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ARTICLES

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INTRODUCTION

Richard Posner observed many years ago, that regardless of how one defines privacy, "one aspect of privacy is the withholding or concealment of information."[1] Recent proposals to regulate the uses of transactional information by private businesses in the name of privacy raise interesting free speech issues, as the recent case of *U.S. West v. FCC*[2] recognized.[3] The tension between privacy, the First Amendment, and the commercial speech doctrine has barely been explored outside of cases involving media defendants and privacy torts.[4] This article argues that this tension reflects a serious conflict between free speech and privacy outside of that narrow area. The courts should think twice before sacrificing the mature law of free speech to the less coherent concerns about privacy.

Within the United States, lawmakers face growing pressure to develop a top-down legal regime for the governance of privacy and data. Much of this pressure stems from the differences between European Union ("EU") countries and the United States. The EU

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[1] Richard A. Posner, *An Economic Theory of Privacy*, AMERICAN ENTER. INST. J. ON GOV'T & SOC'Y, May/June 1978, at 19.

[2] 182 F.3d 1224 (10th Cir. 1999).

[3] *See id*. (holding that the FCC's rulemaking on customer information resulting in "opt-in" regulatory regime violates the First Amendment).

[4] *See*, *e.g.*, Solveig Singleton, *Privacy as Censorship: A Skeptical View of Proposals to Regulate Privacy in the Private Sector*, CATO INST. POLICY ANALYSIS, Jan. 22, 1998 at 1; Eugene Volokh, *Freedom of Speech, Information Privacy, and the Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1 (May 2000); Thomas I. Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329 (1979).

has enacted such a legal regime, known as the Data Protection Directive,[5] while the United States has not.

The different legal regimes present a classic trade problem as illustrated by the following hypothetical: Country X prohibits or heavily regulates certain activity while country Y does not. The activity continues and expands in country Y, while representatives in country X become more frustrated. What do we do? Tolerate the regulatory arbitrage? Sanction country X to remove its regulations, or sanction country Y to adopt them? In large part the answer depends on which country we believe is doing the right thing. With regards to passing data protection laws, there is an assumption that the European nations are doing the right thing and the United States is not.[6] Thus, the United States is pressured to move towards a regulatory regime similar to that of the EU.

Meanwhile, the emerging conflict between privacy and free speech threatens to change the dynamic of the debate surrounding the extent to which the United States should imitate the EU's privacy regulations. Given this conflict, we must seriously reconsider whose approach is in fact the right one.

Part I of this article explores the foundations of the law of privacy in the United States, laying the groundwork for understanding how concepts of privacy relate to each other. Part II explores the philosophical conflict between free speech and privacy. Part III examines the commercial speech doctrine and outlines the broader implications of the use of data in the private sector for the Constitution and human rights.

I. FOUNDATIONS OF PRIVACY IN THE UNITED STATES

Privacy as conceived in twentieth century case law is a young legal concept, less developed than the law of free speech.[7] This is not to deny the Fourth Amendment's constitutional pedigree. As described below, the concept of privacy has expanded far beyond the Fourth Amendment and the assorted doctrines that formed the

[5] Council Directive 95/46/EC, 1995 O.J. (L 281) 31.

[6] *See* PAUL M. SCHWARTZ & JOEL R. REIDENBERG, Data Privacy Law: A Study of United States Data Protection (1996).

[7] *See* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1375 (1992).

basis for privacy protection in the nineteenth century. Privacy today still means that the police cannot search your house without a warrant. However, it also means that the government's rights to determine its citizens' reproductive functions are limited. In addition, some eccentric rights of privacy have grown up to restrict private sector activity. The following sections outline key models of privacy and provide some preliminary background on the conflict between privacy and the First Amendment.

A. Government Intrusions on Privacy

In order to resolve the conflict between the First Amendment and privacy rights asserted against the private sector, we must first explore how the First Amendment relates to privacy rights asserted against the government.

Obviously, private sector companies that collect data in private transactions cannot be charged with violating rights to privacy protected by the Constitution. The Constitution sets forth our rights against the government, and these are different than our rights against private citizens. In short, there is no state action when a private citizen or business collects information about another private citizen or business.[8] It is important to consider how constitutional rights are related to rights asserted against the private sector. This section discusses what those federal rights are. We begin with the Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[9]

The Fourth Amendment does not explicitly mention "privacy", however, many early cases do.[10] The language of the Amendment

[8] S*ee*, *e.g.*, United States v. McAllister, 18 F.3d 1412, 1417-18 (7th Cir. 1994); United States v. Reed, 15 F.3d 928, 931 (9th Cir. 1993); Pleasant v. Lovell, 974 F.2d 1222, 1226 (10th Cir. 1992); United States v. Attson, 900 F.2d 1427, 1432 (9th Cir. 1990).

[9] U.S. CONST. amend. IV.

[10] *See* Boyd v. United States, 116 U.S. 616, 626 (1886); *see generally* Nelson B. Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED

ties privacy to property rights.[11] The framers of the Constitution viewed property rights as the root of privacy (as well as other rights such as free speech).[12] Lord Camden's opinion in the 1765 case of *Entick v. Carrington*,[13] which involved the seizure of private papers, had a powerful influence on the development of Fourth Amendment law.[14] Lord Camden stated:

> Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect.[15]

The centrality of property concepts relating to the understanding of the Fourth Amendment emerged fully in *Boyd v. United States*,[16] when the Court proved itself willing to overlook the evident lack of a traditional "search" or "seizure" in its zeal to protect private papers.[17]

Early in the twentieth century, the Supreme Court encountered a challenge to this property rights view of private information in a case concerning wiretapping telephone conversations.[18] The Court observed that if the telephone company does not object, wiretapping could not violate its property rights.[19] Nor does anyone using a telephone have a property right in his or her

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STATES CONSTITUTION 47-49 (1937); Jacob W. Landynski, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 29 (1966).

[11] *See generally* William C. Heffernan, *Property, Privacy, and the Fourth Amendment*, 60 BROOK. L. REV. 633 (1994) (arguing that property rights are a relection and expression of personal freedoms, and should receive the same protection).

[12] *See id*.

[13] 95 Eng. Rep. 807 (K.B. 1765), 19 Howell's State Trials 1029 (1765).

[14] *See id*.; *see also* Nelson B. Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 47 (1937).

[15] 95 Eng. Rep. 807, 816-17 (K.B. 1765), 19 Howell's State Trials 1029, 1066 (1765) (*Editors' Note*: Early English Law reporters sometimes offer differing accounts of the very same proceedings. Though the English Reports citation is given to facilitate the reader's easy retrieval of the subject case, the verbatim quotation is from the Howell's State Trials version.).

[16] 116 U.S. at 616 (1886).

[17] *See id*.

[18] *See* Olmstead v. United States, 277 U.S. 438 (1928).

[19] *See generally id*. at 464-66.

conversation.[20] As a result, the Supreme Court ruled that wiretapping did not require compliance with the Fourth Amendment.[21] Justice Brandeis dissented, following Thomas Cooley in speaking of "the right to be let alone - the most comprehensive of rights and the right most valued by civilized men."[22] Many years later, Brandeis' dissent became the law.

In *Katz v. United States*,[23] the Court found that wiretappers must comply with the Fourth Amendment even when a wiretap does not involve a trespass.[24] Thus, the Court came to establish a privacy right independent of property rights.

Today a contrary result seems unthinkable,[25] and the property rights theory of privacy has been subordinated to a new theory. Unfortunately, this may be a case of the baby being thrown out with the bath water. Once the link between privacy and property rights has been severed, what takes its place? Whatever it is, it cannot literally be a right to be let alone, for that is far too broad. Even a right to be let alone, unless the police have a warrant, would be a strange legal creature indeed, theoretically barring the police from even the most casual inquiries or observations on a public street.

Ultimately, what replaced the property rights theory of privacy in modern courts is that the Fourth Amendment protects us from infringements upon a reasonable expectation of privacy.[26] This modern standard is problematic. As several commentators have noted, it is circular.[27] This is partly because whether or not one has

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[20] *See id*. at 464.

[21] *See id*. at 466.

[22] *Id*. at 478 (Brandeis, J., dissenting).

[23] 389 U.S. 347 (1967).

[24] *See id*. at 359.

[25] *Olmstead* was controversial in its day as well. *See generally* Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decision Making*, 62 BROOK. L. REV. 1, 45-47 (1996) (describing response of state governments to *Olmstead*).

[26] *See* California v. Greenwood, 486 U.S. 35, 39 (1988); California v. Ciraolo, 476 U.S. 207, 211 (1986); Oliver v. United States, 466 U.S. 170, 177 (1984).

[27] *See, e.g.*, Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384-85 (1974) (stating that the expectation of privacy theory is so circular that it has no place in a theory of what the Fourth Amendment protects); United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (stating that the Fourth Amendment analysis must transcend the search for subjective expectations).

an expectation of privacy will depend on whether the law says one does.

The reasonable expectation of privacy theory gives the courts little guidance when genuinely new methods of surveillance arise. In particular, it would not have helped to resolve the status of wiretapping when *Olmstead* was decided. Did a reasonable expectation of privacy exist in a telephone conversation in 1928, given that wiretapping had been a known method of police investigation since the late nineteenth century[28] and that wiretapping was known to be a common tactic of feuding private parties[29] and criminals? What role would this reality play in forming the public's expectations? Would it depend upon whether the state in which the wiretap was placed had passed a statute concerning wiretapping?[30] What if the question had arisen in the nineteenth century before any of these uses or state statutes had been developed?

If the property rights standard did not answer the above questions, then the reasonable expectation standard does not seem to offer any answer at all. When it comes to new networks and new methods of surveillance, the vast majority of people may have no expectations whatsoever. If they do, the expectations may be wildly varied or quite unreasonable. For example, if people today have an expectation of privacy on the Internet, it can only exist so long as they do not understand the extent to which the technology itself is constantly trading information.

Ironically, the reasonable expectation standard will work best when its expectations are based on property rights. Contracts and customs might also be the basis for a reasonable expectation of privacy,[31] although these will have little or no utility in many new cases. As a general matter, the extent to which the reasonable

[28] *See* Pitler, *supra* note 25, at 45-47.

[29] *See, e.g.*, Washington v. Nordskog, 136 P. 694, 695 (Wash. 1913) (wiretapping by Seattle Times of detective agency did not violate law for malicious injury to property because wiretapping does not injure property).

[30] *See, e.g.*, 18 Rem. & Bal. Code § 2656 (P.C. 135 § 805) ("Who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line."), *cited in Nordskog*, 136 P. at 695.

[31] *See* Katz v. United States, 389 U.S. 347 (1967) (Fourth Amendment protections defined by reasonable expectations of privacy are not entirely circular because expectations are based on objective rules and customs that can be understood as reasonable by all parties involved).

expectation standard is truly independent of property rights is questionable.

Notably, the reasonable expectation standard does not create a right of privacy to records about oneself held by a third party.[32] One is said to have given up one's expectation of privacy when one discloses information to a third party.[33] Similar results may be obtained under the property rights theory of the Fourth Amendment, as long as an ownership interest in the information disclosed is not retained.[34] As discussed below, under most circumstances, one will not be able to assert such an ownership interest.[35]

Next, we briefly consider constitutional rights of privacy not directly arising from the Fourth Amendment. These rights of privacy are derived from a "penumbra" allegedly emanating from the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments.[36] With one exception,[37] the penumbra has been

[32] *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 494-95 (1975) (recognizing that, "the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on [sic] the public record"); Walls v. City of Petersburg, 895 F.2d 188, 193 (4th Cir. 1990) (explaining that privacy protection applies to information which the individual has a reasonable expectation of privacy such that to the extent this information is freely available in public records, protection will not extend).

[33] *See, e.g.*, United States v. Meriwether, 917 F.2d 955, 959 (6th Cir. 1990) (criminal defendant has no expectation of privacy in his pager number because he voluntarily gave it to another person); United States v. Miller, 425 U.S. 435, 437-40 (1976) (criminal defendant has no protectable Fourth Amendment interest in his own financial records maintained by his bank as he has neither ownership nor possession of the records).

[34] *See* California v. Greenwood, 486 U.S. 35, 40-41 (1988) (concluding that there can be no reasonable expectation of Fourth Amendment privacy protection for refuse placed at the curb for the purpose of conveying it to a third party, the trash collector); *see generally* Katz v. U.S., 389 U.S. 347, 351 (1967) (holding that, "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection").

[35] *See* Greenwood, 486 U.S. at 40-41.

[36] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1973) (finding a right of privacy inherent in "areas or zones of privacy" to which various constitutional provisions give rise); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (finding a right to privacy in the penumbra of the Bill of Rights); Thornburgh v. American College of Obstetricians, 476 U.S. 747, 772 (1986) (holding unconstitutional portions of a state statute relating to the regulation of abortion); Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (characterizing past Supreme Court decisions relating to marriage, procreation, contraception, family relationships, and child rearing or educating as generally limiting the state's powers to regulate certain kinds of fundamental decisions).

[37] *But see*, Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that possession of obscene materials in the home is constitutionally protected, essentially finding a privacy right in the First Amendment). *Stanley* raises interesting questions but the case is not

recognized in cases involving reproductive or sexual functions in the context of the privacy of the person or the home.[38] As a constitutional theory, the "penumbra" is a suspect creation, but the same results could be obtained under a straightforward reading of the Ninth Amendment that reserves rights not enumerated in the Constitution for the people.[39]

Of all the cases raising the issue of government intrusions upon privacy, these cases are the least relevant to privacy issues arising in the private sector because they involve the freedom to engage in physical activities or functions, rather than a right to keep information private. Their closest private-sector equivalent is similar to the right to be free of assault or battery. Additionally, these cases do not supply us with a right of privacy independent of property rights, because rights to control our own bodies are in effect another type of property right.

One fundamental observation arises from the Fourth Amendment and the "penumbra" cases: The constitutional right of privacy against government intrusions rarely, if ever, conflicts with the First Amendment.[40] The police can claim no "First Amendment" right to trespass on one's property - no more than you have a First Amendment right to break into a neighbor's house to read a poem in his living room.[41] In a sense, these Constitutional privacy cases are First Amendment rights expressed another way. The right to make one's own decisions about reproduction, for example, might easily be expressed as an exercise of the First Amendment right of free association. The right not to submit to a search without a warrant is a qualification of the right not to speak which the First Amendment also

relevant in resolving a possible conflict between privacy and the First Amendment in the private sector, so it will not be discussed further.

