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PRIVACY PARADOX 2.0

H. Brian Holland*

As a starting point, this essay offers six basic propositions. First, "the '*privacy paradox*' " refers to inconsistencies "between individuals' [asserted] intentions to disclose personal information and [individuals'] actual . . . disclosure behaviors."¹ Put simply, we indicate—at a granular level—specific items of personal information that we will not disclose, but we then give away that same data with what appears to be little regard for the risks of doing so and for little in return.² Second, the privacy paradox is a well-established concept in many fields of the social sciences, even though the precise contours and causes of the paradox are quite controversial.³ Third, broadly speaking, legal scholarship has failed to adequately consider either the various conceptions of the privacy paradox set forth in other fields of scholarship or the import of these conceptions to what may be intended or perceived as more normative legal works.⁴ Fourth, this failure creates a

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¹ Patricia A. Norberg et al., *The Privacy Paradox: Personal Information Disclosure Intentions Versus Behaviors*, 41 J. CONSUMER AFF. 100, 100 (2007). This definition does not invoke concepts of "willingness" or "knowledge," or a more amorphous conception of "privacy attitudes." See *id.* at 100-03. This approach seeks to avoid, at least for the moment, the more protracted causation argument that has dominated and obscured the descriptive statement of condition, for example, that there is an inconsistency between *assertion* and *behavior*. See *id.*

² *Id.*

³ See, e.g., Julia Lane, *Administrative Transaction Data* 12 (German Council for Soc. & Econ. Data, Working Paper No. 52, 2009) (discussing the relationship between ethics and privacy issues).

⁴ This broad statement is, of course, subject to notable exceptions. See HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* 58-61, 125-26 (2010). See generally James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137 (2009) (discussing how social networking sites are socially compelling, yet harmful to privacy interests).

significant gap in what might be termed relevance, credibility, or practical effect, marginalizing the impact of legal scholarship in the formation of privacy policy. Fifth, this space in the sphere of influence elevates the role of fields that are traditionally less concerned with the core privacy values of personhood, autonomy, and control—inter alia, economics, contract law, marketing theory, and computer science.⁵ Sixth, the emergence of social network sites both alters the conditions of the privacy paradox and intensifies the rate and depth of uncontrolled disclosure, further marginalizing legal scholarship that fails to seriously consider the role of the law in privacy policy.⁶

Focusing on this final point, the goal of this essay is to describe both the current market in personal information and the privacy paradox as a product of market distortion. Part I identifies two unique phenomena that modify the conditions of the privacy paradox by creating new and powerful distortions in the market, thereby intensifying the rate and depth of personal data disclosure. The first is a transformation in social organization, which drives individuals to join social network sites and to disclose a great deal of personal information on those networks. The second is an alteration of the basic structure of the information exchange agreement that permits social networking sites to recede into the background as third-party beneficiaries to the social exchange of personal information. Part II addresses the necessity to account for the effect of these phenomena in the formation of privacy policies by briefly addressing various proposals for regulating the collection, storage, use, and transfer of personal information. This section argues that many of these proposals are misguided, either because they under-protect personal information by failing to adequately address the problems of valuation and consent or because they overprotect personal information by failing to

⁵ See, e.g., *PROTECT: The Privacy Paradox*, AM. LIST COUNS. (Am. List Counsel), Winter 2007, at 1, 4-5, available at http://www.alc.com/newsletters/ALCnewsletter_W07.pdf (providing an example of how marketing theory is impacted by privacy paradox inconsistencies).

⁶ danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 221-22, 224 (2008), available at <http://www.jcmc.indiana.edu/vol13/issue1/boyd.ellison.html>.

adequately preserve functionality in socially valuable communications platforms. Part III attempts to briefly conceptualize the broad outline of a more workable solution that, rather than reforming the current notice-and-choice system of privacy protection, is guided by user expectations in imposing minimal restraints on the margins of data collection, storage, use, and transfer practices. Although a solution would impose certain boundaries on the scope of consent, significant space would remain for the negotiation and development of social norms around privacy practices.

I. "MARKETS" IN PERSONAL INFORMATION AND SELF-REGULATION

Personal information is produced through a continual process of action and observation as an "unavoidable byproduct of human existence."⁷ In a culture of pervasive surveillance, always-on observation produces a vast amount of indiscriminate personal information.⁸ Once produced by this interplay between action and observation, personal information becomes available for collection, storage, use, and transfer as a valuable commodity.⁹ Conceived in this manner, as the output of the interactive process between two parties (the actor and the observer), it is perhaps unsurprising that traditional economists invoke familiar market models to explain personal information collection¹⁰ as what might be described as a

⁷ Oscar H. Gandy, Jr., *Toward a Political Economy of Personal Information*, 10 CRITICAL STUD. MASS COMM. 70, 76 (1993).

⁸ Joel R. Reidenberg, *Privacy in the Information Economy: A Fortress or Frontier for Individual Rights?*, 44 FED. COMM. L.J. 195, 201-08 (1992).

⁹ Craig D. Tindall, *Argus Rules: The Commercialization of Personal Information*, 2003 U. ILL. J.L. TECH. & POL'Y 181, 182-87.

¹⁰ See Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 393-409 (1978) [hereinafter Posner, *Right*] (comparing and contrasting economic and noneconomic theories of privacy). Posner laid substantial groundwork for this approach, applying economic analysis to the dissemination and withholding of personal information. See *id.*; see also Richard A. Posner, *The Economics of Privacy*, 71 AM. ECON. REV. 405 (1981) [hereinafter Posner, *Economics*]; see also Kai-Lung Hui & I.P.L. Png, *The Economics of Privacy*, in 1 HANDBOOKS IN INFORMATION SYSTEMS: ECONOMICS AND INFORMATION SYSTEMS 471, 473, 475-76 (Terrence Hendershott ed., 2006) (citing Posner, *Economics*, *supra*; Posner, *Right*, *supra*; George J. Stigler, *An Introduction to Privacy in Economics*

hybrid of rights creation *in* the data collector and rights transfer *to* the data collector.¹¹

Because of this somewhat unusual hybrid, the market in personal information is defined by secrecy and consent rather than by an exchange of property.¹² Individuals hold no property rights in their personal information.¹³ Rather, individuals control their rights in that data only to the extent that they are able to conceal or manage its disclosure,¹⁴ just as the information seeker may use reasonable means to collect personal data outside of the consent market.¹⁵ Once disclosed, property rights in that information are

and Politics, 9 J. LEGAL STUD. 623 (1980)) (explaining that Professor Posner and others in "[t]he 'Chicago School' . . . contended that regulation is not needed—markets for personal information would work as well as markets for conventional goods and services").

¹¹ Vera Bergelson, *It's Personal but Is It Mine? Toward Property Rights in Personal Information*, 37 U.C. DAVIS L. REV. 379, 440 (2003).

¹² See Posner, *Right*, *supra* note 10, at 393 (citing Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295 (1975)). Posner focused his analysis on information that is private in the sense that its subject "will incur costs to conceal [it]." *Id.* at 394. If that same information has "value to others[,] . . . others will incur costs to discover it. Thus we have two economic goods, 'privacy' and 'prying.'" *Id.* Posner explained that these are "intermediate rather than final goods . . . [in that] people are assumed not to desire or value privacy or prying in themselves but to use these goods as inputs into the production of income or some other broad measure of utility or welfare." *Id.* Thus prying and the personal information that such prying reveals is valuable not as an exercise in itself, but if it "enables one to form a more accurate picture of a friend or colleague, and the knowledge gained is useful in one's social or professional dealings with him." *Id.* at 395. Access to this information can thus bring efficiency to the market. See *id.* at 398-99 & n.15. Conversely, the ability to conceal and control the flow of information about oneself reduces the efficiency of the markets and creates the opportunity for misrepresentation or fraud for the purposes of exploitation. *Id.* at 399.

¹³ See generally Hal R. Varian, *Economic Aspects of Personal Privacy*, in INTERNET POLICY AND ECONOMIC: CHALLENGES AND PERSPECTIVES (2009), available at www.ntia.doc.gov/reports/privacy/privacy_rpt.htm (discussing how property rights could be defined in terms of an individual's personal information). But see Posner, *Right*, *supra* note 10, at 397 (implying that property rights have yet to be assigned).

¹⁴ See Posner, *Right*, *supra* note 10, at 399-400.

¹⁵ See, e.g., *id.* at 395. An individual might take steps to conceal the private information, but others may well "have a legitimate interest in unmasking the deception." See *id.* Here, Posner allows that certain intrusive means of obtaining

not, strictly speaking, transferred to the observer, but are instead created in the receiving institution that collects it.¹⁶ Indeed, the data subject has no property rights to transfer.¹⁷ Yet by establishing a property right with the data collector, the information is converted into a valuable asset to be used internally and/or resold on a third-party secondary market.¹⁸

Characterizing the consensual decision to disclose personal information to a third party as a market transaction creates analogous contract questions.¹⁹ To the extent, however, that these exchanges are inherently contractual, it is only for the revelation itself and not as an agreement to transfer property-like rights in the information.²⁰ In adopting a system of secrecy-based rights of disclosure and consent, the data subject's ability to bargain with a particular information seeker is limited to the initial transaction.²¹ The data subject has essentially two options: complete the transaction (disclose) or not (conceal).²² Of course, data gatherers

personal information (for example, eavesdropping) may be regulated, but only because of increased costs resulting from less effective communication. *See id.* at 395, 401; *see also* Hui & Png, *supra* note 10, at 474, 475 ("The Chicago School supports free collection and use of information; hence the issue of property rights is moot.").

¹⁶ Kenneth C. Laudon, *Markets and Privacy*, COMM. ACM, Sept. 1996, at 92, 93, 96 (citing SEC'YS ADVISORY COMM. ON AUTOMATED PERS. DATA SYS., U.S. DEP'T OF HEALTH, EDUC., & WELFARE, RECORDS COMPUTERS AND THE RIGHTS OF CITIZENS 7-10 (1973) [hereinafter RECORDS & RIGHTS]).

¹⁷ *See id.* (citing RECORDS & RIGHTS, *supra* note 16, at 7-10).

¹⁸ *See, e.g., id.* (citing RECORDS & RIGHTS, *supra* note 16, at 7-10) (discussing the value of personal information, using credit card companies as an example).

¹⁹ *See* Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1426, 1444 (1982).

²⁰ *See id.*; Jacqueline Lipton, *Mixed Metaphors in Cyberspace: Property in Information and Information Systems*, 35 LOY. U. CHI. L.J. 235, 250 (2003) (citing STEPHEN ELIAS, PATENT, COPYRIGHT & TRADEMARK: A DESK REFERENCE TO INTELLECTUAL PROPERTY LAW 66 (Lisa Goldoftas ed., 1941); John R. Dean, *The Sheriff is Coming to Cyberville: Trademark and Copyright Law and the Internet*, 11 BYU J. PUB. L. 75, 96 (1997)).

²¹ *See* Vickery, *supra* note 19, at 1444-45.

²² Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2077 (2004) (asserting that one failure of the current privacy market is that it "leav[es] consumers with a binary, all-or-nothing choice to permit or prohibit collection of their personal data").

may create more explicit contractual exchanges by voluntarily adopting terms of use and privacy policies that bind not only the data subject, but also the data collector.²³ If they do, the parties must then, by law, "abide by that policy."²⁴ There is, however, no obligation to adopt such a policy, and in most cases, there are no externally imposed, applicable minimum standards of privacy protection.²⁵

Under the current market model, regulation of routine online interactions is *de minimus*.²⁶ The unauthorized acquisition or transfer of personal information might trigger liability rules

²³ Allyson W. Haynes, *Web Site Visitors and Online Privacy: What Have you Agreed to Share?*, S.C. L., July 2008, at 27, 28 (citing Privacy Policy – About AOL, http://about.aol.com/aolnetwork/aol_pp (last visited May 14, 2010); Terms of Use – About AOL, http://about.aol.com/aolnetwork/aolcom_terms (last visited May 14, 2010)).

²⁴ *See id.* at 29 (citations omitted) (discussing various federal and state privacy laws implicated by a stated privacy policy). Privacy policies and terms of use have, in some cases, been found to create a basis for contract, tort, or statutory liability. *See, e.g., Doe v. Network Solutions, LLC*, No. C 07-05115 JSW, 2008 U.S. Dist. LEXIS 7397, at *13-14 (N.D. Cal. 2008) (finding that companies may incorporate their privacy policies into the service agreement by reference, thus creating a contractual duty to abide by those policies); *Columbia Pictures Indus. v. Bunnell*, No. CV 06-1093 FMC(JCx), 2007 U.S. Dist. LEXIS 46364, at *36-38 (C.D. Cal. 2007) (treating a privacy policy as if it were a contractual creation of a duty); *Collegenet, Inc. v. Xap Corp.*, 442 F. Supp. 2d 1070, 1079 (D. Or. 2006) (citing *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 33 (1st Cir. 2000); *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544, 1549 (2d Cir. 1991)) (stating that a privacy policy may give rise to a tort claim where the privacy policy has "a tendency to deceive" customers); *Dyer v. Nw. Airlines Corps.*, 334 F. Supp. 2d 1196, 1200 (D.N.D. 2004) (explaining that a privacy policy could be construed as a unilateral contract "if the privacy policy was sufficiently definite and the Plaintiffs . . . read [and relied on] the policy prior to providing personal information").

²⁵ Corey A. Ciocchetti, *The Future of Privacy Policies: A Privacy Nutrition Label Filled with Fair Information Practices*, 26 J. MARSHALL J. COMPUTER & INFO. L. 1, 13-14 (2008) (citing Corey Ciocchetti, *Just Click Submit: The Collection, Dissemination, and Tagging of Personally Identifying Information*, 10 VAND. J. ENT. & TECH. L. 553, 597-98 (2008)).

²⁶ *See* Peng Hwa Ang, *The Role of Self-Regulation of Privacy and the Internet*, J. INTERACTIVE ADVERTISING, Spring 2001, at 3, available at <http://www.jiad.org/article8>.

embodied in certain privacy torts,²⁷ but these liability rules have generally proven ineffective in practice.²⁸ Likewise, the acquisition of a particular type of information or of information concerning certain vulnerable groups (such as young children) may fall within statutory or administrative regulations.²⁹ However, the vast majority of online interactions involving the disclosure of personal information fall outside this narrow band of restriction.³⁰ This leaves industry self-regulation, such as voluntary privacy seals and privacy policies, as the primary limitation on the activity of data gatherers, yet often with inadequate results.³¹ Privacy seals can actually be quite misleading to the average consumer, indicating nothing more than the mere existence of a privacy policy—without regard to its content or its effectiveness.³² Likewise, behavioral studies have shown that the mere existence of a privacy policy tends to increase information disclosure, without regard to whether the user reads that policy or understands the actual content.³³ Not

²⁷ See, e.g., Bergelson, *supra* note 11, at 406-14 (discussing various privacy torts, including intrusion upon seclusion, public disclosure of embarrassing facts, and appropriation of name or likeness); Posner, *Right*, *supra* note 10, at 409-21 (discussing how tort law is connected to an economist view to privacy). *But see* Bergelson, *supra* note 11, at 405 (rejecting the fourth privacy tort, "false light," as inapplicable).

²⁸ Bergelson, *supra* note 11, at 405 ("All three theories . . . have been tested and rejected by courts in [the torts] context.").

²⁹ See Ang, *supra* note 26, at 3, 6 (citing Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-6506 (2006); Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725 (2006)); *see also* 16 C.F.R. §§ 312.1-12 (2009).

³⁰ See Ilene R. Berson, *Grooming Cybervictims: The Psychological Effects of Online Exploitation for Youth*, 2 J. SCH. VIOLENCE 9, 9-10 (2003), available at <http://www.cs.auckland.ac.nz/~john/NetSafe/I.Berson.pdf>.

³¹ Ang, *supra* note 26, at 3, 5-6.

³² See generally Kai-Lung Hui et al., *The Value of Privacy Assurance: An Exploratory Field Experiment*, MGMT. INFO. SYS. Q., Mar. 2007, at 19, 19 (reporting the results of a Singapore experiment assessing "privacy statements and privacy seals"); Robert LaRose & Nora Rifon, *Your Privacy is Assured—of Being Invaded: Web Sites with and Without Privacy Seals*, IADIS INT'L CONF. E-SOCIETY, 2003, at 63, 65, 69-70, available at www.iadis.net/dl/final_uploads/200301L009.pdf (discussing how privacy seals have generally been an ineffective method of protecting personal privacy).

³³ See Janice Tsai et al., *What's it to You? A Survey of Online Privacy Concerns and Risks* (NET Inst., Working Paper No. 06-29, 2006), available at <http://ssrn.com/abstract=941708>.

surprisingly, a 2006 study examining the privacy policies of Fortune 500 company websites found that "[l]ess than 4% complied with all measured aspects of the [Fair Information Practices (FIP)]," which are guidelines for notice, choice, access, integrity, and enforcement regulated by the Fair Trade Commission (FTC).³⁴

II. DEFENDING THE CURRENT MARKET

Traditional arguments over the privacy paradox—defined as inconsistencies between "individuals' [asserted] intentions to disclose personal information and their actual personal information disclosure behaviors"³⁵—presume a concept of a "market" in personal information and have thus centered on market function.³⁶

The predominant view in traditional economic studies of privacy implicitly rejects the idea of significant distortion in the market model of secrecy and consent and, thus, the existence of a significant privacy paradox within this market model.³⁷ As active and willing participants in the market for personal information, consumers are seen as rational economic agents "who are [either] fully informed or [who] base their decisions on probabilities coming from known random distributions."³⁸ Consumers not only "have the right to manage privacy trade-offs without regulative intervention, but . . . individuals can, in fact, use that right in their

³⁴ Kathy Stewart Schwaig et al., *Compliance to the Fair Information Practices: How are the Fortune 500 Handling Online Privacy Disclosures?*, 43 INFO. & MGMT. 805, 808, 809 tbl.4 (2006).

³⁵ Norberg et al., *supra* note 1, at 100.

³⁶ Alessandro Acquisti & Jens Grossklags, *Privacy Attitudes and Privacy Behavior: Losses, Gains, and Hyperbolic Discounting*, in ECONOMICS OF INFORMATION SECURITY 165, 166 (L. Jean Camp & Stephen Lewis eds., 2004).

³⁷ *Id.* at 166-68.

³⁸ Alessandro Acquisti & Jens Grossklags, *Privacy and Rationality in Individual Decision Making*, IEEE SECURITY & PRIVACY, 2005, at 26, 26 [hereinafter Acquisti & Grossklags, *Privacy and Rationality*]; see also Alessandro Acquisti, *Privacy in Electronic Commerce and the Economics of Immediate Gratification*, in PROCEEDINGS OF THE 5TH ACM CONFERENCE ON ELECTRONIC COMMERCE 21, 21-23 (2004), available at <http://www.heinz.cmu.edu/~acquisti/papers/privacy-gratification.pdf>.

own best interest."³⁹ Although individuals are concerned about privacy, that concern "is not absolute."⁴⁰ Consumers "are willing to [knowingly] trade off privacy concerns for economic benefits."⁴¹ In some cases, private information is consciously exchanged for "convenience," "personalization,"⁴² or merely the ability "to use a web site."⁴³ Simply put, traditional economists often argue that the market is working and that consumers are receiving appropriate value for the disclosure of their personal information.⁴⁴ Accordingly, any apparent deviation between professed attitudes about privacy in personal information and actual behavior in the handling of that personal information is understood to be illusory; overstated; or, in fact, optimal.⁴⁵

This portrait of consumer participation allows researchers to argue that perhaps the privacy debate is "misdirected."⁴⁶ The issue should not focus on regulating the "collection and use" of personal information, but rather "in setting the right 'prices' " for that exchange.⁴⁷ Moreover, "surveys and experiments clearly show that people value privacy . . . less than some privacy advocates have claimed."⁴⁸ For example, Bernardo A. Huberman, Eytan Adar, and Leslie R. Fine conclude that the privacy paradox is explained, at

³⁹ Acquisti & Grossklags, *Privacy and Rationality*, *supra* note 38, at 26.

⁴⁰ Il-Horn Hann et al., *Online Information Privacy: Measuring the Cost-Benefit Trade-Off*, in TWENTY-THIRD INTERNATIONAL CONFERENCE ON INFORMATION SYSTEMS 1, 8 (2002), available at http://www.comp.nus.edu.sg/~ipng/research/privacy_icis.pdf.

⁴¹ *Id.*

⁴² Ramnath K. Chellappa & Raymond G. Sin, *Personalization Versus Privacy: An Empirical Examination of the Online Consumer's Dilemma*, 6 INFO. TECH. & MGMT. 181, 184-86 (2005).

⁴³ Hui & Png, *supra* note 10, at 489-90.

⁴⁴ See *id.* at 473-75 (citing Posner, *Economics*, *supra* note 10; Posner, *Right*, *supra* note 10; Stigler, *supra* note 10).

⁴⁵ See, e.g., Posner, *Economics*, *supra* note 10, at 406 ("[T]here seems to be no solid basis for questioning the competence of individuals to attach appropriate . . . weight to private information—at least if 'appropriate' is equated with 'efficient.' ").

⁴⁶ Hui & Png, *supra* note 10, at 491.

⁴⁷ *Id.* at 491-92.

⁴⁸ *Id.* at 490.

least in part, by the "strongly contextual nature" of disclosure.⁴⁹ Essentially, people demand a greater price for disclosing information that they perceive to be less desirable and a lower price when they perceive that information to be "somewhat typical or positively atypical compared to the target group."⁵⁰ Moreover "small deviations in a socially positive direction are associated with a lower asking price."⁵¹ Based on these findings, Huberman, Adar, and Fine suggest that reported privacy attitudes reflect concern over the potential disclosure of "less desirable" information, while permissive privacy behaviors largely reflect the low cost disclosure of information that is perceived to be socially neutral or socially positive.⁵²

III. THE PRIVACY PARADOX AS MARKET "FAILURE"

Working within the market conception, commentators have offered at least three primary critiques of rights, structure, function, and efficiency: behavioral market distortions, the decline of consent contracting, and the data subject's lack of legal control over its personal information.⁵³

A. Critique Number One: Behavioral Market Distortions

Some behavioral economists are openly skeptical of these attempts to explain away the privacy paradox as efficient or illusory.⁵⁴ Pointing to a variety of distortions in the market, these skeptics question the evocation of a "fully rational view of the economic agent."⁵⁵ Alessandro Acquisti and Jens Grossklags, for example, point to three factors hindering the decision-making

⁴⁹ Bernardo A. Huberman et al., *Valuating Privacy*, IEEE SECURITY & PRIVACY, 2005, at 22, 25.

