

ARTICLES

PRIVACY, IDENTITY, DATABASES

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ABSTRACT

The past several decades have been characterized by a growing concern over consumer privacy. Aided by advances in technology, many corporations routinely compile records of consumer transactions into vast databases. The resulting dossiers of personally identifiable data are then sold to direct marketers or to data collectors. Not surprisingly, many legal scholars have deemed these developments an unprecedented threat to personal privacy.

However, despite the liveliness of the debate on the topic, the current discourse on privacy has failed to articulate a compelling rationale for protecting consumer information. While legal scholars often simply assume that records of routine consumer transactions are inherently private, several other rationales have been proposed. Some scholars suggest that collection of consumer data is an affront to personal dignity or treat it as an Orwellian monitoring of everyday activities, while others argue that data collection deprives consumers of a property interest in their information.

This Article argues that these rationales are either too vague, too broad, too narrow, or simply based on factually incorrect assumptions. Furthermore, the current privacy discourse tends to overlook the cultural context of data collection. Finally, many scholars overlook the economic and social efficiency of data collection.

This Article proposes a new rationale for limiting access to consumer information. It develops a legal definition of privacy that encompasses both the cultural meaning of consumer data collection and the established principles of privacy law. Through an exploration of the Supreme Court jurisprudence, this Article finds that privacy law protects only information that expresses identity, not personal information *per se*.

With this theoretical framework, the Article proceeds to locate a privacy interest in consumer data. Consumption is the central activity of contemporary society. Our choice of products and brands expresses our consumer identity, which in turn closely relates to our identity as individuals. Since these choices are an expression of personal identity, we can effectively employ the principles of privacy law to control the collection and sale of consumer information. This approach avoids the pitfalls of the current privacy discourse and provides a solid conceptual foundation for tackling privacy issues in

the age of databases.

INTRODUCTION

Contemporary legal discourse on privacy has failed to develop a compelling rationale for protecting consumer information. While most legal scholars rely on models of informational privacy that poorly fit the context of consumer information collection, this Article proposes a new model for protecting consumer information, incorporating both the cultural meaning of data collection and the basic principles of privacy law.

Much of the legal literature on privacy is concerned with consumer information.¹ Advances in technology, including the rise of cyberspace as a potentially dominant commercial medium, have made it easier to compile such information and have greatly increased its availability.² Most of our purchases leave indelible traces, the implications of which we often cannot comprehend. Owners of consumer information databases efficiently collect this stray information, aggregating it into exhaustive consumer profiles, which are available for sale to direct marketers.³ We can only expect the consumer databases to become even more comprehensive because most retailers are not prohibited from selling or renting this information, and doing so provides a new avenue of profits. The notion that records of our purchases, whether they are routine or embarrassing, may become accessible to third parties is unnerving. Not surprisingly, many legal scholars have deemed these developments an unprecedented threat to privacy.⁴

1. The issue is becoming more relevant, as the FBI and CIA are turning to an examination of consumer records as part of post-September 11 anti-terrorism efforts. See generally Electronic Privacy Information Center, Total Information Awareness, at <http://www.epic.org/privacy/profiling/tia> (last visited Jan. 13, 2003).

2. See Elizabeth deGrazia Blumenfeld, *Privacy Please: Will the Internet Industry Act to Protect Consumer Privacy Before the Government Steps In?*, 54 BUS. L.J. 349, 351 (1998) ("[E]ach time a user clicks her mouse while on a web site, the potential exists for the company to record the location of her 'click' and thus to collect information about her online behavior—where she goes, what she buys, when she buys, and how frequently she buys. . . . [T]he Internet's ability to collect such information allows for increasingly accurate and personally targeted marketing.")

3. See *infra* Part I (discussing modern data collection practices).

4. In the past several years, the *Stanford Law Review* and the *Santa Clara Computer and High Technology Law Journal* have presented symposia on the issues of privacy in the electronic age. The symposia addressed what steps needed to be taken in terms of regulation by the on-line industry or the government to protect consumer privacy due to improvements in technology. See Fred H. Cate, *The Changing Face of Privacy Protection in the European Union and the United States*, 33 IND. L. REV. 173, 179 (1999) (quoting Marc Rotenberg, "Privacy will be to the information economy of the next century what consumer protection and environmental concerns have been to the industrial society of the 20th century."); Steven Hetcher, *Changing the Social Mapping*

However, there is a significant and perhaps counterintuitive oversight in the consumer privacy discourse. Information collection appears so innately disconcerting that one may easily make the leap from considering the easy availability of such records to the need to protect them. There are two major reasons for this logical shortcut. First, a central feature of contemporary life is vulnerability, especially to adverse information. Proliferation of databases, records, and all kinds of documentation makes a citizen an object of unseen computerized bureaucracy. Given this vulnerability to information, the desire to limit the availability of any personal information seems only natural. Second, the ingrained American principles of individualism and self-determination lead to an "it's none of your business" rationale for protecting consumer information. Grounded in the Supreme Court-endorsed right to be let alone,⁵ this approach is wary of any involuntary informational exchanges.

On their own merits, these two impulses are legitimate, but they do not establish a viable legal privacy interest in consumer records. That we would like to protect some personal information from disclosure does not mean that such information deserves protection. Indeed, much available personal information—records of sex offense convictions,⁶ for example—is explicitly excluded from privacy protection, no matter how sensitive it is. Consumer information, on the other hand, exists in a legal vacuum. Although some information, such as video rental records,⁷ receives legislative privacy protection, the confidentiality of consumer records, in general, has

of Privacy in Cyberspace, 15 HARV. J.L. & TECH. 149, 150 (2001) (claiming that the most significant public policy concern created by the Internet is the threat to privacy from the increasing flow of personal online data). The tone of journalistic response to the problem has been considerably more fervent. See William Safire, *Stalking the Internet*, N.Y. TIMES, May 29, 2000, at A15 (arguing that privacy is a growing issue of importance for all proponents of freedom). Concerns about privacy implications of computerized data collection actually date back many decades. See generally VANCE PACKARD, *THE NAKED SOCIETY* (1964) (arguing that surveillance capabilities interfere with the traditional rights of citizens); ALAN F. WESTIN, *PRIVACY AND FREEDOM* (1967) (drawing attention to the general privacy threat posed by public curiosity and surveillance); ARTHUR R. MILLER, *ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS* (1971) (examining the threats to privacy caused by the developments in technology while recognizing the benefits of technological achievements); ALAN F. WESTIN & MICHAEL A. BAKER, *DATABANKS IN A FREE SOCIETY: COMPUTERS, RECORD-KEEPING AND PRIVACY* (1972) (asserting that the developments of technology threaten personal privacy).

5. See discussion *infra* Part II.B.

6. *Paul P. v. Verniero*, 170 F.3d 396, 404 (3d Cir. 1993) (holding that Megan's Law requiring community notification for sex offenders, does not violate constitutional right of privacy); cf. *Cline v. Rogers*, 87 F.3d 176, 179 (6th Cir. 1996) (finding no constitutional privacy right for criminal records).

7. 18 U.S.C. §§ 2710-2711.

not been addressed by Congress.

Given this legal and theoretical vacuum, many commentators rely on extreme cases to justify broad privacy protection of consumer records. A frequent rhetorical device is to discuss the disclosure of particularly unseemly or embarrassing purchases.⁸ Even the most ardent direct marketers would have a hard time justifying sharing information about purchases of pregnancy kits, tampons, or girdles.

The intuitive classification of these kinds of consumer records as private, however, is a red herring. Our consumer profiles are replete with purchases that are neither embarrassing nor unseemly. If you purchase a pair of Dockers, and the retailer discloses the transaction to a third party, you may be disconcerted but perhaps not truly offended. The third party would know something about you, but the information is so impersonal that your privacy has not been invaded any more than if a passerby happened to see you wearing that pair of Dockers. Thus, in cases of records of routine purchases, the legal commentators' tendency towards privacy seems to lack either an emotional or legal toehold.

Yet, at some point during the accumulation of isolated transaction records, a recognizable portrait of us materializes. What if a third party can discover all purchases that you have made in the past month? Or, what if that third party can ascertain every single thing that you have in your home, the contents of your wardrobe, your dietary habits, the CDs in your collection? Loss of control over that enormous body of information leaves us truly vulnerable, making privacy protection necessary.

Accordingly, we must justify our finding of privacy in the case of extensive consumer profiles. This Article proposes that the locus of privacy in consumer information rests in the expressiveness of consumer behavior itself.⁹ It is all-too-rarely noticed that privacy law is principally concerned with protection not of information, as such, but expressive information. Consequently, any argument for the

8. See SIMON GARFINKEL, *DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY* 156-57 (2000) (citing a case where a woman filled out a change of address form for her dead mother and as a result was inundated by mail from direct marketers to her dead mother); *id.* at 159.

9. In this proposal, I follow a tradition in privacy scholarship. "The method *de rigueur* in legal scholarship has been for the author to examine the previously favored definition of privacy, tear it down to its bones, expose its fallacies, and establish a new contender for the crown." Ken Gormley, *One Hundred Years of Privacy*, 1992 *Wis. L. REV.* 1335, 1338 (1992); see also Simon G. Davies, *Re-Engineering the Right to Privacy: How Privacy Has Been Transformed from a Right to a Commodity*, in *TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE* 153 (Philip E. Agre & Marc Rotenberg eds., 1997) ("The pursuit of a single definition of privacy has preoccupied so many travelers in this field that the quest has become a standard challenge in the privacy field.").

privacy protection of a certain type of information must start with an evaluation of its expressive value. This Article argues that consumer information is highly expressive and therefore protectable. Once we accept that consumption is an expressive activity, building a theoretical framework for protection of consumer privacy becomes a more intellectually coherent enterprise.

What we buy is how we present ourselves to the outside world; it represents how we choose to interact with it. When we purchase brands or products coded with a certain personality trait, we provide a blurry but strikingly accurate glance at our private selves to any sophisticated examiner of consumer records. What deserves attention here is not the availability of a record of our purchases, as some privacy activists claim,¹⁰ but the inferences that an examiner may make about our consumer preferences.¹¹ These preferences are expressive, revealing and private. Once we establish, as this Article sets out to do, that the examination of consumer records produces a fairly accurate psychological profile, we can apply existing privacy protections to database aggregation of consumer records.

Part I of this Article provides a brief overview of the rise of direct marketing and consumer information databases. Part II explores the contemporary scholarly debate over consumer privacy and proposes a new approach to the problem. It discusses the theoretical shortcomings of the contemporary consumer privacy discourse, including the flaws of the most prominent justifications for consumer data protection. Part III then proposes a new model of privacy that avoids many of these flaws.

10. See Kalinda Basho, *The Licensing of Our Personal Information: Is it a Solution to Internet Privacy?*, 88 CAL. L. REV. 1507, 1507 (2000) (discussing how the increasing collection of consumers' buying habits poses a threat to privacy because it does not allow consumers to have control over their personal information).

11. A concrete example is in order. Assume a person purchases a bottle of scotch, and the record of the transaction is sold to a direct marketer. The most popular brands on the market are X and Y. Brand X is promoted as an old-fashioned drink that is to be sipped and savored, perhaps in front of a fireplace. Brand Y, however, is promoted as "not your father's kind of scotch"—magazine ads for the brand feature young people in crowded nightclubs. Generally, most privacy theorists would cringe at the mere notion that a third party can discover you purchased a bottle of scotch. They would complain that nobody should know whether you drink scotch or how often you drink it. This paper argues conversely that your choice of brand X over Y, or vice versa, deserves the real focus, not the mere purchase of scotch. More importantly, in a consumer records database, the particular choice may be linked up with a myriad of others, all expressive of your personality. Although a record that a young man chose a brand with a musty, conservative image seems trivial, if such data is linked to other consumer records reflecting a distinct preference for products with that image, the direct marketer has gained significant insight into the man's personality.

Part IV explains that one's consumer profile is expressive and, therefore, private. The section uses contemporary social theory to analyze consumption as the primary mode of mediation between self and other in modern society. By analyzing advertising, brands, and products as a system of signs and meanings, Part IV suggests that the marketplace provides considerable freedom for individual self-expression. Then, it relates consumption choices to the concept of privacy as a protection of expressive information. The section concludes with an application of the concept of the expressive consumer identity to several prominent consumer privacy cases and suggests how their outcomes would have differed had the courts applied the conception of privacy suggested here. The Conclusion briefly summarizes this Article's main contention and makes some policy suggestions for the regulation of consumer information databases.

I. MODERN DATA COLLECTION PRACTICES

Market research and direct marketing are the primary reasons for collecting consumer information.¹² The collection of consumer information is made possible by sophisticated database technology, a virtual lack of consumer information protection in the United States, and the shift in the "marketing imagination" from the mass to the individual consumer.¹³ Emerging from these diverse influences, consumer information collection has become a pervasive presence in our lives; the bulk of our mail consists of correspondence based on consumer database information.¹⁴

This is an explosive time in the history of database marketing,¹⁵ an industry based on collecting, analyzing and using consumer information.¹⁶ Database marketing is currently the most promising

12. For more extensive accounts of the rise of consumer data collection, see Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1403-10 (2001); Stan Karas, *Enhancing the Privacy Discourse: Consumer Information Gathering as Surveillance*, 7 J. TECH. L. & POL'Y 29 (2002).

13. See Shaun A. Sparks, *The Direct Marketing Model and Virtual Identity: Why the United States Should Not Create Legislative Controls on the Use of Online Consumer Personal Data*, 18 DICK J. INT'L L. 517, 525 (2000) (discussing the shift in focus by marketers from targeting groups to individuals).

14. See DON PEPPERS & MARTHA ROGERS, PH.D., *THE ONE TO ONE FUTURE: BUILDING RELATIONSHIPS ONE CUSTOMER AT A TIME* 310 (1993) (explaining that every time consumers subscribe to a magazine, purchase from a catalog or get listed in a directory, etc., their personal information is compiled into a mailing list).

15. Database marketing is a form of direct marketing. Sparks, *supra* note 13, at 517. Because contemporary direct marketing is highly dependent on database technology, this paper will employ these two terms interchangeably.

16. *Id.* at 517-18. There are uses for the collected data other than marketing. In

form of marketing, growing at twice the rate of America's GNP.¹⁷ A 1996 poll found that seventy-seven percent of American companies use direct marketing¹⁸ and in the words of one author, "[t]oday it's hard to imagine an organization that doesn't use direct marketing in one form or another."¹⁹ The total amount spent on mailing lists approaches three billion dollars a year,²⁰ and a recent study indicated that one of every thirteen jobs in the United States was the result of direct marketing sales activity.²¹ Overall, the industry employs more than eighteen million people.²² In sum, "[t]he old paradigm, a system of mass production, mass media, and mass marketing, is being replaced by a totally new paradigm, a one to one economic system... characterized by customized production, individually addressable media, and 1:1 marketing. . . ."²³

Without advances in database technology, which allow for storage and sorting of huge amounts of data, database marketing as we know it today would be impossible.²⁴ Before pre-sorting direct solicitation of consumers consisted of indiscriminate mailing of mail-order

one well-publicized case involving a suit against a supermarket, the plaintiff consumer was threatened with the courtroom disclosure of his shopping card records of alcohol purchases. See Ian Goldberg et al., *Trust, Ethics, and Privacy*, 81 B.U. L. REV. 407, 420 (2001) (discussing the privacy hazards of frequent buyer cards).

17. ARTHUR M. HUGHES, *THE COMPLETE DATABASE MARKETER* 4 (rev. ed. 1996) ("It is and will continue to be the hottest growth area in advertising for the foreseeable future.").

18. Jeff Sovern, *Opting In, Opting Out, or No Options at All: The Fight for Control of Personal Information*, 74 WASH. L. REV. 1033, 1047 (1999).

19. BOB STONE & RON JACOBS, *SUCCESSFUL DIRECT MARKETING METHODS* 4 (7th ed. 2001).

20. William J. Fenrich, *Common Law Protection of Individuals' Rights in Personal Information*, 65 FORDHAM L. REV. 951, 956 (1996) (estimating that direct marketing in 1995 led to \$600 billion in sales). Direct marketing sales to consumers reached \$630 billion in 1996, up from \$458 billion in 1991. Business to business sales were another \$540 billion in 1996, up from \$349 billion in 1991. Seth Safier, *Between Big Brother and the Bottom Line: Privacy in Cyberspace*, 5 VA. J.L. & TECH. 6, 7 (Nov. 4, 2002), available at <http://www.vjolt.org>.

