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Commentary on Financial Privacy

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COMMENTARY ON FINANCIAL PRIVACY

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I was delighted to be asked to comment on Peter's paper. I read his book *None of Your Business*[1] in December and found its treatment of the European privacy directive fascinating. It gave me a great respect for Peter's knowledge in the field. There is a lot good about the paper we are here to talk about today. But it is more fun to look at the other side, the criticisms. I am going to deal with three of them. They all unify in one way. Peter is, as his new position advertises, the chief council for privacy. I want to take the role here today of chief council for information.

My three criticisms are this: First, Peter frames the problem as privacy versus government surveillance, thus ignoring the best solution to the problem, which is to make more information public. Second, Peter exaggerates the human need for privacy by presenting the need as immutable and essentially coextensive with embarrassment. People do not need nearly the privacy they think they do. Third, if Peter's broad view of privacy holds, then you can forget about the information age.

Back to the first one. Why are we comparing privacy with a government monopoly on information? Peter correctly points out that making money fully traceable would make taxes fair and enforceable and would wipe out money laundering and with it probably organized crime. It would have a number of other beneficial effects. It would essentially produce a utopia.

Then he notes the problems with full tracebility and the problems dwarf those advantages. Government will use the information repressively. Government agents will use the information for blackmail, extortion, and personal gain. Some of the information will inevitably be leaked from the vault six hundred feet below. With only privacy or government monopoly on information as the two alternatives to choose from, most of us, including myself, would choose privacy. But the best alternative to privacy is not government surveillance; it is an open society in which everyone, not just government, has access to information. When information is already public it cannot be used for repression, nobody can blackmail or extort anybody with it, and it cannot be leaked. But it still gives all those advantages that Peter cites for government surveillance. The only casualty of an open society

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1. PETER P. SWIRE & ROBERT E. LITAN, NONE OF YOUR BUSINESS: WORLD DATA FLOWS, ELECTRONIC COMMERCE, AND THE EUROPEAN PRIVACY DIRECTIVE (1998).

would be privacy.

That leads to my second point. In Peter's view, and I think this is the view expressed in most of the literature, making more information public is undesirable because it would erode privacy. By that view privacy is a basic human need the shape of which remains constant over time. To determine that shape all you have to do is ask people what revelations about them would embarrass them, what would send a chill down their spine. Peter's great opening sentence, "How would you like the government to have access to the records to every purchase you have ever made?"[2] and his example of the requirement of fingerprints for cashing a check illustrate this view.[3] Peter notes that some people will feel an invasion of privacy and a loss of autonomy from having to participate in a fingerprint system. This is not a prelude to Peter's argument against fingerprints; this *is* Peter's argument against fingerprints. In Peter's view, these vague feelings of fear or embarrassment define the human need for privacy. The advocates for information are simply supposed to work around that basic human need.

In my view, which is admittedly the minority view, embarrassment and chill are just natural reactions to change. When no basis exists for a particular embarrassment or chill people quickly get over them. Think back to when somebody first explained to you what people did when they had sex. It was terrible, but I got over it. By Peter's reasoning in this paper, we would survey a bunch of preteens and if they told us that sex was yucky, we would ban it.

Assume people do feel fear and embarrassment at being fingerprinted. Of course, most of us were fingerprinted for the bar. But putting that aside, and I do not doubt that a lot of people will feel fear and embarrassment, why should we take that embarrassment seriously? Or why should we take seriously people's fears about having Internet purchase information revealed? I do not mean this as a rhetorical question. I am interested in good sound reasons why I should not know what you bought at the store yesterday. Privacy advocates think that people are hard-wired for the privacy that they want today. As we attempt to enter the information age, the privacy advocates say they want to maintain the status quo. Think about that, what it would mean to maintain the status quo. It means no more information, and that is exactly what Peter advocates in his paper. He even uses the term "status quo."[4] How do we make sure that the new technology does not reveal more information than the old technology did?

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2. Peter P. Swire, *Financial Privacy and the Theory of High-Tech Government Surveillance*, 77 WASH. U. L.Q. 461, 461 (1999).

3. *See id*. at 476.

4. *Id*. at 491.

In every age, technology determined what would be private and people adjusted to that. When the cockpit recorder was introduced pilots expressed concerns about the recording of everything that they said. But within ten years we could listen to pilots on television perfectly at ease telling dirty jokes, openly ignoring the landing procedures in the moments before they whacked in short of the runway killing everybody on board. The pilots were dead, but they were not chilled by the tape recorder. Richard Nixon handled the tough job of the presidency of the United States with a tape recorder running the whole time. He *did* expect that people were going to later hear what was said.

