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# The Gathering Twilight? Information Privacy on the Internet in the Post-Enlightenment Era

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## ARTICLES

# THE GATHERING TWILIGHT? INFORMATION PRIVACY ON THE INTERNET IN THE POST- ENLIGHTENMENT ERA

MARK F. KIGHTLINGER

### I. INTRODUCTION

The steady stream of news reports about violations of privacy on the Internet<sup>1</sup> has spawned a growing body of literature discussing the legal protections available for personally identifiable information (“PII”) – *i.e.*, information about identified or identifiable persons – collected via the Internet.<sup>2</sup> Much of this literature focuses, not surprisingly, on whether we need legal protection for such PII and, if so, how much. Should we have more regulation or less, more government oversight or less? This

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1. On August 14, 2006, a search via <http://news.google.com> detected 151 news stories containing the terms “Internet,” “privacy,” and “violation” posted between July 11 and August 12, 2006. There is no reason to believe that this represents an unusual number of stories for a one-month period.

2. This voluminous literature includes Fred H. Cate, Commentary, *Principles of Internet Privacy*, 32 Conn. L. Rev. 877 (2000); Catherine Crump, Student Author, *Data Retention: Privacy, Anonymity, and Accountability Online*, 56 Stan. L. Rev. 191 (2003); A. Michael Froomkin, *The Death of Privacy?*, 52 Stan. L. Rev. 1461 (2000); Oscar H. Gandy, Jr., *Legitimate Business Interest: No End in Sight? An Inquiry into the Status of Privacy in Cyberspace*, 1996 U. Chi. Legal F. 77 (1996); Karim Jamal, Michael Maier & Shyam Sunder, *Enforced Standards Versus Evolution by General Acceptance: A Comparative Study of E-Commerce Privacy Disclosure and Practice in the U.S. and the U.K.* (AEI-Brookings Joint Center for Regulatory Studies Working Paper 03-8, July 2003); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 Stan. L. Rev. 1193 (1998); Lawrence Lessig, *The Architecture of Privacy*, 1 Vand. J. Ent. L. & Prac. 56 (1999); Jeffrey H. Reiman, *Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future*, 11 Santa Clara Computer & High Tech. L. J. 27 (1995); Paul M. Schwartz, *Internet Privacy and the State*, 32 Conn. L. Rev. 815 (2000); Rachel K Zimmerman, *The Way the ‘Cookies’ Crumble: Internet Privacy and Data Protection in the Twenty-First Century*, 4 N.Y.U. J. Legis. & Pub. Policy 439 (2000-2001).

Article takes the discussion of Internet privacy protection in a new and very different direction by reexamining the U.S. Internet privacy regime from the perspective of a broader cultural/historical analysis and critique. The perspective adopted is that of Alasdair MacIntyre's account of the disarray in Enlightenment and post-Enlightenment discourse about morality and human nature and the accompanying disappearance of rational justifications for decisions and institutions grounded in that discourse.

MacIntyre has argued that during and after the Enlightenment, thinkers in many different fields agreed on the need to replace the dominant classical and medieval paradigm for explaining and justifying human action.<sup>3</sup> That paradigm had centered on an understanding of human nature as teleological – *i.e.*, directed toward a supreme human end or good, a *telos*.<sup>4</sup> With the rejection of the old paradigm, a new paradigm gradually emerged that characterizes the human being first of all as an individual pursuing his or her own interests in light of his or her own values.<sup>5</sup> Central to this new paradigm are the related notions that individuals characteristically interact with one another and pursue their interests in a market, and that to ensure the market will function properly and coordinate individual interests, bureaucratic oversight of various kinds is required.<sup>6</sup> The first objective of this Article is to show how the U.S. Internet privacy regime reflects and reinforces this post-Enlightenment paradigm. The second objective is to show how the regime reveals some of the limitations of that paradigm.

Identifying a paradigm and its limitations is not the same as overthrowing or replacing a paradigm. Indeed, an important characteristic of any paradigm is that it guides the way thoughtful people see and understand the field to which it applies. Thomas Kuhn remarked that “[u]ntil [the] scholastic paradigm was invented, there were not pendulums, but only swinging stones for the scientist to see. Pendulums were brought into existence by something very like a paradigm-induced gestalt switch.”<sup>7</sup> Thus, if the thesis that the U.S. regime reflects and reinforces a modern paradigm is correct or at least defensible, then that regime also will reflect the way we – or a great many of us – normally see and understand the world. Persuading people to replace the regime with

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3. *Infra* nn. 17-19 and accompanying text.

4. *Infra* n. 13 and accompanying text.

5. *Infra* nn. 28-30 and accompanying text.

6. *Infra* nn. 38-49 and accompanying text.

7. Thomas S. Kuhn, *The Structure of Scientific Revolutions* 120 (2d ed., U. Chi. Press 1970) [hereinafter Kuhn, *Structure*]. See also Thomas S. Kuhn, *Possible Worlds in History of Science*, in *The Road Since Structure* 58, 87-88 (James Conant & John Haugeland eds., U. Chi. Press 2000) (expressing doubts about the applicability to groups rather than individuals of his earlier remarks concerning *gestalt* shifts).

something fundamentally different probably would require displacing the dominant paradigm and thereby changing the way that people see the world. That task is beyond the scope of this Article. Thus, readers seeking yet another proposal for reforming U.S. privacy law should look elsewhere. Admittedly, at a number of points in this Article it is suggested that the older teleological paradigm of human nature and moral life may have some continuing vitality. But this Article does not claim to take on the larger project of defending the old paradigm or a revised version of it.<sup>8</sup> Rather, references to the enduring worth of the old paradigm are intended to sensitize the reader's imagination to other quite different ways of seeing the world and our place in it.

The argument of this Article proceeds in four stages. Section II briefly outlines the transition from the older paradigm to the modern, post-Enlightenment paradigm, drawing heavily on Alasdair MacIntyre's account of the relationships among the individual, the market, and the administrative state. Section III explicates the legal principles of the U.S. Internet privacy regime. Section IV sets those legal principles in a broader context of legal theories concerning the administrative state, drawing in particular on the work of Robert Rabin and other scholars in the field of administrative law. Finally, Section V argues that the U.S. Internet privacy regime reflects and reinforces key tenets of the post-Enlightenment paradigm. In particular, the regime emphasizes protecting the individual who competes in a market and empowering impersonal bureaucratic authority as the guarantor of the individual's privacy.

## II. MACINTYRE'S ACCOUNT OF THE POST-ENLIGHTENMENT PARADIGM

In a series of books and articles published since 1980, Alasdair MacIntyre has developed an account of the emergence and troubled history of what this Article refers to as the post-Enlightenment paradigm<sup>9</sup>

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8. For a relatively brief and accessible defense of Aristotelian moral theory, see Alasdair MacIntyre, *Plain Persons and Moral Philosophy: Rules, Virtues and Goods*, in *The MacIntyre Reader* 136 (Kelvin Knight ed., Polity Press 1998).

9. The discussion of paradigms in this article relies heavily on the work of Thomas Kuhn. See Kuhn, *Structure*, *supra* n. 7, at 43-51, 174-191. Although Kuhn used the term "paradigm" in several different ways, he ultimately emphasized two core meanings. "On the one hand, it stands for the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community. On the other, it denotes one sort of element in that constellation, the concrete puzzle-solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science." *Id.* at 175. "Paradigm" is used in this article exclusively in the first sense. It is worth noting that Kuhn attempted to re-label such a constellation of beliefs the "disciplinary matrix," *Id.* at 182, and to restrict the term "paradigm" to "exemplars," which are "the concrete problem-solutions that students encounter from the start of their scientific education . . ." *Id.* at 187. In addition to being cumbersome, however, the phrase "disciplinary

for understanding morality and human nature.<sup>10</sup> It is impossible in a short summary to capture the breadth and richness of MacIntyre's philosophical and historical arguments,<sup>11</sup> but the core of his position can be stated succinctly. Drawing on a ground-breaking analysis of moral language by Elizabeth Anscombe,<sup>12</sup> MacIntyre contends that the dominant tradition of ethical reflection running from Aristotle through Thomas Aquinas accepted as a basic tenet a three-part teleological account of human nature and human action.