21. See Safier, *supra* note 20, at 8 (citing a study conducted by the Mexican financial firm, Gemax-WEFA).

22. Fenrich, *supra* note 20, at 956 (arguing that the balance of power between direct marketers and consumers is tilted toward direct marketers).

23. PEPPERS & ROGERS, *supra* note 14, at 4-5; see also Jennifer Bresnahan, *Personalization, Privacy, and the First Amendment: A Look at the Law and Policy Behind Electronic Databases*, 5 VA. J.L. & TECH. 8, 8 (2000) ("Personalization is the latest darling of the business world."), available at <http://www.vjolt.org>. See also DAVID LYON, *SURVEILLANCE SOCIETY: MONITORING EVERYDAY LIFE* 43 (2001) (discussing the shift by companies from targeting mass groups to targeting individuals to avoid producing for uncertain markets).

24. See Leslie A. Kurtz, *The Invisible Becomes Manifest: Information Privacy in a Digital Age*, 38 WASHBURN L.J. 151, 152 (1998) (acknowledging the long-time value of information and availability of mailing lists but adding that information is easier to manipulate today).

catalogues, despite the fact that some consumers are more likely than others to respond to such solicitations.²⁵

The lack of comprehensive laws protecting personal informational privacy in the United States has made database marketing possible.²⁶ Information privacy in the United States is protected through a loose patchwork of constitutional, statutory, and common law guidelines, and private sector self-regulation.²⁷ For example, the Fair Credit Reporting Act²⁸ ("FCRA") limits the purposes for which personal information about an individual may be released without consent. Still, the FCRA affects only credit-reporting companies and provides only limited private remedies.²⁹ Similarly, the infamous "Bork law"³⁰ a statute protecting individuals' video rental records, does not cover conceptually similar activities, such as records of purchased books or compact discs. Not bound by consumer privacy legislation, an increasing number of companies have started to sell their data.³¹ Consumer data is as easy to distribute as it is to collect, and given modern software capabilities, it is fairly easy to store, organize, and analyze. Companies such as Catalina Marketing Corporation, Aristotle Industries, Inc., and Winland Services own detailed information on virtually all U.S. households.³²

The consumer profiles contain much information about a person's consumption patterns and brand preferences. For example, in a recent lawsuit, MetroMail, a database company, was ordered to

25. See GARFINKEL, *supra* note 8, at 155 (stating that no marketer wants to send out mail that is likely to be discarded).

26. See A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1462 (2000) (quoting Scott McNealy, the CEO of Sun Microsystems as saying: "You have zero privacy. Get over it.").

27. See Joel R. Reidenberg, *Restoring Americans' Privacy in Electronic Commerce*, 14 BERKELEY TECH. L.J. 771, 772 (1999) (arguing that the government's reliance on ad hoc legal rights created in response to scandals involving abuses of privacy through information gathering has resulted in gaps in the protection of privacy); Beth Givens, *Privacy Expectations In a High Tech World*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 347, 348 (2000) ("The United States has taken a sectoral approach to privacy, enacting laws that apply to specific industries and practices.").

28. 15 U.S.C. § 1681 (1970).

29. See generally Sandra B. Petersen, *Your Life as an Open Book: Has Technology Rendered Personal Privacy Virtually Obsolete?*, 48 FED. COMM. L.J. 163 (1995) (discussing some of FCRA's defects and omissions).

30. Video Privacy Protection Act, 18 U.S.C. § 2710 (1988).

31. See Govern, *supra* note 18, at 1408 (describing the growth of the direct marketing industry); see also ANNE WELLS BRANSCOMB, WHO OWNS INFORMATION? 3-4 (1994) (stating that much of the information people consider to be personal is sold on the market to anyone who believes they can use it for a profit, often without that person's knowledge).

32. See HUGHES, *supra* note 17, at 354 (stating that there may be data on more than forty million households).

produce a number of consumer profiles that it had compiled.³³ One such profile comprised "twenty-five single-spaced pages and contained information such as income, marital status, hobbies, medical ailments, preferred brand of antacid tablets, denture use, and frequency of use of room deodorizers, sleeping aids, and hemorrhoid remedies."³⁴ As the collection of consumer information expands, profiles will grow only more detailed and comprehensive.

The Internet is extremely promising for marketing,³⁵ and some trends have already emerged.³⁶ First, the technology of the Internet provides marketers with a greater ability to aggregate and consolidate information. Second, the Internet has made it easier to buy and sell data. The scandal surrounding a plan by DoubleClick, a company specializing in targeted on-line advertising, to collect and sell Internet surfers' profiles, is the most visible indication of these emerging trends.³⁷

In sum, more information is collected on more Americans than ever before. The records of what we buy are collected, aggregated, and then used by marketers to induce us to buy something else. Personal consumption is becoming a quasi-public activity.

II. LEGAL CONTEXT OF DATA COLLECTION

Not surprisingly, the legal academy has become deeply troubled by the ongoing expansion of consumer data collection.³⁸ Yet, although innumerable articles and books have been published on this topic,³⁹ the consumer privacy discourse has failed to develop a compelling

33. See Mike Hatch, *The Privatization of Big Brother: Protecting Sensitive Personal Information from Commercial Interests in the 21st Century*, 27 WM. MITCHELL L. REV. 1457, 1473 (2001) (explaining that Metromail's computer files contained more than 900 pieces of information on customers dating back more than a decade).

34. *Id.* at 1473-74.

35. Sparks, *supra* note 13, at 527. Arguably, with the dot com crash, the resources for developing that potential may be increasingly limited. Still, once the economy revives, Internet-based marketing is likely to once more attract venture capital.

36. These trends have predictably raised serious privacy concerns. See Steven A. Hetcher, *The Emergence of Website Privacy Norms*, 7 MICH. TELECOMM. & TECH. L. REV. 97, 97 (Nov. 4, 2002) ("There is a burgeoning privacy crisis due in large part to the explosive growth of the Internet."), available at <http://www.mtlr.org>.

37. The privacy scandals are fairly isolated incidents. Most of the time, data is gathered and sold without the consumers ever knowing. See *infra* Part III.C (discussing the *Shibley* case and *DoubleClick* litigation).

38. See *supra* note 4.

39. See generally Froomkin, *supra* note 26 (arguing that, when constitutionally possible, the law should limit data collection); GARFINKEL, *supra* note 8 (surveying today's wide-ranging "threats" to personal privacy); Hatch, *supra* note 33 (advocating in favor of an "opt-in" system in which personal information would be kept private until an individual agrees to its disclosure); ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 825-27 (2002) (discussing constitutional protection for controlling personal information).

rationale for legal protection of this information. Most often, scholars simply assume consumers are entitled to their data and any unauthorized collection of it violates the constitutionally enshrined "right to be let alone."⁴⁰ Although this right, derived from the famous Warren and Brandeis article on privacy,⁴¹ has an illustrious history, it cannot encompass the various data collection practices. Would Warren or Brandeis have gotten so exercised over the right to protect one's preferences in breakfast cereal? Because of this deficiency, a new rationale for protecting consumer data must be developed to address the public's concern that data collection represents a serious privacy invasion.

Instead of assuming that third parties simply have no right to consumer information, we must ask whether the use of that information is an invasion of privacy. This Article argues that privacy law is largely geared toward protecting information that is expressive of one's identity. Therefore, instead of instinctively arguing for wholesale cessation of information collection, privacy activists should first consider the social context and meaning of that practice.

Part A outlines the theoretical shortcomings of the contemporary consumer privacy discourse. Part B links these shortcomings with the larger flaws in the classic "right to be let alone" school of privacy discourse. Part C argues that other prominent rationales for protecting privacy are either too vague, too broad, too narrow or simply based on factually incorrect assumptions.

A *The Shortcomings of Current Consumer Privacy Discourse*

Contemporary privacy scholarship links data collection with privacy invasion so frequently that this assumption has become second nature to many scholars. Numerous articles of varying merit take the need to protect all transactional data as an incontrovertible given. For example, Steven Hetcher writes: "The connection between the collection of personal information and personal privacy is straightforward: the more personal data that websites collect, store, and use, the less privacy that data subjects have."⁴² Paul Schwartz expresses his concerns in similar terms: data collection "creates a potential for suppressing a capacity for free choice: the more that is known about an individual, the easier it is to force his obedience."⁴³

40. GARFINKEL, *supra* note 8, at 257.

41. Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

42. Hetcher, *supra* note 4, at n.29.

43. Paul M. Schwartz, *Privacy and Participation: Personal Information and Public*

Indeed an entire sub-discourse on issues such as "cookies" has evolved without an articulation of privacy protection rationales other than "it's none of their business."⁴⁴ This rationale is too broad and rigid to be applied to various factual circumstances and cultural aspects of data collection. This subsection provides an overview of some contemporary privacy literature, scholarly and popular, and suggests that another approach is necessary.

An article representative of the current privacy discourse is A. Michael Froomkin's *The Death of Privacy*.⁴⁵ In this comprehensive piece, Froomkin argues that an unprecedented variety of technologies collect personal information in an ever-increasing variety of contexts.⁴⁶ He observes that transactional data is tracked, cell phones are monitored, and web-surfing is recorded, while our moves in public are taped by a network of close-circuit cameras.⁴⁷ This system of pervasive surveillance results in a modern life completely visible and permeable to observers,⁴⁸ a veritable erosion of the border separating the private and public spheres. Admittedly, Froomkin endorses a "legal and social response that is at least as subtle and multifaceted" as the privacy-destroying technologies.⁴⁹ Nonetheless, his view of information privacy is quite blunt: information privacy "is a good in itself, and value worth protecting,"⁵⁰ and in an ideal world, privacy would be intact because information would never get collected in the first place.⁵¹

Popular literature on privacy exhibits the same matter-of-course hostility to the collection of information⁵² with authors also failing to articulate a sufficiently flexible approach to different kinds of data collection. For instance, in *The End of Privacy*, Charles Sykes describes

Sector Regulation in the United States, 80 IOWA L. REV. 553, 560 (1995).

44. See *infra* notes 62-66 and accompanying text (providing a brief definition and listing of articles related to cookies and privacy); see also *infra* Part III.C (discussing the *DoubleClick* litigation).

45. Froomkin, *supra* note 26.

46. See *id.* at 1463 (arguing that the rapid increase in technologies might result in a world with no privacy).

47. See *id.* at 1468-1501 (listing technologies that can be used to invade privacy).

48. See *id.* at 1461 (describing the effects of informational technology on privacy).

49. *Id.* at 1543.

50. *Id.* at 1467; cf. Katrin Schatz Byford, *Privacy in Cyberspace: Constructing A Model of Privacy for the Electronic Communications Environment*, 24 RUTGERS COMPUTER & TECH. L.J. 1, 6 (1998) (observing that privacy has an "inherently positive value").

51. Froomkin, *supra* note 26, at 1464 (arguing there should be limits on initial data collection because most of the privacy-related concerns occur after the information is in the database).

52. The theoretical flaws in these books are perhaps even more important than those in specialized legal literature. While the latter caters to a circumscribed community of scholars, the former shapes the popular perception of the problem and legislative solutions for it.

the progressive "erosion of privacy in our everyday lives."⁵³ Devoting a long chapter to consumer privacy, Sykes relates the collection of "every conceivable bit of information about you"⁵⁴ with his concern about governmental surveillance⁵⁵ and concludes that there is "a fine line between marketing and snooping."⁵⁶ Although Sykes seems to be mainly concerned with access to sensitive personal information—medical and/or embarrassing—he argues that all consumer information should be protected.⁵⁷

Similarly, Simson Garfinkel, in his influential book *Database Nation: The Death of Privacy in the 21st Century*,⁵⁸ uses examples of embarrassing disclosures of consumer information to advocate restrictions on the collection of all consumer data.⁵⁹ These scenarios pave the way for striking conclusions. For example, the sale of supermarket smart-card data "gives businesses and government a way of searching your house and scrutinizing your lifestyle without ever obtaining a warrant"⁶⁰ Accordingly, Garfinkel emphatically concludes that "[r]unaway marketing has become a nonstop campaign of corporate-sponsored harassment. This campaign will eventually be extended to every man, woman, and child on the planet. It must be stopped."⁶¹

Discourses on specialized topics in consumer privacy also tend to take an inflexible, anti-collection stand. A prominent example is the discussion of cookies, small text files placed into personal computers by websites, generally without the browser's consent and subsequently accessed by the same or additional websites visited.⁶² Aside from producing one of the worst set of legal puns in recent memory,⁶³

53. CHARLES J. SYKES, *THE END OF PRIVACY: PERSONAL RIGHTS IN THE SURVEILLANCE SOCIETY* 4 (1999).

54. *Id.* at 66.

55. *Sæ id.* at 60 (describing the link between the government and the private sector in terms of data collection).

56. *Id.* at 4.

57. *Sæ id.* at 13 (stating that the meaning of privacy for people is likely to vary and, for some people, being left completely alone may only then constitute real privacy).

58. GARFINKEL, *supra* note 8. Privacy has been declared dead more times than rock'n'roll. For a more multifaceted view, *sæ* AMITAI ETZIONI, *THE LIMITS OF PRIVACY* 2 (2000) (recognizing that privacy is "under siege, if not already overrun").

59. *Sæ* GARFINKEL, *supra* note 8, at 155-76 (listing examples of consumer information being used by marketers).

60. *Id.* at 160.

61. *Id.* at 156.

62. *Sæ* Viktor Mayer-Schoenberger, *The Cookie Concept* (discussing thoroughly internet cookies and how they function), at <http://cookiecentral.com/content.phtml?area=2&id=1> (last visited Sept. 30, 2002).

63. Jessica J. Thill, Comment, *The Cookie Monster: From Sesame Street to Your Hard Drive*, 52 S.C. L. REV. 921 (2001); Lawrence Jenab, Comment, *Will the Cookie Grumble?: An Analysis of Internet Privacy Regulatory Schemes Proposed in the 106th Congress*, 49 U. KAN. L. REV. 641 (2001); Rachel K. Zimmerman, Note, *The Why the "Cookie" Grumbles:*

articles on cookies generally accept the premise that the browsers' activities should not be available to the websites.⁶⁴ Although the goal of websites to provide personalized browsing often receives attention, the authors' underlying premise is that any attempt to collect personal information is inherently suspect and should be resisted.⁶⁵

There are several problems with these accounts of threats to consumer privacy. First, this line of scholarship tends to treat collection of consumer data as a subset of a larger set of privacy-destroying practices, including voyeuristic tabloid culture and sales of sensitive medical information.⁶⁶ Although all of these practices restrict or destroy the "ability to control the acquisition or release of information about oneself,"⁶⁷ it is misleading to discuss them together.⁶⁸ Dissemination of one's medical records differs both in kind and effect from the sale of one's shopping list just as being observed by a surveillance camera differs from workplace keystroke monitoring. Admittedly, all these practices implicate control over personal information, but the extent of our aversion to them varies

Internet Privacy and Data Protection in the Twenty-First Century, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 439 (2000-2001); Anna E. Shimaneck, Note, *Do You Want Milk with Those Cookies?: Complying with the Safe Harbor Privacy Principles*, 26 J. CORP. L. 455 (2001).

64. See Zimmerman, *supra* note 63, at 463 (concluding that those in possession of a browser's personal information could easily use it for inappropriate reasons); Jenab, *supra* note 63, at 647 (arguing individuals are generally unaware of the surreptitious technological methods used and a seemingly consensual transaction, such as viewing a website, results in unknown nonconsensual transactions). See generally Thill, *supra* note 63, at 942 (arguing that there is a legitimate public concern and that websites should at least (1) inform users the website is a "public arena," (2) inform users what data will be collected and for what purposes, and (3) explain the extent to which the information will be utilized).

65. See, e.g., REGINALD WHITAKER, *THE END OF PRIVACY: HOW TOTAL SURVEILLANCE IS BECOMING A REALITY* 103 (1999) ("However convenient, cookies . . . are a key to gaining remote access to personal computer hard drives, with frightening potential for abuse.").

66. See, e.g., SYKES, *supra* note 53, at 3-12 (discussing the privacy concerns raised by cookies in the same context as those raised by the use of credit cards, phones, and automobiles).