Do you really care about the security cameras at the mall? These are yesterday's embarrassments, and we get over those embarrassments. We go through medical examinations that previously would have been considered eggregious violations of privacy. What is the difference? The difference is technology. Today's medical technology can do something for you if a problem is discovered. So what we do and what we have been doing constantly over time is redefining privacy. Now a doctor can look up your rectum with a nurse and two medical students standing by and that does not violate your privacy. Information technology can do more for us than that doctor can. Why don't we give it half that free a rein?

Peter's point about the short term and the long term reminded me of William Prosser's account[5] of the origins of the famous article by Brandeis and Warren, *The Right of Privacy*[6]—referred to as perhaps the most influential law review ever written. Warren was a Boston blueblood, and the newspapers in Boston were reporting on lavish parties that Warren was having and eventually reported on the marriage of his daughter. These were things that Boston Bluebloods did not get into the newspapers. As Prosser describes it, "the press had begun to resort to excesses in the way of prying that have become more or less commonplace today."[7] That was by 1960, so I would assume the disclosures were extremely mild by today's standards. These "invasions of privacy" prompted Warren to get together with Brandeis and write the article on the right of privacy.

That is the second point. We should not assume there is anything particularly desirable or immutable about current definitions of privacy. Fred Schauer, in the recent article in *Jurimetrics*,[8] could have been speaking

5. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).
6. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
7. Prosser, *supra* note 5, at 383.
8. Frederick Schauer, *Internet Privacy and the Public-Private Distinction*, 38 JURIMETRICS J. 555 (1998).

directly to Peter's paper when he said, "we will abandon, hopefully, the belief that our concept of what information is desirable or feasible to keep private will remain untouched by recent and future developments in information technology."[9]

My third point is that privacy is a threat to the information age. Privacy is defined—this is Alan Westin's definition—as "the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others."[10] Well, most information is about people, groups, or institutions. If each of them controls when, how, and to what extent information about him, her, or itself is revealed, then nothing adverse to anybody is going to be revealed. Instead of an information age we are going to end up with pap.

Peter's list of the advantages of privacy over information is just underwhelming. We will not be embarrassed by people knowing about our athlete's foot or some other embarrassing condition. Government will not be able to get a list of our book purchases—and I ask you, what book would be a problem today? Did anyone other than Ken Starr as a passing matter care what Monica was reading? It is not as though Monica was going to be prosecuted for having purchased a copy of *Vox*.

The right to read anonymously is a solution to yesterday's civil liberties problem. Very few people would actually need that kind of privacy and those who did could get it by simply going around the system. Somebody can get the information for them. And yes, Peter's point is right; it is a little more trouble. But it is such a small number of cases. Why should we give up the information age for it?

Peter fears that government will compile a "detailed dossier" about our purchases that might give "disturbing insights" to our personality and actions.[11] It sounds extremely sinister, but I have been trying to figure out what it is that Peter is talking about. What is it about our buying patterns that could produce some sort of a disturbing insight into our personality or our actions? I genuinely can not imagine.

I realize with regard to privacy on some of these points I am advocating what is probably considered an extreme position, but I think it is important to realize how far we are today from an information age. We cannot even effectively use the information that is public record by law. Criminal convictions are public record by law. Yet, the Supreme Court has held that the right to privacy protects the "practical obscurity" of public criminal

9. *Id*. at 557.
10. ALAN WESTIN, PRIVACY AND FREEDOM 7 (1967).
11. Swire, *supra* note 2, at 464.

records.[12] The result is that the public cannot get criminal records from the only source that has them effectively available: the FBI through Freedom of Information Act requests. So you cannot find out whether your next door neighbor is an arsonist. You cannot find out if your surgeon is Jack the Butcher to those who really know him. You cannot find out if the people you extend credit to daily are on their third bankruptcy. The view of privacy that is being sold in this paper is the view that is used to deny us each of these kinds of information.

To have an information age means you are going to have less privacy. Professionals who do a bad job will not be able to have as good a reputation as professionals who do a good job. Welfare recipients who are given money for one purpose will not be able to spend it on another. The government will not be able to claim it is doing one thing when it is actually doing something else. In short, hypocrisy becomes difficult to practice. For some people that is going to seem like a great loss of freedom, but freedom is not about being able to lie to other people or pass for what you are not. Freedom is about having choices and, critically, about having the information necessary to make those choices.

So, I leave you with the three points. The alternative to privacy is not government surveillance; it is freedom of information. Privacy is not a fixed immutable need; it is mostly just a temporary discomfort we get when others get more information about us than we are used to. Assertions of privacy are the main impediment to the flow of information.

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12. *See* United States Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749 (1989).