[38] *See e.g.*, Roe v. Wade 410 U.S. at 153 (extending the privacy right to a woman's right to make autonomous reproductive decisions); Payton v. N.Y., 445 U.S. 573, 601 (1980) (noting that our nation has long recognized the sanctity of the home in the context of unauthorized entry); Russell D. Workman, *Balancing the Right to Privacy and the First Amendment*, 29 HOUS. L. REV. 1059, 1962-63 (1992) (discussing the history of privacy rights found in the penumbras of the Constitution which have come to include marriage, childbearing and family relationships).

[39] *See* Griswold, 381 U.S. at 486 (Goldberg, J., concurring); *see also* Randy E. Barnett, *A Ninth Amendment for Today's Constitution*, 26 VAL. U.L. REV. 419 (1991).

[40] *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976) (picketers had no First Amendment right to trespass on a shopping center to advertise their strike against a shoe company).

[41] *See id.*

protects.[42] The First and Fourth Amendments fit together hand and glove; both limit government power in similar ways.[43] This is important to keep in mind when addressing privacy regulations in the private sector.

B. Privacy and the Private Sector: The Brandeis/Warren Article

A standard history of privacy rules applicable to the private sector in the United States begins with a law review article authored by Louis D. Brandeis and Samuel D. Warren in 1890.[44] The authors' inspiration was their concern that "[t]he press is overstepping in every direction the obvious bounds of propriety and of decency."[45] Warren, in particular, was irritated to find details of his home life described in the society pages of the Boston press.[46] Brandeis and Warren argued in favor of the creation of a new kind of property right in personal information akin to defamation.[47] Privacy was not a new concept in American common law, but the idea of a privacy right independent of other property rights was novel.[48]

The focus of Brandeis and Warren on the press raises obvious First Amendment concerns. The species of privacy rights advocated by Warren and Brandeis would have been a new kind of property right similar to defamation in that truth would not be a defense. The Brandeis/Warren article dismisses First Amendment concerns, explaining that speech in the "public interest" would be protected.[49] The view that the First Amendment protects only

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[42] *See* Wooley v. Maynard, 430 U.S. 705, 713 (1977).

[43] *See* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1383-84 (1992) (noting that the Supreme Court tends to automatically balance the right to privacy against First Amendment freedom of speech "essentially regularizing this symbiotic relationship").

[44] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[45] *Id*. at 196.

[46] *See* Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 6 (1979).

[47] *See* Gormley *supra* note 43 at 1345 (Warren and Brandeis' right to privacy principles illustrated in their 1890 Harvard Law Review article "bore a 'superficial resemblance' to an action for defamation.").

[48] *See* Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892 (1981).

[49] *See* Gormley *supra* note 43 at 1346 (Brandeis recognized that a limitation to the right to privacy did not extend to matters of "public or general interest").

speech in the "public interest," and not other speech was typical of Nineteenth Century jurisprudence.[50] One wonders why Brandeis, later noted for his more radical First Amendment opinions, did not address the issue more deeply.

Part of the reason why Brandeis did not address the issue directly may be explained by the historical context in which the article was written. Many progressives, including Brandeis, became supporters of a broad view of free speech only after World War I.[51] In August of 1921, Brandeis said in conversation to Felix Frankfurter, "I have never been quite happy about my concurrence in [the] Debs and Schenk cases. I had not then thought the issues of freedom of speech out—I thought at the subject, not through it. Not until I came to write the Pierce and Shaefer dissents did I understand it."[52] Brandeis's views on the First Amendment when he first wrote about privacy in 1890 were likely quite different from his later views.[53]

Moreover, Brandeis was not as radical on free speech issues as his contemporaries in the legal mainstream. Unlike the pioneering nineteenth century First Amendment scholars, Brandeis was not a free speech absolutist.[54] Brandeis valued the importance of free speech to democratic citizenship. But he thought "the final end of the State was to make men free to develop their faculties."[55] In embracing the idea that the State could be trusted with this goal, this view is still fairly favorable to government regulation of speech. According to this view, free speech is a means to democratic ends more than an individual right.

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[50] *See* Robertson v. Baldwin, 165 U.S. 275, 281 (1897) (stating that "freedom of speech and of the press . . . does not permit the publication of libels . . . or other publications injurious to . . . private reputation").

[51] *See* transcript of conversations between Louis D. Brandeis and Felix Frankfurter (manuscript in Brandeis Papers, Harvard, box 114, folder 14), *cited in* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 362 (1997).

[52] *Id*.

[53] *See* Helen Garfield, *Privacy, Abortion, and Judicial Review, Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293, 365 n.305 (1986) (Brandies' law clerks noted that his views on privacy rights were different in 1939 than in 1890 in part due to his hardening of ideas, lessening of flexibility, and his Puritan strain.).

[54] *See*, *e.g.*, Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[55] Brandeis, *cited in* RABBAN, *supra* note 51, at 370.

C. *Privacy in the Private Sector: Privacy in Common-Law and Equity*

Since the nineteenth century, privacy problems involving disputes between private-sector parties arose in rapidly growing urban areas as railways developed next to residences and neighbors struggled to accommodate the needs for light, air, and privacy.[56] Concepts of privacy were closely entangled with property concepts.[57] Although a technical trespass was not needed to recover, an invasion of privacy alone was not enough unless the invader had created a recognizable nuisance or violated a cognizable property right in something, such as letters.[58]

Easement law sometimes referred to privacy. One line of cases held that it was not wrong to build windows overlooking your neighbor's lot, but you could not then complain if he built a screen on his own property that blocked the view from your windows to protect his privacy.[59] Most American courts adopted this rule that allowed for rapid, unimpeded construction in our cities and towns.[60] However, under English common law, if you blocked off

[56] *See, e.g.*, Muhlker v. New York and Harlem R.R. Co., 197 U.S. 544, 564 (1905); Roman Catholic Church of St. Anthony of Padua v. Pennsylvania R.R. Co., 207 F. 897, 903 (3d Cir. 1913).

[57] *See id*.

[58] *See* Barrett v. Fish, 47 A. 174 (1899) (a right of privacy in letters is based on property or possession of letters); Grigsby v. Breckinridge, 65 Ky. (2 Bush) 480 (Ky. Ct. App. 1867) (a right of property in letters recognized for purposes of distributing letters after writer's death).

[59] *See* Ray v. Sweeney, 77 Ky. (14 Bush) 12 (Ky. Ct. App. 1878) (windows overlooking one's property can only be remedied by building a screen); Levy v. Brothers, 23 N.Y.S. 825 (Sup. Ct. 1893) (owners of premises that built huge iron sheets blocking light from neighbor's windows did not violate neighbor's right to light and air because the law would not recognize his loss of property as actionable); Burke v. Smith, 37 N.W. 838 (1888) (screens blocking view and light from neighbors windows were proved to be motivated by malice and not to keep out prying eyes, constituting an illegal nuisance; rejected cases in favor of right to erect screens to protect privacy and in favor of easement of light and air); Athey v. McHenry, 45 Ky. (6 B. Mon.) 50 (Ky. Ct. App. 1845) (where one landowner had secured no easement for light and air, other landowner was entitled to erect screens blocking the view of his property); Durant v. Riddell, 12 La. Ann. 746 (1857) (where defendant had erected screen to block view of bedchamber from his veranda to protect plaintiff's privacy, plaintiff could not complain of obstruction of light and view); Klein v. Gehrung, 25 Tex. 232 (1860) (no remedy when windows are built invading one's privacy than to build a wall); *but see* Turner v. Thompson, 58 Ga. 268 (1877) (obstructions designed to protect defendant's privacy in her garden must be torn down to supply necessary light and air to windows of plaintiff).

[60] *See* Guest v. Reynolds, 68 Ill. 478, 488 (1873) (explaining that American courts rejected English doctrine of easements of light and air because of rapid pace of building

the view from someone's windows, they could sue for violation of their easement of light and air.[61] Nuisance suits also referred to privacy concerns. One line of cases involved disputes over windows placed in party walls.[62] A party wall was a wall built half on a landowner's property, and half on the land owned by a neighbor as a means of fire prevention. Such a wall was considered a nuisance if windows were built into it.[63] In nineteenth-century America, a frequent complaint in such suits involved the violation of privacy.[64] Eavesdropping made up another type of nuisance also recognized by English common law.[65]

Another line of more typical nuisance cases mentioned privacy issues along with the more familiar complaints of noise, vibration, and dust.[66] These cases arose from the construction of railways and elevated railway platforms near residences where passengers could peer into the windows of houses.[67] Damages could be recovered for the diminution of the property's market value, and evidence concerning invasions of privacy could be used to

in American cities, and allowing that property owners may build screens blocking off light and air to protect their privacy).

[61] *See*, *e.g.*, Bury v. Pope, 78 Eng. Rep. 375 (Q.B. 1587) (the owner of land was held entitled to erect a house against his neighbor's windows even though they had enjoyed light for over 30 years).

[62] *See generally* Bartley v. Spaulding, 21 D.C. (1 Tuck. & Cl.) (1892) (where plaintiff sought an injunction requiring defendant to close windows in a party wall, claiming that the windows were an interference of her enjoyment and privacy in certain rooms of her house).

[63] *See* Vollmer's Appeal, 61 Pa. 118 (1869) (party wall with windows looking into a neighbor's property is a nuisance and can be enjoined by court of equity); Milne's Appeal, 81 Pa. 54 (1876); Pierce v. New Orleans, 18 La. Ann. 242 (1866) (affirming injunction requiring blocking of windows in party wall to protect the privacy of a residence).

[64] *See* DAVID FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND 89 (1972).

[65] *See id*. (describing the English common law crime of eavesdropping as listening "under walls or windows or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales"). Eavesdropping was considered to be a common law nuisance. 4 WILLIAM BLACKSTONE, COMMENTARIES *168. *See also* Katz v. United States, 389 U.S. 347, 366 (1967) (Black, J., dissenting) (stating eavesdropping was an ancient practice which at common law was condemned as a nuisance).

[66] *See, e.g.,* Swetland v. Curtiss Airports Corp., 55 F.2d 201, 202 (6th Cir. 1932) (defendant enjoined from permitting dust from the operation of an airport to fly or drift in substantial and annoying amounts over the plaintiff's property).

[67] *See e.g.,* Roman Catholic Church of St. Anthony v. Pennsylvania R.R. Co., 207 F. 897, 904 (3d Cir. 1913).

calculate damages.[68] In these cases, American courts followed English common law.[69]

Following Prosser's famous analysis, the growth of common law privacy torts during the early part of the twentieth century is often attributed to Brandeis and Warren's 1890 article.[70] Brandeis and Warren reportedly protested that the groundwork for the new privacy causes of action was already laid in the common law.[71] What they may take credit for, then, is the cautious steps that courts have taken to create new rights in privacy more independent of other property rights.[72]

The privacy torts that came into being during the twentieth century in many states[73] include: misappropriation of one's name and likeness for commercial purposes; public disclosure of embarrassing private facts; publicly placing the plaintiff in a false light, and intrusion into the plaintiff's seclusion.

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[68] *See, e.g.,* Lahr v. Metropolitan Elevated Ry. Co., 104 N.Y. 268 (1886) (recovery for nuisance may include recovery for loss of privacy); Fulton v. Short Route Ry. Transfer Co., 4 S.W. 332 (Ky. Ct. App. 1887) (speculation that damage to buildings and invasion of privacy may occur upon building of railway has adequate remedy at law and injunction in equity would not issue); Railway Co. v. Gardner, 13 N.E. 69 (Ohio 1887) (violation of privacy may be considered in calculating damages against railway); Story v. New York Elevated R.R. Co., 90 N.Y. 122 (1882) (construction of elevated railway is a taking of property and loss of privacy is part of damages); Shano v. Fifth Ave. & High St. Bridge Co., 42 A. 128 (Pa. 1898) (evidence as to invasion of privacy must be considered only as it tends to diminish market value of property); Moore v. New York Elevated Ry. Co., 29 N.E. 997 (N.Y. 1892) (stating there is no reason why defendants, who furnished the means and opportunity for persons to invade the privacy of plaintiff by constructing a railway station and platform, should not be responsible for the consequences of the loss of privacy as it depreciated the rental value of the rooms in the plaintiff's building).

[69] *See id*.

[70] *See* William Dean Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905); *see also* Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983) [hereinafter *Requiem*] "After the article appeared, courts and legislatures began to apply the label 'right to privacy' expansively to situations that bore little resemblance to those encompassed in the vague Warren-Brandeis formulation." *Id*. at 296.

[71] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 19 (1890).

[72] *See* Note, *supra* note 48, at 1893.

[73] Rhode Island, North Carolina, Texas, and Wisconsin have recognized neither common law nor statutory privacy claims. *See* Peter Gielniak, Comment, *Tipping the Scales: Courts Struggle to Strike a Balance Between the Public Disclosure of Private Facts Tort and the First Amendment*, 39 SANTA CLARA L. REV. 1217, n.2 (1999).

The false light tort creates a sort of property right in one's reputation and, as a number of commentators have noted, bears a resemblance to defamation.[74] It has little do to with privacy and more to do with reputation.[75] The information provided is presumably false and recovery is limited to cases where the representation is substantially inaccurate and the depiction offensive to the reasonable person.[76] Although the doctrines of false light and defamation are today distinguishable, false light may very well have originated with defamation.[77] In writing about defamation, Blackstone stated, "A second way of affecting a man's reputation is by printed or written libels, pictures, signs, and the like; which set him in an odious or ridiculous light, and thereby diminish his reputation."[78] Consistent with the rule that truth was not a defense to a charge of libel,[79] Blackstone's tort of "odious or ridiculous" light is a species of defamation to which truth is not a defense.[80] A privacy tort of "false light" is a species of defamation suit to which truth is a defense.[81] The eventual evolution of law recognizing only a tort of "false light" but not of "ridiculous" light parallels the evolution of defamation law recognizing truth as a defense.[82] The constitutional limits on the false light tort have paralleled those of libel law.[83] "False light" and defamation law continue on a similar course—narrower, not broader, than

[74] *See* Farley v. Evening Chronicle Publ'g Co., 87 S.W. 565 (Mo. Ct. App. 1905) (libel case speaking of picture placing plaintiff in a "false light"); Squires v. State, 45 S.W. 147 (Tex. Ct. App. 1898) (libel case speaking of placing plaintiff in "false light"); Stewart v. Swift Specific Co., 76 Ga. 280 (Ga. 1886) (holding that a fabricated story about a woman's afflictions resulting from cat bite was libelous).

[75] *See id*.

[76] *See* RESTATEMENT (SECOND) OF TORTS § 625E(a) (1977).

[77] *See supra* note 74.

