Executive Summary

Privacy is central to a free society, but defining its nature is a slippery business. Nevertheless, privacy's impact on limited government, tort law, criminal law and people's financial dealings is critical. The failure to protect financial privacy opens individuals up to a variety of assaults from an over-intrusive government.

The American founders deeply valued the rights and liberties traditionally guaranteed to them by the English constitution and the common law. They held that in free and just societies, elected governments should possess limited powers and that their primary role - indeed their very reason for existing - is to protect the life, liberty and property of the people they govern.

The Constitution of the United States creates a limited federal government to protect individuals' rights to life, liberty and property. The Bill of Rights contains a number of amendments specifically designed to protect the privacy and private space of American citizens. Privacy, in short, is a defining characteristic of a free society. It is not something to be sacrificed lightly since to do so is to strike at the heart of a free government. In free societies, there is a small public space and a large private space.

But there has always been disagreement about the "right" to privacy, and how far it extends. And even government in a free society needs to collect information on those it suspects of criminal wrongdoing - of violating others' rights. Clearly, government also needs to collect information on non-citizens who may represent a threat, most notably agents of foreign states or hostile non-state actors. But they must do so in a way that honors the private space of its law-abiding citizens and affords due process protections to all citizens and for the purpose of enforcing laws that protect the rights of its citizens.

Negative liberty is the *freedom from* restraint. It is the liberty that animated the founding the American republic and is expressed in our founding documents, the liberty of the common law, the freedom of classical liberalism, the freedom to be left alone, free to lead one's life as one sees fit provided only that one honors others' equal rights to do the same. People that hold to this view of liberty are usually called "conservatives" or sometimes "libertarian" in the United States today, although they would still be called liberals on the continent of Europe today.

Positive liberty or positive freedom is the freedom to realize one's objectives and values, whatever those objectives and values may be. It is the freedom of modern American liberals and of Social Democrats in Europe. In this view, for example, a man of limited financial means is less free then one with greater means because the man of greater means has the means, the "freedom," to do more things. Furthermore, this "freedom" is sometimes collectivized as in the "freedom of the people" acting through the medium of government to accomplish social objectives. Thus, people are regarded as free if they can express their will collectively through government and individual freedom becomes less important. Promoting this understanding of "positive liberty," with some exceptions, usually involves sacrificing "negative liberty."

Our financial affairs reveal a great deal about us. Failing to protect financial privacy makes a huge swath of our life an open book. By providing information to others it empowers them to act against us. In the case of "negative liberty," financial privacy is entitled to protection. The purpose of the state in a polity dedicated to protecting "negative liberty," such as the United States as

originally conceived, is to protect individual rights and private space, including financial privacy. Such a government will protect its citizens against other private actors acting contrary to law.

The very fact that U.S. citizens are being required to report so much private information to the federal government, whether for tax, regulatory, census or simply monitoring purposes would, the author believes, shock the founding generation. Worse, the United States government is willingly participating in international efforts that will enable governments around the world to quite efficiently suppress freedom by obtaining private banking, credit card and tax information relating to American citizens or benign foreigners. This should cause most Americans to shudder.

This paper explains why in detail, and offers a better alternative.

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The Foundations of Financial Privacy:
Why Financial Privacy is At Risk

By David R. Burton

> *Thus privacy fortifies modern democracy's prophylactic intention of preventing the total politicization of a person's life - a prospect that is characteristic of political religions and totalitarian ideologies, but repugnant to the democratic ideal. To the extent that privacy is a condition for the cultivation of individuality and liberty, it is a friend to community - at least to the kind of community that treasures these ideals as major foci of its identity. It is apparent, then, that within the normative framework of a liberal democracy, it is the suppression of privacy, not its invigoration, that is antagonistic to community.*
> **— C. Keith Boone**[1]

Introduction

Why do we value privacy? Is there a "right" to privacy or is "privacy" really a word we loosely use to describe a number of distinct interests and values? If there is a "right to privacy," what is the basis of the right and what are its contours? When should an individual's privacy be invaded in the public interest? Does it matter whether it is the state or a private actor that seeks to invade an individual's privacy and, if so, how? Do the basis and contours of the right change depending on what kind of privacy interest is at stake? Is financial privacy different from other types of privacy and if so, why and in what way?

It is the American political tradition, a tradition that places freedom at its center, in which privacy became most valued and best protected.

This paper examines the legal, historical, economic and philosophical foundations of our concept of privacy generally, and financial privacy in particular, in an effort to help clarify these questions[2] and examines recent attempts to substantially diminish financial privacy around the world.

Two Views of Privacy

> *There is no exclusiveness in our public life, and in our private business we are not suspicious of one another, nor angry with our neighbor if he does what he likes; we do not put on sour looks at him which, though harmless, are not pleasant. While we are thus unconstrained in our private business, a spirit of reverence pervades our public acts.*
> **— Pericles Funeral Oration (Athens 430 BCE)**

> *And the eyes of them both were opened, and they knew that they were naked; and they sewed fig leaves together, and made themselves aprons.*
> **— Genesis 3:6**

The desire for privacy and the affirmation of its value, however tentatively or obliquely expressed, is as old as recorded history - at least in the Greco-Roman and Judeo-Christian traditions which form the basis of American civilization. This paper, however, focuses on the American political and legal tradition, a tradition that, in turn, has its roots in Great Britain and the common law. It is the American political tradition, a tradition that places freedom at its center, in which privacy became most valued and best protected. But privacy in America is now under sustained attack.

In American jurisprudence, there are two countervailing perspectives regarding privacy. The first view is that there is a "right to privacy" and it should be protected both by the constitution and by tort law. The second view is that there is no distinct "right to privacy" but, instead, this "right" is

nothing more than a name loosely given for the application of long-standing tort and constitutional law principles to specific kinds of cases — principles that are different in source, nature and implications and that predate the articulation of a free standing right to privacy.

The First Systematic Articulation of the Right to Privacy

The "right to privacy," was discussed and framed as an independent right by Samuel D. Warren and Louis D. Brandeis in a highly influential 1890 Harvard Law Review article entitled "The Right to Privacy."[3] Warren and Brandeis began their exposition:

> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually, the scope of these rights broadened; and now the right to life has come to mean the right to enjoy life, — the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession - intangible, as well as intangible.[4]

The Warren and Brandeis article discusses the history of the extension of tort law. For example, from battery (intentional and unwanted contact with a person) grew assault (reasonable fear of unwanted harmful contact). The law of nuisance (protecting persons from offensive odors and noises) grew to supplement trespass. The law of slander and libel developed to protect something as intangible as reputation. Property law originally protected corporeal property (i.e. real property and tangible personal property). It gradually recognized intangible, intellectual property rights in works of literature and art, in commercial goodwill, inventions, trade secrets and trademarks. Warren and Brandeis regarded this as a steady, gradual recognition that the law would protect the intellectual, spiritual and emotional life of citizens; that with "... the advance of civilization, made it clear to men that only a part of the pain, pleasure and profit of life lay in physical things."[5]

Political, social and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.

