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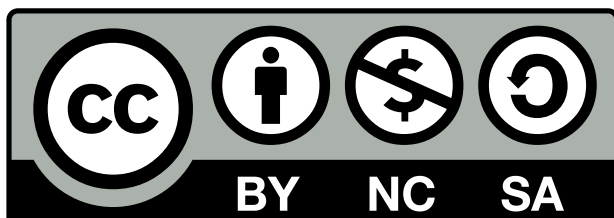
# Privacy and Privacy Rights

Policy Possibilities for Public Discussion

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# ILLUSTRATIVE POLICY POSSIBILITIES

## FOR PUBLIC DISCUSSION

### A. Restrict Government's Power to Collect & Use Our Personal Information

- *Restricts government's power to collect and use our personal information*
- *Gives us the right to seek recourse for harm resulting from violations of these restrictions*

### B. Make Privacy Depend Upon Place and Activity

- *Distinguishes between public and private places and activities*
- *Treats privacy as a very strong right when we are in private places or engaged in private activities*
- *Treats privacy as a more limited right when we are in public places or engaged in public activities*

### C. Give Less Privacy to Public Individuals and Institutions

- *Distinguishes between invasions of privacy that do and do not violate basic liberties*
- *Expands the public realm of society*
- *Allows private individuals and institutions to keep their information secret*
- *Requires government officials and institutions to disclose information pertinent to their public duties*
- *Requires some non-governmental individuals and institutions to forfeit privacy due to the public nature of the lives they live or the impact of their activities upon society*

### D. Protect Our Basic Liberties

- *Distinguishes between invasions of privacy that do and do not violate basic liberties*
- *Protects us against invasions of privacy that violate basic liberties*
- *Does not protect us against other invasions of privacy*

### E. Treat Privacy as Property

- *Allows us to control our personal information by treating privacy and privacy rights as property*
- *Allows us to buy, sell, lease, or otherwise exchange our personal information and our rights to it*

### F. Subordinate Privacy to National Security

- *Allows government to invade our privacy during crises involving military threats to national security*
- *Makes the extent to which government can invade our privacy depend upon the importance of the privacy interest and the significance of the threat*

### G. Forget About Privacy and Embrace Transparency Instead

- *Treats privacy as a lost ideal*
- *Encourages us to value greater transparency and to find ways to reap its benefits*

# THE IF DISCUSSION PROCESS

**Public policy** discussions in America too often focus upon the specific actions that governments might take instead of focusing upon the broader, more conceptual possibilities that might motivate them. This is unfortunate, since the wise choice of a public policy requires an exploration of a wide range of conceptual possibilities – including the different possible concerns, interests, questions, beliefs, values, and goals that might inspire them. The Interactivity Foundation (IF) believes that governments too often act without considering a wide range of conceptual possibilities for public policy, and that citizen discussions of a wide range of such possibilities can help to improve both our public policy choices and our ability to make them. IF thus supports discussion projects that are designed to explore, develop, articulate, and test contrasting conceptual possibilities for public policy in selected areas of concern. We believe that these projects and the conceptual possibilities that we develop in them can help citizens to explore an area of concern with their neighbors and to make individual choices about which policy possibilities might be worthwhile to pursue.

**The aim of IF is *not* to recommend** or advocate specific policy possibilities or actions. It is to improve public policy by encouraging citizens to discuss their governance concerns, and the different ways in which we might address them, with their fellow citizens. The conceptual possibilities that we present in our reports are developed by citizens in confidential, ‘sanctuary’ discussions, for use by their fellow citizens. We hope that they will help to stimulate and aid such discussions, and that they will provide both a starting point and a conceptual springboard for those who wish to explore the different policy possibilities and ends that we might want to achieve as a society.

**With the support of IF**, two discussion panels met in Washington, DC on a monthly basis from October 2002 through June 2004 to explore and develop contrasting conceptual possibilities for public policy pertaining to privacy and privacy rights.

**One panel** consisted of interested citizens, the other of citizens who have worked with issues pertaining to privacy and privacy rights in their professional lives. Our panelists met for over 164 hours of sanctuary discussions

*The aim of IF is not to recommend specific policy possibilities or specific actions. It is to improve public policy by encouraging citizens to participate in democratic discussions.*

in which they explored contrasting conceptual possibilities and developed their ideas as individuals rather than as representatives of groups, institutions, or special interests.

**This report** describes seven contrasting conceptual possibilities for public policy pertaining to privacy and privacy rights that our panelists explored, developed, articulated, and tested during the course of their discussions. It also describes the panelists’ governance concerns about privacy and privacy rights; their thoughts about the actions we might take to implement each of the conceptual possibilities that they developed; and their thoughts about the future consequences that those actions might have for individuals, groups, institutions, and society at large. It does not, however, promote or advocate any of these seven possibilities – or any of the actions that might be taken to implement them – for anything other than public discussion. There are, on the contrary, possibilities in this report that few, if any, of our panelists would endorse – but which they still thought should be part of the public policy discussion about privacy and privacy rights. We do not believe that these are the only possibilities that might be useful to discuss when thinking about future public policy pertaining to privacy and privacy rights. But we do hope that they will be illustrative, and provocative, and worthy of your attention and discussion. We thus invite you to review and discuss the policy possibilities in this report with your friends and neighbors. We hope that you will compare each of them with each of the others before deciding which of them, if any, you would like to pursue.

# PRIVACY AS AN AREA OF CONCERN

**Many Americans** regard privacy as a fundamental right. But our Constitution does not mention a right to privacy. And while the Supreme Court recognized such a right in 1965, its nature and boundaries are not very clear. Privacy and privacy rights have thus long been an area of concern in our society. But recent developments in our electronic information technologies have now magnified our concerns. Today, closed-circuit television cameras record our movements in office buildings, shopping malls, parking lots, and on the streets. Sound surveillance systems make it possible to eavesdrop and spy on people inside their homes. Some software programs make it possible to sort through the contents of as many as 300 million emails a day. Others allow hackers to access information from our personal computers. And still others are being built with the idea of reading our *intentions*. We thus live in an age in which information technology enables people to amass data about our addresses, phone numbers, race, gender, income, hobbies, shopping habits, credit histories, political party affiliations, and a host of other things—which they can both retain in their records and spread around the globe in a matter of seconds.

The potential uses of these technologies raise difficult questions regarding privacy, privacy rights, and the trade-offs that an open society might be willing to make to protect itself—such as—

- ***What does it mean for something—such as a place, an activity, a property, or an individual—to be ‘private’?***
  - ***Where, for what, and from whom should we be able to expect privacy?***
  - ***What does it mean to have a right to privacy?***
  - ***Do we, or should we, have a right or rights to privacy?***
  - ***Which of our possible privacy rights should we protect by law?***
  - ***How should we distribute the burden of protecting our privacy and privacy rights among individuals, institutions, and governments?***
- ***What kinds of actions should we regard as violating our privacy, what should be the consequences of such violations, and whom should we hold accountable for them?***
  - ***What public and private interests compete with an individual’s right to privacy?***
  - ***How should we balance our privacy rights against other values—such as freedom, security, efficiency, and convenience?***
  - ***And what consequences do our answers to these questions have for realigning the boundaries between the public and private spheres of an open democratic society?***

**These questions** reflect broad conceptual concerns about privacy and privacy rights that are fundamental for the future of our democracy. Different people may answer them differently. But we need to decide as a society whether, with whom, and to what extent other people can share what they know about us. And in order to do so, we may need to rethink the boundaries between the public and the private, the kind of society we want to live in, and the kind of state we need to govern it.

