

# **Privacy in a Transparent Society**

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### **Abstract**

In this essay I argue that it is logically and practically possible to secure the right to privacy under conditions of increasing social transparency. The argument is predicated on a particular analysis of the right to privacy as the right to the personal space required for the exercise of practical rationality. It also rests on the distinction between the unidirectional transparency required by repressive governments and the increasing omnidirectional transparency that liberal information societies are experiencing today. I claim that a properly administered omnidirectional transparency will not only enhance privacy and autonomy, but can also be a key development in the creation of a society that is more tolerant of harmless diversity and temperament in its punishment of anti-social behaviors.

### **Biography**

G. Randolph Mayes is an Associate Professor in the Department of Philosophy at California State University Sacramento. He is the author and co-author of various articles in social and legal philosophy and the philosophy of science. His most recent major publication relevant to the current one is “Reconstructing the Right to Privacy” co-authored with Mark Alfino in the journal *Social Theory and Practice* (2003)

## Privacy in a Transparent Society

### 1. Introduction

In a perfectly transparent society control over personal information is impossible. This is a conceptual truth, one that seems to entail that social transparency is a condition in which the right to privacy is necessarily compromised. If this is correct then it is reasonable to associate the increasing transparency of information societies with a decreasing respect for the right to privacy. Assuming privacy is a fundamental moral right, this is nothing to celebrate.

I argue here that this view of the transparent society is mistaken. It is logically and practically possible to respect the right to privacy while maximizing the benefits of transparency. I also argue that a properly administered transparency can be the source of greater tolerance of individual differences and restraint in the treatment of wrong doers.

Key to this essay is an analysis of the concept of privacy that succeeds in preserving its status as a fundamental moral right. I argue that the right to privacy consists neither in a general right to be let alone nor a specific right to control personal information.<sup>1</sup> Rather, it is best understood as a right to a personal space in which to exercise ones practical rationality without interference from others.

## 2. The nature of transparency

Almost anyone who has come to depend on the internet, cellular technology and satellite communications for personal or professional purposes will stipulate that transparency is in some ways a wonderful thing. The ease with which we now communicate, conduct business, inform and entertain ourselves is something that few would actually be willing to trade for a simpler way of life.

The problem with transparency is that it makes *all* forms of information easier to acquire, including things that are, from a simpler point of view, none of our business. In the past, the practical barriers to collecting such information were generally sufficient to discourage it. But these barriers have eroded alarmingly over the last several decades, and we are now faced with a choice: shore up the barriers or “get over it” (as Sun Microsystems CEO Scott McNealy famously advised) and accept our increased exposure as a *fait accompli*.<sup>ii,iii</sup>

Although strong advocates of social transparency applaud McNealy’s advice, it is important to understand that, like transparency itself, transparency advocacy comes in degrees. The most hyperbolic form of it- rejecting all legal restrictions on the acquisition of information- is absurdly anarchic and certainly not a constructive position for managing current social realities. For the purposes of this paper I assume that an advocate of social transparency accepts something like the following more moderate position:

*The increasing availability of information about the activities of private citizens, private businesses, and government agencies is generally a good thing and the burden of proof should always fall on those who believe that it is necessary to restrict access to this kind of information.*

This view of transparency is similar to a moderate stance on personal liberty: It is not that personal liberty must never be restricted; rather, it is just that in a liberal society the burden of proof always falls on those who advocate such restrictions. Although I basically accept this stance on transparency, this essay should not be read as an argument in support of it. It is principally an argument in support of the view that the social benefits of transparency can be achieved without compromising our right to privacy.

### **3. Privacy as a fundamental moral right**

I assume here that privacy is a fundamental moral right. By this I mean that the right to privacy can be derived from considerations of personal autonomy, the cornerstone concept of the rights framework. Put differently, I assume that some degree of privacy is *necessary* for an individual to satisfy the requirements of autonomy.

I stress the term “necessary” here in order to distinguish this condition from a pragmatic one such as would result from substituting a word like “useful” or “desirable”. Wealth and social standing both facilitate autonomy, but we assert no right to such goods because

we are capable of exercising our autonomy in their absence. In general, I take fundamental moral rights to be those the violation of which is properly described as a *hindering* the exercise of one's autonomy, not those that simply fail to promote it.