They noted that the courts had been willing to protect against unauthorized disclosure of private correspondence or of a diary whether or not the writing in question had any commercial or literary value. They wrote that "... the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world. ... the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy ..."[6]

The primary motivation for their article appears to have been to place limits on the ability of the "gossip press" to write about the private affairs of private people.[7] They argued that the law should protect against the unauthorized use of private persons portraits or photographs in newspapers or

in trade. "The press," they wrote, "is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the vicious, but has become a trade, which is pursued with industry as well as effrontery."[8] "The right of one who has remained a private individual, to prevent his public portraiture, presents the simplest case for such extension; the right to protect one's self from pen portraiture, from a discussion by the press of one's private affairs, would be a more important and far-reaching one."[9] They wrote:

> These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. In each of these rights, as indeed in all other rights recognized by law, there inheres the quality of being owned or possessed - and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.[10]

Most courts — including the U.S. Supreme Court in constitutional decisions — have now recognized the right to privacy to some degree.

Warren and Brandeis did not argue that the right to privacy was absolute. "To determine in advance of experience the exact line at which the dignity and convenience of the individual must yield to the demands of the public welfare or of private justice would be a difficult task; but the more general rules are furnished by the legal analogies already developed in the law of slander and libel, and in the law of literary and artistic property."[11] They did, however, enumerate six proposed principles that would provide a rough outline of how tort law might develop to enforce the right.

1. The right to privacy does not prohibit any publication of matter that is of public or general interest.
2. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances that would render it privileged communication according to the law of slander and libel.
3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.
4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent.
5. The truth of the matter published does not afford a defense.
6. The absence of malice in the publisher does not afford a defense.

It is difficult to overstate the influence that this article has had over the past century.[13] Most courts — including the U.S. Supreme Court in constitutional decisions[14] — have now recognized the right to privacy to some degree. The *Restatement of the Law, Torts (2d)*[15], which purports to rep-

resent the prevailing view of the law, recognizes the tort of invasion of privacy although the influence of Dean Prosser (discussed below) is quite evident. The *Restatement* reads:

> Invasion of Privacy
>
> §652A General Principle
>
> (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
>
> (2) The right of privacy is invaded by:
>
> (a) unreasonable intrusion upon the seclusion of another, as stated in §652B; or
>
> (b) appropriation of the other's name or likeness, as stated in §652C; or
>
> (c) unreasonable publicity given to the other's private life, as stated in §652D; or
>
> (d) publicity that unreasonably places the other in a false light before the public, as stated in §652E.

Privacy as Aspects of Different Tort Principles

What has emerged from the decisions is no simple matter. It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasions of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, "to be let alone."[16]

— William L. Prosser (1960)

I believe to the contrary that the tort cases involving privacy are of one piece and involve a single tort. Furthermore, I believe that a common thread of principle runs through the tort cases, the criminal cases involving the rule of exclusion under the fourth amendment, criminal statutes prohibiting peeping toms, wiretapping, eavesdropping, the possession of wiretapping and eavesdropping equipment, and criminal statutes or administrative regulations prohibiting the disclosure of confidential information obtained by government agencies.

An intrusion on our privacy threatens our liberty as individuals to do as we will, just as an assault, a battery or imprisonment of our person does.

An intrusion on our privacy threatens our liberty as individuals to do as we will, just as an assault, a battery or imprisonment of our person does. And just as we may regard these latter torts as offense "to the reasonable sense of personal dignity," as offensive to our concept of individualism and the liberty it entails, so too should we regard privacy as a dignitary tort. ... The injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered.[17]

— Edward J. Bloustein in response to Prosser

Prosser, a name known to almost all American lawyers practicing today because of his textbooks on the law of torts, did not think that there was a "right to privacy." Instead, he regarded the "so-called right to privacy" as nothing more than loose shorthand for four distinct torts, representing four distinct types of invasions, subject to different rules. These four torts may be called:

1. *Intrusion.* Intrusion upon the plaintiff's seclusion or solitude, or in his private affairs.
2. *Public Disclosure of Private Facts.* Public disclosure of embarrassing private facts about the plaintiff.
3. *False Light in the Public Eye.* Publicity that places the plaintiff in a false light in the public eye.

4. *Appropriation.* Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Each of these will be discussed in turn.

Intrusion on a person's seclusion or solitude grew out of the action for trespass and the principle has been applied in cases beyond physical intrusion including eavesdropping with microphones, wiretapping, looking into windows, unauthorized review of a person's bank account, and overbroad subpoenas. It is not an intrusion to take a photograph in a public place or to disclose publicly available records. The cases, in Prosser's view, make it clear that (1) the intrusion must be something that a reasonable person would find offensive or objectionable and (2) the thing into which there is prying or intrusion must be, and be entitled to be, private.[18] The Restatement summarizes the law as follows:

> §652B Intrusion upon Seclusion
>
> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.[19]

In the commentary to the Restatement, the American Law Institute specifically mentions, among other things, "opening his private and personal mail, searching his safe or wallet, examining his private bank account ..." as examples of intrusions that would give rise to liability.[20] Thus, an intrusion on one's financial privacy would be actionable.

Appropriation of the plaintiff's name or likeness for the benefit of the defendant was among the earliest "right to privacy" tort recognized.

Public disclosure of private facts (usually embarrassing) about a person - the tort of primary concern to Warren and Brandeis - was recognized as a tort later than the others. This tort is not directed at ensuring that facts about private persons are accurately portrayed in public but that they are not made public at all. It may provide recovery where a private person's debts were made public or long-ago criminal or otherwise infamous behavior (e.g. adultery) was publicized. It will generally allow recovery where confidential information such as tax returns is made public without the consent of the taxpayer. It will often allow recovery when private information regarding things such as the details of a private wedding, the medical condition of a person, a mother nursing her child or who visited whom is made public. On the other hand, information from public records such as birth certificates, marriage licenses and land records can be made public without liability.[21]

The Restatement summarizes the law as follows:

> §652D Publicity Given to Private Life
>
> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.[22]

The Restatement commentaries specifically mention the publicizing of a person's unpaid debts as an actionable act.[23] But it is just as likely that publicizing a person's income, wealth, spending habits

or the like would constitute an invasion of privacy. Thus, invading a person's financial privacy by publicizing true private financial facts about the person would be actionable.

Placing a person in a false light in the public eye is a tort closely related to defamation. This tort, however, eliminates many of the qualified and absolute privileges that the common law affords in the cases of libel or slander. One example of the false light tort is when a person's photograph is used to illustrate a point unrelated to that person. For example, if a person's image were used in an article regarding dishonest taxi drivers, juvenile delinquents or the like. Another example would be when a quote or opinion was falsely attributed to a person, even though it might not qualify as defamation. It is far from clear when this tort applies rather than defamation as the distinction between the two is largely unprincipled. As a general matter, however, plaintiffs will prefer this tort, where available, to the traditional ones of libel and slander since there are fewer barriers to recovery.[24]

> §652E Publicity Placing Person in False Light
>
> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[25]

Public officials and public figures are held to have given up their right to privacy, at least to some degree.

Appropriation of the plaintiff's name or likeness for the benefit of the defendant was among the earliest "right to privacy" tort recognized. Typically in these cases, a person's image was used in advertising without their consent. From time to time, a person's name was used as well. It is now well established that a person has the right to prevent the use of their image or name in such advertising.[26] Stated differently, courts have recognized a property right in one's image and name.