⁵⁰ *Id.* at 22.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Hui & Png, *supra* note 10, at 472; Acquisti, *supra* note 38, at 23-24; Acquisti & Grossklags, *Privacy and Rationality*, *supra* note 38, at 32.

⁵⁴ See Hui & Png, *supra* note 10, at 473-74; Acquisti, *supra* note 38, at 21-22; Acquisti & Grossklags, *Privacy and Rationality*, *supra* note 38, at 26.

⁵⁵ Acquisti, *supra* note 38, at 22; see also Acquisti & Grossklags, *Privacy and Rationality*, *supra* note 38, at 26.

process with regard to privacy and disclosure: "incomplete [and/or asymmetric] information, bounded rationality, and systemic psychological deviations from rationality."⁵⁶ These factors, they conclude, "suggest that the assumption of perfect rationality might not adequately capture the nuances of an individual's privacy-sensitive behavior."⁵⁷ Such distortions may, in some measure, help to explain the apparent paradox between privacy attitudes and observed behaviors.

In the context of online transactions and privacy, the data subject may possess incomplete information on several levels.⁵⁸ For instance, even when directly involved in the transaction, the subject may lack full awareness of the nature and existence of the privacy invasion itself.⁵⁹ This is even more likely where third parties provide information regarding the data subject to a data gatherer "without [the subject] being part of the transaction between those parties."⁶⁰ Even where the data subjects are directly involved, they may not be aware of the risks associated with data disclosure, the probability of such detrimental occurrences, or the benefits of protecting one's privacy, as many of these risks are only perceptible after the fact.⁶¹ Likewise, in weighing the costs of protection, the data subject may lack complete information regarding the alternatives or the ease and availability of "protective technologies."⁶² Asymmetric information, sometimes referred to as a "lemons market,"⁶³ is a species of incomplete information, in

⁵⁶ Acquisti & Grossklags, *Privacy and Rationality*, *supra* note 38, at 26 (citing Acquisti, *supra* note 38, at 23-24); *see also* Schwartz, *supra* note 22, at 2079-84 (citations omitted) (describing the failure of the current market as a problem of, *inter alia*, "information asymmetries" and "bounded rationality").

⁵⁷ Acquisti & Grossklags, *Privacy and Rationality*, *supra* note 38, at 26 (citing Acquisti, *supra* note 38, at 23-24).

⁵⁸ Acquisti, *supra* note 38, at 23.

⁵⁹ *See id.*

⁶⁰ *See id.* (citing George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970)); Acquisti & Grossklags, *Privacy and Rationality*, *supra* note 38, at 26 (citing Varian, *supra* note 13).

⁶¹ Acquisti, *supra* note 38, at 23.

⁶² *Id.*

⁶³ Tony Vila et al., *Why We Can't be Bothered to Read Privacy Policies: Models of Privacy Economics as a Lemons Market*, in *ECONOMICS OF*

which facts material to the decision-making process—for example, how disclosed personal information will be used by the data gatherer—are known to one of the parties but not the other.⁶⁴ This skews the market.⁶⁵ The company that gathers personal information "know[s] a good deal more about how it uses the personal information it collects than [the data subject knows]."⁶⁶ As Paul Sholtz has observed, "[f]or most people, it is difficult enough just to find and understand a company's privacy policy, much less to monitor the company's use of personal information and detect when violations have occurred."⁶⁷ The data gatherer is thus able to internalize the benefits of personal data while externalizing most of the costs.⁶⁸

The concept of "bounded rationality" refers to "our inability to acquire, memorize, and process" information that is relevant to the decision-making process.⁶⁹ Acquisti offers the following description:

INFORMATION SECURITY 143, 145 (L. Jean Camp & Stephen Lewis eds., 2004) (citing Akerlof, *supra* note 60); *see also* Schwartz, *supra* note 22, at 2081 & n.134 (quoting Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 49 (1993)) (describing how an imbalance of information results in a "lemons equilibrium, which occurs when the market offers only bad products for sale or presents only bad contract terms").

⁶⁴ Acquisti & Grossklags, *Privacy and Rationality*, *supra* note 38, at 26 (citing Varian, *supra* note 13).

⁶⁵ Craswell, *supra* note 63, at 49 (citing Akerlof, *supra* note 60; Michael Spence, *Consumer Misperceptions, Product Failure and Producer Liability*, 44 REV. ECON. STUD. 561 (1977)).

⁶⁶ Paul Sholtz, *Transaction Costs and the Social Costs of Online Privacy*, FIRST MONDAY, May 2001, <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/859/768> (citing Peter P. Swire, *Markets, Self-Regulation, and Government Enforcement in the Protection of Personal Information*, in U.S. DEP'T OF COMMERCE, *PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE* (1997), www.ntia.doc.gov/reports/privacy/selfreg1.htm).

⁶⁷ *Id.* (citing Swire, *supra* note 66).

⁶⁸ *Id.* (citing Swire, *supra* note 66).

⁶⁹ Acquisti & Grossklags, *Privacy and Rationality*, *supra* note 38, at 27 (quoting 3 HERBERT A. SIMON, *MODELS OF BOUNDED RATIONALITY: EMPIRICALLY GROUNDED ECONOMIC REASON* 291 (1997)).

In [the privacy] context, bounded rationality refers to the inability to calculate and compare the magnitudes of payoffs associated with various strategies the individual may choose in privacy-sensitive situations. It also refers to the inability to process all the stochastic [(non-determinative)] information related to risks and probabilities of events leading to privacy costs and benefits.⁷⁰

Some behavioral economists claim that bounded rationality creates distortion in the current market for personal information because "the agent is assumed to have both rationality and unbounded 'computational' power to process . . . all information in their hands and [to] draw accurate conclusions from it."⁷¹ Even the most privacy-concerned individuals are not informed and cannot inform themselves about privacy risks, even when that information is available, because they simply cannot process that amount of information.⁷² Instead, individuals resort to "simplified mental models, approximate strategies, and heuristics"⁷³ (such as intuition), an educated guess, or common sense.

Acquisti and Grossklag's third noted condition, "psychological deviations," refers to a collection of factors.⁷⁴ For example, "hyperbolic discounting" describes how an individual's " 'relative preference for well-being at an earlier date over a later date gets stronger as the earlier date gets closer.' "⁷⁵ There is an interplay, moreover, between hyperbolic discounting and individual tendencies toward "immediate gratification" and "self-control bias," as a lack of self-discipline impedes the individual's ability to act concretely in pursuit of longer-term, overarching desires.⁷⁶ One result is the propensity "to underinsure oneself against certain

⁷⁰ Acquisti, *supra* note 38, at 23.

⁷¹ *Id.* at 24 (quoting 3 SIMON, *supra* note 69, at 291-93).

⁷² Acquisti & Grossklags, *Privacy and Rationality*, *supra* note 38, at 26-27 (citing 3 SIMON, *supra* note 69, at 291).

⁷³ *Id.* at 27.

⁷⁴ *Id.*

⁷⁵ Acquisti, *supra* note 38, at 24 (quoting Ted O'Donoghue & Matthew Rabin, *Choice and Procrastination*, 116 Q.J. ECON. 121, 125 (2001)).

⁷⁶ *Id.* (quoting O'Donoghue & Rabin, *supra* note 75, at 125-26).

risks."⁷⁷ To explain, "people may genuinely want to protect themselves, but because of self-control bias, they will not actually take those steps, and [will] opt for immediate gratification instead."⁷⁸ This cost-benefit analysis is further complicated by difficulties in risk comprehension.⁷⁹ One such difficulty is "optimism bias," the belief that our own risks are less than those of similarly situated individuals.⁸⁰ Likewise, we tend to operate with limited "foresight perspective," focusing on immediately perceptible risks and benefits rather than the less obvious or forward-looking risks and benefits.⁸¹ Finally, it is difficult for individuals to recognize the cumulative risks associated with information disclosure, and as a result, individuals often fail to include these costs in the decision-making calculus.⁸²

Taken together, these market distortions are said to explain, at least to a significant extent, the apparent paradox between privacy attitudes and observed behavior.⁸³ Risk perception, although perhaps heightened in the abstraction of a survey study, is distorted in the actual moment of decision because individuals tend to adopt a rather myopic view of privacy.⁸⁴ The benefits of information disclosure are accentuated and the perception of the immediate, future, and cumulative risks of disclosure are mitigated.⁸⁵ Even

⁷⁷ Acquisti, *supra* note 38, at 24 (citing Howard Kunreuther, *Causes of Underinsurance Against Natural Disasters*, 9 GENEVA PAPERS ON RISK & INS. 206 (1984), available at http://opim.wharton.upenn.edu/risk/library/2004_GenPapers_HK_Underinsurance.pdf).

⁷⁸ *Id.* (citing George Loewenstein et al., *Projection Bias in Predicting Future Utility* 2 (U.C. Berkeley Econ., Working Paper No. E00-284, 2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=239901).

⁷⁹ *Id.* (citing Paul Slovic, *What Does It Mean to Know a Cumulative Risk? Adolescents' Perceptions of Short-Term and Long-Term Consequences of Smoking*, 13 J. BEHAV. DECISION MAKING 259 (2000)).

⁸⁰ *Id.* (citing Neil D. Weinstein, *Optimistic Biases About Personal Risks*, 246 SCIENCE 1232 (1989)).

⁸¹ *Id.* (citing Philippe Jehiel & Andrew Lilico, *Smoking Today and Stopping Tomorrow: Limited Foresight Perspective* (CESifo, Working Paper No. 2603, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1379442).

⁸² *Id.* (citing Slovic, *supra* note 79).

⁸³ Acquisti, *supra* note 38, at 24.

⁸⁴ *Id.* at 24-25, 27.

⁸⁵ *See id.* at 22, 26.

sophisticated individuals concerned about privacy and aware of risks are unlikely to act as rational economic agents under these circumstances, even when they perceive the risks of disclosure to be significant.⁸⁶ As Acquisti observes, the persistence of the privacy paradox in these extreme cases tends to indicate that industry self-regulation and user self-protection schemes will not be sufficient to protect individual privacy.⁸⁷ Likewise, generalized efforts to increase awareness are unlikely to have a meaningful effect on the decision-making process.⁸⁸

B. Critique Number Two: The Decline of Consent Contracting

As previously described, if one characterizes the consensual decision to disclose personal information to a third party as a market transaction⁸⁹—regardless of the species of rights held, created, or transferred—this exchange creates analog questions of fair and effective contracting.⁹⁰ The classic notion of contracting is of consensual, bargained-for, individualized agreements to which the consumer knowingly and voluntarily assents.⁹¹ A second critique of the market in personal information posits that online contracting generally, and contracts for the disclosure of personal information specifically, are overwhelmingly standardized and nonnegotiable.⁹² Consumers must either accept the terms as dictated by the provider or go elsewhere.⁹³ The result is little or no

⁸⁶ Acquisti, *supra* note 38, at 27.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See Laudon, *supra* note 16, at 96, 99.