[78] Blackstone, *supra* note 65, at *125.

[79] Defamation law originated with the canon law. Under canon law, truth was a defense to a libel charge. Truth was also a defense to the ancient English offense of spreading a lie about others. The Star Chamber rejected this tradition, and after the Chamber was abolished by the common law, truth was no longer a defense to the charge of libel in England, nor in America at the time the First Amendment was drafted. *See generally* Zimmerman, *Requiem*, *supra* note 70, at 307-08.

[80] *See id*.

[81] *See* Machleder v. Diaz, 801 F.2d 46, 53 (2d Cir. 1986).

[82] *See* J. Clark Kelso, *False Light Privacy: a Requiem*, 32 SANTA CLARA L. REV. 783, 835 (1992) ("Courts also have almost uniformly held that the same substantive defenses—both common law and constitutional—which apply to defamation actions also apply to false light claims.").

[83] *See* Time, Inc. v. Hill, 385 U.S. 374, 386-87 (1967); Susan M. Gilles, *All Truths Are Equal, But Are Some Truths More Equal Than Others?*, 41 CASE W. RES. L. REV. 725, 734 (1991).

nineteenth century interpretations. Some commentators have suggested that false light is a dying tort.[84]

The tort of intrusion upon seclusion resembles the nuisance suits brought in the nineteenth century to protest invasions of privacy and the common law of eavesdropping.[85] To succeed in a suit for intrusion into plaintiff's seclusion, one must show an intentional invasion, "physical or otherwise, upon the solitude or seclusion of another or upon his private affairs, or concerns . . . if the intrusion would be highly offensive to a reasonable person."[86] The plaintiff must have a reasonable expectation of privacy.[87] Intrusion suits rarely succeed if the information has been gathered in a public space.[88] In this sense, the modern expectations standards refer to their property-based ancestors.[89]

The misappropriation tort[90] and its descendant, the right of publicity tort,[91] create a new, but very limited property right in information about oneself.[92] Misappropriation cases began to arise in the latter part of the nineteenth and early part of the twentieth century when the likeness of private persons were incorporated without the person's consent into labels or advertisements for

[84] *See generally* Diane L. Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U. L. REV. 364 (1989) [hereinafter *False Light*].

[85] *See* Rhodes v. Graham, 37 S.W.2d 46 (Ky. 1931) (discussing how common law eavesdropping gives rise to a cause of action for invasion of privacy).

[86] RESTATEMENT (SECOND) OF TORTS § 652B (1977).

[87] *See* Sanders v. American Broad. Co., 60 Cal. Rptr. 2d 595 (Ct. App. 1997)..

[88] *See, e.g.*, Gill v. Hearst Publ'g Co., 253 P.2d 441, 444 (Cal. 1953) (photo not "surreptitiously snapped on private grounds, but rather was taken of plaintiffs in a pose voluntarily assumed in a public market place").

[89] *See* Dietemann v. Time, Inc. 449 F.2d 245 (9th Cir. 1971) (permitting recovery when pictures taken by guests entering home by subterfuge.); *cf.* Desnick v. American Broad. Co., 44 F.3d 1345, 1352-53 (7th Cir. 1995) (intrusion into an apartment); Miller v. National Broad. Co., 232 Cal. Rptr. 668, 681 (Ct. App. 1986); Doe v. B.P.S. Guard Servs., Inc., 945 F.2d 1422 (8th Cir. 1991) (changing areas); Kemp v. Block, 607 F. Supp. 1262 (D. Nev. 1985); PETA v. Berosini, Ltd., 895 P.2d 1269 (Nev. 1995) (videotape intrusion backstage at a performance).

[90] RESTATEMENT (SECOND) OF TORTS § 652C (1977).

[91] The "right of publicity" laws primarily serve sports figures and movie actors trying to ensure that they have a monopoly on the distribution and sale of their own images. *See id*. It is considered a close cousin of intellectual property law. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (holding that justifications include providing an economic incentive that promotes creative endeavor, and preventing unjust enrichment).

[92] *See* Matthews v. Wozencraft, 15 F.3d 432, 438 (5th Cir. 1994) ("The tort of misappropriation of name or likeness . . . creates property rights only where a failure to do so would result in excessive exploitation of its value.").

commercial products.[93] It is these cases that first discussed the Brandeis/Warren article, as well as early precedents, including English cases, that recognized individuals' property rights in the copies of certain images of themselves.[94] Misappropriation creates interests similar to those protected by trademark or intellectual property law, a property interest in one's own likeness or name.[95] Unlike the Brandeis/Warren article, however, misappropriation claims are effectively limited to the use of a name or image in product advertising.[96]

The tort of public disclosure of embarrassing facts comes closest, in theory, to embracing a broad view of property rights in personal privacy. But in practice, skeptical courts have curtailed it.[97] A plaintiff can recover for public disclosure of embarrassing private facts when another party publicizes a matter concerning his or her private life, provided the matter would be highly offensive to a reasonable person and is not of legitimate concern to the public.[98] Recovery is limited to cases where shockingly intimate information has been revealed.[99] The tort is often compared to that of intentional infliction of emotional distress, and the plaintiff may be required to meet the same high standard of proof to satisfy

[93] *See* Murray v. Gast Lithographic & Engraving Co., 28 N.Y.S. 271 (C.P. 1894) (holding that a man cannot enjoin the publication of a portrait of his child when he gave the portrait to his wife); Marks v. Jaffa, 26 N.Y.S. 908 (Sup. Ct. 1893) (recognizing that law and equity protect individual from publication of photo in newspaper without his consent); Atkinson v. John E. Doherty & Co., 80 N.W. 285 (Mich. 1899) (rejecting Warren & Brandeis analysis, holding that name of public figure could be used on line of cigars without his family's consent); Roberson v. Rochester Folding Box Co., 65 N.Y.S. 1109 (Sup. Ct. 1900) (holding that a girl may enjoin company from printing her picture on boxes of its product) [citing English cases], *overruled by* Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902) (1902).

[94] *See* Pavesich v. New England Life Ins. Co., 50 S.E. 68, 69 (Ga. 1905). This is the first case recognizing the right of misappropriation and invasion of privacy.

[95] *See, e.g.*, Page v. Something Weird Video, 960 F. Supp. 1438 (C.D. Cal. 1996); Hicks v. Ballantine Books, 464 F. Supp. 426 (S.D.N.Y 1978).

[96] *See* Abdul-Jabbar v. General Motors Corp., 75 F.3d 1391, 1398 (9th Cir. 1996); *Something Weird Video*, 960 F.Supp. at 1442.

[97] *See* Zimmerman, *Requiem*, *supra* note 70, at 362 (describing law of public disclosure as presenting "phantom tort cases [that] present facts dangerously near the edge of triviality based on an evil that judges believe is largely mythical"); Harry Kalven, Jr., *Privacy In Tort Law - Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 336 (1966).

[98] *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977).

[99] *See, e.g.*, Sidis v. F-R Pub. Co., 113 F.2d 806, 807-11 (2d Cir. 1940) (holding that although article written about plaintiff was "merciless in its dissection of intimate details" about his life, exposure did not reach the level of a tort).

constitutional constraints.[100] The Court recognized the First Amendment problems inherent in restricting the publication of truthful matter in *Cox Broadcasting Corp. v. Cohn*,[101] holding that the state could not constitutionally forbid a newspaper from publishing the name of a rape victim that was a matter of public record.[102] Again, the Court emphasized that in both privacy and libel cases, the information published must be false to be actionable.[103]

These miscellaneous torts have frequently come into conflict with the First Amendment, particularly when brought against the press.[104] The details of these conflicts have been addressed thoroughly by other commentators.[105] It is clear from the case law that there is a conflict between restrictions on the communication of even nonconsensual, personal and embarrassing information about individuals and free speech.[106] One commentator explains that privacy claims raise more serious First Amendment issues than defamation:

> [T]he statement that "Lawyer X has a secret drug addiction," could be the subject of both a libel action and a privacy action. The only distinction is that in the libel case the speech must be false and in the privacy case the speech could be true. How can the true speech at stake in the privacy case be of less constitutional concern than the

[100] *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (applying constitutional constraints developed in libel law to suit based on intentional infliction of emotional distress); *see also* Doe v. Methodist Hosp., 690 N.E.2d 681 (Ind. 1997).

[101] 420 U.S. 469 (1975).

[102] *See id*. at 491; Florida Star v. B.J.F., 491 U.S. 524, 533 (1989) (publication of truthful information about a matter of public significance cannot constitutionally be punished without a need to further a state interest of the highest order).

[103] *See id*. at 490 ("[W]here the interest claimed is privacy rather than reputation and the right claimed is to be free from the publication of false or misleading information about one's affairs, the target of the publication must prove knowing or reckless falsehood.").

[104] *See* Ross v. Midwest Communications, Inc., 870 F.2d 271 (5th Cir. 1989) (rejecting a rape victim's claim that documentary broadcast by a television station invaded her privacy); Machleder v. Diaz, 801 F.2d 46, 53 (2d Cir. 1986) (holding that plaintiff's own conduct was accurately captured by television camera so that false light claim against television networks must fail).

[105] *See* Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683 (1996).

[106] *See* Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765), 19 Howell's State Trials 1029 (1765).

same, but false, speech involved in the libel case?[107]

The privacy torts appear to be losing this conflict, as the common law privacy actions have been narrowed over the years.[108] The courts seem reluctant in assigning property rights to a difficult concept of privacy and in awarding damages for purely emotional injuries.[109] Plaintiffs rarely recover under these torts and many defendants are granted summary judgment.[110] Generally, companies that gather information about consumers for credit reports or mailing lists do not violate the invasion of privacy standards of liability.[111]

D. Recent Proposals to Regulate Speech in the Private Sector

Fear of new computer network technology, especially the Internet, combined with the development of databases that use this technology, provide a powerful and emotional impetus for the creation of new privacy rights which could potentially affect all media. Proposals to regulate the uses of information by private-sector companies have begun to proliferate in the states and in Congress.[112]

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[107] Gilles, *supra* note 83, at 736.

[108] *See* Diane L. Zimmerman, *Real People in Fiction: Cautionary Words About Troublesome Old Torts Poured Into New Jugs*, 51 BROOK. L. REV. 355, 374 (1985) (describing factors that limit privacy torts) [hereinafter *Real People*].

[109] *See id.* at 370 (discussing privacy claims brought against authors of fiction); Zimmerman, *Requiem*, *supra* note 70, at n.5 (finding fewer than 18 cases in which a plaintiff was actually awarded damages or found to have stated a cause of action sufficient to withstand a motion for summary judgment or to dismiss); Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 207 (1998) (citing study showing that from 1986-1996 defendants prevailed on summary judgment nearly 90 percent of the time).

[110] *See* Zimmerman, *Real People*, *supra* note 108, at 374 ("Most courts have . . . shown commendable hesitancy about allowing plaintiffs to prevail in actions involving the right of publicity claim, except when the use complained of is related to advertising or product marketing.").

[111] *See* Scott Shorr, Note, *Personal Information Contracts: How to Protect Privacy Without Violating the First Amendment*, 80 CORNELL L. REV. 1756 (1995) (describing failure of claims against credit bureaus).

[112] *See* Center for Democracy & Technology, *Privacy 106th Congress: Summary of Major Consumer Internet Privacy Bills in the 106th Congress* (Nov. 6, 2000), *available at* http://www.cdt.org/legislation/106th/privacy/. Privacy Journal, The Latest from PJ: A Ranking of States in Privacy Protection (1997) *available at* http://www.townonline.koz.com.

These proposals seek to establish one or more of the following requirements: (a) disclosure - notice to the consumer describing how information will be used or transferred to third parties;[113] (b) "opt-out" – providing an opportunity for the consumer to choose not to have his information used or transferred to third parties (currently, consumers have the right to "opt-out" of list sales, though only a minority exercise it);[114] (c) "opt-in" - an alternative to "opt-out", under which the consumer's information may be used only with his express consent;[115] (d) access - a requirement that the business provide the customer with the information it holds about the consumer upon request, and provide an opportunity for errors to be corrected.[116]

One model for current domestic regulatory proposals is the European Union's Data Protection Directive. The basic ground rules for privacy for members of the EU are laid down in the EU Data Protection Directive (95/46/ED).[117] The Data Protection Directive applies to both electronic and old-fashioned paper filing systems.[118] The data covered by the directive are information about an individual that somehow identifies the individual, either by name or otherwise.[119] Each national government has the authority to implement the directive in its own way.[120]

The Data Protection Directive begins by laying down basic privacy principles, starting with the idea that information should be collected for specific, legitimate purposes only, and stored in

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[113] *See* UNITED STATES FEDERAL TRADE COMMISSION. BUREAU OF CONSUMER PROTECTION, PRIVACY ONLINE: A REPORT TO CONGRESS §III(A)(1) (June 1998), *available at* http://www.ftc.gov/reports/privacy3/index.htm.

[114] Information Infrastructure Policy Committee, Draft for Public Comment: Option for Promoting Privacy on the National Information Infrastructure, at 46 (April 1997).

[115] PRIVACY ONLINE § III(A)(2).

[116] PRIVACY ONLINE § III(A)(3).

[117] Council Directive 95/46/EC, 1995 O.J. (L 281) 31.

[118] *Id*. art. 3, §1 at 39 ("This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.").

[119] *Id*. art. 2 at 38.

> 'Personal Data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural, or social identity.

See id.