Within that teleological scheme there is a fundamental contrast between man-as-he-happens-to-be and man-as-he-could-be-if-he-realized-his-essential-nature. Ethics is the science which is to enable men to understand how they make the transition from the former state to the latter. . . . The precepts which enjoin the various virtues and prohibit the vices which are their counterparts instruct us how to move from

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matrix" is overly narrow because it presumes that a paradigm is "the common possession of the practitioners of a particular discipline." *Id.* at 182. This article presumes that a paradigm can become a much broader cultural "possession" that governs, or at least profoundly influences, the ways in which thoughtful people ordinarily understand the world. See also Thomas S. Kuhn, *Second Thoughts on Paradigms*, in *The Essential Tension: Selected Studies in Scientific Tradition and Change* 293, 297, 318-319 (U. Chi. Press 1977). In a later work Kuhn recast the disciplinary matrix as the "lexical taxonomy" or "conceptual scheme." Thomas S. Kuhn, *The Road Since Structure*, in *The Road Since Structure* 90, 94 (James Conant & John Haugeland eds., U. Chi. Press 2000). Cf. Thomas S. Kuhn, *The Natural and Human Sciences*, in *The Road Since Structure* 216, 221 (James Conant & John Haugeland eds., U. Chi. Press 2000) (suggesting "hermeneutic basis" as a replacement for "paradigm."). For early critical comments on Kuhn's work, see Imre Lakatos & Alan Musgrave, *Criticism and the Growth of Knowledge* (Imre Lakatos & Alan Musgrave eds., Cambridge U. Press 1970). For Alasdair MacIntyre's critical reformulation of Kuhn's account of scientific revolutions, see Alasdair MacIntyre, *Epistemological Crises, Dramatic Narrative, and the Philosophy of Science*, in *The Tasks of Philosophy* 3, 15-23 (Cambridge U. Press 2006).

10. Key texts include Alasdair MacIntyre, *After Virtue* (2d ed., U. Notre Dame Press 1984) [hereinafter MacIntyre, *After Virtue*]; Alasdair MacIntyre, *Whose Justice, Which Rationality?* (U. Notre Dame Press 1988); Alasdair MacIntyre, *Three Rival Versions of Moral Enquiry* 226 (U. Notre Dame Press 1990) [hereinafter MacIntyre, *Three Rival Versions*]; Alasdair MacIntyre, *First Principles, Final Ends and Contemporary Philosophical Issues* (Marquette U. Press 1990). More recently, MacIntyre has begun to spell out the details of an alternative approach to moral philosophy rooted in the Aristotelian tradition. See, e.g., Alasdair MacIntyre, *Dependent Rational Animals: Why Human Beings Need the Virtues* (Carus Publ. Co. 1999) [hereinafter MacIntyre, *Dependent*]. MacIntyre does not refer to the post-Enlightenment worldview that he describes as a "paradigm" in Thomas Kuhn's sense of the term, but MacIntyre's account of the hold that that worldview has on our way of explaining and justifying human action supports the use of that term in Kuhn's sense. For MacIntyre's favorable view of Kuhn's general approach, see MacIntyre, *Three Rival Versions*, *supra* n. 10, at 17, 50, 118, 122.

11. For MacIntyre's own summary of the key arguments in *After Virtue*, see Alasdair MacIntyre, *The Claims of After Virtue*, in *The MacIntyre Reader* 69, 69-72 (Kelvin Knight ed., Polity Press 1998).

12. G.E.M. Anscombe, *Modern Moral Philosophy*, in *Virtue Ethics* 26 (Roger Crisp & Michael Slote eds., Oxford U. Press 1997).

potentiality to act, how to realize our true nature and to reach our true end.<sup>13</sup>

According to this teleological account, each person passes through a series of life stages and social roles, which might include child, son, father, husband, and community member that are essential to who he or she is. As MacIntyre writes,

These are not characteristics that belong to human beings accidentally, to be stripped away in order to discover “the real me”. They are part of my substance, defining partially at least and sometimes wholly my obligations and my duties. Individuals inherit a particular place within an interlocking set of social relationships . . . . To know oneself as such a social person is however not to occupy a static and fixed position. It is to find oneself placed at a certain point on a journey with set goals; to move through life is to make progress – or to fail to make progress – toward a given end.<sup>14</sup>

Progress toward any “given end” is part of the person’s larger progress toward the human *telos*, toward realizing what is essential in human nature, and such progress is guided by the precepts on virtue and vice developed in the science of ethics. This teleological account of human nature and action was the core of the old Aristotelian paradigm that informed moral and ethical reflection, with some dissent, through the Middle Ages and into the early modern era.<sup>15</sup>

In the period leading up to the Enlightenment, the Aristotelian paradigm came under widespread intellectual attack.<sup>16</sup> According to MacIntyre, “the joint effect of the secular rejection of both Protestant and Catholic theology and the scientific and philosophical rejection of Aristotelianism was to eliminate any notion of man-as-he-could-be-if-he-real-

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13. MacIntyre, *After Virtue*, *supra* n. 10, at 52. MacIntyre notes that “[t]his scheme is complicated and added to, but not essentially altered, when it is placed within a framework of theistic beliefs, whether Christian, as with Aquinas, or Jewish with Maimonides, or Islamic with Ibn Roschd. The precepts of ethics now have to be understood not only as teleological injunctions but also as expressions of divinely ordained law.” *Id.* at 53. For another more detailed account of how such teleological moral reasoning operates, see Alasdair MacIntyre, *Practical Rationalities as Forms of Social Structure*, in *The MacIntyre Reader* 120, 121-124 (Kelvin Knight ed., Polity Press 1998) [hereinafter MacIntyre, *Practical Rationalities*].

14. MacIntyre, *After Virtue*, *supra* n. 10, at 33-34.

15. *Id.* at 52-53.

16. For an account of René Descartes’ reasons for rejecting teleological explanation in the natural sciences, see Arthur O. Lovejoy, *The Great Chain of Being* 124, 188 (Harvard U. Press 1964). As Lovejoy states, Descartes was “the most influential philosopher of the age” immediately prior to the Enlightenment. *Id.* at 123. For a discussion of the metaphysician Baruch Spinoza’s reasons for rejecting teleological explanation, see *id.* at 156.

ized-his-*telos*.”<sup>17</sup> Eliminating the third element of the old framework – the account of a human *telos* or end, the essential or “true” nature of man – left behind two elements that bear an uncertain and potentially hostile relationship to one another. “There is on the one hand a certain content for morality: a set of injunctions deprived of their teleological context. There is on the other hand a certain view of untutored-human-nature-as-it-is.”<sup>18</sup> Enlightenment thinkers and their immediate successors, including among numerous others Denis Diderot, David Hume, Immanuel Kant, Adam Smith, Jeremy Bentham, and John Stuart Mill, attempted to develop new theoretical frameworks that would provide a rational link between untutored human nature and the pre-existing, largely unquestioned catalogue of moral injunctions.<sup>19</sup> But because these thinkers “did not recognize their own peculiar historical and cultural situation, they could not recognize the impossible and quixotic character of their self-appointed task.”<sup>20</sup> Why was their task impossible? Precisely because they were trying to provide a rational explanation for the connection between “a set of moral injunctions on the one hand and a conception of human nature on the other which had been expressly designed to be discrepant with one another.”<sup>21</sup> Explaining the nature of this discrepancy, MacIntyre observes that

