government may suppress as well as propagate information as part of its repertory.

One way in which this perspective may be relevant here relates back to the earlier remarks about government's 'presentation' of itself, and the bearing this has upon political allegiance, governmental credibility, and accountability. How, in short, do we know when we are being lied to by government? And what are the consequences of our finding out (or of our believing that we have found out)? These are among the questions that suggest that attention should be focused upon the relationsnip between confidentiality or the degree of openness of government, and the public support governments seek by purporting to be benevolent, intelligent, and acting in the public interest. This links with a prolific literature concerning the images and information governments put forward for public consumption, of which the concealment of discrepant information or images is an inseparable part (e.g., Merriam 1964, Edelman 1964, Nimmo 1974, Elder & Cobb 1983, Raab 1977). More generally, it links with symbolic interactionism in sociological writing and a dramaturgical framework within which 'presentations of self' (which we could adapt in talking about 'presentations of government') involve careful orchestrations of opacity and transparency (Goffman 1959).

Members of a political system are socialised to believe, and to believe in, certain things about the system as a whole, the rules of the game, roles, incumbents, policies, outputs, and so forth. When expectations are not fulfilled, the system or some aspects of it may be discredited. This disillusionment represents an erosion of support, which may affect the ability of the system to function. A 'credibility gap' may appear; its size and implications depend in part on what the 'illusions' were in the first place, and how political socialisation and propaganda inculcated favourable images of the polity or of its institutions or personnel. The United States in the post-Watergate period provided many illustrations of political disenchantment, when facades were apparently stripped away to reveal what many came to think of as the 'truth' about those in authority. Opinion polls may not measure these changes precisely but some evidence shows declines in popular trust in government, in perceptions of honesty in government, and in popular confidence in the people who ran key institutions (Elder & Cobb 1983, ch.1). The Scottish psychoanalyst Laing generalised this mood beyond America in writing the following:

> "many...contradictions are more apparent than real. They arise from our belief in our own lies and mystifications. Many people are tormented by contradictions that exist only between facts and propaganda, not in the facts themselves.... It would be nice to live in a world where we could feel that if one of the authorities of society...told us something,

> the fact that they said so would make it more likely to be true than false....Unfortunately we are forced by the cynilies, multifarious deceptions and sincerely held delusions... to a position of almost total social scepticism....we are so 'programmed' to believe that what we are told is more likely to be true than false because we are told it, that almost all of us are liable to be caught out occasionally....We can put no trust in princes, popes, politicians, scholars or scientists, our worst enemy or our best friend."
> (Laing, in Cooper (ed.), 1968, pp. 22-3,32)

In different ways, there is some affinity between this sort of writing and the issues taken up in more theoretically-based analyses of trust and its importance in sustaining political and social relationships. Bok's work (Bok 1984, Bok 1978) provides relevant commentary on, and insights into, a vast range of everyday individual and political practices that present ethical dilemmas, brought together under conceptual categories that enable us to address ubiquitous issues of choice within a unified general frame of reference: "We are all,in a sense, experts on secrecy." (Bok 1984, p.xv) By exploring secrecy practices and dilemmas at different levels, and particularly by embracing the wide variety of contexts in which they occur and which have been too often discussed only in separate worlds of discourse, she allows us to understand more clearly what these problems have in common and where they differ. Thus the necessity for transparency on the governmental level and at the same time the presumption in favour of the protection of individual privacy can be held in the same focus to permit the wide debate that is necessary if societies are to develop more adequate rules and policies for the collection and use of information.

In another direction, Luhmann's use of a social systems approach to the question of trust allows one to relate perceptions like Laing's to a more analytical treatment of the functions of trust in society and politics (Luhmann 1979). He says:

> "...communication is made by people and affects people, but it no longer rests on an unchanging view of what is right, or on close personal acquaintance. How is it that, in spite of this, such communications are reliable, and the reduction of their complexity trustworthy?"
> (Luhmann 1979, p.49)

Truth is at the heart of this: "Trust is only possible where truth is possible..." (p.52) For Luhmann, however, this is only the case where one is talking about trust in authority, and by 'authority' Luhmann seems to mean not political authority but those who are knowledgeable, or who have some special expertise on the basis of which they communicate information that is taken on trust. It is not clear how much this differs from trust in legitimate political power, and perhaps a sharp differentiation should not be made between being an authority and being in authority (Carter 1979 in fact associates them). It may be paradoxical that whilst confidence is intrinsic to the general notion of political legitimacy, yet in a democratic

system the warrant for public confidence is the validation of the state's claim to be acting rationally, rather than relying upon tradition or charisma. The state stakes its legitimacy on the claim that it knows the right course of action and is in fact undertaking it. A state that claims to be rational thus has to provide means by which the public can validate its claim; the public should not merely take the government's word for it ('have faith') but should be sceptical, require the state to give an account of itself and to improve the procedures for accountability where they are deficient. As mentioned in the previous section, scepticism is also a reigning principle of scientific activity, and both science and rational politics thus may require the same openness of information. In the longer term, it is in the interest of government that confidence in it has at least some basis in its willingness to practice, promote or tolerate a reasoned scepticism. Thus government could acknowledge gaps between, for instance, intended and actual outcomes of action, the recognition of which is a crucial precondition for public learning. But in the short run, governments are reluctant to admit that they do not know what is going on, or what to do. How the antinomy between trust and reasoned scepticism can be resolved is not easy to say, but it provides a context within which governments present their accounts or, on the other hand, conceal their shortcomings (McPherson, Raab & Raffe 1978).

Conclusion

This paper has merely touched on some areas in which the analysis of politics and government and the issues of confidentiality, privacy and data protection intersect. There is no doubt much scope for tighter and more rigorous formulation of problems which would repay systematic study and which might provide more cogent syntheses of a vast mass of empirical and other enquiries into information practices and conflicts. There is no lack of academic fodder in this area; there is also no lack of public political issues. How the two are to be related is another question: in what ways can academic discourse and research bear fruit in terms of proposed solutions of information-related problems? Or will solutions be found anyway, through private coping-strategies and public pluralism?

REFERENCES

Barrett, S. & Fudge, C.(eds.), POLICY AND ACTION, London: Methuen, 1981

Bok, S., LYING, London: Harvester, 1978

Bok, S., SECRETS, Oxford: Oxford University Press, 1984

Braybrooke, D. & Lindblom, C., A STRATEGY OF DECISION, New York: The Free Press, 1963

Burkert, H., DATA SECURITY AND CONFIDENTIALITY, ITEM F: FREEDOM OF INFORMATION AND DATA PROTECTION, FINAL REPORT, GMD, 1983

Carter, A., AUTHORITY AND DEMOCRACY, London: Routledge & Kegan Paul, 1979

Civil Service Department, DISCLOSURE OF OFFICIAL INFORMATION: A REPORT ON OVERSEAS PRACTICE, London: HMSO, 1979

Deutsch, K., THE NERVES OF GOVERNMENT, New York: The Free Press, 1963

Dror, Y., PUBLIC POLICYMAKING REEXAMINED, Scranton, Pa.: Chandler, 1968
Easton, D., A SYSTEMS ANALYSIS OF POLITICAL LIFE, New York: Wiley, 1965
Edelman, M., THE SYMBOLIC USES OF POLITICS, Urbana: University of Illinois Press, 1964
Elder, C. & Cobb, R., THE POLITICAL USE OF SYMBOLS, New York: Longman, 1983
Etzioni, A., THE ACTIVE SOCIETY, New York: The Free Press, 1968
Flaherty, D., PRIVACY AND GOVERNMENT DATA BANKS: AN INTERNATIONAL PERSPECTIVE, London: Mansell, 1979
Flaherty, D., "Limiting Governmental Surveillance and Promoting Bureaucratic Accountability: The Role of Data Protection Agencies in Western Societies", paper prepared for delivery at the 1984 Annual Meeting of the American Political Science Association, Washington, D.C., August 31, 1984
Goffman, E., THE PRESENTATION OF SELF IN EVERYDAY LIFE, Garden City, N.Y.: Doubleday, 1959
Habermas, J., TOWARD A RATIONAL SOCIETY, London: Heinemann, 1971
Hood, C., THE TOOLS OF GOVERNMENT, London: Macmillan, 1983
Jowell, R., "A Professional Code for Statisticians? Some Ethical and Technical Conflicts", paper for plenary session of the International Statistical Institute's 43rd Biennial Session, Buenos Aires, December 1, 1981
Jowell, R., "Ethical Concerns in Data Collection", in Raab, C. (ed.), DATA PROTECTION AND PRIVACY - PROCEEDINGS OF A CONFERENCE, London: Social Research Association, 1982
Laing, R., "The Obvious", in Cooper, D. (ed.), THE DIALECTICS OF LIBERATION, Harmondsworth: Penguin, 1968
Luhmann, N., TRUST AND POWER, Chichester: Wiley, 1979
McPherson, A., Raab, C., & Raffe, D., "Social Explanation and Political Accountability: Two Related Problems with a Single Solution", paper presented to the Symposium on Accountability of the British Educational Research Association, Leeds, September 1978. A revised version was published in Gray, J., McPherson, A., & Raffe, D., RECONSTRUCTIONS OF SECONDARY EDUCATION, London: Routledge & Kegan Paul, 1983
Mellors, C. & Pollitt, D., "The Data Protection Bill: Protecting Privacy or Promoting Commerce?", THE POLITICAL QUARTERLY, 55,3,1984, pp.308-313
Merriam, C., POLITICAL POWER, New York: Collier Books, 1964. Originally published 1934
Mochmann, E. & Mueller, P.(eds.),DATA PROTECTION AND SOCIAL SCIENCE RESEARCH Frankfurt: Campus Verlag, 1979
Nimmo, D., POPULAR IMAGES OF POLITICS, Englewood Cliffs, N.J.: Prentice-Hall, 1974
Raab, C., "Political Stigma: Toward a Theory of the Credibility Gap", paper presented to the Frankfurt/Edinburgh Seminar, Edinburgh, October 1977
Rein, M., FROM POLICY TO PRACTICE, London: Macmillan, 1983
Rowat, D. (ed.), ADMINISTRATIVE SECRECY IN DEVELOPED COUNTRIES, London, Macmillan, 1979
Simon, H., ADMINISTRATIVE BEHAVIOR, New York: Macmillan, 1957

"THE PUBLIC INTEREST, PRIVACY AND THE MODERN STATE"

A paper presented to the European Consortium for Political Research conference - Barcelona, March 1985.

N.J. Rengger.

THE PUBLIC INTEREST, PRIVACY AND THE MODERN STATE

This paper intends to argue for what, on the face of it, is a disturbing and problematic conclusion - namely, that in modern European states (and their coevals elsewhere in the world) the concept of the 'Public Interest' is a radically incoherent one and that such states must (if they wish to retain intellectual coherence) pay more attention to a very different concept, that of privacy, than many do today. It further suggests that even those states that do give some consideration to this concept, often compromise or ignore the requisite conclusions. My belief is that this conclusion is, in fact, less disturbing than it looks at first sight. I shall offer some reasons for this at the end of the paper, but it is first necessary to define some terms and I am going to start with the concept of the 'modern state'.

1. On the surface, of course, the concept of the 'modern state' does not appear at all problematic, but deeper reflection shows just how problematic it is in fact. There are a bewildering variety of so-called 'types' of 'modern state' and a myriad of value systems which act as pivots about which we locate both ourselves and such states, or which act as criteria for 'judging' the states and identifying their virtues and vices, strengths and weaknesses. To indicate what I want to say about the 'modern state', I am going to adapt part of Oakeshott's discussion of the problem in his essay 'On the Character of a Modern European State'.[1] Oakeshott's contention is that the Modern European State (and those states around the world which resemble it - which, on Oakeshott's reading, is virtually all of them) is best understood by deploying two ideas taken from medieval political and juristic thought - 'Societas' and 'Universitas'.

The concept of 'Societas', argues Oakeshott, is based on the

idea of agents who, by choice or circumstance, are related to one another so as to compose an identifiable association of another sort. The tie which joins them, "and in respect of which each recognizes himself to be socius, is not that of an engagement in an enterprise to pursue a common substantive purpose or to promote a common interest, but that of loyalty to another, the conditions of which may achieve the formality denoted by the kindred word legality."[2]

'Universitas', analogically should be understood as "persons associated in a manner such as to constitute them a natural person; a partnetship of persons which is itself a person, or in some important respects like a person ..... corporate aggregation was recognized as persons associated in respect of some identified common purpose, in the pursuit of some acknowledged substantive end or in the promotion of some specified enduring interest."[3]

Oakeshott's argument is that "modern European reflection about the character of a state and the office of its Government has, then, explored two diverse analogies, each denoting a distinct mode of expression with a logic of its own, in terms of which to understand it: that of civil association (stemming from societas) and that of 'enterprise' or 'purposive' association (stemming from universitas). What these two understandings have in common is the recognition of a state as an exclusive association: no man may be a member of two such associations".[4]

"In the circumstances of modern Europe", he goes on "these two ideal characteristics of a state and the office of its Government have become two well-trodden paths upon which many minds have gone up and down, each leading to a destination, a theoretical understanding more or less exactly specified: the one (signposted societas civilis: imperium) to a formal condition, and the other (marked

universitas: dominium) to a substantive condition."[5]

The theoretical nub, to which all the above leads, is an irreconcilable conflict between these two understandings and by suggesting that much of the tension in modern government and the modern state is due to this conflict: "They both purport to refer to the character of a modern European state and they are irreconcilably opposed to one another" he says.[6] In short, his contention is that "the modern European political consciousness is a polarized consciousness. That these are its poles and that all other tensions - such as those indicated in the words 'right' and 'left' or in the alignments of political parties - are insignificant compared with this."[7]

Now one does not have to agree with the whole of Oakeshott's argument (and I certainly do not)[8] to concede that his analysis is characteristically interesting and has many features to recommend it. In any case I intend to apply his distinction to the two related issues that I address here: the questions of privacy and the public interest. In the course of it, I shall have to adapt his distinction, but its usefulness will, I hope, become apparent.

II. I first wish to examine the question of 'privacy' - on the face of it a seemingly curious topic to figure in a paper on political theory at all. There are many problems with the regulation of 'privacy', with the enforcement of laws maintaining privacy, with the just and correct limits on these laws, with loopholes in them and so on. All of this, however, suggests that there is at least a relatively unproblematic definition of privacy, or criteria with reference to which these empirical questions are discussed and analysed. It is worth, therefore, taking a moment to see if this concept is as obvious as one might at first suppose.

Generally, 'privacy' has been seen as a concept located in the general sphere of 'rights', i.e. citizens in a state are taken to possess a 'right' to privacy - a 'right' here being taken to be the possibility of an individual determining when, and to what extent, his actions, beliefs or affairs should be revealed to others, with only the most serious exceptions to this being allowed.[9] (One such category of exception - perhaps the most often cited - being 'in the public interest',(but more of that later).

Now, quite apart from the obvious objection (that the term 'right' in anything other than a purely legal sense is itself a highly problematic one) there is one further problem with regard to this definition. This is that any so-called 'right' to privacy only truly exists within a given value system - broadly speaking that of classical Western liberation, and ideologies or value-systems coeval with it (for example, some forms of socialism).[10] Thus the problem arises of how one comes to use the concept - so defined - in a state not governed under such a value-system. The obvious answer, of course, is that one cannot. It made no sense in Nazi Germany to talk of a 'right to privacy' when the officially approved view of the state was that of "gleichschaltung' - the bringing of everything under the state's control.

Now it will be argued in response to this that nobody ever supposed that all value-systems will permit a right to privacy but that we should give preference to those that do. The reasons advanced in support of this claim might be varied; they might be ethical, psychological, sociological or a combination of all three, but they would, I submit, only put the argument one stage further back. We would still be faced with the question "Why should we have a 'right' to privacy (as we have just defined it)?'

Many reasons could be given to limit this 'right' much more drastically than its proponents would like while still accepting the 'value' of some privacy for some people. For example, those Soviet citizens who were sincere (as undoubtedly many were) in enforcing Stalin's policy of industrialisation and collectivisation presumably did not wish to deny their own desire for (and right to) some privacy, but would have agreed that their deprivation of millions of their fellow countrymen and women of that self-same right was (as Stalin expressed it to Churchill some years later) 'absolutely necessary for Russia'.

An interesting point, I think, is beginning to emerge here. One might (without too much exaggeration) see the totalitarian states of the 20th century as extreme forms of Oakeshott's 'enterprise' association, i.e. a universitas, directed towards a set purpose (the future Communist state, perhaps, or 'perpetual struggle' and the purification of the race through it - whatever!). The common understanding of privacy, as I have rendered it here on the other han , is very much that geared to a societas - a civil association. As Oakeshott remarks, however, late in his essay "It is of course true that the path marked 'universitas': dominium has been in recent times the more crowded with travellers. It has been trodden not only by genuine intellectual explorers but also by large conducted parties of the helpless and the bewildered, led by half-men usually devoid of respect for their followers." [11]

There is little trouble in guessing that among the 'half-men' we might put Hitler, Mussolini and Stalin, but far more germane to my point are the 'genuine intellectual explorers', and it is to one of these that I now want to turn. Of course, these 'intellectual explorers' are my choice and, as such, I would not wish to foist them on to Oakeshott but for my purposes they are extremely interesting.

One such 'intellectual explorer' worth considering in this context is Milton Friedman. Friedman would usually be considered - at least on a cursory glance - an obvious candidate for Oakeshott's 'civil association' analogy, but is he?:-

Friedman insists that:

> "Government's major function might be to protect our freedom both from the enemies outside our gates and from our fellow-citizens, to preserve law and order, to enforce private contracts, to foster competitive markets. Beyond this major function, government may enable us at times to accomplish jointly what we would find it more difficult or expensive to accomplish severally ... any such use of government is fraught with danger (but) we should not and cannot avoid using government in this way." [12]

However 'limited' a role this prescribes for government (and it does not look all that limited to me) is it not - 'a state understood .... in terms of a purpose and of the persons joined in pursuing it"? [13]

As far as our consideration of privacy is concerned, Friedman's aims are still more in keeping with the universitas analogy. He proclaims - apropos welfare provision - that "the objectives have all been noble, the results disappointing" [14] i.e. he does not disagree with the aims only with the methods. His ideal society, deregulated, market-orientated capitalist and, therefore, 'free' (on his terms) is still a 'purpose' orientated society. Thus, because it is not intrinsic but only contingent, the 'right' to privacy in such a society (if there is one) can still be overridden by the kind of utilitarian argument we saw above - by, for example, an appeal to the 'public interest'.

I have deliberately cited a thinker who stands firmly in the 'liberal' tradition because it is important to see that even here, in the 'demi-monde of neo-liberalism' as it were, the notion of 'privacy' can always be overridden. The next question is to ask if this is inevitable. It is probably no surprise to learn that my answer is "No it is not": Consider, for a moment, Oakeshott's 'societas': civil association. "Civil associates" he says, "are persons (cives) related to one another, not in terms of a substantive undertaking, but in terms of common acknowledgment of the authority of civil (not instrumental) laws specifying conditions to be subscribed to in making choices and in performing self-chosen actions ..... the mode of association here is, therefore, formal; not in terms of the satisfaction of substantive wants, but in terms of conditions to be observed in seeking the satisfaction of wants." [15]

Now Friedman falls outside this because his model of society (being largely an economic one) naturally concentrates on the 'substantive satisfaction of wants', rather than on the conditions to be observed in seeking that satisfaction. Equally, a theory of privacy rooted in the universitas analogy will be liable to the possibility of exception for a variety of reasons to do with the 'purpose' of the universitas. In extreme cases, of course, this purpose will be that of a totalitarian state which we may deem evil, or undesirable, on other grounds; but even in a 'liberal' state - if it is inclining more to the 'universitas' than to the 'societas' - 'privacy' is only a contingent right, always open to be overridden by others if they are more necessary to the 'purpose' than it is.

In a more emphatic sense, however, our normal understanding of the word 'privacy' denotes something much more than this. 'Privacy' is not merely one concept among many struggling in the ceaseless altering of priorities that is a modern state. It is considered one of the most fundamental, but can only be recognized as such in a state inclining more to 'civil association' than to 'universitas'.

The common concern of 'cives' is solely to act justly; "that is, in adequate subscription to the prescription of a republica capable of being amended in response to changed understandings of what is 'just'." [16] On the understanding of civil association that I have already given, however, [17] part of what it <u>is</u> to be 'just' <u>must be</u> to respect other cives "in making choices and in performing self-chosen actions" [18] and part of this must be a respect for 'privacy' <u>considered non-instrumentally</u> (for that is a condition of civil association).

Now 'privacy' on <u>this</u> understanding is in a much stronger position than previously for although it could still (theoretically) be overridden by some higher good - that 'higher good' must be in keeping with the conditions of civil association and must therefore be 'just' (on that association's correct understanding of 'just'). Its atatus as a 'right' is - in a sense - no stronger, but because it becomes almost by definition part of the requisite <u>conditions</u> for civil association to exist <u>at all</u> rathe- than a 'means' directed towards the fulfilment of a 'purpose', it takes a correspondingly higher place among the priorities of such a society.

It must not be forgotten, however, that it is part of Oakeshott's case (and again a part that I agree with) that "what has to be accounted for is not the presence of either of these two characterizations, i.e. societas and universitas, but a political imagination which is itself constituted in a tension between them". [19]

This fact, I suggest, accounts for a good deal of the problems associated with the idea of 'privacy', which are not apparent when we first consider it. It is a concept much more at home in one characterization of a modern

European state (civil association) than with the other ('enterprise' association), but by virtue of the character of the modern state it is forced to coexist in a world where these two characterizations continually conflict.

Is it possible, then, to rescue the idea of privacy from this unfortunate conceptual quagmire? The answer, I think, is "yes", but before I explain why and how I want to turn to that second problematic concept - the 'Public Interest'.