[120] *Id*. ch. II, art. 5 at 39.

individually identifiable form no longer than necessary.[121] The directive goes on to create specific rights for the person the information concerns - the "data subject."[122] The entity collecting the information must give the data subject notice explaining who is collecting the data, who will ultimately have access to it, and why the data is being collected.[123] The data subject also is given the right to access and correct the data. Financial data is not treated in any special way.[124]

The rules are stricter for companies that want to use data in direct marketing or to transfer the data for other companies to use in direct marketing.[125] The data subject must be explicitly informed of these plans and given the chance to object.[126] Stricter rules also govern sensitive information relating to racial and ethnic background, political affiliation, religious or philosophical beliefs, trade-union membership, sexual preferences, and health.[127] To collect this information the data subject must give explicit consent.[128] The law does, however, admit several exceptions, including exemptions for employment contracts, non-profits, and the legal system.[129]

Musing over the principles laid down by the directive - the idea that one has the right to notice and consent to the use of information about oneself, and to access and correct this information - one might well ask whether how such broad principles can be reconciled with many vital or convenient human activities. Indeed, they cannot be. Thus, the directive has become riddled with exceptions.[130]

There is an exemption for data kept for personal and household use, so that one may keep an address book with the names of college friends and distant uncles.[131] Synagogues, trade unions,

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[121] *Id*. ch. II, art. 6(b), (d), (e) at 40.
[122] *Id*. ch. II, § IV at 41-42.
[123] Council Directive 95/46/EC, 1995 O.J. (L 281), ch. II, § IV, art. 10 at 41.
[124] *Id*. ch. II, § IV, art. 10(c) at 41.
[125] *Id*. ch. II, § VII, art. 14(b) at 43.
[126] *Id*.
[127] *Id*. ch. II, § III, art. 8(1) at 40.
[128] *Id*. ch. II, § III, art. 8(2)(a) at 40.
[129] Council Directive 95/46/EC, 1995 O.J. (L 281), ch. II, § III, art. 8(2)(b), (d), (e) at 40-41.
[130] *See*, *e.g.*, *id*. ch. II, § VI, art. 13 at 42.
[131] *Id*. ch. I, art. 3(2) at 39.

churches, and other non-profits are permitted to keep even sensitive information about their members.[132] National governments may exempt journalists from provisions of the directive when, in the government's view, the interest in free speech outweighs privacy interests.[133] Finally, governments conveniently exempt themselves from the directive when it comes to the state's own monetary or financial interests (e.g. taxation) or criminal matters.[134]

Within the United States, as of this writing, 35 privacy bills are pending in 22 states, many of which would adopt a restrictive "opt-in" approach.[135] One example is S. 129 (1999), repeatedly introduced in California by Senator Peace, and modeled upon the European approach.[136] The California bill would mandate that companies implement "opt-in" notices for the collection, storage, and use of information for marketing purposes.[137] A New York bill, S.B. 691/A.B. 696 (1999), would also establish "opt-in" for sharing information with third parties, as would H.B. 5962 (1998) in Michigan.[138]

Congress has also been drawn to the privacy issue, particularly in connection with privacy on the Internet.[139] Users familiar with the Internet are likely to be aware that part of the way the Internet operates is by the ceaseless exchange of information between nodes and machines, and of the routine practice of electronic merchants in deploying cookies.[140] But this effortless information sharing is invisible to new-users and may startle them when they first become aware of it.[141]

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[132] *Id*. ch. III, art. 8(2) at 40-41.

[133] *Id*. ch. II, § II, art. 7(f) at 40.

[134] *Id*. ch. I, art. 3(2) at 39.

[135] An "opt-in" requirement would force businesses to receive consumer consent before their personal financial information could be sold or used for marketing purposes. *See* Rob Garver, *Trade Group Coalition Draws Up Battle Plan Against Privacy Laws*, THE AM. BANKER, March 3, 2000, at 2. *See generally Privacy Legislation in the States: 1999 Trends*, PRIVACY AND AM. BUS. SPECIAL ISSUE, Sept./Oct. 1999 at 1, 3.

[136] S.B. 129 (2000), WL 2000 Cal. Legis. Serv. Ch. 984.

[137] *See* Catherine G. Gillespie, *Legal Affairs: States Take the Lead in Privacy*, CREDIT CARD MGMT., March 1999.

[138] *See id*.

[139] *See, e.g.*, Data Privacy Act of 1997, H.R. 2368, 105th Cong. (1997).

[140] *See American Survey: We Know You're Reading This*, ECONOMIST, Feb. 10, 1996, at 27; *see also Virtual Privacy*, ECONOMIST, Feb. 10, 1996, at 16.

[141] *See Customers Weary About Providing Information Online*, ELEC. COMMERCE NEWS, May 1, 2000.

The recent publicity regarding DoubleClick's decision to change its privacy policy, which at one time was not to link real-world data with Internet-based data gathered through cookies, raised some interesting common-law questions.[142] However, it cannot be the law that a privacy policy can never be changed. Such a policy would simply make companies far more hesitant to adopt privacy policies in the first place. DoubleClick's newly announced practice of linking "cookie" information to real world data was unlikely to result in anything worse than more informed sales practices on the part of their client companies. This is hardly a threat to anyone, even if DoubleClick was not planning to provide opportunities to "opt-out" (as they had announced they were). Judging by the reactions of privacy advocates, however,[143] one would think that DoubleClick was torturing puppies or demolishing old-growth forest. The furor was unfortunate and strongly indicative of the sensationalism and lack of proportion typical in the rush to privacy regulation. A strong regulatory reaction threatens to stifle the freely evolving, seamless communications technology that has been the core strength of the Internet.[144] Such a response came in mid-2000 from the FTC in its proposal to ask Congress for broad privacy regulation for the Internet.[145]

Today a number of bills are pending in Congress to regulate Internet privacy, these include bills proposed by Senator Leahy (D-Vt.), S. 854, by Representative Markey (D-Mass.), H.R. 3321, by Representative Vento (D-Minn.), H.R. 2882, and by Representative Frelinghuysen (R-N.J.), H.R. 3560.[146] Senator

[142] *See generally Privacy Protections for Consumers*, *Congressional Testimony by Federal Document Clearing House*, 2000 WL 23833559 (Oct. 11, 2000) (prepared statement of Andrew Shen, Policy Analyst, Electronic Privacy Information Center). DoubleClick proposed to create detailed profiles on Internet users. The company came under fire for linking personal information such as a name and address to online profiles - records of what Internet consumers were doing online.

[143] *See, e.g.*, Chris O'Brien, *Lawsuit Against On-Line Ad Firm Raises New Questions On Privacy; Some Wonder Whether Policies Can be Trusted*, CHI. TRIB., Feb. 7, 2000, at C13.

[144] *See generally* Shane Ham and Robert D. Atkinson, *DoubleClick and Online Privacy: The Risks of Overreaction*, PROGRESSIVE POL'Y INST. BACKGROUNDER, Mar. 2000 (on file with author).

[145] *See* Claudia Willen, *FTC Changes Its Tune (Gov't. Activity)*, 3 INTELLIGENT ENTER. 11, July 17, 2000.

[146] *See 'Lot of Steam' For Online Privacy Legislation On Hill*, COMMUNICATIONS DAILY, Mar. 7, 2000.

Conrad Burns (R-Mont.) introduced S. 809, which would require web sites to give notice, consent, and access before data about online consumers could be used, with several exemptions, such as those for transactional data (defined as information necessary for using the Internet) and personal data related to legitimate business activities (such as answering a customer's email).[147] Another bill, H.R. 1685 was introduced by Representative Rick Boucher (D-Va.).[148] This bill's privacy provisions simply require detailed notice of the uses of personally identifiable information collected online.[149]

The typical features of proposed privacy regulation permit businesses to learn about their customers only under constraining circumstances.[150] Because of low response rates, "opt-in", in particular, represents close to an effective ban on business' ability to communicate truthful information about real events in which the business was involved to other businesses or third parties.[151] In *U.S. West v. FCC*,[152] the Tenth Circuit considered a challenge to a Federal Communications Commission rule that established an "opt-in" requirement for the telephone company's use of 'customers' proprietary network information" ("CPNI").[153] The companies would be required to obtain explicit consent from a customer before the company could use his or her information for marketing.[154] The court found that the rule restricted speech, rejecting the government's argument that the telephone companies remained free to contact customers using non-targeted methods.[155] The court described several cases that struck down regulations of direct solicitation of customers, and concluded that the existence of non-targeted alternatives was not a substitute for restricted speech.[156] The court reasoned that this was because the First Amendment protects the right to receive speech, not just the right

147 *See id*.
148 *See* Shira Levine, *Following the Flow*, AMERICA'S NETWORK, October 1, 2000.
149 *See id*.
150 *See* Jessica Litman, *Cyberspace and Privacy: A New Legal Paradigm? Information Privacy/Information Property*, 52 STAN. L. REV. 1283 (2000).
151 *See* U.S. West, Inc. v. FCC, 182 F.3d 1224, 1232 (10th Cir. 1999).
152 182 F.3d 1224 (10th Cir. 1999).
153 *See* Dana Grantham Lennox, *Hello, Is Anybody Home? Deregulation, Discombobulation, and the Decision in U.S. West v. FCC*, 34 GA. L. REV. 1645 (2000).
154 *See id*.
155 *See id*.
156 *See id*.

to speak.[157] The court in *U.S. West* concluded that the "opt-in" regime did not amount to an outright ban on speech so it was not subject to the enhanced scrutiny of outright bans on commercial speech that the Supreme Court had developed in *44 Liquormart*.[158]

While the latter conclusion is consistent with the existing case law, it does not make very much sense. This points to a problem with the court's commercial speech analysis. Why does a regulation that restricts speech in *most* cases get less constitutional scrutiny than one that restricts it in *all* cases? Arguably, the former is more narrowly tailored and more likely to pass any test - but why a *different* test? The fact that some speech is allowed does not at all seem relevant to the question of the constitutionality of the restrictions on the speech that is not allowed. The content of targeted speech is likely to be quite different from speech broadcast to the masses and the latter cannot therefore possibly be a near substitute for the former. The commercial speech doctrine thus seems to be out of sync with holdings in other areas of First Amendment law.[159] Perhaps this is related to the mysterious reasoning in some cases that commercial speech is hard to chill because it is for-profit,[160] reasoning that would apply equally well to newspapers and books. But, "opt-in" does not merely "chill" speech, it outright prevents it in most cases because of the costs of compliance and the risks of liability.[161]

Even a law requiring disclosure alone can amount to a ban of exchanges of information that could not be foreseen by the business at the time of the initial transaction. Europe's experience shows us that the total effect of such regulations is a reduction in the amount and quality of information that has flowed freely in the shared domain between businesses and consumers, or the prevention of the growth of such libraries altogether.[162] The

[157] *See U.S. West*, F.3d at 1232.

[158] *See id*. at 1234, n. 5 (discussing 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 495 (1996)). "Indeed, the telecommunications carriers may utilize a multitude of communication channels to say whatever they want to their customers." *See id*.

[159] Louise L. Hill, *Lawyer Communications on the Internet: Beginning the Millennium with Disparate Standards*, 75 WASH. L. REV. 785, 816 (2000).

[160] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1973); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1975).

[161] *See*, *e.g.*, *Banks Stand to Lose Income from New Data Protections*, CREDIT RISK MGMT. REPORT, February 23, 2000.

[162] *See* Joel R. Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, 52 STAN. L. REV. 1315 (2000).

consumer is given a unique veto power over another's ability to learn about him or her, a power that cannot be granted without diminishing the freedom of others. Because we do not own information about ourselves as a general rule, this veto power represents a drastic upheaval in the normal rules of human society. Like a sudden broadening of privacy torts, copyright law, or trademark law, most proposed regulation shrinks the public domain. This conflict is seen between the expansion of copyright law or trademark law[163] and free speech, but privacy law does not have the constitutional sanction that intellectual property law does.[164]

II. WHO OWNS INFORMATION? FREE SPEECH VS. PRIVACY

This part addresses the conflict between privacy and free speech from a philosophical perspective rather than from a litigator's perspective. At the constitutional level, the conflict between privacy and free speech appears to be yet another balancing question. Because the rights of free speech and privacy are equally important, our legal system must somehow provide for both.

Many issues call for balancing, however, what is called for here is compromise. One cannot balance a contradiction. Moreover, if one of the asserted interests in the balance is incoherent, it ought not to be weighed in the balance at all. The purpose of this part, therefore, is to explore the logic of privacy in great detail, to determine exactly what rights are being asserted and how they conflict with rights of free speech.

A. The "I Own Information About Myself" Argument

Privacy is often defined as the right of the subject of the information to control how the information is used and whether it

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[163] *See, e.g.*, Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158 (1982) (arguing that since misappropriation and dilution theories of trademark infringement may protect holders where no consumer confusion exists, application of these theories may implicate First Amendment concerns, especially when the challenged use is solely to communicate ideas); Robert J. Shaughnessy, Note, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 VA. L. REV. 1079 (1986).

[164] U.S. CONST., art. I, § 8, cl. 8.

is to be communicated to third parties.[165] Privacy advocates assert that people have a general right to control the use of information about themselves.[166] This implies that anyone wishing to transfer or collect almost any kind of information should first get the permission of the person whom the information concerns.[167] This is sometimes described as a "right to own information about oneself."[168] For those who shy away from property rights language, this might simply be expressed as a right to "control" information about oneself. Under this view, privacy is an "assignable right."[169]

This idea is familiar in medical and legal ethics and perhaps in other special professional relationships.[170] In these relationships the expectation makes sense. The legal and medical professions understand that clients and patients will not confide in them without the right of confidentiality.[171] Even if this right did not exist by statute, it is implicit in the agreements under which a doctor treats his patient[172] or the lawyer counsels his client.[173] This

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[165] *See* Oscar M. Ruebhausen & Orville G. Brim, Jr., *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1189 (1965) (defining privacy as "the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, behavior, and opinions are to be shared with or withheld from others"); Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968) (describing informational control as an aspect of personal liberty); ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967) ("Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.").

[166] *See supra* note 165 and accompanying text.

[167] *See, e.g.*, Andrew L. Shapiro, *Privacy for Sale: Peddling Data on the Internet*, THE NATION, June 23, 1997, at 11.

[168] *See* Ram Avrahami, *Privacy Petition-Background Information*, Feb. 1997, at 2 (on file with the author).

[169] *See* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 168-69 (1993).

[170] *See* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 410 (4th ed.1994).

> Rights to privacy are valid claims against unauthorized access that have their basis in the right to authorize or decline access. These rights are justified by rights of autonomous choice . . . expressed in the principle of respect for autonomy. In this respect, the justification of the right to privacy is parallel to the justification of the right to give an informed consent . . . .

See id. Beuchamp and Childress define privacy as "a state or condition of physical or informational inaccessibility." *See id*. at 407.

[171] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.6 comment. (1983). *See also* AMERICAN MED. ASS'N, CODE OF MEDICAL ETHICS, E-505 Confidentiality, *available at* www.ama-assn.org/ama/pub/category/2503.html (last visited Nov. 27, 2000).

[172] *See, e.g.*, DeMay v. Roberts, 9 N.W. 146 (Mich. 1881); Horne v. Patton, 287 So. 2d 824 (Ala. 1973) (doctor-patient relationship entails obligation of confidentiality);

understanding is informed by decades or even centuries of custom.[174]

The individual's right to control information is far from implicit in other human relationships, such as ordinary business relationships. To the contrary, humanity's established freedoms have always included, with narrow exceptions, the right of human beings to learn about one another. In the course of a single day, individuals process an enormous amount of information about the people they encounter, such as their age and appearance, their manner of speaking and dressing, and their actions and preferences. Generally, people do not feel obligated to ask for anyone's permission before relaying the information they have collected to a third party, however embarrassing the subject of the information might be.

