

## THE TRANSPARENT SOCIETY

*By David Brin*

*Reading, MA: Addison-Wesley Longman, Inc. 1998*

*Pp. 378. \$25.00 (hard). ISBN 0-201-32802-X*

## DATA SMOG

*By David Shenk*

*New York, NY: HarperCollins Publishers Inc. 1997*

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*The Transparent Society*,<sup>1</sup> by David Brin, and *Data Smog*,<sup>2</sup> by David Shenk, each posit a problem in the current social/political/economic structure of (mainly American) society. This problem is rooted in the public, embodied in the archaic idea of the "common man," losing control of the communication structures of society. The powerful, embodied by government and corporations, control both the information and the channels used to communicate this information. Each author offers the popular audience a set of solutions to this problem, both acting in and criticizing the communications sphere.

This Note will engage both Brin and Shenk on two grounds. First, each takes unrealistic, and at times internally inconsistent, views of the nature of corporate and government power in the modern United States. Each takes positions that misunderstand either the extent or the limitations of power centers, especially corporate ones. The second area of discussion is the conception of the self, the audience, and the self in relation to society, that each proposes. Here, there is considerably more commonality between the two works. While the policies that each proposes rest at opposite extremes on the spectrum of individual integration with society, their conception of the individual rests on substantially similar, and similarly questionable, ground. It is important to realize that both books are "popular" works, speaking to a particular audience who, not coincidentally, are the most likely beneficiaries of their proposed policies.

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

2. DAVID SHENK, *DATA SMOG: SURVIVING THE INFORMATION GLUT* (1997).

## I. SUMMARY: BRIN

The problem is easily identified: advancing surveillance technology and techniques. The ability is now present, or will probably be present in the near future, to monitor every facet of every person's life. However, this is only a problem if we, as a society (or at least as the audience for the book) choose to make it one. Brin fears an attempt to mandate privacy through legislation.

David Brin argues that privacy is impossible. At least, that is, "privacy" in the sense we understand it today — any form of public privacy. His position is that the genie of surveillance technology cannot be stuffed back into the bottle. Technology, including the "gnat-sized cameras" he predicts, is inexorably moving toward a state where there is far more technical and economic power concentrated on promoting the ability to see other people than on the ability to not be seen. The only question for him is who should be given access to that power.

Brin argues that everybody should have that access. The core thesis of *The Transparent Society* is that the powerful (governments and corporations) will always have privacy-invasive technologies. It is the "if guns are outlawed, only outlaws will have guns" argument. If secrecy is the norm, there will be no alternative source of power to check and control the illicit use of surveillance by the powerful. On the other hand, if transparency is the norm, the powerful will not be able to hide their own secrets. People will be able to use their own power to enforce accountability on the powerful, including the choice of the powerful to watch the common people.

Brin would not sympathize with, for example, the idea that a political organization can constitutionally conceal its membership to resist state pressure.<sup>3</sup> His answer to this, as to all problems of transparency, is to appeal to the notion of reciprocity. If the NAACP can examine the government's records to determine who wants to see their membership list and why, the government will be deterred from needlessly seeking or misusing the NAACP's roster. Everybody has skeletons in their closet, and if revealing someone else's skeleton will reveal one of your own, no closets will be opened.

Besides, Brin argues that privacy is an aberrant notion, an artifact of the current state of technological/social development and has never before been used to ensure freedom. Rather, privacy has been the privilege of the powerful whenever it has existed. Only this privacy went under the less pleasing name of "secrecy" and was a tool of

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3. See, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958).



oppression. Brin believes that our current regime of privacy, with the next leap of the technological grasshopper, will again change its name unless we intervene now to alter the governing norms.

This is all for the best. Society as a whole is healthier when based on mutual accountability rather than mutual secrecy. Power can be controlled and new ideas can be examined. In Brin's language, this role is performed by people socialized to attack dangerous ideas: "social t-cells."<sup>4</sup> Increasing the amount of criticism in society is the most proven way to ensure good policy, or at least the prevention of bad policy. Indeed, a two-way flow of information is preferable to even a situation where the government alone is watched, because conspiracies to threaten society can easily come in the context of a blinded state.

Brin also provides normative arguments that a world of "glass houses" is better than a world of "shields." Reversing the traditional rhetorical tactics of authors such as Orwell, he draws a picture of a dystopia ruled by mistrust and living in an "encrypted haze." He tells us that, by protecting certain kinds of personal data, you "could find [ourselves] embarked down a dangerous river, one whose *reductio ad absurdum terminus* is hell."<sup>5</sup> It wields beautiful concepts of freedom, of democracy, of avoiding the "masks" and "shadows" of privacy in a highly polarized manner, and gains great power to convince from the gut reaction to those words.

Brin offers a plan to change the status quo from one of privacy to one of openness. It is unclear what the specific points of this plan would be. Brin proposes general "reciprocal transparency" but insists that the state, people, and corporations need to hash out the details through vigorous negotiation. He would build this paradigm slowly to ensure that society would have ample time to examine each change.