III. In considering this idea I must first digress a little from what, so far, has been the main thread of my argument,[20] and say something in general terms about the concept of 'interest'. Let me take as a text Brian Barry in his essay 'The Public Interest' which takes issue with J.D.B. Miller on precisely this topic.[21] Barry's point is that Miller's definition of interest ("we can say that an interest exists when we see some body of persons showing a common concern about particular matters")[22] hangs far too heavily on the slippery word 'concern'. "One can be concerned at (a state of affairs) or concerned <u>about</u> (an issue) or concerned <u>with</u> (an organization or activity) or, finally, concerned by (an action, policy, rule etc.)."[23] Moreover, Barry argues, Miller defines interests as <u>shared</u>. He talks about 'some body of persons having 'common concerns'. Yet this surely conflicts with our common use of <u>private</u> or <u>personal</u> interests, <u>as distinct from</u> the interests we may or may not share with others.

Secondly, says Barry, returning to the attack on the word 'concern', "the second part of the definition equates a man's interests with his concerns. This conflicts with a great many things we ordinarily want to say about interests. We want to say that people can mistake their interests and that while some conflicts are 'conflicts of interests'

others (e.g. 'conflicts of principle') are not."[24] Barry suggests, as an alternative definition, "a policy, law or institution is in someone's interest if it increases his opportunities to get what he wants - whatever that may be. Notice (he adds) that this is a definition of 'in so and so's interests'. Other uses of interest all seem to me either irrelevant or reducible to sentences with this construction."[25] Thus, he concludes, "It is always a policy (here read as to include law or instruction) that is said to be 'in so and so's interest' - not the actual manner in which he is impinged upon."[26]

The importance of all this, however, is borne out in Section III of Barry's article, for here he argues that his definition of interest allows a meaningful deployment of the concept of the 'Public Interest'. If 'interest' is defined in such a way that this policy is in 'A's interest' is equivalent to 'A is trying to get this policy adopted', it is decisive evidence against there being, in any but a few cases, a 'public' interest, that there is conflict over the adoption of nearly all policies in a state" argues Barry. On his definition, however, "A policy might be truly describable as 'in the public interest' even though some people opposed it."[27]

Now, I think it is helpful to pause here and look at each of Barry's arguments in turn. His argument against Miller seems to me eminently well put, and he is right too, I think, when he says that we <u>do</u> want to talk about conflicts of 'interests' not being the same as 'conflicts of principle' etc. However, I am much less happy about his argument in favour of people 'mistaking their interests'. Let me consider an example which I hope will demonstrate my reservations on this subject. The campaign for Nuclear Disarmament in the UK has - as one of its main aims - been

trying to persuade the British government to abandon both the use and the possession of nuclear armaments. Now according to Barry, to talk of the 'interests of' the CND is a mistake because the only real sense of 'interest' in the political context, lies in talking about a policy being 'in someone's interest'. Thus, protest meetings in Hyde Park might be said to be in CND's interest because it brings to the attention of an ever wider number of people CND's case. Of course it might not be in their interest if it is seen that CND's case is basically unpopular, but this is precisely Barry's point. Here is an instance of people mistaking their interests, an instance not possible under Miller's formulation of interest as 'common concern'.

However, is Barry's presentation much more useful? He argues, against Stanley Benn [28], that "the only enforced sense that one can give to 'what are your interests?', which Benn imagines being put seriously to a farmer, is that it is an enquiry into his favourite intellectual preoccupations - or perhaps into his leisure activities - applications of 'interest' whose irrelevance Benn himself affirms."[29] Yet one must be careful. Remember that one of Barry's charges against Miller was that his criteria did not meet our ordinary sense of 'interest', but do Barry's?

For Barry, remember, one can only legitimately talk about "a policy that is said to be 'in so and so's interest' - not the actual manner in which he is impinged upon". [30] Essentially, therefore, Barry is deploying a distinction between 'interest' (in politics or public matters) and 'interests' (which, he agrees with Benn, are irrelevant in political terms). The concept of 'interest' is, on Barry's account, a means not an end, it is a 'policy, law or institution' designed to 'increase somebody's

opportunities to get what he or she wants'.

Now I have one immediate objection to this and it is one Barry, himself, made against Miller. He is (simply by fiat) ruling out 'private' and 'personal' interest from consideration. I can do no better than to quote Barry against himself: "It might perhaps be argued ..... that only interests shared among a number of people are politically important, but it can surely be validly replied that this is neither a necessary nor a sufficient condition." [31] There is a deeper and more important point here, however. Barry is, I think, right to say that the strongest sense of 'interest' in politics is that of 'in X's interest', but it is not the only one, as his criticism of Miller (and mine of him) suggests. Barry's conception of interest is fundamentally ideological. Politics is devoted to purposes; 'interests' are (more or less) correct ways of attaining those purposes. But what we see at work here, I think, is something like an Oakeshottian 'universitas' conception of politics and government. To someone with a civil association model, interests can be personal and not teleological and therefore he can avoid both Miller's slippery use of concern (which Barry rightly dismisses) and also Barry's own substituted formula, as the only criterion of interest. Furthermore, Benn's question "What are your interests?' is itself a misleading question because the question to ask - as a political scientist or theorist - is 'what is your interest?' - to which Benn's farmer would (rightly) reply - 'My interest as what? as a farmer? father? husband? member of the Conservative party? churchgoer? member of CND? = any individual has innumerable interests in this sense; but if we are asking for his interest (meaning 'how is it going to affect his action in the political arena), we must ascertain his own order of priorities among his interests and, of course, this may be no simple matter as his interests may pull in different directions. Thus our

farmer's interest (as a member of CND) is to advance every argument or occurrence that will further the achievement of his 'end' - or obtaining a declaration of unilateralism from the British government. Now this can be understood in Barry's fashion (a policy designed to increase his opportunities to get what he wants) but it is only the sole criterion of interest on one view of what the political relationship consists of i.e. you conceive of politics in teleological terms, and this view, in the modern state, lives uneasily in conflicting partnership with at least one other.

IV. Let us now turn to where this leaves the concept of the 'Public Interest'. The difficulty here is in ascertaining the precise meaning of the term 'Public' and this is a difficulty which the 'Public' interest shares with terms like the 'National' interest (and also National Security which I shall discuss briefly a little later on). Barry examines the ramifications of his argument by considering some of the things Rousseau says in Du Contrat Social about the 'General Will' (an interesting if obvious choice as Rousseau most assuredly had a 'universitas' theory of politics), but I do not think that the discussion actually establishes anything very germane to my purpose here (save for a somewhat clearer - if less Rousseauean - notion of the general will). However, earlier on in his article, Barry makes an interesting aside - "Even the most sceptical writers" he says, "often admit that a law prohibiting assault by anyone against anyone is a genuine example of something which is 'in the public interest' or 'in everyone's interest'."

This is worth considering for a while, chiefly because, even on Barry's own argument, the two phrases 'in the public interest' and 'in everyone's interest' are scarcely equivalent terms. To begin with some degree of priority would have to be introduced into this idea of interest.

Something that is 'in everyone's interest' might, for example, be stealing as much from the exchequer as they could, but it would scarcely be - assuming you accept the idea of government at all - in their long-term interest (i.e. government, of admitted necessity, would collapse). This is where Barry's argument falls down here, a 'policy' might be - individually - calculated to increase opportunities for happiness and, thus be in somebody's interest (arguably even in many people's interest) and yet be against the interest of the continuation of the overall body which makes social life possible and, therefore, against everybody's interest (on the assumed premise of the necessity for some form of government). What is necessary here is a choice between interests and, therefore, a criteria for judging them. This is largely absent from Barry's account (though he does discuss it briefly apropos Rousseau).[32]

But then it will be said (on our agreed premise) that a policy abstaining from wholesale brigandage will be 'in the public interest'. To this I reply, not so, and to explain why, I must digress again.

In general, in any state - modern or otherwise - there will be a more or less substantial body of dissident opinion. Occasionally, this dissident opinion will become so far removed from the accepted orthodoxy as to become genuinely interested in the overthrow of the existing system of government. Obviously, for example, such a situation existed in pre-revolutionary Russia. Consider the rival standpoints of the Tsar and his government, and Lenin and the Bolsheviks. In these circumstances is it possible to talk of a policy being 'in the public interest'? For these two groups in Russian society would have defined what was 'in the public interest' in 1917 quite differently, if, here, we assume that the general sense of the public interest, as the concept is

usually deployed, is the well-being of 'the people' of a particular state. Obviously, for the Tsar, the 'public interest', in this sense, is best served by a continuation of Imperial rule (it seems quite probable that the Tsar was perfectly genuine in this belief). Equally obviously, for Lenin, it is best served by an overthrow of that rule. Thus, using Barry's terminology, a policy directed towards increasing the likelihood of the continuation of imperial rule (for the Tsar) or the overthrow of it (for Lenin) would each be considered 'in the public interest'. Now, of course, two things need to be said here. First of all, Lenin would probably have admitted my earlier point and been prepared to jettison the notion of his revolution being 'in everyone's interest' (it obviously was not!), but as a good Marxist he would have to say that the establishment of Communist society would <u>eventually</u> be in everyone's interest (as it would end the condition of alienation etc.).

Secondly, Lenin himself would not have talked in terms of 'the public interest' but of the proletariat's interest. This brings me back to the problem of defining the 'public'. The point here is that two policies diametrically opposed to one another could both, with some plausibility, be said to be 'in the public interest', but only on their own terms, i.e. whether or not you agree with their claim will depend on which side of the ideological fence you are sitting. As David Manning and Tim Robinson have put it "in Marxist-Leninist terms it makes sense to say Lenin persuaded his followers to start the proletarian revolution, whereas in terms of imperial law he can only be understood to have incited them to commit treason." [33] How then, can Barry's definition of a policy being 'in the public interest' stand up? Well obviously, one way would be to determine 'the public interest' in this sense by a mere head-count but this becomes a purely stipulated

definition of interest - a will of all (or rather the majority) and not a 'general' will. Barry's reflections on Rousseau, incline him towards a rather odd varient of this. "Rousseau" he argues, "calls for the citizen's deliberations to comprise two elements."

(a) The decision to forego .... policies which would be in one's own personal interest alone, or in The Common Interest of a group smaller than the whole, and

(b) the attempt to calculate which of the various lines of policy that would affect oneself equally with all others is best for him (and, since others are like him, for others)." [34] The problem here, however, is that it is precisely in determining what is 'in the public interest' that needs to be accomplished before this two-step formula can be of any use. The argument, therefore, is circular, as any such argument must be.

The main reason why all 'public interest' arguments relapse into circularity is really, I think, rather obvious, if what I have already said about individual interest is borne in mind. In cases of individual interest, whether on a narrow Barry-type formulation, or on a broader 'societies' formulation, there will be guiding reasons for such interests - be they psychological, political, moral or whatever - and we can, therefore, identify in a limited (and a personal) sense, an individual 'mistaking his interests', even if only retrospectively. There is no problem in such instances because, as long as we are considering purely personal interests within explicitly stated shared interests - no conflict <u>of interest</u> (within the sharing group) will arise. Immediately the concept of 'public interest' is introduced, however, we are asked to order our interest related decisions in such a way that a non personal conception of interest becomes dominant; what Kant might have called a 'heteronomous conception of interest', and here disputes

are inevitable. Furthermore, these disputes are not the kind that can be settled by Barry's arguments (or Miller's, or Benn's, or anybody else) because they are disputes about ends and in the sense in which we have been discussing interest it is necessarily a question of means.

It is particularly useful to recall Oakeshott's argument at this point. In any modern state where the universitas analogy is stronger, policies 'in the public interest' will usually be defined and enacted - it is after all an obvious 'purpose directed' enterprise - and differing policies, also said to be 'in the public interest' will be opposed to them. Of course, different purposes may be sought but the same model of government will be at work. Thus, 'the public interest' loses any independent specific meaning in terms of characterization of the modern European State I have been working with. It is a concept of use only internally, that is to say within a particular conceptual framework and, therefore, has noe of the explanatory and recommendatory force expected of it to influence precisely those people outside that framework that it must influence if it has to any practical political effect. People are asked to sacrifice personal interests 'in the public interest', but will only do so if, at least, to some degree, they already agree with the conception explicit or implicit of the 'public interest' being deployed.

On a sociatas or civil association view the concept becomes (I would argue) equally illusory, although for a different reason. "The ideal sociatas (says Oakeshott) is that of agents who, by choice or circumstance, are related to one another so as to compose an identifiable association .... that which joins them and in respect of which each recognizes himself to be a socius, is not that of an engagement in an enterprise to pursue a common substantive purpose or to promote a common interest but that of loyalty

to one another .... it is what in an earlier essay I have called a moral relationship". [35] (underlining mine).

In this instance, therefore, the concept of the 'public interest' becomes nonsensical in a societas where there may be shared concerns but not shared interests (in any of the senses I have used the terms here).

V. It is time to draw some threads together. I have argued that by using Oakeshott's distinction between societas and universitas, considered as opposite poles for viewing the modern European State, part of the problem with our notion of privacy is that it is a notion derived much more from Societas than from Universitas. I have argued, secondly, that the notion of 'the public interest', as often used to 'oppose' many privacy claims based on a 'right' to privacy, has much closer links with the universitas analogy, but that by either analogy the notion if the public interest is incoherent.

In the final part of my paper I want to do three things. First, to consider a possible objection to my argument so far; secondly, outline what I consider the implications of this argument are for conceptions of, and concerns about, privacy in modern states, and, thirdly, I want to suggest why I think my conclusions are less worrying than they might at first appear.

The most obvious objection to my argument thus far is simply to deny the distinction between Societas and Universitas that I have borrowed, largely unchanged, from Oakeshott. This is a wide and somewhat complicated subject, and to those who doubt the analogies validly I can do no better than to suggest consulting Oakeshott's own defence of it in '<u>On Human Conduct</u>'. However, there are, I think, two points that can be made to strengthen at least the plausibility of my use of it in investigating the

relationship between privacy and the public interest in the modern state.

In that colourful border region where the history of ideas, political theory, empirical political science and political philosophy all meet and intermingle, one of the most fruitfully explored areas of late has been the broad concept of what I will call (following Stuart Hampshire) [36] "Machiavelli's question": the question of the correct relationship between public life and private life in politics. In Machiavelli's own case, of course, the question was posed specifically in the moral sphere, but in recent years a number of theorists have widened the scope of the debate considerably. Inevitably, of course, it only glancingly touches on the problems that I am concerned with here, but Stuart Hampshire, Bernard Williams, Thomas Nagel, Michael Walzer and especially Sissela Bok have all said interesting and important things about the relationship between privacy and 'the public interest'. [37]

A number of these writers, however, while they say interesting things <u>about</u> privacy do not, I think, give a very satisfactory account of the reasons behind the vagueness of the concept to which I have already referred. Moreover, their considerations of the public interest display the same weakness. Hampshire, for example, discusses utilitarian accounts of morality, arguing that "the utilitarian habit of mind has brought with it a new abstract cruelty in politics", [38] and argues that, " for Machiavelli and his contempories a political calculation was still a fairly simple computation of intended consequences .... whereas) computation by common measure now seems the most orthodox way to think in politics." [39]

"Thus, he says, linking Machiavelli and the utilitarians, "The utilitarian doctrine insisting that there is a common

measure of those gains and losses, which superficially seem incommensurate, is in any case called into being by the new conditions of political calculation. Any of the original defects in the doctrine will now be blown up, as a photograph is blown up and made clearly visible in action." [40]

I am not saying Hampshire's argument is wrong (indeed I think it is largely correct), but the point is that Machiavelli was not a utilitarian, but a Renaissance humanist (albeit of a singularly unorthodox kind:). His moral theory (insofar as he had one) was very different from the utilitarian's; his governing assumptions largely dissimilar and his 'ends' (and ideal state) widely divergent. Yet Hampshire is not wrong to think the way he does, for they do have something in common. They are linked by a shared 'conception' of government (though the 'ends' that conception of government is directed towards are different, as I said) i.e. that conception is effectively the 'enterprise as-ociation' that Oakeshott links with the Universitas analogy.

It is, of course, sensible to be suspicious of simple explanatory models, in political theory, as anywhere else, but both on historical grounds (as Skinner's and Oakeshott's own arguments suggest) and on conceptual one's - as I have just indicated - it makes sense to draw some kind of distinction along those Oakeshottian lines and, having made it, to see what light it sheds on our political assumptions.

One need not agree with all that Oakeshott claims for his two analogies - one need not, for example, hold that "all other tensions in the European political consciousness are insignificant compared with this." [41] (my italics). I would argue that, although many tensions are reducible to this distinction, some are not. One, at least equally important, the problem of divergent moralities in politics, is prefigured -

at least on some interpretations - [42] by Machiavelli. Meinecke's Machiavellian 'sword thrust into the European body politic', is just as vital a dichotomy as Societas/ Universitas, and is not reducible to it; neither is it the only one.

Nonetheless, Oakeshott's distinction is a valid and highly useful one as regards the evolution of the Modern European State, and highly illuminating (as I have had to show) when it is applied to a number of problematic concepts that still trouble political consciousness - such as 'privacy' and 'the public interest'. In itself, that makes it worthwhile to consider and discuss.

VI. Having said that, in partial defence of my use of his analogy, I want to look again at one of those problematic concepts - 'privacy'. As I have already suggested, 'privacy' as an idea, occupies a unique position - in European thought. It is almost universally recognized as good <u>in theory</u> (varieties of fascism being the only obvious exception here) and yet, on a large number of readings at least, in modern European states, it is becoming more honoured in the breach than the observance. Now, obviously part of the reason for this is what I will call 'vulgar' Machiavellianism on the part of politicians, but it does, I believe, go deeper than mere adventurism. The dual standard, as far as 'Privacy' is concerned, is rooted in that contradictory alliance between societas and universitas in modern states that I attempted to illustrate in my earlier comments and on the most common concept used to 'override' claims of privacy - the 'public interest'. To illustrate the conclusion I wish to point to here (since we are after all, discussing confidentiality, privacy and data protection) consider the British Data Protection Act passed by Parliament in 1984. This Act has 8 major principles [43], and a number of 'Rights' guaranteeing the subject. [44] However, in Part IV of the Act, it states

quite emphatically: "Personal data are exempt from the provisions of Part II of this Act and of Sections 21-24 above (the section on rights) if the exemption is required for the purpose of safeguarding national security." [45]

Now, there are two points worth reflecting on here. The first is the concept of 'National Security'. (Naturally it is not defined in the Act and, indeed, not satisfactorily in any Act). The only Act which at all broaches the matter - the Official Secrets Act - discusses a number of offences against National Security (some of them notoriously vaguely) but makes no real attempt to define 'National Security' itself. Phrases that come to mind in this context - "against the interest of the State" or (surprise!) "against the Public Interest" - are all equally unhelpful in actually telling us what 'National Security' is. There is, of course, one good reason for this, but also several bad ones. The 'good' reason is that any concept of National Security must be context-bound to some extent, thus a hard and fsat definition would be self defeating. The 'bad' reasons are, however, bound up with a problem of what I will call 'location'; i.e. who locates 'National Security'. The answer, of course, generally speaking is the Government of the day. Even aside from obvious cases of political interference with judgements about 'National Security', however, a genuinely sincere Government can run into difficulty defining, first, what it is and secondly, what (as a consequence) constitutes an offence against it. Now working on an 'Enterprise association' model, it is not difficult to see how some sort of definition of 'National Security' might arise. Let us, for a moment, return to Rousseau. Rousseau, who wanted a strong, vigorous, new active state, suggested (as is well known) a Civil Religion to emphasize civic virtue, and suggested tolerance be extended to all religious "so long as their dogmas contain nothing contrary to the duties of Citizenship". But, "Whoever dares to say 'Outside this Church is no salvation' ought to be driven from the state". [46]

Thus, commitment to religious virtue if it contradicts civic virtue would - by this definition - be an act against 'National Security'.

This, of course, is an extreme example, but it serves to highlight the contention that an 'Enterprise association' can deploy some meaningful use of the idea of 'National Security'. The problem with it is that it falls into the same conceptual trap as did the notion of the 'Public Interest' with which, of course, it is so closely linked. 'National Security' can only be defined internally within a given value system, because it depends on shared purposes, agreed ends, and so on and cannot, therefore, carry the weight that is expected of it - particularly in a state where 'purposes' are disputed as, in modern European States, they inevitably are. This is the fatal weakness of the 'universitas' model of government. It is 'ends' or 'purpose' orientated, but if there is more than one 'end' or 'purpose' it offers no possibility of judging between them. It is, therefore, locked in a contradiction from the start.

The 'purpose' behind an Act such as the Data Protection Act is, of course, to safeguard individual personal data and this, of course, is an aspect of the 'agreed universal good' of privacy that I mentioned. As I argued earlier, however, 'privacy' is a concept geared fundamentally to civil association, not 'enterprise association' and, therefore, to attempt to restrict or limit it by using a concept only applicable in the latter instance (and then only dubiously, i.e. 'National Security' or 'The Public Interest') is to invite conceptual incoherence of the very first order.

Is it true, however, that 'National Security' is strictly analogous to 'The Public Interest' in that it cannot be sensibly deployed in Civil Association? There are, of course, actions or events which would constitute a breach of

Civil Association but, I rather think that 'an act against National Security' would be an inappropriate definition for any of them. In this context, 'National Security' could only sensibly be construed as some sense of the necessary collective need of the members of the Association (who have, remember, only a commitment to formal conditions - not substantive interests) and as Civil Association is a formal condition (a moral relationship, as Oakeshott says), the term 'National Security' seems pointless and, indeed, anomalous as a term representing these formal conditions of association.

Now, it is part of the assumption I have been working with that modern European States contain this ambiguity about privacy; in large part because of the conflicting 'poles' in their history (both practical and intellectual). It seems to me that in a society which wishes to retain a 'societas' conception of privacy, it is better to dispense entirely with notions like 'The Public Interest' or 'National Security' - terms for which conceptual warrant can only be given in a limited and contested sense.

This conclusion would strike some as a particularly disturbing one. Am I saying, they might ask, that governments can never appeal to such ideas, to safeguard the 'Security' of the people they (in some sense) represent? Is there no such thing as treason? What of obvious betrayal (Fuchs, Nunn May, Philby , Blunt etc)? Is it not transparent that certain things (the betrayal of military plans, especially in wartime, for example) are simply against the 'security' of a nation?