This default rule enables the practice of journalism. Journalists have no general obligation to get permission before writing a story about another's activities, even though the story and the details that they report may be very personal or sold for commercial value.[175] Journalists often use information available over computer networks to develop and track important news stories. While a newspaper may be penalized if the information it publishes violates copyright laws, is defamatory, or violates other common law rights, these exceptions are very narrow and themselves often collide with First Amendment rights of free speech.[176] Thus, no general consent

Geisberger v. Willuhn, 390 N.E.2d 945 (Ill. Ct. App. 1979) (statutory right equated with contract right); McDonald v. Clinger, 482 A.D.2d 482 (N.Y. App. Div. 1982) (tort and contract liability theories against doctor); Peterson v. Idaho First Nat'l Bank, 367 P.2d 284 (Idaho 1961) (implied duty of confidentiality exists between bank and client).

[173] *See* Taylor v. Blacklow, 132 Eng. Rep. 401 (K.B. 1836); In re Boone, 83 F. 944, 952-57 (C.C.N.D. Cal. 1897) (describing duties of attorney to client at common law).

[174] *See In re Boone*, 83 F. at 953 (stating that the rule of confidentiality needs no positive enactment because it "springs from the very nature and necessities" of the attorney-client relationship).

[175] *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) (newspaper may publish rape victim's name once it is a matter of public record); Time, Inc. v. Hill, 385 U.S. 374 (1967) (magazine cannot be liable for inaccurate portrayal of an individual's private life unless the plaintiff establishes knowing or reckless falsehood); Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979) (state law punishing truthful publication of the names of juvenile offenders violates First Amendment).

[176] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (newspaper may be held liable for defamatory statement against public official only if plaintiff proves the statement was made with "actual malice"); Harper & Row, Publishers, Inc. v. National Enterprises, 471 U.S. 539 (1985) (magazine's right to publish extensive quotations from leaked manuscript in violation of copyright law not protected by First Amendment).

requirement applies to journalists.[177]

This requires us to consider the details of exactly what it means to assert a right to control information about oneself. Assume that a given individual, Grendel, is very ugly, and wishes to conceal that information from others. As long as Grendel remains at home behind closed doors, that information remains with him. It is shielded from others partly by his property rights because the public does not have the right to march up to his window and peer in on him. It is also shielded partly by technology because Grendel has installed the protection of window blinds. In this sense, the information is entangled with Grendel's property and no one in the private sector has the right to wrest it from him.

As soon as Grendel steps into the presence of other people, or invites people into his home, they will make observations about him that are in no sense *his* property. He has disclosed his appearance to them. Perhaps stated more accurately, they have used their eyes, ears, and other senses to *create* their own information about him. This information exists in the form of thoughts and sense impressions in their minds. It is conceptually very difficult to imagine Grendel having a right to control a thought in someone else's mind, even when that thought may later become an observation in a notebook, a comment to a coworker, or an email to a company.

Furthermore, it is difficult to imagine how the legal community would deal with a new set of rights that broadly reassigns the right to control the flow of information from the perceivers of that information to the subjects of the information. Possession and control of this type of information would generally be in different hands, a situation likely to yield endless disputes and extreme challenges for enforcement.

One might argue, in response, that when Grendel left his house, he implicitly consented to giving up his right to information concerning himself to the public. It may also be argued that explicit consent should be required for any information transfer, other than information learned through casual viewing in a public place. This argument is interesting but problematic. It is difficult

[177] *See* Cox Broad. Corp. v. Cohn, 420 U.S. at 491 (noting that without the information provided by the press, people would be unable to vote intelligently or register opinions on the government).

to uncover what the concept of consent means in these circumstances, because it is hard to conceive of consent to relay information learned through casual viewing being withdrawn. If the public is observing Grendel only on Grendel's terms, could Grendel march out into the street waving a sign saying, "If you look at me, you may not repeat the observation that I am ugly to anyone else" and make this legally binding on anybody? One would think not. Grendel's consent or lack thereof is not relevant. His entry into others' spheres of observation simply becomes an occasion for them to learn things about him. This is part of the nature of the world, a default rule of human interactions, and not something to which we consent to.

There is no reason to believe that business transactions take place under a fundamentally different set of default rules. They too are human interactions. For example, if one purchases a lawnmower from Sears, the sale of the lawnmower is an actual event involving a real person. The opinion that information, such as the purchaser's name, address, and buying habits should not be recorded and transferred without his consent conflicts with the default rule that facts and ideas, including our names and addresses, remain free for all to collect and exchange.[178] While it is possible for both parties to the transaction to agree to a different set of rules governing that information, unless an explicit arrangement has been arrived at, there is no reason for either party to suppose that something other than the ordinary default rules permitting disclosure are operating.

It may also be argued that information learned about consumers in the course of a transaction is different in the commercial context because the information has monetary value. Generally, however, that value is determined by how the business collecting the data, aggregates, and analyzes it. The consumer's name, address and so on have little or no value except in connection with the other names in the collection.

It is relevant to compare intellectual property law with the idea that people own information about themselves. Copyright law protects only the author's original expression (her choice of words,

[178] *See generally U.S. West*, 162 F.3d at 1232 (holding that a law which prevents a merchant from communicating with or targeting customers, or limits anything that might be said to them is an unconstitutional restriction on free speech).

phrases, and sentences), not the facts and ideas that she expresses.[179] One may not copyright the historical facts of the battle at Verdun; likewise, one may not copyright the fact that he or she bought a lawnmower from Sears.[180] Patent law is also limited. It creates a property right in ideas, but only in certain new ideas within a narrow technical sphere.[181] Both copyright and patent laws are thus much narrower than the proposed right to own information about oneself.

B. Do New Databases Cross an Invisible Line?

There is an obvious similarity between information collected in databases about consumers and the information people exchange regularly with one another informally. With the inclusion of large amounts of data in modern databases, each additional factoid may be fairly trivial and harmless when taken by itself, but may be disturbing to some when taken together. This leads us to ask the question: Is commercial tracking essentially different from gossip? The question does more than set up a potentially informative analogy. It is another way of pointing out that the default rule for information exchanges in human society heavily favors the free exchange of information. Why change the rule now? Gossip may be despised, but it is not illegal.

Oral or email gossip and the collection of transactional data in the commercial sector are the same in several vital respects. Both reflect the same general default rule about the freedom of information. In addition, both exchange information about reputation, behavior, and trustworthiness, which are very important in human society.

Anthropologists observe that gossip holds communities together.[182] Gossip is defined as "informal, private

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[179] *See* 17 U.S.C. § 102 (1994).

[180] *See* Feist Publications Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) ("No matter how original the format . . . the facts themselves do not become original through association.").

[181] *See* 35 U.S.C.S. § 101 (1994) (The Act states, in part, that "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the condition and requirements of this title.").

[182] *See* Sally Engle Merry, *Rethinking Gossip and Scandal*, *in* REPUTATION: STUDIES IN THE VOLUNTARY ELICITATION OF GOOD CONDUCT, at 50 (Daniel B. Klein, ed. 1997).

communications between an individual and a small, selected audience concerning the conduct of absent persons or events."[183] In non-literate societies, gossip can be an important means of storing community history.[184] Thus, gossip serves both a social and an economic function.[185] After reviewing evidence on the function of gossip in ancient and modern communities, Professor Diane Zimmerman concludes that:

> [t]he privacy literature . . . has rarely acknowledged a . . . body of evidence, casting doubt on the preeminent value of privacy and suggest that the communication of information about such personal matters may serve a successful and productive social function. . . History, religious doctrines, literature, and the social sciences are replete with examples that suggest our society is at least ambivalent about the weight to assign to interests in personal privacy when they compete with the value of truthfulness about the character and activities of our neighbors.[186]

Gossip and other informal personal contacts serve an important function in advanced economies. In Nineteenth Century America, entrepreneurs would increase their sales by acquiring information about their customers. Customers relied on their neighborhood banker, whom they knew since childhood, to grant them credit. They would return again and again to the same stores for personalized service.

Today, however, most residents of the United States can escape neighborhood gossip by moving to larger cities. Many business exchanges occur between strangers who will never meet again. This anonymity has many benefits, as "formal freedoms and growing wealth allow people to flee the oppressive constraints of family, local community, or figures of petty authority, for the anonymity—and anomie?—of life in large metropolitan areas."[187] Such anonymity also has disadvantages, as noted by Adam Smith:

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[183] *See id*.
[184] *See id*.
[185] *See id*. at 54.
[186] Zimmerman, *Requiem*, *supra* note 70, at 326.
[187] Jeremy Shearmur & Daniel B. Klein, *Good Conduct in the Great Society: Adam Smith and the Role of Reputation*, *in* REPUTATION: STUDIES IN THE VOLUNTARY ELICITATION OF GOOD CONDUCT at 29 (Daniel B. Klein, ed. 1997).

> While a man . . . remains in a country village his conduct may be attended to, and he may be obliged to attend to it himself . . . . But as soon as he comes to a great city, he is sunk in obscurity and darkness. His conduct is observed and attended to by nobody, and he is therefore likely to neglect it himself, and to abandon himself to every low profligacy and vice.[188]

In large anonymous environments, where strangers deal with strangers, informal gossip networks can break down. The growth of modern popular journalism (despised by Brandeis and Warren) developed simultaneously with the destruction of many private networks through urbanization.[189] However, city dwellers have actively sought to keep such private networks going, and sociologists have noted that the free exchange of personal information continues to play a key social role in modern society.[190]

Meanwhile, economic actors must develop new mechanisms of relaying information to each other about fraud, trust, and behavior of potential customers. Towards the end of the Nineteenth Century and throughout the Twentieth Century, formal credit reporting began to evolve out of gossip networks.[191] Dun & Bradstreet, which reports on the creditworthiness of businesses, originated with Lewis Tappan.[192] Tappan managed credit accounts in his brother's silk business and exchanged letters with 180 correspondents throughout the country about the creditworthiness of businesses in their communities.[193] Forty years ago, community-based nonprofit organizations handled consumer credit reporting.[194] Three nationwide for-profit firms now handle this.[195] Today, retailers continue to struggle with the problem of providing personalized service, controlling inventory, and dealing with fraud in a more mobile world with fewer "regular" customers. The

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[188] *Id.* at 34.

[189] *See* Zimmerman, *Requiem*, *supra* note 70, at 333.

[190] *See id*., at 333-34.

[191] *See* Daniel B. Klein, *Knowledge, Reputation, and Trust by Voluntary Means*, *in* REPUTATION: STUDIES IN THE VOLUNTARY ELICITATION OF GOOD CONDUCT, at 7 (Daniel B. Klein, ed. 1997).

[192] *See id*.

[193] *See id*.

[194] *See id*.

[195] *See id*.

advent of the Internet has turned this struggle into a crisis.

An Internet merchant is in the position of a blindfolded shopkeeper. Her ears are also blocked as she can not respond to comments customers make about her display. She does not know whether customers look like shoplifters. She cannot guess whether the customer is a local or a tourist, a one-time visitor or a regular, or a businessman or a housewife. She does not know the nationality, age or gender of the customer. Online, strangers are dealing with ever more distant strangers. The collection of data using "cookies" and other devices has become part of the way the Internet works as a natural substitute for the incredible array of information we get through gossip, face-to-face encounters,[196] and traditional, not-very-detailed compilations of public records.

The equivalence of gossip and consumer databases suggests that there is no need to treat the evolution of databases as a crisis. Those who argue for a new legal regime for privacy, however, view new uses of information as having crossed an "invisible line" between permissible gossip and violative information collection.[197] While the use of new technology to collect information may make people uneasy, is there any reason to suppose that any harm that might result will amount to greater harm than the harm that could come from being a victim of vicious gossip?

Advocates of the creation of new privacy rights argue that the compilation of data about consumers does more damage than gossip because it takes place on a larger scale.[198] Brandeis and Warren argued that "as long as gossip was oral . . . [one's] peace and comfort were . . . slightly affected by it."[199] The same view is echoed today:

> Twenty years ago, say, the local butcher might know that Mrs. Jones bought a ham every Saturday. That was, in a sense, public information. Yet it was not widely available. Perhaps the butcher let the mustard merchant know about Mrs. Jones; but there was no easy way for

[196] *See generally* JONATHAN COLE, ABOUT FACE (1998) (describing research and interviews explaining how humans exchange information through facial expressions).

[197] *See generally Virtual Privacy*, *supra* note 140, at 16.

[198] *See id*.

[199] E. L. Godkin, *The Rights of the Citizen: To his Reputation*, SCRIBNER'S MAGAZINE, July 1890, at 66, *quoted in* Warren & Brandeis, *supra* note 44, at 217 n. 4..

> just anybody, out of idle curiosity or for any other reason, to find out. This is changing.[200]

Another new privacy advocate adds that, "new retail distribution of sensitive personal information to the public at large increases the social risk of exposing previously private information to friends, colleagues and enemies."[201]

But consumer databases cannot be meaningfully distinguished from gossip on the grounds that gossip causes *no* harm because it is less widely distributed. Historically, gossip exchanged within small communities could cause terrible harm, because public commentary within those communities had powerful influence over others' lives.[202] One anthropologist notes that in an isolated Spanish village, "[p]eople live very close to one another under conditions which make privacy difficult. Every event is regarded as common property and is commented upon endlessly . . . . People are virtuous for fear of what will be said."[203]

Returning to the butcher example, if buying ham were considered controversial within Mrs. Jones' religious community, her reputation could suffer great damage. "When individuals are dependent on one another for cooperative hunting, farming, herding, or for access to wage labor, gossip and the reputations it creates can have serious economic consequences."[204] Without a good reputation, a participant in a medieval community could not serve as a witness or plaintiff in a legal proceeding.[205] In feudal society, one's right to hold land depended upon one's reputation for faithfulness.[206] Under Roman law, an individual's rights as a citizen could be lost if the individual gained a reputation for bad moral conduct.[207]

The collection of consumer information on a larger scale in a butcher's database actually is *less* likely to have a harmful impact on Mrs. Jones' life than gossip. The few people who have access to the information on the database will not particularly care about

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200 *Virtual Privacy*, *supra* note 140, at 16.
201 Avrahami, *supra* note 168, at 4.
202 *See* Merry, *supra* note 182, at 47.
203 *See id*. (quoting a study of an Andalusian town).
204 *Id*. at 59.
205 *See* Zimmerman, *Requiem*, *supra* note 70, at 327-28.
206 *See id*. at 328.
207 *See id*.