The place for insect cameras is never clear. They would clearly be allowed in corporate boardrooms and police stations. They would also be free to roam the public streets, guarding against crime. Transactions between private parties would be public, as would most personal data. The system would preserve some personal privacy, but is not clear

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4. "Social t-cell" is one of the more fascinating ideas Brin brings to the table. These t-cells are ever vigilant for any dangerous ideas, and always prepared to offer criticism. In creating this idea, Brin implicitly abandons the pluralist notion of political actors as all being out for their own self-interest, simultaneously making certain assumptions, discussed below, about the nature of political discourse discussed below. It also puts anyone who wishes to criticize this book in a rather curious position of accepting this t-cell hypothesis as a validation or stereotype, depending on temperament, of themselves.

5. BRIN, *supra* note 1, at 81.

which. Brin points to “the home” as a place where privacy is sacrosanct — in other words, that part of the person that has no meaning to the outside world — or, at least, the rational part of the outside world.<sup>6</sup> In another sense, that formulation holds the placement of a question in the spheres of privacy or publicity as a matter of choice, but this choice is based on action and location (these spaces are private, these interests are private, so to do these is to remain private) rather than explicit choice of “privacy” or “publicity.”

Brin’s cautious utopia includes many changes from privacy to transparency. These changes include an abandonment of the idea that information, either personal data or intellectual property, can be owned in the same sense as property. Thus, personal data should not be owned as a matter of privacy. Intellectual property rights should not further be expanded, and should be reformed to take into account a wider concept of fair use, encourage discourse, and still, possibly through copy-protection and microtransactions, compensate producers for their work. Another necessity is an open structure on the Internet, both in terms of security and free debate (endorsing ideas such as “tag commentary” to discuss texts online). The informational infrastructure of the United States must also be open, linux-style, so that attacks or mistakes can be rectified by common effort.<sup>7</sup> Brin seems to be partially in favor of the clipper chip proposal as a government accountability check against other (criminal) types of power. However, according to Brin, a better solution is to impose a small tax on encryption to encourage careful consideration of the true need for secrecy. The use of social security numbers as both identifiers and passwords is strongly criticized. Such places where pseudonyms are allowed (such as the protection of whistleblowers) should be both identified as such and perhaps set up to default to identity revelation when the threat is removed or, perhaps, eliminating the records of those transactions altogether. Predictions, arguments, and other public statements would be tracked, to verify the credibility of

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6. He seems to be communicating a political message that personal, home privacy is especially important and the people who are concerned about the person in the home are irrelevant — an American liberal view of the private and public spheres, much like that expressed in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

7. Open in this context refers to “open-source,” a method of distributing software along with the source code used to create it, so that the receiver of the software can read that source code, and if necessary, make changes to it. Linux is an operating system developed and distributed by the open-source method. For a discussion of the security and reliability benefits of open-source software, see *The Business Case for Open Source* (visited May 20, 1999) <<http://www.opensource.org/for-suits.html>>.



speakers. Social “disputation arenas” would be created to facilitate the examination of public policy.

The remainder (and majority) of the book is a critique of the arguments of those viewed as against transparency, from Plato to Gilmore. Those can be broken up into the framework described above, a two-part defense of transparency. The first prong covers the impossibility of privacy and the second calls to fears of cabals, conspiracies, and terrorists that might otherwise concentrate power in the darkness. For the critique of this argument in Part III below, this structure is mirrored. First, the argument of the impossibility of privacy is examined. Second, the consequences of ubiquitous mutual surveillance are examined. The core target of this critique is not the general position on openness. Instead, the main problem addressed below is in the proportionality of the harm of this openness on strong and weak players.

## II. SUMMARY: SHENK

Shenk argues that modern American society provides too much information for its members to digest. Bombarded with advertising, e-mail, news, entertainment, and instant communication, we are forced to process the information faster and less well. The standard critical filters are dropped — people must deal with information as it comes in, without reflection or advice. Humans are moving to the pace of computers, rather than vice versa.

The symptoms of this glut of information are summarized as a set of aphorisms listed after the table of contents. The argument can be best summarized by going over the most interesting of those aphorisms, which form the basic structure of the book.

“Information, once rare and cherished like caviar, is now plentiful and taken for granted like potatoes.” This is the core principle of the book. There is no scarcity of information about products, each American receives thousands of advertising messages daily. There is no scarcity of information about politics, as each person now has newspapers, magazines, cable news, and the Internet at her disposal. There is no scarcity of information in business, as white-collar workers spend most of their time “processing documents.” Copying is effortless, as is transmission of the copies. In short, more information exists than ever before.

“Putting a computer in every classroom is like putting an electrical power plant in every home.” Classrooms are social filters for the world’s information — their core function is to teach what needs to be taught (to socialize, Shenk leaves unsaid). Computers and the Internet

replace that filtered flow with random, unexamined, raw data. This is unnecessary, and even harmful, if education is to maintain its traditional role.<sup>8</sup>

“Too many experts spoil the clarity.” This refers to the increasing difficulty of coming to a decision as more information is provided. In effect, there is a law of diminishing returns at some point. As more and more studies, many of dubious validity, enter any debate, the chance of gaining usable knowledge and coming to a decision decreases. One might, since this section is accompanied by an extensive discussion of the *Daubert*<sup>9</sup> problem, call it an instance where the probative value of specialized information is outweighed by the opportunity costs of understanding.