None of what I say in this essay should be interpreted as rejecting the validity or importance of a more socio-psychological notion of privacy, of which there are many.<sup>iv</sup> I agree that there are ways of using the term that, while failing to secure privacy as a fundamental moral right, do successfully characterize it as a good worth striving for and perhaps even securing by legislation. My claim here is only that there is an important sense in which privacy is a fundamental moral right (henceforth, simply "right"), and that this right is compatible with, and even promoted by social transparency.

#### **4. The right to be let alone**

Although privacy was originally characterized as the "right to be let alone," today it is also commonly defined as the right to control personal information.<sup>v,vi</sup> These are distinct notions, but they are connected in this obvious way: the attempt to acquire a person's private information may result in an unwarranted intrusion into her private life.

Specifically, we may disturb this individual in our act of acquiring the information we seek, or we may go on to use this information in a way that disturbs her.

On this point of view the right to be let alone is clearly the more fundamental notion. The act of acquiring personal information will result in a privacy violation only if it has some

disturbing effect. Of course, transparency is the condition that permits one to acquire personal information about others *without* disturbing them. So on this view transparency threatens the right to privacy only insofar as it enables one to disturb or otherwise harm individuals with the information it makes accessible.

Several well documented difficulties arise for this view of privacy.<sup>vii</sup> The most basic of these is that there is no fundamental right to be let alone. By this I mean that most instances of people failing to let other people alone either (a) do not violate autonomy at all or (b) do violate autonomy, but are best understood as violations of other fundamental rights. Consider the following examples:

1. You sit next to me on a public bench after I have forbidden you from doing so.
2. You sit next to me on a public bench after I have forbidden you from doing so and begin singing badly.
3. You sit next to me on my own porch after I have forbidden you from doing so and begin singing badly.
4. You sit on me on my on my own porch after I have forbidden you from doing so and begin singing badly.
5. You sit on me on my own porch and begin singing badly while beating my brains in with a mallet.

All of these are clear examples of a failure to let a person alone. In cases (1) & (2) there seem to be no rights violations at all, as I have no right to prevent you from sitting next to

me on a public bench or from singing in my presence. Cases (3)-(5) are also examples of the failure to let a person alone, and they seem to involve clear rights violations as well. But they do not require us to acknowledge a right to privacy. Rather, the violations seem to be adequately characterized by reference to the right to property, the right to liberty, and the right to life.

This difficulty extends to failures to let a person alone as a result of acquiring personal information. If, for example, I acquire the password to your PayPal account and proceed to enrich myself thereby, this violation is adequately accounted for by reference to the violation of property rights. Of course it is against the law to collect passwords, and it is common to describe this as an act of theft, whether or not it is followed by unauthorized withdrawals. But it is not obviously coherent to speak of a short sequence of numbers or letters as a piece of property, and there is really no need for it since the criminality of acquiring a person's password without permission is adequately explained in terms of conspiracy or endangerment. In any case, the main point here is the same as above. A fundamental right to privacy need not be invoked to explain the violation of rights that may occur as a result of acquiring personal information.

## **5. The right to control personal information**

If there is no right to be let alone, then we seem to have lost our connection between personal information and the right to privacy. A simple way to preserve this connection is to assert that the right to privacy just *is* the right to control personal information. On this

view, there need be no resulting disturbances of the sort required by a right to be let alone. I would violate your right to privacy by the simple act of acquiring your account password or any other certifiably private information.

Most people in liberal societies do experience a strong sense of violation when they discover that others have been snooping into their private affairs. This is at least some evidence of a right to control personal information. But this sense of violation is easily explained as above: we fear the harm that may result. In order to justify the claim that there is a right to control personal information, we must have a reason for thinking that we violate the autonomy of another by the simple act of acquiring such information, *regardless* of possible consequences.

Again, there simply is no such right. There is only one sense in which you might be said to violate my autonomy by the simple act of acquiring personal information against my will, and that is in the very fact that you are acquiring my information against my will. But in the absence of reasons for thinking personal information is special in this regard, such an act no more violates my autonomy than if you were to sing a song, ride a bicycle or bake brownies against my will. Any other alleged violation of autonomy stemming from knowing personal information would have to be the result of either doing or threatening to do something with this information.