Mrs. Jones or have any power over her, especially if Mrs. Jones is a typical resident of a large, anonymous urban community.

Furthermore, commercial compilations of data about consumers are likely to be much more accurate than gossip. Companies in the business of collecting and selling consumer information, whether it relates to purchasing habits or credit history, have an incentive to sell correct and accurate information. Those who maintain commercial databases also have a concrete profit incentive to get the details right. Admittedly, errors do occur at times. Many complaints about private databases surface when people find errors in their credit reports.[208] But the evidence suggests that, on the whole, rates of error in credit reports are low.[209] Two highly publicized, yet biased, studies misleadingly report high rates of error in credit reporting (from 30 to 50 percent).[210] A 1991 study by Consumers Union relied on its own employees and their acquaintances to review their own credit reports and report inaccuracies.[211] Consumers Union did not check whether those claims of inaccuracy were true or false or try to identify the source of the errors.[212] The Public Interest Research Group ("PIRG") also failed to select a random sample in their study.[213] The PIRG estimated an error rate from a sample of consumers who had reason to suspect that errors were present and who paid to have their credit reports reviewed.[214] A more rigorous study of 15,703 consumers, conducted by Arthur Anderson & Co., showed that the true error rate for non-trivial errors is probably as low as one to three percent.[215]

Finally, databases of information about consumers tend to be more impersonal and protective of consumer privacy than gossip.

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[208] *See* Daniel B. Klein & Jason Richner, *In Defense of the Credit Bureau*, 12 CATO JOURNAL 393, 402-07 (1992) (discussing Consumers Union Study "What Are They Saying About Me?," Apr. 29, 1991); Edmund Mierzwinski, *Nightmare on Credit Street or How the Credit Bureau Ruined My Life*, REPORT, UNITED STATES PUBLIC INTEREST RESEARCH GROUP, June 6, 1991.

[209] *See* Klein, *supra* note 208, at 403-04.

[210] *See id.*

[211] *See id*.

[212] *See id*.

[213] *See id*.

[214] *See id*. at 405-07. The PIRG study also failed to identify the source of the errors, and reported anecdotes featuring consumers' unconfirmed assertions that their reports contained errors. *See* Mierzwinski, *supra* note 208.

[215] *See* Klein, *supra* note 208, at 407-08.

Companies that collect information about consumers carefully protect that information from competitors in order to preserve their investment . These measures also preserve consumer privacy. For example, when the company sells the use of its list to a direct marketer, it often does so through a third-party "fulfillment house." The fulfillment house compiles lists, creates mailing labels, and attaches those labels to be sent in the mail. The marketer does not even see the list or the labels, let alone the information in the files. To preserve its reputation, the fulfillment house must protect the company's list from disclosure. Companies enforce this by "seeding" the lists with dummy entries, usually fake names and real addresses. If those addresses begin to get mail from competitors, the company knows that the fulfillment house has betrayed the secrecy of its list.[216]

To summarize, databases of consumer information are likely to be substantially less harmful than gossip. These databases have also welcomed benefits, such as lower prices and better consumer services. The benefit offered by gossip, *i.e.*, greater conformance to social norms is unlikely to be appreciated by the subject, but he is apt to be pleased with a lower credit card rate.

III. PRIVACY AND THE FIRST AMENDMENT

Few cases have addressed the potential conflict between privacy regulation and the First Amendment. As it is unclear whether privacy regulations will be enacted, or what form they will take ("opt out" or "opt in," the extent of disclosure or access requirements), this part will not analyze the constitutionality of every possible permutation of privacy regulation. Rather, this part will survey the issues that are likely to arise in those cases, and explores how the issues should be resolved.

Many different kinds of regulations that restrict speech and information already exist, from obscenity to intellectual property, from defamation to insider trading laws, from the Fair Credit Reporting Act to the FDA's mandatory labeling requirements. Just what is it that makes the potential conflict between privacy

[216] *See* Letter from Peter Vanderschraaf, California Institute of Technology, to Professor Dan Klein, University of California at Irvine 1 (June 23, 1995) (on file with author).

regulation and the First Amendment more difficult, or more interesting, than these other restrictions on speech? In some cases, very little. To say that privacy regulation raises free speech issues is not to say that these other regulations do not. Clearly, intellectual property laws, mandatory labeling requirements, and defamation raise serious First Amendment issues. To discuss how they are resolved is beyond the scope of this article. Nevertheless, the fact that these laws coexist with the First Amendment does not mean that no First Amendment issue exists with respect to privacy regulation. Furthermore, in resolving First Amendment cases, the courts examine each proposed regulation on its own merits.[217] Each regulation affects a different type of speech, is supported by a different rationale for regulation, and requires different tailoring.[218]

Private-sector privacy regulations are distinguishable from the examples listed above. Unlike intellectual property rights, property rights in privacy do not have constitutional sanction. Copyright, patent, and trademark laws affect a small range of potential information when compared to a system of privacy regulation that would give people property rights in facts about themselves. Other types of regulation, such as insider trading rules or the Fair Credit Reporting Act, address specific problems in fairly narrow industry sectors.[219] There are various exceptions that restrict the rule of freedom of information.[220] Adopting all-encompassing privacy regulations, however, would take these exceptions and make them the rule. This will result in an extraordinarily broad array of observations and facts about real people and real events to be simply taken out of the shared domain of research. The Supreme Court has repeatedly emphasized the problems inherent in punishing true speech.[221] An omnibus system

[217] *See, e.g.*, Thornburn v. Austin, No. 99-2146, 2000 U.S. App. LEXIS 25980 (8th Cir. 1999).

[218] *See id*.

[219] *See*, *e.g.*, 15 U.S.C.A. § 1681 (2000) (requiring that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information).

[220] *See*, *e.g.*, 5 U.S.C.A. § 552(b)(6) (1996) (restricting the release of personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy).

[221] *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64 (1964) ("truth may not be the subject of either civil or criminal sanctions"); Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (finding that the First Amendment protects "some falsehood in order to protect

of privacy regulation would mark an extremely radical change in the legal framework for the flow of information through the economy.

The next part explores the questions that are likely to arise in any First Amendment challenge to privacy regulation. The primary issues are whether the speech in question is classified as commercial or non-commercial speech, the strength of the government's interest in regulating the speech and whether the proposed legislation is narrowly tailored to suit its purpose.

A. Is It Commercial Speech?

Suppose Alice orders a widget from Budget Widgets. In the course of the transaction, Budget learns her name, address, and notes that she has ordered a widget. Her name is then transferred within Budget to a list of persons who might be interested in widget upgrades, a special widget warrantee package, or widget accessories. Budget also notes the type of widget she bought - one particularly sized for tall people. Budget had only recently begun to offer widgets in different sizes in certain test markets to determine whether there are enough buyers in the petite and tall markets to overcome problems with inventory control. Another company, Case Co. makes leather carrying cases for widgets. Case Co. rents the list containing information about widget buyers from Budget Widget, and ultimately contacts Alice.

Obviously, some of these contacts fall within the traditional definitions of commercial speech, for example if Alice was solicited directly by phone. But other transfers of the information, such as Budget's creation of the information database, its internal uses of the information, and its transfer to Case Co., do not fit the definition of commercial speech.[222] The database itself, is more

[truth]").

[222] *See* Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980). *Central Hudson* established the following inquiry to test the constitutionality of a restriction on commercial speech:

a) Does the speech accurately promote a legal product or activity?
b) Is the government's interest in regulating the speech substantial?
c) Does the regulation directly advance the government interest at issue?
d) Is there a reasonable fit between the regulation and the interest it is intended to further?

Id. at 564.

like a library than an advertisement.

Commercial speech was first defined as speech that "did no more than propose a commercial transaction,"[223] and later, more broadly, as "expression related solely to the economic interests of the speaker and its audience."[224] Traditionally, advertising, in-person solicitation, and similar activities constituted commercial speech.[225] When companies collect and use consumer data, and subsequently share it with other businesses for product development and inventory control, it does not resemble traditional commercial speech. However, if the data is actually used for marketing, it will at least in some aspect involve commercial speech.

Courts face a struggle in determining when and whether privacy regulations affect commercial speech and when they affect ordinary speech. For example, the Supreme Court has declined to decide whether credit reports are commercial speech,[226] although some lower courts had held that they are.[227] Credit reports, at least, involve economic information. Other databases will present harder issues.

In *U.S. West v. FCC*,[228] U.S. West argued that some of the speech affected by the FCC regulation, particularly the transfer of the information within the company, was not commercial speech.[229] The court rejected this argument on the grounds that the intra-company speech was too closely related to marketing.[230] The court stated that "when the sole purpose of the intra-carrier speech based on CPNI is to facilitate the marketing of telecommunications services to individual customers, we find the speech integral to and inseparable from the ultimate commercial solicitation. Therefore,

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[223] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

[224] *Central Hudson*, 447 U.S. at 561.

[225] *See id*. (defining commercial speech as expression that serves the economic interest of the speaker while at the same time assists consumers and furthers societal interests in the dissemination of information).

[226] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762 n. 8 ("We . . . do not hold . . . that the [credit] report is . . . commercial speech.").

[227] *See, e.g.*, Millstone v. O'Hanlon Reports, Inc., 528 F.2d 829, 833 (8th Cir. 1976); *cf.* Grove v. Dun & Bradstreet, 438 F.2d 433 (3d Cir. 1970) (credit reports are analogous to commercial speech in receiving less First Amendment protection).

[228] 182 F.3d 1224 (1999).

[229] *See id*. at 1228.

[230] *See id*.

the speech is properly categorized as commercial speech."[231] The court examined the regulations under the *Central Hudson* test for commercial speech.[232]

This approach has the advantage of simplicity, but the analysis will not be appropriate to all types of privacy regulation. In the *U.S. West* case, the regulations targeted uses of CPNI for marketing purposes.[233] Some broader proposed forms of regulation along European lines (e.g., state privacy bills) would regulate the use and trade of information for many purposes, such as inventory control or product development.[234] The fact that some commercial speech might lie at either end of the process for using the information is fairly incidental. The goal of the regulation is to control the information itself, not advertising or the attempt to sell a product.[235]

Furthermore, determining whether a given use of data is considered commercial speech depends on the current status of the commercial speech doctrine in the Supreme Court. When the commercial speech doctrine first evolved, part of the rationale for giving commercial speech limited protection was that it was valued less than political speech.[236] But the Court has taken steps in recent years away from that approach.[237]

First, commercial speech has recognized value to consumers. Empirical studies of advertising, conducted in the decades after the commercial speech doctrine came into existence, reject the view that advertising and marketing are essentially exploitive activities that are of no benefit to consumers.[238] Today, advertising is understood to enhance competition between similar products and to lower prices. This leads to higher quality products and more choices. Should the Supreme Court consider a challenge to privacy regulation to affect only, or primarily, commercial speech

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[231] *See id*. at 1233.

[232] *See id*. at 1233-39.

[233] *See U.S. West*, 182 F.3d 1224.

[234] *See* Joel R. Reidenberg, *Setting Standards for Fair Information Practice in the U.S. Private Sector*, 80 IOWA L. REV. 497, 541 (1995).

[235] *See* Anita L. Allen, *Privacy as Data Control: Conceptual, Practical, and Moral Limits of the Paradigm*, 32 CONN. L. REV. 861, 863 (2000).

[236] *See Central Hudson*, 447 U.S. at 563 (1986).

[237] *See* Cincinnati v. Discovery Network, 507 U.S. 410 (1993).

[238] *See generally* JOHN E. CALFEE, FEAR OF PERSUASION: ADVERTISING AND REGULATION (1997).

as opposed to ordinary speech? If so, the "value" of commercial speech will certainly be raised again with a vengeance. Courts have already recognized the value of credit reporting to consumers.[239] Data about consumer transactions is widely used throughout the economy to start new companies, charities, grassroots political groups, to develop new products, to establish new markets, to dramatically lower the costs of distributing products, and to control fraud. There is no question that this has benefited U.S. consumers. For example, credit card rates in the United States are generally much lower than in Europe.[240] In this sense, networks that relay information about transactional behavior have produced general benefits that may not be entirely captured by the private economic actors that invested in their creation. These networks have some of the characteristics of "public goods."[241]

Second, and perhaps more importantly, the ranking of certain types of speech as having less value than other types of speech has a dubious constitutional pedigree. It is not clear whether the framers of the Constitution intended the Federal Government to protect primarily political speech, and not private speech.[242] Much has been made of the fact that the framers evidently did not entirely disapprove of libel and defamation law.[243] Many of these discussions entirely neglect that libel law was state law[244] and the Constitution intended to describe only the powers of the federal

[239] *See, e.g.*, Wilson v. Retail Credit Co., 325 F. Supp. 460, 467 (S.D. Miss. 1971), *aff'd*, 457 F.2d 1406 (5th Cir. 1972); Tureen v. Equifax, Inc., 571 F.2d 411, 416 (8th Cir. 1978).

[240] *See International: Americans Heat Up the U.K. Credit Card Market*, CREDIT CARD NEWS (Oct. 1, 1999) (stating that few credit card offers overseas are as low as what U.S. banks have made to individuals stateside).

[241] A public good is nonexclusive, meaning that someone can enjoy the good without paying for it. Also, the consumption of a public good is non-rivalrous, meaning that when one person uses the good, he does not diminish the benefits that anyone else can receive from it. *See* N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS (1998).

[242] *See* O. Lee Reed, *A Free Speech Metavalue for the Next Millennium: Autonomy of Consciousness in First Amendment Theory and Practice*, 35 AM. BUS. L.J. 1, 9 (1997) (describing that Justice Brandeis, in *Whitney v. California,* stated that the Framers believed "the final end of the State was to make men free to develop their faculties," but he immediately followed by asserting that free speech is a "means indispensable to the discovery and spread of political truth" and that "public discussion is a political duty").

[243] *See generally* William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984).

[244] *See id*. at 126, n. 182 (1984) (citing 8 ANNALS OF CONG. 2151 (1798) and discussing the remarks of John Nicholas, Edward Livingston, and Albert Gallatin).

government.[245] The question of whether the framers would tolerate libel law does not resolve whether they intended the federal government to have any powers over speech.

The history and structure of the First Amendment suggests that the framers had no intention to regulate speech. Federalists such as James Wilson[246] and Alexander Hamilton[247] argued that the Bill of Rights was not necessary because the Constitution supposedly gave the government no power to do those things that the Bill of Rights prohibits.[248] Madison also shared this view, and ultimately supported the Bill of Rights as politically necessary to persuade opponents to ratify the Constitution.[249] The framers thus had no intention that the federal government have the power to regulate speech, and with that in mind it cannot be true to the Constitution to treat some speech as different from other speech.