My answer to this question is two-fold. First, I do think that - for reasons I have outlined - concepts like 'The Public Interest' and 'National Security' are radically incoherent when applied to modern European States, and,

therefore, for the sake of intellectual coherence and clarity, should not be deployed under any circumstances. I am aware, of course, that because largely of the practical advantages that accrue to all governments through their use, this is a vain hope. This must not be taken, however, as a denial (necessarily) of certain duties towards a state. Fuchs or Blunt can be conceived of as 'traitors' - I would agree the more so, than if they are merely seen as having 'betrayed National Security'. E. M. Forster's famous phrase that "I hate the idea of causes and if I were forced to choose between betraying my friends and betraying my country, I hope I would have the courage to betray my country", [47] is I think, helpful in understanding my meaning here. Forster hit upon an important truth, at least on a 'Societas' understanding of governments in that the notion of friendship and the duties and responsibilities it entails, is, in a certain sense, of a higher priority to our obligation to 'the State', but this is much more true of s state that is conceived of as an 'Enterprise Association' than it is of one conceived of as a 'Civil Association'. In the former the tie is substantive and purpose orientated and thus, those who disagree with the purpose may feel no loyalty to 'the State' (as such) and, therefore, not see such actions as a 'betrayal'. Indeed, for them it will <u>not be</u> betrayal - vide my example of the Russian Revolution. In 'Civil Association', on the other hand, the tie is formal - moral if you like - and is a tie of people considering one another (in Kantian terminology) as ends not means. Therefore, the <u>activity</u> of betrayal (necessarily considering them as means and not ends) is in error, however justified the reasons might be.

This is not the place, however, to discuss the ethics of betrayal, and I want to return to my two main concerns in this paper, 'Privacy' and the 'Public Interest'. My

conclusions about the 'incoherence' of the 'Public Interest' and the importance of 'Privacy' (however it is defined in detail) do no real harm to a state whose citizens have travelled the path marked 'societas civilis', since, as I have agreed, 'privacy' is a fundamental idea derived from it and concepts of 'The Public Interest' (and derivatives of it like 'National Interest' and 'National Security') are simply unnecessary. Only if the path marked 'Universitas: dominium' is the route travelled by a state, does the incoherence of 'Public Interest' become a conceptual problem.

Oakeshott is, of course, right that it <u>is</u> that path that has been followed more frequently in recent years (suggested earlier in terms of sphere - neo-liberal economic and political theory) where this can be seen going on and where the signposts leading up the 'Universitas' path are clear and unobscured. Thus, considering our notions of 'privacy' and 'the Public Interest', we are compelled, I think, to reflect upon what kind of analogy we consider most appropriate, both to our aspirations as individuals and our alleged duties as citizens. It is not, of course, easy. Like Aristotle, we can only expect, as much precision as the subject matter will admit. Yet, continued reflection is not only an <u>aid</u> to understanding but <u>essential</u> for it. "Wovon man nicht sprechen kann, darüber muss man schweiger", [48] says Wittgenstein, and, of course, he has a point. But, as political theorists and political scientists, we cannot possess his detachment, and considering the problems associated with our ideas of 'privacy' and 'The Public Interest' at least has the virtue of showing us why.

NOTES

1. In 'On Human Conduct' (Oxford, 1975)
   see pages 185-326

2. Ibid. (p.201)

3. Ibid. (p.203)

4. Ibid. (p.313)

5. Ibid. (p.317-18)

6. Ibid. (p.318-19)

7. Ibid. (p.320)

8. For a much fuller account of how the recognizably modern conception of 'State' came to be found, see Quentin Skinner's magisterial "The Foundations of Modern Political Thought" (Cambridge University Press, 1978 (2 vols)). It does not offer a totally dissimilar argument to Oakeshott's (which I have not discussed here, as it is hardly germane to my purpose), but the differences are, I think, valuable, where Skinner does differ from Oakeshott. However, this does not necessarily damage Oakeshott's main argument, which I borrow and adapt here.

9. For a good example of this approach see Alan Westin's 'Privacy and Freedom' (London: Bodley Head 1967)

10. See R.N. Berki's excellent short book 'Socialism' (Dent, 1975) esp. Ch. 2 for an elaboration of this point. See also John Dunn's recent monograph 'The Pol. Theory of Socialism" (Cambridge 1984)

11. Oakeshott op. cit. p. 321

12. Milton Friedman "Capitalism and Freedom" (Univeristy of Chicago Press, 1962) p. 2-3

13. Oakeshott op. cit. p. 315

14. Milton & Rose Friedman "Free to Choose" (Secker & Warburg 1980) p.203

15. Oakeshott op. cit. p. 313

16. Ibid. p. 313

17. See above

18. Oakeshott op. cit. p. 313

19. Ibid. p. 320

20. I say only, with Horace, "Verboque provisam rem non invita sequentur".

21. Barry's essay appears in Anthony Quinton's (ed.) 'Political Philosophy" (Oxford University Press, 1967) pages 112-126, and he will almost certainly have changed his mind by 1985. However, I have seen no printed change of heart:, and the point is, anyway, a good one to illustrate my own view. If his views have now changed , I apologise in advance for treating views (originally expressed in 1964) as contemporary. Miller's bo which Barry argues against is 'The Nature of Politics'.

22. cit. Barry op. cit. p.113

23. Ibid

24. Ibid. p.114

25. Ibid. p.115

26. Ibid.

27. Ibid. p.117

28. In Benn's article "Interest in Politics" "Proceedings of the Aristotelean society 1960" See Barry op. cit. p. 115

29. Barry op. cit. p. 115

30. Ibid. p. 115

31. Ibid. p. 114

32. Ibid. p. 118-9

33. D.J. Manning and T.J. Robinson "The Places of Ideology in Political Life" (Croom Helm 1985) p. 70.

34. Barry op. cit. p. 122

35. Oakeshott op. cit. p. 202-2

36. See the introduction to "Public & Private Morality" (ed. Stuart Hampshire) - (Cambridge University Press 1978) page IX)

37. See Sissela Bok "Secrets on the Ethics of Concealment and Revelation" (Oxford 1984)

Bernard Williams "Persons, Character and Morality"

"Politics and Moral Character"

and "Conflicts of Values"

in "Moral Luck" (Cambridge University Press 1981) (philosophical papers 1975-1980)

Thomas Nagel "Ruthlessness in Public Life"

in "Mortal Questions" (Cambridge University Press 1979)

Stuart Hampshire "Morality and Pessimism" and "Public and Private Morality"

in Hampshire (ed) op. cit.

Michael Walzer "Obligations" (Harvard University Press 1970)

"Just and Unjust Wars" (Penguin, 1977)

38. Hampshire op. cit. p.4

39. Ibid p. 5

40. Ibid

41. Oakeshott op. cit. p. 320

42. See Isaiah Berlin's "The Originality of Machiavelli" in "Against the Current: Essays in the History of Ideas" (Oxford University Press 1981)

43. See The Data Protection Act 1984 (H.M.S.O.) Schedule 1 The data protection principles.

44. Ibid. See Part III of the Act, sections 21-25

45. Ibid. See section 27 (1)

46. J.J. Rousseau "Du Contrat Social" (trans. G.D.H. Cole) (Dent 1973)p.277

47. E.M. Forster "Two Cheers for Democracy"

48. Ludwig Wittgenstein "Tractatus Logico Philosophicus" (1921) (Routledge and Kegan Paul, 1961). Proposition 7.

Paper for the ECPR Workshop on 'Confidentiality,Privacy and Data Protection', Director Charles Raab,Barcelona, 1985.

INTELLIGENCE SECURITY AND SECRECY

K.G.Robertson
Department of Sociology
University of Reading
Whiteknights
Reading
England

INTRODUCTION

This paper will examine those issues which are raised by intelligence operations and security measures which have an effect on government attitudes to the disclosure of information. It will examine the national security justification for government secrecy, the civil liberty issues raised by intelligence gathering, and two particular examples, the vetting of civil servants and the national security aspects of the Official Secrets Act. The main claim is that any discussion of the role of intelligence in a democratic society must take account not only of the requirements of democracy but also the requirements of effective intelligence.

Much of the recent debate on government secrecy and on the activties of intelligence and security services, both in Britain and the United States, has focused on the threat, real or imagined, which such activities pose to civil liberties and democracy. However this paper will argue that the concentration on 'abuse' has meant a lack of understanding of the issues which the state faces in responding to threats, either real or imagined, and a lack of understanding of how the differences between political systems affects the response of democratic countries to such 'threats'.

A major premise is that the debate has been conducted at too high a level of abstraction to contribute to the explanation of such practices and that a more realistic approach is necessary. It will be argued that although civil liberties and democracy are a part of the debate they have dominated it to a degree which is counter-productive. There has been a regrettable tendency for those who are concerned with security to ignore the question of rights and for those concerned with rights to ignore the threats which the state sees itself as facing. There is a tendency for civil libertarians to dismiss all or most notions of threat as exaggerated, symptoms of red-scares, or as delusions of the military or intelligence mind. There is a similar tendency for those sympathetic to intelligence or the military to ignore or dismiss civil liberties as phantoms of the wholly-minded intellectual with little or no part to play in the making of policy. It is recognised that the above statements are somewhat exaggerated but there has been a definite tendency for opinon on these matters to be divided along the lines above which leads one to wonder whether either side reads anything which the other produces.

NATIONAL SECURITY

The national security justification for the withholding of information has been under considerable attack both in Britain and in the United States. This is not without good reason since it suffers from imprecision and generality which has tempted governments to abuse its meaning. However, this does not mean that nothing meaningful is contained in the phrase or that it does not justify keeping certain information secret. A specious form of argument is often used by critics of government secrecy. For example, Des Wilson, chairman of the Campaign for Freedom of Information, states : "Government blunders are most easily concealed in the field of defence,where secrecy can be justified by claims that 'national security' is at risk".[1] The implication is clear, we are meant to be suspicious of all such claims of 'national security' on the ground that such claims are only used to cover-up blunders. One wonders what the sense of a statement would be which said that 'defence information is most easily concealed on the grounds that defence information is involved'. This point is particularly important when one considers that all countries which have some form of *freedom of* information legislation allow for an exemption to defence, foreign affairs, and law enforcement information [2]. The concept of national security information involves more than information relating to defence. It involves information which relates to security,that is information, the premature or unauthorised release of which, would harm the ability of the state to respond to threat. It can therefore relate to information in the areas of subversion, sedition, terrorism,treason, defence, foreign affairs, intelligence, financial plans, scarce resources, technology,and trade. Barry Buzan in his book,Peoples,States and Fears argues that the concept of threat can meaningfully be identified in at least the following areas; military, political, economic,ecological and he states that :

"Each state exists, in a sense, at the hub of a whole universe of threats. These threats define its insecurity, and set the agenda for national security as a policy problem... Beacuse threats are so ambigious, and because knowledge of them is limited, national security policy-making is necessarily an imperfect art. It requires constant monitoring and assessment of threats,and the development of criteria for allocating policy priorities, and for deciding when threats become of sufficient intensity to warrant action." [3]

Buzan also convincingly argues that 'absolute' security is a chimera and that the problem which states face is making themselves relatively less insecure. He also argues that there may well be 'disharmonies' between the requirements of state security and individual security. Making the state more secure,for example against the terrorist threat, may make some individuals at least,less secure. However, it is clear from his argument that this dilemma cannot be wished away or resolved simply by focusing on only one ,the individual,and neglecting the other, the state.

The implication of the above argument is that it is difficult,if not impossible, to constrain the state's ability to respond to such threats without agreement as to the nature of the threats which it faces. No argument which centres solely upon the rights or liberties of the citizen is likely to be persuasive to politicians who have the responsibility to respond to such threats and vulnerabilities.

Although the national security justification for secrecy is inherently vague,it is none the less real. For example,Sissela Bok in her review of the moral difficulties surrounding the concept of the 'secret' has particular problems with the concept of military secrecy. She recognises that there are genuine problems of defence ,war, and the need for self preservation and seeks to discover the 'proper limits' [4] for such justifications. She uses two quite different tactics. The first is to show that excessive secrecy may not actually contribute to national security. This is to take issue with the stated national security requirements and argue that secrecy may be counter-productive to achieving these agreed requirements. The second approach is to argue that there are moral considerations which place limits on the concept of 'defence' and therefore the justification which it provides for secrecy. She states :
"While such arguments [concerning war] point persuasively to the special difficulties of living up to moral ideals in wartime,they do not show that moral considerations can be set aside in dealing with enemies." [5]
Her conclusion is that only by having an open,public discussion, of the moral choices involved can a society avoid the "burden of living with the results of clearly immoral or even questionable choices".[6] However, when it comes to giving examples they are either ones which few would find problematic, such as treating prisoners with decency,or they are highly contentious such as the morality of nuclear weapons. There are few, if any, examples which are such clear instances of immorality that a change in the conception of defence would be universally accepted in Western society. One example which she does offer for consideration is Nicholas Katzenbach's [7] argument that covert operations to influence political results in foreign countries should be abandoned. The difficulty is that she does not distinguish between the argument that such methods are counter-productive, and are therefore not worthwhile on pragmatic grounds, and the argument that such activities should be abandoned because they are unethical or unlawful or both. This confusion is characteristic of her whole analysis of these issues. Ethics alone cannot answer the question of what degree of secrecy is justified on the grounds of national security because most agruments about ethics are also arguments about policy.

This discussion on the nature of national security has attempted to make it clear that ethics, civil liberties, individual rights and democracy are not capable of providing a solution to the problem of government secrecy. Any debate on this issue that does not make it clear which threats against the state are considered to *be* real and which unreal or 'minor' is inadequate.

THE ORGANISATION OF INTELLIGENCE AND SECRECY

All democratic countries protect intelligence information but not all give such information equal protection. Secondly, all countries have some intelligence capacity but not all countries organise it in the same way. Thirdly, all countries have some method by which the intelligence services are made accountable to those who constitute the 'government' but not all countries have the same method. These statements are not, I trust, controversial but they have very profound implications for the analysis of the relationship between intelligence, secrecy and security. The first of these, and the most important, is that it is difficult, if not impossible, to argue that there is some inherent quality of democracy which requires uniformity of practice. Each country's attitude towards keeping intelligence information secret is crucially affected by the organisation of intelligence and by its conception of the threats which it faces.

The first problem to consider is the organisation of intelligence. In Britain, the organisation of intelligence is a state secret. This arises from the fact that there is no statutory provision creating an intelligence service. The intelligence service, in a modern sense, was created by the Committee for Imperial Defence in 1909. This was, in part, possible because of the Secret Service Vote which had been voted annually by Parliament since 1797 for the purpose of "obtaining information which is requisite for the security of the country".[8] Apart from this, there is no legal framework for intelligence in Britain and no full Parliamentary debate on intelligence has yet taken place.[9] Furthermore, no records of the main intelligence services have ever been officially released. The names, organisation and activities of the intelligence services are also covered by a D Notice, although one which is increasingly disregarded.

However, due to historical research and Government Commissions and Reports, a reasonably accurate picture can be given [10]. Foreign intelligence is the responsibility of the Secret Intelligence Service, SIS, more commonly known as MI6. SIS is a part of the Foreign and Commonwealth Office (FCO) and reports to the Foreign Secretary and is tasked by the Joint Intelligence Committee which also prepares the intelligence assessments in accordance with government policy. Domestic and Colonial Intelligence is the responsibility of the Security Service, more commonly referred to as MI5. MI5 is housed in the Home Office, although the Director has direct access to the Prime Minister. There is no coordinating, analysis or tasking body for counter intelligence or domestic intelligence. Two further agencies are worthy of note. The first of these is the Government Signals and Communications Headquarters which officialy is responsible for government codes and cyphers but also intercepts the communications of others. The second are the Special Branches of the various police forces who act as the official investigating agency and arrest agency for activities defined as subversive but

it also covers questions of nationality and the activities of aliens. The American pattern of intelligence organisation is very different from the British.[11]

In America, the foreign intelligence agency is a product of the 1947 National Security Act and is an independent agency responsible for both collecting information and has a major role in providing assessments to the President. The domestic intelligence function is mainly the responsibility of the FBI. The FBI is a law enforcement agency with counter intelligence functions. It is not however a separate secret agency of the state in the way MI5 is. However the FBI does share some similarity with MI5 in that considerable debate exists over the extent to which its powers and activities are a product of law or even of executive order.[12]

The effect of these organisational factors on secrecy is significant. In the case of SIS, because it is a part of the FCO and a key member of the JIC, its operations are under a form of political control. Although this mechanism operates in secret it does give some basis for insuring that the activities of SIS are in accordance with government foreign policy objectives. This is a mechanism of political control and not of public control which does leave the intelligence services open to the accusation that they may act, or be required to act, in ways which are not in accordance with democratic values. In the United States,the problem is somewhat different in that the accusation against the intelligence community tends to be that they are out of political control. This raises the issue of whether we are faced with a choice between openness and accusations of 'rogue elephants' or secrecy and accusations of hidden influence or conspiracies.

However, it is necessary to look at what tasks SIS carries out [13] and to look at intelligence requirements [14]. There are five elements of intelligence and all five are involved in foreign intelligence: collection , SIS is basically a collection agency;analysis, performed by the JIC; tasking, which again is carried out by the JIC in collaboration with the FCO;covert action or special operations,which can be carried out by SIS; and counter intelligence, there being a division of SIS with responsibility for resisting penetration and penetrating hostile intelligence services.

In contrast the CIA is an independent agency [15]. This means that the CIA must act in accordance with its 'charter' or risk censure. Obviously, the extent to which Congress has acted to restrict or monitor the activities of the agency has varied greatly over time from virtually zero in the Nineteen Fifties to considerable in the Nineteen Seventies [16]. The impact of the need or the possibility of 'external' scrutiny does create a very different meaning to secrecy . The CIA has to compete with the State Department's Bureau of Intelligence and Research in order to establsh its value as an analytical agency. There also exists the Defence Intelligence Agency which also produces analysis in accordance with its basically military needs and it does, to a

degree have its own sources of information through the fact that signals intelligence is a part of the Defence Department.

The US pattern creates a more competitive environment in which disagreements such as bureaucratic in-fighting over budgets, men, prestige, influence,and skill, are more likely to produce a situation in which leaks, and opportunities to present alternative views, are seen as more valuable and less of a threat than in Britain. In Britain, the leak remains a danger not only to 'security' but also to the political structure of coordination and control. A Minister is likely to find a leak a threat to his ability to control the activities of SIS and as implying an inability on his part to control SIS. Of course, it may be the case that such control is not always as close or well-informed as it ought to be, the Commander Crabb Affair being one such incident, but nevertheless, politicians are only likely to see publicity as valuable when it doesn't challenge their ability to control and this is more likely to be the case in the US than in the UK. It is true that the UK Defence Intelligence Staff(DIS) also carries out analyis of intelligence information but it relies for its information on the collection agency, SIS. However, the Falklands Island Affair is an example in which the responsibility for 'intelligence failure' has not been clearly allocated between the two agencies [17]. DIS can share responsbility for a failure to anaylse information.

The organisation of intelligence effects secrecy because it effects the degree to which politicians see the activities of intelligence services as being under their control. Secrecy is also effected by the organisation of intelligence because such organisation effects the level of bureaucratic in-fighting.

INTELLIGENCE REQUIREMENTS AND SECRECY

It is rarely the case that it is the content of intelligence information which is the sole, or even major, reason for secrecy. Rather, it is because the release of the information may well reveal the source of the information. Such a revelation would of course enable the target to take steps to counter the source of penetration or leakage. The second point is that secrecy is indespensable if the indentity of those involved is not to become known to the targets, whether a hostile power or a terrorist group. This is not simply a matter of preserving lives but also of making detection and therefore,counter measures, more difficult. The third reason is to prevent the opposition from being able to discover what you know and therefore keeping him in a state of uncertainty. The logic of deterrence, of defence and offence, is very similar to the problem of intelligence and counter-intelligence. The enemy has to expend time, effort, and resources because he is not sure what capacity or knowledge you have and he is not able to make calculations that a certain course of action is risk free because he does not know what you know. The fourth justification is the need to keep the methods of intelligence collection secret so as to prevent counter measures being taken. This means keeping the technology of surveillance

secret. The fifth reason is one which is not peculiar to the work of intelligence agencies but applies to the civil service in general, that is, the need to keep the advice offered to Ministers confidential until the Minsiter decides otherwise.

For example the government had anxieties over the publication of both the Masterman book on Double Cross [18] and the Winterbotham book on Ultra [19] not because the content was of any other than historical interest, but because the ability, capacity and methods involved might lead some foreign powers to take counter measures which otherwise they would not. This may not apply to the Soviet Union, who are no doubt well aware of the capacity and methods of British intelligence, not least because of the number of agents they have had, but to other less sophisticated nations who may not possess that expertise or knowledge. For example it has recently been stated in the Government White Paper on the Interception of Communications in the United Kingdom that the Foreign Secretary will be able to issue warrants to intercept communications to collect economic information and although it was stated that this practice is not new it is the first time it has been publicly acknowledged [20]. This public statement is likely to have occassioned debate inside the intelligence services as to whether it may not alert those in a position to cause strategic damage to British economic interests, such as certain oil producing countries, that they are likely to be the targets of such clandestine collection. Similarly, the importance and effort devoted by the West to the decoding and interception of communications may have alerted other countries that they need to take extra care in this area.

The major argument against this view is that there are so many other sources of information which have indicated the importance of signals intelligence that the fact that Britain has such a capacity can alert no one. In other words, since one cannot control all sources of information, although one may be able to influence one's friends and allies,there is little point in attempting to keep all information about intelligence secret. However ,intelligence tends to be an activity which focuses on minimising risk and the intelligence communuity is likely to be persuaded that keeping all intelligence operations, sources, methods, and capacities in the dark is going to make their task easier. Given the nature of offence and defence this is not an unreasonable position provided the principles are a matter of public debate.It has been claimed that the focus on abuse, restrictions, investigations and access legislation has made the work of the CIA more difficult. Not just in terms of its actual effects but because of the perception of others that the CIA no longer controls access to the information which it is given [21].

One aspect of the benefits of intelligence secrecy which has not been previously mentioned is that the secrecy of domestic intelligence activities may actually help civil liberties. The argument is as follows. If the mere fact that one may be under surveillance can act to inhibit the willingness of citizens to speak freely or participate freely, even though no harm may

follow from the fact that they are under such surveillance then keeping the extent and nature of surveillance secret removes one source of inhibition. This is an argument which is closely related to the 'chilling effect' which has been the concern of both the American Courts and civil libertarians. The Supreme Court has recognised the possibility that domestic intelligence may produce a chilling effect but it has not as yet struck down any statutes or programmes on that basis alone [22].The chill effect is an argument which has become extremely popular amongst the critics of the FBI and domestic intelligence activities in general.