67. See Froomkin, *supra* note 26, at 1463 (using "informational privacy" as shorthand when referring to the ability to control the acquisition or release of information about oneself).

68. For instance, some scholars argue that proposed restrictions on the communication of consumer transactional data would "apply far beyond a narrow core of highly private information" and, as a result, "would cover all transactional information, such as the car, house, food, or clothes one buys." Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1117 (2000) (arguing that some proposed restrictions would be unconstitutional under the First Amendment). This anticipated over-extension of data restriction exists because this line of scholarship treats fundamentally different data transactions as all having the same or similar privacy concerns. If one can see, however, that different data transactions raise different concerns, then one can accept specific data restrictions aimed at specific concerns.

greatly.

More importantly, these authors do not explain adequately why we should be concerned about collection of consumer information. Presumably, their assumption is that consumer data is a subset of personal data, which individuals have a privacy right to control. Yet, just as there are varying levels of free speech protection,⁶⁹ different levels of privacy interests exist.⁷⁰ One may guard one's workplace web habits or raise concerns about having cell phone calls tracked but still part with "shopping list" information rather freely.⁷¹ If people willingly treat private information differently and consciously waive their privacy rights in certain transactional data, it is disingenuous to argue for an imposition of statutory or common law protection on that information. Therefore, the movement to protect consumer information from insatiable databases should be grounded in a more complex understanding of privacy, one without simple solutions.

B. General Limitations of the "Right to Be Let Alone" Rationale

The deficiencies in the contemporary consumer privacy discourse are related to the shortcomings of the classic theory of informational privacy. This section describes the concept of informational privacy, as well as its critics, and demonstrates how these criticisms apply to the consumer privacy discourse.

The "none of their business" vision of privacy grows out of the Western liberal tradition, which honors a rigid divide between the public and the private, the individual and the state.⁷² This concept is rooted intellectually in the famous article by Warren and Brandeis, *The Right to Privacy*.⁷³ Reacting to what the authors perceived as

69. See LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1 to 12-39 (2d ed. 1988) (discussing various freedom of speech issues and applicable restrictions).

70. See *id.* § 15-1 to 15-21 (surveying various privacy rights concerns and courts' attempts to balance those rights with freedom of speech rights).

71. See Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 729-30 (1999) (noting that although individuals express a high level of concern about privacy, in reality they expect low levels of privacy and often trade privacy for other goods).

72. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("We deal with a right of privacy older than the Bill of Rights—older than our political parties . . ."). For a dense theoretical treatment of the development of the public/private discursive divide, see generally JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger trans., MIT Press 1989) (1962). Historically, however, many practices that we currently conceive of as private have not always been so regarded. See Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1132-40 (2002) (stating that the matters we deem private have changed subtly over time from public to private).

73. Warren & Brandeis, *supra* note 41. It has been said that the influence of this article "pervades the law." Symposium, *The Right to Privacy One Hundred Years Later*, 41 CASE W. RES. L. REV. 639, 643 (1991).

erosion of the private domain, they asserted:

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man . . . has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.⁷⁴

Reflecting on the article, Ken Gormley observed that Warren and Brandeis might have argued for a privacy tort but “meant to preserve an individual’s ‘inviolable personality,’ a fragile and intangible thing . . . essential to preserve a ‘civilized’ and ‘cultured’ society.”⁷⁵ In other words, the dynamic public sphere could only be maintained by a protection of the private realm.⁷⁶ To accomplish that goal, the public was to be kept away from the private.

The Supreme Court has often relied on Warren and Brandeis’s famous formulation of the “right to be let alone” language in articulating its privacy jurisprudence.⁷⁷ In *Katz v. United States*, the Court used that idea as a conceptual foundation of the Fourth Amendment protection from unreasonable search and seizure.⁷⁸ On

74. Warren & Brandeis, *supra* note 41, at 196.

75. Gormley, *supra* note 9, at 1352 (claiming that although Warren and Brandeis’ privacy was a tort notion, it reflected the common law recognition of individuality and its ability to buffer the clash between human and the human’s environment).

76. *See id.* (stating that American democracy placed a premium on the individual).

77. It is well beyond the scope of this paper to properly analyze the Supreme Court’s formulations of the right to privacy. It suffices to note that the Court recognizes the right in the context of the Fourth Amendment, *see Katz v. United States*, 389 U.S. 347 (1967), or as a penumbral right of autonomy, *see Griswold v. Connecticut*, 381 U.S. 479 (1965). The constitutional status of informational privacy, or the individual interest in avoiding disclosure of personal matters, is unclear. Without explicit guidance from the Supreme Court, the circuits are split. The majority position is that such a constitutional right exists. *See Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978) (stating that the Supreme Court has clearly recognized the Constitution protects one’s privacy of personal affairs); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983) (asserting that the Constitution protects a person’s interests in avoiding disclosure of personal matters); *In re Crawford*, 194 F.3d 954, 958-59 (9th Cir. 1999) (finding that the Constitution protects informational privacy but the right is conditional and not absolute); *J.P. v. DeSanti*, 653 F.2d 1080, 1089 (6th Cir. 1981) (endorsing a conception of the right but stating that it is limited); *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) (noting that the courts generally hold informational privacy to be constitutionally protected if the information sought is within one’s reasonable expectations of confidentiality); *see also* Richard C. Turkington, *Legacy of the Warren and Brandeis Article: The Emerging Unenumerated Constitutional Right to Informational Privacy*, 10 N. ILL. U. L. REV. 479, 502 (1990) (stating that the right has been made a constitutional right by the judiciary). *But see* *AFL-CIO v. Dep’t of Housing & Urban Dev.*, 118 F.3d 786, 791-92 (D.C. Cir. 1997) (expressing “grave doubts” about the constitutional nature of a right to informational privacy).

78. *Katz*, 389 U.S. at 350-51 (holding that a person’s right to be let alone can be

another occasion Justice Fortas noted that “[the right to privacy] is . . . to live one’s life as one chooses, free from assault, intrusion or invasion.”⁷⁹ Similarly, Justice Douglas argued that this right includes the privilege of every American to “shape his own life as he thinks best, do what he pleases, go where he pleases”⁸⁰ without undue interference from others.

Concern about the erosion of the barrier between the private and public underlies much of privacy scholarship.⁸¹ Importantly, many scholars emphasize the individual right to withdraw from the public gaze, thus fundamentally altering the Court’s view of privacy as the obligation of the government or third parties to respect private space.⁸²

Thus, Alan Westin defined privacy as the “claim of individuals, groups, or institutions to determine for themselves when, how, and to

compared to the protection of a person’s property and life).

79. *Time, Inc. v. Hill*, 385 U.S. 374, 413 (1967) (Fortas, J., dissenting); *see also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that the right to privacy is the right to be free from unwarranted governmental intrusions into fundamental matters that affect a person); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (stating that this right exists except in limited circumstances).

80. *Doe v. Bolton*, 410 U.S. 179, 213 (1973) (Douglas, J., concurring) (quoting *Kent v. Dulles*, 357 U.S. 116, 126 (1958)).

81. This approach has proved quite popular in part because modern culture is deeply concerned with encroachments of the state and third parties into one’s private realm, which, in turn, infringes on one’s sense of self. *Cf. Gormley, supra* note 9, at 1439-40 (linking the development of privacy law to sociological and technological currents in American history). To appreciate the importance of the public/private boundary for modernity, one need only think of the work of such authors as FRANZ KAFKA, *THE TRIAL* (Edwin Muir trans., Schocken Books, Inc. 1995) (1937); VIRGINIA WOOLF, *A ROOM OF ONE’S OWN* (1929); and DON DELILLO, *WHITE NOISE* (1985).

These cultural currents have certainly been influenced by historical realities of totalitarian societies’ disregard for that boundary. For example, the Soviet Union had an extremely low level of personal privacy. *See* Jonathan M. Winer, *Regulating the Free Flow of Information: A Privacy Car as the Ultimate Big Brother*, 19 J. MARSHALL J. COMPUTER & INFO. L. 37, 40 (2000) (noting that the right to privacy has resulted from the assertion of individual rights to protect against regimes like the Nazis and the Soviets); *cf. Jed Rubenfeld, The Right of Privacy*, 102 HARV. L. REV. 737, 784, 806-07 (1989) (observing that privacy law has been able to protect American society from “creeping totalitarianism”). Interestingly, radical/progressive political perspectives are often congruent with disregard or even contempt for the private/public distinction. *See* CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 168-69 (1989) (arguing that a private boundary for a woman is a false notion because the private sphere is constructed to perpetuate abuse against women); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991) (arguing, with regard to the gender perspective, “the law’s privacy is a sphere of sanctified isolation, impunity, and unaccountability.”); *see also* Reva B. Siegel, “*The Rule of Love: Wife Beating as Prerogative and Privacy*,” 105 YALE L.J. 2117, 2122-23 (1996) (observing that the concept of privacy has been used by the courts to implicitly sanction domestic violence against women).

82. *See supra* notes 80-81 and accompanying text.

what extent information about them is communicated to others.⁸³ Similarly, Hyman Gross approached privacy as “control over acquaintance with one’s personal affairs,”⁸⁴ and, on another occasion, as “the condition of human life in which acquaintance with a person or with affairs of his life which are personal to him is limited.”⁸⁵ Finally, Arthur Miller argued that privacy is the individual’s ability to control the circulation of information relating to himself.⁸⁶

Yet, despite this illustrious history, applying the tenets of the informational privacy approach to consumer data is cumbersome at best. As suggested above, it fails to give sufficient attention to the context of the privacy invasion: “If privacy simply meant ‘being let alone,’ any form of offensive or harmful conduct directed toward another person could be characterized as a violation of personal privacy. A punch in the nose would be a privacy invasion as much as a peep in the bedroom.”⁸⁷ In the context of consumer privacy, this means a sale of one’s entire consumer history would be fundamentally comparable to a telemarketing call based on records of a newspaper subscription.

Furthermore, the classic argument for information privacy is too one-sided. While extolling the right to control one’s information, it overlooks the often legitimate reasons for others’ interest in that information. For example, retailers may want to possess consumer information to improve their services or to establish stronger ties with their most valued customers.⁸⁸

83. WESTIN, *supra* note 4, at 7. Professor Gerety argued that Westin’s definition is too broad, and privacy law should not encompass control over all information about oneself. See Tom Gerety, *Redefining Privacy* 12 HARV. C.R.-C.L. L. REV. 233, 261-62 (1977) (stating that Westin’s analysis is faulty because it lacks a true restricting term of analysis).

84. Hyman Gross, *Privacy and Autonomy*, in NOMOS XIII: PRIVACY 169 (J. Roland Pennock & John W. Chapman eds., 1971) (arguing that approaching privacy in this neglected consideration helps to answer why privacy is desirable, when its loss is and is not objectionable, and the amount to which one is entitled).

85. Hyman Gross, *The Concept of Privacy* 42 N.Y.U. L. REV. 34, 35-36 (1967).

86. See MILLER, *supra* note 4, at 25 (declaring this definition, reached by lawyers and social scientists, as fundamental to the right of privacy).

87. ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 7 (Rosemarie Tong ed., 1988).

88. See generally Eric Jorstad, *The Privacy Paradox*, 27 WM MITCHELL L. REV. 1503, 1510 (2001) (observing that a phone call from a local vendor informing a customer of helpful, innovative products makes customer “feel good”); PEPPERS, *supra* note 14, at 18-50 (discussing how businesses can effectively market their items to the individual so that they become loyal and repeat customers); George Raine, *Retailers Want You! Struggling Stores Appeal Directly to Top Customers to Revive Sales*, S.F. CHRON., Nov. 2, 2001, at B1 (describing personalized mailings from retailers affected by recent economic downturn to their frequent customers), available at <http://sfgate.com/cgi-bin/article.cgi?f=/chronicle/a/2001/11/02/BU196621.dtl> (last visited Oct. 20, 2002).

The disregard for the economic efficiencies of data collection has lead Judge Richard Posner to reject the control-based paradigm as fundamentally misguided.⁸⁹ Posner conceives of privacy as a way for individuals to avoid disclosing discreditable information about themselves, a kind of a bait-and-switch.⁹⁰ "[W]hen people today decry lack of privacy," Posner asserts, "what they want, I think, is mainly something quite different from seclusion; they want more power to conceal information about themselves that others might use to their disadvantage."⁹¹ This conception of privacy allows Judge Posner to discount the ostensibly privacy-invading effects of such activity as sales of magazine subscription lists. These transactions should be allowed because "information about the subscribers that is disclosed to the purchaser of the list is trivial . . . [and] the purchaser cannot use it to impose substantial costs on the subscribers."⁹² Admittedly, law-and-economics concepts may not apply to such normatively charged concepts as privacy. Still, Posner presents a cogent critique of the privacy theorists' traditional emphasis on control over information, especially in the context of consumer privacy.

There are also more extreme opponents of information privacy. For David Brin privacy is an outmoded paradigm that should be replaced with complete visibility.⁹³ He argues that transparency is "beneficial to all levels of society,"⁹⁴ as it would ensure greater public feedback on individuals' private behavior and greater tolerance.⁹⁵ In other words, mutual accountability is preferable to pervasive individual secrecy.⁹⁶ He further extrapolates that the eventual widespread availability of personal information will lead to a point when details of individuals' private matters are both readily accessible and

89. See Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 406-08 (1978) (discrediting noneconomic theories of privacy because they either presuppose human response to diminishing privacy or confuse a probable result of increasing privacy with a probable result of lessening it).

90. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 46 (5th ed. 1998) (observing that economists analogize the individual's use of privacy to prevent the public from knowing unfavorable information to a seller's use of privacy in an attempt to conceal defects in his products).

91. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 271 (1981).

92. Posner, *supra* note 89, at 399.

93. DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM?* 334 (1998).

94. *Id.* at 245.

95. See *id.* at 334 (asserting that complete transparency deters those with bad intent from acting out either because the individual is afraid of what others will think or because the individual does not want to get caught).

96. See *id.* (explaining that although one might find it irksome that the public knows trivial details about oneself, the individual can understand the benefits of knowing the activities of those on which he depends, such as politicians).

simply boring.⁹⁷ Brin's book is perhaps too outlandish⁹⁸ to be considered alongside classic privacy scholarship, it viably challenges the presupposition that the ability to exercise control over personal information is an inherent good.

C. *Other Theoretical Justifications for Controlling Data Collection*

Although the conventional "right to be let alone" rationale is used most frequently in the consumer privacy discourse, several other theoretical rationales are also prominent. These justifications fall into three general categories: (1) collection of information leads to a quasi-totalitarian surveillance society; (2) control over information is essential to personhood, and (3) information is personal property.

This section will argue that although these approaches are valuable and well-considered, they generally overlook the cultural context of data collection, thus failing to encompass the cultural dimension of that practice. Furthermore, as some commentators have pointed out, these three justifications suffer from logical and practical flaws, rendering them unsuitable as theoretical underpinnings of the privacy discourse.⁹⁹ Therefore, although these approaches provide more sophisticated perspectives on consumer privacy than those considered in the previous section, they still fail to present a sufficiently compelling case for viewing consumer data collection as a true privacy threat.¹⁰⁰

1. *Surveillance*

A frequently iterated rationale for restricting collection of consumer data is that it creates a surveillance society and panoptic effects.¹⁰¹ In monitoring consumers' activities, this surveillance

97. *See id.* at 334-35 (claiming that after some time, it will simply be common courtesy to look away because there will be an understanding that people vary in eccentricity).

98. *See generally* Lawrence Lessig, *Forum* to Symposium, *Cyberspace and Privacy: A New Legal Paradigm?*, 52 STAN. L. REV. 987, 999 (2000) (calling Brin a lunatic).

99. *See* Solove, *supra* note 72, at 1124 (stating that these justifications are overly broad notions of privacy).

100. Of course, any single conceptual definition of privacy is likely to be too broad or too narrow, too tied into its historical context or improperly oblivious of social context. Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087 (2002). Therefore, it may seem unfair to focus on the defects of various privacy rationales. Indeed my own proposal, as presented in Part II.D below, is likely subject to some of the same criticisms. Still, in confronting a practice as complex as consumer data collection, it is best to utilize a theoretical framework that is most responsive to the social meaning of that practice. Accordingly, I posit that the prominent conceptual frameworks used in analyzing consumer privacy fall short of that ideal fit, while the one proposed in this article comes closer.