Here is a way to appreciate this point at an intuitive level: Imagine a benign voyeur, a curious being who has the means of knowing everything about you, but who is incapable

of doing you harm, or of communicating this information to anyone who might. No rational person who grasps the nature of such a being could be disturbed by its existence for long. One may, of course, be reasonably disturbed by any real world approximation of such a being (e.g., a benign social scientist or detective) but, again, this makes sense only because we have a reasonable fear of consequences they may be helpless to prevent.

## **6. Knowledge and it's suppression in a liberal society**

Note that in establishing that there is no right to control personal information we made no assumption concerning whether control of personal information is in general a good thing or a bad thing. Let's be clear that it is neither. Some control of personal information is essential to our personal security; too much control enables disastrously antisocial behavior. Plato, Tolkien and others used the legend of the Ring of Gyges to dramatize this latter point: even for the just man, total control of personal information (invisibility) is a sure path to moral depravity. Contemporary authors like Gerstein and Inness have emphasized the former, arguing that intimacy and selfhood both depend on the ability to share our thoughts and feelings with a select few.<sup>viii ix</sup>

Even if we can not reliably generalize on the morality of knowing personal information, we can reliably generalize on the morality of knowing itself. Knowledge is generally a good thing. Liberalism depends on creating it; totalitarianism depends on suppressing it. Hence, when citizens of a liberal society accept that something like personal information,

should *not* be known, it must only be as a comparatively rare and defeasible exception to the rule that knowledge is good and its suppression is evil.

It is important to emphasize this simple point, if only because most of us do not instinctively place the control of personal information in the same category as censorship, clandestine government projects, and other inherently problematic forms of knowledge suppression. We correctly think of protecting our personal information as an essential survival skill. But it is important to realize that protecting personal information is no more generally a good thing for society than any other form of knowledge suppression. Out of concern for your own safety it may be legitimate for you to know things about me that I consider none of your business: my viral load, my blood alcohol content, my social attitudes, my religious beliefs. Out of normal curiosity about your fellow man it may be legitimate for you to know much else: my salary, my birthplace, where I got my bicycle, or whether I am currently online. No amount of my understandable desire that you should not know such things will add up to my *right* that you should not.<sup>x</sup>

## **7. Privacy as the right to exercise practical rationality**

Alfino and Mayes argue that the right to privacy is best understood as the right to control the space in which we think.<sup>xi</sup> More precisely, it is the right to exercise our practical rationality without undue interference. I believe this view provides a useful analysis of the right to privacy. In order to motivate it we need adequate answers to these two

questions: (1) Is there such a right? (2) Why should we associate it with the right to *privacy*?

***7a. Is there a fundamental right to exercise our practical rationality?***

From the standpoint of liberalism, society is a cooperative relationship between autonomous beings. The fundamental agreement is to respect the liberty of other people and to avoid harming or endangering others in the exercise of ones own. Respect for liberty entails no right to aid. Autonomous beings are not strictly obligated to come to the assistance of other autonomous beings, however compelling the moral or pragmatic case may be for doing so. Hence, liberalism clearly assumes that society is composed of individuals who are reasonably self-sufficient.

This requirement of self-sufficiency is indefensible if the means for achieving it are denied. Clearly the most basic requirement of self-sufficiency is the exercise of our practical rationality. Without it we are helpless to learn, deliberate, or make rational decisions. Hence, it follows that individuals in a liberal society have a right to exercise their practical rationality without undue interference.

***7b. Why should the right to exercise practical rationality be identified as the right to privacy?***

There are two parts to this question. (i) Does this way of using the term square with our basic intuitions about the meaning of privacy? (ii) Does this analysis preserve privacy as a distinct moral right?

(i) Although there is no general right to be let alone, the claim that there is has great intuitive appeal. One way of explaining this appeal is to note that it expresses the common intuition that we are always entitled to a bit of *personal space*. But what is personal space, such that it should be so completely portable? It can not be the space that human beings share with all other physical objects in the universe, for the amount of physical space to which humans are entitled varies according to the social context. Even if there were a minimum physical space to which every human is entitled, say on an elevator or public transit, this is not what the right to privacy is about.