The 'chill' is said to arise from the fact that simply knowning that one may be under surveillance can act to inhibit the freedom with which one is willing to express certain beliefs or participate in certain activities. However the effect can only exist when there is some basis for believing that surveillance is a reality. If one has no real basis for the belief one is left with mere anecdotes or, in some cases, a form of collective paranoia. There is a Polish story about a dissident who one day discovers that he is no longer under surveillance and complains to his friends that this is a serious loss of status since it implies he is no longer dangerous ! Certain left groups seem to compete with each other in producing anecdotes about clicks on their phones or mail disappearing with a similar motive. However, I am not claiming that all such tales are false,but simply claiming that official acknowledgement that one is likely to be under surveillance, the publication of detailed rules, may act to inhibit freedom of expression and organisation more than only general statements about subversion.

Despite this 'unintended consequence' of more detailed rules and public discussion of the meaning of subversion I remain in favour of this happening because the benefits out-weigh this factor but it is one which does need to be borne in mind. This is especially so when drawing up or publishing detailed guidelines on who can be a target of such surveillance. Such guidelines may make some people feel more secure that they are not targets but ,if they are effective, they are bound to make others feel less so.

The US Courts have considered the issue of the chilling effect on several occasions and have given protection to citizens against administrative practices or statutes which infringe first ammendment rights. There have been two types of cases. The first concerns requirements by the federal or state authorities that membership of an organisation be revealed if employment or passports are to be enjoyed [23]. Such requirements have been held to be overbroad, as unncessary to the performance of the adminsitrative agency, or as giving too great a degree of discretion to the auhtority. An example of such overbroad legislation or practices are ones which required disclosure of communist party membership. However,such cases concern specific actions which involve possible 'punishment' for a federal, state or government contract employee. They have been overturned because they involve dismissal or denial of some benefit.

The second category of such cases has been concerned with private associations and the consequences of statutes requiring disclosure of membership of such associations [24]. The Court has held that irrespective of whether any government sanctions are imposed as a result of membership,the requirement to disclose may lead to citizens being harassed or embarrassed to such an extent that they may be inhibited from exercising their constitutional rights. However it is vital to recognise that although the Court accknowledged the existence of a possible chilling effect this was not the reason why such statutes were struck down. The Court acted because the government had done something specific which affected constitutional rights and not because of some vague or remote consequence affecting such rights. For example, in Laird v.Tatum [25] the Court ruled that the plaintiffs had no standing to sue the government for an alleged overbroad collection of information by Army Intelligence since no specific injury had been identified. In this, the only clear case in which a claim was made that the mere collection of information constitutued an infringement of first amendment rights the Supreme Court of America ruled that the issue was not justiciable.This suggests that it would rule against the claim,made by many liberal critics, that domestic intelligence programmes are, in and of themselves, an infringement of rights. No court in Britain has ever been asked to rule on such a case but it is unlikely,given the attitude in other national security cases, that it would consider such a claim either.

I will now examine two further specific issues. The first of these is the issue of loyalty, security and civil servants and the second the legal penalties for disclosing national security information.

SECURITY, CIVIL SERVANTS AND POSITIVE VETTING

A major problem with intelligence files, although not a problem unique to their files, is accuracy. Almost every administrative decision requires and depends upon accurate information and although the accuracy of tax,social security and other such files may be of more immediate concern to most citizens it is nevertheless the case that intelligence files are used to justify the denial of employment, as well as transfer,demotion and dismissal of both government employees and their contractors. It may also lead to the denial of employment in private industry unconnected with the government should the information be transferred as happened in the Martin Case [26]. The problem of the transfer of information from the government to outside parties is important but it is not one which I will consider other than to say that security files are sensitive and should not be so transferred.

The government has the right to expect, as any other employer, that it grants employment to people who are suited for the job offered. It also has the duty to safeguard its lawful secrets and to investigate breaches of trust. Finally, it has the duty to investigate the actions of hostile intelligence services and those who may, even unwittingly, be acting in collaboration with them. These then are the major threats which the state sees itself as facing from its employees and which juistifies it placing them under some degree of security investigation at various points in their careers.

The figures on security purges do not suggest any hysteria and the lack of complaint may indicate either an overwhelming fear on the part of those affected or the accuracy of the information supplied. It is difficult to accept fear as the major reason for the lack of such complaints. Anxieties were expressed in the 1950s with the creation of a Civil Service Political Freedom Committee, a Campaign for the Limitation of Secret Police Powers and complaints from some of the Civil Service Trade Unions that 'purging' was unnecessary and that the procedures for doing so were unsatisfactory. However ,up until January 1954 42 civil servants had resigned or been discharged, and 69 were transferred and of the 148 investigated, 28 were reinstated [27]. According to a report in the Economist in June 1982 the additional figures to that date were :50 had resigned or been discharged, 88 transferred, amd 33 reinstated [28]. This means that only 8 had left the service and 19 been transferred in the period from 1954 up to 1982. This is a remarkably low set of figures considering both the anxiety caused by the discovery of traitors inside the scientific and intelligence community and also when compared with the United States when between 1947 and 1953 6,828 resigned and 560 were removed or denied employment [29].It is not possible to give any accurate estimate of the numbers dismissed or who resigned under the Eisenhower Administration since no agreed system of reporting exists. Estimates vary considerably,for example, David Caute states that between 1953 and 1956 there were 1500 dismissals and 12,000 resignations [30] whereas Guenter Lewy states that between 1953 and 1956 there were only 315 dismissals for disloyalty [31]. These figures are particularly striking in the light of the fact that although the USA did discover its share of Soviet spies in the period of McCarthyism none was in the intelligence service although documents from the OSS were found in the offices of the magazine Amerasia [32]. This raises the interesting ,and as yet unsolved, problem of why Britain and the United States reacted so differently to fears of Soviet espionage and disloyal communists [33].

I attempted, in Public Secrets [34],to offer a partial explanation based upon the relationship between the executive, civil servants,the elected assemblies and political parties but it is not a complete answer. However the focus on the struggle over who is to be the 'tribune of the people' and the opportunities which political systems create for individuals to attempt to exploit uncertainties over who has legitimate claim to that title, is a better explanation than those which focus on the

inherent good sense or 'political culture' of Britain compared to American 'hysteria'. Succinctly put, the explanation is that in Britain an attack on the loyalty of the civil service was an attack on the competence of the government and majority party. In the United States, although the attack on the loyalty of civil servants was also an attack upon the government in the form of Roosevelt/Truman policies it was possible to disassociate the two forms of criticism in a way which was impossible in Britain. McCarthyism could be presented as a concern with security and not a simple act of political opportunism or indeed party politics.

The practice of security vetting in Britain has not greatly changed from the 1950s in that an investigation will be carried out before an offer or transfer of employment to a sensitive position is made. The nature of the investigation, whether positive or negative, will depend upon the sensitivity of the position. A negative investigation consists of a search of existing records in order to discover whether there is anything detrimental. A positive investigation consists of an inquiry into friends and associates so that the department can make a "conscious effort to confirm his reliability" [35]. However, even a positive inquiry seems to depend upon interviewing those associates supplied by the person himself and his referees and in checking the answers which he supplied in response to a security questionnaire. As the Radcliffe Committee on Security Procedures in the Public Service stated in 1962 :

"The inherent weakness in Positive vetting,as we see it,is that the field enquiries only rarely throw up material which is hard enough for any conclusive action to be founded upon them" [36].

Recent cases such as that involving Michael Bettaney [37] of MI5 show that the problems remain. The dilemma is that positive vetting relies upon existing records and an investigation which is largely generated by the answers given by the person being investigated.From the security service point of view little of this process is secret,what is secret is the file which exists after such an investigation. In March 1948 Prime Minister Attlee announced to Parliament that those who were ,or had associations with, communists and fascists would be barred from public employment in areas vital to security [38]. The existing policy, one which is largely unchanged, is that an individual is not told what has been discovered if he is denied employment The Crown is seen as having no obligation to employ anyone and therefore, the individual is not being denied of any right [39]. Making the results of the investigation public is problematic for two reasons;it may inhibit the willingness of people to be forthright in their replies to questions about a friend or colleague and it may damage the privacy of the individual by revealing information,for example about drunkenness which is only of interest to the Security Service. However, keeping the results of the investigation secret means not only the danger of inaccurate information being used to deny someone a benefit but could also lead to a disloyal or unreliable person being appointed. One could argue that some outside body such as the Security

Commission should be given the task of reviewing such investigations in order to safeguard against these two dangers. At the moment the Commission only investigates the Security or Intelligence services after a disaster has occurred. This is a good instance of how external checks can not only improve civil liberties but also improve efficiency.

Other possible solutions,although all less attractive are: increased surveillance and investigation, increased standards of what is to constitute a security risk, and increased monitoring of individuals in their positions once appointed. The first involves spreading the net of interviews much wider than it currently is, increasing the pyhsical or technical surviellance or encouraging fellow employees to report suspicious behaviour. None of these is attractive since it would either be too expensive of time and effort, encourage gossip, or place higher standards on public employees than are expected of the population at large. Gossip is bad for morale and, if listened to, may debar a considerable proportion of the population from government service. For example is having an extra-marital affair an example of unreliability or is a weakness for gambling or for alcohol to count ? It is relatively easy to be wise after the event but difficult to know in advance when alcohol moves from being a weakness to becoming a problem. These are matters of judgement but ones in which the criteria are impossible to clearly define. Positive vetting then, is not,and should not be thought of as, full-proof. This makes the case for some form of external review a matter of some urgency.

The next problem is what one does with an employee whom one suspects of being a risk. The first point which needs to be made is that those involved in sensitive work know that they will be subject to special procedures, including a security investigation. As stated above, the government announced that those engaged on secret work would be subject to special procedures. The 'secret' is again, what has been discovered as a result of the investigations. If a current employee is accused of communist or fascist associations he is informed of the charge against him and given a right of appeal to a tribunal consisting of Three Advisers. He is not told of the evidence against him, he is only allowed to prepare a statement and call witnesses to testify on his behalf. The Minister, on receiving the final report of the Three Advisers then makes a decision concerning transfer or, if this is not possible, the opportunity to resign and if this is refused he may be dismissed. However in the case of character defects, although the individual is 'usually' told of the case against him there is no right of appeal to the Three Advisers although he may bring the matter before his Head of Department [40].

There are,then,two main issues associated with the loyalty of civil servants. The first is the criteria which ought to be applied in deciding that someone is a security risk and the second arises in connection with the procedures for dealing with people in such a category who are already employees. The Labour

Party, in its discussion document Freedom and the Security Services, has argued that:

"It might have been hoped that the Security Commission would have appreciated changing contexts of security. Left-wing socialists do not often aspire to reach senior or sensitive government positions and even then are likely to be as antagonistic to the Soviet Bloc as many in the Western Alliance."[41]

One might argue that the final sentence is a rather weak claim, since its use of the phrase,'even then are likely',raises the very doubts it seeks to remove.

However, the problem is a genuine one, namely to what extent can ideology or political beliefs justify classifying an indivdual as a security risk. The clearest instance is where such an ideology can be linked to, or even identified with, a hostile foreign power. This has been true of both fascism and communism. Many western governments have not seen fascists or communists as being truly 'independent' but as acting only in concert with other foreign parties or as taking direct orders from a foreign power. Another problem is the extent to which ethnic, national or religious identity may raise doubts concerning loyalty. During time of war all states have acted to intern members of ethnic minorities who are associated with a hostile power although this has not always been carried out in a responsible manner. The difficulty arises when war is not at hand. An example which is likely to be a matter of debate is the extent to which being an active Zionist or PLO supporter ought to be a barrier to certain positions in the Foreign Office. There are really two issues. The first being whether someone with committed views would be considered capable of offering impartial advice and whether,therefore, they could hold such a position. The second is whether they would be denied employment on the grounds that they would be more likely to be disloyal. This is not merely an abstract problem in that there have been two cases,one in which a civil servant divulged information to a South African and one involving Egypt [42].However in neither case was there any ethnic or other relationship with the countries involved.

The appropriate criteria for assessing security risk must be a matter for Parliament but little useful discussion of this issue has taken place. This is partly a result of the fact that there is no Minister with clear reponsibility for the activities of MI5. Further, there is no equivalent of the JIC which examines and tasks the internal security service. This situation is not satisfactory in that it places too great a responsibility upon MI5. The absence of a proper internal mechanism of accountability is particularly important given the constitutional position, adopted since the 1870s at least,that governement administration is only satisfactory where a clear structure of political accountability exists. The creation of a special executive committtee with the task of analysing, tasking and reviewing the activities of MI5 should be a matter of priority.

NATIONAL SECURITY AND LEGAL PENALITIES FOR DISCLOSURE.

The major issue to be discussed is the extent to which the probability of, or even possibility of, an offence against the state, for example one under the OSA, justifies the state collecting and storing information. However, before discussing this issue it is necessary to provide some background on the nature of the Official Secrets Act.

An interpretation of the British Official Secrets Act which has gained popularity is that it arose as a result of 'spy fever'. This has its origin in an article by David French entitled Spy Fever in Britain in which French states that the Act was produced by a sub-committee of the Committee of Imperial Defence which, although it consisted of 'level-headed men' not normally given to flights of fancy, were convinced that a large number of German spies were at work in Britain and that the Act "was rushed through the Commons before the Press,or hardly anyone else noticed it,".[43] This has been intrepreted by some as meaning, although French never claims this, that the OSA was a product of spy fever. For example Crispin Aubrey,one of the defendants in the ABC Trial, wrote a book entitled Who's Watching You ? in which he states that the Act was passed "at a time of German spy fever"[44]. Des Wilson, the organiser of the Campaign for Freedom of Information has written that the OSA was enacted "in extraordinary circumstances in 1911 when war seemed imminent".[45] Finally, State Research go even further and claim that the Act was not only passed in haste but that MI5 played a part in drafting it [46]. Since MI5 did not exist at the time and the Secret Service Burueau came into existence as a result of the deliberations of the same committee which formulated the Act the statement is historical nonsense. James Michael is much more careful in his interpretation of French's argument and makes it clear that spy fever provided the opportunity for the government to achieve its desires. However as illustrated above,others imply that spy fever was the motive and this is false. As I demonstrated in Public Secrets [47] the government had been attempting to deal with civil service leaks and the 'unauthorised' communication of information for about forty years before the 1911 OSA was enacted.

The next point to examine is the nature of OSA prosecutions. Prosecutions have covered a wide diversity of cases including not only those accused of betraying secrets to a foreign power but those accused of communicating information to those planning a crime or attempting fraud as well as those who communicate information without authority. The case which first gave rise to recent anxieties amongst both sections of the public and the legal profession as to the wisdom of the Act was the Chandler case [48]. This case involved what many saw as an unjustified extension of the Act to apply to acitivities for which it was never intended. The case involved a conspiracy to enter a

prohibited place 'prejudicial to the safety or interests of the State'- the defendants were found guilty and although not all of the Lords agreed that the state had the final say on the meaning of 'prohibited place' the House of Lords refused an appeal challenging the meaning of prohibited place. The Lords stated that if the law produced an interpretation which it was 'inconceivable that Parliament can have so intended' then the answer lay in Parliament and amending the Act [49]. However, I will focus on the more recent ABC trial. James Michael says of the ABC case that it :"was a dramatic illustration of the wide scope of the Official Secrets Acts and how they could be misapplied".[50] His justification for this conclusion takes four main forms. The first is that the only basis upon which the police could have known about the meeting of the three defendants was by the interception of telephone calls and of mail. The second is the hidden hand argument, involving 'advice' from the CIA and from British civil servants, particularly, the Security Service. The third criticism centres on the practice of jury vetting which is seen as a political device and one which constitutes a fundamental attack on the impartiality of juries. His final criticism of the case is that some four months prior to the arrest of the three men the Home Secretary, Mr. Silkin, had assured the House that when the law was changed 'mere receipt' would no longer be an offence and that the Attorney General had the discretion to decide whether to prosecute such offences befroe the change was made [51].

Let me make my position clear from the outset - the prosecution was badly handled. The case probably caused more harm to the secrecy surrounding Signals Communication and to the government desire to maintain its secrets than anything that the defendants had done. One can only conclude that the Attorney General was badly advised by senior civil servants, law officers and by the intelligence community, widely defined. This is especially true of the decision to press charges under section 1 of the OSA which they were subsequently forced to drop. However, one must recognise that the defendants also behaved in a manner which was ill-adivsed. For Berry, a former member of the Signals Regiment to write to the Agee/Hosenball Defence Committee offering information was inviting attention from the authorities. It is true that the authorities could only have come to know of the offer of help and the subsequently arranged meeting if mail and/or telephone calls were being intercepted but given the government's attitude towards Philip Agee this is hardly surprising. Deportation orders against Agee and a journalist, Mark Hosenball, were issued in November 1976 and they finally left the country in May 1977. There is no doubt that the Government considered the activities of Agee to be a direct and immediate threat to security given his stated intention to reveal as much as possible about the activities of US Intelligence, including its activities in Britain and other European countries, as well as his visit to Jamaica. The deportation order cited as the grounds for deportation that Agee had had regular contacts with foreign intelligence officers harmful to the United Kingdom. No details were given but American sources have claimed that Agee

has made several trips to Cuba where the local Direcion Generale de Intelgencia (the DGI) works closely with the Soviet KGB [52]. The CIA considers Agee to be a defector in place, that is,they acted to terminate every operation and agent known to Agee [53]. One interesting aspect of the deportation arises in the memoirs of the former CIA London head of station, Cord Meyer. Meyer states that a Trotskyist magazine,Voice of the People,published an article in January 1976 in which Meyer was indentified as head of station with a photograph of Meyer included.In the article Agee claimed that the head of CIA in London was working closely with British intelligence against the IRA and that the CIA had bases in Dublin and Belfast which intercepted communications and infiltrated the Republican movement. Meyer states:
"These allegations were completely false. There were no CIA bases in Dublin or Belfast and no CIA officers assigned to work there...But the falsity of the allegations did not make them any less dangerous...What Agee had done by publishing false allegations was to single me out as a prime target for the terrorists.Instead of living with a vague or generalised fear of terrorist action,I now had to aceept the fact that my name must be high on the list of priority targets."[54]
This article, I have been unable to confirm its existence, may well have been sufficient to convince the British authorities that action against Agee was necessary.

This background on the Agee Affair is important,something agreed by the ABC Committee as well as by me,since many people have seen the 'injustice' against Agee as being compounded by the 'injustice' against Aubrey,Berry and Campbell. My point, however, is that if Agee was involved in contacts with hostile intelligence services there isn't an intelligence service in the world which would not have had him ,and his immediate associates,under surveillance.

The prosecution case focused on the claim that Berry,the former member of the Signals Corps,had communicated information without authority,Campbell was accussed of having received the informaton 'knowing or having reasonable ground to believe that the information was communicated in contravention of the Act' and Aubrey with having aided and abetted Campbell in doing an act preparatory to Campbell's offence. All three defendants were found guilty but the judge adopted a strategy of giving conditional or suspended sentences but also requiring the defendants to pay a proportion of the costs ,thereby in effect fining them for having 'refused' to do a deal and plead guilty. The press, and most commentators, have argued that the prosecution was ill-advised and that the defendants were investigative journalists who were doing nothing more than pursuing their legitimate interest in intelligence and security but there remains a difficult issue which has not been explored.

It is this. Surveillance and security activities need not lead to public trial and prosecution but may be dealt with in covert or even illegal ways such as harassment of friends and colleagues, cutting off the jounralist from various privileges, sending

letters to employers, engaging in black propaganda, and by making it clear to those concerned that they are under active and continuous surveillance. One way in which such responses may be inhibited is by prosecutions being instituted which give the judiciary and the public an opportunity to express their veiws on what constitutes a threat and what is inconvenient or even merely harmful.This is a key problem in understanding the organisation of domestic intelligence since it raises the question of the relationship between intelligence gathering in order to inform or monitor and intelligence gathering as an act prior to law enforcement [55]. Intelligence gathering ,for example collecting clippings from various publications, collecting names of those attending meetings, monitoring the overlapping membership of the committees of groups who publish such facts, sending a representative of the security services to attend public meetings, or even instructing a member of the security services to join such a group are not unlawful or unavailable to the general public. Indeed ,such activities are precisely the ones which Duncan Campbell and others see themselves as practising on the intelligence community and as thereby constituting no threat to such organisations. The logic would seem to apply both ways.

Either such collection is harmless when practised by the Security Service against people who it decides are 'interesting' or they are harmful when practised by journalists investigating security matters. There is a difference of course,when such action by the state is to lead to the imposition of sanctions. The most obvious form of state harm is arrest, trial sentence but this, as stated earlier is not the only possibility. However the tradition of rights, such as against unlawful search and seizure, have developed to protect the citizen against immediate and direct harm to his liberty and the Courts, as I stated earlier on the chilling effect ,have been somewhat reluctant to act to protect against long-term,indirect or vague harms. One problem of amending or narrowing the scope of the Official Secrets Act is not simply that a new Act is more likely to be used, the replacement of a blunderbuss with an armalite rifle,but also that it may produce less opportunities for the issues in such cases to be brought into the open and discussed. Disciplinary procedures are internal and unlikely to produce an opportunity for public discussion.

The issue which needs to be settled is what rights the state has to collect information for the purposes of guiding policy or monitoring a situation and the rights it has to collect and store information which can form the basis of a prosecution. The problem is that although information gathering may be an act preparatory to prosecution it need not be. Because the purpose cannot be determined in advance this has led some commentators [56] to argue for the abolition of all domestic intelligence gathering until an actual crime has been,or is very likely to be, committed. However there is also a real public demand that the state not wait until the bombs have gone off before taking action - preventative policing. The answer which one gives to the question of which is the greatest danger, collecting information

on 'interesting targets' or waiting until a crime has been committed depends upon the seriousness one gives to the threats which the society is facing. Once again, there is no escape from this issue although it should be a matter for public debate and not simply one for the Security Services to decide.