Furthermore, the Ninth Amendment makes it clear that even if the First Amendment can be interpreted to protect only or primarily political speech, the Ninth Amendment stands in reserve to protect our rights to learn things about other human beings in the more ordinary course of our lives.[250] In short, it is a mistake to think that the First Amendment gives us our rights of free speech.[251] Rather, those rights already exist: the First Amendment merely sets out some of the rights that are to be protected, but it

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[245] *See id*. at 125 ("Nowhere in the constitutional convention or the state ratification debates is there anything close to an understanding that the Constitution was meant to impart or to countenance a federal power to punish seditious libel.").

[246] *See* James Wilson, Speech in the State House Yard, Oct. 6, 1787 *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 167-72 (Merrill Jensen ed., State Historical Soc. of Wis. 1976).

[247] Alexander Hamilton wrote that:

> [A] bill of rights . . . is not only unnecessary in the proposed Constitution but would even be dangerous," and that [any bill of rights] "would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? . . . [T]he Constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights.

THE FEDERALIST No. 84, at 513-15 (Clinton Rossiter ed., 1961).

[248] *See id*.

[249] *See* Wallace v. Jaffree, 472 U.S. 38, 94 (1985) (Rehnquist, J., dissenting).

[250] JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 34-41 (1980) (discussing the reasoning behind the enactment of the Ninth Amendment).

[251] *See id*.

was never intended to be an exclusive list.[252] As Justice Black pointed out long ago, whatever the framers may have thought of the value of different kinds of speech, they evidently thought that the federal government could not be trusted with such subjective questions.[253] There is also no indication that the courts were supposed to be involved in making such evaluative decisions in selecting some categories of speech for more protection than others.[254]

This appears relevant in answering questions about privacy regulation because the Supreme Court has in some areas treated information about public figures and newsworthy events differently than they would private speech.[255] This trend began when the constitutionality of many privacy torts came into question and newsworthy speech was considered the only speech worthy of protection.[256] The Court then gathered entertaining speech into the fold of the constitutionally protected.[257] Commercial speech, fighting words, and obscenity were left out. In recent years, true commercial speech has to a great extent been brought back in and afforded greater protection.[258] It would

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[252] *See id*.

[253] Justice Black stated:

> [P]eople were afraid of the new Federal Government. I hope that they have not wholly lost that fear up to this time because, while government is a wonderful and an essential thing in order to have any kind of liberty, order or peace, it has such power that people must always remember to check them here and balance them there and limit them here in order to see that you do not lose too much liberty in exchange for government.

Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 557 (1962). *See also* Solveig Singleton, *Reviving a First Amendment Absolutism for the Internet*, 3 TEX. REV. L. & POL. 279, 300-05 (1999).

[254] *See* Gilles, *supra* note 83, at 741.

[255] This is particularly true in the area of libel law. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964). *See* Gilles, *supra* note 83, at 736-40; *Dun & Bradstreet*, 472 U.S. at 758 (stating that the "actual malice" standard of libel law does not apply to speech that is not of public concern). *See also* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

[256] *See* Diane L. Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 J. ART & ENT. LAW 35, 58, notes 59-63 (1998).

[257] *See id*.

[258] *See* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); 44 Liquormart v. Rhode Island, 517 U.S. 484, 497-98 (1996) (abandoning *Posadas* case); Ibanez v. Florida Dept. of Bus. and Prof'l Regulation, Bd. of Accountancy, 512 U.S. 136 (1994) (state ban of truthful use of terms "CPA" and "CFP" by accountants is unconstitutional); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993); Edenfield v. Fane, 507 U.S. 781 (1993); Rubin v. Coors Brewing Co. 514 U.S. 476 (1995).

logically follow that the treatment of other truthful private speech would keep up. The constitutionality of libel, misappropriation, and the right of publicity have not caught up entirely with these developments.

The idea of holding some true speech as less valuable than other true speech makes little sense.[259] It raises the problem of distinguishing speech that is of public concern from speech that is not.[260] It comes dangerously close to contradicting the well-established principle that the press should not enjoy special privileges under the First Amendment to defy laws that others must obey.[261] Any special status for matters of "public concern" or special exemptions for the press are likely to be increasingly incoherent in the age of the Internet, which is breaking these boundaries down. The structure and language of the Constitution do not protect only political speech, but ordinary private speech as well.[262]

In summary, it does not automatically follow that because companies involved in the transfer of transactional data about consumers are for-profit and that the information is sold, that the speech in question must be characterized as commercial speech. Regardless of whether it is determined to be commercial speech or ordinary private speech, in the system of unregulated flow of information in the economy, speech as a whole has substantial benefits for consumers. Thus it is in the public interest to extend First Amendment protection to such speech.

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[259] *See* Gilles, *supra* note 83, at 739.

> The Court has failed to offer any rationale for holding that some true speech is of more importance than other true speech, or to use its terminology, that some true speech is of public concern, and other true speech is not . . . . [T]he Court lacks any doctrinal or theoretical basis from which to assert that valueless true speech exists.

See id.

[260] *See Dun & Bradstreet*, 472 U.S. at 786 (Brennan, J., dissenting) ("[T]he five Members of the Court voting to affirm the damages award in this case have provided almost no guidance as to what constitutes a protected matter of public concern.").

[261] *Cf., id*. at 781-83 (Brennan, J., dissenting) ("Perhaps most importantly, the argument that Gertz should be limited to the media misapprehends our cases. We protect the press to ensure the vitality of First Amendment guarantees. This solicitude implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection.").

[262] *See* Stanley v. Georgia, 394 U.S. 557, 567 (1969) (holding that the First and Fourteenth Amendments prohibit making private possession of obscene material a crime); *see also* William C. Heffeinan, *Privacy Rights*, 29 SUFFOLK U. L. REV. 737, 754 (1995).

B. The Nature of the Government's Interest

Determining the nature and strength of the government's interest in particular privacy laws and regulations also poses a challenge for courts considering the constitutionality of privacy regulations.[263] Commentators often lump Fourth Amendment claims attempting to regulate one's body or person together with databases containing consumer data in order to assert that there is a general interest or "basic right" to something called privacy.[264]

It would be remiss of the courts to treat privacy as an amorphous lump in considering the constitutionality of private sector privacy regulations. To begin with, government violations of privacy do not raise First Amendment issues at all.[265] The very existence of the Constitution is founded on the premise that government is a "necessarily evil" and that it poses a unique threat to liberty that private sector actors do not.[266] Therefore, whatever rights the private sector may violate in gathering information, these are not constitutional rights.[267] The court in *U.S. West* properly asked the government to assert an interest in privacy regulations that was not founded on constitutional privacy cases.[268]

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[263] *See* Zimmerman, *Real People*, *supra* note 108, at 368 ("[P]rivacy interests as a general matter lack the ratification conferred by long historical acceptance. Privacy as a tort-protected interest goes back less than a century, and its legal status is still relatively weak when compared to defamation.").

[264] *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374, 413-15 (1967) (Fortas, J., dissenting) (describing privacy as a "basic right" stemming from the Constitution).

[265] *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) ("An agent acting - albeit unconstitutionally - in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.").

[266] *See id*.

[267] *See* Birnbaum v. United States, 588 F.2d 319, 326 notes 14-17 (2d Cir. 1978) (describing the distinction between common law and constitutional privacy claims); Drake v. Covington County Bd. of Educ., 371 F. Supp. 974, 980 (M.D. Ala. 1974) (Johnson, C.J., concurring) (stating that the Warren-Brandeis right of privacy is a creature of state law and is not constitutionally based); Mimms v. Philadelphia Newspapers, Inc. 352 F. Supp. 862, 865 n. 5 (E. D. Pa. 1972) (distinguishing right of privacy from constitutional cases); Paul v. Davis, 424 U.S. 693, 713 (1976) (constitutional right to privacy limited to unreasonable government searches or interference with matters relating to family and reproduction).

[268] In *U.S. West*, the court explained that:

> The breadth of the concept of privacy requires us to pay particular attention to attempts by the government to assert privacy as a substantial state interest . . . . We emphasize that the privacy interest in this case is distinct and different from the more limited notion of a constitutional right to privacy which is addressed in

Although the privacy claims asserted against the private sector are not constitutional claims, courts may analogize between private sector and Fourth Amendment privacy cases. Under both Fourth Amendment law and private sector privacy cases, the question of the people's expectation of privacy has become part of the definition of privacy.[269] This analogy, however, does not favor broad expectations of privacy rights in the private sector because the interpretation of privacy expectations in the Fourth Amendment context is very narrow.[270] Evidently, one would not reasonably expect that the police would not read their home's heat signature[271] or pick through their garbage.[272] It is difficult to understand how one could reasonably expect operators of web sites or stores not to make notes of information about their customers – the very same information that merchants historically have stored away in their memories in the course of ordinary transactions.

Justifications for the extension of privacy rights against the private sector taken alone, however, suffer from a similar lack of precision in attempting to assert a government interest. The court in *U.S. West* concluded that the government's interest in the CPNI regulations was to protect people from embarrassing revelations about who they had called and when.[273] The court noted that the government "cannot satisfy the second prong of the Central Hudson test by merely asserting a broad interest in privacy," and called for a particular description of the type of privacy served. [274] The court added that "privacy is not an absolute good because it imposes real costs on society. Therefore, the specific privacy interest must be substantial, demonstrating that the state has

cases such as Griswold v. Connecticut . . . and Roe v. Wade.

U.S. West, 182 F.3d at 1234, n. 4.

[269] *See* O'Connor Et Al. v. Ortega, 480 U.S. 709 (1987) The Court stated that they:

> [H]ave no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable. Instead, "the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." Oliver v. United States, 466 U.S. 170, 178 (1984).

See id.

[270] *See generally* Gormley, *supra* note 7.

[271] *See* United States v. Penny-Feeney, 773 F. Supp. 220 (D. Haw. 1991), *aff'd on other grounds*, 984 F.2d 1053 (9th Cir. 1993).

[272] *See* California v. Greenwood, 486 U.S. 35 (1988).

[273] *See U.S. West*, 182 F.3d at 1237-38.

[274] *Id*. at 1234-35.

considered the proper balancing of the benefits and harms of privacy."[275] The court reluctantly concluded, that this was a substantial state interest, though not sufficiently well supported in the FCC's record.[276]

The court's skepticism is well founded. The extension of privacy rights against the private sector is commonly supported by the theory that such rights are essential to human dignity, to maintain and develop one's personality, and so on.[277] Courts have sometimes echoed these arguments in defamation cases.[278] However, these arguments are problematic as constitutional arguments. They are unlikely to hold up well in making the case for the constitutionality of broad privacy regulation lacking the historic pedigree of defamation.[279] What exactly is "human dignity?" Assuming human dignity is defined, should all actions that violate human dignity be illegal?[280] How is human dignity offended if Safeway learns through a Safeway card that I am in the habit of buying pineapples and do not own my own home? Our intuitive understanding of human dignity and human rights is probably sufficient to allow us to understand that we ought not to

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[275] *Id*. at 1235.

[276] *Id*.

[277] *See* Roscoe Pound, *Interest of Personality*, 28 HARV. L. REV. 343, 362-63 (1915) (privacy torts protect mental peace and individual comfort); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 970-71 (1964) (individual dignity); Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 53 (1974) (describing the sensational exposure of the intimate details of a private life in the mass media as a deeply intrusive impairment of the intimacy and inner space necessary to individuality and human dignity).

[278] *See Dun & Bradstreet*, 472 U.S. at 757-58.

[279] *See* Time, Inc. v. Hill, 385 U.S. at 388. The Court stated:

> One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press.

See id.

[280] *See* Zimmerman, *Requiem*, *supra* note 70, at 339. Stating that:

> [A]lthough human dignity is an important value, it is hard to define, identify, and measure. Moreover, the existence of an arguably fundamental interest in dignity does not lead inexorably to the conclusions that law can or should shield it from all possible assaults. Many important human values, such as loyalty to friends or the love of parents for their children, are either unprotected by law entirely or can be enforced by it only tangentially.

See id.

be subject to torture by the police, or to starve prisoners of war. But it does not bring us to the understanding that it is wrong for businesses to collect data about their customers without the customers' consent, especially given the fact that we routinely do this sort of information gathering in our ordinary private lives.[281] While we often desire to conceal facts about ourselves from others,[282] we also at times have an interest in learning information about others.[283]

A concept that sees information gathering for the purpose of commerce as an offense to human dignity, must suppose that human dignity is very fragile. Do we really need the federal government to protect us from being embarrassed? Can we assert a right not to be embarrassed? Surely a government interest in protecting human dignity must be founded on something more substantial than vague fears that someone somewhere may obtain information about you and might use that information to try to sell you products, or annoy you with junk mail.[284] And how is it consonant with human dignity to prevent businesses from communicating truthful information about real events to other businesses? What about the dangers to human dignity from paternalism? Whatever the interests in human dignity or personality are, they are arguably not constitutional interests and certainly not constitutional rights. These arguments are vague and lack even the common-sense impulses that underlie the assertions of government interest in regulating such things as alcohol, gambling, and the like.

The next part explores how a government interest in privacy regulation might be supported by the assertion of better-defined interests, whether merely substantial or compelling.

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[281] *See id*. at 326-35 (describing sociological evidence on the value and function of gossip).

[282] *See* Prosser, *Privacy, supra* note 70, at 399 (1978) (sheer self-interest motivates desire for privacy).

[283] *See infra* pp. 124-30 (discussion on gossip).

[284] To bring the issue of annoyance into perspective, consider that the Court has held many times that the First Amendment protects unpleasant speech. Speech that angers the public is protected. *See* Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (describing speech that angers the public). To justify a ban on speech, words must incite a listener to violence. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (stating that the speech at issue must be "likely to . . . produce [a violent] action").

1. A Dubious Assertion of Market Failure

One position the government might take is to assert that privacy regulation is not really an attempt to control speech at all, but is merely an economic regulation intended to correct a market failure. This theory assumes that consumers do not know how companies are using the data collected about them or how extensive that data collection is. According to this theory, the market needs more information to operate effectively. The evidence of market failure would be that consumers widely report concern about privacy in surveys, but that the marketplace continues perversely with its trade in consumer transaction data without offering "opt-out" or "opt-in" programs. As far as government interests are concerned, however, the support for this theory is relatively weak.

First, the regulations in question are clearly content-based. These regulations turn on whether the information in question was personal, described purchases, or was individually identifiable. Let us assume for this discussion that the government admits to regulating speech and states that its interest in regulating speech is the asserted market failure.

