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Response

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RESPONSE

PETER P. SWIRE*

I recognize some of Lynn's comments on my paper and do not recognize others. Let me take the three points in turn.

In terms of wanting disclosure, there is a very interesting book that came out last year by David Brin called *The Transparent Society*.¹ Brin makes points that echo what Lynn is saying. We should get over this cry of Big Brother. Accountability would be better. In the course of the book, among other things, he cites to an article that is on my web site, which I wrote six years ago, about what I call public feedback regulation.² At that point I was talking about how the Internet can be used as a new engine of accountability, and what a wonderful thing that is.

There are all sorts of ways that accountability and good access to information are important. Nothing in my paper today talked about repealing the Freedom of Information Act or stopping many kinds of accountability.

Mark Rotenberg, the head of Electronic Privacy Information Center, is one of the most hawkish people on privacy and is also hawkish on government accountability, accountability of securities disclosures, and a variety of other things. I think it is a more nuanced world. There are strong arguments for information flow in many areas, and there are arguments about limiting information flow in other areas. We limit information to protect intellectual property when we stop copying and when we enforce trade secrets laws. Businesses know deep in their souls that they cannot let everything out, and there are very complicated rules about when data can flow. The difficult questions are when there should be accountability and when there should be limits on the flow of information.

As to privacy being an immutable need or not, in the paper I gave the disclaimer twice: there is not a privacy recipe for all times and all places. What I tried to do in the paper is set forth analytically what main points society recognizes. I think that changes over time.

In thinking about that, and about the third point that privacy is incompatible with the information age, one way to answer is to ask whether we live in a democracy or a land of consumers. If you are on the market side,

* This is a transcription of comments made orally at the Symposium.

1. DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM?* (1998).

2. See Peter P. Swire, *Public Feedback Regulation: Learning to Govern in the Age of Computers, Telecommunications and the Media* (visited May 19, 1999) <<http://www.osu.edu/units/law/swire.htm>>.

then you tend not to discount teenagers' views about sex. As a market we often want to respect what consumers want. But there is a large literature that points to a whole set of possible market failures in the private market.

On the democratic side, 80% of Americans feel that they have lost all control of their privacy. There is very strong support for certain kinds of limits on access to financial information.

When we look at the entire range of people, about 25% of people are privacy purists, about 15% of people would walk down the street naked and would not care, and there is a whole bunch of people in the middle.

One of the questions we must ask as a society is what to do about that 25% of people who care and want the issue addressed. Do we blow them off and say we just do not care? Or do we try to create a society where there are some choices in the market? Can we create a mechanism to allow them to choose?

I think there has to be a serious answer to those people who really do care and who show that in a variety of actions. Just to say I do not care so they should not care either is a mistake. Different groups feel differently about privacy. Women feel much more strongly about privacy than men. Women don't want cameras in their bedrooms. Men don't care as much. Closed circuit TV cameras in England disproportionately track young black males. It turns out the camera operators just decided that they are going to go after young black males and attractive young women.

In a society where we are setting up rules we have imperfect institutions. We have some corrupt institutions. We have governments in other parts of the world who are going to be part of this system. We hope in this country we do not have that problem here. Before we just say, "Privacy—get over it," which is what the head of Sun Microsystems said a few weeks ago, we want to at least think through a lot of different reasons and take account of a lot of different people.