[s]ince the moral injunctions were originally at home in a scheme in which their purpose was to correct, improve and educate . . . human nature, they are clearly not going to be such as could be deduced from true statements about human nature or justified in some other way by appealing to its characteristics. The injunctions of morality, thus understood, are likely to be ones that human nature, thus understood, has strong tendencies to disobey.<sup>22</sup>

According to MacIntyre, we live today with the continuing failure to achieve a key objective of Enlightenment philosophers, *i.e.*, “replac[ing] what they took to be discredited traditional and superstitious forms of morality by a kind of secular morality that would be entitled to secure the assent of any rational person.”<sup>23</sup>

[T]he great Enlightenment theorists had themselves disagreed both morally and philosophically. Their heirs have, through brilliant and so-

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17. MacIntyre, *After Virtue*, *supra* n. 10, at 54. For an alternative version of this claim, see Alasdair MacIntyre, “Ought” in *Against the Self-Images of the Age* 136, 149-50 (U. Notre Dame Press 1978).

18. MacIntyre, *After Virtue*, *supra* n. 10, at 55.

19. *Id.* at 39-50 (discussing Diderot, Hume, Kant, and Smith); *Id.* at 62-64 (discussing Bentham and Mill). For a summary of the premises of Enlightenment thought, see Lovejoy, *The Great Chain of Being*, *supra* n. 16, at 288-289.

20. MacIntyre, *After Virtue*, *supra* n. 10, at 55.

21. *Id.*

22. *Id.*

23. MacIntyre, *The Claims of After Virtue*, *supra* n. 11, at 70.

pshisticated feats of argumentation, made it evident that if these disagreements are not interminable, they are such at least that after two hundred years no prospect of termination is in sight. Succeeding generations of Kantians, utilitarians, natural rights' theorists, and contractarians show no sign of genuine convergence.<sup>24</sup>

The post-Enlightenment paradigm under which we operate today arose from and continues to reflect the inconclusiveness of this "inconclusive intellectual debate,"<sup>25</sup> this failure of philosophy to achieve rational consensus on an account of morality and human nature.

The rejection of the old paradigm and the growing awareness of a seemingly unbridgeable gulf between untutored-human-nature-as-it-is and the received catalogue of moral injunctions ultimately led to a radical reinterpretation of the nature of the relationship between the "is" and the "ought." Under the old Aristotelian paradigm, "[t]o call something good . . . is . . . to make a factual statement. To call a particular action just or right is to say that it is what a good man would do in such a situation; hence this type of statement too is factual. Within this tradition moral and evaluative statements can be called true or false in precisely the way in which all other factual statements can be so called."<sup>26</sup>

On the [Aristotelian] view the facts about human action include the facts about what is valuable to human beings (and *not* just the facts about what they think to be valuable); on the [emerging modern] view there are no facts about what is valuable. 'Fact' becomes value-free, 'is' becomes a stranger to 'ought' and explanation, as well as evaluation, changes its character as a result of this divorce between 'is' and 'ought'.<sup>27</sup>

Once one rejects the view that there is a *telos* or end that we all share qua human beings, a *telos* or end about which we can make factual claims potentially subject to rational public debate and resolution, it appears to follow that all accounts of "the" human end are actually accounts of private ends and desires pursued by particular human beings or groups. MacIntyre labels this characteristically modern philosophical position "emotivism," *i.e.*, "the doctrine that all evaluative judgments and more specifically all moral judgments are *nothing but* expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character."<sup>28</sup> Our ends thus come to be understood as personal "values," *i.e.*, the grounds or bases of evaluative judgments, and

24. Alasdair MacIntyre, *Some Enlightenment Projects Reconsidered*, in *Ethics and Politics* 172, 181-182 (Cambridge U. Press 2006).

25. MacIntyre, *Three Rival Versions*, *supra* n. 10, at 227.

26. MacIntyre, *After Virtue*, *supra* n. 10, at 59.

27. *Id.* at 84. See also Alasdair MacIntyre, *Some More about "Ought"* in *Against the Self-Images of the Age* 157, 169 (U. Notre Dame Press 1978).

28. MacIntyre, *After Virtue*, *supra* n. 10, at 11-12. According to MacIntyre, "to a large degree people now think, talk and act as if emotivism were true, no matter what their



they are relocated from the public and objective realm of factual disputation to the private and subjective realm of preference and feeling. Such values, because they are private, cannot be scrutinized and appraised as true or false according to the measure provided by the old notion of the human *telos* or of a social order and rules based on that *telos*.<sup>29</sup> “[T]he self is now thought of as criterionless, because the kind of *telos* in terms of which it once judged and acted is no longer thought to be credible.”<sup>30</sup> With its values placed beyond rational criticism or productive debate, the self becomes a kind of sovereign in its own private realm of value. “[I]n acquiring sovereignty in its own realm[, the modern self] lost its traditional boundaries provided by a social identity and a view of human life as ordered to a given end.”<sup>31</sup> According to MacIntyre, this “self which has no necessary social content and no necessary social identity can then be anything, can assume any role or take any point of view, because it *is* in and for itself nothing.”<sup>32</sup> As MacIntyre says in another context, this is a self “whose distinctive identity consists in key part in the ability to escape social identification, by always being able to abstract him or herself from any role whatsoever it is the individual who is potentially many things, but actually in and for him or herself nothing.”<sup>33</sup>

In MacIntyre’s analysis, this fundamental shift in the understanding of human nature or the human self caused, or at least reinforced, distinctively modern, interlocking developments at the level of the single person and the level of social institutions. At the level of the single person, one sees the emergence or invention of the “individual” as a paradigmatic unit of analysis.<sup>34</sup> The notion<sup>35</sup> is lost of a human self as an essentially social being passing through a series of life stages and roles and realizing the specifically human essence or *telos*. As MacIntyre remarks,

[t]ake away the notion of essential nature, take away the corresponding notion of what is good and best for members of a specific kind who share

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avored theoretical standpoint may be. Emotivism has become embodied in our culture.” *Id.* at 22.

29. This is not to suggest that one cannot make factual claims of a sort about values within the post-Enlightenment paradigm. Indeed, it is quite common to make a factual claim such as “X values liberty over equality” or “X values the woman’s right to choose over the fetus’s right to life,” and such a claim may be true or false. One cannot, however, verify or falsify X’s claim that “liberty is more valuable than equality,” because that claim is understood to reflect X’s private values.

30. MacIntyre, *After Virtue*, *supra* n. 10, at 33.

31. *Id.* at 34.

32. *Id.* at 32.