“All high-stim roads lead to Times Square.” This suggests that information overload creates greater information overload. When recipients of information do not have the time and knowledge to deal with all that goes across their desk, information providers vying for the recipients’ attention have an incentive to increase their volume. An information provider wishing to have its communication noticed will use more dramatic language, leading to hyperbole. It will be more prone to exaggeration and sensationalism. Of course, this creates a collective action problem — everyone individually has an incentive to increase the volume and quantity, while all would gain from an overall reduction. The result is a vicious cycle of increasing numbers of increasingly “loud” communiqués.

“Birds of a feather flock virtually together.” As more and more information becomes available, a person is no longer required to venture into unfamiliar territory. People with expertise or interest in a particular area of knowledge can spend all their time receiving information from, and conversing with fellow practitioners of, this area. Indeed, they have to, lest they fail to “keep up” with the latest information. Likewise, culture becomes splintered as enough material exists in any particular area to completely occupy both producers (Shenk’s example is hyper-specialized radio stations) and consumers. This is a diminishing return of cultural production — at a certain point in the massification of culture,

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8. Shenk does not examine the idea that technology may perform a transformative, rather than a simply supplementary, role in education. Nor does he discuss the opportunity for children to learn liberal arts style “critical thinking” — similar to Brin’s t-cells — by examining raw information.

9. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). One of the core problems of *Daubert* is that scientific advances require judges and juries to evaluate competing scientific theories that they cannot understand.



it reverses into niches. Again, a vicious cycle begins, as businesses both cater to and reinforce these niches.

“The electronic town hall allows for speedy communication and bad decision making.” This is the familiar refrain that politicians and decision-makers must be isolated from public opinion.<sup>10</sup> Without sufficient understanding, people make hasty and emotional decisions.<sup>11</sup> Unfortunately, citizens are already communicating with government about issues they are not informed about and are not leading politicians to informed judgments. A similar axiom is “[m]ost roads bypass journalists.” This suggests that information providers, especially rapacious corporations, package self-interested information into an ostensibly neutral format (“infomercials” and “advertorials”). These attach the “journalist” level of consumer trust to biased advertising.

“Equifax is watching.” Corporations are the chief beneficiaries of this information glut. First, they have the resources to deal with information about consumers — far more so than the resources consumers have to deal with the information provided by corporations. Second, they have actual uses for this information — the niche marketing mentioned above and better control (through better information) of risky transactions such as loans and employment offers. Unfortunately, this also involves dehumanizing citizens by, for example, tracking their every keystroke in the workplace. This phenomenon is called “dataveillance.” In addition to the knowledge corporations gain about consumers, the information consumers have is also advantageous to the corporation. The more data people are required to process, the less their cognitive resources can be expended to evaluate critically any one piece.

Shenk offers several solutions, all rooted in individual action. First, consumers of information must be more skeptical. “Beware stories that dissolve all complexity.” Anecdotes increasingly act as heuristics because they are easy to digest in an otherwise incomprehensible flood of data. Unfortunately they often do not reflect the full story, so Shenk instructs the reader to view them with a skeptical eye. Second,

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10. Brin, in contrast, cites this as a positive step. See BRIN, *supra* note 1, at 252–54 (discussing “positive feedback regulation” implicitly as a form of direct democracy, though through market participation against corporations). This shows two fundamentally different views of the ability and willingness of average persons to participate in the political sphere. Shenk assumes people are willing, but not able. Brin assumes people are able and willing. Neither considers the possibility that, except for “special interests,” average people are able, but not willing.

11. One possible reason for this, though Shenk does not make this argument here, is that the raw information about every issue creates an illusion of understanding.

journalists should take more responsibility for providing readers with proven knowledge, not constrained by the “news flash” mentality to seek “scoops.”

Third, one must resist. Information consumers<sup>12</sup> must filter information themselves. This is mainly accomplished by favoring information not tied to haste — books — over information, such as television news and the Internet, which are more constrained by time. Release fast communication by abandoning cellular phones and pagers. Read less e-mail. Yet at the same time, expose yourself to, and be exposed to, information outside your niche. Speak to people in different disciplines — recreate the renaissance person. Reciprocate this enlightenment simply, in an accessible manner.

He only suggests two measures in this “data fast” that will actually affect corporations on the other end of the informational transaction. “Say no to dataveillance” might actually deprive marketers of the information they need to control consumer behavior. Likewise, “[r]esist[ing] advertising” — or at least not contributing by wearing advertising on clothing — will limit corporate control over the channels of communication.

Fourth, one must stop talking. As Shenk puts it, “be your own editor.” Break the collective action problem by acting irrationally in the short run, rationally in the long run, and limiting your own informational output. Much like the arguments against littering, Shenk asks readers to think globally and act locally.

Fifth, government has a role in limiting spam, enacting time, place, and manner restrictions on advertising, and prohibiting fraud. In addition, government, along with corporations, should be forcibly restrained from engaging in “dataveillance.” At the same time, government’s communication should be simplified as well. Finally, government should play a role in educating citizens to be able to participate in rational policy debates.

Much like the analysis of *The Transparent Society*, the critique of *Data Smog* will consider first the implications Shenk’s solutions have for the power balance of society. Second, it will consider Shenk’s substantially homogenous audience, and the policy prescriptions he offers them, in the context of other members of society who Shenk does not address.