In the context of a discussion about rights, personal space is best understood as the space required by the entities to which rights are attributed, viz., persons. Personal space, in other words, is best understood as the space needed by free, rational, and equal human beings for the exercise of their autonomy. Whether personal space is regarded as a useful fiction (like hyperspace, cyberspace, conceptual space, etc.) or granted a place in our ontology doesn't matter much to me here. I introduce it mainly to cement the intuitive connection between privacy and the exercise of rationality. (We can agree that Cartesian

assumptions concerning the privacy and freedom of the mind are flawed while still acknowledging that this is the tradition from which our basic intuitions about the nature of personhood arise.)

(ii) Understood as the right to exercise our rationality, the right to privacy might be reasonably construed as an aspect of the right to liberty, viz., the liberty of thought. But this is only true because rights generally can be conceived as certain kinds of individual liberties. When we think of the liberty of thought and expression in a way that distinguishes it from other rights what we normally have in mind is the *content* of our beliefs and ideas.

Of course, we are not bound by traditional usage. One may reasonably claim that the right to liberty covers activities of any sort, including mental activity, constrained, of course, by the usual considerations of harm or possible harm to others. The exercise of our rationality is a mental activity, so it is covered under this intuitive extension of the principle of liberty.

The reason for resisting this way of thinking is this: rationality is special. As opposed to other aspects of mental activity, a person's rationality is what makes his participation in liberal society possible. Hence, we view interfering with a person's practical rationality as a much greater harm requiring far greater justification than interfering with his ability to have certain kinds of experiences (e.g., the experience of having sex with minors, the experience of methamphetamine acting on our serotonin receptors, the experience of

blowing oneself up in a crowded marketplace, etc.) Although it is certainly permissible to interfere with a person's rational planning when the plans being made are anti-social in nature, in a liberal society the preferred methods for doing so involve a fundamental appeal to, not an interference with, a person's rationality.

### **8. Implications for the control of personal information**

On this way of thinking about privacy the question whether we violate a person's privacy by obtaining personal information is the question whether we thereby interfere with the exercise of her practical rationality. The answer is that we do not. Just as with the more general notion of the failure to let a person alone, one does not interfere with the practical rationality of another *simply* by acquiring information about her. One of two further conditions must be satisfied before interference with practical rationality is even a logical possibility: (1) She must become aware that someone has acquired information about her; (2) Someone must use this information in a way that interferes with or delimits her actions in some way.

It is slightly amusing to consider that on this view the principle moral obligation of the voyeur is to avoid detection. But it's important to see that this is no *reductio*. Consider the act of staring. It's palpable rudeness consists in the fact that it may be noticed and that it will be disturbing to the individual of interest. Although society requires us to know much much about our fellow citizens, the freedom to observe comes with an obligation not to intrude unnecessarily into the personal space of the person of interest.

Intrusive forms of observation not only undermine rationality by inducing fear in the subject, but they undermine the very goals of observation by inducing a set of behaviors that occur only because the subject knows herself to be the object of our attention.

Above we argued that there is no need to assert a right to be let alone or a right to control personal information in order to account for the rights violations that may result from disturbing or snooping on others. This point might be made here as well, but as we have good independent grounds for regarding the exercise of practical rationality to be a fundamental right, it will not have the same force. This notion of privacy adds an important dimension to our understanding of the harm done by a variety of offenses. For example, a significant aspect of the harm associated with crimes like harassment, extortion, stalking, blackmail, hate speech and identity theft is the degree to which they can compromise the victim's rationality.

## **9. Unidirectional transparency and Orwell's dystopia**

It should now be clear that the right to privacy is at least *logically* compatible with social transparency, since it is logically possible to have access to the personal information of others without interfering with their practical rationality. But it is also clear that transparency can easily enhance our ability to violate privacy. This is a happy result since it is essential to the plausibility of this argument that our reworking of the concept of privacy does not make demonstrating the practical compatibility of privacy and transparency any easier.