101. *See* Solove, *supra* note 74, at 1142 (surmising that more known information

society encourages self-censorship and generally impedes the path to self-realization.¹⁰² Eventually, the personal knowledge of surveillance will structure the subject's very existence; previously alien social norms will be internalized and followed mechanically.¹⁰³

A commonly invoked metaphor in the surveillance discourse is George Orwell's all-seeing Big Brother.¹⁰⁴ Although private sector data collection is a far cry from Orwell's vision of an omnipresent electronic eye of the state,¹⁰⁵ many contemporary privacy theorists apply it to collection of information by private actors.¹⁰⁶ For instance, Paul Schwartz argued that "free society depends upon individual self-determination, the processing of personal information can have a destructive effect on this capacity. . . . [Computer databases create] a potential for suppressing a capacity for free choice: the more that is known about an individual, the easier it is to force his obedience."¹⁰⁷ Schwartz also has argued that online "surveillance of naked thought's digital expression short-circuits the individual's own process of decision-making."¹⁰⁸ Taking a slightly different approach, Jerry Kang notes that because cyberspace allows one to collect and analyze more information at a lesser cost, web surfers are subject to "dataveillance."¹⁰⁹ Finally, no less an authority than Lawrence Lessig

leads to more surveillance and more surveillance leads to less privacy).

102. *See id.* (arguing that surveillance can destroy a person's peace of mind and inhibit his or her daily activities).

103. *See* MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 195-228 (Alan Sheridan trans., Vintage Books 1979) (1978) (providing the classic treatment of panoptic effects).

104. GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 6 (1949). A Lexis search for "privacy AND Orwell OR Big Brother" generated 933 hits. *See also* Solove, *supra* note 12, at 1395 ("Journalists, politicians, and jurists" usually equate the problems created by databases with the "Big Brother" metaphor); Jonah Goldberg, *Big Brother, My Butt*, *NAT'L REV.*, Mar. 22, 2002, at 1 (claiming that people on both the right and left of the political spectrum raise the ominous Big Brother image "as if he's lurking behind every newlawand every newgadget").

105. *See* ORWELL, *supra* note 104, at 6 (saying the "Thought Police" could watch and hear an individual's every move whenever they wanted without that individual knowing of the surveillance).

106. For a powerful analysis of privacy as a safe harbor from the quasi-totalitarian state, see Rubinfeld, *supra* note 81, at 805-07.

107. Schwartz, *supra* note 43, at 560; cf. Jeffrey Reiman, *Diving to the Panopticon. A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future*, 11 *SANTA CLARA COMPUTER & HIGH TECH. L.J.* 27, 40 (1995) ("Total visibility infantilizes people. It impoverishes their inner life and makes them more vulnerable to oppression from without.").

108. Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 *VAND. L. REV.* 1609, 1657 (1999). In his discussion, Schwartz makes an explicit reference to George Orwell as a model for his analysis. *See id.* (referring to Orwell's novel as a "classic analysis" of how this type of surveillance can "exert negative pressure").

109. Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 *STAN. L. REV.* 1193, 1261 (1998) (citing Roger Clarke, *Introduction to Dataveillance and Information Privacy, and Definition of Terms* at <http://www.anu.edu.au/people/Roger.Clarke/>

has used the Big Brother metaphor in summarizing the current state of affairs.¹¹⁰

It is not surprising that Orwell's dark vision of a dehumanizing regime found a receptive audience among intellectuals, both high and middlebrow.¹¹¹ Throughout the twentieth century, as the power of the state grew both in liberal democracies and totalitarian regimes, the individual became mere fuel for major historical forces. Big Brother became a convenient semiotic touchstone in discussions of social control in general, and regarding state and private power over individuals.

The ominous shadow of Big Brother is a powerful rationale for curtailing data collection. The use of this metaphor in legal scholarship, however, merely expresses extra-legal anxieties, and lacks a strong grounding in the traditional legal understanding of privacy. More important, there is little factual evidence that data collection leads to detrimental self-censorship.

First, a resonant metaphor cannot substitute for a well-developed philosophical rationale for data protection in a particular context. Knee-jerk references to Big Brother, needlessly complicate the already-difficult task of protecting privacy in the information age. Second, even when a literary metaphor is an expression of complex social theories, reliance on it is often unhelpful. As Judge Posner observes, "it is a mistake to try to mine works of literature for political or economic significance—even when it is political literature."¹¹² Use of literary metaphors is unlikely to enhance our understanding of privacy, in part because the literary meaning is inherently open-ended in the way that legal precedent or historical events are not.¹¹³ Furthermore, mixing genres here is unwarranted because Big

DV/Intro.html. (last visited Jan. 6, 2003), who defined "dataveillance" as "the systematic use of personal data systems in the investigation or monitoring of the actions or communications of one or more persons."

110. Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 505 (1999).

111. See Schwartz, *supra* note 108, at 1656 (explaining that Orwell's vision of a telescreen collecting private information and devoid of any human element is widely used by commentators).

112. Richard A. Posner, *Orwell Versus Huxley: Economics, Technology, Privacy, and Satire 1* (Univ. of Chi. LawSch., John M. Olin Law & Econ. Working Paper No. 89 (2d Series)), available at <http://papers.ssrn.com/sol3/delivery.cfm/991118401.pdf?abstractid=194572> (last visited Nov. 30, 2002); see also RICHARD A. POSNER, LAW AND LITERATURE 7 (rev. ed. 1998) (acknowledging commonalities shared by law and literature but also distinguishing the two by characterizing law as systematic and literature as artistic).

113. Of course, both legal decisions and historic events are subject to interpretation and re-evaluation. I am merely saying that the extent of interpretive freedom is qualitatively higher in literature.

Brother is not, has never been and, as a literary device, cannot be a true reflection of objective reality. The Big Brother metaphor is a refraction of social anxieties, a product of our cultural imagination, not a tool for conceptualizing privacy issues.

Even if we accept the use of literature in formulating our positions on consumer privacy, Big Brother may be the wrong metaphor for the task. Daniel Solove persuasively argued that Big Brother is intricately linked with data collection by the state and cannot account for the variety of information practices by the multitude of private actors.¹¹⁴ While Orwell's ubiquitous telescreens were designed to ensure obedience and conformity, collectors of consumer information, however, have a radically different goal in mind—they aim to study and exploit the information for commercial purposes.¹¹⁵ Therefore, the resort to Orwell's work is out of sync, conceptually and factually, from the contemporary consumer data collection practices.

Furthermore, despite warnings against personality-warping self-censorship, there exists little evidence that consumers actually alter their behavior because of ongoing data collection.¹¹⁶ The presumption is that if purchases of certain controversial items are recorded, their consumption would decrease.¹¹⁷ That has not been the case as evidenced by the consumption of pornography. Disclosure of such habits can have adverse social consequences, including public humiliation.¹¹⁸ Presumably, surveillance concerns would keep consumers from purchasing pornography, if the purchase was recorded. Yet, mail-order merchants of pornography, where the consumer has to disclose his name and address, are apparently doing brisk business.¹¹⁹ Operators of 900 lines have also prospered even though the caller's identity is easily identifiable.¹²⁰

114. See Solove, *supra* note 12, at 1400 (stating that data collection goals have been "less malignant" than Big Brother's aim to intrude into personal privacy).

115. *Id.* at 1417.

116. *But see id.* at 1418 (asserting that knowledge of one's behavior being monitored and recorded leads to self-censorship).

117. *Id.*

118. Cf. Jed Rubenfeld, *The Right of Privacy and the Right to Be Treated as an Object*, 89 GEO. L.J. 2099, 2099 (2001) (stating that many people regularly access pornography on the Internet, "but we consider it tremendously embarrassing to admit this sort of thing in public").

119. The pornography industry is a growing eight billion dollar business. Daniel J. McDonald, *Regulating Sexually Oriented Businesses: The Regulatory Uncertainties of a "Regime of Prohibition by Indirection" and the Obscenity Doctrine's Communal Solution*, 1997 BYU L. REV. 339, 339 (1997) (citing Jamie Dettmer, *Fight Against Pornography Lags Amid Justice Scandal*, INSIGHT, July 22, 1996, at 7). Even if a small percentage of the porn sales are recorded, it is a strong argument against the self-censorship rationale.

120. See Brian D. Woolfall, *Implications of a Bond Requirement for 900-Number Dial-a-Rm Providers: Exploring the Need for Tighter Restrictions on Obscenity and Indecency*, 30 CAL. W. L. REV. 297, 299 (1994) (citing 135 CONG. REC. S15793 (1989) (statement of

Self-censorship is also absent in the consumption of politically unpopular literature.¹²¹ Books by such ideologically radical authors as Noam Chomsky and Patrick Buchanan are among the best-sellers on Amazon.com, a site that diligently tracks consumer's preferences.¹²² Furthermore, self-censorship, and the surveillance rationale generally, does not apply to the large portion of the consuming public that is unaware of data collection. For such consumers, the protection of data cannot be justified by the undesirability of self-censorship.

Also, it is not clear how the surveillance rationale applies to routine consumer purchases, the records of which are unlikely to alter individuals' behavior. The figure of Big Brother casts a chilling shadow because it implies a hierarchical power relationship with the individual dwarfed by the state. With consumer data collection, the power relationship is present—consumers often cannot opt out of data collection¹²³—but that power is quite benign. There are no adverse consequences from routine data collection, except for the greater volume of junk mail.¹²⁴

Finally, the Big Brother metaphor, as applied to the consumer privacy discourse, fails by not differentiating between kinds of information being collected.¹²⁵ Admittedly, different forms of data collection may all share a non-consensual element, but the extent of our aversion to them varies greatly. This conceptual imprecision is another significant flaw in the Big Brother approach to consumer

Sen. Helms) ("The dial-a-porn industry as a whole generated an estimated \$ 2 billion in 1989."). It is reasonable to assume that the number of callers has grown in the past thirteen years.

121. Of course, normatively we may favor self-censorship in consumption of pornography, while our liberal ideas contradict suppressing unpopular political speech. Compare Catharine A. MacKinnon, *Pornography as Defamation*, 71 B.U. L. REV. 793, 796 (1991) (asserting that pornography does not provide any beneficial consequence to women since those involved in it are "battered, tortured, raped . . . or humiliated, molested, [or] objectified"), with *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (discussing that "unfettered" exchange of ideas is important to bring about socially desired political change, and therefore, liberal ideas are not censored) (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)).

122. See Kang, *supra* note 109, at 1227 (discussing how servers can trace client preferences through "clicktrails" and/or cookies).

123. Karas, *supra* note 12, at 31-43.

124. In very rare cases, data collection can lead to truly horrible consequences. In one case, a convicted rapist used one woman's personal information, obtained while processing consumer surveys under the terms of his work program, to stalk and terrorize her. See Sandra T. M. Chong, Comment, *Data Privacy: The Use of Prisoners for Processing Personal Information*, 32 U.C. DAVIS L. REV. 201, 203-05 (1998).

125. Big Brother has been invoked in many different contexts such as red light cameras, FBI surveillance, neighborhood watch groups, and copyright management systems. See Weinberg, *supra* note 104, at n.3 (listing examples where Big Brother appears).

privacy.

2. *Personhood*

Another prominent reason given for restricting the gathering of consumer information is that the practice devalues an individual's dignity.¹²⁶ To theorists subscribing to this view privacy is a basic human right, an indelible feature of personhood.¹²⁷ Accordingly, data collection is morally and ethically wrong.¹²⁸

This rationale seems conceptually similar to its close cousin, "the right to be let alone."¹²⁹ However, despite the superficial resemblance, the two approaches are fundamentally distinct. The classic Warren and Brandeis formulation centers on privacy as a safe harbor from the intrusive eyes of the public.¹³⁰ The personhood thesis propounds a normative view of privacy, arguing that privacy is a socially desirable condition of protection and development of the personality. For instance, Edward Bloustein asserted that the concept of privacy protected against activities "demeaning to individuality,"¹³¹ and representing "an affront to personal dignity,"¹³² or an "assault on human personality."¹³³ Similarly, philosopher Jeffrey Reiman wrote that privacy rights protect individual interests "in becoming, being, and remaining a person."¹³⁴ In another article, Reiman argued that "total visibility infantilizes people. It impoverishes their inner life and makes them more vulnerable to oppression from without."¹³⁵

The Supreme Court arguably adopted this view of privacy in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹³⁶ Building on the privacy-as-autonomy cases such as *Griswold v. Connecticut*¹³⁷ and *Eisenstadt v. Bair*,¹³⁸ Justice O'Connor wrote: "At the heart of liberty is

126. Kang, *supra* note 109, at 1260 (citing Stanley I. Benn, *Privacy, Freedom and Respect for Persons*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 227 (Ferdinand David Schoeman ed., 1984)).

127. *Id.* at 1266.

128. *See id.* at 1260 (stating that humans have the ability to be moral but surveillance does not).

129. *See supra* Part II.B (discussing the "right to be let alone").

130. *See supra* Part II.B (addressing the Warren and Brandeis "Right to Privacy" article).

131. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dan Passer*, 39 N.Y.U. L. REV. 962, 973 (1964).

132. *Id.*

133. *Id.* at 974.

134. Jeffrey H. Reiman, *Privacy, Intimacy and Personhood*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY, *supra* note 126, at 300, 314.

135. Reiman, *supra* note 107, at 40.

136. 505 U.S. 833, 851 (1992) (discussing how matters involving personal, intimate choices are central to dignity and liberty).

137. 381 U.S. 479 (1965).

138. 405 U.S. 438 (1972).

the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."¹³⁹

Informational privacy allows individuals to set on this road of self-determination without undue interference from the outside observers. Joel Reidenberg argues that "the treatment of personal information is an element of basic human dignity. Fair treatment of personal information accords respect to an individual's personality."¹⁴⁰ Jessica Litman used a similar approach by arguing that activities of data merchants are simply socially reprehensible; that the data market is an affront to personal dignity.¹⁴¹

Professor Schwartz expresses a related concern.¹⁴² He argues that the danger of data collection is not that it erodes the boundary between public and private space, but rather that it discourages participation in the web's "virtual democracy," thereby diminishing the quality of political discourse.¹⁴³ Schwartz further argues that privacy law must help construct boundaries around personal information to assist the individual in defining private terms of life.¹⁴⁴ Given the political potential of the internet, "participants in cyberspace need access to public, quasi-public, and private spaces where they can engage in civic dialogue and the process of self-definition."¹⁴⁵ Accordingly, freedom from automated collection of information allows for the development of a sophisticated citizenry.¹⁴⁶

There are major problems with employing the personhood rationale in the context of consumer information gathering. First, it suffers from a certain high-minded focus on the value of privacy over other competing interests. Yet, there are numerous social interests that directly clash with the individual's right to control information. For example, as Amitai Etzioni has argued, society rightfully desires the collection of medical information from expectant mothers for

139. *Casey*, 505 U.S. at 851.

140. Joel R. Reidenberg, *Setting Standards for Fair Information Practice in the US Private Sector*, 80 IOWA L. REV. 497, 498 (1995).

141. See Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1284-86 (2000) (discussing how information is collected by using marketing tactics and then distributed without consumer knowledge).

142. See Schwartz, *supra* note 108, at 1611 (maintaining that the absence of strong privacy rules threatens democracy).

143. *Id.* at 1667.

144. *Id.* at 1664 (citing ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 985 (1995)).

145. *Id.* at 1667; see also Paul M. Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815, 834 (2000) (developing the idea of constitutive privacy, which provides a framework to create standards for information privacy).

146. See Schwartz, *Internet Privacy and the State*, *supra* note 145, at 822, 857 (conjecturing that state activities may stimulate the emergence of consumer sophistication).

public health purposes.¹⁴⁷ Similarly, where some see the sale (i.e. publication) of personal information as a violation of dignity, others see an exercise of constitutionally enshrined First Amendment rights that are crucial to a democratic society.¹⁴⁸ Moreover, as discussed above in reference to the “right to be let alone” rationale, strong economic and public policy favor collection and dissemination of personal data.¹⁴⁹ Our society must recognize the values of personhood and personal dignity, but to define personhood rights so broadly that they trump other, equally legitimate social interests, creates a gross imbalance.