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12. Who could also be termed “attention producers” to focus on the other end of the communication transaction.



## III. POWER ERRORS: BRIN

Brin's empirical argument, that mutual [effective] transparency is the only possible solution, is problematic. It rests on two mistakes. First, Brin assumes away incentive theory. Governments, corporations, and other power centers<sup>13</sup> that have been demonstrated to seek and use information whenever possible are placed in an information/opportunity cost market against citizens who, in the U.S. at least, rarely even vote. Governments and corporations see both economic and political advantages in having the information about ordinary citizens in their hands, and hence are willing to expend their greater resources to gather and (more importantly) effectively use this information. Ordinary citizens do not have vested financial interests in seeking information about corporations (unless they want to engage in insider trading) and have been shown to be surprisingly apathetic when interacting with government. "Equally" granting power in a resource that power centers can use effectively but individuals cannot is a dangerous proposition. Brin recognizes this in chapter 9, but fails to see the extent of the uselessness of transparency for the poor and powerless. In other words, Brin identifies the problem with having too much information to process,<sup>14</sup> and identifies the problem with the technologies of transparency being controlled by the elite,<sup>15</sup> but, unlike Shenk,<sup>16</sup> fails to connect the two and see how the one can lead to the other.

Brin's second error is even more troublesome. He argues that no matter how vigorously society tries to keep the tools of surveillance from the powerful, who have motives to invade privacy, the powerful will always manage to acquire these tools, even if in secret.<sup>17</sup> This is unrealistic, and the solution — to make sure that both sides have the same technology — is implausible. How can entrenched institutions be held sufficiently accountable that, once a new technology to evade the reciprocal surveillance arises, they are forced to evenly distribute it?

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13. Brin also seems to think that privacy advocates are only afraid of government, come from the "far right," and totally ignore the threat of corporate power. See BRIN, *supra* note 1, at 108–10. (Also, citing Czarist Russia and Nationalist China as "weak-blind" governments before their respective revolutions betrays, at best, a lack of diligent research. Russia especially would best be described as a tyranny overthrown by another tyranny.) The campaign yet being waged against Intel is only one example of the error of that assumption. See, e.g., *Protect your PC's Privacy* (visited May 20, 1999) <<http://www.bigbrotherinside.com>>.

14. See BRIN, *supra* note 1, at 300.

15. See *id.* at 297.

16. See SHENK, *supra* note 2, at 145–53.

17. See, e.g., BRIN, *supra* note 1, at 284–93, 333–35.

What institution is he describing which is powerful enough to be not subject to laws banning surveillance technology, yet weak enough to be subject to laws banning the technology that can evade surveillance technology? This strange mix of power and powerlessness is an impossibility. Just as the NSA, or Intel, can spy on citizens, it can also deceive the cameras supposedly watching them, as a result of the same technological arms race that Brin recognizes will doom the powerless when trying to avoid eavesdroppers.

Brin's key error is his prediction about the development of technology. To the extent that his argument relies on the inevitability of the production of new surveillance technology and methods outstripping the ability to preserve secrets, it again fails an incentive-centered test. If privacy is the default, as it is now, the powerful institutions will not need to take extreme measures to protect their own secrecy, being protected by the legal system. Their incentive will be to expend more resources to evade the legal system to find out information about others. Likewise, if publicity is the default, the powerful will not need to expend resources to find out about others, this right being protected by "reciprocal transparency." They will, however, be threatened by their own transparency and will have an incentive to devote those extra resources to guarding their secrets. Thus, power always spends time and money against the baseline system to gain an advantage over those governed by the defaults. That is why they are the powerful — because they have special abilities. Brin's argument assumes that the powerful will still spend resources to create a transparency already guaranteed them by the governing social norms.

The response might be "if transparency is the default, those anti-transparency technologies will be seen before they can be implemented." However, this is inconsistent with the argument in the final chapter, where he suggests that transparency move forward gradually, with "baby steps." Since, as Brin acknowledges, the technology of secrecy is currently ahead of the technology of surveillance (at least in the encryption realm, since each additional bit makes cracking encryption exponentially more difficult), it can be predicted that powerful institutions, after promising accountability at the "negotiating table" Brin suggests, will simply turn around and conceal their secrecy technology.

To what extent, at any rate, is society actually doomed to the growing use of, as opposed to the existence of, surveillance technology? Telephone wiretapping is a good case in point. As against the government, the Fourth Amendment prevents this surveillance



technology from being used except in socially acceptable ways.<sup>18</sup> If it is misused, a host of protections, from the exclusionary rule<sup>19</sup> to civil litigation<sup>20</sup> are available. As against corporations, the protections are in some way stronger. Rather than liability rule protection, the legal system provides property rule protection — agents of law enforcement can be summoned, or in some cases personal force can be applied, to directly prevent corporations and other private power centers from entering one's private sphere. Everything from trespass and wire fraud to invasion of privacy, right of publicity, and assorted state computer crime statutes<sup>21</sup> could be used to stop corporate invasion of privacy. In addition, powerful legal tools have existed for hundreds of years against corporations that are only now being used (albeit for other purposes) again. For example, quo warranto, an action filed by the state to dissolve a corporation violating its charter, can be used in case of extreme violations of the public interest and norms.<sup>22</sup> In short, there is no evidence that corporations and government will inevitably have, and

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18. See, e.g., *Katz v. United States*, 389 U.S. 347 (1967). While the FBI and other law enforcement agencies are continually pushing for expanded surveillance ability, this is being done through the political process, under social control, and not through some technological fait accompli.