## The panelists in IF’s Privacy Project

used these questions as springboards for their discussions. They did *not* try to *define* the terms ‘privacy’ and ‘privacy rights’ once and for all. Nor did they strive for consistency in using them. They instead spoke about privacy in several different senses, which fall broadly under the categories of *liberty*, *autonomy*, *secrecy*, and *property*—and about rights as ranging from mere expectations to expectations guaranteed in law. This enabled them to explore a wide range of governance concerns pertaining to privacy and privacy rights—including concerns about where, for what, and from whom we should be able to expect privacy; and concerns about the various rights and interests that might compete with these expectations. And this, in turn, eventually led them to develop a wide range of possibilities for addressing them.

**When our panelists spoke about privacy** as liberty, they often spoke about being free from unwanted intrusions, surveillance, disclosures of information, and public accountability for their actions; about freedom of action and movement; and about their freedom, or right, to be left alone. Some panelists used ‘the right to privacy’ to refer to a host of basic liberties – such as free speech, freedom of religion, freedom of association, the right to be secure against unreasonable searches and seizures, the right to due process, and many other rights that are (and are not) mentioned in the Constitution. When they spoke about privacy as autonomy, they often spoke about their ability to control their own personal information, their actions, their personal space, and whatever is not subject to legitimate government control. When they spoke about privacy as secrecy, they often spoke about confidential information, privileged communications, and their ability to say or do something without being identified, and without it being recorded or publicized. And the panelists often spoke of ‘privacy’ and ‘the right to privacy’ as *their* privacy and *their* right to privacy – which eventually led them to speak of them as a kind of intellectual property that they own and can thus buy, sell, lease, give away, or exchange in other ways.

**Our panelists described telemarketers,** political and marketing surveyors, email spam, and internet pop-ups as annoying intrusions that infringe upon their right to be left alone – and they complained about the time and energy that they have to waste on them. They were very concerned about the government’s power to collect information about us, and they said that there is an irony in the fact that the very same government that we want to protect our privacy may be the greatest single threat to it. But they were also concerned about the ways in which businesses and other private institutions collect, use, and disseminate information about us without our knowledge or consent. They said that we have unwittingly given away our privacy by using credit cards, ATM cards, EZ-pass, the internet, and other things that leave electronic trails of our activities and make it easy for people to collect and use information about us without our knowledge, consent, or control.

**Our panelists were especially worried** that the information that is collected about them might be used to harm them. They thus worried that insurance companies might use their medical records to raise their insurance rates or to cancel their policies entirely; that employers might use them to deny them jobs or promotions; and that banks and other financial institutions might use their credit records to increase their interest rates, or to deny them credit and loans. They seemed especially concerned about how these ill effects might result from false information, and they often spoke about how difficult it is to correct false information once it has been made public. They also voiced numerous concerns about how invasions of privacy might affect their freedom and autonomy as citizens. They worried that the information that is collected about their political views, activities, and associations might result in political retaliations, including the loss of jobs, in both the public and the private sectors. They described the chilling effects that electronic surveillance might have upon their freedom of speech and their willingness to contribute to political organizations or to participate in political demonstrations. And they worried about the possible Orwellian consequences that might result from our government’s use of electronic surveillance devices.

**Finally, our panelists worried** that the loss of privacy might be a *fait accompli* – and that we might simply have to adapt to a future in which we no longer have a right to privacy at all. They said that our current laws do very little to protect personal privacy, that we often have to disclose personal information to governments and corporations to receive the services we need from them, and that there is now a social trend toward greater transparency. They wondered whether and to what extent we would have the will – or the technological ability – to enforce laws that actually would protect our privacy. They wondered whether we will be willing to pay the price of protecting it in the future, especially given the security, convenience, and efficiency that greater transparency might offer. And they wondered whether it is possible to protect our privacy through moral and social pressure instead of laws.

*There were five basic concerns that the panelists returned to during the course of their discussions. They repeatedly said that:*

- *Many invasions of privacy are annoying disturbances that waste their time, money, and energy*
- *Some invasions of privacy threaten their freedom and autonomy as citizens*
- *We have no way of knowing or controlling how the information that is collected about us will be disseminated and used*
- *The information that is collected about us might later be used to harm us*
- *We simply may not have any privacy or enforceable rights to privacy in the future*

**Our panelists explored** a wide-range of conceptual possibilities for addressing these concerns, and they eventually selected nine of them for inclusion in their report. I have reduced their nine conceptual possibilities to seven in this revised version of the report by combining two of their original possibilities and eliminating one of them altogether. The two possibilities that I have combined both flowed from the idea that we will not be able or willing to enforce privacy laws in the future. One of these possibilities said that we should continue to value privacy, but that we should treat it as a social norm instead of a legal obligation to be enforced by the government. The other said we should simply forget about privacy and privacy rights and try to adapt to transparency and its many conveniences instead. I have combined these two possibilities because we repeatedly found in our citizen discussions that a discussion of either one of them seemed to naturally engender a discussion of the other. I have also eliminated a possibility that would protect privacy as a very strong fundamental right for much the same reason. Discussions of each of the other possibilities seemed to naturally engender a discussion of the idea that privacy is, or ought to be, a very strong fundamental right. In each of these cases we repeatedly found that our discussion participants felt as if they had already discussed these two possibilities and knew where they stood on them by the time we began to discuss them.

## THIS REPORT

**The following pages** present seven different conceptual possibilities for public policy relating to privacy and privacy rights. They also present our panelists’ ideas about what we might do to implement each possibility were we to adopt it, and the possible effects that those actions might have upon individuals, groups, institutions, and society at large. Readers should bear in mind that these are *different* ways of thinking about privacy and privacy rights. This means that the seven possibilities that we present arise from different beliefs, interests, values, and goals. It also means they are not necessarily consistent with each other – let alone mutually reinforcing planks in a single policy platform. And it means that they may even arise from different concepts of privacy and privacy rights.

**We want to emphasize** that this report is intended primarily for citizen discussion, and not for politicians and policy makers. It thus does not recommend or advocate the adoption of any one of these possibilities – or, indeed, any particular policy regarding privacy and privacy rights at all. It instead describes policy possibilities that our panelists thought might be useful for public discussion – along with their possible practical consequences and the concerns, values, interests and beliefs that inspired them. Our reasons for presenting this material are thus different from those of most other public policy institutions that publish reports about privacy and privacy rights.

**Most public policy reports** recommend actions that governments should take to solve problems in current policy. They are generally written to overcome opposition and to secure political support for those actions. Our project, by contrast, assumed that privacy is a perennial area of concern. But we did not presume that our current policies are broken and need to be fixed. We did not, indeed, focus upon current policy at all. The adoption of some of the possibilities in this report would be a clear departure from our current policy toward privacy and privacy rights. But the adoption of other possibilities might well be consistent with it.

