

Privacy and Transparency

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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 temperate in its punishment of anti-social behaviors.

Introduction

In a transparent society information of any kind is easily available to any interested party. This is a conceptual truth, one that seems to imply 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. I argue here that this view of the transparent society is mistaken. It is logically and practically possible to protect the right to privacy while maximizing the social 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. Rather, it is best understood as a right to a personal space in which to exercise ones practical rationality without interference from others.

The Nature of Transparency

Almost anyone who has come to depend on the internet, cellular technology and satellite communications for per-

sonal or professional purposes will stipulate that transparency can be 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 my 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 (Rosen, 2000).

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 a strong advocate of social transparency accepts something like the following 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.

Privacy as a Fundamental Moral Right

For the purpose of this paper I assume 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. The immediate problem with this assumption is that it is not obviously true. The two best known analyses of the right to privacy are: (1) the right to be let alone (Warren and Brandeis, 1984); and (2) the right to control personal information (Westin, 1967). But as much as citizens of a free society may sometimes prefer to be let alone, and as much as citizens of a knowledge society may sometimes prefer to remain invisible to others, there simply can be no fundamental right to privacy in either of these senses. Even when these preference may be so strong and universal as to warrant legislation for narrowly defined circumstances and types of information, the ultimate justification must lie elsewhere.

All this has been amply demonstrated by others (e.g. Thomson, 1975). But, as a right to informational privacy is still commonly asserted by those who wish to protect us from the excesses of the information age, it may be worth emphasizing the following before proceeding: Even if we cannot 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 evil.

It is important to emphasize this near axiom of liberalism, 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 (Taipale, 2004).

Privacy as the Right to Exercise Practical Rationality

The claim that there is a general right to be let alone also has great intuitive appeal. One way of explaining this appeal is to note that it expresses the common intuition that everyone is entitled to a bit of personal space. Elsewhere I have argued precisely this: the right to privacy is the right to control our personal space (Alfino and Mayes, 2003).

However, as I use the term, personal space is not the bit of physical space around us that defines our comfort zone with respect to the proximity of strangers. Rather, it is the space that persons, i.e., autonomous agents, require to conduct their affairs in a rational manner. As the essential activity of persons is rational deliberation, I suggest that the right to privacy is the right to engage in rational deliberation without undue interference.

The basis of this view may be briefly summarized as follows. From the standpoint of classical 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 one's 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 for doing so may be. 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 rationally pursue our interests. Hence, it follows that individuals in a liberal society have a fundamental right to exercise their practical rationality without undue interference.

On this way of thinking about privacy the question whether we violate a person's privacy by obtaining her 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.

Unidirectional vs. Omnidirectional Transparency

It should now be clear that the right to privacy, as I use the term, is at least logically compatible with social transparency, for it is logically possible to have access to the per-

sonal information of others without interfering with their practical rationality. But it is equally clear that transparency can easily enhance our ability to violate the privacy of others. So the challenge is to show that social transparency and privacy can be practically compatible as well.

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. 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 smart phones, only the thought police would have had them. Google would be controlled by Big Brother. But the economy of Oceania would never have developed cell phones or internet search engines in the first place. We now have an ample historical basis for asserting that a free market is needed to provide the incentive structure for this degree of scientific and technological innovation.

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 (Brin, 1998). Is this fact alone likely to inhibit the exercise of our practical rationality?

It may appear so, but the truth is that almost any example one can produce in support of this view will assume a degree of unidirectionality. For instance, I would find it extremely troubling to learn 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 feels 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 punishment is insufficient to deter its occurrence. This, I think, is what we initially fail to grasp about the reality of transparency. Even in a radically transparent society, where it is as easy to break into a bank account as it is to break into a storefront window, 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 simply 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.

Does Transparency Induce Irrationality?

There is a different 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 personal encounters with said people. Awareness or suspicion that we are being observed by actual people (as opposed, say, to perfectly benign voyeuristic super 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 one's 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 (Rachels, 1975; Inness 1992).

In the final analysis, however, this valid concern must be balanced against the tremendous good that accrues 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. That said, 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 respecting privacy as a fundamental moral right. The claim under consideration here is that our awareness of our exposure 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, this means that whether it is rational in any given society to increase transparency depends on how satisfactorily it is instantiated other liberal values like freedom, equality, and tolerance. Any society whose members are duped into thinking they will necessarily be better off by increasing transparency will have 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 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.

Imagining Privacy in a Transparent Society

It is essential, then, to try to conceive 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 cannot 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 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, ironically, 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 main defect. The claim is 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 considering 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.

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?

No, this is a 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 cannot 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 likelihood that the perpetrator will be caught. (Ideally, a fine certain of 100 dollars should deter to the same degree as a .01 probable fine of 10,000 dollars.) The greater the social transparency, the more likely the crimes will be detected. Hence, as societies become more transparent, they must become more temperate in their punishment of wrongdoing as well.

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 se-

crecy. 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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