19. See *id.*

20. See, e.g., 42 U.S.C. 1983 (1994).

21. See, e.g., TEX. PENAL CODE ANN. § 33.01 (West 1994).

22. For example, the National Lawyers Guild in Los Angeles, through its International Law Project for Human, Economic & Environmental Defense, is attempting to compel the California Attorney General to seek revocation of the Unocal Corporation's charter through quo warranto. See *Petition to Revoke Unocal's Corporate Charter*, (visited Mar. 16, 1999) <<http://www.heed.net/revoke.html>>. For a description of the New York Attorney General's petition to revoke charters of nonprofit corporations serving as "propaganda arms of the [tobacco] industry," see Bill McAllister, *N.Y. Judge Places Tobacco Institute under Control of Receiver*, WASH. POST, May 3, 1998, at A13. This was eventually resolved by settlement. See *State v. Phillip Morris, Inc.*, 686 N.Y.S.2d 564 (N.Y. Sup. Ct. 1998); Harry Berkowitz, *Council Canceled/Tobacco Industry to End Research Group*, NEWSDAY, Oct. 23, 1998, at A64. See also ARK. CODE ANN. § 23-51-119(g) (Michie Supp. 1997) (providing for quo warranto actions against trust companies); Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions*, 56 S. CAL. L. REV. 1141, 1246 (1983) (citing examples of quo warranto advocacy and use).

be able to use, surveillance technology.<sup>23</sup> Brin cites no evidence for the claim that these laws are unenforceable.

Brin says: if gnat cameras are outlawed, only outlaws will have gnat cameras. The response from a complete understanding of the power relationships is: if secrecy is outlawed, only outlaws will have secrecy. There is no reason to assume that the powerful will be more successful at keeping surveillance ability in a regime of privacy than they would be at keeping privacy in a regime of surveillance. If Brin made the effort to prove that the gnat-camera genie cannot be put back in the bottle,<sup>24</sup> instead of just asserting it, the book would be many times better. Instead, he makes a choice to believe that privacy is forever lost. This choice is in itself an argument, and needs to be supported as such.

#### IV. POWER ERRORS: SHENK

Shenk seeks to withdraw. Shut off the spigots of information, choose what you want to see, who you want to hear, and why. He does not realize what this does, again, to power. When you shut off the tap everywhere, you also help power holders who can still force through some communication, uncluttered by those without power.

Shenk's error is not internal to his consideration of the power dynamics of large quantities of information. Rather, it is an error of incompleteness, of failing to consider the effects that his remedial effects for the listener (or data subject) have on both powerful and less powerful speakers. Some insight can be gained from the work of Jürgen Habermas.<sup>25</sup> Habermas sets out a history of cultural power based on

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23. Brin's parallel argument, that we will willingly give away privacy to the government in a fit of terror, *see* BRIN, *supra* note 1, at 230, compares the developed democracy of the United States to the new and troubled democracy that existed in Weimar Germany. If the judgment of the American people is so poor as to give totalitarian powers to the government in times of crisis, it is equally likely just as quickly to sacrifice hard-won "mutual accountability" in favor of "national security," in similar times of crisis. In other words, there is no point in assuming that the people will give away in terror some of their freedoms, but not others. This strange error of believing that characteristics assumed in one situation will not manifest themselves in others is found throughout this book.

24. Or, in the context of privacy-enhancing technology, at least handcuffed and tossed into a closet.

25. *See generally* JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger trans., MIT Press 1989) (1962). A caveat is in order. This may be a very limited reading of Habermas's work in this book. All the same, it does provide valuable insights to the problems with Shenk's argument.



representation, or the act of public speech and display.<sup>26</sup> The association of “public” with power developed from medieval times, when the royal court engaged in public display, through the shift of attention from “court” to “town,” and to the taking over of the “public” by private persons with reasoned debate against the public authorities.<sup>27</sup> This is the clearest existing version of the argument that speech, especially public speech, translates into political power.

The question is how to recreate this public sphere. For Habermas argues that it no longer exists in that form — that private persons have become consumers, rather than creators, of discussion in the public sphere.<sup>28</sup> New technologies, particularly the Internet, may provide some hope for limited remediation of these problems. Discussion in such media exists open to all, if not always received by to all, as opposed to the specialized and private discourse sold to an uncritical public which is characteristic of most other discourse. Shenk criticizes the expansion of this mode of discourse, largely because he ironically is a victim of its alternative. His idea of “superdemocracy” comes from politicians and businesspersons.<sup>29</sup> In effect, his presence on the consumer end of the massification of the public sphere has blinded him to more nuanced theories of discourse among private persons without commercial journalistic intermediaries.<sup>30</sup> As a result, he assumes that the only possible type of citizen is the person we have today — an informational consumer and specialist who cannot participate in this democratic exchange. Abandoning that assumption, and instead creating a legal and social regime<sup>31</sup> that encourages the public use of reason makes the recreation of Habermas’s public sphere through these direct democracy proposals somewhat more plausible.