> §652C Appropriation of Name or Likeness
>
> One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy.[27]

Prosser summarizes the state of the law as follows:

It is evident that these four forms of invasion of privacy are distinct, and based on different elements. It is a failure to recognize this that has been responsible for much of the apparent confusion in the decisions. Taking them in order - intrusion, disclosure, false light and appropriation - the first and second require the invasion of something secret, secluded or private pertaining to the plaintiff, the third and fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other three do not. The fourth involves a use for the defendant's advantage, which is not true of the rest.[28]

The courts have regarded the right to privacy as very much an individual right that is extinguished upon death and cannot be pursued by corporations or unincorporated associations.

The Restatement summarizes the law as follows:

> §652I Personal Character of Right of Privacy
>
> Except for the appropriation of one's name or likeness, only a living individual whose privacy is invaded can maintain an action for invasion of privacy.[29]

What Limits to Privacy

While one can sympathize with the Warren-Brandeis-Bloustein view of privacy and their motivations, the sheer breadth of its implications must give us at least some pause as a road map for the development of the law, particularly if it is unmoored from the philosophical foundations of the American political tradition. The Warren-Brandeis view, for example, would enable plaintiffs to recover from newspapers for publishing truthful information. Not only does such an approach dispense with many of the defenses and privileges incorporated into the law of defamation (truth being the most obvious example but also various other qualified and absolute privileges that evolved under the common law), it raises issues relating to the freedom of the press guaranteed by the federal and state constitutions. Indeed, in the 1960s the U.S. Supreme Court in cases like *New York Times v. Sullivan*[30] and *Time, Inc. v. Hill*[31] afforded constitutional protection against tort claims for media stories about public officials and public figures except in cases of malice. Public officials and public figures are held to have given up their right to privacy, at least to some degree.

The Warren-Brandeis view would enable plaintiff's to recover damages even when the plaintiff's were concealing important information that may be relevant to potential business associates, potential mates or others with whom the plaintiff may have dealings. It can be, then, a handmaiden to misrepresentation that some find troubling.

The price we pay for the income tax is high, both in terms of lost privacy but also in terms of high administration costs and lost economic growth.

Economic Analysis of Privacy

Richard A. Posner[32] has written a number of provocative articles regarding the economics of privacy. In general, he attaches little or no value to privacy that is not efficiency enhancing and significant value to privacy that is efficiency enhancing. His analysis, although economic, extends beyond ordinary market transactions to discuss personal matters such as sex and marriage. "[S]ecrecy is entitled to protection where it is necessary to protect an investment in the acquisition of socially valuable information, but not where it serves to conceal facts about an individual, if known to others, would cause them to lower their evaluation of him as an employee, borrower, friend, spouse or other transactor."[33] For example, torts that enable people to protect their reputation (e.g. libel, slander and the false light privacy tort) deserve support because good reputations that are deserved reduce transactions costs and are socially beneficial. Good reputations that are not deserved reduce utility since the person on the other side of the transaction is less likely to get the quality, or reliability or honest dealing that was expected and bargained for. Accordingly, Posner does not support aspects of the public disclosure of private facts privacy tort. He argues that discrediting information should not be protected since information that would "destroy an undeservedly good reputation or create a deservedly bad one ... would facilitate optimal transacting (or refraining from transacting) with this person. Legal protection of such information would foster fraud in the employment, marital and other personal service markets" and impede the ability of non-legal forms of regulation (e.g. shunning bad actors) to work.[34]

He would, however, afford protection against disclosure of embarrassing but not discrediting information. He gives the example of a nude photograph, noting that most people would not want such a photograph published even if it contained "no unexpected deviations from normality." although "[t]he reason for such reticence is obscure."[35] His argument, interesting but not wholly persuasive is that such information constitutes "noise," "is distracting and interferes with clear communication. "An economically efficient law of privacy," he argues, "will thus try to distinguish between discrediting and embarrassing (but not discrediting) facts and give less - maybe no - protection to the former."[36] It is more likely that non-economic factors are at play. Sexual modesty, for example is a value that has been cultivated in society since the ancient Hebrews penned the book of Genesis.

Posner supports protections for trade secrets (in effect commercial privacy) against theft or breach of contract but not against reverse engineering. He supports the appropriation of name or likeness privacy tort as an aspect of protecting one's reputation.

Posner does acknowledge that "[c]oncealment sometimes serves a legitimate self-help function. An example is a rich man's concealing his income because he fears that he might be a target for kidnappers. This motive is to be distinguished from wanting to conceal one's income from creditors, adult family members and the tax collector."[37]

Probably because he has the good fortune to live in a country where kidnapping is rare and where the government does not confiscate the wealth of political opponents or religious or ethnic minorities, he gives this "legitimate concealment" concern extremely short shrift and attaches virtually no value to this consideration. As discussed below, however, in the international context these issues come to the front and center. Most governments are quite willing to do confiscate the wealth and property of political opponents, and of religious and ethnic minorities. Most governments are corrupt and contain individuals that are willing to share information with criminal elements for purposes of kidnapping or extortion. Most governments have utterly inadequate controls the use to which financial information can be put and have very too few safeguards to ensure that the information is not obtained by unauthorized users.

…those individuals who cherish their own privacy cannot demand more of the legal system.

It is also not clear why he is so quick to think that, for example, family members are entitled to know so much about each other's finances in the absence of voluntary disclosure. One may presume that he does not think creditors have the right to know about their debtor's finances unless they fail to pay their debts, although this is not clear either. As to the tax collector, the only reason that we must provide such voluminous financial information to the tax authorities is the income tax. If the income tax were completed replaced by a national sales tax or a value added tax (or excise taxes and customs duties), then routine disclosure of detailed financial information is unnecessary. The price we pay for the income tax is high, both in terms of lost privacy but also in terms of high administration costs and lost economic growth.[38]

Posner's economic analysis has come under criticism. Professor Richard A. Epstein, a noted University of Chicago colleague of Posner, for example, writes:

> Posner's basic theoretical structure for treating the law of privacy suffers from all of the weaknesses that plague his general treatment of common law liability subjects. His reliance on the unbounded discretion of the state, simply as a matter of collective choice, to use economic criteria to assign property rights to or away from individuals continues to ignore the powerful moral constraints that abound in this area.[39]

Epstein's conclusion deserves serious consideration.

> On some issues the answers that I reach seem clear and powerful. On others, these analytical efforts do little to resolve the original uncertainty. Critics may take the failure to achieve complete clarity and precision as a sign of weakness of the method. I prefer, however, to regard it as an unwelcome strength. To the extent that most of our fundamental legal institutions rest upon the implicit, shared expectations of the governed, there is no reason to think that all these expectations will be equally instructive or equally uniform on all important issues. To the contrary, while solid results are possible at the core, we should expect some disagreement at the edges, and privacy law does lie at the edge of tort law....Much of my analytical efforts could be regarded as an evasion in the sense that they do not attempt to plumb the depths of the profound moral sentiments that prompted legal recognition of the privacy conception in the first place. Yet there too I may offer a qualified defense, if only in closing. My failure to deal with privacy as it relates to friendship, trust, love, companionship and the like does not arise from the belief that these are unimportant matters. Indeed, they may be too important to be trusted to lawyers, particularly in an adversary context. ... The law can provide a framework for protecting private property and consensual relationships. Yet those individuals who cherish their own privacy cannot demand more of the legal system. In its philosophical sense, privacy may be one of the highest values of civilization, but it is one we obtain only by individual effort and planning and not solely as of legal right.[40]

Some noted social commentators… think privacy is overrated.