33. MacIntyre, *Practical Rationalities*, *supra* n. 13, at 135.

34. MacIntyre, *After Virtue*, *supra* n. 10, at 60. See MacIntyre, *Practical Rationalities*, *supra* n. 13, at 129.

35. MacIntyre, *After Virtue*, *supra* n. 10, at 33-34.

such a nature, and the Aristotelian scheme of the self which is to achieve good . . . necessarily collapses. There remains only the individual self with its pleasures and pains.<sup>36</sup>

Because the individual has no essential nature and thus is not essentially social, theoretical accounts of the individual tend to treat society as nothing more than an arena in which individuals seek to secure what is useful or agreeable to them. [Such accounts] thus tend to exclude from view any conception of society as a community united in a shared vision of the good for man (as prior to and independent of any summing of individual interests) . . .<sup>37</sup>

Building on the work of Locke, Rousseau and Smith among others, the post-Enlightenment paradigm relies heavily on concepts of contract and market to explain and justify the individual's actions.<sup>38</sup> Individuals pursue their interests, which come to be known as their utility, in a market and they freely bind others through contracts. Individuals also come to be seen as bearers of "rights," which are understood to protect each individual from threats by other individuals or groups.<sup>39</sup> According to MacIntyre,

[t]he central conceptions informing thought within civil society about human relationships are therefore those of utility, of contract and of individual rights. And the moral philosophy which gives expression to the standpoint of civil society consists of a continuing debate about those concepts and how they are to be applied.<sup>40</sup>

At the level of social institutions, the modern administrative state and the modern bureaucratic corporation emerge as fundamental units of analysis. Individuals who pursue their utility as defined by private values invariably engender conflict that can trigger social disorder and collapse.<sup>41</sup> Thus, in a world consisting of individuals, social order ap-

36. MacIntyre, *Three Rival Versions*, supra n. 10, at 138.

37. MacIntyre, *After Virtue*, supra n. 10, at 236.

38. See John Locke, *Second Treatise of Government* (C.B. MacPherson, ed., Hackett Publ. Co. 1988); Jean-Jacques Rousseau, *On the Social Contract* (Richard W. Crosby trans., King's Ct. Commun. 1978); Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (R.H. Campbell et al. eds., Clarendon Press 1976).

39. In a provocative discussion of Polynesian concepts of "taboo" and their treatment in Western anthropological literature and political theory, MacIntyre concludes:

[t]he arrival upon the social scene of conceptions of right, attaching to and exercised by individuals, as a fundamental moral quasilegal concept, whether in the European later Middle Ages or seventeenth century, or in nineteenth-century Polynesia, always signals some measure of loss of or repudiation of some previous social solidarity. Rights are claimed *against* some other person or persons; they are invoked when and insofar as those others appear as threats.

MacIntyre, *Three Rival Versions*, supra n. 10, at 184-185.

40. Alasdair MacIntyre, *The Theses on Feuerbach: A Road Not Taken*, in *The MacIntyre Reader* 223, 223 (Kelvin Knight ed., Polity Press 1998).

41. The archetype of this argument is, of course, found in Hobbes's account of the "warre . . . of every man, against every man." Thomas Hobbes, *Leviathan* 64 (Dent 1965).

pears to be a fundamental problem, and social structures must be devised to establish and maintain social order. What institutions will guarantee order? Under the post-Enlightenment paradigm, the characteristic answer to that question is the bureaucracy.<sup>42</sup> Bureaucracies “manipulat[e] . . . human beings into compliant patterns of behavior”<sup>43</sup> to achieve political or economic ends or “interests.” These ends or interests do not find their justification in a shared vision of the human good or *telos* because such a shared vision is not available. Thus, these bureaucratic ends or interests will appear to be arbitrary from the perspective of any individual or group that does not happen to share the ends or interests that the bureaucracy pursues. But the important point is that some end or interest is pursued, and order is maintained. Modern bureaucratic management is praised (or condemned) according to its perceived “effectiveness” or “expertise”<sup>44</sup> in ordering individual behavior in light of such ends or interests.<sup>45</sup>

According to MacIntyre, the result of these interconnected personal and institutional developments is a

bifurcation of the contemporary social world into a realm of the organizational in which ends are taken to be given and are not available for rational scrutiny and a realm of the personal in which judgment and debate about values are central factors, but in which no rational social resolution of issues is available . . .<sup>46</sup>

As a consequence of this bifurcation, political and moral debate tends to organize itself into two immediately recognizable positions: the contending parties agree . . . that there are only two alternative modes of social life open to us, one in which the free and arbitrary choices of individuals are sovereign and one in which the bureaucracy is sovereign, precisely so that it may limit the free and arbitrary choices of individuals.<sup>47</sup>

From this, MacIntyre concludes that “the society in which we live is one in which bureaucracy and individualism are partners as well as antagonists.”<sup>48</sup> He labels this state of affairs the “culture of bureaucratic individualism.”<sup>49</sup>

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42. For an explanation of how the term “bureaucracy” is being used here, see *infra* n. 192-197 and accompanying text.

43. MacIntyre, *After Virtue*, *supra* n. 10, at 74.

44. *Id.* at 75, 86, 109 (acknowledging that his discussion of bureaucracy is heavily indebted to the work of Max Weber).

45. See *id.* at 88-108 (arguing that the type of effectiveness or expertise claimed by the bureaucrat is not possible and refers to the belief in such expertise as the “fetishism . . . of bureaucratic skills.”).

46. *Id.* at 34.

47. *Id.* at 35.

48. *Id.*

49. *Id.* at 71.

It should come as no surprise that MacIntyre's arguments have encountered criticism and debate on many different fronts.<sup>50</sup> It is not, however, the purpose of this Article to defend or criticize MacIntyre's position. Rather, the objective is to show how the post-Enlightenment paradigm and its difficulties illuminate certain important characteristics of U.S. Internet privacy law. As this Article shows, the U.S. Internet privacy regime reflects MacIntyre's description of the bifurcated post-Enlightenment world. Paradoxically, calls for greater individual sovereignty typically result in an actual increase in bureaucratic control, at least in part because the post-Enlightenment paradigm for explaining and justifying human action leaves us with no apparent alternative. The sovereign individual, it turns out, is lost without the bureaucracy, and the bureaucracy takes as its *raison d'être* the management of sovereign individuals pursuing their personal objectives in the market according to their private values.

As far as I know, MacIntyre has not participated in public discussions of Internet privacy. But his account of the intellectual roots of what this Article calls the post-Enlightenment paradigm allows us to identify and explore the broader significance of at least three characteristics that are likely to appear in any modern information-privacy regime. First, one would expect such a regime to focus on individuals because, as noted above,<sup>51</sup> the rejection of a teleological account of human nature left us with an understanding of society as a collection of individuals each pursuing his or her own ends or utility according to his or her own values. Who "I" am can no longer be answered in terms of what it means to be a human being with this particular role in this community, but must be answered in terms of entirely contingent value-neutral facts about me, including what I happen to desire or value. Indeed, one would expect privacy itself to be understood as one more desire or value that may receive legal protection and/or rhetorical support as a "right" of each individual against other individuals and groups.

An information-privacy regime that focuses on the individual and the value that he or she places on privacy can be expected to attach particular importance to the individual's consent. This follows from the paradigmatic account of the self as an individual with no essential characteristics, no "true" nature or end. The "I" that is not anything in particular, that has no essential identity, comes to be seen as little more than the capacity to adopt successive identities, the capacity to affirm or approve in successive acts of will this characteristic as at least tempora-

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50. See *id.* at 264-79 (discussing some of the initial objections to MacIntyre's arguments and his first responses); see also Kelvin Knight, *Guide to Further Reading*, in Alasdair MacIntyre, *The MacIntyre Reader* 276 (Kelvin Knight ed., Polity Press 1998).