The concept of market failure proposed by our hypothetical defenders of privacy regulation is a flawed one. Some decades ago, economists began to experiment with models of markets in which they assumed away information costs or transaction costs.[285] They noted that these markets satisfied certain definitions of efficiency.[286] These models were valuable for explaining certain trends in real markets. But they were not intended to be used as a normative standard by which to judge the operation of markets in the real world, any more than it would be appropriate to use a world in which labor costs, transportation costs, or material costs were zero. In the real world, information is a scarce good along with other goods.

The question of how much information consumers are willing to purchase with their valuable time and resources is a question that the markets themselves should answer. For example, the market for lawnmowers would not be more efficient if lawnmower

[285] *See generally* Aric Rindfleisch and Jan B. Heide, *Transaction Cost Analysis: Past, Present, and Future Applications*, 61 J. MKTG. 30 (1997).

[286] *See id*.

companies were required to hand out 500 page reports on metallurgy along with their products. According to the theory that a failure of information represents a market failure, this booklet would bring consumers closer to a state of perfect information and improve efficiency. It is not rational, however, for consumers to spend their time reading a book about metallurgy before purchasing a lawnmower. Moreover, the benefits of reading the information are likely to be little or none. Chances are low that the lawnmower will malfunction due to poor metallurgy. Furthermore, in acquiring the information, the consumer would incur opportunity costs - the lost time he could have used for some other purpose. Thus, moving a market closer to perfect information in this artificial manner would not benefit consumers.

Should consumers want to do so, they are certainly free to seek out information about how companies collect and use information about them.[287] Consumers are aware at a general level that this practice occurs fairly extensively, as indicated by answers to survey questions about their privacy concerns.[288] But, it takes time and resources to generate detailed notices of how information is gathered and used. Given that there is little or no harm to consumers from the gathering of this information in the ordinary commercial context, it may simply be inefficient for markets to be providing this information at all.

How do we reconcile this argument with the survey results showing that consumers care about privacy? It is relatively simple. Surveys report consumer preferences under circumstances that do not force consumers to consider the costs of their choices. It does not cost a consumer anything to say that he values privacy on a survey.[289] But in the real world, exercising that preference would cost him time and perhaps money. Markets do not reflect consumer preferences in a vacuum, but rather reflect how strong

[287] Consumers can request to see the files that companies hold and can correct mistakes, block disclosure, and find out where information about them has been sent. Consumers can also check credit reports and insist on giving permission before information contained in the reports are released. *See American Survey: We Know You're Reading This*, ECONOMIST, Feb. 10, 1996, at 28.

[288] *See*, *e.g.*, http://ibm.com/privacy.html; http//cnn.com/privacy.html (describing each company's privacy policies).

[289] *See American Survey: We Know You're Reading This*, ECONOMIST, Feb. 10, 1996, at 28. (stating that while Americans feel they have "lost all control" over personal information, they are still willing to fill out warranty cards, questionnaires, and surveys).

those preferences are when compared to other preferences (such as low prices for goods and services, or prompt customer service), taking into account the costs of each. In other words, consumers may say one thing while doing another. Because markets in reality respond to what consumers do, not what they say, the markets reflect the balance of costs and benefits in a way that surveys simply cannot. For this reason, surveys are not a reliable guide to how markets ought to respond. The failure of a market to produce a good when consumers say they want it is not evidence of market failure.

Insofar as consumer concerns about privacy matter enough to the consumers to spur them into action, companies are responding by offering more detailed privacy policies.[290] For example, many company websites offer links to the details of their privacy policies.[291] Other companies are responding by offering affirmative benefits like free computers in exchange for consumer information, which appear to satisfy consumer concerns about privacy very well.[292] As economist Tom Hazlett once observed in discussing regulation of the broadcast industry, "what the government describes as marketplace failure is, more often than not, simply a failure by regulatory agencies to agree with choices made by consumers."[293] This seems to be true of apparent market failures regarding privacy as well.

2. Fraud and Identity Theft — Security, Not Privacy

A hard look at the ordinary business practice of collecting and trading consumer information reveals little concrete harm to consumers from which the government can assert an interest in protecting them from. This is the main stumbling block those asserting a government interest in privacy regulation will have to face. The courts have traditionally addressed one concrete harm - the existence of data about consumers in a database creates a target

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[290] *See supra* note 288.

[291] *See id*.

[292] *See*, *e.g.*, *Free PCs – With a Catch*, WIRED NEWS, Feb. 8, 1999, at http://www.wired.com/news/business/0,1367,17783,00.html (last visited Dec. 1, 2000).

[293] Thomas W. Hazlett, *Market Failure as a Justification to Regulation Broadcast Communications*, *printed in* RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA, (Robert Corn-Revere ed., 1997).

for thieves, hackers, stalkers, and perpetrators of fraud.[294] Arguably, narrowly tailored responses to the problems of fraud, identity theft, and stalking are already embodied in other laws.[295] There is no doubt that such activities are illegal.[296] The question is whether it is appropriate to take the additional step of regulating private databases for the sake of lowering the risk of fraud and identity theft?

First, one problem with this argument is that most types of privacy regulations that have been proposed have nothing to do with combating fraud. It does not matter whether a consumer has notice or has consented to the inclusion of his data in a library of information; if the database is insufficiently secure, he may still be a victim of identity theft. Similarly, databases today that consist of data collected without consent or elaborate notice provisions may be very secure or very insecure. Thus, the security argument does not help us to address the question of the constitutionality of an "opt-out" or "opt-in" regime.

Second, some of the regulations contemplated and supported by privacy advocates would actually make security problems substantially worse. As a general matter, companies are more likely to fall victim to fraud (for which consumers ultimately pay) when they know less about the person with whom they are dealing. If all a company knows is a customer's name (for example "Tom Smith"), it is likely to be bamboozled by somebody else calling up and claiming to be Tom Smith. If the company knows the name and social security number, it is slightly less likely to be bamboozled; the pretender would have to know Tom's social security number, as well. If the company knows the name, social

[294] *See*, *e.g.*, AT&T Comm. v. Pacific Bell, 1998 U.S. Dist. Lexis 13459 (1998) (holding that defendants had violated the Uniform Trade Secrets Act by using plaintiff's electronic billing databases for marketing purposes); *see also*, CCO Info. Serv. v. MacLean Huter Mkt. Reports, 44 F.3d 61, 65 (2d Cir. 1994) (holding that databases should be protected from illegitimate use by third parties and that Congress should be able to protect such compilations through the copyright laws even if a directory contains absolutely no protectable written expression); *see also*, Jones v. Federated Fin. Reserve Corp., 144 F.3d 961 (6th Cir. 1998) (involving a person who obtained a credit report on roommates ex-spouse).

[295] *See*, *e.g.*, CAL. PENAL CODE § 646.9 (1999) (stalking); CAL. PENAL CODE § 13848 (2000) (prevention of technology related crimes); N.Y. PENAL LAW § 190-25 (1998) (criminal impersonation); N.Y. PENAL LAW § 120.45 (stalking in the fourth degree); OHIO REV. CODE ANN. § 2913.21 (2000) (misuse of credit cards); OHIO REV. CODE ANN. § 2903.211 (2000) (menacing by stalking).

[296] *See supra* note 295.

security number, and fingerprint or voiceprint, Tom's imposter is going to have a very hard time. Insofar as privacy regulation makes it more burdensome for companies to exchange analysis about perpetrators of fraud and person's identities, it is likely to increase, not decrease, losses from fraud.

Identity theft is a particularly hard problem to address. If someone claims that a certain purchase on a credit card bill is not really his, how do you know he is not lying? One can only know if one can establish his identity, and the identity of the purchaser, but that is precisely what is at issue. Therefore, the most appropriate response to the problem of identity theft might be to develop different enforcement mechanisms. Special courts could be established to deal with identity theft, where victims could establish their identities and obtain new identities more quickly. The answer, however, is certainly not restricting the private sector right to gather information.

Another respect in which privacy regulation might make security problems worse is by demanding that consumers be able to access the files of information kept about them to make changes or corrections. The question then becomes, just who is this person that is claiming the right to access Sally Jones's file? Is it Sally Jones or someone who happens to know her maiden name?

The reality is that informational security and privacy are quite different issues. Often, the best solution to security problems is to get more information about consumers, not less. Privacy regulations as proposed thus far are therefore mostly irrelevant to, or affirmatively harmful to, security interests.

C. Narrow Tailoring

The final prong in determining if speech is commercial speech requires that the regulation in question be narrowly tailored.[297] In cases involving commercial speech, the regulation need not be the least restrictive alternative, but it should at least be shaped in some way to carry out the government's stated interest. How inquiries into the constitutionality of private regulation turn out will largely depend on the details of the regulation in question and the nature of

[297] *See Central Hudson*, 447 U.S. at 565 *citing* In re Primus, 436 U.S. 412 (1978).

the governments asserted interest. This part offers a few general observations.

Of the proposals to regulate the uses of data by private-sector companies, the most narrowly tailored would probably consist of regulations intended to address concerns about negligent or reckless security practices or identity theft. These regulations would duplicate existing common law obligations so that federal regulations may not be needed. There is no reason to suppose that private companies want to have insecure systems or treacherous, psychotic employees. If such regulations were passed, they would most likely have to pass a tailoring inquiry.

The next type of regulation concerns pure disclosure requirements. This type of regulation would be particularly tailored to the "market failure" argument described above. This is not to say that disclosure requirements would not be somewhat burdensome, particularly for small businesses. There is always the question of how much disclosure is necessary, in what size font, and whether or not anyone will read it.

The next most burdensome type of regulation would establish mandatory "opt-out" lists. Though these are much less burdensome than "opt-in" requirements, for some uses of information, "opt-out" may simply be inappropriate. If one is collecting information on who does not pay debts, it defeats the purpose of the list to allow consumers to "opt-out". There may be some uses of data, therefore, for which even an "opt-out" requirement is too much.

The types of regulation most likely to run into substantial trouble on constitutional grounds are "opt-in" requirements, or outright bans on the transfer of certain information. The *U.S. West* court found that "the FCC's failure to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy, indicates that it did not narrowly tailor the CPNI regulations regarding customer approval."[298] The FCC argued that because several people that were asked to "opt-in" refused to do so or hung up, no narrower regulation would suffice.[299] The court found that this evidence was ambivalent - the customers may simply have been averse to marketing generally, and not responding to

[298] *U.S. West*, 182 F.3d at 1238-39.
[299] *See id*.

particular concerns about CPNI.[300] The court missed a more important flaw in the FCC's argument - the FCC presumed that the customers had a right to veto the company's use of their CPNI.[301] But the extent and nature of this right is exactly what is at issue in this case.

Access requirements also pose a substantial constitutional problem, because they appear to be unrelated to any substantial government interest. For most uses of data (with the exception of credit reports) it will not particularly matter whether the data in question is in error. Additionally, access mandates undercut attempts to fight identity theft and fraud. Such access requirements create security problems as previously discussed.[302] Many mid-sized and smaller businesses, and any business in a controversial line of trade, are likely to find the risk unmanageable and the cost of setting up access mechanisms prohibitive. Access regimes also have broad potential for abuse. For example, a small store that sells gay, Christian, or pro-choice literature might find itself bombarded by enough access requests from consumers, all of which must be processed and answered according to regulation, to overwhelm its staff.

CONCLUSION

The restrictions declared unconstitutional by the Tenth Circuit in *U.S. West* affected only a certain type of telephone call related data, and were specifically intended to address the use of that data for marketing. Many proposed regulatory schemes are much broader, such as those in effect in Europe, proposed in various U.S. states, or in Congressional bills proposing to regulate the collection of information over the Internet. The fact that the *U.S. West* court could not uphold the constitutionality of the privacy regulations proposed by the FCC suggests that broader regulation will face significant obstacles in the courts.

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[300] *See id*.

[301] *See generally id*. (At issue in the case were regulations requiring telecommunication companies to obtain affirmative approval from customers before the company could use a customer's CPNI, presupposing that customers could refuse such approval.).

[302] *See* discussion *infra* Part III.B.2.

Restricting companies' use of information about transactions and consumer preferences raises troublesome First Amendment issues. Throughout history, people have generally been free to learn about one another in the course of business transactions and other day-to-day contacts. Restrictions that alter this default rule sweep a potentially enormous pool of facts and ideas out of the shared domain.

The conflict between privacy regulation and the First Amendment provides an occasion for the courts to re-examine certain peculiarities of the tests for the validity of commercial speech and private speech. Problem areas in the current speech doctrine include: (a) placing a higher value on certain types of truthful speech than other speech, particularly the idea that commercial speech is of low value; (b) the treatment of outright bans on commercial speech under a higher standard of scrutiny than partial bans. If a ban is only partial, this properly goes to the question of the narrowness of tailoring, not the standard of scrutiny; and (c) the view that commercial speech is easily chilled because it is for profit. This factor cannot distinguish commercial speech from newspapers or other publishing activities.

Assuming that current speech doctrines remain fundamentally unchanged, however, courts should be skeptical of privacy regulation for several reasons. The government's asserted interest in privacy has not been convincingly articulated. The real harms that might be occasioned by the existence of a database, such as the use of the data in fraud or identity theft, have little to do with privacy. Fraud concerns are not addressed even by restrictive "opt-in" requirements except in the broad sense that "opt-in" renders the creation of many databases impossible, and thus may lower an individual's risk of identity theft by some miniscule factor. Because the exchange of information actually helps to combat fraud and identity theft, regulations are likely to do more harm than good.

The "injury" that stems from the collection of data most often brought forward by advocates of regulation - harm to the human personality or risks of embarrassment - relies on an exaggerated view of human frailty. The view that we have a right not to be embarrassed or made uneasy by collections of information has no constitutional status. In fact, courts are traditionally skeptical of such subjective harms that border on the imaginary. This parody

from The Onion perhaps best makes the point:

> New "Phone Book" Raising Serious Privacy Issues: Palo Alto, CA—Alarmed by the "ever-shrinking security and rights of individuals in the information age," the Palo Alto-based group Citizens For Privacy is calling for strict controls to be placed on "phone books"—printed directories of all the telephone numbers in a specified area. "With this new piece of technology," CFP head Nadine Geary said, "anyone could know your phone number in literally seconds." Exacerbating the situation, Geary said, is the fact that, in many cases, the subject's address is also printed right next to the number. "If this device is allowed to be distributed," Geary said, "literally anyone would be able to track you down at any time. It's frightening."[303]

[303] http://www.theonion.com/onion3213/indes3213.html (visited October 30, 1997) (on file with author).