Communitarian Perspective

Some noted social commentators, communitarian Amitai Etzioni for example, think privacy is overrated. He regards privacy as "a societal license that exempts a category of acts (including thoughts and emotions) from communal, public and governmental scrutiny." He emphasizes that privacy is not an absolute. It is contextual and subjective and requires balance.[41] He also argues that "important social formulations of the good can be left to private choices - provided there is sufficient communal scrutiny! That is, *the best way to curtail the need for governmental control and intrusion is to have somewhat less privacy.*" (emphasis in original) ... "because the community, which relies on subtle social fostering of prosocial conduct by such means as communal recognition, approbation, and censure. These processes require the scrutiny of some behavior, not by police or secret agents, but by friends, neighbors, and fellow members of voluntary associations."[42]

Government and Privacy

> *The protection guaranteed by the amendment is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.*[43]
>
> **— Olmstead v. U.S., 277 U.S. 438, 478 (1928) (J. Brandeis, dissenting)**

Both the Warren-Brandeis and the Prosser approach to privacy focuses on tort law. In other words, they focus on the proper scope of legal protections against private actors' invasion of individuals' privacy. There is, however, the question of government and the degree, lesser or greater, to which it is obligated to honor the privacy interests of its citizens. Brandeis, of course, was addressing precisely that issue in his *Olmstead* dissent.

In *Olmstead*, the defendant was a Washington bootlegger during prohibition who had been convicted on the basis of evidence collected by federal prohibition officers by means of wiretaps (illegal at the time in the state of Washington). The Supreme Court held, by a narrow majority, that the wiretaps were not an unreasonable search and seizure within the meaning of the Fourth Amendment since the wires ran outside of his home and projected his voice outside of the home.[44] Brandeis' view, the minority view early the century, now generally commands a substantial majority of the Supreme Court.[45]

The framers held that in free and just societies, elected governments should possess limited powers and that their primary role …is to protect the life, liberty and property of the people they govern.

Privacy in a Free Society

The American founders were heavily influenced by the British philosopher John Locke, particularly his *Two Treatises on Government* (1690), and by prominent figures in the Scottish Enlightenment such as Adam Smith, author of *The Wealth of Nations* (1776) and a *Theory of Moral Sentiments* (1759). They deeply valued the rights and liberties traditionally guaranteed to them by the English constitution and the common law. In his *Commentaries on the Laws of England* (1765), William Blackstone, the great English jurist who was well-known and highly regarded in colonial America, wrote that the very purpose of law to be to secure natural liberty.

> The natural liberty consists properly in a power of acting as one thinks fit, without any constraint or control, unless by the law of nature. ... And these [rights] may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty; and the right of private property ... [46]

The framers held that in free and just societes, elected governments should possess limited powers and that their primary role - indeed their very reason for existing — is to protect the life, liberty and property of the people they govern. It was their judgment that the British government was no longer protecting these rights.

This view is expressed in the U.S. Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed ...[July 4, 1776]

Privacy, in short, is a defining characteristic of a free society.

It is also set forth in Articles I and II of the earlier Virginia Declaration of Rights, authored by George Mason weeks before Jefferson penned the Declaration of Independence:

> I. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty,

> with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.
>
> II. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.
> [June 12, 1776]

The Constitution of the United States creates a limited federal government based on the principles discussed above designed to protect individuals' rights to life, liberty and property. The Bill of Rights, approved by the first Congress and ratified soon thereafter, contains a number of amendments specifically designed to protect the privacy and private space of American citizens (most notably the 3rd, 4th and 9th Amendments).

Isaiah Berlin, a Russian émigré who settled in England, became a fellow at Oxford and was a noted liberal author, wrote of the critical importance of privacy to a free society:

> The desire not to be impinged upon, to be left to oneself, has been a mark of high civilization both on the part of individuals and communities. The sense of privacy itself, of the area of personal relationships as something sacred in its own right, derives from a conception of freedom which, for all its religious roots, is scarcely older, in its developed state, than the Renaissance or the Reformation. Yet its decline would mark the death of civilization, of an entire moral outlook."[47]

Privacy, in short, is a defining characteristic of a free society. It is not something to be sacrificed lightly since to do so is to strike at the heart of a free government. In free societies, there is a small public space and a large private space. People are free to do as they please, free of any interference from government, provided they do not interfere with the equal rights of others. Notably, citizens of a free republic are free to go where they please, talk with whom they please, meet with whom they please, say what they please, trade with whom they please, work at what they please, and so on without any legal requirement to explain anything to the state, the church or to others. Free people are not required to report their whereabouts or their actions to government. Moreover, governments in free societies do not monitor law-abiding citizens unless they are suspected of criminal acts and then can do so only under strict safeguards because all citizens are presumed innocent until the state has proven otherwise in a court of law. Since the purpose of government is to protect individual freedom and individuals' private space, government will not restrict that freedom and invade individuals' private space except as necessary to enforce the law. Invading private spaces requires authority from an independent judiciary that enforces legal restrictions on police action.[48] To the extent these things are not so, a society is less free.

In free societies, there is a small public space and a large private space.

Privacy in Totalitarian Societies

In contrast to governments in a free society, totalitarian governments constantly monitor their citizens and, in most spheres of life, actions are presumed to be prohibited unless explicitly permitted or licensed. The state encourages or requires citizens to monitor their fellow citizens. Citizens are obligated to report their whereabouts to the authorities. Contacts with foreigners, or out-of-towners or those holding unacceptable political or religious opinions must be reported. Virtually all aspects on one's life is known and controlled by the state. The only work available is for the state, homes are owned and controlled by the state, financial transactions must be conducted through state financial institutions, and the media and educational institutions are controlled by

the state. The state knows a great deal about what is going on within its jurisdiction and can, therefore, control what goes on. The state aggressively monitors citizens out of fear that they may engage in activities of which the state does not approve or which may represent an actual threat to the government (organizing politically, for example). Systems are established to systematically collect, analyze and act on information about individuals. The information collected enhances the power of the state to control the lives of those living under its control.

Clearly, even government in a free society needs to collect information on those it suspects of criminal wrongdoing - of violating others' rights. Clearly, government also needs to collect information on non-citizens who may represent a threat, most notably agents of foreign states or hostile non-state actors. But they must do so in a way that honors the private space of its law-abiding citizens and affords due process protections to all citizens and for the purpose of enforcing laws that protect the rights of its citizens. Otherwise, they are doing nothing less than sacrificing the freedom of their citizens that it is their very purpose to protect and adopting instead the methods of totalitarian or authoritarian states.