**We do not present these possibilities** in an attempt to forge a consensus for action amongst the citizens who might discuss them. Nor do we present them to begin a debate about which is the best or most suitable for us to adopt. We present them, instead, with the hope that each individual citizen who discusses them will come to better understand his or her own mind, and that this will in turn result in better policy. We have, in describing each of the possibilities, thus offered several reasons why you might *not* like it—and we have tried to direct your attention toward other possibilities in the report that you might prefer if you do not like it. It is pointless and perhaps even counter-productive to try to compare or evaluate the possibilities in terms of any one concept of privacy, governance concern, or policy issue. Some possibilities are consistent with each other. Others are mutually exclusive. But each of them presents an approach toward privacy that should be explored in its own right. And taken together, they represent a wide range of different concepts, beliefs, values, interests, concerns, and goals that might motivate public policy regarding privacy and privacy rights. We believe that each of them deserves attention and thoughtful consideration, and that they should all be included in policy discussions pertaining to privacy and privacy rights.

**We have described** each possibility in broad conceptual terms, and we have made no effort to describe the many qualifications and exceptions that we would need to make to them if we were to actually adopt any one of them as our policy. It may be useful, for this reason, to emphasize that *we certainly do not intend any of the possibilities in this report to be understood as being, in any way, absolute, unqualified, complete, or without exceptions.* It seems clear, on the contrary, that we would have to work out the details of many exceptions and qualifications to each of the possibilities that we describe were we to ever adopt it as our actual policy toward privacy and privacy rights. We know that the devil is in the details—and that the details are his full-time residence when it comes to public policy. But we think that these exceptions and qualifications are best worked out as the need for them arises.

**We also want to emphasize** that we do not intend the ‘possible implementations’ and ‘possible effects of these actions’ that we list after each possibility to be necessary, certain, complete, or even consistent with each other. Predicting the actual consequences of adopting a conceptual possibility is always a difficult task. This is because we can usually implement a possibility in several different ways, and because its actual effects will depend upon how we actually implement it. Our panelists often disagreed about how a possibility might be implemented and about the effects that those actions might have. You will probably think of different ways to implement each possibility, and of different consequences that they may have for individuals, groups, institutions, and society at large as well. We have nonetheless included some of our panelists’ thoughts about them in this report—

- partly to illustrate how a discussion about conceptual possibilities might lead to a discussion about possible actions and their possible consequences in the real world
- partly to give you a better idea of what the panelists were thinking about when they developed a possibility, and
- partly with the hope of stimulating further discussion about the conceptual possibilities themselves.

**Finally, this report is not** a philosophical or scientific treatise. Nor is it a textbook intended to educate citizens and policy makers. It is, on the contrary, a description of some of the governance possibilities that were developed by citizens who met to explore their concerns about privacy and privacy rights with the expressed purpose of developing, testing, and articulating contrasting governance possibilities that others might find useful to discuss. We have prepared this report with the hope that it will help to facilitate further discussions about privacy amongst our citizens. We expect that different people will have very different ideas about privacy and privacy rights. But we hope that discussing the possibilities in this report will stimulate them to contribute their own ideas to this discussion, and to explore and develop their own ideas and the ideas that we present further.



**As you consider these issues yourself and discuss them with others, you may wish to ask yourselves some of the following questions:**

- What are the values that motivate this particular possibility?
- Why might someone hold these values?
- Why might someone be opposed to them?
- What goals is this possibility trying to achieve?
- Why might someone have those goals?
- Why might someone be opposed to them?
- What actions might we take to implement this possibility were we to adopt it?
- What effects might those actions have upon individuals, groups, institutions, and society at large?
- How might they affect you personally?
- What are the strengths of this possibility?
- What are its weaknesses?
- Who would be likely to benefit from the adoption of this possibility?
- Who would be unlikely to benefit from the adoption of this possibility?
- What other approaches are available for pursuing the values and goals that inspired this possibility?
- Who might be more likely to benefit from choosing those other approaches?
- Who might be less likely to benefit from choosing those other approaches?
- What actions would we be likely to take to implement this possibility, given our current political realities, were we to adopt it?
- What effects would those actions be likely to have upon individuals, groups, institutions, and society at large?
- How effective would this possibility be in achieving its desired ends if we were to adopt it?
- What would you do to strengthen this possibility?
- How would you compare this possibility to each of the other possibilities in this report?

# RESTRICT THE POWER OF GOVERNMENT TO COLLECT AND USE OUR PERSONAL INFORMATION

*This possibility would restrict government’s power to collect, use, and share personal information about its citizens, and it would give us the right to seek legal recourse for harm resulting from violations of these restrictions.*

**Do you wonder** what governments do with all the personal information they collect about you? Do you think that they may sometimes use it in ways that conflict with your own attempts to control what other people can know about you? And do you worry that they may sometimes misuse their power to collect information in ways that compromise your freedom or cause you harm?

**This possibility** flows from the belief that governments need to collect information about their citizens and to share it with others in order to fulfill their legitimate governmental functions. But it also flows from concerns that they may sometimes divulge information that we would prefer to keep secret, that they may use it in ways that conflict with our own attempts to control what others know about us, and that they may abuse their power to collect information – or misuse the information itself – in ways that may compromise our freedom or even cause us harm. This possibility would put limits on the personal information that governments can collect about their citizens. It would also put limits on what they can do with it. The rules it envisions would probably not free us entirely from unwanted governmental disclosures of our information, or from our being publicly accountable for them. And governments would probably still be able to legally collect certain kinds of information about us without our consent. But this possibility would still give us greater control over our privacy by requiring governments to state the intended use of each piece of personal information that they collect about us – and by requiring them to weigh and balance each potential invasion of privacy against their need to know the specific piece of information in question to carry out the specific activity in question.

**Restricting the power of government** in this way would also give us greater control over our privacy by forbidding governments from using the personal information they collect for purposes other than those for which its collection and use was originally approved – and by making them legally accountable for violations of these restrictions. And it would offer us legal recourse if we feel that we have been harmed by a government’s use of false information about us, or by its misuse of true information that it has collected about us, or by its abuse of its power to collect personal information about us.

*This possibility would give us greater control over our privacy by requiring governments to state the intended use of each piece of personal information that they collect about us—and to weigh and balance each potential invasion of privacy against their need to know the specific piece of information in question.*

**Other Perspectives.** But even if you share these beliefs and concerns, you may wonder how we would ever agree about what governments need to know in order to fulfill their legitimate functions – or how we could enforce the privacy rules that we might eventually adopt. You may worry that allowing governments to invade our privacy is a slippery slope. Or you may think that they are powerful enough to both find out whatever they might want to know about us, and to use that information in whatever way they see fit. If you are inclined to think this way, then you may conclude that we should forget about trying to protect our personal information, resign ourselves to the futility of trying to restrict government’s power to collect and use it, and try to embrace the virtues that transparency offers instead.