51. See *supra* n. 34 (and accompanying text).

rily “mine” and to disaffirm or dismiss that characteristic as “other” or “not really me.”<sup>52</sup> Thus, the descriptors “gay man” and “law professor” may not relate to my “true” nature, because I have no “true” nature, but my capacity to consent to one or both (or neither) of these descriptors as mine, my capacity to choose, is somehow essential to who I am. As MacIntyre contends, one of the

dominant images [of our culture] is that of the individual human being as one who defines her or himself through her or his acts of choice, choices which determine for her or him not only what use to make of this or that object and what attitude to take to this or that other human being, but also how to describe or to redescribe, to classify or reclassify the objects and the uses, the other human beings and the attitudes.<sup>53</sup>

By protecting and enhancing this capacity to consent or choose, a privacy regime seems to protect the core of one’s identity, *i.e.*, one’s sovereign capacity to construct identities for oneself. Moreover, by focusing on the individual’s consent, a privacy regime can avoid appraising the values that lay behind the individual’s consent, since there is no shared criterion for assessing the truth or falsity of those values. “All preferences of all individuals are to be weighed in the same balance and accorded the same respect, no matter whose they are or what their grounding.”<sup>54</sup> Consent thus becomes the gown that covers a multitude of sins.

Second, under the post-Enlightenment paradigm, because the consenting individual has no essential nature and the realm of fact is understood to be value-free, one would expect an information-privacy regime to reflect a certain ambivalence about the significance of PII. On the one hand, because the individual is essentially no one or nothing, the individual may come to see his or her identity as an individual – who or what he or she is – as itself a fundamental issue. At the level of professional philosophical discourse, this issue manifests itself as (among other things) the so-called “problem of personal identity”<sup>55</sup> and drives the reflections of the existentialists.<sup>56</sup> At the level of personal experience, one would expect to see anxiety about the significance of PII. Facts about the individual and what the individual has done seem to provide a kind of content to the “I” who lacks an essential nature. I “am” a person with this name and address, this height and weight, this gender and sexual orientation,

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52. MacIntyre, *After Virtue*, *supra* n. 10, at 39-45, 32, 115-117.

53. Alasdair MacIntyre, *Philosophy Recalled to Its Tasks: A Thomistic Reading of Fides et Ratio*, in *The Tasks of Philosophy* 179, 195-196 (Cambridge University Press 2006).

54. MacIntyre, *Practical Rationalities*, *supra* n. 13, at 129.

55. MacIntyre, *Three Rival Versions*, *supra* n. 10, at 199.

56. See William Barrett, *Irrational Man* (Doubleday 1958) (providing a good overview of the work of the major figures in existential philosophy (*i.e.*, Kierkegaard, Nietzsche, Heidegger and Sartre)).

this social security number. Loss of such PII or of consensual authority over it seems to entail loss of oneself, and such loss could trigger tremendous anxiety in a self that, without such PII over which to exercise authority, stands in constant danger of vanishing. Thus, under the post-Enlightenment paradigm, an information-privacy regime might be expected to address the individual's anxiety about loss of consensual authority over PII.

On the other hand, because the individual is understood to lack essential characteristics and because the facts about the individual have no intrinsic value, the same individual who is very anxious about retaining authority over his or her PII must acknowledge that items of such PII can be discarded or disseminated without real loss to the self. I may stand six feet three inches tall and weigh 210 pounds, but this height and weight are not who I "really am," not the "true" me, because there is no "real" or "true" me. My height and weight are simply value-free facts. Facts can, however, acquire value of a sort when and if the individual consents to trade them in a market, because others may value them as a means to their own ends. Clothing sellers, for example, might be interested in acquiring PII about my height and weight in order to tout certain kinds of apparel to me. I can also exercise my consensual authority over this value-free PII by trading it for something I value more. Thus, under the post-Enlightenment paradigm, one would expect an information-privacy regime built around the consenting individual who has no essential nature to acknowledge the need for an institution such as a market in which the individual can trade PII to obtain or achieve what he or she values and thereby increase or maximize his or her utility.

Third, under the post-Enlightenment paradigm, one would expect an information-privacy regime to emphasize bureaucratic supervision. Again, this expectation derives from the importance of individuals and individual consent in a world lacking a credible shared vision of the human *telos*. As already noted,<sup>57</sup> in a world consisting of individuals who pursue their values and exercise their wills or capacities to consent in a market, a rational resolution to conflict is not available and disorder seems to be an ever-present threat. Accordingly, one would expect to find institutions devoted to limiting conflict and coordinating or channeling the consent of individuals. Two such institutions have become paradigmatic. On one side are large-scale private bureaucratic enterprises – *e.g.*, modern corporations – that respond to and channel individual consensual activity in the market by organizing and standardizing demand for and use of individuals' PII. On the other side is a public bureaucratic administrative apparatus with authority to oversee and, where necessary, limit the exercise of individual will and the related activities of cor-

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57. *See supra* n. 46 (and accompanying text).

porate enterprises. MacIntyre observes that “the major justification advanced for the intervention of government in society is the contention that government has resources of competence which most citizens do not possess.”<sup>58</sup> Accordingly, public officials will justify administering the privacy of consenting individuals by appealing to superior competence or expertise, and they will claim to act as an impersonal public check on the strife-torn marketplace of individual will. Thus, by a curious paradox, under the post-Enlightenment paradigm, the impersonal administrative state may come to be seen as a necessary precondition of the modern individual’s capacity to construct his or her personal identity through acts of consent to, and affirmation of, particular items of personal information as “mine” or “not mine”.

It may be useful to deal here with two possible objections before proceeding with the argument. The first objection asks why we need to rely on Alasdair MacIntyre, or indeed any philosopher, for the proposition that a modern information-privacy regime is likely to focus on individuals, markets, and bureaucratic oversight. In response, it may be useful to cite a comment by Alfred North Whitehead, who wrote (perhaps with some irony) that “[f]amiliar things happen, and mankind does not bother about them. It takes a very unusual mind to undertake the analysis of the obvious.”<sup>59</sup> In the spirit of Whitehead, it is a working hypothesis of this Article that such “obvious” aspects of a modern information-privacy regime as individuals, markets, and bureaucracies are obvious because they reflect the post-Enlightenment paradigm that has come to structure our ordinary understanding of the world. Hence, this Article examines not just the obvious but the obviousness of the obvious in order to uncover some of the premises and limits of our notion of privacy protection.

The second objection goes to the repeated references in this Article to “the” post-Enlightenment paradigm. Surely it is not credible to argue that there is a single paradigm that supervened upon the collapse of the old Aristotelian paradigm. If anything, our era is characterized by the lack of an authoritative or powerful paradigm for explaining human nature and justifying human action. Consequently, thoughtful people have to muddle through discussions of these issues and make decisions relying on their best intuitions and insights. There are at least two answers to this objection. First, MacIntyre<sup>60</sup> and this author are both prepared to acknowledge that there are competing paradigms in the post-Enlightenment era. The argument here is based on the somewhat more modest claim that a great many of us have learned to organize our thoughts

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58. MacIntyre, *After Virtue*, *supra* n. 10, at 85.

59. Alfred N. Whitehead, *Science and the Modern World* 4 (Macmillan 1953).

60. MacIntyre, *Three Rival Versions*, *supra* n. 10, at 170-215 (comparing and contrasting the Encyclopaedist, Thomist and Genealogist frameworks).

about our lives and our world in accordance with “the” post-Enlightenment paradigm outlined in this section.<sup>61</sup> Second, the objection itself provides evidence of the power of the post-Enlightenment paradigm by appearing to adopt one of its key tenets, *i.e.*, that moral disagreement and the multiplicity of personal perspectives are an inevitable feature of our intellectual environment that must be confronted by an act of individual choice or decision. Thus, in many respects, the “to each his own paradigm” argument is itself simply a version of one essential element of the post-Enlightenment paradigm.