Before leaving the issue of prosecutions and the collection of information it is worth noting that in the recent Ponting trial a debate emerged as to the meaning of the 'interests of the state' and as to who is the body to determine that interest. This had also arisen in the ABC case and the Judge in both cases made a similar ruling, namely, that it was not an issue for the jury to decide. However, the situation is unsatisfactory in that doubt exists as to the extent to which the requirement that the Minister determines the interest in national security cases also applies to cases in which national security is stated by the prosecution not to be involved. Such doubt is bound to make juries uncertain in cases similar to that involving Clive Ponting [57].

THE REFORM OF THE OSA - FRANKS AND NATIONAL SECURITY

Those looking to reform the OSA and 'solve' the problems raised by recent prosecutions are obviously going to look to previous government declarations on this issue and it is to an analysis of the Franks Committee report on section 2 that I will now move. The Franks Committee on Section 2 of the OSA struggled with the problem of what information deserved to be protected by criminal penalties and they stated it should be information ,the disclosure of which would cause serious injury :
"It is information relating to these basic functions of a central Government which most requires protection. It is here that a threat to the nation can have the most serious consequences."[58] The Committee then went on to interpret this as referring to information in the areas of foreign affairs, law and order,defence and security,and currency and reserves. The Committee did, however, recognise that it may be difficult to state whether the release of a particular document would cause serious injury to the nation and therefore sought,in the area of defence ,to base the penalties on the classification system and to place the onus on the government to properly classify the information in its possession. However, in 1973 in a brief debate on the Report in Parliament ,the then Home Secretary, Robert Carr, 'accepted the main recommendations' but argued that all information relating to the intelligence and security services should be protected by criminal sanctions and that in the area of foreign affairs the concept of serious damage may be too narrow to cope with the sensitivity of foreign relations [59]. However, as is well known , the government took no action to actually implement any reforms. The next government initiative involved the Labour Home Secretary Merlyn Rees who,in 1976 and 1978 published a set of proposals on reforming the OSA. The proposals were quickly embroiled in a series of arguments over the effect of the proposals on the demand for more open government. The

argument was presented that any reform of the OSA without legislation on freedom of information would make the possibility of such legislation less likely since it would seem less urgent. The ABC case effectively buried the proposals. In relation to national security the proposals were, compared to Franks, more strict in some areas and more liberal on others. It did, unlike Franks,protect all intelligence and security information and information relating to cyphers and communications with criminal sanctions. This would almost certainly have made a prosecution of the type involving the ABC defendants possible. Then in 1979 the Conservative government introduced an even tougher Bill which was effectively killed when it was pointed out that it may have prevented the publication of such books as Andrew Boyle's on the Climate of Treason which exposed the existence of the traitor Blunt [60].

The present government, in the form of the Attorney General commenting after the Ponting verdict, has stated that no change is envisaged.

The reasons for this are the difficulties which I identified in the first part of the paper, that of identifying the threats and the boundaries of what needs to be protected and and those listed in the second, the organisation of British intelligence. Without a debate on the nature of threats, either internal or external no reform of the law on national security is likely to win whole-hearted support. A search for agreement on all aspects of security would, of course be fruitless, but a search for agreement on fundamentals, such as used to exist in certain areas of foreign policy in relation to the Soviet Union , is not unimaginable. However, these issues are still likely to be difficult to resolve in the UK because of the organisation of British intelligence, the role of the Courts ,and the nature of relationship between Ministers, Cabinet, Civil servants and Parliament.

In conclusion, it is clear that no discussion of the relationship between intelligence,security and secrecy is adequate unless it takes into account four main issues : the organisation of intelligence and the political context within which it operates; the threats faced by the society,whether domestic or foreign; intelligence requirements; and finally the values, institutions and requirements of democracy. The focus on the 'abuse ' of intelligence and on civil liberties has distorted the understanding of these problems which has so far been offered by political science.

1. Des Wilson (ed.):The Secrets File, London, Heinemann, 1984,p.5.

2. For a useful overview see: Government Publications Review, Jan/Feb.,1983 10(1).

3. Barry Buzan: People's States and Fear, Brighton Sussex, Wheatsheaf Books, 1983, pp.88/89.

4. S.Bok: Secrets, NY. Pantheon Books, 1982,p.192.

5. Bok,ibid.,p.193

6. Bok,ibid., p.193

7. "Others (secret practices) are equally injurious indirectly because of their capacity to backfire and to invite abuse. Thus Nicholas Katzenbach has argued that the case against using covert operations in friendly countries- such as paying friendly party leaders or trying to damage hostile ones- is so strong that the practice should be abandoned." S.Bok,ibid.,p.203. The article referred to is; N.Katzenbach :Foreign Policy,Public Opinon,and Secrecy, Foreign Affairs,Oct. 1973 Vol.52. However, Katzenbach is by no means the only such critic,for example : Adler,Orbis,23(3),1979;Wise, Halperin, Falk,and Barnet, Society, 12(3),1975; H.Frazier (ed.): Uncloaking the CIA, NY.,The Free Press, 1978.

8. O'Halpin: The British Intelligence Budget in K.Robertson (ed.): British and American Perspectives on Intelligence, London, Macmillan, forthcoming January 1986.

9. However debates on 'intelligence failures' have occurred, most notably, over the Blunt Affair in November 1979, Hansard Cols.402-520.

10. Useful sources are - C.Andrew:Government and Secret Services,International Journal,34,1979;C.Andrew and D.Dilks (ed.): The Missing Dimension, London, Macmillan, 1984;Report of the Tribunal of Inquiry into the Vassal Case, HMSO, Cmnd.2009, 1963; Statement of the Findings of Privy Councillors on Security, HMSO, Cmd.9715, 1955;Radcliffe Report on Security Procedures in the Public Service, HMSO, Cmnd.1681, 1961; and the Security Commission Reports - Cmnd.2722,1965; Cmnd. 3151, 1966; Cmnd. 3365, 1967; Cmnd. 5367, 1973; Cmnd. 8876, 1983.

11. The CIA is well described in the six volumes in the series on Elements of Intelligence edited by Roy Godson, Transaction Books, 1979,1980,1981,1982,1981 edition revised in 1983 and in R.Cline: Secrets,Spies and Scholars, Washington DC.,Acropolis Books,1976 and basically updated in his The CIA Under Reagan,Bush and Casey, Washington DC., Acropolis Books, 1981.H.Moses: The Clandestine Service of the CIA, McLean Virginia, Association of Former Intelligence Officers, 1983; H.Rostizke: The CIA's Secret Operations, NY. Reader's Digest Press, 1977; W.Leary: The CIA -

history and documents, London, Eurospan, 1984.Another excellent source is Book IV of the Final Report of the Senate Select Committee on Intelligence April 1976 US GPO Washington DC.

12. Athan Theoharis has been running a virtual one-man campaign on this issue - A.Theoharis: Spying on Americans,Philadelphia, Temple University Press, 1978 and numerous articles.

13. C.Andrew and D.Dilks (ed.),ibid., and Nigel West (pseud.) : MI6-British Intelligence Operations from 1900 to 1945, London, Weidenfeld and Nicolson,1983; and the Franks Report on the Falkland Islands,Cmnd.8787, HMSO 1983; A.Verrier: Through the Looking Glass, London, 1983; G.McDermott: The New Diplomacy and its Apparatus, London, Plume Press, 1973.

14. Intelligence requirements are the subject of the six volumes by Godson(ed.) ibid.,and essays by John Bruce Lockhart : Some Observations on the Intelligence Spectrum, Dept.of Economics, University of St.Andrews, 1982,and What is Intelligence ? in Robertson (ed.) forthcoming ibid.

15. Cline ibid.; Book 1 of the Final Report of the Senate Select Committee on Intelligence, ibid; T.Powers: The Man who kept the Secrets, London,Weidenfeld and Nicolson,1979 who states that for thirty years "the CIA became the President's chief instrument for conducting what amounted to a secret foreign policy."p.306.

16. Loch Johnson: The CIA - controlling the quiet option, Foreign Policy,39, Summer 1980; L.Johnson: The US Congress and the CIA, Legislative Studies Quarterly, 5(4) 1980.

17. Franks Report on Falklands,ibid., para 299 ff.

18. J.C.Masterman: The Double Cross System, Yale University Press, 1972.

19. F.W.Winterbotham: The Ultra Secret,London, Weidenfeld and Nicolson, 1974.

20. The White Paper on the Interception of Communications as reported in The Times, 8/2/85.

21. See, the evidence given by Frank Carlucci, Deputy Director of the CIA to the House Intelligence Sub-Committee on Legislation 96th Congress 1st.Session, April 1979.

22. See, Developments in the Law- The National Security Interest in Civil Liberties, Harvard Law Review, 1972 and R.Morgan: Domestic Intelligence, Austin ,Texas University Press, 1980, chap. 6; The term 'chilling effect' was first used in a Supreme Court opinon in Wieman v. Updegraff,344 US 183,195 ,1952.

23. See, US v. Robel 389 US 258,1967, a case involving a statute imposing criminal penalties for membership of the communist party and Aptheker v. Secretary of State 378 US 500, 1964, a case

involving a denial of a passport because of membership of the communist party.

24. See, Bates v. City of Little Rock 361 US 516, 1960 a case involving the compulsory disclosure of membership of the local NAACP.

25. 408 US 1,28,1972.

26. P.Hewitt: The Abuse of Power, Oxford, Martin Robertson, 1982, pp 48/49; for related examples see P. Hewitt: Privacy- the information gatherers, London, NCCL, 1980,p.62 ff.

27. 9 were still under investigation at that date.See H.H. Wilson and H.Glickman : The Problem of Internal Security in Great Britain, Garden City, Doubleday, 1954 and the Bridges-Day Joint Committee Report on the Political Activities of Civil Servants, Cmd. 8783, HMSO, 1953.

28. The Economist,5 June 1982.

29. G.Lewy: The Federal Loyalty-Security Program, Washington DC, American Enterprise Institute,1983,p.4.

30.D.Caute: The Great Fear, London, Secker and Warburg, 1978,p.275.

31. Lewy,ibid., p.5.

32. Caute,ibid.,p.55 and p.566 fn.11. Among those involved in the Amerasia case was Andrew Roth of Naval Intelligence and accusations were also made in an FBI report against Duncan Lee of the OSS.

33. There have been many interesting attempts: Caute,ibid.; R.Brown : Loyalty and Security- employment tests in the US, New Haven Conn., Yale U.P.,1958; E.Bontecou: The Federal Loyalty Security Program, Ithaca NY., Cornell U.P., 1953; E.Shils: The Torment of Secrecy, London, William Heinemann, 1956; R.Griffiths and A.Theoharis (eds.): The Specter, NY.,Franklin Watts, 1974; E.Latham: The Communist Controversy in Washington,Cambridge Mass., Harvard U.P.,1966;A.Weinstein: Perjury, London,Hutchinson, 1978.

34. K.G.Robertson; Public Secrets, London, Macmillan, 1982, pp.124-129.

35. P.Hennessy and G.Brownfeld: Britain's Cold War Security Purge- the origins of positive vetting,The Historical Journal, 25(4) 1982 p.969 quoting from PRO CAB 21/2248.

36. Radcliffe Report on Security ibid., para 62.

37. The Security Commission Report on Bettaney is eagerly awaited but for reports see The Times 17/4/84 and 11/4/84.

38. Prime Minister Attlee stated that there was no way to distinguish those communists : "prepared to endanger the security of the state ..(so that) no one known to be a member will be employed in work 'vital to security'." Hansard 15 March 1948 col. 1704.

39. No citizen has a right to a civil service position and although rules have developed for coping with the terms of employment of civil servants, technically they are appointed and dismissed at the Queen's pleasure. The principle is that "the power to appoint and regulate the conduct of civil servants is derived from the royal prerogative ".S.A. de Smith : Constitutional and Administrative Law, Harmondsworth Middx.,Penguin Books, 1975, p.194.

40. The system was first described to the House of Commons in a series of answers by Prime Minister Attlee. See Hansard Vol.451, 15 March, 25 March and 5 June 1948. Announcements of the changes introduced by the Churchill government were supplied in answers to written questions on 9 May and 31 July 1952, Hansard Vol.500 and 504, Cols 74 and 172/3 respectively. The system was reviewed by the Privy Counsellors in 1955, ibid..

41. The Labour Party:Freedom and the Security Services,March 1983,p.14.

42. The Rhodesian instance was of a member of the Cabinet Office Typing pool passing documents to Norman Blackburn who claimed to be a Rhodesian but was,in fact, a member of South African Intelligence. See Security Commission Report 1967 ibid..The second involved a member of the British Embassy in Israel showing documents to her Egyptian lover.She was given a suspended sentence in November 1982. According to The Times of 29 July 1983 a Security Commission report on the case was published on 28 July but it is not in the monthly list of HMSO publications.

43. David French: Spy Fever in Britain,1900-1915, The Historical Journal,21(2),1978,p.301.

44. C.Aubrey: Who's Watching You ?,Harmondswoth Middx.,Penguin, 1981,p.18.

45. Des Wilson (ed.): The Secrets File, London,Heinemann, 1984, p.13.

46. State Research: Review of Security and the State 1978, London, Julian Friedmann,1978,p. 51.

47. K.G.Robertson,ibid.,chap.4.

48. AC 763,1963; 3 ALL ER 142,1962; 3 WLR 702, House of Lords.

49. Lord Reid, ibid., House of Lords.

50. James Michael : The Politics of Secrecy,Harmondsworth Middx., Penguin, 1982, p.51.

51. Michael,ibid.,pp 50-59.

52. D.A.Philips: The Night Watch, NY.,Atheneum, 1977,: " From Intelligence available to the CIA it was obvious that Agee was in contact with the Cuban intelligence service and,by implication at least, with the KGB."p. 262.

53. Thomas Powers: The Man Who Kept the Secrets, London, Weidenfeld and Nicolson, 1979, : "When his (Agee) defection became apparent, the Agency proceeded exactly as it would have if he'd flown to Moscow, terminating agents and closing down operations about which Agee might have known."p.70.

54. Cord Meyer: Facing Reality, NY.Parper and Row, 1980,p.221.

55. For examples of such intelligence gathering see: K.Jeffery :The British Army and Internal Security 1919-1939, The Historical Journal, 24(2),1981; S.R.Ward:Intelligence Surveillance of British Ex-Serviceman 1918-1920,The Historical Journal, 16(1),1973.

56. For example the Church Committee, Final Report, Book 2 p.320,recommended that 'preventative intelligence' only be allowed where there is a specific allegation or specific information that a terrorist act or hostile intelligence service is involved. The ACLU has argued that domestic intelligence activity should be permitted only where there is a reasonable suspicion that a crime is about to be committed and even the guidelines drawn up by Attorney General Levi require an allegation or information that a crime may be committed before any investigation can be opened. A useful overview can be found in Morgan ibid.,chap.8, and in J.T.Eliff:The Reform of FBI Intelligence Operations, Princeton NJ., Princeton UP.,1979.

57. For Reports and Comment on the Ponting Trial see The Times and Guardian from January 29 to February 12 1985.

58. Franks Committee Report on Section 2 of the OSA, Vol.1,Cmnd. 5104, HMSO, 1972, para.116.

59. House of Commons, 29/6/73, Hansard Cols.1885 ff.

60. Andrew Boyle: The Climate of Treason, London, Coronet Books, 1980, Epilogue, and the Debate on Blunt, Hansard, ibid.

Public Data for Private Research*

Eric Tanenbaum
Department of Government
University of Essex
Colchester, Essex
England

*Prepared for the March, 1985 ECPR Workshops, Barcelona

ABSTRACT

The recent creation of a Data Protection Registry in the United Kingdom and the iminent adoption of protocols relating to the its operation requires consideration of the Registry's possible impact on the availability of computerised data for social research.

This paper contributes to this assessment by describing how pre-Registry practices developed to protect the "rights" of data providers while ensuring that material was available for social analyses. The paper draws on the experience of a data distributing agency to show that these analyses, conducted by researchers who were not involved in the initial collection of data, have added value to the data. In this sense, the paper claims, data providers are rewarded for their contribution of information.

Introduction:

Recent discussions of data protection in the "information age" and the inviolability of the data provider's[1] right to privacy tend to focus on the benefits of restricted access to data and overlook the rewards forthcoming from wider data availability[2]. As a result the data provider's return from the effort expended in making personal information available to a data collector may be diminished if regulations develop without sufficient regard to the positive aspect of access to "private data".

This is particularly worrying now in Great Britain where discussions of a decade (or longer) have crystallised as an Act of Parliament (Data Protection Act 1984) which establishes The Data Protection Registry, an agency which <u>might</u> effectively curtail the positive use of individual data. The word "might" is used advisedly because as with any new piece of legislation, the force of the Data Protection Act lies in the interpretation of the Act. However "interpretation" should not occur without regard to consequences; this paper describes several possibilities using pre-Act behaviour to

[1]In this paper "data providers" refers to the original source of data rather than to data distributing organisations like data banks or data libraries. In this sense it is synonymous with "informant".

[2]The British Association (for the Advancement of Science) Study Group's 1974 report entitled "Does Research Threaten Privacy or Does Privacy Threaten Research" is a noteworthy exception to this albeit one made in an earlier cycle of the discussion.

illustrate the results of different plausible interpretations of the Act[3] on a particular area, that of social research.

Although Britain has only recently introduced a formal generalised mechanism to govern the maintenance of computerised information files about individuals, since the inception of computerised information systems <u>ad hoc</u> protocols have developed to control particular aspects of data storage and dissemination. These practices may stem from professional guides (eg British Sociological Association, British Psychological Society) which have "moral" status in that they are recommendations for self-control by members, or they may be incorporated in legislative acts which legitimate specific data collection ventures (such as the Statistics of Trade Act, 1947). Whatever their source and whatever their force they have had a significant impact on Britain's "data culture". Consequently they offer a base from which to speculate about the impact of a single legitimate (legislated) code of conduct on data provision in the future, if not one from which to actually prescribe a set of practices that should be developed within that code.

The paper begins with a selective review of current (pre Data Registry) practices employed in the commercial and government sector. This both shows the common concerns that seem to apply to data collectors and the ways that these concerns are communicated to the

[3]The parts of the Act most pertinent to this paper state:

data providers (who may be individuals or organisations). The review is followed by a discussion of the potential offered social researchers by data collected "for other purposes" by investigators other than themselves. The third section of the paper describes how this potential has been realised and how that realisation has been affected by the need to stay within current constraints on data availability. The database examined comes from Great Britain during the 1970's and reflects the experience of a single national agency during that time and focusses on a specific type of data. However there is no reason to suspect that the conclusions are not generalisable to time periods and circumstances. The paper concludes by questioning whether the devices employed to date to free access to data, thus maximising the data giver's return while guarding the data giver's "rights", will suffice as the nature of data changes.

I. Data Protection: The Pre-Registry Scene

Without legislative guidance for the general case of data collection, storage and use, a set of norms developed to inform the data practitioner about appropriate behaviour. Three source influences can be identified in the development: (a) professional (b) legislative and (c) pragmatism.

Several of the British professional associations such as the British Sociological Association, the British Psychological Society, the Market Research Society and the relatively-recent conglomerate, the Social Research Association, either have adopted or have suggested codes of practice to be employed by their members when conducting research. These codes are similar in that none have more

than moral suasion although their violation can result in the perpetrator's expulsion from the professional group. The force of this depends partly on the profession's cohesion and on the professional society's role as a licensing authority -- a status held only by the British Psychological Society at the moment.

These codes are also similar in that they contain references to the "proper" treatment of material obtained from subjects and allude to a "contract" struck between the data giver and the data collector. The "Code of Conduct" of the Market Research Society (Market Research Society, 1984) offers as good an example as any of the tone of this type of guide. Part II of the Code contains a statement of the Principles, Rules of Conduct and points of Good Practice relating to the market researcher's "Responsibilities to Informants." As will be seen from those parts of the Code reproduced in Appendix A, members of the Society are enjoined to ensure that any assurances made to informants are kept; among these assurances are (a) the informant's right to remain anonymous if desired [Clause 2.2] and (b) the informant's right to request and be told the reason personal questions are asked [Clause 2.7.g]. There are also points relating to the final disbursement of records collected by the Society's members. Clause 3.10 is perhaps the most pertinent in the context of this discussion as it seems to restrict the distribution of results (which should include individual records after personal identifiers have been removed [Clause 2.12]) to anyone other than the commissioning client. Clearly this clause is designed to protect the client's interest but it also has implications for informants.

The Social Survey Division of the British government's Office of Population Censuses and Surveys applies a similar set of principles when it collects data with the many sample surveys that it conducts annually. In it's Handbook for Interviewers (McCrossan, 1984) the following are included among the list of "essential introductory points" which interviewers should make to (potential) respondents before the interview itself:

> 2. The name of the department(s) on whose behalf the survey is being undertaken.
>
> 4. The purpose of the survey and/or the uses to which the information will be put.
>
> 5. The confidential nature of the enquiry: the identity of informants is not disclosed to any other government department, nor to members of the public or press, nor to anyone who is not an authorised representative of OPCS. All survey findings are presented in such a way that no individual informant can be identified.
>
> 6. The voluntary nature of their cooperation: this does not necessitate the use of the actual word 'voluntary' and is often covered by saying 'Would you be willing to help us?' You must of course be quite explicit if an informant asks you whether the survey is voluntary.

Three points emerge from these two examples. These relate to the (a) nature of the agreement between the data source and the receiver, (b) the assumptions made about the data provider and (c) the expected useful "life" of data records.

It is assumed, correctly in most instances, that most data gathering ventures are only possible if the source of the data (usually an individual on his or her behalf, but possibly as a representative of an organisation) voluntarily cooperates. This entails establishing a rapport based partially on the credibility of

the data collecting agency -- a credibility reinforced by assuring the data provider about why material is being gathered and how it will be used.

These assumptions about the nature of the data collection venture are only justifiable if the agreement is one between "equals" in which the informed consent of the informant is obtained. This of course raises the question "Informed about what?"[4]

Interviewers can usually give enough information (in a non-intimidating way) about the immediate goals of the study to allow a judicious decision to cooperate to be made by the informant[5]. It is less clear that they can offer the same information about how data will be used during their "useful life". It is also likely that any attempt to cover the general case on the doorstep that covers all

---

[4]One can also raise a related point about a layperson's capacity to be sufficiently informed about the increasingly complex statistical and data analytic capabilities used by researchers to give the kind of consent that is "informed". This concern appears to be addressed by several of the items emerging from the Bellagio Conference on Privacy, Confidentiality, and the Use of Government Microdata reviewed by Flaherty (1978).