The Means of Intrusion as a Central Issue

One consideration that seems to be largely sidestepped in the analyses discussed above is how the defendant obtained the information. It should be more relevant in assessing liability than it is under the Warren-Brandeis approach to tort law. It should matter whether the defendant or his source obtained the information by violating a trust or by breaching a legally binding confidential relationship or by trespass or by fraud or by employing an unlawfully intrusive method such as wiretapping or by other coercion? If the defendant simply ask questions of neighbors or associates or surfs the Internet, should he really be deemed a tortfeasor, as Warren and Brandeis would have it? In the former case, the defendant obtained the information by violating another's rights. In the later, in the absence of a Warren-Brandeis type public disclosure tort, there would be no liability since no right was violated.

Government must collect information in a way that honors the private space of its law-abiding citizens….

Analyzed from a Lockean perspective, the perspective of most founders, the question becomes did the invasion of privacy occur by using coercion (defined as the use or threat of force or fraud) to deprive another of their life, liberty or property. If the invasion is by government and involved coercion, (as it usually does), was it based on probable cause, or at least a reasonable suspicion with a basis in fact of wrongdoing by the person whose privacy was invaded or was the invasion more of the nature of a general warrant, which the founders so detested.

It does not take much of leap to regard people as having a property interest in their name and likeness such that people cannot use another's name or likeness without consent. Protecting a person's name and likeness in this manner is closely akin to protecting a person's reputation by allowing the defamation torts as a cause of action or allowing them to have enforceable rights in works of literature or art. Similarly, the false light torts are close kin to the defamation torts. The unreasonable intrusion torts also would generally be enforceable in a Lockean state, since they usually involved either trespass, breach of a fiduciary or contractual duty or some other highly intrusive method.

The unreasonable publicity line of tort cases is a different matter. In these cases, a Lockean analysis would be quite different than the cases and than the approach Warren and Brandeis urged. If the information was obtained illegitimately - by the invasion of the property, contractual or similar interest of a person - then the disclosure should be regarded as tortuous. If, however, the information

was obtained legitimately and was not defamatory, then the disclosure of the information would not be tortuous.

Financial Privacy

Two noted contemporary liberal theorists, Isaiah Berlin and John Gray, have noted the distinction between two competing ideas of liberty, what they call "negative liberty" and "positive liberty."[49] It is a distinction that would have been unknown to the founders of the American republic. The distinction has become important because a legion of political theorists and politicians have labored, with some success, to remake the definition of the words freedom, liberty and liberal in the quarter millennium since the United States was founded.

Negative liberty is the *freedom from* restraint. It is the liberty that animated the founding the American republic and is expressed in our founding documents, the liberty of the common law, the freedom of classical liberalism, the freedom to be left alone, free to lead one's life as one sees fit provided only that one honors others' equal rights to do the same. People that hold to this view of liberty are usually called "conservatives" or sometimes "libertarian" in the United States today, although they would still be called liberals on the continent of Europe today.

Positive liberty or positive freedom is the *freedom to* realize one's objectives and values, whatever those objectives and values may be. It is the freedom of modern American liberals and of Social Democrats in Europe. In this view, for example, a man of limited financial means is less free then one with greater means because the man of greater means has the means, the "freedom," to do more things. Furthermore, this "freedom" is sometimes collectivized as in the "freedom of the people" acting through the medium of government to accomplish social objectives.[50] Thus, people are regarded as free if they can express their will collectively through government and individual freedom becomes less important. Promoting this understanding of "positive liberty," with some exceptions, usually involves sacrificing "negative liberty."

> ***Our financial affairs reveal a great deal about us.***

Our financial affairs reveal a great deal about us. Banking, tax, credit card, telephone bills and other financial information enables another to learn with whom we have business relationships, how we earn our living, how much wealth we have and of what it consists and on what we spend our money (including what books and magazines we read, what organizations we belong to, what movies we rent, who we have spoken to on the telephone, what doctors we see, what medicines we buy, what form of birth control we buy, what lawyers we retain, where we have been and when and so on). Our financial records, then, provide a detailed and intimate portrait of our lives.

Failing to protect financial privacy makes a huge swath of our life an open book. By providing information to others it empowers them to act against us. A government collecting taxes, a government suppressing religious minorities or political opponents, a confidence man engaging in fraud, a thief or a kidnapper would all be aided in their mission by knowing who has wealth and where it is located, the source of a person's income and the pattern of people's lives. A person's dignity may be impaired if aspects of our private lives become public. Relationships may be tried when salaries, or the size of gifts become known. And so on.

Privacy relating to sexual matters or conversations we may have with others (e.g. our doctors, our lawyers, our clergy or on the telephone) is important and the primary place that the Supreme Court has chosen to erect protections against government intrusions. Clearly, however, in terms of practical impact on our lives, financial privacy is equally as important. It is in the case of financial

privacy, however, that the difference between the competing concepts of negative and positive liberty becomes so critical. In the case of "negative liberty," financial privacy is entitled to protection.

The purpose of the state in a polity dedicated to protecting "negative liberty," such as the United States as originally conceived, is to protect individual rights and private space, including financial privacy. Such a government will protect its citizens against other private actors acting contrary to law. Judicial enforcement of the intrusion, public disclosure of private facts (at least to some degree) and, sometimes, false light torts described above combined with traditional property protections and contractual arrangement between individuals and their financial service providers will adequately protect financial privacy from bad private actors. Furthermore, such a government will not itself invade the financial privacy of its citizens unless it is necessary to enforce the law and then only after procedural requirements affording due process are met. Such a government will not trespass on private property or inquire about or monitor private affairs except for the purpose of protecting its citizens' liberty or property interests and will do so only for cause

Failing to protect financial privacy makes a huge swath of our life an open book.

In the case of "positive" liberty, the liberty of modern American liberals and Social Democrats in Europe, financial privacy is of limited value or importance. When it collides with other "freedoms" or with the will of the people expressed through the state, it must give way. This is primarily because a major component of the modern liberal agenda is the creation of a welfare state to redistribute wealth from more affluent to less affluent citizens in an effort to increase the freedom of the poorer citizens to achieve their objectives in life. To achieve this objective, the state must become financially intrusive. It must have a graduated income tax at high levels both to pay for its redistribution and to ensure that it takes more from its more affluent citizens. Administering an income tax, in turn, requires knowing detailed financial information about all of its citizens and compulsory means to acquire that information. Thus, while a modern or contemporary liberal may support financial privacy against private actors, as against government, the modern or contemporary liberal view is that our financial privacy must be severely invaded by government in the name of promoting "positive freedom."

As late as 1886, the Supreme Court in *Boyd v. U.S.*[51], refused to allow warrantless searches of businesses in tax cases or require the wholesale production of documents of taxpayers when criminal charges could result. "It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the constitution, in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure"[52]

Administering an income tax…requires knowing detailed financial information about all of its citizens and compulsory means to acquire that information.