How much of that power does Shenk allocate to whom, in his attempt to constrict the amount of representation to which the audience (of private persons) will submit itself? The most likely transfer of power under this scenario would be to the very corporations he fears.<sup>32</sup> The left

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26. *See id.* at 7–8. Habermas does not use the term “power” in this context, but is clearly discussing something that we could call power.

27. *See id.* at 26–27.

28. *See id.* at 159–75.

29. *See SHENK, supra* note 2, at 131–33 (examining direct democracy arguments from Ross Perot and software entrepreneur Tim Stryker).

30. Shenk’s own dual nature as both a consumer and an intermediary of information (i.e., a journalist) may have something to do with this error.

31. This regime could include, for example, weakening of intellectual property laws, positive social feedback for dissent and multiple political parties.

32. In effect, Shenk’s arguments, while well-intentioned, will lead to what Habermas, drawing from Mills, characterizes as “mass” opinion, opinions expressed by

is even today decrying this very trend. The cry that corporations are putting democracy<sup>33</sup> at risk is closely competing with the complaints of environmental destruction as the core critique of the corporate state.<sup>34</sup> The more speech corporations get, the less speech the individual gets, through the constricting mechanisms of intellectual property law,<sup>35</sup> the limited attention span Shenk recognizes, and the reduction of capacity for critically listening to the core message. This final factor will make majority messages more prone to internalization, thus weakening the power of dissent.

The clearest example of this mistaken transfer of power is in chapter 19, entitled "Be Your Own Editor."<sup>36</sup> There, Shenk advises readers to "Give a hoot, don't info-pollute" and "avoid verbosity and the gratuitous use of images."<sup>37</sup> Small speakers are not necessarily responsible, simply because information is no longer scarce, for restoring that scarcity. Perhaps the proper way to remedy the overabundance of information is to reduce the incentives for the worst producers of the most useless information, the corporations. In some spheres, ironically, this could be done with speech. For example, social discussion and critique of the artifacts of the advertising society, public criticism and outrage directed at advertising practices, would make these advertisements less effective

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the few for the many, rather than "public opinion," created by many for many. See HABERMAS, *supra* note 25, at 249. One important feature that Habermas points to in the development of the public sphere is a certain amount of disputation — rather than a simple act of representation of the common, or the state ideas, a public use of reason often in opposition (or potentially so) to the public and to others. See *id.* at 52. This cantankerous personality is precisely what Shenk (unlike Brin) seems to be concerned about. See SHENK, *supra* note 2, at 101–08, 131–37, 167–71.

33. Which we can describe as that state of speech where the public sphere is controlled by private persons.

34. See, e.g., Editorial, *The Corporatized University*, Multinational Monitor, November 1997 (visited Mar. 16, 1999) <<http://www.essential.org/monitor/hyper/mm1197.02.html>> (decrying loss of academic independence to corporations, including infamous "no disparagement" contract the University of Wisconsin-Madison almost signed with Reebok); Interview with Nicholas Johnson, Multinational Monitor, May 1995 (visited Mar. 16, 1999) <[http://www.essential.org/monitor/hyper/issues/1995/05/mm0595\\_07.html](http://www.essential.org/monitor/hyper/issues/1995/05/mm0595_07.html)> (citing media conglomeration as a threat to the diversity of ideas listeners are exposed to); Holley Knaus, *The Commercialized Classroom*, Multinational Monitor, March 1992 (visited Mar. 16, 1999) <[http://www.essential.org/monitor/hyper/issues/1992/03/mm0392\\_07.html](http://www.essential.org/monitor/hyper/issues/1992/03/mm0392_07.html)>. While Shenk would probably agree that many of these abuses should be stopped, his "solutions" do nothing to resolve them, but merely slow the tide of counter-speech.

35. See generally JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 144–50 (1996).

36. SHENK, *supra* note 2, at 191.

37. *Id.* at 191–92.



in influencing consumers. A powerful normative counter-message would reduce the incentives for corporations to advertise, while actually increasing socially beneficial speech.<sup>38</sup>

The advice to curtail one's own information production would be sound if it were given to the sources of problematic information. However, it is important to remember that this is a popular book, designed to be read by the middle class, "information-glutted" computer user. Indeed, it is the advertisers and corporate controllers who he considers a true threat.<sup>39</sup> However, he also argues that those few places in the modern information culture where private (as opposed to government) persons (as opposed to corporations) can speak are equally dangerous. In that "superdemocracy" chapter,<sup>40</sup> Shenk argues that providing official venues for representation through technology will lead to bad decision-making, with public officials being more likely to consider public opinion than rational policy. This assumes both that public officials consider rational policy now, and that the public is not sufficiently educable to make public opinion worthwhile. As regards the first, any study of corporate and other "non-rational" influence on the political process will uncover the power of lobbying. The second implies that public officials, especially in the directly elected Congress and White House, somehow have more information, or more intelligence to use that information, than the public. However, this ignores the huge workload of elected officials, the effects of specialization,<sup>41</sup> and, amusingly, the core premise of the book. If information is not scarce,<sup>42</sup> and policymakers have as much difficulty as others in dealing with large quantities of information,<sup>43</sup> how can adding simpler voices — different perspectives on the information already troublesome — be worse than the current system?