⁹⁰ Wayne R. Barnes, *Rethinking Spyware: Questioning the Propriety of Contractual Consent to Online Surveillance*, 39 U.C. DAVIS L. REV. 1545, 1573 (2006); see also Laudon, *supra* note 16, at 99.

⁹¹ RICHARD W. BAUMAN, *IDEOLOGY AND COMMUNITY IN THE FIRST WAVE OF CRITICAL LEGAL STUDIES* 89-90 (2002); Laudon, *supra* note 16, at 99.

⁹² See generally Barnes, *supra* note 90 (proposing that those who consent to the terms of Internet spyware contracts fall victim to an unequal bargaining process that violates public policy and often produces contracts that are unconscionable).

⁹³ *Id.* at 1608 (citing *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)).

bargaining power.⁹⁴ Indeed, consent itself is similarly obscured.⁹⁵ In some situations, the provider masks contract terms in an attempt to dramatically decrease the transaction costs associated with reading, understanding, and renegotiating the contract.⁹⁶ In other cases, the consumer is presented with what might be characterized as a sophisticated form of adhesion contract, such as click-through or shrink-wrap 'agreements.'⁹⁷ In either situation, the idea that the consumer has consented in any real sense is largely fiction.⁹⁸

This move toward standardized contracts has caused some to question "the continu[ing] legitimacy of contract models based upon volitional bargaining and individualized assent to contract terms."⁹⁹ Most consumers no longer bother to read or understand contract terms, perhaps because they know that renegotiation is not possible.¹⁰⁰ The value of standardized and nonnegotiable contracts to the provider, particularly in reduced transaction costs, is simply too great given the disparities in bargaining power.¹⁰¹ Moreover, courts seem unwilling to apply the traditional contractual standards and remedies of unconscionability, fraud, duress, etc., to reign in these practices.¹⁰²

⁹⁴ Barnes, *supra* note 90; Daniel D. Barnhizer, *Propertization Metaphors for Bargaining Power and Control of the Self in the Information Age*, 54 CLEV. ST. L. REV. 69, 112-13 (2006).

⁹⁵ *Williams*, 350 F.2d at 449.

⁹⁶ *See* Barnes, *supra* note 90, at 1608 (citations omitted).

⁹⁷ *Id.*

⁹⁸ *See Williams*, 350 F.2d at 449.

⁹⁹ Barnhizer, *supra* note 94, at 80 & n.54 (quoting and citing Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1296 (1998); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 431, 485 (2002)) (explaining the concept that " 'there can be no free-standing purely 'private' regime of property and contract' " should apply to cyberspace). Margaret Jane Radin and R. Polk Wagner argued that the statement should apply to cyberspace. Radin & Wagner, *supra*, at 1295-96.

¹⁰⁰ Barnhizer, *supra* note 94, at 112-13.

¹⁰¹ Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1224 (1983).

¹⁰² *See, e.g.*, *Bishop v. Washington*, 480 A.2d 1088, 1094 (Pa. Super. Ct. 1984). *But see* *Ferguson v. Lakeland Mut. Ins. Co.*, 596 A.2d 883, 885 (Pa.

Pushing standardization to an extreme, some have adopted a " 'contract-as-product' " model, conceptualizing contracts as component commodities.¹⁰³ The terms of the transaction are considered to be part of the purchase, just "one more characteristic of the good or service being sold."¹⁰⁴ Proponents of this approach argue that, as commodities, contracts may actually be subject to greater regulation through safety standards, warranties, labeling requirements, and the like.¹⁰⁵ It is clear, however, that the commodification of contracts would signal the end of the traditional notion of contracts based on individualized bargain and consent. Thus commoditized personal information would be integrated with commoditized terms of transfer.

Absent individualized bargaining or real consent, it might be argued that there can be no market efficiency or even no market at all.

C. Critique Number Three: Lack of Legal Control over Data

A third critique of the market in personal information attacks our conception of the character of the goods of exchange. As previously described, the data subject has no property rights in his

Super. Ct. 1991) (citing *Koval v. Liberty Mut. Ins. Co.*, 531 A.2d 487, 491 (Pa. Super. Ct. 1987); *Bishop*, 480 A.2d at 1094).

¹⁰³ Barnhizer, *supra* note 94, at 81 (citing Michael J. Madison, *Rights of Access and the Shape of the Internet*, 44 B.C. L. REV. 433, 441-42, 446-52 (2003) [hereinafter Madison, *Rights of Access*]; Michael J. Madison, *Reconstructing the Software License*, 35 LOY. U. CHI. L.J. 275, 315-16 (2003) [hereinafter Madison, *Reconstructing*]; Hillman & Rachlinski, *supra* note 99, at 429-31; Margaret Jane Radin, *Online Standardization and the Integration of Text and Machine*, 70 FORDHAM L. REV. 1125, 1139-40 (2002); John J. A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 286-88, 308-10 (2000); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203-07 (2003); Rakoff, *supra* note 101, at 1176-80).

¹⁰⁴ *Id.* (citing Madison, *Rights of Access*, *supra* note 103, at 441-42, 446-52; Madison, *Reconstructing*, *supra* note 103, at 315-16; Hillman & Rachlinski, *supra* note 99, at 429-31; Radin, *supra* note 103, at 1139-40; Burke, *supra* note 103, at 286-88, 308-10; Korobkin, *supra* note 103, at 1203-07; Rakoff, *supra* note 101, at 1176-80).

¹⁰⁵ *Id.* at 81-82 (citing Arthur Allen Leff, *Contract as a Thing*, 19 AM. U. L. REV. 131, 149-50 (1970); Radin, *supra* note 103, at 1139).

or her personal information.¹⁰⁶ The individual's rights are instead defined by his or her ability to conceal or manage the disclosure of that information.¹⁰⁷ Property rights arise only upon disclosure, and then only in the data collector.¹⁰⁸ It is argued that this is an intractable problem with the market: a problem beyond distortion that cannot be reformed but necessitates a wholesale redefinition of the market itself.¹⁰⁹ The starting point for this approach is a rather minimal statement about markets:

as long as the two parties involved can readily make and enforce contracts in their mutual interest, the marketplace itself will arrive at the most efficient resolution of the problem. All that is required is a clear definition of who has the legal right . . . (in other words, property rights) and the marketplace will take care of the rest.¹¹⁰

A consistent idea emerges from this proposition: it is possible to construct a more efficient market through the recognition of some species of property rights in personal information where those rights are allocated to the data subject rather than to the data gatherer.¹¹¹ Although the specifics vary, advocates of this approach generally see three advantages in allocating property rights to the data subject: (1) it will bring data subjects more clearly into the market for personal data, "encourag[ing] participation in the information economy;"¹¹² (2) it will provide data subjects with

¹⁰⁶ See *supra* notes 12-18 and accompanying text.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ Sholtz, *supra* note 66.

¹¹⁰ *Id.* (citing David Friedman, *The Swedes Get It Right*, WORLD ACCORDING TO COASE, http://www.daviddfriedman.com/Academic/Coase_World.html (last visited May 14, 2010)).

¹¹¹ *Id.*

¹¹² *Id.* Interestingly, Marco De Boni and Martyn Prigmore reach the same result through the application of Hegelian principles of alienation, concluding that this analysis "provides a clear allocation of economic rights: to the individual to whom the information pertains." Marco De Boni & Martyn Prigmore, *A Hegelian Basis for Information Privacy as an Economic Right*, LEEDS METROPOLITAN U. SCH. COMPUTING, http://www.lmu.ac.uk/ies/comp/staff/deboni/papers/Hegelian_Basis_For_E-privacy.pdf (last visited May 14, 2010) [hereinafter De Boni & Prigmore, *Hegelian Basis*]; see also Marco De

more control over their personal information and, thus, increased bargaining power in negotiating its transfer, resulting in a more functional and efficient market and forcing data gatherers to internalize certain costs that they are currently able to externalize;¹¹³ and (3) it will provide individuals with a greater ability to effectuate what is perceived to be an individual preference for greater privacy, with an accompanying social benefit.¹¹⁴ Without property rights, the data subject lacks the bargaining power necessary for a fair and efficient market and the ability to control downstream rights.¹¹⁵ Various critiques of peroptization are addressed later in the essay.¹¹⁶

IV. SOCIAL NETWORK SITES AND MARKET DISTORTIONS

This essay's primary assertion is that the emergence of social network sites modifies the conditions of the privacy paradox by creating new and powerful market distortions that intensify the rate and depth of personal data disclosure. These distortions are founded on two integrated phenomena. First, social network sites are uniquely situated to benefit from certain transformations in social organization that are driving individuals to (1) join these mediated networks and (2) disclose a great deal of personal

Boni & Martyn Prigmore, *A Hegelian Basis for Privacy as an Economic Right*, 3 CONTEMP. POL. THEORY 168, 184 (2004) [hereinafter De Boni & Prigmore, *Privacy as an Economic Right*]; Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1132 (2000) (citing Laudon, *supra* note 16, at 92-100; Carl Shapiro & Hal R. Varian, Univ. of Cal., Berkeley, US Government Information Policy 29-30 (July 30, 1997), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.64.3289&rep=rep1&type=pdf>).

[Editors' Note: The above citation references two similar, but nonetheless distinct, versions of the Marco De Boni and Martyn Prigmore article. De Boni & Prigmore, *Hegelian Basis*, *supra*; De Boni & Prigmore, *Privacy as an Economic Right*, *supra*.]

¹¹³ See, e.g., Samuelson, *supra* note 112, at 1130-46 (discussing the appeal and limits of a property right in personal information); Sholtz, *supra* note 66 ("[I]t is clear that a significant market failure has occurred concerning ways in which companies collect and use personal information.").

¹¹⁴ See Sholtz, *supra* note 66.

¹¹⁵ *Id.*

¹¹⁶ See *infra* pt. V.

information via those networks.¹¹⁷ Second, social network sites are altering the basic structure of the information exchange agreement, such that awareness of and consent to personal information collection and associated practices recede even more deeply into the background.¹¹⁸

A. Phenomenon Number One: Transformations in Social Organization Driving Data Disclosure

Sociologist Barry Wellman described the evolution of social organization "[f]rom [l]ittle [b]oxes to [s]ocial [n]etworks,"¹¹⁹ mapping this transition to a tripartite typology of movement from bounded groups to glocalized relationships and now towards networked individualism.¹²⁰ Glocalization describes a shift away from neighborhoods (bounded groups) to households and worksites (glocalized relationships),¹²¹ resulting in a "combination

¹¹⁷ For a discussion of this phenomenon, see *infra* pt. IV.A.

¹¹⁸ For a discussion of the second phenomenon, see *infra* pt. IV.B.