The influence of the modern liberal view can be seen in 20th century Supreme Court decisions. The Supreme Court is no longer willing to uphold the Bill of Rights if doing so endangers the funding of the welfare state or, in general, its regulatory powers. For example, in *U.S. v. Powell*[53], the Supreme Court held that the IRS may obtain information through administrative summons without significant limitation and that "the Commissioner need not meet any standard of probable cause." In *U.S. v. Miller*[54] the Supreme Court reversed the Fifth Circuit Court which had held that bank records "fell within a constitutionally protected zone of privacy" holding instead that bank records are not private papers but "the business records of the banks" and were unprotected by the Fourth Amendment. There was "no

legitimate "expectation of privacy" in their contents.[55] The checks are not confidential communications but negotiable instruments to be used in commercial transactions. ... The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." Contractual arrangements and centuries of banking practices apparently are of no matter. *SEC v. Jerry O'Brien, Inc.*[56], which reversed a Ninth Circuit decisions to the contrary, stands for the proposition that the government need not be bothered to notify targets when they subpoena documents from third parties because doing so "would be highly burdensome for both the Commission and the courts."[57] Inconvenience for the government is now regarded as constitutional principle. When it comes to obtaining financial or business records for tax or regulatory reasons, the Supreme Court has ruled that the constitution does not represent any barrier. There is virtually no financial information the U.S. federal government cannot obtain from businesses and, usually, individuals. There are, however, statutes that prohibit public disclosure of most of the information collected by government, unless the disclosure is during court proceedings.[58] Despite attempts by the Nixon administration to use the IRS for political purposes and the use of FBI files by political operatives in the Clinton White House, it has been rare, so far, for the American government to use this information for reasons other than the regulatory or tax reason for which it was collected in the first place. These barriers may be breaking down, however, under the threat of terrorism.

The Supreme Court is no longer willing to uphold the Bill of Rights if doing so endangers the funding of the welfare state or, in general, its regulatory powers.

The International Assault on Financial Privacy

The very fact that U.S. citizens are being required to report so much private information to the federal government, whether for tax, regulatory, census or simply monitoring purposes would, the author believes, shock the founding generation. We have come a long way from the limited government envisioned by the framers. Even relatively responsible governments, such as our own, can be expected to misuse and abuse information collected from time to time. The fact that the information exists and can be used and that people are not saints virtually guarantees it. However, we, in the U.S., still maintain some degree of governmental accountability and a series of legal protections that most people around the world do not enjoy.

Currently, the United States government is willingly participating in international efforts that will enable governments around the world to quite efficiently suppress freedom by obtaining private banking, credit card and tax information relating to American citizens or benign foreigners. This should cause most Americans to shudder. Most governments are corrupt. Most governments are not interested in preserving freedom. Most governments are more than willing to use such information to oppress their political opponents or disfavored ethnic or religious minorities. Most governments are more than willing to confiscate the property of their political opponents. Most governments are willing to use the information to aid favored businesses located within their jurisdiction. Few governments have meaningful controls on information or legally enforceable firewalls on the use to which information can be put, so unscrupulous government employees can misuse information even if it is not a matter of state policy. For example, banking information has routinely been used in Columbia to identify potentially profitable kidnap victims.

The remainder of this paper addresses the specifics of the various international and domestic initiatives relating to financial privacy. It does not address various other federal initiatives such as Internet use monitoring, enhanced wiretap authority and the like. When considered in their entirety, the scope of these initiatives is quite breath taking. The world will be a vastly different place

if these initiatives are allowed to bear fruit and no legal limits are placed on the use to which the information can be put. In a very important sense, these initiatives would make the fictional Big Brother in George Orwell's novel *1984* quite real quite soon.

Since the September 11 terrorist attacks on the United States, there has been a renewed focus on obtaining information about the global financial activities of terrorists and criminals. The needs of law enforcement officials to combat serious crimes, prevent terrorism and protect national security are of the highest concern to those in the United States, but many OECD governments appear to be exploiting the political climate in the aftermath of September 11 to promote information exchange policies that have more to do with limiting tax competition than enhancing international efforts to apprehend terrorists and criminals.

Well before the September 11 attacks, the OECD and the UN had launched major initiatives designed to abolish financial privacy and limit tax competition by blacklisting low-tax jurisdictions or so-called tax havens (the OECD Harmful Tax Competition project) and enabling the UN to share financial information among UN members through the proposed United Nations International Tax Organization (UNITO).

Both initiatives are not only anti-competitive, but also constitute a gross violation of individuals' privacy. Moreover, they will exact a steep price in terms of reduced economic freedom and limits on national sovereignty.

The OECD campaign against tax competition

The OECD is worried that low tax countries attract too much capital from high tax countries, primarily the welfare states of the European Union. In a 1998 report entitled 'Harmful Tax Competition: An Emerging Global Issue', the OECD stated that 'Globalization has... had the negative effects of opening up new ways by which companies and individuals can minimize and avoid taxes and in which countries can exploit these new opportunities by developing tax policies aimed primarily at diverting financial and other geographically mobile capital'.[59]

The OECD considers a country a "harmful" tax regime if the country (i) has low or zero income taxes, (ii) allows foreigners investing in the country to do so at favourable rates, and (iii) affords financial privacy to its investors or citizens. The OECD identified 41 countries (mostly developing countries) as 'harmful tax regimes'.[60]

The logic of the OECD proposal is the total abolition of financial privacy and a world where all governments can access the financial information of any individual living anywhere in the world.

Under an OECD Memorandum of Understanding (MOU), a jurisdiction must have made a 'commitment' by 28 February 2002 to eliminate 'harmful tax practices' to avoid being blacklisted as a 'noncooperating jurisdiction'. By the expedient of broadening what constitutes a 'commitment,' the OECD has persuaded over 30 jurisdictions to become "committed jurisdictions." Seven jurisdictions have been blacklisted.[61] As a result of the fluidity of the process and the lack of any governing rule or principle in the process, it is now far from clear what being a "committed jurisdiction" actually means. The target date for the elimination of "harmful tax practices" was April 2003. That deadline appears to have unofficially slipped. It is quite probable that the OECD and at least some of the "committed jurisdictions" will soon have a falling out as the OECD starts to demand binding agreements that would effectively abolish financial privacy. Alternatively, the OECD could compromise its aims.

Sanctions proposed by the OECD for imposition on the targeted low tax countries include the termination of tax treaties, denying income tax deductions for purchases made from targeted countries' businesses (thereby dramatically raising the cost of buying goods from that country), imposing withholding taxes on payments to residents of targeted countries, and denying the foreign tax credit for taxes paid to the targeted government. The OECD also proposes to explore measures designed to disrupt normal banking and business operation. These proposed sanctions are more draconian that those imposed on states that engage in the most egregious human rights violations.

OECD member countries like the United States, the United Kingdom and Switzerland are currently exempted from this initiative, but they can in time expect the high-tax European Union to bring pressure to bear through the OECD, the World Trade Organization (WTO), and the UN. The U.S. engages in classic tax haven behaviour by imposing no tax on most foreigners that earn interest or capital gains in the U.S. while imposing substantial taxes on U.S. persons that earn U.S. source interest or capital gains. These provisions[62], originally enacted into law in the 1980s, have attracted over U.S. $1 trillion to U.S. capital markets. Furthermore, by targeting certain countries while exempting the United States and others, the OECD initiative is inconsistent with national treatment and most favoured nation treaty commitments as a member of the WTO.

The OECD initiative provides for the abolition of financial privacy in the 41 targeted countries as it relates to the 30 OECD member countries. The targeted countries would be under an obligation to routinely share banking, tax and other financial information with OECD member countries. There would be no requirement for the recipient country to show probable cause to believe that a crime had been committed in either country. There would not even be a requirement to show that some civil wrong had been committed or was even suspected. The information would simply be sent to any OECD country that asked for it. Nor are there any restrictions on the use to which the information may be put. For instance, nothing in the OECD proposal prevents OECD countries' intelligence services from sharing this kind of information with their own private companies or with non-OECD countries.