Another flaw in the personhood rationale rests in its failure to account for context-specific scenarios, i.e., it does not specifically consider the social and cultural meaning of consumer information.¹⁵⁰ The personhood discourse explains why it is important for information to be private in general, but not why control over consumer data is important to individual dignity. Daniel Solove perceptively argues that “[a] pragmatic approach to the task of conceptualizing privacy [does not] begin by seeking to illuminate an abstract conception of privacy, but [should] focus instead on understanding privacy in specific contextual situations.”¹⁵¹ Accordingly, before asserting whether a certain type of information is private, the privacy discourse must note how individuals generally treat certain kinds of information. The non-contextual application of such broad concepts as “privacy,” “personhood” or “human dignity” wanders needlessly divorced from the meaning of consumer data collection.

Third, in utilizing the pragmatic approach proposed by Solove,¹⁵² it becomes readily apparent that the personhood rationale is somewhat

147. See ETZIONI, *supra* note 58, at 24 (providing that if proper treatment is given to an HIV-positive woman during pregnancy, the risk of infection to the infant is reduced by two-thirds).

148. Volokh, *supra* note 68, at 1049; see also Froomkin, *supra* note 26, at 1506-23 (discussing the clash between the First Amendment and privacy concerns).

149. See *supra* Part II.B (discussing the “right to be let alone”).

150. The criticisms presented in this and the following paragraph are equally applicable to the “right to be let alone” rationale and, to a lesser extent, to the other two conceptual frameworks discussed in this section.

151. Solove, *supra* note 72, at 1128; see also Robert C. Post, *The Social Foundations of Privacy, Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 969 (1989) (observing that privacy cannot be reduced to objective facts but “can only be understood by reference to norms of behavior”).

152. See Solove, *supra* note 72, at 1091 (describing a pragmatic approach to privacy that includes a focus on the consequence of ideas rather than their connection to an ultimate reality). The approach is pragmatic because it emphasizes the contextual and dynamic nature of privacy. *Id.*

undermined by the consumers' mindset.¹⁵³ Consumers do not tend to treat transactional data as private, or at least treat it as less private than other data, such as financial information.¹⁵⁴ A 1998 study found that consumer worries about protecting privacy in the Internet ranked as "the top reason people are staying off the Web—above cost, ease of use and annoying marketing messages."¹⁵⁵ Yet, despite these concerns people did not "stay off the Web." E-commerce revenues have skyrocketed in the past several years.¹⁵⁶ Although consumers tend to voice concerns about privacy, they routinely part with personal data. Although fifty-four percent of respondents in a recent poll believed that tracking consumers' online habits violated privacy, the same percentage acknowledged providing personal information to websites.¹⁵⁷ Another study found that consumers do not mind parting with personal information but draw a line only when asked to provide information of a financial nature.¹⁵⁸ The way that consumers tend to trade consumer information for even minor financial gain also reflects the low level of concern for privacy of that information. Also, offline consumers regularly use discount cards, fill in optional information on warranty cards, and fill out highly detailed Nielsen ratings surveys on their television-watching habits.¹⁵⁹ This is

153. *Sæ id.* at 1116 (noting that personhood includes those attributes that an individual considers an essential part of their being).

154. *Sæ infra* notes 173-75.

155. BW/Harris Poll: Online Insecurity, available at <http://www.businessweek.com/1998/11b369107.htm> (last updated Mar. 5, 1998); *sæ also* Nicole M. Buba, Note, *Waging War Against Identity Theft: Should the United States Borrow From the European Union's Battalion?*, 23 SUFFOLK TRANSNAT'L L. REV. 633, 637 n.21 (2000) (citing a poll stating that eighty-eight percent of respondents were concerned about threats to their privacy when conducting online transactions, and fifty-five percent of those respondents were "very concerned"); Christopher K. Sandberg, *Privacy and Customer Relationship Management: Can They Peacefully Coexist?*, 28 WM. MITCHELL L. REV. 1147, 1149-50 (2002) (listing various surveys and studies that reflect a high level of concern with privacy).

156. Between the fourth quarter of 1999 and the first quarter of 2000, retail e-commerce sales have increased by eighty-seven percent to \$10.24 billion. *Sæ* Estimated Quarterly U.S. Retail Sales, at <http://www.census.gov/mrts/www/current.html>; *cf.* Jerry Berman & Deirdre Mulligan, *Privacy in the Digital Age: Work in Progress*, 23 NOVA L. REV. 549, 562 (1999) (observing that the necessary use of credit cards makes consumers identifiable upon purchasing, and it threatens their privacy).

157. *Sæ* Sandberg, *supra* note 155, at 1149-50 (noting that ninety-four percent of the respondents believed the government should punish companies who violate privacy).

158. *Id.* at 1149-50 ("88% [of respondents] said they would give their name to a vendor, 90% would give their level of education, age, and hobbies, 59% would give their household income, but only 41% would give their salary, and only 13% would give their credit card number.").

159. *Sæ e.g.*, Katie Hafner, *Do You Know Who's Watching You? Do You Care?*, N.Y. TIMES, Nov. 11, 1999, at G1 (citing statistics from the Food Marketing Institute of Washington that show 27,000 food stores provide discount cards that are linked to purchasing information and half of the stores' customers participate in the

not to say consumers are hypocritical in expressing a high-level of concern about online privacy. Rather, as a matter of social practice, consumers simply tend to value the convenience of online shopping and marginal financial gain over the potential privacy threats of data collection.¹⁶⁰

Finally, the time of the personhood rationale may have passed. If every disclosure of private information presents an affront to personhood, is it even possible to proceed with a society so focused on massive and uninterrupted flows of information as ours? In the vaunted information age, we may have already crossed the threshold, leaving the personhood rationale behind. We generate too much information, too often to keep the genie in the bottle.¹⁶¹

3. *Information as property*

A much promulgated and oft-criticized approach is conceptualizing consumer information as personal property.¹⁶² Once we accept consumers' property interest in their data, the argument goes, they will have a legal right to sell, license or withhold their information from marketers.¹⁶³ The benefits are two-fold. First, consumers regain control over the distribution of personal information.¹⁶⁴ Second, consumers will be compensated for the use

program).

160. *But see* Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1398 (2000) (arguing that in the consumer context, each exchange of information is "trivial and incremental," which has a tendency to minimize its effect).

161. *See* Froomkin, *supra* note 26, at 1469 (arguing that once data is created and filed in different ways, it is easy to share and difficult to eliminate).

162. *See generally* Basho, *supra* note 10, at 1509 (proposing the licensing of personal information by consumers to businesses); BRANSCOMB, *supra* note 31, at 2 (describing the history of information as property and the conflict it creates); Kang, *supra* note 109, at 1246-86 (advocating for a law that would allow businesses to use personal information gathered on-line only for necessary transactions, unless otherwise agreed to by the consumer); Lawrence Lessig, *The Architecture of Privacy*, 1 VAND. J. ENT. L. & PRAC. 56, 63-65 (1999) (suggesting the creation of a market that treats information as property and those who use the information internalize the cost); Patricia Mell, *Seeking Shade in a Land of Perpetual Sunlight: Privacy as Property in the Electronic Wilderness*, 11 BERKELEY TECH. L.J. 1, 79 (1996) (arguing that personal information as property should only be shared between businesses if consumers grant the businesses license to do so); Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2383 (1996) (stating that personal information, like all other information, is property). *But see* Litman, *supra* note 141, at 1287 (offering the idea that personal information treated as property would expand the market rather than constrain it); Pamela Samuelson, *Privacy as Intellectual Property*, 52 STAN. L. REV. 1125, 1132 (2000) (noting that while there are some appealing aspects to a personal information as property regime, there are many disadvantages that proponents fail to consider, e.g., the idea of free alienability of property).

163. *See* Basho, *supra* note 10, at 1525 (noting the license would be revocable).

164. *See id.* (emphasizing the ability of the consumer to control what businesses

of their information.¹⁶⁵

The concrete solutions for resolving the "privacy market failure" vary. For example, one commentator proposed "a system of explicit personal information contracts."¹⁶⁶ Lawrence Lessig has suggested that such standard-negotiating software as P3P ensures an efficient privacy market.¹⁶⁷ Using a law-and-economics approach, Professor Murphy argues that "privacy rules are in fact implied contractual terms" with the default rule being non-disclosure.¹⁶⁸ However, all of these practical analyses share an underlying assumption that personal information, "like all information, is property."¹⁶⁹

Despite its initial appeal, this approach to privacy is flawed. Allowing property rights in information is a solution, not a way of framing the problem. Personal information was not generally considered "property" until it became a viable solution for the privacy crisis.¹⁷⁰ Perhaps scholars, frustrated by the lack of statutory, common law or constitutional protection of private information, turned to property doctrines as a last ditch resort.

But by focusing on the property aspects of information, they tend to miss the visceral impulse behind the privacy concerns. Professor Litman articulates that concern when she says a property rights solution to the problem of consumer privacy "takes the shame away. . . [i]f we make the system legitimate . . . then the shame card is gone, and right now it is the only one that seems to be working."¹⁷¹ By focusing on the property characteristics of personal information, privacy scholars may construct sophisticated economic models but miss this gut reaction to data collection.¹⁷²

receive the information and how the businesses can use the information).

165. *Id.*

166. See Scott Shorr, *Personal Information Contracts: How to Protect Privacy Without Violating the First Amendment*, 80 CORNELL L. REV. 1756, 1775 (1995) (proposing a system where the contracts would forbid credit bureaus from releasing personal information without consent); see also Steven A. Bibas, *A Contractual Approach to Data Privacy*, 17 HARV. J.L. & PUB. POL'Y 591, 592 (1994) (arguing that a contractual regime is best suited for resolving privacy issues).

167. See Lessig, *supra* note 162, at 63-64 ("The benefits of a [privacy] market would be many. . . . [M]achines can bear the cost of this [privacy market] negotiation and could act as our agents to protect our privacy."). See also *Developments in the Law—The Law of Cyberspace*, 112 HARV. L. REV. 1577, 1647 ("A P3P regime will result in the optimal level of privacy protection because it permits individuals to value privacy according to their personal preferences").

168. Murphy, *supra* note 162, at 2416-17.

169. *Id.* at 2383-84.

170. See Samuelson, *supra* note 162, at 1130-31 (noting the traditional view of personal data was that it cannot be owned by any one person).

171. Jessica Litman, *Privacy and E-Commerce*, 7 B.U. J. SCI. & TECH. L. 223, 227-28 (2001).

172. See *id.* at 227 (arguing that a property regime would further the incentive for

This gut reaction is most evident in the recent Lexis P-Trak, Marketry, Inc., and DoubleClick scandals. In September of 1995, Marketry, Inc., a list broker, started marketing a list of over 250,000 email addresses compiled from Internet newsgroups and websites.¹⁷³ The list was segmented into eleven interest categories, including pornography, computer, sports, education, news, and religion.¹⁷⁴ After this news was posted to a number of bulletin boards on the Internet and subsequent considerable adverse public reaction, the list was withdrawn.¹⁷⁵ Similarly, in 1990, Lotus Development Corporation and Equifax announced plans to market a CD-ROM based on individual credit reports, making available names, addresses, and the purchasing behaviors of individuals.¹⁷⁶ However, these plans were scrapped after opposition was mobilized on the Internet, and Lotus received over 30,000 complaints.¹⁷⁷ DoubleClick was also embroiled in a well-publicized scandal involving the creation and sale of web-surfers' personal profiles.¹⁷⁸

In all of these cases, the people outraged by the marketing of their data did not demand restitution for its value, but rather insisted their information remain unavailable for purchase.¹⁷⁹ Some may argue that these activists are simply those consumers who in a property regime would refuse to sell or license their information.¹⁸⁰ Still, the core impulse in these privacy scandals is controlling information, not getting paid for it.

Finally, personal information also lacks several central characteristics of property. First, unlike much property, personal information is inexhaustible and endlessly reproducible. In a click of a mouse, one database becomes two. Furthermore, personal information lacks the Lockean "mixing of labor" that in Western

business to sell personal information and legitimize the practice that consumers are seeking to stop).

173. See Mary J. Culnan, *Self-Regulation on the Electronic Frontier: Implications for Public Policy*, June 1997, in NAT'L TELECOMM. & INFO. ADMIN., U.S. DEP'T OF COMMERCE, PRIVACY AND SELF REGULATION IN THE INFORMATION AGE (discussing three cases of self-regulation on the internet, including the Marketry, Inc. incident), <http://www.ntia.doc.gov/reports/privacy/selfreg1.htm#1E> (last visited Nov. 30, 2002).

174. See *id.* (noting that it was not possible to opt-out of the list).

175. *Id.*

176. *Id.*

177. See *id.* (remarking that Equifax later announced it would no longer sell lists derived from its consumer credit file).

178. See *infra* Part III.C (discussing the *DoubleClick* case).

179. See Culnan, *supra* note 173 (indicating that individuals contacted Lotus, Marketry, Inc., and Lexis to request their information not be included in the databases).

180. See Basho, *supra* note 10, at 1525 (describing a system where personal information is considered property and can be licensed to businesses per an individual's decision).

societies often bestows title to property.¹⁸¹ It takes little effort to purchase a box of cereal, and the process creates a valuable piece of information. Finally, the goal of protecting information for the sake of privacy does not easily map on to the core characteristic of property: alienability.¹⁸²

The practical difficulties associated with establishing a property regime in personal information are considerably more complex and interesting than they may seem from the sketch presented. Yet, the property approach fails to answer the crucial question: why should we consider routine consumer information private? A possible response to that question is presented in Part III.

III. TOWARD A NEW FRAMEWORK FOR PROTECTING CONSUMER PRIVACY

Before arguing for the protection of information, one must consider what kind of information deserves protection and why. The approach needs to consider the cultural and social context of information and the goals of privacy law. This section argues that a primary goal of privacy is to shield the self from the public. Although the privacy discourse is notoriously multifaceted, it is primarily concerned with access to information that is expressive of the person's self. At first glance, to distinguish the protection of personal information and information about the self may seem like gilding a lily. Yet, it is important to note that privacy law and scholarship seek to protect not mere information relating to a person, but rather "information plus," information that is expressive of one's self.

A. *Privacy as Control over Information*

When we talk about privacy, we almost always mean informational privacy. Certainly, the things that we seek to keep private—our bodies, personal decisions, feelings—seem qualitatively different from such information as bank or medical records. At closer examination, however, these categories are reducible to personal control over information. For example, privacy suits for publication of nude photos seek to deny third parties information about the appearance of the plaintiff's unclothed body.¹⁸³ Protection of privacy

181. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 128 (Mark Goldie ed., Everyman 2000) (1690) ("Whatsoever then he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.")

182. See Samuelson, *supra* note 162, at 1137-38 (remarking that a typical property regime allows for the free alienability of the property, but it is not the desired result with personal information).

183. See, e.g., *Hudson v. Montcalm Publ'g Corp.*, 379 S.E.2d 572, 573-74 (Ga. App.

as intimacy is essentially control over information that reveals what we are when our guard is down.

The cases treating privacy as autonomy present a more difficult problem. For example, in *Griswold v. Connecticut*¹⁸⁴ and *Eisenstadt v. Bair*,¹⁸⁵ the Supreme Court struck down state laws which prohibited the dispensation of contraceptives to married and single individuals, respectively, holding that individuals have the right to make personal decisions without state interference.¹⁸⁶

However, these cases are as much about information control as they are about the inviolability of intimate life. Importantly, in *Whalen v. Roe*,¹⁸⁷ the Court noted its previous decisions that individuals have constitutional "zone[s] of privacy" protect not only an "independence in making certain kinds of important decisions," but also their "individual interest in avoiding disclosure of personal matters."¹⁸⁸ In other words, the right is two-fold: to make private decisions and withhold information about them. Although the Court has framed its privacy rhetoric in terms of constitutional limits on state power,¹⁸⁹ these decisions also suggested that *knowledge* of intimate decisions entails the exercise of an impermissible degree of power over individuals.¹⁹⁰

This concept is best understood through the prism of Michel Foucault's notion that knowledge is a mode of control.¹⁹¹ Foucault argues that modern societies exercise power through the collection and use of information.¹⁹² Information constitutes discourses that represent ways of understanding and classifying the world at large. After information is framed as knowledge, it may be organized to form a discourse on the topic. For example, observation of the

1989) (discussing the sale of a nude photo by the ex-husband of the plaintiff, who claims it was a privacy invasion).