**Possible Implementations.**

We *could*—

- require governments to justify their ‘need to know’ each piece of personal information that they collect about us
- require governments to strip personal identifiers from information wherever possible
- require governments to get appropriate judicial, legislative, or executive approval to collect personal information for specific purposes
- require governments to furnish us with the information that it collects about us, to tell us how our information will be used, and to destroy the information once its purpose has been fulfilled
- create and publicize procedures by which people can challenge and correct the false information that government collects about them, and procedures by which people can seek recourse from harm resulting from it
- allow citizens harmed by the government’s misuse of their personal information or by its abuse of power in collecting that information to obtain monetary damages and a court order prohibiting further harm
- have citizens and non-governmental institutions establish watchdog groups to provide oversight

**Possible Effects of These Actions.**

These actions *could*—

- limit government’s collection of personal information to what it really needs to know in order to fulfill its legitimate functions
- help to protect your privacy even if government needs to use your personal information
- hinder our law enforcement agencies’ ability to detect criminal activity and our judicial system’s ability to adjudicate disputes; lead to disputes about what government needs to know
- increase our awareness of privacy issues; make us more careful about what we say and do in public, and how we protect our personal information; make us less careful about these things if we feel complacent with the new laws
- lead to more government bureaucracy and to more bureaucratic disputes about what government does and does not need to know; raise questions about whether the restrictions can be effectively enforced
- cripple the judicial system’s ability to adjudicate such disputes, since it might not have access to the information it needs to do so; lead to a boom in the information business if government hires private firms to collect the information it needs
- demoralize society if we realize that government can get any information it wants even with our best efforts to restrict it

**For Further Discussion . . .**

- What kinds of personal information can governments currently collect and use, and for what purposes?
- What kinds of personal information should governments be allowed to collect and use, and for what purposes?
- Should the kind of personal information that governments are able to collect depend upon what it will be used for—e.g., taxes, employment benefits, law enforcement, medical care, or financial matters?
- Are there exceptional circumstances under which the government should be allowed to collect information that would normally be treated as private and protected from disclosure or use?
- Should the rules we apply to the government and its handling of personal information also apply to individuals and businesses? If so, why so? If not, why not?
- Should these rules be written to generally permit government disclosure and use, so as to minimize our right to privacy, or to generally prohibit government collection and use, so as to protect privacy as a fundamental human right?

## MAKE PRIVACY DEPEND UPON PLACE & ACTIVITY

*This possibility would treat privacy as a very strong right when we are in private places or engaged in private activities, but as a much more limited right when we are in public places or engaged in public activities.*

**Do you think that certain places** and activities should be treated as more private than others? Do you feel that your home is your castle, that what you do in your bedroom is your own business, and that you should be free from unwanted disturbances and surveillance while you are there? And do you worry that the development of electronic information technologies is increasingly compromising that freedom?

**This possibility** flows from a belief that private places and activities are different from public places and activities, and that we should generally be free from unwanted intrusions or observation when we are in private places or engaged in private activities. It also flows from concerns about the audio and visual surveillance of private homes, the nuisance caused by junk mail and telemarketers, and the privacy of our activities on the internet. This possibility would allow governments, non-government institutions, and individuals whom we do not know to send us mail, and to telephone or email us at home without our consent to notify us of emergencies. But it would otherwise prohibit them from disturbing us at home unless there is good reason to think that we are using it as a place of business. And it would prohibit government from keeping our homes under surveillance unless there is good reason to think that they are implicated in criminal activities. We would, under this possibility, generally be free from unwanted surveillance and disturbances when we are in private places or engaged in activities that do not affect the public. We would also be free from targeted government surveillance without the government having shown probable cause of criminal activity. But we would have less reason to expect privacy when we are in public places or engaged in activities that affect the public.

*We would, under this possibility, generally be free from unwanted surveillance and from being disturbed when we are in private places or engaged in activities that do not affect the public. We would also be free from targeted government surveillance without the government having shown probable cause of criminal activity. But we would have less reason to expect privacy when we are in public places or engaged in activities that affect the public.*

**Other Perspectives.** But even if you agree that some places and activities should be more private than others, you may think that it will be difficult to decide exactly which activities and places should be private and which should not – let alone the legitimate purposes for which others may invade our privacy. You may think, for example, that the fact that most of our homes are now equipped with telephones, televisions, fax machines, and computers means that they should no longer be regarded as private. For these machines enable us to gather information about the outside world and to perform actions in it. And they also enable people in the outside world to gather information about what we are doing in our homes. You may think that these machines, together with the fact that a growing number of Americans now work from their homes – not only as independent contractors with their own businesses, but as employees as well – have blurred the distinction between public and private space, and the reason why we used to expect greater privacy in our homes. If you think any or all of these things, then you may also think that we should forget about trying to base our right to privacy upon where we are and what we are doing, and that we should distinguish between public and private individuals and institutions instead.

**Possible Implementations.**

We *could*—

- have Congress enact laws defining which places and activities are public and private, and restricting invasions of private places and activities
- enact laws creating ‘privacy zones’ that entitle people to varying degrees of privacy
- decide that people do not have a right to privacy when they are in public places
- extend existing laws governing the privacy of postal mail and telephone conversations to cover communications in cyberspace
- enact laws stipulating greater penalties for violating privacy when the violators ignore obvious attempts that people have taken to protect it
- have the Executive Branch encourage a national discussion to determine how recent technological, societal, and political developments have affected our ideas about which places and activities should be regarded as public and private
- appoint a ‘Privacy Czar’ to decide which places and activities should be regarded as public and private
- have the courts decide which places and activities should and should not be treated as public and private

**Possible Effects of These Actions.**

These actions *could*—

- result in a ‘default assumption’ that people should generally not be disturbed without their consent when they are in private places or involved in private activities
- clarify where public and private places and activities begin and end
- result in people holding more meetings in private places
- restrict government’s access to private email, but lead to less efficient law enforcement and security
- lead to the development of better technologies for protecting privacy, change media rules for publishing personal information, and free us from surveillance at home
- place greater restrictions on government’s tracking of persons in both private and public places, result in the decline of telemarketers and market researchers, and free us from surveillance when we are in private places or engaged in private activities
- result in more and greater infringements upon some of the basic liberties guaranteed by the Constitution
- result in a decision that we should no longer treat the home and some of the activities that occur in it as private

**For Further Discussion . . .**

- Do you think that we should treat the internet and cyberspace as a public or private place? And why?
- Should we treat the privacy of email in the same way that we treat the privacy of snail mail? If so, why so? If not, why not?
- Do you think that we should treat our offices and our cars as public or private places? And why?
- Do you think that we should treat the home as a private place even if we use it as our place of business? If so, why so? If not, why not?
- Do you think that there are certain activities that we should regard as private regardless of where they occur—or do you think that if we want people to treat our activities as private then we should take care to perform them in private places?
- Do you think that the younger generation has a different sense of privacy than the older generation? And if so, do you think that it is because they are engaged in different activities or for some other reason?

## GIVE LESS PRIVACY TO PUBLIC INDIVIDUALS & INSTITUTIONS

*This possibility would treat the privacy rights of individuals and institutions differently by giving greater privacy to those in the private realm and less privacy to those in the public realm.*

**Do you think** that some individuals and institutions should have less privacy than others due to the impact that they might have upon society? Do you believe that others have forfeited their right to privacy as a result of their actions? And do you think that some people should be deprived of their right to privacy because of the public lives they have chosen to live?

**This possibility** flows from a belief that there is a difference between the public and private realms of society, and that individuals and institutions in the public realm should have less privacy than those in the private realm. This possibility would thus recognize different privacy rights for different individuals and institutions depending upon whether we regard them as public or private. But it would also expand the concept of the public realm to include individuals and institutions that are often regarded as private. The public realm of society is typically understood as government, and the private realm as everything else. This possibility would expand the concept of the public realm to include certain individuals and institutions that are not part of government – such as rich and powerful people, influential political advisors, candidates for public office, celebrities, criminals, powerful corporations, companies that do business with the government, and non-profit organizations. Some of these individuals and institutions exert extraordinary influence upon the public. Others have forfeited their right to privacy by their actions. This possibility would limit their privacy rights accordingly. Private individuals and institutions would generally have the right to be left alone, to disclose information about themselves and their activities as they see fit, and to keep such information secret if they choose to do so. Public individuals and institutions would generally not have these rights.