Once this step has been taken, there will be no principled reason for the exchange of information not to be generalised so that any government in the world will be entitled to the information. The logic of the OECD proposal is the total abolition of financial privacy and a world where all governments can access the financial information of any individual living anywhere in the world.

United Nations International Tax Organization

The United Nations has adopted the logic of the OECD proposal and seeks to generalize its provisions to all UN member states. In recommending the creation of a United Nations International Tax Organization (UNITO), the 2001 report of the UN High Level Panel on Financing for Development to the General Assembly stated:[63]

The taxes that one country can impose are often constrained by the tax rates of others: this is true of sales taxes on easily transportable goods, of income taxes on mobile factors (in practice, capital and highly qualified personnel) and corporate taxes on activities where the company has a choice of location. Countries are increasingly competing not by tariff policy or devaluing their currencies but by offering low tax rates and other tax incentives, in a process sometimes called 'tax degradation.'[64]

The proposed ITO would engage in negotiations with tax havens to persuade them to desist from "harmful tax competition." It contemplates taking a lead role in restraining the tax competition

designed to attract investment by multinationals in developing countries.[65] Another task that might fall to an ITO would be the development, negotiation and operation of international arrangement for the taxation of emigrants. At present emigrants pay taxes only to their new country once they have changed nationality. This exposes high tax countries to the risk of economic loss when many of their most able citizens emigrate.[66]

The idea that a government should be able to impose taxes on the future income of those that have emigrated from its jurisdiction is repugnant and a violation of fundamental human rights. It rests on the premise that the state retains a right to the fruits of its former nationals' future labour and investment income even after they have emigrated. It should be viewed as a violation of Article 13 of the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948, which states in relevant part that '[e]veryone has the right to leave any country'.

It is extraordinarily naïve to believe that governments, particularly those known to be corrupt or to systematically violate human rights, will not use sensitive information provided to them by the UN to achieve political objectives within their own countries. If the UN enables them to track the financial activities of their political opponents, then it will make it much easier for repressive governments to identify and oppress their opposition.

Do we really want to foster a world were terrorism sponsoring states can obtain freely financial information about their targets, as would be the case if the UN had its way.

Do we really want to foster a world were terrorism sponsoring states can obtain freely financial information about their targets, as would be the case if the UN had its way. Do we want governments, like those in Columbia, that are corrupt and infiltrated by criminal elements to be able to obtain information on likely kidnapping targets? Do we want governments, such as those of Iran, Saddam Hussein's Iraq, Burma, Cuba or the People's Republic of China to be able to identify the financial resources of their political opponents or human rights activists, whether in-country or in exile? Do we want to provide governments throughout Africa or Asia that systematically oppress their ethnic minorities with the means to bankrupt those minorities?

A Better Way

The Task Force on Information Exchange and Financial Privacy was composed of leading former law enforcement officials, tax attorneys and economists.[67] The Chairman of the Task Force was former U.S. Sen. Mack Mattingly. It developed a program that would enhance the ability of Western governments to fight terrorism and organized crime while enhancing the financial privacy of ordinary law abiding citizens.

The Task Force recommended in its Report on Financial Privacy, Law Enforcement and Terrorism (March 2002), the formation of an effective international Convention on Privacy and Information Exchange composed of democratic governments that respect the rule of law. The Convention proposed by the Task Force would streamline and improve the exchange of information for law enforcement, national security and anti-terrorism purposes and establish under international law enforceable restrictions on the use to which collected information could be put. Moreover, the Convention would establish a private right of action to enforce individual legal rights under the Convention.

The Task Force also proposed that money-laundering laws be better targeted. Rather than bury investigators in a mountain of millions of currency transactions reports or suspicious activity reports with respect to law-abiding citizens, a more effective system should be developed where the

activities of persons on a government watch list are provided by financial institutions to the appropriate national authorities. Persons could be placed on the watch list if the government had a reasonable and significant suspicion of unlawful.

Conclusion

Information is power. Given the propensity for harm that the modern state has demonstrated time and again during the last century, it simply is not prudent to trust governments around the world with the power to identify, defund and cripple their political opponents, to suppress religious freedom, to oppress ethnic minorities and to control the lives of their citizens. Moreover, many governments will not take the steps necessary to insure that financial information is protected against inappropriate commercial uses or from abuse by corrupt officials or private actors. Support for the UN and OECD initiatives should be out of the question to anyone who attaches even the slightest value to financial privacy and the benefits of tax competition.

In 1928, U.S. Supreme Court Justice Louis Brandeis wrote in *Olmstead v. United States* that the privacy of the individual is the right most valued by civilized men. That, in defense of this right, the American people regularly makes great sacrifices, including allowing known criminals to go free when courts exclude probative evidence to enforce the 4th Amendment, demonstrates the American commitment to privacy. But it is a commitment that must be perfected by rediscovering the traditional American ideas about freedom and liberty and the proper role of government. Failing to protect financial privacy makes almost all of our lives an open book. Our financial records provide a detailed and intimate portrait of our lives. This is information that should not routinely be available to the government or private actors without the consent of the person in questions or unless traditional constitutional due process has been honored. There is a need for a renewed understanding of the key role that preserving financial privacy must play in preserving our freedom - an understanding that once was commonplace in the United States but was been sacrificed in the 20th century in the interest of promoting the modern welfare state. It is time to accord the same constitutional and other protections to our financial lives as to other aspects of lives.

Endnotes

1. C. Keith Boone, "Privacy and Community," Social Theory and Practice, Vol. 9 No. 1, pp. 6-24 (1983).
2. This discussion does not engage in a sustained argument regarding the superiority of a free and democratic society and a republican form of government to various forms of totalitarian or authoritarian government. It assumes the superiority of a "liberal" state, that is, a limited government with elected representatives that protects individual liberty.
3. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," Harvard Law Review, Vol. 4, No. 5, pp. 193-220 (December 15, 1890).
4. Ibid. at 193. Trespass vi et armis means 'trespass with force and arms' and is among the oldest English torts.
5. Ibid. at 195.
6. Ibid. at 213.
7. Specifically, Warren and his wife's family were tired of reading about themselves in the newspapers of the day. See, e.g., William L. Prosser, "Privacy," California Law Review, Vol. 48, No. 3, pp. 383-423 (August 1960) at 383.
8. Ibid. at 196.
9. Ibid. at 213.
10. Ibid. at 205.
11. Ibid. at 214.
12. Ibid. at 214-218.
13. See, e.g. William L. Prosser, The Law of Torts (4th Ed.), §117, p. 802 n. 9 for a long list of law review articles in support of the Warren-Brandeis point of view.
14. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (relating to contraception), and *Roe v. Wade*, 410 U.S. 113 (1973) (relating to abortion).
15. The Restatement of the Law, Torts (2d), American Law Institute, 1977.
16. William L. Prosser, "Privacy," California Law Review, Vol. 48, No. 3, pp. 383-423 (August 1960) at 389. The reference to Cooley is footnoted to Cooley, Torts 29, (2d ed. 1888).