### III. CONSENT UNDER U.S. INTERNET PRIVACY LAWS

Influenced by political calculation rather than the arguments of philosophers, such as MacIntyre, Congress has shown no inclination to regulate online information-privacy comprehensively.<sup>62</sup> Instead, Congress has relied to a large extent on a pre-existing administrative bureaucracy – the Federal Trade Commission (“FTC”) – to protect privacy in the online environment under the Federal Trade Commission Act (“FTC Act”).<sup>63</sup> As discussed in Section A below, the FTC has concluded that the best way to protect privacy online is to ensure that any information an individual receives from a Web site about how PII will be used is accurate and not misleading. Congress concluded that in one area – *i.e.*, children’s privacy – a new law was required to respond to the emergence of the Internet. As discussed in Section B below, in the Children’s Online Privacy Protection Act (“COPPA”), Congress required Web site operators to obtain the informed consent of a child’s parents before collecting the child’s PII via the Internet. In effect, COPPA reinforced the FTC’s position that the key to privacy protection online is the adult individual’s informed consent bolstered by FTC oversight.

#### A. THE FEDERAL TRADE COMMISSION ACT

The FTC seeks to protect the privacy of individuals who use the Internet under Section 5 of the FTC Act, which prohibits unfair or deceptive practices in and affecting commerce.<sup>64</sup> The FTC, following the

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61. *Cf.* MacIntyre’s comment, *supra* n. 28 (contending that “[e]motivism has become embodied in our culture.”).

62. Ronald J. Mann & Jane K. Winn, *Electronic Commerce* 211 (2d ed., Aspen Publishers 2005).

63. See John C. Dugan et al., *Privacy and E-Commerce in the United States*, in *E-Commerce Law & Business* 9-96 - 9-175 (Mark E. Plotkin et al. eds., Aspen Publishers 2003) (examining other sector specific privacy laws the United States has adopted that also have an impact on the Internet).

64. 15 U.S.C. § 45(a)(1) (2000).



agency's long-standing approach to false and misleading advertising,<sup>65</sup> has taken the position that a Web site operator violates Section 5 if the operator acts in a manner that is not consistent with material representations made in the Web site's privacy policy.<sup>66</sup> In other words, if a Web site states that an individual's PII will be collected only for certain specified purposes and may be transferred only to specified third parties, the Web site operator must ensure that any PII collected is used only for those purposes and transferred only to those third parties. Use of the PII for an unspecified purpose or transfer to an unspecified third party will render the Web site's statements about privacy protection deceptive and could subject the Web site operator to an injunction or civil penalty under Section 5.<sup>67</sup>

There is, of course, an obvious objection to the FTC's approach to online information privacy. The FTC can act only if a Web site operator fails to abide by the Web site's privacy policy or other privacy commitments made on the Web site. But if the Web site contains no privacy policy and makes no material representations concerning protection of PII, the Web site's operator probably will escape the FTC's reach.<sup>68</sup> In fact, this objection highlights the central role of individual consensual authority and responsibility in the FTC's scheme. If, consistent with his or her own values, an individual decides to provide PII to a Web site that makes no representations about whether and how it will protect the PII, then the individual must live with the consequences of his or her decision. The rule is *caveat emptor*. In a community with no shared vision of the good, an individual remains free to make decisions that others might regard as inexplicable or mistaken, because there is no agreed criterion against which we can appraise the individual's values. Web site operators remain free to decide, in light of their own perceived but equally "criterionless"<sup>69</sup> interests, whether and to what extent they wish to make

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65. See *FTC Policy Statement on Deception*, <http://www.ftc.gov/bcp/policystmt/ad-decept.htm> (Oct. 14, 1983) (reprinted in 45 *Antitrust & Trade Reg. Rep.* (BNA) 689-90, 694 (1983)).

66. 15 U.S.C. § 52(b) (2000); see also Federal Trade Commission, *Privacy Online: Fair Information Practices in the Electronic Marketplace, A Report to Congress* 34, <http://www.ftc.gov/reports/privacy2000/privacy2000.pdf> (May 2000) [hereinafter *FTC 2000 Report*].

67. 15 U.S.C. § 45 (2000).

68. *Id.* (providing that the FTC also has the authority, under Section 5, to take action against a Web site operator whose conduct is deemed to be "unfair."). See *U.S. v. Choice-Point Inc.* ¶ 26, <http://www.ftc.gov/os/caselist/choicepoint/0523069complaint.pdf> (Jan. 30, 2006) (asserting that a data processor's security procedures were not merely "deceptive" under Section 5 because they contradicted the processor's material representations but also and independently that those procedures were "unfair" under Section 5). It remains to be seen whether the FTC will use its unfairness authority more broadly in this area to impose a standard independent of that set by a data processor's own material representations.

69. See *supra* n. 30 (and accompanying text).

privacy protection commitments that the FTC will enforce.

Although this *laissez faire* approach might appeal to some theorists who value the anarchic qualities of the Internet,<sup>70</sup> the FTC has not publicly espoused caveat emptor, presumably because caveat emptor tends to be politically unpopular with the emptor and his or her elected representatives. From the mid-1990s onward, polling data suggested that many people in the United States were not happy with the level of privacy protection on the Internet.<sup>71</sup> For example, a study reported by Business Week in 2000 showed that about one quarter of Internet users believed that their privacy had been invaded and some 40 percent of people who shopped online had concerns about the privacy and security of their PII.<sup>72</sup> According to the same study, many people who had avoided buying products and services over the Internet cited lack of privacy protection as an important reason.<sup>73</sup> Faced with such data and recognizing that a Republican-controlled Congress might refuse to enact comprehensive privacy legislation, the FTC decided instead to press for industry self-regulation.<sup>74</sup>

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70. See, Dan L. Burk, *Federalism in Cyberspace*, 28 Conn. L. Rev. 1095 (1996) (arguing that Constitutional principles of federalism limit state authority to regulate the Internet); David R. Johnson & David Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367 (1996) (arguing that cyberspace is separate from real space and should be subject to its own rules instead of national regulatory regimes); Lawrence Lessig, *The Zones of Cyberspace*, 48 Stan. L. Rev. 1403 (1996) (criticizing the Johnson & Post argument); Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. Chi. L. Rev. 1199 (1998) (criticizing the Johnson & Post argument); David G. Post, *What Larry Doesn't Get: Code, Law, and Liberty in Cyberspace*, 52 Stan. L. Rev. 1439 (2000) (responding to Lessig); see also, Lea Brilmayer & Jack Goldsmith, *Conflict of Laws Cases and Materials* 840-857 (5th ed., Aspen Law & Business 2002) (showing that the debate about whether and how to impose domestic laws on the Internet is now sufficiently mainstream that it has found its way into standard casebooks).

71. See *Public Opinion on Privacy*, <http://www.epic.org/privacy/survey> (last updated May 15, 2006) (summarizing the results of numerous polls reflecting consumer concerns about privacy).

72. Business Week Online, *Business Week/Harris Poll: A Growing Threat*, [http://www.businessweek.com/2000/00\\_12/b3673010.htm](http://www.businessweek.com/2000/00_12/b3673010.htm) (March 20, 2000); See Susannah Fox, *The Pew Internet & American Life Project, Trust and Privacy Online: Why Americans Want to Rewrite the Rules*, [http://www.pewinternet.org/pdfs/PIP\\_Trust\\_Privacy\\_Report.pdf](http://www.pewinternet.org/pdfs/PIP_Trust_Privacy_Report.pdf) (Aug. 20, 2000).