184. 381 U.S. 479 (1965).

185. 405 U.S. 438 (1972).

186. See *Griswold*, 381 U.S. at 486 (holding that marriage includes a right to privacy within the relationship and is worthy of constitutional protection); *Eisenstadt*, 405 U.S. at 453-54 (finding that the privacy right extended to married couples cannot be withheld from individuals; if privacy rights are to mean anything, they must be extended to all).

187. 429 U.S. 589 (1977).

188. *Id.* at 598-600.

189. See, e.g., *Griswold*, 381 U.S. at 485 (holding that the attempt of government regulation to control certain activities invades an area of "protected freedoms" and cannot be sustained); *Eisenstadt*, 405 U.S. at 453.

190. See, e.g., *Griswold*, 381 U.S. at 485 (noting that the statute had a "destructive impact" on marriage by forbidding the use of contraceptives); *Eisenstadt*, 405 U.S. at 454 (explaining that privacy is the right from unwarranted intrusions on private life).

191. See generally FOUCAULT, *supra* note 103 (discussing power, knowledge, and concepts of self in relation to the penal system).

192. See *id.* at 25-30 (arguing that power also produces knowledge).

mentally ill leads to a discourse of mental illness, and patients are forced into discursive spaces and categories. Similarly, information about sexual behavior constitutes a discourse of sexuality, where a multitude of practices are rigorously categorized. Such discourses allow the state and private parties to categorize individuals based on information learned about them. Thus, a homosexual encounter turns the person into a discursive trope—"the homosexual"—and a manic episode classifies the person as "mentally ill." Therefore, possessing information about an individual allows classification and exercise of discursive power over him or her.¹⁹³

The privacy-as-autonomy cases, such as *Griswold* and *Eisenstadt*, restrict information about private practices to resist oppressive categorization of individuals based on this information.¹⁹⁴ Information about the use of contraceptives by a single person places that person into a fixed discursive space. Declaring this information off limits allows individuals a momentary reprieve from the exercise of power through discursive practices. As Jed Rubenfeld argues, the right of privacy "prevents the state from imposing on individuals a defined identity. . . ."¹⁹⁵ In other words, the rationale behind the *Griswold* line of cases may be characterized as follows: intruding on private decisions is knowing, knowing is classifying, and classifying is impermissibly controlling.¹⁹⁶ Therefore, even in cases where the state violates privacy by active regulation of private behavior, violation of informational privacy is of equal concern.

B. *Privacy is Control over Expressive Information*

The preceding discussion framed the privacy discourse in terms of concerns over control over personal information. But, on the other hand, private information is not merely data. At the DMV, we part

193. See, e.g., 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION*, 17-35 (Robert Hurley trans., Vintage Books 1990) (1978) (describing the historically changing views of sexuality and how society has grown to incessantly discuss sexuality). Foucault notes this discourse has compartmentalized sexuality. *Id.* He also notes that the discourse surrounding sexuality emanates from and through power. *Id.* See generally FOUCAULT: A CRITICAL READER (David Couzens Hoy ed., 1986) (discussing Foucault's views on many things including knowledge and power).

194. See Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, in *PRIVACY, NOMOS XIII* 7 (J. Roland Pennock & John W. Chapman eds., 1971) (observation makes a person "fixed as something—with limited probabilities rather than infinite, indeterminate possibilities").

195. Rubenfeld, *supra* note 81, at 794 (referring to an "anti-totalitarian" right to privacy and contrasting it to a "personhood" right to privacy, which frees individuals to define their own identities).

196. See Louis Henkin, *Privacy and Autonomy*, 74 *COLUM. L. REV.* 1410, 1424-25 (1974) (making a similar point by observing that *Griswold*, *Eisenstadt*, and *Whalen* do not establish a freedom from official intrusion, but one from official regulation).

with information about such private matters as our address, occupation, weight, or date of birth, willingly and routinely. We do not seem to care who knows this information. Yet, if these same forms asked for our political affiliation or favorite novelist, we would (quite rightly) object on the grounds of privacy. What is the difference between these kinds of information? What makes us perceive information as private?

This Article posits that privacy should be framed not as mere control over personal information, but rather information that expresses one's identity.¹⁹⁷ The protection of "expressive information" is a daunting project without an organizing principle. How do we know whether a bit of data is expressive or not? And what exactly is "identity"?

By "identity," I mean any information that distinguishes an individual and is expressive. Fundamentally, privacy protects information about difference. We generally consider information about one's homosexuality as private, because it distinguishes an individual from the "norm" of heterosexuality. Similarly, our grades and test scores are private partly because their very function is to distinguish a person from the mass of test-takers. To be private, distinguishing information must generally be expressive, meaning it must allow discursive classification of the person.

The paradigmatic example here is the privacy protection accorded to HIV diagnoses. Information that X has AIDS is so potent (and so private), because it allows for classification of X into a discursive category,—"X is a homosexual and/or a diseased person"—and allows speculative conclusions from that information—"X probably engaged in socially unacceptable behavior such as drug use or promiscuous and/or homosexual sex."¹⁹⁸ In sum, a viable privacy rationale must establish a nexus between the information and the expressive identity.

197. See Gerety, *supra* note 83, at 236 (defining privacy as "autonomy or control over the intimacies of personal identity"); see also Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133, 154-56 (1991) (suggesting that because most theories of personhood assume private information is a crucial part of a person's identity, there must be a recognized "right to informational privacy based on personhood").

198. This is not to say, of course, that such inferences are correct or moral. In the case of AIDS victims, for instance, such inferences are harmful and often factually incorrect. My point is a more general one: disclosure of expressive personal information enables discursive classification of the subject.

As another example, knowledge of whether a person voted is generally not seen as private, but the content of the vote is private because it categorizes the person politically.

"Identity," however, is a notoriously slippery concept. Pragmatism and contemporary social theory suggest that it is best to group expressive information into clusters, which constitute a variety of social identities. To borrow Foucault's insights,¹⁹⁹ this approach may be organized around the protection of clusters of information that differentiate an individual within a particular discourse: gender, politics, body, consumption, etc.

Traditionally, the privacy discourse focused on the liberal humanistic concept of the individual as a unified, whole entity. In other words, access to any kind of personal information—diaries, medical records, consumer information—has been grouped as fundamentally similar, as an invasion of personal privacy.²⁰⁰

A better approach is to relate the private information to a particular aspect of a person's identity. So, instead of a general notion of individual privacy, a court would consider whether one's privacy as a consumer, a sexual being, a father, etc. had been invaded by a particular practice. This approach not only allows for greater flexibility in legal decision making, but also acknowledges that modernity has transformed individuals from complete subjects to a collection of subjectivities. The modern individual, therefore, is a collage of largely self-created masks, each expressing an aspect of his or her personality.²⁰¹

Insights into our sub-identities also reveal a great deal about who we are as individuals. This is best illustrated by Ludwig Wittgenstein's concept of family resemblance.²⁰² Wittgenstein suggests that certain concepts may have common characteristics in that they draw from a common pool of similar characteristics: "a complicated network of similarities overlapping and criss-crossing; sometimes overall similarities, sometimes similarities of detail."²⁰³ Wittgenstein

199. *See supra* notes 213-15 and accompanying text (describing Foucault's idea that knowledge is a mode of control).

200. *See, e.g., supra* note 68 and accompanying text.

201. *See* ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* Preface (Allen Lane The Penguin Press 1959) (1969) (analogizing social life to theatrical performances and arguing that a person's social life is similar to a series of performances staged for the benefit of others); *cf.* Jeffery Malkin, *Stolen Photographs: Personality, Publicity, and Privacy*, 75 *TEX. L. REV.* 779, 800-01 (1997) (arguing that, in post modernity, "one's very identity or individuality, is at the same time something which has to be put on, acted or worn as an external appendage, *owned* as a property nominally apart from the body self.") (quoting RACHEL BOWLBY, *JUST LOOKING: CONSUMER CULTURE IN DREISER, GISSING AND ZOLA* 28 (1985)).

202. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 32 (G.E.M. Anscombe trans., The Macmillan Company 1973) (1953) (explaining that the resemblance among family members such as build, eye color, gait, and temperament, overlap and are analogous to groups that share similarities).

203. *Id.*

illustrates this idea by noting the variety of "board-games, card-games, ball-games, Olympic games, and so on."²⁰⁴ Although these games lack "something that is common to *all*," there are "similarities, relationships, and a whole series of them at that."²⁰⁵ Accordingly, although dissimilar personae may seem to have little in common, identity is comprised of all of them.²⁰⁶ If information provides an unwarranted glimpse into one's identity as a consumer, it also intrudes on one's privacy as an individual. Thus, privacy law must protect individuals against such glimpses.

After this winding trip we may apply the derived principles to a concrete problem: collection of consumer information. As asserted earlier, the classic privacy discourse has largely failed to articulate a workable rationale for protection of transactional data beyond a somewhat murky right to be let alone or to control personal information.²⁰⁷ This section counters that we need to focus on protecting information expressive of one's identity. To simplify the task, the effort may be focused on protecting only information that expresses our identity *as consumers*.²⁰⁸ Part IV argues that database records of patterns of consumption constitute a representation of one's consumer identity. Aggregated information about one's consumer preferences portray one's self as a consumer and, consequently, as an individual.

IV. THE PRIVACY INTEREST IN CONSUMER DATA

Having asserted that privacy is best defined as the protection of the integrity of the individual self as composed of a multitude of identities, I now turn to one such identity: the individual as a consumer. The argument that attention should be directed towards analyzing whether the data collection invades privacy by disclosing the subject's personality as expressed through his consumer self.²⁰⁹

204. *Id.* at 31.

205. *Id.*

206. *See generally* ERVING GOFFMAN, *PRESENTATION OF SELF IN EVERYDAY LIFE* (1959) (approaching identity behavior as performance).

207. *See supra* Part II.A-B and accompanying notes (arguing that the consumer privacy discourse has failed to develop a compelling rationale for the legal protection of consumer data information).

208. In other words, a pattern of buying books for fundamentalist Christians (or for radical feminists) may say something about one's political inclinations, but nothing about one's identity as a consumer.

209. Admittedly, a great deal of the text below properly belongs in such non-legal disciplines as cultural studies. Yet, it is necessary to ground my argument for the legal protection of consumer privacy. In any case, it is impossible to speak of privacy in the abstract; concrete descriptions suggest not only the scope of the problem, but

Since that self is expressed in the aggregation of a critical mass of consumer information, privacy law should protect against marketing or creation of comprehensive database profiles. On the other hand, it should permit collection or sale of records of isolated transactions, which individually do not rise to the level of invasion of privacy.

Section A outlines the importance of consumption in our society and culture. By examining the culture of consumption as a system of signs and meanings, Section B suggests that it provides considerable freedom for individual self-expression. Section C relates the consumer self created by these consumption choices to the concept of privacy as protection of expressive information. The section concludes with an application of the concept of the expressive consumer identity to several prominent consumer privacy cases, and suggests how their outcomes would have differed had the courts applied the conception of privacy presented here.

A *Characteristics of a Consumption Society*

Economic, social, and historical developments have thoroughly transformed the cultural and personal meaning of consumption.²¹⁰ Although defining cultural phenomena is an impossible task, a serviceable definition suggests that a consumer culture is one that "makes consumption an end in life, imparting value and importance upon acts of consumption."²¹¹ Where in pre-industrial times consumption was incidental,²¹² consumption has become a central activity of our lives.²¹³ Many scholars have argued that people no

also the solutions for it. Solove, *supra* note 72, at 1090-91; cf. David M Skover & Kellye Y. Testy, *LesBiGay Identity as Commodity*, 90 CAL. L. REV. 223, 226 (2002) (arguing that the gay civil rights discourse must account for the role of gays as consumers).

210. For a comprehensive and provocative history of consumption in the United States, see generally CONSUMER SOCIETY IN AMERICAN HISTORY, A READER 1-13 (Lawrence B. Glickman ed., 1999); THE CONSUMER SOCIETY READER (Juliet B. Schor & Douglas B. Holt eds., 2000) (providing a theoretical overview of consumption).

Although my focus is on consumption in American society and culture, the perspectives presented are applicable to post-industrial societies generally. See generally MICHAEL WEISS, THE CLUSTERED WORLD: HOW WE LIVE, WHAT WE BUY, AND WHAT IT ALL MEANS ABOUT WHO WE ARE (2000) (demonstrating how corporations and non-profit groups use the same demographic clustering of consumer information used in the United States to market products and ideas all over the world).

211. Bradley A. Harsch, *Consumerism and Environmental Policy: Moving Past Consumer Culture*, 26 ECOLOGY L.Q. 543, 556 (1999).

212. See DANIEL MILLER, MATERIAL CULTURE AND MASS CONSUMPTION 134-42 (1987) (providing a concise history of consumption and the industrial revolution); DANIEL BELL, CULTURAL CONTRADICTIONS OF CAPITALISM (Basic Books 1996) (1976) (presenting a classic study of the tension between the increasing importance of consumption and the Protestant ethic).

213. See, e.g., Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and*

longer value products for their use value, but primarily as symbols.²¹⁴ Modern obsessions about money, sex, or status are reducible to anxieties about consumption.²¹⁵ Indeed, the influence of culture on consumption is so pervasive that it shapes our perception of citizenship itself.²¹⁶ In sum, consumption is a way of relating to the world, a process of construction of subjectivity.²¹⁷ Accordingly, we not only are men, women, liberals or conservatives, but also and always consumers.

Caveats, 74 TEX. L. REV. 1847, 1885 (1996) (stating that consumption choices create opportunities for conversation and for the formation of social relationships and are the most easily observed indicators of who a person is and where he or she fits in on the social hierarchy); PACO UNDERHILL, *WHY WE BUY: THE SCIENCE OF SHOPPING* 95 (1999) (suggesting that people “use shopping as therapy, reward, bribery, pastime, as an excuse to get out of the house, as a way to troll for potential loved ones, as entertainment, as a form of education or even worship. . . .”); *THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY, 1880-1980* x-xii (1983) (arguing that all social observers agree on the importance of consumption in twentieth-century American culture, and that consuming goods is a culture, as well as “an ethic, a standard of living and a power structure”).

214. *See* *THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY, 1880-1980*, *supra* note 213, at xiv-xv (stating that “the characteristics of commodities become reified into . . . symbols that are disengaged from the particular and immediate needs of everyday life.”); JEAN BAUDRILLARD, *FOR A CRITIQUE OF THE POLITICAL ECONOMY OF THE SIGN* 57 (Mark Poster ed., Charles Levin trans., Telos Press 1988) (1981) (arguing that modern consumption is at the stage where commodities are immediately produced as signs “and where signs (culture) are produced as commodities”). This development causes a disengagement from experiencing life as-is, and instead, encourages experiencing life as a stream of symbols. JEAN BAUDRILLARD, *SIMULACRA AND SIMULATION* 87 (1994).

215. *See e.g.*, DAVID T. EVANS, *SEXUAL CITIZENSHIP: THE MATERIAL CONSTRUCTION OF SEXUALITIES* 45 (1993) (noting that the pursuit of the commodified self is accomplished through the “acquisition and conspicuous manifestation of style”).

216. *See* Rachel Bowlby, *Soft Shell: Marketing Rhetoric in Feminist Criticism*, in *SEX OF THINGS* 383 (Victoria Grazia ed., 1996) (commenting that “[i]n education, health, housing, . . . voting and many other fields, we are all addressed as ‘consumers’ now. . . . The consumer is fast becoming the model of citizenship itself.”); *see also* Ronald K.L. Collins & David M. Skover, *Commerce and Communication*, 71 TEX. L. REV. 697, 741-42 (1993) (declaring that “[w]e are as we consume . . . and that [o]ur identity as Americans is a combination of citizen-self and consumer-self.”).

Indeed, “[o]ur very images of our own body, our own selves, our own personal self-worth (or lack of it) is mediated by the omnipresent [commercialized] images of mass culture.” Skover, *supra* note 209, at 239 (quoting Douglas Kellner, *Critical Theory, Commodities and the Consumer Society*, in *THEORY, CULTURE, AND SOCIETY: EXPLORATIONS IN CRITICAL SOCIAL SCIENCE* 66 (1983)); *see also*, MIHALY CSIKSZENTMIHALY & EUGENE ROCHBERG-HALTON, *THE MEANING OF THINGS: DOMESTIC SYMBOLS AND THE SELF* 53 (1981) (noting that “objects have a determining effect on the development of the self, which is why understanding the type of relationship that exists between people and things is so crucial.”).