17. Edward J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," New York University Law Review, Vol. 39 (December 1964) pp. 1002-1003.
18. Prosser, ibid. at 390-391.
19. The Restatement of the Law, Torts (2d), American Law Institute, 1977.
20. The Restatement of the Law, Torts (2d), American Law Institute, 1977 (see particularly comment b and illustration 4 for §652B).
21. William L. Prosser, "Privacy," California Law Review, Vol. 48, No. 3, p. 396.
22. The Restatement of the Law, Torts (2d), American Law Institute, 1977.
23. The Restatement of the Law, Torts (2d), American Law Institute, 1977 (see particularly illustration 2 for §652D).
24. Prosser, supra, at pp. 398-401.
25. The Restatement of the Law, Torts (2d), American Law Institute, 1977.
26. Prosser, supra, at pp. 401-405.
27. The Restatement of the Law, Torts (2d), American Law Institute, 1977.
28. William L. Prosser, The Law of Torts (4th Ed.), §117, p. 814. See also, William L. Prosser, "Privacy," California Law Review, Vol. 48, No. 3, p. 407.
29. The Restatement of the Law, Torts (2d), American Law Institute, 1977.
30. 376 U.S. 254 (1964).
31. 385 U.S. 374 (1967).
32. Posner has been a judge on U.S. Court of Appeals for the Seventh Circuit since 1981 and a professor at the University of Chicago School of Law since 1969. He is regarded as a leader (probably the leader) in the field of law and economics.
33. Richard A. Posner, "Privacy, Secrecy, and Reputation," Buffalo Law Review, Vol. 28, pp. 1-55, 2 (1978)
34. See, Richard A. Posner, "Privacy," in *The New Palgrave Dictionary of Economics and Law*, Vol. 3, pp. 103-108 (1998) at 105. See also, Richard A. Posner, "The Right of Privacy," Georgia Law Review, Vol. 12, No. 3, pp. 393-422 (Spring 1978) and Richard A. Posner, "Privacy, Secrecy, and Reputation," Buffalo Law Review, Vol. 28, pp. 1-55 (1978); Richard A. Posner, *Sex and Reason*, Harvard University Press (1992); Richard A. Posner, *Overcoming Law*, Harvard University Press (1995).
35. "Privacy," supra., at 105.
36. Ibid.
37. Posner, "Privacy, Secrecy and Reputation," at 15.
38. See, e.g. "Emancipating America from the Income Tax: How a National Sales Tax Would Work", by David R. Burton and Dan R. Mastromarco (Cato Policy Analysis No. 272 April 15, 1997). (Available at http://www.cato.org/pubs/pas/pa-272.html).
39. Richard A. Epstein, "Privacy, Property Rights and Misrepresentations," Georgia Law Review, Vol. 12, pp. 455-474, 459 (1978).
40. Ibid, at 474.
41. Amitai Etzioni, *The Limits of Privacy* (Basic Books, 1999).
42. Ibid., at 213.
43. This view was echoed by Ayn Rand in *The Fountainhead* (1947) when she wrote "Civilization is the progress of a society towards privacy."
44.
45. *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. U.S.*, 389 U.S. 347 (1967).
46. In *The Founders' Constitution*, Philip B Kurland and Ralph Lerner, Editors, Vol. 5 (University of Chicago Press, 1987), pp. 388-389.
47. Isaiah Berlin, "Two Concepts of Liberty," in Four Essays on Liberty (Oxford University Press, 1969), originally published in 1958 by Clarendon Press.
48. In the case of businesses and other places of employment in the U.S., this requirement has eroded under the weight of the regulatory state to the point where it virtually does not exist.
49. Isaiah Berlin, "Two Concepts of Liberty," in Four Essays on Liberty (Oxford University Press, 1969), originally published in 1958 by Clarendon Press. See also, John Gray, "On Negative and Positive Liberty," in Liberalisms: Essays in Political Philosophy, pp. 45-68 (Routledge, 1989).
50. By Rousseau, for example. Moreover, this public concept of freedom can be found in the ancients, where Greek or Roman authors defined freedom primarily as the right to participate in the government of the polis or the republic.
51. 116 U.S. 616 (1886).
52. 116 U.S. 616, 622 (1886).
53. 379 U.S. 48 (1964).
54. 425 U.S. 435 (1976).
55. As some commentators have not, this formulation of the constitutional standard is odd. As time goes on, the expectation of privacy will exist where the Supreme Court has ruled it exists and not where the Supreme Court has ruled it does not exist. For example, although there may have been an expectation of privacy in bank records in the past, there certainly is not after the *Miller* decision.
56. 467 U.S. 735 (1984).
57. 467 U.S. 735,748 (1984).
58. See, e.g. 26 USC 6103.
59. OECD, 'Harmful Tax Competition: An Emerging Global Issue', (Paris: OECD, 1998), p. 14, section 23.
60. For a detailed discussion, see "Report on Financial Privacy, Law Enforcement and Terrorism," (March 25, 2002) of The Task Force on Information Exchange and Financial Privacy (now available at http://www.freedomandprosperity.org/task-force-report.pdf) and "Financial Privacy and Individual Liberty," David R. Burton, May 14, 2003, Institute for Research on the Economics of Taxation, IRET Policy Bulletin No. 86 (ftp://ftp.iret.org/pub/BLTN-86.PDF).
61. They are Andorra, the Principality of Liechtenstein, Liberia, the Principality of Monaco, the Republic of the Marshall Islands, the Republic of Nauru and the Republic of Vanuatu.
62. 26 USC §871(h)-(i).
63. UN report is available at http://www.un.org/esa/ffd/a55-1000.pdf.
64. Report of the High Level Panel on Financing for Development to the General Assembly, p. 65.
65. Ibid.

66. Ibid.

67. The Task Force included former U.S. Sen. Mack F. Mattingly, Chairman, former Rep. and V.P. nominee Jack F. Kemp, former attorney general Edwin Meese, III, David R. Burton, Dr. Veronique de Rugy (Cato Institute), Stephen J. Entin (Institute for Research on the Economics of Taxation), James W. Harper, Esq. (PolicyCounsel.com, Privacilla.org), Dr. Lawrence A. Hunter (Empower America), J. Bradley Jansen (Free Congress Foundation), Dan Mastromarco (Prosperity Institute, Argus Group), Dr. Daniel Mitchell (Heritage Foundation), Andrew Quinlan (Center for Freedom and Prosperity), Dr. Richard W. Rahn (Discovery Institute), Solveig Singleton, Esq. (Competitive Enterprise Institute), Mark A. A. Warner, (Hughes, Hubbard & Reed), and the Hon. John Yoder, Esq. (Burch and Cronauer).

About the Author

David R. Burton is a principal in the Argus Group, an Arlington, Virginia based law and government relations firm. He is a leading proponent of fundamental tax reform. He drafted the two leading national sales tax plans introduced in Congress and has assisted proponents of a flat tax. Mr. Burton served as the Manager of the Tax Policy Center of the U.S. Chamber of Commerce and Vice President of Finance and General Counsel for New England Machinery, a small multinational equipment and instrumentation manufacturer. He also has served as an Adjunct Professor of the University of Maryland International Management Program. He is a graduate of the University of Chicago (B.A., Economics) and the University of Maryland School of Law (J.D.).

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