We may begin this task by briefly recalling that in his influential novel *Nineteen Eighty-four* George Orwell famously imagined a dystopia named Oceania which instantiated a certain form of transparency that seriously undermined the practical rationality, hence privacy, of its inhabitants.<sup>xii</sup> The transparency within Oceania is unidirectional: information about the activity of private citizens flows from the citizens to the Thought Police and ultimately to Big Brother via microphones and telescreens installed in every living space. This unidirectionality is insured by a rigidly hierarchical single-party oligarchy.

Orwell's depiction of a society in which the technologies of mass surveillance are concentrated in the hands of government is plausible enough, but it suggests nothing concerning whether increasing transparency within a liberal democracy is likely to *result* in such conditions. In fact, this claim does not have much *prima facie* plausibility at all. In our world, surveillance technologies are not developed by government corporations, but by private industry. These corporations have enormous interest in marketing their product to private consumers, since they supply the bulk of the demand. If Orwell were to have equipped Oceania with cellular smart phones, only the thought police would have had them. Google would be controlled by Big Brother. But the economy of Oceania probably would never have developed cell phones or internet search engines in the first place. We now have ample reason to believe that a free market is needed to provide the incentive structure for this degree of scientific and technological innovation.<sup>xiii</sup>

## 10. Privacy and omnidirectional transparency

So our legitimate concerns about privacy are not properly framed in Orwellian terms. The compelling question for us is whether an increasingly *omnidirectional* transparency is a significant practical threat to the right to privacy. Ours is a society in which the activities of private citizens, multi-national corporations, and government are *all* becoming easier for *anyone* to observe. Is this fact alone likely to inhibit the exercise of our practical rationality?<sup>xiv</sup>

It may appear so, but the truth is that almost any example one can produce in support of this view will involve the assumption of unidirectionality. For instance, I may find it extremely troubling that my personal medical history is something you may acquire with moderate skill from the safety of your living room. But, given that this is an illegal activity, what really troubles me is that you can do so without being caught and punished. This point applies *mutatis mutandis* to examples of personal information illicitly collected by insurance companies, marketing agencies, and various branches of government. The problem is never *everyone's* transparency; the problem is always *someone's* opacity.

If this like a facile response, it may help to reflect briefly on something more concrete. Consider the fact that many felonies, like robbing the local mini-mart, are not terribly difficult to commit. Getting away with it is the problem, and the likelihood of being

caught is usually a powerful disincentive. Generally speaking we need to erect physical barriers to wrongdoing when the probability of detection is insufficient to deter its occurrence. This, I think, is what we initially fail to grasp about the reality of transparency. In a transparent society it may be as easy to break into a bank account as it is to break into a storefront window. But the impulse to prevent such crimes by restricting the technology that enables them may make no more sense than restricting the possession of bricks. A more enlightened approach may be to insure that the perpetrators of such crimes are just as vulnerable to the technology as their victims.

That said, one might still have a distinct preference for restricting the technology. After all, either of these approaches would eliminate the problem if they could be implemented successfully. Of course the restriction gambit encounters all the problems associated with opposing products for which there exists such extraordinary demand. But perhaps the strongest reason for opposing this alternative is Orwellian. The most effective way for the state to detect the private use of sophisticated information technologies is by granting itself relatively unrestricted access to them.

### **11. Does transparency induce irrationality?**

There is still another objection to social transparency that is not predicated on unidirectionality. It is that even if specific acts of observation do not themselves interfere with or ultimately bring harm to the members of a transparent society, living under conditions of transparency means that they may always reasonably suspect themselves to

be the subject of observation, and this is bound to distort what would otherwise be private behavior.

Let's begin this discussion by stipulating that normal people are concerned about how other normal people perceive them, and that this fact is not fully explained as a practical concern about future encounters with these people. Awareness or suspicion that we are being observed by real people (as opposed to perfectly benign voyeuristic beings) can cause us to worry about how we appear to them and this inhibits us in ways that may reasonably be described as interfering with our practical reason.