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38. This is the area where Brin best informs Shenk. *See* BRIN, *supra* note 1, at 131–37 (discussing "social t-cells" and criticism as the sole antidote to error), 252–54 (discussing public feedback as a restraint on business).

39. *See, e.g.*, SHENK, *supra* note 2, at 145–53.

40. *See id.* at 131–37.

41. People with specialized political knowledge are obviously going to be more likely to wish to speak, and to influence other people with less knowledge in an area, on the area of their specialty.

42. *See id.* at 27.

43. *See id.* at 89. The information that Shenk argues policymakers cannot deal with is produced by experts, not the average person who is the subject of the "Superdemocracy" chapter. *See id.* at 91.

## V. CONCEPTION OF THE SELF

Both Brin and Shenk seem to be speaking to a particular sort of person — indeed, a sort of stereotype. They each speak to the middle class suburban computer user — the sort of person who feels a certain dispossession in the information age. This dispossession comes from the fact that such people had some power, at least as consumers, before their relationship to information became problematic. They now feel threatened by the increasing amount of “dataveillance” and frustrated that the technology expected to increase their relative power is in fact decreasing it, through increasing reliance on tools controlled by the elite. The response is, in Brin’s case, to step back and win through softness. Yield and allow the powerful to watch you, but only on the condition that you can watch them. Shenk’s solution is to win through hardness — put up impenetrable shields against the powerful. Neither solution is adequate; both, even ignoring their factual errors and focusing on the normative policy arguments, are dangerous.

Indeed, it is along this axis that computer technology changes power relationships. Assume, for the moment, that Shenk is right about the lack of real benefit to the individual from the flood of information from computer technology. The distinction is between the “users” of the technology and the “controllers.” This distinction is fundamentally a distinction between the rich and the middle class, or the technicians and the users, or the active and the aware, or the powerful and the “normal.”

So what about the poor (the technologically disenfranchised or the unaware)? In the Brin scenario, little changes for them in regard to the rich. To the extent the extremely powerful want to watch the extremely weak, they can do so without resistance.<sup>44</sup> However, the wealthy have little incentive to watch the poor — they are neither a threat (in terms of competition or effective political dissent) nor able to provide a benefit enhanced by information (in terms of marketing, the poor are less relevant consumers). Brin’s world does change the relationship between the poor and the middle class, or the disempowered and the “normal,” as distinguished from the powerful. For it is the middle classes that fear the poor — that would both objectify and distrust the poor. An example is contained in the traditional racism explanation of “white flight” to the suburbs. If the middle class white people flee the poor black people,

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44. The most commonly cited example is in the governmental context, the welfare/social work system, which has the power to condition simple survival on release of personal information. That which is gained through force by government can equally be gained through fraud by corporations, since the priorities in cognitive allocation of the poor are clearly on more vital matters than corporate power.



they will equally fear stereotypical crime, watch the poor minority neighborhoods, objectify this class of people further through having them at their command on television screens, view (look for) the differences only, and further make poor minorities into an “other,” an object of fear and distrust. Brin all but suggests this when he cites reduction in crime as one advantage of having ubiquitous observation. To what extent will the ability to view those who you fear, gaze into the slums with horror and contempt, create further divisions in American society?

Similarly, Shenk’s policy choices would damage the poor. By blocking information created by the poor (largely already blocked) and the middle class, leaving only the (admittedly limited) information from those commercial sources, including journalists, who can force their way into the public consciousness, you harm the poor most of all. The speech of the weakest in society becomes subject to the self-selection of their intended listeners. These listeners, already motivated by misunderstanding, would naturally select information-reinforcing cultural, ethnic, and economic stereotypes. At the same time, the powerful would be able to speak freely to the poor, free of counter-messages.

The answer to information problems is not to forcibly show everything (Brin) or to forcibly silence everyone (Shenk). It is far better to allow the people you wish to assist to choose how to represent themselves to the outside world, while building structures that reduce the incentive for the powerful to dominate the mass dialogue.

Shenk clearly seeks forceful withdrawal through blocking of unwanted information. What is not as obvious is that Brin seeks withdrawal as well. By putting cameras in the streets, you also perform an objectification.<sup>45</sup> You objectify your neighbors by putting their images, and their actions, within your knowledge and control. Brin performs fundamentally the same task as Shenk, drawing more lines between the individual and the group. In effect, the power of

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45. There is one beautiful example of this objectification. Brin argues that, as personal information becomes more public, it will seem less important. “Today, twenty-year-old men skim past ubiquitous lingerie ads in the newspaper with barely a flicker of their eyes. So it may be with personal data.” BRIN, *supra* note 1, at 157. A feminist scholar would cite the ubiquity of lingerie ads in newspapers as a form of objectification of the female form. See, e.g., CATHERINE MACKINNON, *ONLY WORDS* (1993). Would, then, the ubiquity of personal information on the Internet be a form of objectification of the person? Leading, in fact, to the commodification Brin decries and the dataveillance Shenk worries about? See BRIN, *supra* note 1, at 89–107; SHENK, *supra* note 2, at 145–51.

representation is replaced by involuntary representation. The problem is that power is created by scarcity. If everyone is private, power comes from speech. If everyone is represented, and thus a member of the public sphere, power comes from having control of one's own public image — preserving those parts of your self that you do not want in the public sphere.