However one aspect of "informed consent" not usually addressed relates to the layperson's ability to think of herself or himself as a member of a collectivity to which an allegiance is owed. That is, discussions of data use and data release generally refer to the use of individual data at the individual-level. It is seen as sufficient to make the informer aware of the use of data in this context so that there is an awareness of possible personal damage. There seems to be less concern (and thus less guidance) about informing data providers that their "groups" may be at risk.

[5]The investigator will also have to weigh the possibility of contaminating the data collected with too profuse a description of the research goal.

future applications would be sufficiently vague (or at least abstract) to raise the suspicions of the informant about the interviewer's intentions (and thus likely lessen the likelihood of cooperation).

The usual reassurance given potential informants about the future of the data that they supply is that the material will only be used for "statistical" purposes. In this sense "statistical" implies analysis of aggregates in which the identity of individuals is submerged by the grouping process. The viability of this assurance is contingent on other links in the "data chain". These elements may include non-primary analysts who access the data at some time after the initial analyses and the library service that stores the data for distribution to these researchers.

The data collecting agency has to make the material that it gathers available to others for the future dissemination of material to be a problem that impinges on the interview-interviewee "contract". Here pragmatism, one of the three sources of "codes of practices" referred to above, can come into play. Simply put, the problem disappears if the data collection agency refuses to release any material after the initial analyses are complete. This policy allows the interviewer to give an easy assurance to the interviewee and future use and security need not arise as a possible source of contention, particularly if all records are destroyed within a given period.

However while record destruction is a safe and secure solution to a troublesome problem (which may account for its adoption by some agencies), its other obvious effect is to waste resources for, as many authors noted (eg Hakim, 1982; Hyman, 1972; Finifter, 1975) and as will be shown later in this paper, the first analysis of data

after collection often only scratches one surface of the dataset[6]. Because destruction makes data completely inaccessible, one looks to other more positive routes to staying within the limits of an acceptable "guarantee" to data providers.

When data <u>are</u> retained for subsequent use for projects not known at the time of collection, an assurance can still be given to the data provider <u>but</u> it relies on the data collection agency's willingness to devote resources to work that will substantiate the assurance. Essentially undertakings to data providers are contingent on distortions being built into the data collected so that a gap (of sorts) is inserted between the data provider (ie the informant) and the data file resulting from the data collection venture. Several devices are employed to define the gap. These are described briefly below[7].

The easiest technique to apply is the selective erasure of parts of the information. Current British practice seems to favour the removal of names and areal identifiers, followed by the modification or replacement of particular data values.

When data are collected by a sample survey of a population areal

---

[6]This also limits the repayment to the data provider for the effort taken to give data to the investigator by restricting the amount of information that can be extracted from that information.

[7]Although there are many ways to secure data while permitting them to be released in the public domain (eg see Boruch & Cecil, 1979), only those employed in the United Kingdom are reviewed here.

"broadbanding" in which all but the grossest of areal locators[8] are removed, combined with the normal uncertainty about individual identities stemming from the choice of a subset from the population (especially if the sampling fraction is small) is thought to ensure that the source of individual records will be thoroughly disguised.

Disguising the geographical location of respondents is less effective when organisations are the units of analysis or when the sampling fraction is unusually large (as might occur when a specific population is of interest) or when an individual informant possesses characteristics that are both uniquely noticeable "in a crowd" (of observations) and which are publicly recognisable outside of study context. Here more substantive tinkering is required. It may include truncating certain values or adding a random component to a measure (chosen so that population estimates remain "accurate" while individual values do not) or using different scales of measure depending on the observation[9].

[8] In the United Kingdom this is typically the "Standard Region", a statistical division of the country into twelve large areas with populations of several millions in each. It is worth noting also that the restriction of geographical locations to these large regions is also usually defended on more conventional statistical grounds as the sampling design usually employed limits the reliability of any inferences to more finely specified regions.

[9] For example, in one well-known British study the industrial firm was the unit of observation. Although a national sample of companies was used and geographical identifiers below the Standard Region were not released it was still quite simple to identify large firms because of their prominance in these Regions. There are not that many ice-making factories with over 1125 employees in East Anglia (say)! For this study raw counts were changed to percentages for firms in the top size decile and the release of actual industrial type information ("SIC/MLH") was restricted to broader categories than would otherwise have been possible.

These techniques are not directly applicable to data collected under the influence of the third type of "code of practice" mentioned earlier in this paper, for this refers to those few, but significant, instances in which the legislative authority under which data are collected specifically excludes their later release for use by third parties in any but a (traditional-) published format. The two cases that stand out are the Department of Employment's "New Earnings Survey" collected under the authority of the Statistics of Trade Act (1947) and the Census Office's Population Census authorised by the Census Act (1920). For both, clearly, it would be illegal to release the data as collected and that a significant amount of (costly) effort is required to transfer these files before their release to interested third-parties could be sanctioned. As these two provide examples of what resources might be required if other similar sources of data were tapped it is worth describing the kind of work currently undertaken with the New Earnings Survey and the Census files.

The New Earnings Survey is an annual 1% sample of all tax returns. Some of the data are collected at source via forms completed by the employer who has the statutory assurance that only published

reports of these data will be produced[10] and that all subsequent

[10]Section 9(1) of The Statistics of Trade Act (1947) states:

> No individual estimates or returns, and no information relating to an individual undertaking, obtained under the foregoing provisions of this Act, shall, without the previous consent in writing of the person carrying on the undertaking which is the subject of the estimates, returns or information, be disclosed except—
>
> (a) in accordance with directions given by the Minister in charge of the government department in possession of the estimates, returns or information to a government department ... of any of their functions; or
>
> (b) for the purpose of any proceedings for an offence under this Act or any report of those proceedings.

Section 9(5) states:

> The following provisions shall have effect with respect to any report, summary or other communications to the public of information obtained under the foregoing provisions of this Act—...
>
> (b) in compiling any such report, summary or communication the competent authority shall so arrange it as to prevent any particulars published therein from being identified as being particulars relating to any individual person undertaking except with the previous consent in writing of that person or the person carrying on the undertaking, as the case may be; but this provision shall not prevent the disclosure of the total quantity or value of any articles produced, sold or delivered; so, however, that before disclosing any such total the competent authority shall have regard to any representations made to them by any person who alleges that the disclosure thereof would enable particulars relating to him or to an undertaking carried on by him to be deduced from the total disclosed.

Section 9(6) states:

> If any person discloses any individual estimates or returns or any information contrary to the

> provisions of this section, or of any order made under this section, he shall be liable, on summary conviction, to imprisonment for a term not exceeding three months or a fine not exceeding fifty pounds, or on conviction on indictment to imprisonment for a term not exceeding two years or to a fine not exceeding five hundred pounds, or, in either case, to both such imprisonment and such a fine.

(as printed in Yonge (1972), Halsbury's Statutes of England Vol. 37 p. 40-41)

analyses of these data will have to rely on the published material. In short, the data are secured by control over publication -- any other access can only be had by people who are subject to the Department of Employment's regulations, that is, who are effectively staff members of the Department.

The published New Earning Survey reports can support reanalyses but the restriction to published material both reduces analytical flexibility and stops any analyses that require reorganisation of the underlying data (such as might be necessitated by a project that utilised the time component in this 10 year series of data). As a result of the restricted access to NES data and the desirability of data restructuring a group of researchers have undertaken a three-year research project to produce a large set of "quasi-individual" records from the 10 year data sequence. The new data structure is founded on case triads organised on ten basic dimensions. These records constitute a legally-acceptable approximation to otherwise prohibited individual-level data. It was only made possible by a group of researchers ability to undertake the design and implementation of a restructuring strategy, the Department of Employment's acceptance of a member of the project team as an "honourary" member of the Department who was thus eligible to access the "true" individual NES records and a research council's willingness to spend £10,000's on such a project[11].

In effect the restructured New Earnings Survey data will resemble the Small Area Statistics produced from the British Census of Population. British Census results are only published in spatially-defined aggregates and although analytical flexibility is enhanced by

the availability of this material in computerised form, the lack of a micro-data[12] file of information from the census constrains census analysts to questions that can be answered with grouped data, where the smallest group is the "enumeration district"[13]. Given the average size of an "ED" and the presentation of census data as cross-classified tables the identification of specific individuals with extreme (or at least unusual combinations of) characteristics is possible. Consequently the data for sparsely populated cells are adjusted by the addition of a random component[14].

Any student of social research methods will be aware of the

---

[11] In fact, the restructuring of th NES data is associated with ten substantive analytical projects; the cost of restructuring is thus a common overhead borne by the individual projects.

[12] A micro-data file contains records at the individual level

[13] Enumeration districts refer to the amount of territory that an census enumerator ("interviewer") can cover on Census night. In 1981 there were slightly over 100,000 "ED"s with an average population of about 150 people.

[14] The introduction to the self-completed questionnaire used in the 1981 Population Census included the following statement: "Your replies will be treated in STRICT CONFIDENCE. They will be used to provide statistics but your name and address will NOT be fed into the census computer. After the census the forms will be locked away for 100 years before they are passed to the Public Record Office." (emphasis in the original)

danger of the ecology fallacy described by Robinson (1950) and will immediately react against analyses using grouped data of the kind presented from the British Population Censuses. For this (among other reasons) there has been an ongoing (if sporadic) discussion about the possibility of producing a file of individual level data from the Population Census which, at the very least, would permit an estimate of the extent of error introduced by using grouped data. Norris (1983) offers a thorough review of the case for a micro-data file.

For several reasons related to the topic of this paper, a micro-data census file has not been produced in the United Kingdom. First, although the Census Act prohibits the release of information in such a way that individuals might be identified[15] (and it is to be remembered that there is a legal obligation to complete a Census questionnaire), it does not disallow a sample of responses to be released at the individual-level, given that anonymity can be protected. Nonetheless there appears to be a widespread belief among census data users that even a controlled micro-data file lies outside the Act's provisions. A likely consequence of this misunderstanding has been that fewer researchers have requested such a file than might otherwise. Second, even giving the legal possibility of a file of micro-data, the fear that the release of data like these might lead to a repeat of the protests over the 1971 British Census or to a result similar to that which stopped the 1981 German Census has argued for caution. At the

[15] The process, known as "Barnardisation" (as it was introduced by a statistician named Barnard), is described in Rhind (1983) p. 184.

least any file of micro-data will have to be carefully constructed to balance the interests of researchers and data collectors. The third reason stems from the need for a careful design -- whatever the final form of the dataset, its derivation from existing census records will be expensive. Although it is not clear who will carry the expense of producing the file, but clearly if the expenses are met they will be from a budget that would be allocated to other research projects.

II. The Potential of Old Data

As mentioned above, many authors (for example, Hakim, 1982; Hyman, 1972; Finifter, 1975; Boruch, 1978) have argued persuasively for the adoption of old data for new research ventures using techniques of "secondary analysis". Although there is no need here to rehearse the detail of their discussions, a brief statement of some of the more general points relating to Great Britain does provide a context for the general theme of this paper.

Five aspects are discernible in the argument for the use of social data produced in the government and commercial sectors for analyses conducted by people other than the primary data collectors. These relate to the:

(a) coverage of data collection;

(b) content of collected data;

(c) care exercised in the data collection;

(d) cost of data collection; and the

(e) contribution made by such use.

a: Coverage

Although the necessity of national survey studies in British social research has been seriously questioned recently (Miller,

1983), for many social investigations in a country marked by regional differences adequate coverage of functional relationships (which may covary with particular settings) suggests that where possible national overviews should be taken so, that at least, regional differentiation can be discounted. However this requires careful production of data across the country, something which is difficult to ensure given limited research budgets. A virtue of data collected by workers in the government and commercial sectors is that they generally offer well-founded bases from which to make regional estimates. Thus several government-surveys have national sample sizes of over 25,000 respondents; when, as is often the case, Standard Regions are used as a stratification factor in the sample design they offer Regional as well as national samples. Where the data are collected result from the administrative process cross- (and) within-regional coverage is even better served.

b: Content

Data collected for primary use in the government and commercial sectors relate directly to the concerns of those commissioning the collection. However it is rare for a datum to be "univocal"; the meaning ascribed to information is context dependent and so a particular bit of information can be interpreted in many different ways.

Besides the "plastic" nature of data (which was for a long time the leading argument put forth by advocates of secondary analysis) it is worth noting that there seems to be an increasing commonality of concerns among the various sources of data. Thus a data file of interest to policy-makers in a department of employment may easily be

of interest in its own right to researchers analyeing the marketing of a new consumer product or to researchers evaluating structural inequalities. Moreover, often data of the kind being described may have been collected over time thereby providing a rare opportunity in social research to assess change.

c: Care in Data Collection

The care taken in many data collection ventures in the government and commercial sectors far exceeds that possible for individual researchers when collecting new data. Both commercial and government sector research agencies have data collecting infrastructures that offer the specialsed knowledge and techniques that are necessary to ensure the quality of collected data. Operationally this becomes of greater concern as more data are used and as the end user becomes more remote from the initial collector.

d: Cost of Data Collection

With the possible exception of the ability to generate information across time, the three "C's" referred to above could be replicated in all primary research with appropriate expenditure of money[16] (and time). In 1985 one need not review the financial constraints imposed on researchers in all sectors to make the case that multiple access to information sources is desirable, all other

[16]Even estimates now based on access to information generated in the normal course of administration could be made using well-constituted sample surveys. The cost in time and money would be huge.

concerns being equal.

e: Contribution Made by Secondary Use

From the description of the four benefits offered by "old" data to analysts it appears that the benefits are all one-way. Clearly, if this were so, there would be little incentive to release data, particularly given the potential risk of disclosure. However there is some evidence available about the kind of uses to which these data are put and it can be argued that the evidence supports a claim that there is some return to the data provider.

In the United Kingdom the Economic and Social Research Council's Data Archive was established in 1967 to provide a distributing repository of computer-readable data of interest to social researchers. Although it generally operates to support re-use of data collected for other purposes, it has in the last five years developed a role as a broker of data collected by government research agencies to researchers employed in other sectors. In the remaining part of this section the use made of this data source is described to demonstrate the "value added" by extra use.

Two aspects of "value added" are considered: (a) disciplinary insight and (b) breadth of analysis. The worth of both, in turn, is contingent on acceptance of two assumptions which will be stated here but not defended[17].

The first is that the understanding of data and the

[17]The argument is reviewed in Tanenbaum (1979).

interpretation of phenomena is partly culturally determined. The culture most important for social research is the analyst's discipline (subject). The second assumption is that information is important in the policy making and adjucating process and that any increase in "relevant" information fed back to that process[18] is used and improves the product of the process.

If these two assumptions are accepted than it is worth presenting evidence that the disciplinary perspective on particular data sources is expanded and that "useful" analyses are done when data are made accessible. The evidence to be presented here is taken from the experience of the ESRC Data Archive.

i) Expanded Disciplinary Perspectives

Table 1 shows that in the period 1975 through 1983 an increasing number of disciplines are represented among the Data Archives users of data collected by government ministries with social surveys. Although commentators outside the social science community might claim that there is little to distinguish between the outlooks (blinkers?) of particular parts of the social science community, it's likely that stark differences would be apparent to social scientists.

Insert Table 1 About Here

People of different subject backgrounds are employed within the

[18]How this is done is unclear although one of the few consistent generalities from evaluation research is that the effect of information on decision-makers is diffuse rather than specific.

ministries collecting and analysing the data and it is likely the case that their orientations both shade the interpretation placed on the analyses and guide the choice of the analytic strategies themselves. Typically, the research establishment assigned to any particular project is small and is unlikely to include a good representation of the available social science perspectives. By allowing the data to be used by others than the originators this multiple perspective can be bought-in at little financial cost. It appears from Table 1 that this has actually happened. It remains to be demonstrated that this has had a useful information output, a topic discussed in the next section.

ii) The Results of Extended Data Access

The results of extended data access are described by the type of analyses conducted on a single data source generated by a government agency. Here, it is the Office of Population Censuses and Surveys Social Survey Division's annual "General Household Survey", an omnibus survey conducted for several sponsoring ministries who use the survey as a means of gathering reliable current information relating to specific policy goals.

Table 2 contains a representative list of the titles supplied to the research projects that non-government analysts wished to undertake using micro data from this particular source.

It is worth noting that the information contained in the Table results from the way in which the data are released for any would-be analyst has to submit a lengthy description of why the data are required to the distributing agency (here, the Data Archive). This is

used to support application on the would-be analyst's behalf to the data collection agency for permission to release the data. If permission is granted, the analyst undertakes to submit any material prepared for publication to the data collection agency for pre-publication comment as well as abide by the other clauses contained in the form included as Appendix A to this paper.

Insert Table 2 About Here

The Table speaks for itself in illustrating the argument that additional information is extracted from available data sources which can be fed back to the policy process. What is not so apparent from the Table is that in several instances it is unlikely that similar analyses would have been carried out by researchers working for the data originators, either because they required a multi-disciplinary perspective not available to the originators or, more commonly, because they do not address specific policy questions and so are not justified by a prevailing ethos in British government which (exclusively) legitimates goal-oriented research. The object of the studies referred to the bolstering of an information environment which can serve as a backdrop against which more specialised concerns

can be contrast[19].

III. Administrative Data: A Special Case?

Some time ago, a commentator on the political scene wrote that "to be governed is to be at each operation, at each transaction, at each movement, marked down, recorded, inventoried, priced, stamped, measured, numbered, assessed, licensed, authorized, sanctioned, endorsed, reprimanded, obstructed, reformed, rebuked, chastized." Although one might wish to temper some of Proudhon's (1923) more florid phrases, one will likely agree that the process of public administration in 1985 produces as much information about those subject to it[20] as did that of France in the mid-19'th century. Indeed the only remarkable difference that comes to mind in the latter part of the 20'th century concerns the style of the information, rather than its content or extent. Increasingly administrative information is maintained on computers and as the skill for management of that information develops and becomes available beyond the realm of the computer specialist, it becomes more attractive as a resource to be used by social analysts.

[19]One could also note the different resources available to analysts working in different sectors to point to an argument that analysts will apply that which they have most of. Thus, for example, the government sector analyst works in a time-starved environment in which a schedule is imposed by legislative needs, which in Britain is often the awkward Parliamentary Question. The researcher in this sector however is partially compensated by having the finances necessary to conduct research. The analyst employed in the academic sector has time but little money.

[20]The range of statistical topics produced as a spin off from government administrative practice is shown in Tanenbaum and Nunez

The question arises whether the case made for the release of data collected by the survey method to people not party to the original data collection applies to the release of information collected from the administrative process. In one sense, that of the function of analyses, it does. If secondary use of survey data can offer something to those who commissioned the data collection, then surely the analyses of data which describes the impact of policy will offer the same return. However a different question has to be addressed which returns to the "rights" of the data donor.

Several operational practices were described above which made the identification of individuals sufficiently difficult to warrant the public release of data collected from them. These generally relied on the data source being a sample chosen from a larger population. They also depended on the data donor being able to voluntarily offer information to the researchers for it was clear from the examples used that as the compulsion to give data rose, the barriers to the release of the data to others also increased. As most administrative information is gathered with one form of compulsion or another, it is likely that restrictions on the release of data will apply.

The point of this paper, however, has been that where constraints on data have been released, there have been positive returns which, on the evidence so far, have outweighed any negative effects steaming from the distribution of data. These benefits have transpired because of the development of acceptable access modes. These came about informally and related to the kinds of information that were available at the time. In 1985 a new set of protocols is required that allows access to all forms of computerised data within the confines of a new

rule.

BIBLIOGRAPHY

Anderson, M. and E. Tanenbaum (1984) "Preservation of Administrative Records" (Report to Economic & Social Research Council, London).

Boruch, R. (ed) (1978) Secondary Analysis, (London: Jossey-Bass).

Boruch, P. and J. Cecil (1979) Assuring Confidentiality in Social Research, (Philadelphia: University of Pennsylvania Press).

British Association Study Group (1974) "Does Research Threaten Privacy or Does Privacy Threaten Research?" (London: British Association for the Advancement of Science).

Department of Employment (1983), New Earnings Survey: 1982 Part B (London: HMSO).

Finifter, B. (1975) "Replication and Extension of Social Research Through Secondary Analysis," in Social Science Information, xiv: 119-33.

Flaherty, D. (1978) "The Bellagio Conference on Privacy, Confidentiality, and the Use of Government Microdata," in Boruch, R. (ed) Secondary Analysis, (London: Jossey-Bass) p. 19-30.

Hakim, C. (1983) "Research Based on Administrative Records," Sociological Review xxxi:489-519.

Hakim, C. (1982) Secondary Analysis in Social Research, (London: George Allen & Unwin).

Hyman, H. (1972) Secondary Analysis of Sample Surveys: Principles, Procedures and Potentialities, (London: Wiley).

Market Research Society (1984) The Market Research Society Yearbook: 1984, (London: Market Research Society).

McCrossan, L. (1984) A Handbook for Interviewers: A Manual of Social Survey Practice and Procedures on Structured Interviewing, (London: HMSO).

Miller, W. (1983) The Survey Methods in the Social and Political Sciences, (London: Francis Pinter).

Norris, P. (1983) "Microdata from the British Census," in D. Rhind (ed) A Census User's Handbook, (London: Methuen) p. 301-319..

Proudhon, J-P. (1923) General Idea of the Revolution in the Nineteenth Century, (translated by J.B. Robinson) (London: Freedom Press).

Rhind, D. (1983) "Mapping Census Data," in Rhind, D. (ed) A Census User's Handbook, (London: Methuen) p. 171-198..

Robinson, W. (1950) "Ecological Correlations and the Behavior of Individuals," in American Sociological Review xv:351-357.

Tanenbaum, A. and A. Nunez (1982) "Social and Economic Statistics in the United Kingdom," in International Social Journal, xxxiv:

Tanenbaum, A. and A. Nunez (1982a) "Social and Economic Statistics in the United Kingdom: A Bibliographic Sketch," UNESCO Report, Paris.