Many authors have emphasized the importance of a private space as a place of refuge from public scrutiny. On this way of thinking, privacy not only insures the free exercise of practical rationality; it provides room to relax and let ones hair down a bit as well. Our personal space is a place where it is safe to give often quite exaggerated expression to our thoughts and feelings, and to share them exclusively with people whose discretion and understanding we have come to trust.<sup>xv</sup>

This valid concern must of course be balanced against the tremendous good that can accrue through increased transparency. The conditions needed to establish a trusting relationship with intimates are, after all, precisely those required to perpetrate the most horrifying breaches of trust, such as spousal and child abuse, rape, and sexual predation. But my main claim in this essay is not that transparency involves a reasonable sacrifice of privacy for the purpose of optimizing other social goods. Rather, it is that transparency

is logically and practically compatible with a respect for privacy. The claim under consideration here is that our awareness of the condition itself tends to undermine this right.

I think the best response to this is as follows: How people experience social transparency depends on what they believe its effects to be. If members of a society are generally satisfied that increased transparency results in significant net gains in liberty, safety, and toleration of individual differences then this belief itself will protect privacy by facilitating their ability to function rationally under conditions of transparency. However, if they believe the opposite then their privacy will just as surely be undermined as a result.

Of course any privacy we gain from our belief that transparency is a benign condition would ultimately be lost if the belief were false. Any society whose members are duped into thinking they are better off as a result of transparency has instantiated the conditions necessary to produce the Orwellian nightmare. On the other hand, a society whose members irrationally and falsely believe that it can only be made be *worse off* by transparency are equally in danger of producing Popper's "Oedipus Effect." Our very belief that transparency compromises our privacy insures that it is so.

## **12. Imagining privacy in a transparent society**

It is essential, then, to try to fathom the nature of a transparent society whose members are alive to ways that transparency may be abused, but who are not convinced on a priori,

metaphorical, or literary grounds that transparency is itself intrinsically dehumanizing. This is a large task, but here are a few relevant considerations.

First, it is important to understand that the inhibitory effect of transparency on the members of a society who are accustomed to a great deal of control over personal information can not be reliably projected into a transparent society. People do in fact get used to their exposure, and indeed one of the most striking facts about internet behavior is how many people seem actively to seek it. The most natural explanation of the extraordinary popularity of services like MySpace, Facebook, and YouTube is that normal people- not just a perversely exhibitionist minority- do desire very much to be known by strangers.

The common idea that people are naturally inhibited by the thought of exposure to other people who they do not know, has its counterpoint in the observation that we are often quite a bit more comfortable confiding in strangers than intimates. There are good reasons for this. One is that we often do not expect to see the stranger again. (Hence, we do not expect her to interfere with our practical rationality.) Another is that strangers, by virtue of their disinterested perspective, are often better capable of aiding our rational decision making by giving us more objective advice. So in fact we sometimes reveal ourselves to strangers in an effort to enhance and protect our privacy.

Second, our initial discomfort at being observed is sustained mainly by the suspicion that the audience is hostile or unsympathetic. But this suspicion is far more likely to be

accurate in a society whose members can easily block access to their personal affairs. In a liberal society a widespread critical attitude toward the harmless self-regarding behaviors of others is sustainable only to the extent that these behaviors can plausibly be represented as abnormal. Under conditions of increasing transparency the behaviors that once aroused social interest become entirely ordinary and unremarkable.

Of course many people mark this very feature of transparency as its principle defect. They claim that transparency undermines autonomy, individuality, creativity and intimacy by erasing the division between the public and private sphere. But the simple fact of transparency does not in any way violate this distinction. Indeed it is just as plausible to assert that transparency *reinforces* our respect for this distinction. If we are all capable of observing the behavior of others under conditions of intimacy, we should predict a more realistic understanding of human behavior to emerge, as well as a greater appreciation for the importance of discretion. Those who do not achieve it, like gawkers at a nude beach, expose themselves as social incompetents.

Third, the prospect of transparency induces social anxiety because people believe that transparency increases the *likelihood* that their behavior will be observed. This seems like a perfectly reasonable assumption, but again transparency can actually have exactly the opposite effect. This is easy to appreciate by imagining a transparent context in which you actively advertise your personal information, for example when competing for a position with a thousand other applicants. From an individual point of view the most

vexing thing about universal transparency is not ones increased exposure, but rather the difficulty of getting noticed.