I am going to propose a radical idea: to have a society based on respect, you must trust your neighbors. For universal empowerment, each person must have control over his or her representation, at least up to the point that his or her private interest was outweighed by the public interest in freedom to represent.<sup>46</sup> Brin proposes a system for running the polis based on a frank analogy to “mutually assured destruction.”<sup>47</sup> If we both have a camera, I will not spy on you, because you will know and retaliate. Is armed standoff, even if effective,<sup>48</sup> a healthy way to organize a society?<sup>49</sup>

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46. This blanket statement creates a difficult line-drawing game. At some point, the personal right not to represent, to put one's words in certain locations but not in others, runs up against the public right to represent using all available semiotic material, including that identified with another person. This is, of course, the core question (once economic aspects are stripped away) of intellectual property, particularly copyright and the right of publicity. It is beyond the scope of this Note to address this issue; however, it is not done by completely removing all protection for the individual who is going to be represented by another person, no more than by subjecting the needs of the public to the demands of corporations and individuals who hold semiotic wealth. Brin addresses this issue and argues for the current system of intellectual property protection or something less protective. *See* BRIN, *supra* note 1, at 89–107.

47. “MAD,” the old nuclear deterrence policy that said “if you kill us, we'll kill everyone on earth.” Brin convincingly argues that, because, unlike nuclear deterrence, a use of surveillance technology can be “taken back” or nullified by non-use (I take your photo but do not post it on the Internet), it can be effectively used to deter overuse of surveillance power. *See* BRIN, *supra* note 1, at 254–57.

48. Of course, the MAD scenario is based on an assumption of complete destruction. If the destruction is more partial — if, for example, a powerful person can destroy the weak person's credit, hope of future employment, and family relationships, while the weak person can only damage the powerful person's business by ten percent (a likely scenario if someone tried to enforce accountability on the IRS, banks or credit reporting companies, or employers) — then the MAD principle is fundamentally weakened. The powerful can still observe the weak, *see, e.g.*, SHENK, *supra* note 2, at 145–53, and use that information for some purposes. As long as he does not use his power to its fullest extent, the weak player still has the incentive to avoid further punishment by not using his limited power to harm the strong player. Put differently, if you have a knife and I have nothing, it solves nothing to give you a gun and me a knife, though the change in power is roughly equal. *See generally* Thomas Koenig & Michael Rustad, “Crimtorts” as Corporate Just Deserts, 31 U. MICH. J.L. REF. 289, 315, 322 (1998) (discussing various forms of potential sanction against corporations, including adverse publicity).

49. One problem with MAD on the individual level that does not exist between



Yet, somehow, he experiences this as different from a world based on "shields." Ignoring the ancient axiom that "the best defense is a good offense," Brin assumes that providing people with a good offense will avoid defensiveness. This is a fundamental paradox in attempts forcibly to integrate people based on individual autonomy. This process has been observed at many levels.<sup>50</sup> When people think of themselves as separate from each other, and objectify each other (with tools to do the same), and inflict power upon each other, it is not going to lead to some utopian harmony. Rather, it will lead to separateness, and an increase in distrust.

## VI. CONCLUSION

Both Brin and Shenk identify the correct social problem to be solved — the loss of popular power. Each demands to be read as a highly relevant part of the social discourse. Each also correctly attributes the problem to the way society handles information and language. If their factual assumptions about power were a little more plausible, their arguments would be easier, though by no means easy, to believe. Is there a solution to the problem which Brin and Shenk each incompletely identify? If there is, it is contained in neither work.

Brin is closer. He certainly is right that criticism is the best antidote to error and that free criticism should be preserved above all. This at least sees the solution to the crisis of the public sphere, to wield the public use of reason against power. However, his dichotomy between vertical pyramid-style surveillance and horizontal surveillance too quickly dismisses the real possibility of an inverted pyramid.<sup>51</sup> Vigilance only against power could encourage a true open society. One need not fear terrorists and conspiracies enough to allow a concentration of information, both in the hands of the powerful and in the hands of one's neighbors. After all, reciting the maxim that criticism is an antidote to error does not imply that society should expose the lives of those not powerful enough to do anything creating error.

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nation-states is the undermining of any kind of social unity. Even Richard Posner notes this in a discussion of revenge. "Vengeance breeds intense loyalty within small, especially with family, groups . . . [b]ut powerful loyalties within small groups retard the formation of larger loyalties, to the tribe, the *polis*, or the nation." RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 29 (1988).

50. See, e.g., Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 254 (1993) (criticizing attempts to decentralize power to cities while keeping the definition of cities as autonomous individuals). Brin's argument can be seen as an attempt to decentralize power (the control over accountability) to individual people, while still not questioning how this necessarily changes their identity.

51. See BRIN, *supra* note 1, at 276–77.

Shenk, by realizing that informational overabundance favors those who can use it, sees the incentive problems but chooses a poor solution. Self-censorship and strict informational selection are far more dangerous than counter-speech. Shenk chooses the blunt object of filtering when a far more subtle alteration of incentives through criticism would have the same benefit, without the costs.

If there is a solution, it has not yet entered this discourse. Distrust of power and mutual respect between equals, rather than mutual threat (Brin) or withdrawal (Shenk) might be a good place to start.

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