73. *Id.*

74. Federal Trade Commission, *Online Profiling: A Report to Congress, Part 2 Recommendations* 10, <http://www.ftc.gov/os/2000/07/onlineprofiling.pdf> (July 2000) [hereinafter *FTC Online Profiling Recommendations Report*] (stating that, in 2000, the FTC called on Congress to adopt legislation to regulate online privacy practices); Timothy J. Muris, *Protecting Consumers' Privacy: 2002 and Beyond, Remarks at the Privacy 2001 Conference*, <http://www.ftc.gov/speeches/muris/privisp1002.htm> (Oct. 4, 2001) (suggesting that under the Bush Administration, the FTC has stopped calling for new legislation and renewed its focus on self-regulation).

Between 1996 and 2002, the FTC held several public hearings<sup>75</sup> and produced a number of public reports<sup>76</sup> on a variety of online privacy and security issues. In 1998, the FTC urged industry to adopt five basic "Fair Information Practice Principles"<sup>77</sup> – notice, choice, access, security, and enforcement.<sup>78</sup> A Web site operator who chooses to comply with these principles is encouraged to post a privacy policy that tells a user in some detail what the operator will do with any PII collected via the Web site.<sup>79</sup> In particular, the operator should give the user an opportunity to opt out of data collection or should seek some affirmative evidence that he or she wishes to opt in.<sup>80</sup> The FTC's emphasis on posting privacy policies and obtaining user consent shows that the FTC regarded informed consent as the appropriate basis for collection and use of PII. If a Web site operator posts a privacy policy, the FTC will have authority under Section 5 to enforce the policy and ensure that it does not deceive or mislead individuals who provide PII to the Web site. The Web site operator ultimately determines what commitments, if any, he or she will make with respect to collection and use of PII, and the FTC can hold the Web site operator to those commitments.<sup>81</sup>

Much of the FTC's work on the issue of informed consent has focused on so-called "secondary" or "unrelated" uses of PII. According to the

75. See Federal Trade Commission, *Reports, Letters and Workshops*, <http://www.ftc.gov/privacy/reports.htm> (accessed July 1, 2006) (listing the FTC's workshops on privacy).

76. See e.g., Federal Trade Commission, *Privacy Online: A Report to Congress*, <http://www.ftc.gov/reports/privacy3/priv-23a.pdf> (June 1998) [hereinafter *FTC 1998 Report*]; Federal Trade Commission, *Self-Regulation and Privacy Online: A Report to Congress* 12, <http://www.ftc.gov/os/1999/07/privacy99.pdf> (July 1999); Federal Trade Commission, *Final Report of the FTC Advisory Committee on Online Access and Security*, <http://www.ftc.gov/acoas/papers/finalreport.htm> (May 15, 2000) (reporting on various options for establishing standards for accessing PII collected online); Federal Trade Commission, *Online Profiling: A Report to Congress*, <http://www.ftc.gov/os/2000/06/onlineprofilingreportjune2000.pdf> (June 2000); *FTC Online Profiling Recommendations Report*, *supra* n. 74; *FTC 2000 Report*, *supra* n. 66.

77. See *FTC 1998 Report*, *supra* n. 76, at 7-11.

78. *Id.* at 7.

79. *Id.* at 7-8.

80. *Id.* at 8-9.

81. The FTC's authority to hold a website operator to his or her commitments should not be underestimated. Once a website operator has made representations concerning collection and use of PII, the FTC enjoys considerable leeway to determine what those representations mean to the individual website user and to determine what steps the website operator must take to comply with those commitments. For example, in the FTC's case against Microsoft concerning the Passport online authentication system, the FTC used a statement in Microsoft's privacy policy that it would hold PII in a secure manner as a basis for a Consent Order imposing a variety of specific data security requirements on Microsoft. Federal Trade Commission, *Decision and Order, File No. 012 3240*, <http://www.ftc.gov/os/2002/12/microsoftdecision.pdf> (2002). For a brief discussion of FTC's enforcement activities in the area of online privacy, see *infra* n. 83-90 (and accompanying text).

FTC, a Web site operator must give an individual a choice when the operator wishes to use the individual's PII for a purpose not specified in the Web site's privacy policy when the information was collected.<sup>82</sup> If the Web site operator does not give the individual such a choice and proceeds to use the individual's PII for a previously unspecified purpose, this secondary or unrelated use will render the privacy policy deceptive under Section 5. If the Web site operator gives the individual an informed choice and the individual in some manner signals his or her consent, then the newly specified purpose(s) become part of the Web site's privacy policy, at least with respect to that individual. Section 5 will then require the Web site operator to act in a manner that is consistent with the amended privacy policy.

The FTC's focus on informed consent for secondary or unrelated uses of PII reveals an important fact about the scope of Section 5. Consent is legally relevant only in a limited sense with respect to "primary" uses of an individual's PII, *i.e.*, uses that were specified in a Web site's privacy policy at the time the individual's PII was collected. Under the FTC Act, the key question is whether the Web site operator has used and is using the individual's PII in a manner that is consistent with the Web site's privacy policy. If the answer is "yes," then the FTC has no authority to inquire into whether the Web site also obtained the individual's consent. One could argue that the FTC infers the individual's consent from the fact that the individual provided PII to the Web site. But this argument goes beyond the language of Section 5, which does not grant any legal significance to an individual's consent *per se*. The individual's consent is legally relevant only in the sense that the individual's decision to provide PII to a Web site binds the Web site operator under Section 5 to adhere to any material representations concerning use of PII that the operator may have made at the time the individual provided the PII. If an individual wanted the FTC to initiate enforcement action on the ground that he or she did not consent to collection and use of PII, however, the individual would have to show that the Web site's privacy policy materially misrepresented the uses that the Web site operator would make of the individual's PII. In other words, the individual would have to show absence of proper notice in order to raise the issue of non-consent under Section 5.

It is beyond the scope of this Article to discuss in detail the FTC's enforcement actions in the area of online privacy.<sup>83</sup> It is sufficient to note that the FTC has brought several high-profile cases and reached

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82. *FTC 1998 Report*, *supra* n. 76, at 8-9.

83. See Dugan, *supra* n. 63, at 9-56 - 9-63 (discussing the FTC's enforcement activities); see also Federal Trade Commission, *Privacy Initiatives: Unfairness and Deception*, [http://www.ftc.gov/privacy/privacyinitiatives/promises\\_enf.html](http://www.ftc.gov/privacy/privacyinitiatives/promises_enf.html) (providing links to documents related to the cases that the FTC has brought).

settlements with, among others, Microsoft,<sup>84</sup> Eli Lilly,<sup>85</sup> Toysmart.com,<sup>86</sup> GeoCities,<sup>87</sup> ReverseAuction.com,<sup>88</sup> and various online pharmacies<sup>89</sup>. In each of these cases, the FTC alleged among other things that the Web site operator failed to abide by the representations made in an online privacy policy, either with respect to the collection and use of PII or with respect to the level of security that would be provided for such PII after collection, or both. The FTC has been particularly insistent that Web site operators abide by any commitments that they may have made regarding disclosure of PII to third parties – presumably because such disclosure may significantly increase the risk that an individual's PII will be used for purposes other than those represented in the privacy policy of the Web site that collected the PII. In the GeoCities case, for example, the FTC accused GeoCities of disclosing PII collected from its members to third parties despite an explicit pledge not to do so. In the ensuing consent order, GeoCities agreed to post a privacy policy that clearly and accurately described its policy on disclosing PII to third parties.<sup>90</sup>

#### THE CHILDREN'S ONLINE PRIVACY PROTECTION ACT

Although Congress has allowed the FTC to oversee most aspects of online privacy under long-standing provisions of the FTC Act, publicity surrounding collection of PII from children via the Internet prompted Congress to adopt COPPA, which supplements the FTC's legal authority in the area of children's information privacy.<sup>91</sup> As one leading commentary states, COPPA "governs the collection, use, and disclosure of children's personal information by any operator of a Web site or online service directed to children, or any operator that has actual knowledge that it is collecting or maintaining personal information collected from a

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84. See FTC Press Release, *Microsoft Settles Charges Alleging False Security and Privacy Promises*, <http://www.ftc.gov/opa/2002/08/microsoft.htm> (Aug. 8, 2002).