¹¹⁹ Barry Wellman, *Little Boxes, Glocalization, and Networked Individualism*, in DIGITAL CITIES II: COMPUTATIONAL AND SOCIOLOGICAL APPROACHES 10, 10-12 (Makoto Tanabe et al. eds., 2002), available at <http://www.chass.utoronto.ca/~wellman/publications/littleboxes/littlebox.PDF> [hereinafter Wellman, *Little Boxes, Glocalization, and Networked Individualism*]. Wellman has observed that, strictly speaking, "a group is really a special form of a social network that is *densely knit . . . and tightly bounded*," but that the distinction is helpful to the analysis. Barry Wellman, *From Little Boxes to Loosely Bounded Networks: The Privatization and Domestication of Community*, in SOCIOLOGY FOR THE TWENTY-FIRST CENTURY: CONTINUITIES AND CUTTING EDGES 94, 95 (Janet L. Abu-Lughod ed., 1999), available at <http://www.chass.utoronto.ca/~wellman/publications/littleboxes1/littleboxes1.pdf> [hereinafter Wellman, *From Little Boxes to Loosely Bounded Networks*].

¹²⁰ Wellman, *Little Boxes, Glocalization, and Networked Individualism*, *supra* note 119, at 10, 12, 16 (describing a community of networked individualism where "[p]eople remain connected, but as individuals rather than being rooted in the home bases of work unit and household"); see also Barry Wellman, *The Rise (and Possible Fall) of Networked Individualism*, 24 INSNA – CONNECTIONS, 2001, at 30, 30, available at http://www.insna.org/PDF/Connections/v24/2001_I-3-4.pdf (describing the evolution of community towards " 'networked individualism,' in which the individual operator of his/her network is important, rather than the household or work unit").

¹²¹ Wellman, *Little Boxes, Glocalization, and Networked Individualism*, *supra* note 119, at 13.

of intense local and extensive global interaction"¹²² based on "shared interest rather than . . . shared kinship or locality."¹²³ This transition from groups to glocalization was "driven by revolutionary developments in both transportation and communication," facilitating movement away "from hierarchically arranged, densely knit, bounded groups" in single locales to "contact between people in different places and multiple social networks."¹²⁴ The rise of networked individualism refers to a second transition from place-to-place connectivity to person-to-person connectivity and the technologies that make that transition possible by "linking people wherever they are."¹²⁵ Cellphones, e-mail, instant messaging, and the World Wide Web allow people to remain connected across larger, but fragmented, networks—moving rapidly between them, "but as individuals rather than being rooted in the home bases of work unit and household."¹²⁶

A recent "Social Ties" study by the Pew Research Center found support for Wellman's theory in empirical data.¹²⁷ Researchers concluded that "social relationships—and communit[ies]—are not fading away" or falling apart; communities are simply transforming.¹²⁸ The traditional orientation toward neighborhood-based or other single-community groups is being replaced by spatially dispersed social networks.¹²⁹ With kinship and friendship unhinged from location,¹³⁰ social networks are more fragmented, but they are also robust.¹³¹ They

¹²² Wellman, *Little Boxes, Glocalization, and Networked Individualism*, *supra* note 119, at 13.

¹²³ *Id.*

¹²⁴ *Id.* at 10, 13.

¹²⁵ *Id.* at 15.

¹²⁶ *Id.* at 15-16.

¹²⁷ See JEFFREY BOASE ET AL., PEW INTERNET & AM. LIFE PROJECT, THE STRENGTH OF INTERNET TIES: THE INTERNET AND EMAIL AID USERS IN MAINTAINING THEIR SOCIAL NETWORKS AND PROVIDE PATHWAYS TO HELP WHEN PEOPLE FACE BIG DECISIONS 42 (2006), *available at* http://www.pewinternet.org/~media/Files/Reports/2006/PIP_Internet_ties.pdf.pdf.

¹²⁸ *Id.* at i.

¹²⁹ *Id.*

¹³⁰ *Id.* at 5.

¹³¹ *Id.*

are broad, in that the average social network comprises more than two hundred relationships,¹³² but they are also deep, including a sizable number of friends and relatives who are much more than mere acquaintances.¹³³

The Pew study also found many benefits of these larger, more fragmented social networks.¹³⁴ They tend to expand the individual's exposure to the diverse experiences of others.¹³⁵ They are likely to provide better access to specialized resources.¹³⁶ There is also a greater potential for the provision of social capital.¹³⁷ Even within these larger networks, core ties—people with whom the individual has a very close relationship—play a distinct role, providing a more frequent source of help with significant life issues and events.¹³⁸ What makes these new social networks distinctly different, however, is the sheer number and expanded role of significant ties¹³⁹—people outside the individual's ring of core ties, but more than mere acquaintances.¹⁴⁰ These significant ties play a more important role at the margins, providing assistance with somewhat less significant matters, such as searching for a new job, finding a place to live, choosing an item to purchase, or making an investment.¹⁴¹ Thus individuals with larger social networks, usually including a greater number of significant ties, "seem to get the best of both worlds."¹⁴² They maintain both a rich pool of core ties, from whom they are able to draw social capital in times of great need, and a large and diverse network of significant ties, from whom they are able to receive more specialized resources.¹⁴³

¹³² BOASE ET AL., *supra* note 127, at 5.

¹³³ *Id.*

¹³⁴ *Id.* at 15.

¹³⁵ *Id.*

¹³⁶ *See id.* at 26-28.

¹³⁷ *Id.* at 15.

¹³⁸ BOASE ET AL., *supra* note 127, at iii, 30 & fig.12.

¹³⁹ *Id.* at 29-30 & fig.11.

¹⁴⁰ *Id.* at iii.

¹⁴¹ *Id.* at 30.

¹⁴² *Id.* at 29-30.

¹⁴³ *Id.* at 29-30 & fig.12.

These expansive social "networks can also be a burden."¹⁴⁴ The desire to build large social networks—and the effort expended to do so—lead almost inevitably to a desire to ensure their maintenance over time and distance.¹⁴⁵ The growth and fragmentation of one's social networks comes not primarily from exposure to vast numbers of potential social ties, but rather from the aggregation of relationships from different aspects of one's life.¹⁴⁶ Friends no longer fall away because of geographic or other circumstances; the relationship is simply reconfigured.¹⁴⁷ It takes significant "time and energy to maintain a large" and fragmented network that challenges one's ability to meet expectations of sociality from an increased number of discrete individual and collective relationships.¹⁴⁸

Advancements in communications technology play a vital and beneficial role in managing the burden of building and maintaining these larger, more fragmented networks.¹⁴⁹ Cellphones and Internet technologies enable communication at both the 'intense local' and 'extensive global' levels.¹⁵⁰ This allows users of these technologies to build and maintain larger and more fragmented networks than nonusers, with roughly the same number of core ties but a greater number of significant ties.¹⁵¹ Communication technologies also facilitate broader access to social capital from both core and significant ties.¹⁵² "[P]eople not only socialize online, but they

¹⁴⁴ BOASE ET AL., *supra* note 127, at 15.

¹⁴⁵ *Id.*

¹⁴⁶ *See id.* at ii, 15.

¹⁴⁷ *See id.* at 42.

¹⁴⁸ *Id.* at 15.

¹⁴⁹ *Id.* at ii-vi ("The number of core ties is about the same, regardless of whether one goes online or not, [but] internet users have a slightly larger number of significant ties than non-users.").

¹⁵⁰ *See* BOASE ET AL., *supra* note 127, at ii-vi.

¹⁵¹ *Id.* at vi ("The number of core ties is about the same, regardless of whether one goes online or not. However, internet users have a slightly larger number of significant ties than non-users.").

¹⁵² *Id.* at vii, 15, 28, 42-43 (clarifying that the Internet permits "people [to] use the internet to activate their social networks when they need help" and that "[p]eople who are fairly heavy users of information and communication technologies are also more likely than average to report high levels of receiving help when they need it").

[also] incorporate the internet into seeking information, exchanging advice, and making decisions."¹⁵³ Thus, rather than "suck[ing] people away from in-person contact, fostering alienation and real-world disconnection,"¹⁵⁴ research shows that "the internet is enabling people to maintain existing ties, often to strengthen them."¹⁵⁵ Indeed, the data is fairly clear that new communication technologies do not replace more 'intimate' communication, such as in-person and phone contact, but rather supplement these more traditional forms of communication and thus facilitate the maintenance of larger social networks.¹⁵⁶ Although connection to significant ties might be the most striking result of these new communication technologies, most of the interaction taking place online is with core ties – the family and friends to whom one regularly speaks either in person or over the phone.¹⁵⁷

¹⁵³ BOASE ET AL., *supra* note 127, at 42.

¹⁵⁴ *Id.* at 1-2 (recognizing the "fear about what the internet is doing to relationships is that the internet seduces people into spending time online at the expense of time spent with friends and family" and "worries that relationships that exist in text — or even screen-to-screen on flickering webcams — are less satisfying than those in which people can really see, hear, smell, and touch each other").

¹⁵⁵ *Id.* at 3 (citing Jeffrey Boase & Barry Wellman, *Personal Relationships: On and Off the Internet*, in THE CAMBRIDGE HANDBOOK OF PERSONAL RELATIONSHIPS (Anita L. Vangelisti & Daniel Perlman eds., 2006); JAMES E. KATZ & RONALD E. RICE, SOCIAL CONSEQUENCES OF INTERNET USE: ACCESS, INVOLVEMENT, AND INTERACTION (2002)) (illustrating "research . . . showing that the internet is not destroying relationships or causing people to be anti-social"). "The internet does not reduce in-person or telephone contact, or any other form of social activity; it replaces only sleeping or TV watching." *Id.* at 22. Furthermore, the "replacement theory" is not supported, but the opposite is true, particularly for significant ties—"[t]he more contact by one medium, the more contact by others." *Id.* at 22-23. "[T]he current generation of email users is communicating much more often than recent generations and possibly more often than any previous generation since people huddled in caves with only conversation to pass the nights away." *Id.* at 24.

¹⁵⁶ *See id.* at 22, 30-31.

¹⁵⁷ *Id.* at 3-4 ("[T]he relationships maintained through online communication only rarely are with an entirely new set of individuals who live far away," but rather "a large amount of the communication that takes place online is with the same set of friends and family who are also contacted in person and by phone.").

Social network sites are uniquely situated to benefit from these transformations in social organization and the communication demands of the larger, more fragmented social networks that have emerged. danah m. boyd and Nicole B. Ellison "define social network sites as web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system."¹⁵⁸ Facebook provides an excellent example.¹⁵⁹ Users create public displays of connection using various points of commonality.¹⁶⁰ Existing connections migrate from physical space to the online environment.¹⁶¹ Lost connections are reestablished based on shared, articulated histories.¹⁶² New connections are established as users declare and cross-reference their affiliations.¹⁶³ Networks grow exponentially as they link and overlap.¹⁶⁴ At each point, personal information is the connective key.¹⁶⁵

To more completely understand the role of personal information within these networks, it may be helpful to conceptualize Facebook as a platform for social production.¹⁶⁶

¹⁵⁸ boyd & Ellison, *supra* note 6, at 211.