**Far from protecting the privacy rights** of public individuals and institutions, we might actually require them to disclose information about activities that we think might have a significant impact upon society.

*This possibility would recognize different privacy rights for different individuals and institutions depending upon whether we regard them as public or private. But it would also expand the concept of the public realm to include individuals and institutions that are often regarded as private.*

**Other Perspectives.** But even if you agree with these ideas, you may think that this possibility could all too easily have undesirable consequences if it is not implemented carefully. You may think that some public institutions might not seek the governance advice they need for fear of unwanted publicity – and that some public individuals might forego the medical care they need if required to disclose their health records. You may think that people would generally be reluctant to accept government jobs and other leadership positions if they have to forfeit their privacy, that we might have to offer them more money or other incentives to accept them as a result, and that we might end up creating new privileges for them that would undermine the point of restricting their privacy in the first place. Or you may think that we should actually protect the privacy of certain public individuals, such as whistle blowers, who are the sources of certain kinds of valuable information. But if you think any or all of these things, then you may be less inclined to give public individuals and institutions less privacy, and more inclined to strengthen privacy as a fundamental right of all citizens.

**Possible Implementations.**

We *could*—

- define the public and private realms, including what counts as governmental individuals and institutions, and what non-governmental individuals and institutions count as public
- enact laws defining what kinds of information individuals and institutions in the public and private realms would be required to disclose, and what kinds of information they would be allowed to keep secret
- create an arbitration process charged with establishing each individual's and institution's privacy status, and with adjudicating disputes that might arise about someone's privacy status
- treat private contracting companies as part of the public realm when they do business with the government
- create a Federal Department of Privacy and/or a Privacy Czar charged with determining what information governments can collect from public and private individuals and institutions; with insuring that they do not collect any other information; with adjudicating refusals to disclose information and resolving claims resulting from privacy violations; and with developing ways to allow the public a broader access to government information that it has the right to see

**Possible Effects of These Actions.**

These actions *could*—

- create a hierarchy of privacy rights for different kinds of public and private individuals and institutions; limit privacy in inapt ways if not done carefully; be difficult to do carefully
- lead to less efficient government services, since governments would have less information about the private realm; make people reluctant to take public leadership positions and other public jobs that require them to forfeit privacy
- provide more information about individuals and institutions that have the power to affect our lives; lead to disputes about privacy status and to a black market in personal information
- subject government contractors to disclosure; shift economic power abroad, if companies move offshore to avoid transparency
- harm public individuals who might be less willing to seek health care and other help they need for fear of unwanted publicity; offer recourse to those who think their information has been misused or inappropriately disclosed to others; be a 'Catch-22', since much of the information that government collects is information about private individuals, and since government might be required to disclose information that private individuals have the right to keep secret

**For Further Discussion . . .**

- Do our current expectations of privacy depend upon whether our society regards us as public or private entities?
- Is it reasonable for politicians and celebrities to expect some right to privacy for certain aspects of their lives even though their positions and fame depend in great measure on disclosure of their thoughts and actions?
- Are the concepts of privacy, on the one hand, and disclosure and transparency, on the other, opposite sides of the same coin? Or are they concepts that pertain to very different things?
- Where should we draw the line on the disclosures that we require of public persons and institutions? Does it matter what activities they are engaged in—as in Possibility B?
- How should our treatment of individual natural persons differ with respect to privacy from our treatment of the collective 'artificial' persons (such as corporations and other institutions) that we create?
- Should non-governmental institutions that serve the public have different disclosure obligations from government institutions? If so, why so? If not, why not?

# PROTECT OUR BASIC LIBERTIES

*This possibility would have government vigorously protect us against invasions of privacy that violate our basic liberties—but it would offer little or no protection from invasions of privacy that are merely annoyances or that reflect competing private interests that do not threaten our basic liberties.*

**Do you think that some invasions** of privacy threaten our basic liberties, while others are merely nuisances or disputes between competing private interests? Do you think that government should protect us against invasions of privacy that threaten our basic liberties, but not against those that do not? And do you sometimes worry that government may be our predator, as well as our protector, when it comes to protecting our privacy and privacy rights?

**This possibility** flows from the belief that one of the basic duties of government is to protect our basic liberties – and that there is a big difference between invasions of privacy that infringe upon our basic liberties and invasions of privacy that do not. But it also flows from a concern that governments themselves may threaten our basic liberties, especially if we give them unlimited power to collect information about our personal lives, and that they may also take sides in competing private interests under the guise of protecting our privacy. This possibility maintains that our right to privacy is really the right to the whole host of our basic liberties, including our free speech, our freedom of religion, our freedom of association, our right to be secure against unreasonable searches and seizures, our right to due process, and many others that are and are not mentioned in the Constitution. It would thus try to increase government protection of our privacy in matters that involve our basic liberties, while decreasing government intervention in those that do not.

*This possibility flows from the belief that one of the basic duties of government is to protect our basic liberties—and that there is a big difference between invasions of our privacy that infringe upon our basic liberties and invasions of privacy that do not.*

**Government**, according to this possibility, would take vigorous action to protect us against invasions of privacy that infringe upon our basic liberties or that otherwise hinder our ability to function as free citizens. But it would generally not protect us against other invasions of privacy. It would thus take vigorous action to uphold our voting rights and the secret ballot; to prohibit loyalty oaths; to protect our right to participate in political demonstrations; to restrict its own use of electronic surveillance on private homes; and to protect us against retribution for expressing our political, religious, or philosophical views. But it would take little or no action at all to protect us from junk mail, or from telemarketers, or from doctors sharing our private medical records with insurance companies; or from demands that we give corporations information about ourselves in exchange for their services.

**Other Perspectives.** But even if you share these beliefs and concerns, you may wonder why government should not also protect us against invasions of privacy that do not threaten our basic liberties. You may know people who have suffered from unwanted disclosures of their medical, financial, education, and employment records. You may think that governments should protect us against these invasions of privacy too. And you may think that they should even protect us from telemarketers and junk mail if we want them to. If you think this way, then you may also think that we should regard privacy itself as a fundamental right, regardless of whether or not it pertains to our basic liberties. Or you may think, on the other hand, that, as important as privacy may be to our way of life, our basic liberties must take a back seat when our national security is at stake. And if you think this way, then you might think that we should subordinate privacy and our basic liberties to national security whenever it is threatened.