217. *See* Bowlby, *supra* note 216, at 383 (arguing that the discourse on marketing and consumption is dominant in the discussion of identity/subjectivity formation); *see also* MARY DOUGLAS & BARON ISHERWOOD, *THE WORLD OF GOODS: TOWARDS AN ANTHROPOLOGY OF CONSUMPTION* 161 (1979) (commenting that the consumer’s need for goods fulfills the need to be included with fellowconsumers).

Mass production requires mass consumption.²¹⁸ That link is ensured by heavy reliance on advertising. Indeed, advertising is the central institution of consumer culture.²¹⁹ Advertising is a major social and cultural discourse,²²⁰ at least by its sheer prominence in the individuals' experience of everyday life.²²¹ A prominent sociologist noted, "in contemporary society advertising has taken over from other social agencies the tasks of transmitting beliefs, values, and behavioral codes that in earlier times were incorporated in myths, proverbs, and rituals."²²² Similarly, Raymond Williams sardonically quipped that advertising is the official art of capitalist societies.²²³ As Baudrillard observes, "[t]oday what we are experiencing is the absorption of all modes of expression into that of advertising."²²⁴ Far from being a marginal presence on the cultural scene, advertising permeates the public sphere, structuring and imparting meaning to consumption and, some would say, life itself.

B. Personal Meaning of Consumption

Discussing consumption in the abstract, however, is unsatisfactory. This section demonstrates how individuals interact with that culture. Specifically, this section argues that because consumption culture provides wide latitude for self-expression, one's consumer profile is

218. See Coombe, *supra* note 216, at 1862-63 (commenting that postmodernity has oriented the Western world toward consumption); see also STEWART EWEN, CAPTAINS OF CONSCIOUSNESS: ADVERTISING AND SOCIAL ROOTS OF THE CONSUMER CULTURE 3 (1976) (positing that both mass consumption and mass production are part of the modern phenomenon of mass culture). See generally *supra* note 210 (discussing the history of mass consumption).

219. THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY, *supra* note 213, at xiii; see also JAMES B. TWITCHELL, ADULT USA: THE TRIUMPH OF ADVERTISING IN THE AMERICAN CULTURE 1 (1997) (furthering the notion that underlying consumer culture is that advertising is quintessential); JULIANN SIVULKA, SOAP, SEX, AND CIGARETTES: A CULTURAL HISTORY OF AMERICAN ADVERTISING 3 (1997) (discussing the impact of advertising on American culture).

220. See Collins, *supra* note 216, at 698 (arguing that "[advertising] messages are more than solicitations to buy—they are the codes of our children . . . and that [w]e are largely the sum of what we buy.').

221. See Harsch, *supra* note 211, at 566 (citing that an average adult sees about 21,000 commercials a year). This figure does not include billboard, newspaper, and other forms of advertising. *Id.* In the early 1990s, spending on advertising amounted to approximately 2.5% of the U.S. GNP, and the per capita advertising spending was \$495. *Id.*

222. WILLIAM LEISS ET AL., SOCIAL COMMUNICATION IN ADVERTISING 166 (2d ed. 1990); cf. Rochelle C. Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 397 (1990) (noting that "some trademarks have worked their way into the English language; others provide bases for vibrant, evocative metaphors.').

223. Quoted in Deseriee A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L.J. 615, n.7 (2000).

224. BAUDRILLARD, SIMULACRA AND SIMULATION, *supra* note 214, at 87.

closely related to one's identity.

It is a rather uncontroversial tenet of modern social theory that individuals no longer consume products for the value of their utility, but rather for their symbolic value. Justice Frankfurter observed that "[i]f it is true that we live by symbols, it is no less true that we purchase goods by them."²²⁵ In the modern world, "products appeal through [the] figurative meanings they express. . . . Capitalism is burgeoning from the calculated production of meanings."²²⁶ Another commentator expressed the consensus view that consumers purchase not only things but also images.²²⁷ As noted above, that meaning is often produced by the discourse of advertising.²²⁸

Advertising is a sophisticated system of signs, with internal consistencies, rules of logic and narrativity.²²⁹ By using these signs, advertising imbues products with symbolic meaning. Yet, although the language of advertising may be internally consistent, only the dourest Marxist would argue that the advertising discourse instills oppressive consumerist ideology into the pliant minds of the public. As with any complex discourse, consumption presents diverse viewpoints and sensibilities. Certainly, all products are presented as providing a pathway to happiness,²³⁰ but the symbolism of brands and products suggests wildly different ways of getting there. Consumers choose those products and brands that carry the most appeal by decoding these signs.

Accordingly, the marketplace of products is also one of meanings, serving as true self-invention through consumption. Picking up on the creative aspect of this process, sociologist Pierre Bourdieu argued that individuals use consumption to construct social status and identity through distinctions in taste, so that the choice of a

225. *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942).

226. ERNEST STERNBERG, *THE ECONOMY OF ICONS: HOW BUSINESS MANUFACTURES MEANING* 3 (1999).

227. See Varda Langholz Leymore, *HIDDEN MYTH: STRUCTURE AND SYMBOLISM IN ADVERTISING* 35 (1975) (examining the dynamic nature of advertising and commenting that advertising does not exist in a void; rather, it is intentionally aimed at consumers to produce appealing images).

228. See *supra* Part III.A.

229. See generally Guy Cook, *THE DISCOURSE OF ADVERTISING* 37 (1992) (discussing style and form of advertising); Sut Jhally, *THE CODES OF ADVERTISING* 5 (1987) (commenting on the way that advertising is used in consumer culture and its impact).

230. See, e.g., Steven Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 IND. L.J. 689, 695 (1994) (commenting that commercial messages encourage the concept that happiness and self-fulfillment come not from the interaction with others, but from the relationship with goods).

particular group of products "classifies the classifier."²³¹ Some even argue that this freedom to invent oneself through consumer choices is the only available individual freedom in our society.²³² Yet, although scholars in the humanities and social sciences see consumption as a means of communication and self-expression, the legal discourse has not fully recognized the importance of consumer identities.

1. *Expressive meaning of consumption*

Hopefully, by this point even a skeptic reader will agree that products have an aura, which provides a meaning beyond its functional use. But what is the extent of this semiotic choice, and what are some of the meanings to which consumers respond?

Perhaps the most striking characteristic of contemporary consumption is the sheer magnitude of consumer choice. By the late 1990s, American supermarkets featured 340 brands of breakfast cereals, 87 soft drink brands, 66 mouthwashes and 50 brands of bottled water.²³³ The choice among these myriad of brands is rarely purely rational. As sociologist Marilyn Halter observed, by the 1970s, "[p]arity in the production and technology of consumer goods had, for the most part, been achieved, so that customers could no longer differentiate between the quality and value of services" rendered by different companies and brands.²³⁴ In many cases, even price is not a major factor in the purchasing decision.²³⁵

Yet, how does the consumer find his or her way through this maze of choices? As noted above, to a large extent, through actively decoding products' cultural messages and responding to those messages with most personal appeal determines brand and product preferences.²³⁶ Of course, not every routine purchase is expressive of

231. See generally PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* (1984).

232. Richard Elliott, *Symbolic Meaning and Postmodern Consumer Culture*, in *RETHINKING MARKETING* 114 (Douglas Browlie et al. eds., 1999).

233. See JACK TROUT, *DIFFERENTIATE OR DIE* 6 (2000) (noting the variety and abundance of products available to the consumer); see also MARILYN HALTER, *SHOPPING FOR IDENTITY: THE MARKETING OF ETHNICITY* 15 (2000) (observing that "both segmented marketing strategies on the corporate level and more localized [enterprises] have generated a much more diverse and varied array of choices for the consumer than is typically acknowledged.").

234. HALTER, *supra* note 233, at 5.

235. See UNDERHILL, *supra* note 213, at 99 (illustrating that approximately twenty-eight percent of men and fourteen-percent of women do not look at price tags when shopping).

236. See generally COOK, *supra* note 229, at 67-69 (providing a thorough discussion of decoding); JUDITH WILLIAMSON, *DECODING ADVERTISEMENTS* 52 (1978) (attempting to reveal the real meanings of advertising messages through critical close reading).

one's personality. Still, the aggregate consumer self—the self that is recorded in marketing databases—represents a self-created identity that is unique, meaningful and expressive.

A thorough discussion of the semiotics of consumption is beyond the scope of this Article. However, the soft drink marketplace presents a vivid illustration of the politics of brand meaning. In his recent book, Thomas Frank describes how the semiotic identities of major soft drinks were constructed in the 1960s.²³⁷ Responding to the market dominance of Coca Cola, advertisers positioned Pepsi as a youthful alternative to Coke's stodgy image.²³⁸ While advertisements for Coke featured an intergenerational vision of unity and peace, Pepsi's ads featured images of the counterculture designed to place the "Pepsi Generation" back in the center of the screen—"a vision of its consumers as impudent insurrectionaries, flouting the dull, repressive mores of the past."²³⁹ At present, the youthful rebelliousness of the "Pepsi Generation" has lost the political edge it had in the 1960s, yet it still remains a powerful cultural trope and valuable brand equity.²⁴⁰ Similarly, when 7-Up was introduced to the soft drink market, it was marketed as an edgy brand for the non-conformists who eschewed Pepsi's appeals to generational unity.²⁴¹ In a nod to the counterculture, the 7-Up ads mocked advertising itself, cementing the drink's image as the "un-cola."²⁴² Thus, consumers could choose from at least three distinctly different cultural messages when browsing through the soft drink aisle of the local supermarkets. An aggregation of these distinct, expressive choices in a consumer information database produces a unique representation of the person's identity.

An important objection is that most individuals' consumption choices are limited by their economic means: the people who deeply

techniques). In the 1950s, David Packard created a furor by arguing that consumer responses are not rational but are driven by subliminal techniques of persuasion in advertising; DAVID PACKARD, *THE HIDDEN PERSUADERS* 3 (1956). However, the possibility of such techniques has never been scientifically demonstrated. COOK, *supra* 229, at 208.

237. See THOMAS FRANK, *THE CONQUEST OF COOL: BUSINESS CULTURE, COUNTERCULTURE, AND THE RISE OF HIP CONSUMERISM* 169 (1997) (commenting that one of the most dramatic confrontations of the newhip consumerism was the "cola wars").

238. *Id.* at 170.

239. *Id.* at 169.

240. See *id.* at 173 (describing how Pepsi has re-positioned itself by moving away from the counterculture of the 1960s).

241. See *id.* at 165-67 (noting that 7-Up used the youth culture to speak and reposition itself against the cola market).

242. See *id.* at 167 (describing how 7-Up ads systematically disrupted the monotony of Coke and Pepsi ads).

respond to the elegance of Chanel, for example, cannot always afford to buy it. While empirically true, this argument overlooks the breadth of meanings available at every price level, as soft-drink branding indicates.²⁴³

Even if we concede that personal financial resources limit brand choice, significant opportunities for self-expression through consumption are still available because of semiotic differences among products. Meanings are not necessarily imposed on a product by advertising. Sometimes products themselves inherently code for certain cultural qualities. An oak table is semiotically different from one with a metal surface; preferring whiskey over wine is also rich with cultural meaning. Thus, in decoding our consumer personality, the nature of the product may say as much about our identity as consumers as our brand preferences.

This characteristic is perhaps most obvious when considering consumer clothes choices.²⁴⁴ In her well-known book *The Language of Clothes*, Alison Lurie argues that a person's choices in clothes partially reveals his or her "occupation, origin, personality, opinions, tastes, [and] sexual desires."²⁴⁵ Drawing on an extensive literature on the semiotic qualities of fashion, Lurie asserts that with fashion, as with language, each person starts with innumerable choices, yet develops an idiom that is identifiably his.²⁴⁶ Thus, choices of color scheme,

243. Semiotic differences are even more pronounced with luxury products. For example, presumably there is little difference between the various entry-level luxury cars, however, each of them carries a rather distinctive, semiotic meaning. Jaguar's campaign for the new X-type focuses on what the car *means* rather than what it *is*; the ads feature the new model only fleetingly, instead emphasizing the romanticism of the brand by featuring young couples accompanied by a torch song. Coming from a very different place, BMW's ads focus on the sensation of handling the "Ultimate Driving Machine," an aspect overlooked by Audi whose ads highlight the TT Roadster's muscular modernist design. On the other hand, Lexus's campaign is awash in rich pastel colors and suggests a certain unhurried, autumnal ease. To be sure, this may seem like splitting hairs. Nonetheless, a decades-long brand loyalty, as reflected in consumer records, certainly suggests a pattern of response to the image represented by the brand.

244. As Quentin Crisp observed, "our clothes are too much a part of us for most of us to be indifferent to their condition: it is as though the fabric were indeed a natural extension of . . . the soul." (quoted in JOANNE ENTWISTLE, *THE FASHIONED BODY: FASHION, DRESS AND MODERN SOCIAL THEORY* 9 (2000)). In a more cynical mood, Crisp added that "[f]ashion is what you adopt when you don't know who you are." *Id.*

245. ALISON LURIE, *THE LANGUAGE OF CLOTHES* 3 (1981). The fascinating subject of the relationship between fashion and social meaning is beyond the scope of this paper. For a thorough treatment, see FRED DAVIS, *FASHION, CULTURE AND IDENTITY* (1992). Also, for a gender-studies perspective on fashion, see generally DIANA CRANE, *FASHION AND ITS SOCIAL AGENDAS: CLASS, GENDER, AND IDENTITY IN CLOTHING* (2000).

246. See LURIE, *supra* note 245, at 5 (asserting that choosing certain clothing defines oneself and makes certain statements).

style, and fabric are as telling as one's brand preferences.²⁴⁷ The point is not that the color scheme of one's clothes miraculously reveals one's personality. Rather, this information, in conjunction with one's other consumer choices, may provide a clue when all of it is recorded in a comprehensive database.

2. *Empirical evidence of consumption's expressiveness*

Thankfully, one need not depend only on semiotics to make an argument for the expressiveness of consumption. Empirical evidence also confirms the link between identity and consumption patterns.

Not surprisingly, the impetus for this kind of research came from the brainstorming of marketing departments. Since the 1970s, direct marketers have relied on demographic data in targeting their solicitations.²⁴⁸ Dissatisfied with this nearly scattershot approach, in the early 1980s, marketers turned to "psychographic" data, which combined demographic information with psychological characteristics such as opinions, attitudes, beliefs, and lifestyle.²⁴⁹

The links between consumer behavior, psychology and socioeconomic status proved to be extremely popular and effective.²⁵⁰ For example, one company has created a complex classification system, with such categories as "blue blood estates," "bohemian mix," and "shotguns and pickups."²⁵¹ Another company created lists of groups including "First Time Credit Card Holders," "Grown But Still At Home," "Hi-Tech Seniors," "Status Spenders," and "Waist Watchers."²⁵² Each cluster includes a description of the persons' incomes, racial or ethnic background, political attitudes, and hobbies.²⁵³ These classifications were made possible by looking deep within the increasingly detailed²⁵⁴ consumer information databases

247. *See id.* at 182-211 (arguing for instance that the color and patterns of one's clothing, among other things, communicates information to other people). For a more in-depth study of the cultural significance of color, see JOHN GAGE, *COLOR AND CULTURE: PRACTICE AND MEANING FROM ANTIQUITY TO ABSTRACTION* (1993); JOHN GAGE, *COLOR AND MEANING: ART, SCIENCE, AND SYMBOLISM* (1999).

248. Solove, *supra* note 12, at 1406.

249. *Id.* at 1406-07.

250. *See* DAVID SHENK, *DATA SMOG* 114 (1997) (noting that because of its economic advantages, niche marketing has become popular).

251. *See* WEISS, *supra* note 210, at 12-13 (listing Claritas's forty consumer groups ranked by affluence).

252. Solove, *supra* note 12, at 1410.

253. *See* HUGHES, *supra* note 17, at 300 (stating, for example, that the "Blue Blood Estates are America's wealthiest suburbs and are mostly white").