Yonge, A. (ed) (1972) Halsbury's Statutes of England: 3'rd Edition, Volume 37, (London: Butterworths).

Recipients

Year	Discipline*				
	Sociology	Political Science	Geography	Business Admin	Economics
1975	4				
1976	5	1			
1977	14	1	1	9	4
1978	10	17	2	5	22
1979	7	9		17	25
1980	14	13	1	6	35
1981	31	4	4	8	50
1982	45	9	12	8	52
1983	30	3	6	25	48

Table 1:

ACCESS TO GOVERNMENT-COLLECTED SURVEY DATA VIA DATA ARCHIVE
BY
DISCIPLINE OF RECIPIENT

*Discipline of recipient assessed by departmental address.

1. A Cross-Section Study of the Distribution of Earnings in the UK

2. Sex Differences in Sickness Absence from Work - GHS 1975 and 1976

3. Alternative Approaches to Classifying Women by Social Class

4. Taxation, Incentives and the Distribution of Income

5. The Economic Value of Life Saving: An Estimate from the British Labour Market

6. Problems in Human Capital Analysis: The Case of Great Britain

7. The Education, Occupations and Earnings of Men and Women

8. An Analysis of Variation in Job Satisfaction

9. Determinants of Housing Tenure Choice in the UK

10. Patterns of Family Formation and Dissolution in Contemporary Britain

11. Social and Economic Factors in Fertility Differences

12. Circumstances of Families with Pre-School or Primary School Children

13. The International Comparative Programme on Life Cycle Methodology to Integrate Social Indicators

14. Economics of Discrimination

15. An Analysis of the Relationship Between Socio-Economic Factors, Self-Reported Morbidity and the Use of Health Services

16. The Growth and Distribution of Fringe Benefits in British Industry

17. An Analysis of Occupational Earnings

18. Evaluation of the SIR Data Management Package

19. Work, Household and Marriage in the Earlier Stages of the Life Cycle: 1850-Present

20. Economic Analysis of Female Labour Force Participation Rates

Table 2:

Research Projects Using A Single Data Source:
A Selective List

APPENDIX A:
SELECTED CLAUSES FROM THE MARKET RESEARCH SOCIETY'S "CODE OF CONDUCT"

Subject to the provisions of this Clause, and those of Clause 2.9, the informant shall remain entirely anonymous.

No information obtained about individual informants which includes their identity shall be revealed, either directly or indirectly, other than to persons engaged in the administration, checking or processing of research in accordance with the Code.

No information obtained about individual informants which includes their identity shall be used, either directly or indirectly, other than for the administration, checking or processing of such research.

Information about individual informants which includes their identity shall only be further revealed to, or used by:

(a) Persons requiring it in order to conduct or process further interviews, after the first, with the same informants - subject to the conditions in Clause 2.8.

(b) Persons requiring it for other purposes, provided informants have consented to their identity being revealed, after being told the general purpose(s) of this revelation and the general nature of the recipient(s).

The person responsible for the research project must ensure that persons receiving such information are themselves bound by this Code of Conduct, or agree in writing to abide by it for this purpose....

2.7 Members must ensure that, on request at the time of the interview, the informant is provided with: ...

(g) the reason for asking personal questions.

Recommendations for good practice associated with the results of the data collection include the following clauses:

2.12 ...It is more desirable for documents revealing data about an informant to bear no identifier other than a code or serial number....

2.13 (Members should) ... remember that anonymity can be breached indirectly as well as directly, eg when the population is small or known and tables contain small cells ....

3.8 Primary and secondary records shall be the property of the agency (but see Clause 3.9). The agency shall be entitled to destroy primary records without the client's permission one year but no sooner after presentation of the results providing secondary records are adequate to enable these results to be reconstructed. The agency shall be entitled to destroy any records whether secondary or primary without the client's permission two years but no sooner after presentation of the results.

3.9 After the agency has submitted its report upon the study to the agreed specification, the client shall be entitled to obtain from the agency the original records, or duplicate copies of them, relating to his report, provided that ... the identity of informants, and where relevant, the names of their companies, is not revealed or Part II of the Code is fully observed.

3.10 Any findings deriving from the study, other than published information, shall not be disclosed at any time by the agency to any person other than to the client commissioning the study unless the client gives his permission or unless under the instruction of a court of competent jurisdiction. This refers only to studies exclusively commissioned by a specific client or clients, and it does not refer to research techniques used in the study, nor to methodological analyses, so long as there is no disclosure of any such findings.

ESRC DATA ARCHIVE
University of Essex, Wivenhoe Park,
Colchester, Essex CO4 3SQ

Tel Colchester (0206) 872670 (Direct line (0206) 872295 (University s
International +44 206 872670
+44 206 872295
Telegraphic address: University Colchester
Telex: 98440 (UARLIB G

OPCS GHS DATA

RESEARCH UNDERTAKING FORM

In consideration of the ESRC Data Archive agreeing to supply to me certain data in machine-readable form together with supporting documentation as set out in the Schedule hereto (hereinafter called 'the material', which expression shall include any further or other data or documentation not the subject of a separate agreement) I hereby undertake:

1. Purpose
To use the materials for the purposes of academic research which shall include the preparation for publication in a scholarly context of analyses or interpretations of the data contained in the materials, and to seek the approval of the Director of the Archive for any other proposed use.

2. Confidentiality
To act at all times so as to fully preserve the individual confidentiality of survey respondents and their replies. (N.B. Only in the most exceptional circumstances does the Archive hold and accept data in which individuals can be identified. This should therefore be regarded as an 'overkill' insurance clause.)

3. Acknowledgement
To acknowledge, in any work based in whole or part on such materials, both the original depositors and the Archive and to declare, in any such work, that those who carried out the original analysis and collection of the data bear no responsibility for the further analysis or interpretation of it. The suggested form of acknowledgement is:

> Material from the General Household Survey made available through the Office of Population Censuses and Surveys and the ESRC Data Archive has been used by permission of the Controller of H.M. Stationery Office.

4. Publication: deposit
To deposit with the Archive a copy of any published work based in whole or part on such materials.

5. Publications: clearance
To submit any report or interpretation of further analysis of data to the OPCS for comment before distribution (e.g. as in presentation to a conference or seminar) or publication.

6. Copyright: codebooks
Not to make copies of data, codebooks or other documents supplied by the Data Archive without the previous consent in writing of the Director of the Data Archive.

7. Copyright: electromagnetic materials
Not to copy in whole or in part, any electromagnetic materials supplied by the Data Archive, providing that this restriction shall not apply to the extent that for academic purposes it is necessary to make copies for my exclusive use.

Supported by the Economic and Social Research Council and the University of Essex

8. Access to others
To give access to the data contained in the materials only to persons, specified on this application, directly associated with me or working under my control and to require any person to whom I do give such access to give prior written undertakings to me:

(a) not to use the data except in connection with my academic purposes, and

(b) not to give access to the data to other persons,

(c) not to generate tables for other users.

9. Record of use by others
To maintain a list of all persons to whom access to the data has been given and to supply a copy thereof together with copies of the written undertakings referred to above to the Director of the Data Archive at any time upon the Director's request.

10. Derived data sets
At the conclusion of my research (or at any time at the request of the Director of the Data Archive) to offer for deposit in the Archive on a suitable medium at my own expense any new data file derived by transformation of variables or otherwise from the materials supplied and/or by the addition of new machine-readable information, together with sufficient explanatory documentation or codebooks to enable such new data file(s) to be accessible to others.

11. Derived data sets: access to others
To allow the Data Archive to grant access to such new data files and documentation and on such terms and conditions as the Director of the Data Archive shall from time to time see fit to impose.

12. Errors
To notify the Archive of any errors discovered in the data or accompanying documentation.

13. Charges
To meet the charges for the supply of materials.

SCHEDULE

Study Number **Title**

Signature ..... **Date** .....

Name (BLOCK LETTERS) .....

Address (BLOCK LETTERS) .....

.....

..... **Tel. No.** .....

The Concept of Exploitation in Adam Ferguson's Essay on The History of Civil Society

John D. Brewer
Department of Social Studies
Queen's University of Belfast

Presented to the workshop on exploitation, European Consortium for Political Research, Barcelona, 26-30 March 1985

Introduction

Adam Ferguson was born in 1723 in Perthshire, Scotland. His Essay on the History of Civil Society, first published in 1767, is now generally regarded as a classic in the history of the social sciences. Although its reputation continued during the nineteenth century in Germany and America, British social science quickly forgot the Essay and its author.[1] It was the American interest which introduced Ferguson to twentieth century English-speaking audiences (Bryson, 1945; Kettler, 1965; Lehmann, 1930; Schneider, 1967; Whitney, 1934), although German[2] interest in Ferguson's work parallels the American (Dahrendorf, 1968: 58-59; Jogland, 1959; Jokisch, 1981; Marcuse, 1967: 13-16; Proesler, 1935). This international interest in Ferguson extends to the Netherlands (Belien, 1979; Kerstholt, 1982) and especially to Italy (Bartolommei, 1979; Perillo, 1975, 1978; Salvucci, 1972; Tarabuzzi, 1980). There has been something of a revival of interest in Britain too. The Essay was reprinted in 1966 and Ferguson and his colleagues in Scotland at this time, like Adam Smith and John Millar, are beginning to find their way into the general histories of sociological theory produced by British social scientists (Clarke, 1982; Hawthorn, 1976; MacRae, 1961, 1969; Meek, 1976; Strasser, 1976; Swingewood, 1984; cf American examples like Collins and Makowsky, 1972; Rossides, 1978). These works coexist with the modern specialist studies of the whole Scottish School (Campbell and Skinner, 1982; Chitnis, 1976; Hopfl, 1978; Meek, 1954; Olson, 1975; Rendall, 1979; Skinner, 1965; Swingewood, 1970; Trevor-Roper, 1977), which should be set alongside the older specialist studies of the school (Bryson, 1945; Pascal, 1938).

Contemporary interest in Ferguson takes one of four forms. There are those who see Ferguson as an adjunct of Adam Smith in the origins and development of classic political economy (Clarke, 1982: 32; Collins and Makowsky, 1972: 64; Rossides, 1978: 47-48; Skinner, 1965).[3] A second interpretation runs counter to the first in that it portrays Ferguson as a precursor of Marx and important in the origins and development of historical materialism (Kerstholt, 1982; Meek, 1954; Perillo, 1975, 1978; Salvucci, 1972). This materialist interpretation is given substance by Marx who acknowledges Ferguson's contribution several times.[4] This interpretation has been criticised (Forbes, 1966: xxv; Lehmann, 1974; Swingewood, 1984: 27). A notable critic is David Kettler (1965, 1976a, 1976b, 1977) who interprets Ferguson within the Aristotlean tradition

of political philosophy, which emphasises the virtue and worthy actions required for political citizenship, these being seen as the dominant concerns of the Essay (for example see Kettler, 1977: 439, 446, 452, 454). The final interpretation is the sociological one, which points to Ferguson's role in separating 'civil society' from the 'state' and to the direct and deliberate attention he gave to the concept of 'society' (for example see Hawthorn, 1976; Jogland, 1959; Lehmann, 1930; MacRae, 1961, 1969; Schneider, 1967; Swingewood, 1970, 1984). In this regard the list of sociological concepts which Ferguson is said to have anticipated includes the well documented notions of social action and its unintended consequences (for example Jokisch, 1981; Schneider, 1967: xxix, passim), the social division of labour (for example Rattansi, 1982: 15-26; Swingewood, 1970: 175-77), social evolution and social change (for example Bartolommei, 1979; Bernstein, 1978; Slotkin, 1965), alienation (Forbes, 1966: xxxi; MacRae, 1969: 23) and social class (for example Calvert, 1982: 14, 18, 22-25). But one also finds in the Essay discussion of such concepts as social conflict, folkways, private property, political and economic subordination, the sexual division of labour, crowd behaviour, professional groups, social solidarity, language, imperialism, bureaucratization and many more.

One of the concepts omitted by sociologists from this list is exploitation. The reason for this is clear. Unlike the disciplines of political science and philosophy, sociology has not rendered 'exploitation' into a discrete concept.[5] It is not a part of sociology's conceptual vocabulary and where sociology does use the term it is not separated from its association with Marx's critique of capitalism. Thus the concept is employed, if at all, in its Marxist sense to describe economic exploitation (for example Mann, 1983: 122). Because sociology as a discipline has not considered exploitation as a discrete concept separate from Marx's general account of capitalism, some sociologists, when referring to the sets of behaviour which are normally described by the concept of exploitation, have invented other terms. Thus, Lind refers to 'tribute extraction' and to the regularization of this extraction into 'tribute systems' (1983). This tendency only serves to reinforce the inability of the discipline to make 'exploitation' a discrete concept. Therefore, in interpreting Ferguson's Essay sociologists have not employed the concept of exploitation when they have rendered his writing into modern sociological discourse.

All attempts to subsequently reinterpret classic texts in the idiom, style and conceptual vocabulary of modern disciplines is fraught with difficulty (in relation to sociology see Merton, 1967: 8-26). All too often the earlier discussion becomes infused by others with modern meanings. But there is an obverse to this. As MacRae noted, a scholar's inability to employ the vocabulary of special words and usages, which seems so to afflict modern sociology, often veils earlier writings from us (1969: 25). It will be argued here that although Ferguson never used the term, the concept of exploitation can be reliably and usefully implanted on Ferguson's discourse in the Essay. Moreover, to do so has a number of benefits. Firstly, it brings a historical perspective to the more conceptual and theoretical literature produced on the concept of exploitation recently (for a selection see Arneson, 1981; Buchanan, 1979; Crocker, 1972; Elster, 1983; Holmstrom, 1977; Roemer, 1982; Steiner, 1984; Tormey, 1973). In this regard Ferguson provides a historical perspective which extends back to the eighteenth century and shows that the antecedents of the concept stretch further back than Marx, even though most contemporary discussions begin, and sometimes end, with Marx (cf Steiner, 1984). Even despite the Marxian heritage of most contemporary discussions, there are fundamental disagreements in the literature on how exploitation is conceptualized. A historical perspective is useful in another way, for it demarcates the genesis of the different conceptualizations. This paper is not nominating Ferguson as the father of some conceptualization. In fact the history of ideas suggests that polygenesis is the norm in matters like this. However a claim is being advanced that a historical perspective is necessary in order to demonstrate that the antecedents of the term extend further back than Marx, who is normally credited with bequeathing the notion to social science. Continuing this historical perspective may well extend the origins of the theme before Ferguson, which only illustrates the need for historical analysis to supplement the conceptual analysis. In this respect this paper is claiming that an analysis of Ferguson's Essay illustrates part of the origins of some of the varying meanings given to the term. Finally, Ferguson's writings on the theme of exploitation provide one further demonstration of his now accepted sociological imagination; but one for which he is not usually noted.

The Concept of Exploitation

The classic view of Marx on exploitation can be briefly stated. Necessary labour is that labour which satisfies the subsistence needs of workers and their dependants. Surplus labour means all that labour over and above necessary labour. The degree of exploitation is determined by the ratio of surplus to necessary labour. The greater the proportion of time that the worker is forced to work for the capitalist, the greater the rate of exploitation. Thus Marx links exploitation with the labour theory of value and in so doing he draws on the formulation of the labour theory of value in classic political economy. This dates from Adam Smith (Meek, 1956) and even before (Meek, 1973). Smith was a contemporary of Ferguson although Ferguson does not rank in Meek's order of precursors or influences on Smith's labour theory of value (1973). It would be surprising if he did. The Essay is not concerned with productivity, markets and commerce, but with the social, political and human consequences of these in civil society. In this respect it is the opposite to Smith's The Wealth of Nations. When Ferguson is cited by Marx it is in connection with these effects rather than for any outline of the free market economy or the labour theory of value. Thus he is not cited in Marx's account of exploitation.

The contemporary debate on exploitation, much of which is grounded in Marx, has extended the meaning of the term beyond the extraction of surplus value. At least nine different conceptualizations are contained in the literature, some of which are not mutually exclusive.

1. Exploitation constitutes interference by the first party with the opportunities of a third party to bid for the goods and services of a second party (Steiner, 1984).
2. A group is exploited if it would be better off materially by withdrawing from the existing set of social relations (Roemer, 1982).
3. Exploitation constitutes taking unfair advantage of someone in free market transactions (Elster, 1983; Walt, 1984).
4. Exploitation is characterized by unequal possession of capital goods and private property (Roemer, 1982).
5. Status exploitation exists in a situation where remuneration is made according to status and where status is not representative of a special skill (Roemer, 1982: chs. 7-8).
6. Exploitation is characterized by mistreatment, oppression and coercion in the labour process (Arneson, 1981; Levi and North, 1982).

7. Exploitation is characterized by inequality of control and power in the labour process (Arneson, 1981; Holmstrom, 1977; Crocker, 1972; Przeworski, 1982).
8. Exploitation involves the diminution, impoverishment and denuding of workers (Holmstrom, 1977).
9. Exploitation involves a lack of just deserts (Arneson, 1981).

Some of these formulations are specific and novel and have few direct anticipations. This particularly applies to the first three conceptualizations. Others describe fairly general circumstances as preconditions or consequences of exploitation and are encompassing enough to find anticipations in a whole range of precursors. Any attempt to equate exploitation with mistreatment, oppression, power inequality or lack of control must inevitably throw up many discussions of these themes which act as anticipations. It is possible, for example, to find anticipations of nearly all the remaining six formulations in the work of Ferguson nearly two and a half centuries ago. But this practice of finding vaguely and slightly matching quotations in separate works is unsatisfactory, for as Whitehead once remarked, 'everything of importance has been said before by somebody who did not discover it' (quoted in Merton, 1967: 13). Ironically in saying this, Whitehead had himself been pre-empted by de Morgan who noted a generation before that 'there has hardly ever been a great discovery in science without it having happened that the germs of it have been found in the writings of several contemporaries and predecessors' (quoted in Merton, 1967: 13). In this instance a historical perspective can degenerate into the mere search for increasingly faint adumbrations.

In recent years a variety of important theoretical debates have problematized the notions of continuity and recurrence in the history of ideas (Kuhn, 1962; Focault, 1971). The meaning of concepts, it is argued, is grounded by the overall structure of theories - or paradigms (Kuhn), problematics (Bachelard), discursive formulations (Focault) - in which they are embedded. They cannot be understood apart from the discursive space they occupy in relation to other concepts. At first sight this seems to rule out the search for historical continuity in ideas. However, the implications of these arguments provide a better foundation for a historical perspective, for they require us to set what are taken to be early anticipations of later ideas in the context of the whole framework in which they each appear. That is, we should

not just examine whether the same or similar words appear in different problematics, but whether there is an equivalence in the meaning of the vocabulary in the context of the problematic which gives this vocabulary its particular discursive meaning.

It will be argued here that the significance of Ferguson's Essay extends beyond the fact that one finds echoes and anticipations of what later writers call exploitation. Rather it is that in his discursive formulation, exploitation (to use the modern idiom) is understood in the same way as it is in contemporary formulations. That is, his work has three characteristics which are also to be found in the conceptualizations of such people as Arneson (1981), Buchanan (1979), Crocker (1972), Elster (1983), Holmstrom (1977) and Roemer (1982), to name but a few. These characteristics are: exploitation is understood as economic exploitation, which is now almost the paradigm case of exploitation; it is approached through the notion of human agency; and the discussion of exploitation is integrally linked to an ethical concern about its effects.

The Theme of Exploitation in Ferguson's Essay

The social climate within which Ferguson wrote was one of new discovery - in science, cultural comparison and industry and production. The Scottish lowlands were a thriving commercial centre witnessing the introduction of machine industry. The key to this progress was Glasgow and its tobacco and linen trade with America. Linen production increased five fold between 1728 and 1777, indicating a thriving clothing industry, this industry being the first to shift to machine and factory production (on Scotland's economic progress see Lenman, 1981; for England see McKendrick, Brewer and Plumb, 1983). With the economic transformation of Scotland came changes in established social patterns. These were added to by agrarian decline and politically forced depopulation of the Highlands. This produced a mass of unskilled labour separated from the means of their former livelihood. New social problems were created - problems of adjustment, relief for the distressed, of human rights and of the effects of machine production. Ferguson's own position as a former Highlander, who had become geographically and socially mobile in moving to the lowlands, added a special dimension to his concern with these problems (MacRae, 1969: 19). Ferguson saw the paradox of commercialism and industrial progress. It gives rise to personal

liberty, political security and the rule of law, but it also has adverse consequences which produce, among other things, second rate citizens pursuing worthless, dehumanized, mechanical tasks. The Essay, in fact, is the first extensive study of this paradox and Ferguson therefore needs to be distinguished from Hume, Montesquieu, Mandeville, Shaftesbury and Smith. This is what Marx saw in Ferguson, who he mistakenly referred to as Adam Smith's teacher. Literally this was an error but Ferguson did proceed Smith in analysing the adverse social and political consequences of mechanical labour and the division of labour. The well cited charge by Smith that Ferguson plagiarized his work on the division of labour has been analysed by Hamowy (1968). Through an excellent piece of scholarly detection Hamowy shows that Smith had in mind Ferguson's use of pins to illustrate the productive capacity of the division of labour (1968: 256f). He was not referring to any plagiarism in the analysis of the sociological implications of the division of labour, which Smith does not discuss in his early writings. Although Ferguson produced a draft of the Essay ten years prior to its publication[6] at the time of Smith's Glasgow lectures, in Smith's Glasgow lectures there is only one passage on the 'confining effects' of the 'specialization of employment'. Even in Smith's The Wealth of Nations, which appeared nearly ten years after the Essay, Smith's analysis of the disruptive effects of the division of labour is restricted to a brief outline of the psychological attitudes it generates (Smith, 1937: 734).