**Possible Implementations.**

We *could*—

- appoint a blue-ribbon commission to decide which invasions of privacy violate our basic liberties and which do not—including which invasions of privacy do and do not hinder a person’s ability to function as a citizen in a democracy
- repeal or reduce privacy laws that currently protect us from invasions of privacy that do not violate our basic liberties—including such laws as HIPAA, the Right to Financial Privacy Act, and the IRC Privacy Rules
- enact new laws, where current laws are weak or non-existent, that protect us against invasions of privacy that violate basic liberties, including laws that protect us from public and private retribution for holding or expressing political, religious, and philosophical views of any kind
- strengthen our judicial and law enforcement systems so that they can vigorously enforce laws that protect us against invasions of privacy that violate our basic liberties
- develop citizen arbitration systems and community action groups to deal with invasions of privacy that do not infringe upon basic liberties

**Possible Effects of These Actions.**

These actions *could*—

- lead to the general improvement of privacy protection in areas related to basic liberties, public life, and political freedom; lead to controversy about which invasions of privacy violate basic liberties and how to deal with those that do not violate basic liberties
- increase productivity by eliminating costs of protecting privacy; increase invasions of privacy in areas that do not involve basic liberties; decrease individual privacy relative to large institutions
- reduce invasions of privacy in areas that involve basic liberties; make it easier for terrorists and criminals to escape detection; undermine or eliminate campaign finance laws by making it easier for the rich to make anonymous contributions to influence the political process
- check governments and others from invading privacy in areas that involve basic liberties; expand their power to invade privacy in other areas; increase litigation about specific laws
- make us more pro-active in protecting our privacy in these areas; lead people to see that there are privacy rights beyond basic liberties that they want to protect

**For Further Discussion . . .**

- How should we distinguish between invasions of privacy that violate our basic liberties and invasions of privacy that do not violate our basic liberties?
- Should we regard all invasions of privacy that do not violate our basic liberties as mere inconveniences?
- Why do you think that the founders did not include a specific right to privacy in our Bill of Rights?
- Does this possibility differ from our current policy regarding privacy rights? And if so, how?
- Should we regard the right to privacy as an ‘umbrella right’ that is supposed to cover all of our basic liberties, or as a separate right that is necessary to protect our basic liberties, or as something entirely different?
- Are there any social and legal alternatives to appealing to rights as a way to protect our basic liberties? And if so, what are they?

# TREAT PRIVACY AS PROPERTY

*This possibility would give us greater control over our personal information by treating privacy and privacy rights as forms of intellectual property that we can buy, sell, lease, or give away as we see fit.*

**Do you believe** that your privacy is something that belongs to you and you alone? Do you think that your medical records, purchase history, and credit rating must be valuable information since so many people are trying to get hold of them? And do you think that you should have the right to control who gets this information and what they can do with it?

**This possibility** flows from the recognition that we often speak about privacy, personal information, and privacy rights in the possessive as ‘my privacy’, or ‘your personal information’, or ‘her right to privacy’. It also flows from a recognition that personal information such as medical records, purchase histories, academic records, credit ratings, employment histories, and personal profiles have a value on the free market. It thus flows from the recognition that businesses often want to purchase our personal information and to use it to increase their profits – and from a concern that we may be giving away something valuable by not charging people and institutions for information that they want to know about us. This possibility would give us property rights to our personal information, including audio and visual images that are made of us. It would thus allow us to buy, sell, rent, lease, or give away our personal information, and the rights to use it, in the same way that we can exchange anything else that we own. Your personal information need not be secret or held in confidence in order for it to be regarded as private according to this possibility. Its privacy would instead consist in the fact that a private entity owns the property rights to it, and is thus able to control who can use it – and how. Your medical records might be public knowledge in the sense that the whole world knows what they contain. But no one would have the right to use that information without your consent so long as you own the property rights to it. And if you should exchange the property rights to your personal information, then people would need to seek permission from whoever currently owns them in order to use it.

**We would, under this possibility,** thus be free to charge some people and not others for the right to collect and use information about us. This means that we would be able control who can use our personal information, the purposes for which they can use it, and the price it would cost them to use it. But it also means that we can sell or lease or give our personal information, as well as the rights to use it and to exchange it with others, to other people and institutions that want it. And this, depending upon the terms of the sale, means that you might very well find yourself in the position of having to ask others for their permission to use information about yourself.

***Your personal information need not be secret or held in confidence in order for it to be regarded as private according to this possibility. Its privacy would instead consist in the fact that a private entity owns the property rights to it, and is thus able to control who can use it—and how.***

**Other Perspectives.** But even if you feel sympathetic toward treating privacy as property, you may still wonder who actually owns, or should own, your personal information. For while your medical records are about you and you alone, they still exist only because of your interaction with your doctors. So shouldn't your doctors have property rights to them as well? And doesn't the same reasoning hold true for your financial, academic, legal, and employment records – or for pictures and recordings that are made of you? We might well need a whole team of Washington lawyers to determine what kinds of personal information should be protected as private property – and a Federal Privacy Czar to set ‘price and information’ controls that reflect the relative utilities of different kinds of personal information. And if all of this keeps you awake at night, then you might think that we should probably forget about privacy and embrace transparency instead.

**Possible Implementations.**

We *could*—

- enact laws that define personal information as property and stipulate which kinds of personal information would be protected as property and which would not
- review existing privacy laws with an eye toward repealing them or changing them to conform to the new property laws
- create a system of intellectual property rights on personal information, similar to copyrights, that would include ‘fair usage’ clauses that permit governments and others to use limited amounts of personal information for certain purposes without consent of its owner
- allow governments, non-governmental institutions, and private citizens to require people to disclose personal information in exchange for their services
- have government take an active role in creating a personal information market by regulating the exchange of certain kinds of information, developing a price system for personal information and the rights to it, and regulating how people obtain, exchange, and use protected information
- have government take a more passive role in the personal information market by limiting itself to ensuring that information exchanges are not coerced

**Possible Effects of These Actions.**

These actions *could*—

- provide people with additional income from the sale and use of their personal information; increase litigation over stolen or misused information, which strains the judicial system
- improve clarity regarding the use of personal information; reduce or even eliminate the need for other rules to protect privacy
- enable governments to use the information that they really need free of charge; lead to significant growth in the information industry; lead to sales, income, and property taxes on personal information; lead to widespread theft and a black market in information
- lead to a bartering system in which people are able to exchange their personal information for goods and services, or for lower prices on goods and services they want
- lead to more efficient ways to exchange, bill, and pay for personal information; raise prices as companies have to pay for information they now get and use freely; make news coverage more difficult and expensive; give people less control over the use and distribution of their personal information if it is not worth much
- increase the influence of market forces in an already market-dominated society; require us to constantly bargain and haggle over the price of our personal information

**For Further Discussion . . .**

- Would the sale, disclosure, or maintenance of personal information differ by income or wealth?
- Would this difference matter? Should it?
- Would each of us negotiate our own terms and prices with each interested buyer or would we quickly establish certain standard terms and pricing? How? Should this be done by the marketplace or by the government?
- How would we know about and enforce violations?
- Would we sell our personal information only as it exists as of certain dates so that if we moved the next day, we could sell our new address information to another purchaser? Or would the buyer have the right to know and use our personal information for a set number of years or the remainder of our lifetime?
- Who should own the information that arises from our interactions with others? Could ownership be shared? Among how many parties?

## SUBORDINATE PRIVACY TO NATIONAL SECURITY

*This possibility would allow government to legitimately invade our privacy during national security crises involving military threats to national security.*

**Do you believe** that government's primary duty is to defend its citizens and the nation against military threats? Do you worry that there is a fundamental conflict between protecting our personal privacy and protecting our national security? And do you think that our right to privacy must ultimately take a back seat to legitimate national security concerns during national security crises?

**This possibility** flows from the belief that there is an inherent and irreducible tension between protecting our privacy and protecting our security; that we simply have to decide which of the two takes priority over the other; and that national security must take precedence over our rights to privacy, since we might have no rights at all if we were conquered by another state. This possibility would thus give the federal government the power to suspend our privacy rights and to invade our privacy, in all senses of these terms, during a national security crisis. The specific actions that the government might take during a national security crisis would probably depend upon the nature of the national security threat and the nature of the proposed invasion of privacy – and we would probably need to define, ensure, and periodically review the institutional authority necessary for making these decisions, as well as their success. But the government, under these conditions, might well be able to collect and withhold any piece of information that it wants about us during a national security crisis. There might also be no restriction on the kinds of technologies that the government could use to collect and store this information, or on the government's power to store the information that it collects about us for indefinite periods of time. Indeed, the government would probably not even be required to inform us that we are, or were, under surveillance or that it has collected information about us.