¹⁵⁹ *Id.* at 210-11, 213, 221.

¹⁶⁰ *See, e.g., id.* at 218 (discussing how Facebook users joined networks based on which university or institution they attended).

¹⁶¹ *See id.* at 211.

¹⁶² *See generally* Claire Suddath, *Raging Retrosexuals*, TIME, Sept. 21, 2009, at 79, available at www.time.com/time/printout/0,8816,1921609,00.html. *See also* Gardengates, *How to Find Lost Friends on Facebook*, EHOW, http://www.ehow.com/how_4801002_lost-friends-facebook.html (last visited May 14, 2010) (demonstrating tips on how to reconnect with people on Facebook).

¹⁶³ *See* boyd & Ellison, *supra* note 6, at 213.

¹⁶⁴ *See, e.g., andfaraway*, <http://andfaraway.net/blog/2009/11/08/25-years-of-facebook-friends/> (Nov. 8, 2009, 23:44 EST); Brian Solis, *Facebook, MySpace and How to Avoid the Perils of 'Social Network Fatigue'*, SOC. J. COMPUTING, Aug. 9, 2007, <http://socialcomputingjournal.com/viewcolumn.cfm?colid=546>.

¹⁶⁵ *See* Grimmelmann, *supra* note 4, at 1149-51 (citations omitted).

¹⁶⁶ *See, e.g., YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 3, 91-92, 99, 106 (2006) (exploring the concepts of social production), available at

Users are motivated by the provision and accumulation of social capital, but the product is user-supplied personal information.¹⁶⁷ Among users, Facebook is a " 'gift economy,' " based on sharing rather than selling.¹⁶⁸ I share my personal information with you; you share your personal information with me. Through this practice we create and exchange social capital. The network provides a mechanism by which to meet the expectations of sociality from a greater number of discrete individual and collective relationships.¹⁶⁹ Reflecting this diversity of relationship, sociality takes many forms. Various modes of communication—one-to-many broadcasting, personal messaging, one-to-one communication in public space, etc.—service different forms of relationships and discrete networks.¹⁷⁰ Not only are the information and tools of distribution centralized, but so are the tools of reception and evaluation.

The process of sociality that occurs within these networks is driven by our need to preserve the benefits of community in a more splintered world: remaining connected in our relationships, creating and retaining common experience, engaging peer opinion,

http://www.benkler.org/Benkler_Wealth_Of_Networks.pdf; NICHOLAS CARR, THE BIG SWITCH: REWIRING THE WORLD, FROM EDISON TO GOOGLE 137-40 (2008) (exploring concepts of social production); DON TAPSCOTT & ANTHONY D. WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING 11-15, 30-31, 95-96, 153, 289-90 (2006); see also Steven A. Hetcher, *Hume's Penguin, or, Yochai Benkler and the Nature of Peer Production*, 11 VAND. J. ENT. & TECH. L. 963, 994-97 (2009) (citations omitted) (discussing Facebook as a peer production).

¹⁶⁷ See BENKLER, *supra* note 166, at 361-62; Hetcher, *supra* note 166, at 995.

¹⁶⁸ Hetcher, *supra* note 166, at 986 n.95, 995 (citing Rishab Aiyer Ghosh, *Cooking Pot Markets: An Economic Model for the Trade in Free Goods and Services on the Internet*, FIRST MONDAY, Mar. 2, 1998, <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/580/501>; Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369, 373 (2002)).

¹⁶⁹ Grimmelmann, *supra* note 4, at 1151.

¹⁷⁰ See, e.g., *id.* (citations omitted) (discussing how social network users can communicate with each other by posting comments on each others' 'Walls,' by tagging each other in pictures and by sending messages through a private messaging system that is not available for other people in the network to see).

and building reputation.¹⁷¹ Personal information is at the heart of these engagements.¹⁷² It is how we create intimacy.¹⁷³ It is how we maintain, strengthen, and even transform so many distinct and diverse relationships scattered throughout a large, fragmented network. Users must move beyond basic identifiers and contact information, although this data is part of one's profile, to reveal true expressions of self—for example, preferences, graphic representations, affiliations, acts, and sexuality.¹⁷⁴ Thus, just as the transformation of social organization drives us to join these networks, so too does the primary need for community encourage the centralization and distribution of our most personal data.

The range and depth of personal information disclosed on the network is a product, in part, of the process of identity performance and evaluation in a mediated environment.¹⁷⁵ As Oscar Gandy observes, "individual identities are formed in interaction with others," including group affiliation.¹⁷⁶ "In [mediated] environments, traditional identity cues, such as accent and style of dress, are not [readily] available."¹⁷⁷ Even where assertions of digital identity are linked to an individual's offline identity, such as Facebook, users must still compensate with reference to other cues: providing more information, increasing

¹⁷¹ Grimmelman, *supra* note 4, at 1152-54 (quoting Hugo Liu, *Social Network Profiles as Taste Performances*, 13 J. COMPUTER-MEDIATED COMM. 252, 262 (2008), available at <http://jcmc.indiana.edu/vol13/issue/liu.html>) (citing Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 923-24 & nn.7-8 (2005)).

¹⁷² *Id.* at 1154 (citing Strahilevitz, *supra* note 171, at 923-24 & nn.7-8).

¹⁷³ *Id.* (citing Strahilevitz, *supra* note 171, at 923-24 & nn.7-8) ("Sharing personal information is a basic component of intimacy.")

¹⁷⁴ *See id.* at 1151 (citing Andrew B. Serwin, *Privacy 3.0—The Principle of Proportionality*, 42 U. MICH. J.L. REFORM 869, 902-05 (2009)).

¹⁷⁵ *Id.* at 1152-53.

¹⁷⁶ Oscar H. Gandy, Jr., *Exploring Identity and Identification in Cyberspace*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1085, 1088 (2000) (citing William E. Cross, Jr., *Oppositional Identity and African American Youth: Issues and Prospects*, in TOWARD A COMMON DESTINY: IMPROVING RACE AND ETHNIC RELATIONS IN AMERICA 185, 203 (Willis D. Hawley & Anthony W. Jackson eds., 1995)).

¹⁷⁷ Cliff Lampe et al., *A Familiar Face(book): Profile Elements as Signals in an Online Social Network*, in PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 435, 436 (2007).

communication time, and using networks to triangulate and authenticate.¹⁷⁸

Cliff Lampe, Nicole B. Ellison, and Charles Steinfield provide a useful structure for conceptualizing this link between identity and the proliferation of personal information, describing online identity performance in terms of the signaling theory, the common ground theory, and the transaction cost theory.¹⁷⁹ The signaling theory, positing that "conventional signals" are not inherently reliable but are instead a matter of social convention and context,¹⁸⁰ helps to explain "why Facebook profiles might be more 'honest' " and dispersed in the information provided because one's "shared social network can provide explicit or implicit verification of identity claims."¹⁸¹ The common ground theory explains the motivation to provide greater amounts of information in terms of the common frames of reference that help to define membership in shared communities, expanding the breadth and depth of one's networks.¹⁸² The transaction cost theory bridges the gap between signaling and common ground, suggesting that the provision of more information "reduce[s] the cost[s] of finding the common referents."¹⁸³

For younger users engaged in the process of identity formation, these acts of articulation—text, images, audio, and video—serve a distinct purpose.¹⁸⁴ As danah boyd describes, teens in digital space are engaged in the practice of writing themselves "into being."¹⁸⁵ This captures a process by which younger users

¹⁷⁸ Lampe et al., *supra* note 177, at 436.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 437.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 436-37.

¹⁸⁴ danah boyd, *Why Youth (Heart) Social Network Sites: The Role of Networked Publics in Teenage Social Life*, in *YOUTH, IDENTITY, AND DIGITAL MEDIA* 128-29, 131 (David Buckingham ed., 2008), available at <http://www.danah.org/papers/WhyYouthHeart.pdf> [hereinafter *Social Network Sites*].

¹⁸⁵ danah boyd, *Friends, Friendsters, and MySpace Top 8: Writing Community into Being on Social Network Sites*, *FIRST MONDAY*, Dec. 2006, available at <http://www.danah.org/papers/FriendsFriendsterTop8.pdf>

"work out identity and status, make sense of cultural cues [and societal norms], and negotiate public life."¹⁸⁶ It is the process of taking risks: putting yourself out there, pushing boundaries, gauging reactions, and attempting to determine what is acceptable and what is not.¹⁸⁷ To this end, teens often maintain multiple identities, some linked to their offline identities and others closeted, making claims of personal information public.¹⁸⁸

B. Phenomenon Number Two: Altering the Structure of the Information Exchange Agreement

The second phenomenon creating new and powerful distortions in the market for personal information is an alteration to the basic structure of the information exchange agreement.¹⁸⁹ This structure integrates two previously discussed aspects of social network sites. First, the network is configured as a platform for social production in which users are motivated to contribute personal information by the provision and accumulation of social capital.¹⁹⁰ This platform is, however, commercially architected and maintained,¹⁹¹ a fact that, under most conditions, remains deeply in the background as the "gift economy" of user transactions operates in the open.¹⁹² Every transaction in that economy is facilitated by

[hereinafter *Friends*] (citing JENNY SUNDÉN, MATERIAL VIRTUALITIES: APPROACHING ONLINE TEXTUAL EMBODIMENT (2003)).

¹⁸⁶ *Social Network Sites*, *supra* note 184, at 120.

¹⁸⁷ *Id.* at 137.

¹⁸⁸ See Chris J. Pelzer, Iowa State Univ, Social Networking Sites and the Consequences of Multiple Identities Among Members of Virtual Communities 5 (unpublished manuscript), available at <http://www.public.iastate.edu/~cjpelzer/Resarch Paper Final Draft.pdf>.

¹⁸⁹ See Grimmelman, *supra* note 4, at 1179.

¹⁹⁰ *Id.* at 1151.

¹⁹¹ See William McGeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105, 1107-08, 1114 (citing Facebook, Facebook's Privacy Policy, <http://www.facebook.com/policy.php> (last visited May 14, 2010) [hereinafter Facebook's Privacy Policy]; MySpace.com, Privacy Policy, <http://www.myspace.com/index.cfm?fuseaction=misc.privacy> (last visited May 14, 2010)).

¹⁹² XIAOCHANG LI, MORE THAN MONEY CAN BUY: LOCATING VALUE IN SPREADABLE MEDIA, MIT CONVERGENCE CULTURE CONSORTIUM 3-4 (2009), available at http://xiaochangli.com/research/C3_valuewhitepaper.pdf.

the platform, and every detail of every transaction is captured by the network.¹⁹³ Second, as discussed previously, the law has embraced the proliferation of standardized, nonnegotiable contracts in which consent is often obscured both at the time of agreement—for example, by dramatically increasing the transaction costs associated with reading, understanding, and renegotiating the contract—and throughout the life of the contract.¹⁹⁴ The user agrees up front to an ongoing relationship in which continuing consent is inferred from continued use of the network.¹⁹⁵ The very inclusion of the network as a party to these user-to-user transactions is seldom if ever reconfirmed, ensuring that the broad, dictated terms of consent retreat from the more visible terms of the information exchange agreement.¹⁹⁶ A comparison between different models of these agreements helps to illuminate these points.