### **13. The transparency paradox**

The suggestion that privacy is best protected under conditions of transparency is what Daniel Weitzner has recently called the “transparency paradox”.<sup>xvi</sup> Of course, it is paradoxical only when we think of privacy as the restriction of personal information. When we think of it as the personal space required for the exercise of practical reason, it becomes an interesting, if somewhat counterintuitive hypothesis.

The standard approach to protecting privacy is to prevent information from getting out into the world. We use firewalled computers, security enabled networks, security encrypted webpages, anonymizing software, etc. as a way of creating what cryptographers call “security through obscurity.” But, (as we noted briefly in section 10) this lock and key approach may be inherently incommensurate with the task of protecting privacy in an increasingly transparent world. Weitzner argues that one of the most important tools for protecting privacy is “active transparency”; making personal information more readily available so that its illicit use can be more easily discovered.

The case for active transparency in the business world is easily stated. In an increasingly transparent society, investors can reasonably insist on being provided with corporate information that is relevant to their investing decisions. Actively transparent businesses

gain greater investor confidence, actively obscure businesses lose it. Consumer transparency benefits everyone as well. Businesses with access to consumer buying habits are in a better position to know what sort of products they should create. The less time and effort they need to put into this sort of research, the more efficiently they can be developed.

Although Weitzner does not specifically argue for greater government access to personal information, he does argue that active transparency can result in greater gains in personal privacy. This depends on implementing transparency at the government level for the purpose of restricting how information is actually used. For Weitzner, the most important form of governmental transparency is transparency with respect to the *inferential* procedures employed in gathering evidence. If the Fourth Amendment is currently too restrictive in terms of what the government should be allowed to know, it is insufficiently restrictive with respect to how this knowledge may be used.

Just as transparency enables investors to insist on more information about corporate activities, it makes it increasingly legitimate for citizens to expect government to produce a full accounting of the inferential process which resulted in government interference in our daily lives. This makes it increasingly practical to permit government access to personal information for one purpose (e.g., suspicion of terrorist activity) while forbidding it for another (e.g., illegally downloaded music files or private e-mails detailing a cocaine habit).

To put the point more generally, our desire to restrict government access to information for the protection of privacy and other rights is partly due to the assumption that once information has been legally acquired, it is liable to be used for any legitimate government purpose. But in a transparent society we have the technological means to protect privacy by exchanging freer access to information for greater restrictions on its use.

#### **14. Transparency and the future of liberalism**

Orwell's Big Brother enjoyed complete control of the information network. The Ministry of Truth did not have to contend with anything as unruly as the World Wide Web. Citizens of Oceania had no videophones with which to report or record the activities of the Thought Police. Despite these striking dissimilarities between our world and the world of *Nineteen Eighty-four*, attitudes toward transparency remain surprisingly Orwellian in nature.

But Orwell's apocalyptic vision should frighten us only in its capacity to be self-fulfilling. In falsely believing that transparency leads to oppression, we could make the colossal mistake of accepting restrictions on knowledge acquisition that would provide the kind of secrecy required to cause the most extraordinary harm to humankind.

Understood for what it *is*, rather than what it has come to *mean*, social transparency may be as fundamental to liberalism as liberty itself.

To see this, we need only revisit our earlier reflections on knowledge. Access to knowledge is essential to autonomy, and hence to every value we derive from it. Ignorant people are not free. Equal treatment implies equal access to information. Private ownership and enterprise depends on people knowing the value of the products they create and trade. And of course the value of knowledge itself depends on our privacy, i.e., our uncompromised practical rationality.

Tolerance is the one liberal value that might appear to escape this analysis. Isn't it in fact *easier* to tolerate strange or repulsive practices the less we know of them? Indeed isn't the very point of informational privacy to encourage tolerance?

But this is a serious confusion. If I were a gay man and you an intransigent homophobe, then a tolerable relationship between us may depend on your ignorance of my sexual orientation. But you are not thereby *tolerating* my homosexuality, for logically you can not tolerate that of which you are unaware. Indeed, wherever ignorance of individual or cultural differences makes it easier for people to get along, it is only because of an underlying intolerance of these differences. Tolerance, as a liberal value, is not ignorance in the service of peaceful relations. Rather, it is a commitment to peaceful relations given full knowledge of our differences.