**These actions** might amount to government spying on its own citizens, and they might well violate laws that prohibit the government from spying on its citizens under normal conditions. But national security crises are not normal conditions. Our laws would not be worth the paper they are written on if we were defeated in war. And if we adopt this possibility, then it would actually be the policy of government to not enforce those laws during a national security crisis.

***This possibility would give government the power to suspend our privacy rights and to invade our privacy, in all senses of these terms, during a national security crisis.***

**Other Perspectives.** But even if you agree that our national security must take precedence over our personal privacy, you might still think that the measures that our government might take to implement this possibility could be very dangerous if they are left unchecked, and very difficult to check once they are in place. You may worry that they could lead to a much stronger government bureaucracy and to a situation in which government would have so much personal information about its citizens that the policy would inevitably be abused. You may also think that government might too easily use this policy to justify invasions of privacy that have nothing to do with national security. And you may fear that its abuse of privacy in the name of national security might compromise our other rights, lead to a more repressive society, and pose a serious and irreversible threat to all of our civil liberties. If you are inclined to think any or all of these things, then you might also think that we should regard privacy as a fundamental right of all citizens, protect our basic liberties, and restrict government's power to collect and use our personal information.

**Possible Implementations.**

We *could*—

- define what constitutes our national security, what constitutes a threat to it, what kinds of privacy invasions are justified by what kinds of national security threats, and what limits, if any, apply to government’s right to invade privacy during national security crises
- enact laws giving the government the power and authority to collect information about citizens for national security purposes
- require citizens to carry national identity smart cards; use radio frequency identifiers to keep track of potential national security threats; keep potential security threats under audio and visual surveillance
- revive the ‘Total Information Awareness Program’ and use statistical models for the random search and seizure of personal records, facilities, and equipment
- educate citizens about the loss of privacy rights that might occur during national security crises
- decide to not educate citizens about the loss of privacy rights that might occur during national security crises

**Possible Effects of These Actions.**

These actions *could*—

- lead to a safer and more secure society; lead to heated debates about what national security is, what a national security crisis is, how to tell that there is a crisis and that it is over, and what limits, if any, apply to government’s right to invade privacy during a national security crisis
- strengthen government bureaucracy; shift power to the intelligence community, the military, and the executive branch
- result in more efficient government and law enforcement services; lead to the development of more effective surveillance technologies; compromise our freedoms and lead to a more repressive society
- allow government to collect a lot of information that does not affect national security; increase the potential for its abuse; make people more secretive and distrustful of government
- lead government to exaggerate the danger of national security threats
- lead to a permanent national security crisis, to a distrustful society, to a totalitarian state, and to civil unrest

**For Further Discussion . . .**

- Would you prefer to live in a very secure country with weak privacy rights or in a less secure country with strong privacy rights? And why?
- Do you think that we really have to choose between protecting our personal privacy and protecting our national security? Or is there some way to protect both of them at once?
- Do you think that we need to protect our national security in order to protect our privacy and personal freedoms, or that we need to protect our privacy and personal freedoms in order to protect our national security? And why?
- What powers and rights do our law enforcement agencies have to protect and invade our privacy? And what powers and rights *should* they have?
- Do you agree that the very same government that we want to protect our privacy is the greatest single threat to it? If so, why so? If not, why not?
- If you do not agree that we should sacrifice our personal privacy to protect our national security, then what goods, behaviors, freedoms, and values would you be willing to give up, compromise, or trade in order to protect it?

## FORGET ABOUT PRIVACY AND EMBRACE TRANSPARENCY INSTEAD

*This possibility would encourage us to value transparency more than privacy, and to try to find more effective ways to reap its benefits.*

**Do you feel** that passing laws to protect our privacy is a bit like closing the barn door after the horse is gone? Do you think that attempts to enforce such laws are both increasingly expensive and increasingly ineffective – and that it is ludicrous to have laws that we are unwilling or unable to enforce? And do you think that we might ultimately be better off if we simply forget about privacy and embrace transparency instead?

**This possibility** flows from a belief that the development of new information technologies, together with a shift in our social mores toward greater transparency, are forcing us to continually rethink what should and should not count as an invasion of privacy – and that this, in turn, is making it increasingly difficult to enact effective privacy laws. It also flows from a concern that we simply will not enforce our privacy laws in the future – either because new and more powerful technologies will make it increasingly difficult to do so, or because we simply will not be able or willing to spend the money that will be necessary to do so. This possibility would thus encourage us to forget about trying to protect our privacy, and to focus our attention upon the benefits that greater transparency might offer us instead. We would not have a legal right to privacy under this possibility. We would instead have a society in which people value transparency and the benefits that it offers much more than they value their privacy. Here, the benefits of greater transparency would probably include greater convenience, greater efficiency, and greater security. Greater transparency could make everyone, including government, more accountable for their actions. And it could also be very good for business, since protecting privacy is costly, and since companies could save a lot of money if they did not have to train their employees to comply with privacy laws, or protect the privacy of their customers and employees, or guard their own proprietary information.

**Greater transparency** could thus save us a lot of time, money, and energy that we might otherwise waste by trying to salvage a lost cause. It could, no doubt, also have detrimental effects on our personal freedom – at least in the sense of our right to be left alone – and perhaps even do away with it entirely. But the actions that we might have to take to protect personal privacy in our ‘brave new world’ can also be detrimental for our personal freedom, and they can all too easily lead to a distrustful society and an authoritarian police state. Greater transparency, on the other hand, could lead to us regard security, efficiency, and convenience as more valuable than privacy. And these benefits could also help to offset the detrimental effects that the loss of privacy might have.

*This possibility flows from a belief that the development of new information technologies and a shift in our social mores toward greater transparency are forcing us to continually rethink what should and should not count as an invasion of privacy—and that this, in turn, is making it increasingly difficult to enact effective privacy laws.*

**Other Perspectives.** But even if you believe that we will not enforce our privacy laws in the future, you may think that there are other ways to protect privacy and that we should not give up on it altogether. You may think that we could each take greater responsibility for protecting our own privacy, for respecting the privacy of our neighbors, and for tolerating our differences with them. You may think that we could do this by developing new encryption tools, or simply by being more careful about what we say and do. And you may think that we can reverse the trend toward greater transparency by promoting respect for privacy as a social norm, and by building a moral consensus around the idea that acts that infringe upon a person’s privacy are improper.