254. Once you have *some* information, you need *more* information. In other words, marketers realize that if a dossier with twenty-five data fields provides some insight into a person's consumer preferences, they will want dossiers with fifty data fields to create a more precise profile; then you need seventy-five data fields to refine the profile, etc.

and making ever more minute distinctions, all based on the communicative properties of consumption.²⁵⁵

Importantly, the clustering research revealed that consumption patterns do not necessarily depend on income.²⁵⁶ Individuals within the same income bracket often decide to spend their money on different types and brands of products.²⁵⁷ For example, despite similar incomes, members of "Bohemian Mix" prefer foreign films and organic food, while people in the "Middle America" cluster favor sitcoms and frozen TV dinners.²⁵⁸ These differences in consumption patterns are part and parcel of the differences in these individuals' personal identities.

Moreover, marketing research reveals that the relationship between consumption and identity is stronger than incidental linkages. Consumption patterns that define a "cluster identity" strongly correlate with political and social views. For example, the "Bohemian Mix" cluster is notably short on fundamentalist Christians, while people in "Middle America" are largely Reagan Democrats who "remain fearful of government overspending and the lack of programs that help the middle class."²⁵⁹ Thus, consumption patterns may identify one as a liberal, moderate Republican, radical feminist or born-again Christian.

For some individuals, consumption is no longer a way of expressing identity but is synonymous with identity. Largely confined to cultural fringe groups and youth sub-cultures,²⁶⁰ this phenomenon deserves special attention in the consumer privacy context. "You are what you consume" is a tired cliché, and this Article distinguishes between one's consumer identity and ultimate self. Yet, the identity of many subcultures is directly related to distinctive patterns of consumption.²⁶¹ One need only think of the personal styles of punk

255. Detailed consumer information can then lead to predictive powers. See Malcolm Gladwell, *The Science of Shopping*, THE NEW YORKER, Nov. 4, 1996 (describing the author's shock at a marketing analyst's ability to accurately guess his preferred brand of a shaving razor), available at http://www.gladwell.com/1996/1996_11_04_a_shopping.htm.

256. See WEISS, *supra* note 210, at 126-32 (outlining reasons for consumption patterns such as social rank, household composition, ethnicity, urbanization, and mobility).

257. Comparing the preferences of different clusters with similar incomes, illustrates that individuals within the same income bracket often purchase different things. See *id.* at 368-92 (summarizing Claritas's forty clusters).

258. *Id.* at 300-03, 331-34.

259. WEISS, *supra* note 210, at 300, 331.

260. See generally Coombe, *supra* note 216, at 1864 (discussing how "mass media imagery" and "commodified cultural texts" provide illustration of a minority group's identity).

261. See *id.* at 1864 (noting that urban gangs often create identities by using

rockers, hip-hoppers, or Harley-fetishizing bikers. Often people discuss these subcultures in terms of their political or social significance.²⁶² Still, it is important to recognize that their political or social messages are communicated almost exclusively through style, i.e., consumption. When databases record the purchase of a punk rocker's studded leather jacket, a hip hopper's oversized basketball jersey, or a biker's collection of Harley memorabilia, they expose the relationship between the purchaser and the subculture's message.

To summarize, consumption patterns, as revealed by consumer records, are related to individuals' identities. On one level, they expose a person's response to the barrage of meanings that are embodied in products and brands. On another level, they pinpoint not only the person's socioeconomic status, but also his or her cultural and social inclinations.

C *Toward Privacy Protection of the Consumer Self*

This section gets us back to the original concern of this paper: providing a rationale for privacy protection of consumer data. It suggests how a more nuanced understanding of the relationship between transactional data and privacy law could have changed the rationale in some important consumer privacy cases.

To clarify the argument, it would be helpful to contrast the courts' decisions in *Sibley v. Time, Inc.*²⁶³ and *In re DoubleClick Inc. Privacy Litigation*.²⁶⁴ In *Sibley*, the Ohio court held that the disclosure of magazine subscription information did not constitute a violation of the right to privacy,²⁶⁵ and in *DoubleClick* a New York court determined that the defendant's use of cookies to collect potentially personally-identifiable information to build demographic profiles of Internet users was permissible under federal law.²⁶⁶ Application of the model of privacy proposed in this Article demonstrates that the court

certain brands of athletic shoes or clothing).

262. See generally DICK HEBDIGE, *SUBCULTURE: THE MEANING OF STYLE* (1979) (examining the political and social undercurrents of punk rock, reggae, and glam); TRICIA ROSE, *BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA* (1994) (doing the same for rap and hip hop subcultures); BARBARA JOANS, *BIKE LUST: HARLEYS, WOMEN, AND AMERICAN SOCIETY* (2001) (analyzing social and gender politics of the biker lifestyle).

263. 341 N.E.2d 337 (Ohio Ct. App. 1975).

264. 154 F. Supp. 2d 497 (S.D.N.Y. 2001).

265. *Sibley*, 341 N.E.2d at 339 (relying in part on a statute enacted by the Ohio legislature that permitted the sale of names and addresses of registrants of motor vehicles).

266. *DoubleClick Inc. Privacy Litigation*, 154 F. Supp. 2d at 519-26 (finding that plaintiffs failed to plead violations of any of the three federal statutes under which they brought the suit).

decided *Sibley* correctly. DoubleClick's practices, however, are more questionable due to the aggregation of the collected information into comprehensive profiles, expressive of the consumers' selves.

In *Sibley*, a magazine subscriber sued Time Inc., a publisher, for selling lists of subscribers of particular magazines to third parties.²⁶⁷ The plaintiff claimed that this practice constituted an invasion of privacy because it amounted to a sale of individual "personality profiles."²⁶⁸ He argued that "[t]he buyers of these lists are able to draw certain conclusions about the financial position, social habits, and general personality of the persons on the lists by virtue of the fact that they subscribe to certain publications."²⁶⁹ Noting that "the mail box . . . is hardly the kind of enclave that requires constitutional defense to protect 'the privacies of life,'"²⁷⁰ the court held that even if subscription information amounted to "personality profiles," their sale does not rise to the level of a privacy violation.²⁷¹

The *DoubleClick* litigation, in contrast, involved a much more expansive effort at collection and use of information. The case is the most prominent in the emerging field of privacy litigation over Internet cookies. DoubleClick utilized cookies to allow collection of information about the user's online activities.²⁷² In June 1999, DoubleClick purchased Abacus Direct Corp., a direct-marketing company that maintained an extensive database, which contained names, addresses, telephone numbers, retail purchasing habits and other personal information of approximately ninety percent of American households.²⁷³ The plaintiffs claimed that DoubleClick intended to merge the two databases of on-line and off-line profiles, to create extremely detailed profiles of internet users' consumer behaviors.²⁷⁴

267. *Sibley*, 341 N.E.2d at 338.

268. *Id.* at 339.

269. *Id.*

270. *Id.* (quoting *Lamont v. Comm'r of Motor Vehicles*, 269 F. Supp. 880 (1967)).

271. *Id.* at 339-40.

272. *In re DoubleClick Inc. Privacy Litigation*, 154 F. Supp. 2d 497, 502-03 (S.D.N.Y. 2001). The company collects, compiles, and analyzes information about Internet users and uses it to target online advertising. *Id.* at 500.

273. *Id.* at 505.

274. *Id.* When DoubleClick and Abacus announced a merger, one of the executives proudly stated, "The goal is to have the most complete picture of the consumer you can." Quoted in Givens, *supra* note 27, at 352. Consolidation of information databases may also happen through sales of consumer lists of defunct dot.coms, a phenomenon more common in the current economic climate. See Richard A. Beckmann, Comment, *Privacy Policies and Empty Promises: Closing the "Toysmart Loophole,"* 62 U. PITT. L. REV. 765, 767-70, 774-88 (2001) (focusing primarily on the *Toysmart* case and evaluating the relationship between bankruptcy and consumer protection law).

Plaintiffs sued DoubleClick under the Electronic Communications Privacy Act ("ECPA") and the Federal Wiretap Act.²⁷⁵ In a lengthy and well-reasoned opinion, the court dismissed the plaintiffs' federal claims, holding that DoubleClick's activities fell within the statutory exceptions.²⁷⁶ Additionally, the plaintiffs brought a common law claim of invasion of privacy, but the court did not address this claim.²⁷⁷

It is worthwhile to compare the conduct challenged in *Shibley* and *DoubleClick*. If one conceives the violation of privacy as disclosure of expressive information about the individual's consumer self, most privacy activists would likely denounce both practices, arguing that DoubleClick's activities are simply the apogee of a disturbing pattern. The differences between the two practices are then of scope, not kind.

Yet the difference between the cases is more fundamental. In *Shibley*, the plaintiff was quite wrong in alleging that his preferences in magazines constituted a personality profile. Certainly different kinds of people would read *Guns and Ammo* and *Mother Jones*. Yet magazine subscriptions are a tiny sliver of the consumer self. Subscriptions do not represent a pattern of individual response to the culture of consumption any more than preferences in brands of cereal. They are suggestive, but not truly revealing. In a sense, Mr. Shibley preceded modern privacy theorists by improperly arguing that any disclosure of personal consumer information is a violation of the right to privacy.²⁷⁸ In cases with such small stakes, where there is no disclosure of the consumer self, rationales of economic efficiency should prevail over control over information.

The situation in *DoubleClick* presents a stark contrast. The defendant made a deliberate attempt to compile and sell comprehensive profiles that embodied Internet users' consumer identities.²⁷⁹ Information in these profiles would have constituted a comprehensive portrait of the consumer self, including brand and

275. See *Double Click Privacy Litigation*, 154 F. Supp. 2d at 507, 514; see also Electronic Communications Privacy Act, 18 U.S.C. § 2701 et seq.; Federal Wiretap Act, 18 U.S.C. § 2510 et seq.

276. *Id.* at 514, 519.

277. See *id.* at 526 (declining to accept supplemental jurisdiction over state law claims).

278. See *Shibley v. Time, Inc.*, 341 N.E.2d 337, 339 (Ohio Ct. App. 1975). Mr. Shibley incorrectly contended that buyers of the subscription lists were able to make conclusions about those listed such as social habits and personality, and therefore, it amounted to an invasion of privacy. *Id.*

279. See *DoubleClick Privacy Litigation*, 154 F. Supp. 2d at 519 (discussing DoubleClick's intention to provide a service in exchange for money).

product preferences going back years, if not decades.²⁸⁰ Although individual bits of data in the consumer profile are as inconclusive as those in *Shibley*, their aggregation and juxtaposition represent a qualitatively different kind of threat to privacy. By purchasing such a profile, a third party could study this pattern of response to the consumer culture to place the individual precisely in the matrix of culture and to look beyond the demographics into his very identity. This aggregation of consumer data presents a troubling and significant threat to the right of privacy.

The contrast between *Shibley* and the *DoubleClick* litigation represents in miniature the main argument of this Article. To appreciate the nature of the threat to privacy, one needs to look at the kind of information collected and how it is used. Without the context of the consumer culture, much of this information is unexpressive, and the collection of it should not cause alarm. On the other hand, privacy is threatened when companies compile data into profiles that reveal the individual's consumer and, consequently, personal identity.

Another way of framing this proposed right to one's consumer identity is by analogizing it with the long-established right against commercial appropriation of one's image. Publicity rights refer to "the inherent right of every human being to control the commercial use of his or her identity"²⁸¹ and were "like Eve from Adam's rib . . . carved out of the general right of privacy."²⁸² Although theoretically this right is universal, it has most frequently been invoked by celebrities.²⁸³ Importantly, just like the privacy right proposed by this Article, the publicity right protects only one aspect of the celebrity's identity: his or her public persona. Much like the consumer identity, the public identity of celebrities is created by their personal choices.²⁸⁴

280. A cookie is capable of storing a user's shopping list of purchased items while browsing a virtual mall, and this information may be uploaded later. See Mayer-Schoenberger, *supra* note 62 (discussing thoroughly internet cookies and how they function).

281. J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* v (2d ed. 2000); see also RESTATEMENT (SECOND) OF TORTS § 652C (1977) (imposing liability for appropriating one's "own use or benefit the name or likeness of another").

282. J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* 5-68 (1st ed. 1987). See generally Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1203-08 (1986) (analyzing the historical relationship between publicity and privacy rights); Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647 (1991) (analyzing Justice Warren's and Justice Brandeis's article *The Right to Privacy*).

283. See generally Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993).

284. See *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970)

The coherent identity that the publicity right protects consists of the roles or songs that a celebrity chooses, the persona he or she projects, and even his or her choices in personal life.²⁸⁵ Each of these choices carries a semiotic component, and the right of publicity allows the celebrity to control the production of meanings that the public may derive from the celebrity's public image.²⁸⁶

The nature of a person's interest in personal data is somewhat analogous to a celebrity's protection of his or her public image. His consumer self is created through a series of choices and personal qualities. Compilation and sale of a consumer profile that is an accurate reflection of a person's consumer self constitutes a commercial appropriation of that self. Although this Article does not propose the use of publicity rights law to control collection and sale of consumer data, it suggests a conceptual similarity between that body of law and privacy law.

At heart, with privacy we are concerned with the relationship between self and other, individual and the public. Information is rarely private inherently. Its privacy value derives from its expressiveness, from the ability of that information to say something that may lead others to come to certain conclusions about us. Private information, in other words, is something that provides fodder for the discursive dynamic of social and cultural classification. We cannot and should not shield ourselves completely from that dynamic. Yet, that does not mean that information that is expressive should not be protected. The contemporary privacy discourse has generally overlooked the expressive quality of information that comprises our consumer selves, along with the social and cultural context of data collection. This Article has attempted to fill in that conceptual gap.

CONCLUSION

The prominence of the discussion of privacy in the information age is unsurprising. Advances in technology and corporations' unquenchable thirst for consumer information have substantially eroded the ability of individuals to control their personal data.

(upholding plaintiff's publicity rights and reasoning that "[a] celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity... is the fruit of his labors and is a type of property."). *But see* Madow, *supra* note 283, at 182-97 (criticizing this rationale for publicity rights).

285. *See generally* MCCARTHY, *supra* note 281, at 4-74 to 4-76 (defining the term "persona").

286. Madow, *supra* note 283, at 145-46.

Scholars have suggested a wide variety of ways of combating the problem, but have not developed a satisfactory conceptual framework for protection of mundane consumer information.

This Article's perspective allows the consumer privacy discourse to move beyond a "none-of-their-business" rationale and towards articulating a more viable rationale for protecting consumer information. To do so it is necessary to determine precisely what privacy law is supposed to protect. This Article suggests that privacy is the protection of information that expresses our identities. Therefore, discussion of privacy must center on the particular information that is disclosed and on particular expressive identities that are forcibly shared with third parties. To approach the collection of consumer information in the same way as the collection of medical, credit, or biometric information needlessly obscures the issue.

Given this conceptual framework, this Article argues privacy laws should protect the expressive nature of our consumption. The consumer identity is part and parcel of identity as individuals. Accordingly, the routine and widespread aggregation of consumer information is an invasion of personal privacy.

An inevitable question is "So what?" Even if we develop a novel conception of personal privacy, it must be applied to the complicated issues of consumer information collection. I have developed some preliminary approaches elsewhere.²⁸⁷ Yet, it bears noting that under the approach proposed in this Article, a simple bar on collection of information is improper and inefficient.²⁸⁸ First, a collection of transactional information facilitates better relationships between retailers and consumers, including personalized shopping experiences. Second, banning information gathering would put out of work millions of Americans who work in the direct marketing industry. Third, consumer information is a valuable tool for in-house marketing research. Finally, the privacy threat is in the aggregation of consumer records, not isolated instances of data collection. A single retailer's consumer file may be extensive, but its scope is unlikely to be comprehensive enough for a true representation of our consumer identities. To use an analogy, while scattered bits of a puzzle are unintelligible, when they are put together, a picture does emerge. Accordingly, legislative limits must be placed on the

287. See Karas, *supra* note 12, at 60-62.

288. Doing so may also run afoul of the First Amendment. See, e.g., Volokh, *supra* note 68, at 1051 (noting that the First Amendment generally does not preclude the communication of facts).

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compilation of records in third party databases.

Practical applications of the approach proposed here must be left for another time. This Article's principal contribution is to underscore some conceptual shortcomings in the way we often talk about privacy and to articulate a conception of privacy that hopefully avoids these theoretical pitfalls.