A similar point applies to our ability to discourage anti-social behaviors in a humane manner. We punish these behaviors largely for the purpose of deterring them, and we usually regard punishment in excess of what is required to deter as unnecessarily cruel.

But the deterrent capacity of a punishment is directly proportional to the perceived likelihood that the perpetrator will be caught. (Ideally, a fine certain of 100 dollars should deter to the same degree as a 1% likely fine of 10,000 dollars.) The greater the social transparency, the more likely it is that our crimes will be detected. Hence, the more social transparency, the less severe our punishments need be.

## 15. Conclusion

In this essay I've argued that it is logically and practically possible to respect the right to privacy in an increasingly transparent society. This result depends on a particular analysis of the right to privacy, one that is based on the requirements of autonomy rather than the advantages of secrecy. It also rests on an appreciation of the social benefits of omnidirectional transparency and the harm that may be done by laws designed to enforce public ignorance. Although the positive value we attach to knowledge means that the burden of proof must be on those who wish to restrict access to information, I think it is clear that this burden is easily borne in many cases. For such cases the important point to appreciate is that transparency is not an impediment, but an ally in the protection of privacy. Specifically, because a properly developed transparency will enable us to identify the perpetrators of information-related crimes, it can enable us to protect privacy in a way that does a minimum of violence to our liberal and humanitarian values.

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<sup>i</sup> See, for example, Mark Alfino and G. Randolph Mayes, "Reconstructing the Right to Privacy," *Social Theory and Practice*, 29.1 (2003) 1-18.

<sup>ii</sup> Several articles and books provide ample evidence of this. See, for example Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America*. (Random House, 2000)

<sup>iii</sup> McNealy's infamous comment was made verbally to a group of reporters in January of 1999.

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<sup>iv</sup> See, for example Ruth Gavison, "Privacy and the Limits of the Law," *Computers, Ethics, and Social Values*. eds. Deborah Nissenbaum and Helen Johnson. (Uppers Saddle River, New Jersey: Prentice Hall, 1995).

<sup>v</sup> The "right to be let alone" was first defended in Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy." In Schoeman, Ferdinand David, ed., *Philosophical Dimensions of Privacy: An Anthology*. Cambridge, Massachusetts: Cambridge University Press, 1984: 75-103.

<sup>vi</sup> For an extended treatment of informational privacy see Alan Westin, *Privacy and Freedom*, (New York, Atheneum: 1967).

<sup>vii</sup> Judith Jarvis Thomson, "The Right to Privacy," *Philosophy & Public Affairs*, 4.4 (1975): 295-314.

<sup>viii</sup> Robert Gerstein, "Intimacy and Privacy", *Ethics* 89 (1978): 76-81.

<sup>ix</sup> Julie Inness, *Privacy, Intimacy and Isolation*, (Oxford: Oxford University Press, 1992)

<sup>x</sup> This point is further elaborated in K.A. Taipale, "Technology, Security and Privacy: The Fear of Frankenstein, the Mythology of Privacy and the Lessons of King Ludd". *Yale Journal of Law and Technology*, Vol. 7, No. 123 (2004)

<sup>xi</sup> Alfino and Mayes, op. cit.

<sup>xii</sup> George Orwell, *Nineteen Eighty-Four: A novel*. (New York: Harcourt, Brace & Co.: 1984)

<sup>xiii</sup> This point could be made quite a bit more strongly. See, for example Richard Muller, "Who's Afraid of 1984?" in *Technology Review* July 12, 2002.

<sup>xiv</sup> This point is made and explored in copious detail in David Brin, *The Transparent Society: Will Technology Force Us to Choose between Privacy and Freedom?* (Perseus Books: 1998)

<sup>xv</sup> For example James Rachels, "Why Privacy is Important", *Philosophy and Public Affairs* (1975) 4: 323-33

<sup>xvi</sup> Daniel Weitzner, "Openness as a Privacy Protection Strategy," *Computerworld*, May 25, 2004.