In the classic e-commerce model, the consumer provides money and a narrow universe of personal data associated with the delivery of the purchased goods or services.¹⁹⁷ In exchange, the consumer receives the requested merchandise and perhaps

¹⁹³ Catherine Dwyer et al., *Trust and Privacy Concern Within Social Networking Sites: A Comparison of Facebook and MySpace*, in ASS'N FOR INFO. SYS., 13TH AMERICAS CONFERENCE ON INFORMATION SYSTEMS (2007), available at <http://csis.pace.edu/~dwyer/research/DwyerAMCIS2007.pdf> ("Social networking sites record all interactions, and retain them for potential use in social data mining.").

¹⁹⁴ Rakoff, *supra* note 101, at 1182, 1191 (quoting *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 172 (Cal. 1981)).

¹⁹⁵ Fred H. Cate & Michael E. Staten, *Protecting Privacy in the New Millennium: The Fallacy of "Opt-In"*, NAT'L RETAIL FED'N, 2000, <http://www.bbbonline.org/UnderstandingPrivacy/library/whitepapers/fallacyofoptin.pdf>.

¹⁹⁶ See, e.g., Google, Google Terms of Service, at para. 4.2, <https://www.google.com/accounts/TOS?loc=US&hl=en> (last visited May 14, 2010) [hereinafter Terms of Service] (noting that a user that agrees to the terms of service also agrees that Google may change the form and nature of its services without giving notice to the user).

¹⁹⁷ See generally R. Ken Pippin, *Consumer Privacy on the Internet: It's "Surfer Beware"*, 47 A.F. L. REV. 125, 126 (1999) (discussing the increase of online sales and the resulting concerns regarding the protection of consumer information).

personalization for future purchases.¹⁹⁸ Here, the merchant is a direct and salient beneficiary of a discrete universe of information, limited in time.¹⁹⁹ The merchant can use that information, inter alia, to populate a proprietary database, share that information with third parties, or combine that information with information acquired from others.²⁰⁰

The Gmail model builds on this basic arrangement. The initial transaction looks like the e-commerce model, with the user providing a limited amount of personal information (less than required by most online merchants) in exchange for e-mail services.²⁰¹ Gmail then provides a platform for transactions between individuals in the form of exchanges of information between the user and third-party contacts, often with benefits to social capital.²⁰² Gmail recedes into the background, almost as a third-party beneficiary of these subsequent exchanges between contacts.²⁰³ Based on the content of these exchanges, Gmail is able

¹⁹⁸ See Pippin, *supra* note 197, at 126 (discussing storage of consumers' personal information on the Internet).

¹⁹⁹ See *id.* at 127-28 (citing MARTHA K. LANDESBURG & LAURA MAZZARELLA, FED. TRADE COMM'N, SELF-REGULATION AND PRIVACY ONLINE: A REPORT TO CONGRESS 10-11, 19-20 (1999), <http://www.ftc.gov/os/1999/07/privacy99.pdf>) (discussing the enormous amount of personal information that commercial websites collect from consumers)).

²⁰⁰ See *id.* at 127-30 (discussing how websites store consumer information and target users through online advertising).

²⁰¹ Terms of Service, *supra* note 196, at para. 5.1; Google Accounts, Gmail, <https://mail.google.com/mail/signup> (last visited May 14, 2010).

²⁰² McGeeveran, *supra* note 191, at 1115, 1130 (citing Miguel Helft, *Google's Free Phone Manager Could Threaten a Variety of Services*, N.Y. TIMES, Mar. 12, 2009, at B.9, available at <http://www.nytimes.com/2009/03/12/technology/internet/12google.html>; Rex Crum, *No End in Sight for Microsoft-Google War*, MARKETWATCH, Oct. 15, 2008, <http://www.marketwatch.com/news/story/no-end-sight-microsoft-google-war/story.aspx?guid=%7BA5D6279D-40A9-4AEB-9835-C003D296A841%7D&dist=msr>; Posting of Nick O'Neill to All Facebook, <http://www.allfacebook.com/2008/07/facebook-further-attack-on-friendfeed-adds-comments-to-news-feed/> (July 31, 2008, 9:41 EST)).

²⁰³ See, e.g., Google, Gmail Privacy Notice (Feb. 9, 2010), <http://mail.google.com/mail/help/privacy.html> (noting that the Gmail service can retain information and contents of e-mails and allow advertisers to market goods and services based on the contents of those e-mails).

to gather a great deal of personal information and push out advertisements coordinated to that data.²⁰⁴ Gmail claims not to pass personal data on to third parties except when required by law.²⁰⁵

The social network site model, in turn, builds on the Gmail model, although the consumer initially publishes a great deal of personal information to a profile, rather than simply providing a limited amount of data on a one-time basis.²⁰⁶ Going forward, the social network site provides the platform for organization, coordination, and communication, leveraging attributes of the social production model, for example, leveraging easy group formation, the social urge to share, integrated tools for contribution, the move toward "[m]ass amateurization" in the production of user-created content, and changes in the information filtering process from prepublishing to postpublishing.²⁰⁷ Capitalizing on this social production phenomenon, the network is architected to incorporate multiple points of data production and data sensors.²⁰⁸ Users are producing information about themselves, information about others, and information about their various social networks.²⁰⁹ Contacts act as both data sensors and

²⁰⁴ See, e.g., Google, *supra* note 203 (noting that Gmail will retain information in messages in order to send advertisements that are relevant to the messages sent).

²⁰⁵ *Id.*; Google, Privacy Center: Privacy Policy, <http://www.google.com/privacypolicy.html> (last visited May 14, 2010) (explaining that Google will share limited information with third parties).

²⁰⁶ Compare Grimmelman, *supra* note 4, at 1149 (citing Facebook, Help Center: Friends, <http://www.facebook.com/help.php?page=441> (last visited May 14, 2010); Posting of Florin Ratiu to The Facebook Blog, http://blog.facebook.com/blog.php?blog_id=company&blogger=651632348 (May 1, 2008, 22:02 EST)), with Google, Privacy Center: Privacy FAQ, http://www.google.com/privacy_faq.html (last visited May 14, 2010).

²⁰⁷ See, e.g., CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* 29, 48-49, 63-66, 83-84, 87 (2008); Lampe et al., *supra* note 177, at 435-36.

²⁰⁸ Lampe et al., *supra* note 177, at 435-36.

²⁰⁹ See, e.g., Posting of Mark Zuckerberg to The Facebook Blog, <http://blog.facebook.com/blog.php?post=54434097130> (Feb. 16, 2009, 14:09 EST) (discussing the inherent conflict between sharing information and restricting it to users' intended audiences).

producers.²¹⁰ Tools for data collection, use, and publication—for example, search access and functionality, News Feed, and Beacon—are built into and layered on top of the network.²¹¹ The result is an exponentially expanding mosaic of information.

Like Gmail, the social network site has full access to the content of these informational flows, but with the contextual benefit of primarily authenticated identity and articulated social networks.²¹² Moving beyond the Gmail model, personal information is collected across a multitude of sources and across extended periods of time while being aggregated, analyzed, and shared.²¹³ Durable and heavy usage produces a broader range and greater depth of data.

Much like the Gmail model, the social network site itself tends to recede into the background of this informational hum, positioned as a veiled third-party beneficiary of discrete exchanges between contacts and the flow of information within and across networks. Transitions in social organization push users to the network and necessitate ongoing participation. The single 'bargain' of membership, standardized and nonnegotiable, is sustained across time.²¹⁴ The network's status as a party to these social

²¹⁰ See, e.g., Posting of Adam Ostrow to Mashable, <http://mashable.com/2009/12/10/facebook-privacy-experts/> (Dec. 10, 2009, 9:36 EST) (discussing privacy experts' responses to Facebook's settings that encourage users to share information with " 'everyone' ").

²¹¹ See, e.g., Grimmelmann, *supra* note 4, at 1146-48.

²¹² See, e.g., Facebook's Privacy Policy, *supra* note 191 (explaining that Facebook has the right to retain information from transactions completed on the network and may record any user communications).

²¹³ See News Release, Worcester Polytechnic Inst. (WPI), Online Social Networks Leak Personal Information to Third-Party Tracking Sites (Aug. 24, 2009), <http://www.wpi.edu/news/20090/privacy.html>. For a full study on leakage of personal information, see generally BALACHANDER KRISHNAMURTHY & CRAIG E. WILLS, WORCESTER POLYTECHNIC INST., ON THE LEAKAGE OF PERSONALLY IDENTIFIABLE INFORMATION VIA ONLINE SOCIAL NETWORKS (2009), <http://conferences.sigcomm.org/sigcomm/2009/workshops/wosn/papers/p7.pdf>.

²¹⁴ See, e.g., Facebook, Help Center: Login and Password – Sign Up, <http://www.facebook.com/help/?page=173> (last visited May 14, 2010) (signifying that once an individual signs up for Facebook and accepts the network's e-mail confirmation, registration is complete).

transactions is seldom if ever reconfirmed.²¹⁵ Consent recedes further into the background, obscured not only by the behavioral market distortions discussed previously, but also by intense societal pressure to maintain network connection and visibility.²¹⁶

V. CRITIQUING REMEDIAL PROPOSALS

The market distortions just described—which flow from fundamental changes in social organization, unique characteristics of the new mediated environments of social interaction, and evolving legal concepts serving technical and market efficiency²¹⁷—present unique difficulties for our notice-and-choice system of privacy protection. Social network sites are particularly troublesome because the revelation of personal information is the very reason users are on the site in the first place; we join Facebook for the purpose of telling other people about our lives. We make our personal information 'public' both voluntarily and intentionally, and we expect others to pay attention. We also expect others to provide additional information about us and thus to acknowledge the social ties of association. We work hard to develop a network identity that is deep, broad, and socially connected, just as we envision ourselves to be.

The challenge, then, is to facilitate privacy regulation while preserving the benefits of new social spaces that require strategic data disclosure in order to work. By this measure, the majority of current proposals for regulating the collection, storage, use, and transfer of personal information are misguided,²¹⁸ either because they under-protect personal information by failing to adequately address the problems of valuation and consent or because they overprotect the information by failing to adequately preserve functionality in socially valuable communications platforms. Although this essay is not intended as an exhaustive critique of privacy proposals, a few examples are instructive.

²¹⁵ See Facebook, *supra* note 214.

²¹⁶ See *supra* pt. III.A.

²¹⁷ See *supra* pt. IV.

²¹⁸ See Posting of Sarah Perez to ReadWriteWeb, http://www.readwriteweb.com/archives/should_social_networks_be_regulated.php (June 5, 2008, 8:15 EST).