There are some who still hold Smith to be superior to Ferguson in discussing the sociological implications of the division of labour (Clarke, 1982: 30; Skinner, 1965: 17), although this is something of a minority view (cf Lehmann, 1930: 187, 1974: 165; MacRae, 1969: 22-23; Pascal, 1938: 173-74; Swingewood, 1970: 165, 175-76). Clearly Smith refers to what Marx later called 'the division of labour in the factory', while Ferguson discusses the 'social division of labour' (Marx, 1976: 184, 187-89; Rattansi, 1982: 91f). Ferguson makes only three references in the Essay to the productive capacity unleashed by the division of labour (1966: 180, 181, 230). His concern was directed to the social effects of the division of labour, especially the tendency for the division in the workplace to be repeated outside the factory in social life generally. Indeed, after outlining the social evolution of commercial or 'polished' society[7] the Essay becomes wholly directed to an analysis of the adverse effects of the growth of commerce and of an

advanced division of labour.[8] Montesquieu, Mandeville, Hume, Shaftesbury and Smith noted the economic and productive consequences of the division of labour for commercial society, but minimised its social effects.[9] In this sense Swingewood is correct to argue that Ferguson's Essay represents a break with work which had gone before (1984: 23).

It is in the context of Ferguson's discussion of the social division of labour and the consequent paradox of commercial society that he anticipates what later writers have called alienation, class conflict, political oppression, dehumanization and over-rationalization. It is in this context also that he discusses many of the features which modern authors have described as characterizing exploitation.

In the Essay Ferguson offers a critique of private property and the political and social subordination that arises from it (1966: 96f, 121f, Part IV, also 1769, ch. i, sec. x, xii). Indeed, commercial society is chiefly characterized by the unequal ownership of private property and the power and class inequalities that arise from it (for example 1966: 180f). When discussing the growth of private property Ferguson mentions that it is the chief cause of the tone and character of the state (1966: 133), social class (1966: 135-36, 150), class conflict (1966: 191), imperialism (1966: 136), civil liberty (1966: 154f) and conversational competence and language use (1966: 174), among other things. However unlike Roemer (1982; cf Przeworski, 1982: 290), who describes unequal possession of private property as the cause of exploitation, Ferguson does not use the term when describing the effects of the growth of private property. Nonetheless, as part of his outline of the paradox of commercialism Ferguson is led into discussing what others have later described as preconditions or consequences of exploitation. He anticipates three particular features which have latterly been given the term. In criticising the growth of riches, wealth and luxury Ferguson outlines what Roemer has called status exploitation (1982: chs. 7-8). But Ferguson devotes greater attention to the effects of commercialism among the poor, those performing 'mechanical labour' as he describes it (for example 1966: 101, passim). In so doing he outlines what has become an important element in contemporary conceptualizations: that workers lack control over the labour process and are deprived, denuded and diminished as a result (see Buchanan, 1979; Crocker, 1972: 208; Holmstrom, 1977: 365). Ferguson extends this critique in the same direction as later writers, in that he proceeds from this powerlessness to

argue that there is a lack of just deserts for those who perform mechanical labour (cf Arneson, 1981: 205). Exploitation, therefore, is seen as economic exploitation.

Status exploitation involves a situation where remuneration is made according to status and where status is not representative of a special skill. Roemer sees it as common in socialist countries, but it clearly operates in other societies alongside other forms of exploitation. Ferguson's critique of wealth, riches and luxury in commercial society parallels Roemer's concern. Ferguson attacks both the cultural value system in commercial society, whereby riches are made the standard against which to judge people and by which to estimate what is good (1966: 103, 247), and the economic reward system in commercialism, where fortune is allowed to bestow character and rank (1966: 158, 251). He decried the society in which he lived as at worst evil and a best a 'mixture of good' (1966: 162), because it was a society where people have to be rich in order to be considered great (1966: 161-62). It was a society where the desire for profit stiffles the love of perfection and where self-interest cools the imagination and hardens the heart (1966: 217, also see 223-24, 233).[10]

In this respect Ferguson is attacking a number of features of commercial society: the tendency for it to make wealth the principal object of the state (for example 1966: 157, 158; cf Kettler, 1977: 458); the tendency to evaluate people by their material possessions and not their character or the quality of their mind (1966: 247, 250-51, 252-53); the creation of a society dedicated to the persuit of peripheral and meaningless external apparel and conveniences (1966: 237, 247-48, 253, 260), adorned at great expense by the labours of many workers (1966: 253) who are 'debased' and 'dejected' by being considered poor (1966: 250); the tendency for the rich to substitute self-interest for public interest (1966: 233, 250, 255, 264-65, 289); and the tendency for the rich to become sordid, illiberal and oppressive (1966: 187, 253). Clearly in these circumstances, commercialism also creates a situation where skills are not the determinant of wealth and remuneration.

One sees in this critique of wealth and riches that Ferguson is concerned about the effects of unequal wealth on the attitudes of the rich to the poor and of the attitudes of the poor themselves. This is one part of the general effect of commercialism on those who perform mechanical labour. There are two references in the Essay to the forced

character of mechanical labour, where Ferguson refers to the 'necessity' which drives some people to perform mechanical labour in order to have 'moderate enjoyments of life' (1966: 259, see also 217). Although elsewhere Ferguson does refer to workers as having no option but to toil for others (1966: 241) and to the 'ordinary race of men' being the 'property of persons' who are considered to be of a class superior to their own (1966: 254). The result of this forced labour is that workers do not have their abilities extended or stretched (1966: 182-83): the genius of the master is cultivated while that of the worker lies waste (1966: 183). While the abilities of workers under mechanical labour lie waste, they lack interest, knowledge and imagination (1966: 181). That is to say, there emerges a division of labour between 'manual' and 'mental' labour, to use the terminology of modern authors, where those who perform mechanical or manual labour are considered to be ignorant, unknowledgeable and are unconsulted about their tasks. 'Many mechanical arts', Ferguson says, by which he means industry, 'require no capacity; they succeed best under a total suppression of sentiment and reason... manufactures prosper most where the mind is least consulted and where the workshop may...be considered as a engine, the parts of which are men' (1966: 182-83, for similar references see 187, 217). Thus those who perform mechanical labour are denuded and diminished by it. Ferguson believes this because, as he writes, 'the value of a person should be computed from his labour; and that of labour itself from its tendency to procure and amass the means of subsistence' (1966: 236). People should be judged by their labour, and when this labour is mechanical they are obviously denuded and deprived of the opportunity to realise this value. Ferguson also indicates in this passage that he believes labour should be directed to providing people with their means of subsistence and no more; a point which Marx considerably extended in the theory of surplus value, although Ferguson is using the term value differently in this passage.

The lack of consultation of workers, presumably by their employers regarding their labour, is a part of the lack of control which workers experience. Ferguson does not directly mention powerlessness as a characteristic of mechanical labour, although it is implied in several passages. One example is the reference to the 'necessity' which drives some people to perform mechanical labour. Another example is the lack of consultation of workers by those who control mechanical labour. Like

modern authors Ferguson refers to this form of labour process as undemocratic and constituting a threat to democracy (1966: 187, 255). He refers to those who toil in order to assuage the passions of the few as being oppressed and in a position where they dare not refuse to toil (1966: 241). Workers have to become inured to depredation (1966: 277). These are all features of the inequality of control and power which later writers have considered to be characteristic of exploitation.

There is a considerable degree of sympathy in Ferguson for workers performing mechanical labour and suffering the adverse conditions associated with it. In some of his later works, written after the French Revolution, Ferguson takes a more conservative stance on the issue of equality. In one instance he argues that the only respect in which all people should be equal was their equal right to defend themselves, and to attack inequality violates this right (1792, ii: 458). This seems to justify inequality, but written so soon after the French Revolution, it may only reflect a concern about the violence that occurred in the name of equality in France. In the Essay, written twenty-five years earlier, Ferguson is unequivocal in his support for equality (for example see 1966: 149, 157). He argues that there was a need to control and moderate the accumulation of wealth (1966: 157, 158). In one passage he writes, 'the whole mass is corrupted, and the manners of a society changed for the worse, in proportion as its members cease to act on principles of equality, independence or freedom' (1966: 250). Referring to the Grecian states, where he describes a similar labour process as under commercialism, with wealth being unequal and the rich being exempt from labour, he writes, 'we feel its injustice, we suffer for the helot under the severities and unequal treatment to which he was exposed..slaves have a title to be treated like men' (1966: 185). Ferguson strongly implies the same for those performing mechanical labour, for when he completes the analogy with Grecian states he writes, 'in every commercial state, notwithstanding any pretension to equal rights, the exaltation of the few must depress the many' (1966: 186). Therefore, mistreatment, depredation, oppression and powerlessness are all portrayed by Ferguson as consequences of commercialism, later to be described by others as features of exploitation.

In fact Ferguson is emphatic about the tenuous sense of freedom in commercial society. 'Many of the establishments which serve to defend the

weak from oppression, contribute, by securing the possession of property, to favour its unequal division, and to increase the ascendant of those from whom the abuse of power may be feared' (1966: 157; cf Thompson, 1975: 263). This passage distinguishes Ferguson from the classic political economists who saw in commercialism the protection of civil and political liberty. Indeed, Ferguson draws a distinction, common in contemporary discussions of civil rights, between rights in law and rights in practice: 'it is not mere laws, after all, that we are to look for the securities of justice...statutes serve to record the rights of a people...but without the vigour to maintain what is acknowledged as a right, the mere record is of little avail' (1966: 166). The most equitable laws on paper are consistent, he writes, with the utmost despotism in administration (1966: 167). At least in the Essay Ferguson cannot be categorized along with Hume and Smith as classic liberals trapped between having to justify a formal equality of individuals and an inequality of reward and property (Rattansi, 1982: 26). Ferguson never justifies inequality of reward or property in the Essay. The reverse is the case. It was this reverse concern which led him to give an outline of conditions which later writers have called exploitation and, like later formulations, to link this outline with an ethical imperative which sees these conditions as wrong and unjust.

Ethics, Exploitation and Human Agency in the Essay

It is the notion of human agency which links Ferguson's outline of economic exploitation with the ethical imperative which sees economic exploitation as wrong and unjust. Agency plays a considerable part in modern game theoretic and rational choice theory conceptualizations of exploitation (for example see Elster, 1983; Roemer, 1982; for an overview see Lash and Urry, 1983: 47). Agency also lies behind other formulations of the term in the emphasis on the young Marx and the tendency to merge alienation and exploitation (for example Crocker, 1972; Holmstrom, 1977; Buchanan, 1979), alienation being seen as containing a clearer sense of the human agent than Marx's later, more technical sense of exploitation as the extraction of surplus value (Arneson, 1981: 203f). One of the problems in interpreting Ferguson sociologically is that he does not have the crude conception of society as a collective whole dominating human agents, which so characterizes much of modern sociology, although

some scholars do imply that Ferguson held such a view (Lehmann, 1930; MacRae, 1969; Swingewood, 1970). As Swingewood notes in much later work on Ferguson, it is the complex relationship between human agents and social structure which lies at the heart of the whole Scottish contribution to sociology (1984: 27). This relationship between agency and social structure is said to be one of the dominant concerns of contemporary social theory (for example see Giddens, 1979: 49-95). In Ferguson's outline of the nature of society he is very topical in that he attempts to explore the influence in social life and practice of both human agency, usually understood and conceived of in terms of human nature, and social structural phenomena, such as class, private property, the division of labour and so on. Materialist and early sociological interpretations of Ferguson have tended to underscore this emphasis in Ferguson on agency. But in Ferguson's outline of the origins of private property, for example, he emphasises the actions, often unintended, of human agents acting in terms of their human nature (for example 1966: 122). The same applies to the origins of the division of labour (1966: 180). Throughout Ferguson's discussion of the social structural characteristics of society he mentions human nature and the actions of agents as one causal factor in their origins. In fact Ferguson roots the origins of society (an issue greatly discussed in this period) in agency and the actions of human agents acting in terms of their basic human nature (1966: Part I, Section III). Although thereafter Ferguson recognises that social structural phenomena come to have an independent effect and often act to constrain and influence human nature and human agency. For this reason human agency (or human nature in Ferguson's terms) is partly a socio-cultural product and partly ahistorical.

It is precisely this interface between agency and social structure which provides the ethical imperative to Ferguson's outline of the conditions described by others as being exploitation. It has been emphasised here that Ferguson conceives of exploitation as economic expolitation, which is ultimately linked to the social division of labour and thus to the character and consequences of commercialism. What provides the ethical imperative to Ferguson's discussion of economic exploitation is that he perceives it, and the social division of labour generally, as having adverse effects on the human agent. It is true that Ferguson describes the effects of the social division of labour (and hence of the economic exploitation embedded in it) as breaking the bands of society (1966: 191,

218, 219). But because of the interaction between agency and social structure in Ferguson's conception of society, this breaking of the bands of society is itself rooted in the notion of agency. There are two effects on the human agent noted by Ferguson. Social structural conditions, such as the social division of labour, private property, class inequality, which involve what others have called exploitation, rebound on the human agent and break the bands of society because they destroy a person's gregarious, sociable and public spirited nature. Social structural conditions come to constrain agency and influence human nature, in this instance destroying the basic facet of human nature which is, Ferguson says, to 'love society' and to make the spirit of society the ruling spirit of human nature (1966: 218).[11] Secondly, these social structural conditions affect human agency because they destroy a person's active, creative, imaginative abilities, which are important elements of agency and were considered by Ferguson to be fundamental aspects of human nature. According to Ferguson people need to be active, creative and be able to employ their imaginative capabilities; we are like meteors which shine only while in motion. Moments of rest are moments of obscurity (1966: 210, also see 215, 217, 219, 221).[12]

With this view of agency, labour plays a considerable part in the fulfilment and realization of human nature. Ferguson did not only see labour as a means by which agency can express itself. He saw public affairs and military involvement as other opportunities for the creative, active and imaginative abilities of people to be given reign. This is why the Essay is concerned about the effects of the specialization of public affairs and the growth of a professional army (1966: 221, 230-35, 256-57, 259, 262, 266-67, 269). These can have equally disasterous effects as the specialization of labour, destroying liberty (1966: 266), encouraging decline (1966: 204f, 249), despotism (1966: 256) and political slavery (1966: 261). Thus, political slavery, as Ferguson calls it, and economic oppression are closely related (1966: 278-79). But Ferguson also considers labour as a source of fulfilment and as an opportunity to realise human potential. He writes in one passage that the value of every person should be computed from their labour (1966: 236). His complaint against mechanical labour is expressed in terms of its affect on agency, destroying, as it does, the opportunity for agents to express their active and creative abilities through labour. It is in this context that

Ferguson draws the distinction between mental and mechanical labour and refers to the latter as leaving workers waste (1966: 180-88). Again Ferguson contrasts with Adam Smith who saw labour as a burden and a sacrifice, with rest being the fit state of man.

The similarity with Marx at this point is worth noting. Marx emphasised labour as the instrument for man's self-creation and fulfilment. For this reason he criticises Smith (1973: 145-49). Marx argued that Hegel saw the human agent as essentially a labouring creature, but criticised Hegel for not seeing the negative side of labour. It is surprising therefore that Ferguson is not cited as a precursor who saw that labour was both essential to the realization of human agency and that it had negative effects which prevented this realization. But there is a more striking parallel between Marx and Ferguson. In the early Marx at least there is an explicit attempt to link the division of labour and human nature, and to examine the effects of the former on the latter.[13] It is for this reason that Marx conceives of alienation as involving alienation from the human 'essence' or 'species being' and he links alienation to the division of labour. Marx uses the term exploitation in the context of the theory of surplus value in his later work. Therefore, in his early works he does not link up exploitation with the division of labour, alienation and human agency. However, modern formulations of the concept of exploitation have claimed that there is an implicit link between all these concepts in the early Marx (for example Crocker, 1972; Holmstrom, 1977). Although Ferguson never uses the term alienation, those later writers who have imposed the concept on Ferguson's discourse, have done so precisely to emphasise that Ferguson perceives the division of labour, and commercialism generally, as having an alienating effect on the human agent, alienating man from his nature.[14]

It is here that the parallel with Marx and later writers on exploitation is clearest. Economic exploitation is integrally linked to the division of labour. Mechanical labour is seen to have an adverse effect on the human agent. This effect is approached through the notion of human nature and can be described as alienation. Herein lies an ethical imperative which sees economic exploitation, and the division of labour to which it is ultimately linked, as harmful, wrong and unjust. In sharing these beliefs with contemporary writers on the theme of exploitation, Ferguson can be considered to be very modern in his

formulation of exploitation, despite never utilizing the term in his discourse.

NOTES

1. One of the puzzles in the history of sociology is why Ferguson was so quickly assigned to obscurity. This issue is briefly touched on by Lehmann (1930: 241f), MacRae (1969: 25-26) and Swingewood (1970: 177). The factors used to explain this decline include the French Revolution, the rise of socialism, the emergence of Social Darwinism, the growth of romanticism and the emergence of the idea of beneficient progress. And unlike Smith, of course, Ferguson was not an exponent of classic political economy and did not champion the ideas of the nineteenth century merchant class.

2. German interest began almost immediately. The Essay was published in Leipzig within a year of its publication in Edinburgh. Ferguson influenced Hegel (Marcuse, 1967: 13-16; cf Lehmann, 1974: 169; Salvucci, 1972), and through Hegel he influenced Marx. The Polish sociologist Gumplowicz considered Ferguson the father of modern conflict sociology. Sombart considered Ferguson highly (1923). In this century there were early studies of Ferguson by Huth and Buddenberg, who saw Ferguson as a precursor of Tonnies. The Essay was reprinted twice in Germany this century before being reprinted in English.

3. This view is mistaken. This paper does not consider this issue directly but does indicate that Ferguson had different views to the classic political economists in respect to the idea of self-interest, the market, labour, civil and political liberty and social progress.

4. For example Marx cites Ferguson in the Poverty of Philosophy, Capital, volume I and the German Ideology.

5. Hence most of the recent debate on exploitation has taken place in philosophy and political science journals. The only exception is the political sociology journal Politics and Society, 11, 1982, which devoted an issue to a critique of Roemer's work on exploitation.

6. Called a 'Treatise on Refinement'. In this draft he outlines many of the themes which later reappeared in the Essay, particularly the adverse effects of commercialism and the division of labour on 'national felicity' and manners.

7. These terms are used interchangeably in the 1767 edition of the Essay, although by the 1814 edition many of the references to 'polished' society had been replaced by the term 'commercial' society. See Duncan Forbes' compilation of varients in the two editions (Ferguson, 1966: 281-90, especially 289).

8. References in Ferguson's later works to the division of labour are more scarce but see, for example, Ferguson's Principles of Moral and Political Science (1792, vol. I: 242, 251, vol. II: 420, 422-24).

9. Pascal mistakenly argues that Smith did discuss the sociological implications of the division of labour (1938: 171), although he does admit that Ferguson's analysis is more thorough (1938: 173).

10. In this critique of luxury Ferguson anticipates Veblen's theory of the leisure class. However Spengler (1959) argues that Mandeville's Fable of the Bees, written in 1714, is a better anticipation. Mandeville's critique of luxury is written in the form of an analogy, whereas Ferguson's is expressed directly.

11. In this sense Ferguson is similar to the whole Enlightenment which viewed human nature in positive terms, either lacking egoistic desires or having these selfish impulses held in check by the more dominant gregarious ones. In this way Ferguson's view of human nature contrasts markedly with Hobbes and with nineteenth century sociology which resurrected Hobbes' view of human nature. On this contrast between the two centuries see Dawe (1970) and de Coppins (1976).

12. Kettler (1977: 439-40) suggests that Ferguson's experiences in the Black Watch Regiment as a chaplain influenced his views on what Kettler calls 'activism', which is what has been called 'agency' here. The hustle and bustle of a busy commercial environment in Scotland at this time also played its part.

13. Some writers claim that beginning with the German Ideology Marx drops ideas like 'human essence' and 'human nature' from his writings (see Rattansi, 1982: 54f, 170f). Others claim that Marx retained an emphasis on human nature, conceived of as a socio-cultural product (Walliman, 1981; Wartenberg, 1982). This argument is not at issue here, for there is agreement that at least in the early Marx there was an interaction between the division of labour, human nature and alienation. It will be shown that Ferguson also sees human nature as partly a socio-cultural product and recognises an interaction between agency, alienation and the division of labour.

14. In this way Ferguson differs from Rousseau who is also seen as a precursor of the concept of alienation. As others have noted (Forbes, 1966: xxxi; MacRae, 1969: 23), Ferguson's discussion is more sociological in that he relates alienation to specific socio-economic circumstances, whereas Rousseau sees alienation as an inevitable concomitant to progress from the original state of nature.

References

ARNESON, R.J. (1981). What's wrong with exploitation, Ethics, 91: 202-27.

BARTOLOMMEI, S. (1979). Forza del 'progretto', potere della 'cirostanze', e teoria del 'progresso' in An Essay on the History of Civil Society di Adam Ferguson, Pensiero Pol., 12: 344-60.

BELIEN, M. (1979). De Schotse verlichting: radicaal en christelijk verlicht, Kleio, 20: 305-14.

BERNSTEIN, J.A. (1978). Adam Ferguson and the idea of progress, Studies in Burke and His Time, 19: 99-118.

BRYSON, G. (1945). Man and Society, Princeton: Princeton University Press. Reprinted in 1968 by Augustus Kelley, New York.

BUCHANAN, A. (1979). Exploitation, alienation and injustice, Canadian Journal of Philosophy, 9: 121-30.

CALVERT, P. (1982). The Concept of Class, London: Hutchinson.

CAMPBELL, R. and SKINNER, A. (1982). The Origins and Nature of the Scottish Enlightenment, Edinburgh: John Donald.

CHITNIS, A.C. (1976). The Scottish Enlightenment: A Social History, London: Croom Helm.

CLARKE, S. (1982). Marx, Marginalism and Modern Sociology, London: Macmillan.

COLLINS, R. and MAKOWSKY, M. (1972). The Discovery of Society, New York: Random House..

CROCKER, L. (1972). Marx's concept of exploitation, Social Theory and Practice, 1: 201-15.

DAWE, A. (1970). The two sociologies, British Journal of Sociology, 21: 207-18.

DAHRENDORF, R. (1973). Homo Sociologicus, London: Routledge and Kegan Paul.

DE COPPINS, P.R. (1976). Ideal Man in Classical Sociology, London: Pennsylvania State University Press.

ELSTER, J. (1983). Exploitation, freedom and justice, in Pencock, J.R. and Chapman, J.W., Marxism, London: New York University Press, 272-304.

FERGUSON, A. (1966). An Essay on the History of Civil Society, Edinburgh: Edinburgh University Press.

FERGUSON, A. (1769). Institutes of Moral Philosophy, Edinburgh.