**Possible Implementations.**

We *could*—

- enact a constitutional amendment stating that the heretofore recognized constitutional right to privacy will no longer be recognized or enforced
- repeal laws that currently protect individual and corporate privacy; enact laws allowing publication of the heretofore private affairs of individuals and institutions; establish legal precedents denying their claims to privacy
- launch an education initiative to change societal values and expectations regarding privacy and the consequences of greater transparency
- offer incentives to support the further development and widespread use of electronic information technologies
- broadcast government proceedings on radio, TV, and the internet; post government records on the internet; make the information that governments collect with surveillance cameras publicly accessible via TV and the internet
- require citizens to carry smart cards containing pertinent personal information; create an electronic central registry; publish individual and corporate tax records, health records, and personal property and financial records on the internet

**Possible Effects of These Actions.**

These actions *could*—

- enhance law enforcement, national security, and tax collection; save money for businesses that would no longer have to comply with privacy laws
- improve morality, since people would be able to know what everyone else is doing and no one would want to embarrass themselves; worsen morality, since people would soon become immune to embarrassment
- lead people to value transparency, knowledge, equality, efficiency, security, and convenience more than privacy and personal freedoms
- lead to growth in the information industry and to the further development of electronic information technologies that protect privacy
- keep citizens better informed about how their government works and what it is doing; make our political leaders more accountable to us; lead people to move to less populated areas to protect their privacy
- flood the market with less reliable and less valuable information; reduce business initiative and product quality if transparency extends to trade secrets; lead businesses to move overseas to protect their privacy; result in fewer liberties and eventually in totalitarian government

**For Further Discussion . . .**

- Do you agree that it is ludicrous for a society to have laws that it is unwilling or unable to enforce? If so, why so? If not, why not?
- What would your daily life be like in a society in which personal privacy was seen as a ‘lost ideal’ and almost all of your activities, thoughts, and behaviors were available for public review?
- How might the adoption of this possibility change your view of yourself and your relationship to society?
- Do you think that it would be easier or more difficult for unpopular minorities and minority viewpoints to survive in a transparent society? And why?
- Do you think that greater transparency, and the fact that everyone’s dirty laundry would be on public display for all to see, would make us more puritanical as a society, or more tolerant of human weaknesses, or have little or no effect on our moral character at all? And why?
- Do you think that our competitive capitalist system could survive if businesses were no longer able to maintain the confidentiality of trade secrets and marketing plans? If so, why so? If not, why not?

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# ON CONTRASTS AND CHOICES

## AMONG THE POSSIBILITIES

**There are many contrasts** among the seven conceptual possibilities in this report, and many choices that you would have to make in order to adopt any of them. Some of these contrasts deal with what privacy is, others with who should have it, others with where and under what conditions we should have it, others with the conditions under which we might suspend our privacy rights, and still others with whether we should have a legally enforceable right to privacy at all. I will make no effort to describe all of these contrasts. But a few examples of some of the more salient ones might help you to recognize others, and to better understand the possibilities that we have described and the need to choose among them.

**Thus, Restrict Government Power to Collect and Use Our Personal Information and Subordinate Privacy to National Security** give different answers to the question *‘What public and private interests compete with our right to privacy?’* The first of these possibilities would protect our right to privacy by placing limits on the power of government to collect, store, and use personal information about us. But the second would allow government to suspend our right to privacy when we are in a national security crisis. We do not think that you can consistently adopt both of these possibilities at the same time. You must choose between them.

**Similarly, Make Privacy Depend upon Place & Activity and Forget About Privacy and Embrace Transparency Instead** give mutually exclusive answers to the question *‘Where, for what, and from whom should we be able to expect privacy?’* The first possibility says that we should be able to expect privacy when we are in private places, such as our homes, or when we are engaged in activities that do not affect the public. But the second possibility says that we cannot really expect privacy anywhere anymore. We do not think that you can consistently adopt both of these possibilities. You must once again choose between them.

**Make Privacy Depend upon Place & Activity** also differs from **Give Less Privacy to Public Individuals & Institutions** in the criteria they apply for deciding who should have a right to privacy. The former says that it is primarily a matter of where you are and what you are doing. The latter says that it all depends upon the role you play in society and the impact your actions may have upon other people—regardless of where you are and what you are doing—and that some people and institutions may forfeit their right to privacy due to the lives they have chosen to lead. We think that it may be possible to adopt both of these possibilities at once. But they obviously point in very different directions.

*Our hope is that these contrasts will stimulate and enhance your exploration of these and other conceptual possibilities for public policy pertaining to privacy and privacy rights—and that you will come to a better understanding about what you think our public policy toward privacy and privacy rights should be by exploring them with your friends and neighbors.*

**Several of the conceptual possibilities** differ in their very concept of what privacy is. **Protect Our Basic Liberties** conceives of privacy as a host of basic freedoms, including free speech, freedom of religion, freedom of association, the right to be secure against unreasonable searches and seizures, and the right to due process, among others. **Restrict Government’s Power to Collect and Use Our Personal Information** conceives of it as the power to control what others can know about us. **Forget About Privacy and Embrace Transparency Instead** conceives of it primarily as a right to keep information about ourselves and our activities secret. And **Treat Privacy as Property**, as the name implies, conceives of our privacy and privacy rights as intellectual property that we own—and can thus buy, sell, or exchange in some other way for other things we might want.



**We should point out** that each of our conceptual possibilities might be regarded as presenting at least two different policy choices. For you might choose to accept it *or* to reject it—or to modify it in some way to improve upon it. And we should also remind you, once again, that we have developed these possibilities to stimulate public discussion, and not because we want to recommend or advocate that you adopt them. Our panelists selected the possibilities presented in this report with these ideas very much in mind. They thus discussed many possibilities that are polar opposites during the course of the project, and we could have easily included contraries, such as **Do Not Give Public Individuals and Institutions Less Privacy**, to each possibility presented in the report. But we have generally chosen not to include polar opposites, because we think that a discussion of any possibility should naturally engender a discussion of its contrary. And we have generally chosen to describe possibilities that say what we should do, instead of what we should *not* do, partly because we find these possibilities more useful when it comes to thinking about possible practical consequences, and partly because we wanted to present a small number of possibilities that would be useful for public discussion.

**Finally**, while most of our possibilities reflect a generally positive outlook toward the protection of privacy and privacy rights, **Forget About Privacy and Embrace Transparency Instead** sees the demise of privacy as a *fait accompli*, and maintains that we simply will not be able or willing to enforce our privacy laws in the future. This possibility advises us not to waste our time, money, and energy fighting a lost cause, and to focus our attention upon the many benefits that the loss of privacy might have to offer us.

**These, again, are just a few of the ways** in which the possibilities in this report contrast with each other. There are, of course, numerous ways in which they overlap. But I hope that pointing out these differences will help you resist the temptation of thinking that we are advocating them, or treating them as planks in a unified or comprehensive policy platform for privacy and privacy rights.

**Our hope**, once again, is that each of you will, by exploring these possibilities and by discussing them with your friends and neighbors, come to a better understanding about what you think our public policy pertaining to privacy and privacy rights should or could be. We thus hope that you will discuss these possibilities with your friends and neighbors, and that you will compare each of them with each of the others, before you decide which of them, if any, would be worthwhile to pursue.



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## **An Open Invitation to Further Discussion & Interactivity**

We hope that you will use this report to carry forward the discussion begun by our project panels.

We have developed a discussion process that may be helpful for groups interested in discussing the ideas presented in our reports or in discussing matters of public interest more generally. We have also developed facilitation and discussion guidebooks to assist in the planning and conduct of these discussions. These materials, as well copies of this and other Interactivity Foundation reports, may be downloaded from our website (listed below). You can also obtain additional printed copies of any of our publications (at no cost) by sending us a request that briefly indicates their intended use. See the contact information listed below.

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Finally, we welcome your comments, ideas, and other feedback about this report, its possibilities, any of our publications, or our discussion processes.

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