A. Under-Protection

In *A Taxonomy of Privacy*, Daniel J. Solove acknowledges that "[i]f a person consents to most [otherwise invasive] activities, there is no privacy violation"—a particularly acute problem in social network sites.²¹⁹ The overwhelming legal significance of consent and its relationship to market distortions undermines many privacy regulation proposals.²²⁰ For instance, proposals to allocate property rights in personal information to the data subject provide no real answer for the market distortions that undermine the rational economic actor and, thus, consent. Although proponents claim that property rights would create equality in bargaining, property is freely alienable and thus easy to transfer. Propertization may, therefore, improve the data subject's position in the clandestine collection of personal information but do little to limit contractual consent. Proposals to make privacy more salient at the point of disclosure through education and notice are more accurately targeted at the issue of consent but have so far proven to be ineffective.²²¹ Some commentators are seeking a technical solution that attempts to automate and enhance our better judgment by mitigating information asymmetries and psychological distortions, nudging us towards privacy at the moment that our judgment is most impaired, but even those involved in the development of these technologies agree that they will likely be only marginally beneficial.²²²

Proposals to expand regulation in the area of consumer fraud or to create a do-not-track registry are similarly flawed.²²³ There is no indication that social network sites need to engage in fraud to attract users and collect personal information; users are adequately

²¹⁹ Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 484-85 (2006).

²²⁰ See generally Joel Winston, *FTC Staff Report: Behavioral Advertising Tracking, Targeting, & Technology*, 970 PRACTISING L. INST. 411 (2009) (summarizing and analyzing public comments to the FTC concerning online privacy regulation for behavioral advertising).

²²¹ See generally *id.*

²²² Grimmelman, *supra* note 4, at 1184-87 (quoting *Social Network Sites*, *supra* note 184, at 132) (discussing the ineffectiveness of technical controls).

²²³ See, e.g., Catherine Rampell, *'Do Not Track' Registry Proposed for Web Use; Online Behavior Used to Tailor Ads*, WASH. POST, Nov. 1, 2007, at D.1.

motivated to join and disclose as it is.²²⁴ Likewise, a do-not-track registry would have little effect on those many users seeking the benefits of a social network site. Finally, proposals to expand liability, sounding in common law tort, may have some applicability to specific bad acts of publication and/or collection, but those proposals are largely trumped by the type of contractual consent provided by social network site users.²²⁵

B. Overprotection

Because of the market distortions present in a social network site and the effect of those distortions on the act of consent, some have sought to impose strict restrictions.²²⁶ One such proposal is the imposition of an opt-in system, in which data subjects must affirmatively choose to disclose information by opting in to the collection.²²⁷ At some level, however, this is precisely the system currently followed by social network sites.²²⁸ Users opt in to the

²²⁴ Rory Bahadur, *Electronic Discovery, Informational Privacy, Facebook and Utopian Civil Justice*, 79 MISS. L.J. 317, 347-48 (2009) (quoting Ralph Gross & Alessandro Acquisti, *Information Revelation and Privacy in Online Social Networks (The Facebook Case)*, 4 WORKSHOP ON PRIVACY ELECTRONIC SOC'Y §§ 1, 3.3 (2005), <http://www.heinz.cmu.edu/~acquisti/papers/privacy-facebook-gross-acquisti.pdf>).

²²⁵ Sander J.C. van der Heide, Note, *Social Networking and Sexual Predators: The Case for Self-Regulation*, 31 HASTINGS COMM. & ENT. L.J. 173, 179-83 (2008).

²²⁶ See, e.g., Press Release, NetChoice, *Misguided Marketing Restriction and Online Travel Tax Top List of Worst Internet Legislation* (Aug. 18, 2009), <http://www.netchoice.org/press/misguided-marketing-restriction-and-online-travel-tax-top-list-of-worst-internet-legislation/>; see also Thomas Cheplick, *Illinois Social Networking Bill Targets Minors*, INFOTECH & TELECOM NEWS, June 1, 2009, available at http://www.heartland.org/infotech-news.org/article/25325/Illinois_Social_Networking_Bill_Targets_Minors.html.

²²⁷ Marshall Lager, *Social Networking: Getting in Touch the CRM Way*, CUSTOMER RELATIONSHIP MGMT., Mar. 2006, at 20, 22, 25, available at <http://www.destinationcrm.com/Articles/Editorial/Magazine-Features/Social-Networking-Getting-in-Touch-the-CRM-Way-42899.aspx>.

²²⁸ Bruce L. Mann, *Social Networking Websites - A Concatenation of Impersonation, Denigration, Sexual Aggressive Solicitation, Cyber-Bullying or Happy Slapping Videos*, 17 INT'L J.L. & INFO. TECH. 252, 256 (2009); Jon Hood, *Facebook Turns Off Beacon: System Assailed by Privacy Advocates Is*

service and affirmatively agree to the terms for data collection, storage, use, and transfer.²²⁹ A more restrictive iteration of this approach would require a default setting in which no data is collected or used to facilitate the service but, instead, the default would mandate users to opt in to change these settings.²³⁰ This approach, apart from its rather paternalistic overtones, has the potential to cripple the service either functionally or economically.²³¹ Personal data provides the means for establishing and expanding one's network. It is at the heart of the social transactions that occur on the network. Would any active user of a social network site actually fail to opt in if failing to do so significantly impacted the functionality of that site? It is quite plausible to envision privacy improvements at the margins, but at what cost? Moreover, the long-term economic viability of social network sites is premised on the sites' ability to monetize the user base through targeted advertising that requires individualized data.²³² Draconian opt-in requirements might lethally undermine that ability.

VI. CONCEPTUALIZING A SOLUTION

A full discussion of appropriate regulatory design is beyond the scope of this essay. Nevertheless, it may be helpful to lay down a few conceptual markers. Most importantly, designing appropriate privacy regulation in social network environments requires moving beyond the private/public binary by delinking (1) the act of intentionally disclosing personal information in and to a mediated network environment from (2) the presumption that intentional disclosure indicates voluntary waiver of nearly all privacy expectations in that information—even where the user has

Casualty of Class Action, CONSUMERAFFAIRS.COM, Sept. 19, 2009, http://www.consumeraffairs.com/news04/2009/09/facebook_beacon.html.

²²⁹ Cate & Staten, *supra* note 195.

²³⁰ Grimmelmann, *supra* note 4, at 1184-87.

²³¹ *Id.*; see Cate & Staten, *supra* note 195.

²³² Yasamine Hashemi, Note, *Facebook's Privacy Policy and Its Third-Party Partnerships: Lucrativity and Liability*, 15 B.U. J. SCI. & TECH. L. 140, 148 (2009); Jane E. Kirtley, *Privacy Protection, Safety and Security*, 987 PRACTISING L. INST. 15, 22-23 (2009).

manifested consent via contractual agreement to the contrary. Once the act of disclosure and the express terms of consent are no longer entirely dispositive of privacy expectations, the troubling implications of the new and powerful market distortions associated with social network sites become less onerous. This is not to say, however, that individual consent should be replaced with pervasive public regulation or intense judicial scrutiny. Nor is this to suggest that we should rely on the existing model of the targeted but exacting regulation of certain types of 'intimate' information or vulnerable users,²³³ although many of these existing limitations might well stay in place. Instead, the regulatory power should be used sparingly at the margins to establish, based on reasonable user expectations, expansive boundaries for the permissible collection, storage, use, and transfer of personal information, leaving ample room for the development of social norms and negotiated expectations for disclosure and consent.

By way of example, regulators might well be guided by emerging norms of 'network' privacy expectations.²³⁴ In this model, we distinguish between data collection and storage, data flow within networks, and data flow between networks. Data collection and storage by social network sites would be fairly unregulated, although subject to existing notice and consent requirements and, thus, open to broad negotiation. Here, restrictions on the postcollection storage of individually identifiable information, such as reflecting reasonable user expectations as to data security and data expiration periods, might be desirable. A similar, minimally regulated market approach might be appropriate for data flowing *within* networks. Here, limited regulation aimed at enabling network definition and maintenance could provide the appropriate structure for market development, function, and enforcement in the context of which norms of individual control would be more likely to emerge. Data flow *between* networks might well require more robust regulation,

²³³ Winston, *supra* note 220, at 431-32.

²³⁴ See generally Steven A. Hetcher, *The Emergence of Website Privacy Norms*, 7 MICH. TELECOMM. & TECH. L. REV. 97 (2001) (discussing privacy norms that emerged on social networking sites), available at <http://www.mtlr.org/volseven/Hetcher.pdf>.

integrating various tools of control with targeted legal restrictions. On the technology side, this could include user control over network partitions, data tagging, and the addition of persistent contextual data, just to name a few possibilities. These technological solutions could then be paired with legal restrictions on network crossing, downstream use, and data transfer, as well as a requirement of data portability aimed at creating greater competition in the market for favorable privacy terms.

Regardless of the precise approach, the key is to recognize that rights-based, regulatory, technical, and educational proposals aimed at 'fixing' our notice-and-choice system of privacy protection are almost certain to fail.²³⁵ This system is premised on acts of disclosure and consent, and in the age of social network sites, the market distortions previously described are simply too powerful and distortive to effectively regulate without destroying the very functionality of these new social spaces.²³⁶ We must instead look for meaningful ways to capture and enforce user expectations as to the collection, storage, use, and transfer of personal information, but only at the margins, leaving significant room for the negotiation of social norms around privacy practices.

VII. CONCLUSION

Social network sites alter the conditions of the privacy paradox by creating new and powerful market distortions. Transformations in social organization are driving individuals to join, participate, and remain in these networks as a way to maintain relationships and to build community.²³⁷ It is through the disclosure and exchange of personal information over the network that users construct groups and create intimacy. As individuals engage in our communities through identity performance, computer-mediated environments require us to compensate for the lack of traditional identity clues by increasing our time on the network and providing a greater amount of personal

²³⁵ Grimmelmann, *supra* note 4, at 1178-87.

²³⁶ *See supra* pt. IV.

²³⁷ Grimmelmann, *supra* note 4, at 1151-60.

information.²³⁸ For younger users engaged in identity formation, navigating this new public space is particularly challenging.²³⁹ Social network sites serve as the platform for these social transactions and the exchange of information on which they are based. Yet these platforms have fundamentally altered the more familiar structure of an information exchange agreement. Rather than receiving a discrete set of information tied to the necessities of a specific transaction, social network sites cultivate a continuous relationship in which whatever minimal amount of negotiation and consent exists attendant to that transaction is front-loaded. This single 'bargain' is then maintained over time, receding into the background as millions of user-to-user transactions flow through the architecture. The social network site facilitates and encourages those transactions, profiting as a third-party beneficiary of the information generated by those social bargains.

Our notice-and-choice system of privacy protection is ill-equipped to deal with the market distortions just described, particularly in the context of social spaces devoted to large, inclusive networks and the open exchange of personal information. The majority of current proposals for regulating privacy in these environments are imprudent because they either fail to adequately address the problems of valuation and consent (under-protection) or fail to adequately preserve functionality (overprotection). Instead of attempting to fix our notice-and-choice system of privacy protection—a fool's errand in an environment seeped in new and powerful market distortions of consent—the better approach is to be guided by user expectations as to the outer limits of permissible data collection, storage, use, and transfer. These expectations would be expressed in minimal regulatory restraints at the margins of these practices, leaving significant room for markets in the development of social norms around privacy practices.

²³⁸ See Grimmelmann, *supra* note 4, at 1151-60.

²³⁹ See *id.* at 1152-53.