85. See FTC Press Release, *Eli Lilly Settles FTC Charges Concerning Security Breach*, <http://www.ftc.gov/opa/2002/01/elililly.htm> (Jan. 18, 2002).

86. See FTC Press Release, *FTC Sues Failed Website, Toysmart.com, for Deceptively Offering for Sale Personal Information of Website Visitors*, <http://www.ftc.gov/opa/2000/07/toysmart.htm> (July 10, 2000).

87. See FTC Press Release, *Internet Site Agrees to Settle FTC Charges of Deceptively Collecting Personal Information in Agency's First Internet Privacy Case*, <http://www.ftc.gov/opa/1998/08/geocitie.htm> (Aug. 13, 1998).

88. See FTC Press Release, *Online Auction Site Settles FTC Privacy Charges*, <http://www.ftc.gov/opa/2000/01/reverse4.htm> (Jan. 6, 2000).

89. FTC Press Release, *Online Pharmacies Settle FTC Charges*, <http://www.ftc.gov/opa/2000/07/iog.htm> (July 12, 2000).

90. Federal Trade Commission, Agreement Containing Consent Order, File No. 9823051, <http://www.ftc.gov/os/1998/08/geo-ord.htm> (1998).

91. See Mann & Winn, *supra* n. 62, at 201.

child.”<sup>92</sup> In essence, COPPA requires a covered Web site operator to provide notice to and obtain opt-in consent from a child’s parents before collecting the child’s PII. As will be shown below,<sup>93</sup> by making a parent legally responsible for his or her child’s PII and thereby recognizing the legal significance of an adult’s informed consent, COPPA affirms the FTC’s general approach under Section 5. Just as a parent is legally responsible for his or her child’s PII under COPPA, an adult individual is legally responsible for his or her own PII under the FTC Act.

For purposes of this Article,<sup>94</sup> it is instructive to note the key ways in which the approach to children’s privacy under COPPA differs from the FTC approach to protecting adult’s online privacy.<sup>95</sup> First, of course, COPPA creates a new category of legal subjects whose PII will receive special treatment under Section 5. This new category is denominated “children.” Instead of drawing the line between “adult” and “child” at a traditional location such as 18 or 21 years of age, Congress defined children as only those individuals who are under the age of 13.<sup>96</sup> Thus, an individual 13 years of age or older retains legal responsibility under Section 5 for decisions about whether to allow a Web site operator to collect and use his or her PII.

Second, COPPA incorporates a scienter or intent element unknown under Section 5. Under Section 5, the Web site operator’s intent or knowledge is not legally relevant. The only question is what, if any, material representations the operator made concerning the treatment that PII would receive at the time a particular person provided PII to the Web site.

By contrast, the requirements of COPPA apply if and only if a Web site directs content to children under 13 or the operator has actual knowledge that the Web site is collecting or holding PII provided by a child under 13.<sup>97</sup> The Web site operator’s intent will be ascertained objec-

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92. Dugan et al., *supra* n. 63, at 9-84 - 9-96.

93. See *infra* n. 114 (and accompanying text).

94. See Dugan et al., *supra* n. 63, at 9-84 - 9-96 (providing a more detailed review of COPPA and the compliance issues that it raises for Web site operators).

95. Violations of the FTC’s regulations implementing COPPA (the “COPPA Rule”) are deemed unfair and deceptive acts in violation of Section 5. 15 U.S.C. § 6502(c) (2000) (stating that a violation of COPPA’s regulations “shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under” 15 U.S.C. § 57a(a)(1)(B)) (2000); 16 C.F.R. § 312.9 (1999). Thus, strictly speaking, it is not accurate to contrast COPPA and the COPPA Rule with Section 5. COPPA and the COPPA Rule define the parameters of Section 5 in the area of children’s online privacy. In order to avoid constant use of cumbersome clarifying language, however, this Article treats Section 5 and COPPA as though they were separate legal regimes, the former covering adult online privacy and the latter covering children’s online privacy.

96. See 15 U.S.C. § 6501(1) (2000); 16 C.F.R. § 312.2 (1999).

97. See 15 U.S.C. § 6502(a) (2000); 16 C.F.R. § 312.3 (1999).

tively. In the preamble to the regulation implementing COPPA ("COPPA Rule"), the FTC states that the content of the Web site as a whole will determine whether the Web site is directed toward children.<sup>98</sup> The FTC considers "among other things, the site's 'subject matter, visual or audio content, age of models, language or other characteristics of the Web site or online service . . .'"<sup>99</sup> In effect, whether a Web site is "directed" to children turns on whether a reasonable user would conclude, based on an examination of the Web site as a whole, that the Web site operator intends to reach children and gather their PII.

Third, COPPA and the COPPA Rule differ from Section 5 in mandating that Web site operators post a privacy notice. Under Section 5, a Web site operator does not have to post a privacy policy or provide any form of notice before collecting PII from Internet users. By contrast, a Web site subject to COPPA must post a notice outlining the Web site's information practices, including a description of the types of information collected from children, how the information is collected (actively or passively), how the information will be used, and whether the information will be disclosed to third parties.<sup>100</sup> COPPA also requires the Web site operator to provide a similar notice directly to a child's parent<sup>101</sup> before collecting the child's PII or upon becoming aware that the Web site possesses PII pertaining to a child.<sup>102</sup> Section 5, by contrast, does not require that a special notice be directed to anyone.

The fourth and arguably most important difference between Section 5 and COPPA is that the latter, with limited exceptions,<sup>103</sup> requires a Web site operator to obtain "verifiable" parental consent,<sup>104</sup> *i.e.*, the consent of someone who is verifiably the child's parent, before collecting PII

98. Children's Online Privacy Protection Rule, 64 Fed. Reg. 59,888, 59,893 (Nov. 3, 1999).

99. *Id.* (quoting 64 Fed. Reg. 22753, 22764 (Apr. 27, 1999)).

100. 15 U.S.C. § 6502(b)(1)(A)(i) (2000); 16 C.F.R. § 312.4(b)(2)(i)-(iii) (1999).

101. 15 U.S.C. § 6501(7) (2000); 16 C.F.R. . § 312.2 (1999) (providing that the term "parent" includes a child's legal guardian).

102. *See* 15 U.S.C. § 6502(b)(1)(B)(i)-(iii) (2000); 16 C.F.R. . § 312.4(c) (1999).

103. The FTC has established five exceptions to the requirement that parental consent be obtained before collection of a child's PII. Without prior parental consent, an operator may collect: (1) a child's or parent's name or e-mail address solely in order to provide notice and seek consent; (2) a child's e-mail address for the "sole purpose of responding directly on a one-time basis to a specific request from the child," provided the e-mail address will not be used again for any other purpose; (3) a child's e-mail address to respond more than once to a specific request from the child (e.g., for a subscription to a newsletter) but for no other purpose; (4) a child's name or e-mail address if it is "reasonably necessary" to protect the safety of a child who uses the site or online service; and (5) a child's name or e-mail address to protect a Web site's security, "take precautions against liability," respond to a court order, or provide information to law enforcement. 15 U.S.C. § 6502(b)(2) (2000); 16 C.F.R. § 312.5(c) (1999).

104. *See* 15 U.S.C. § 6502(b)(1)(A)(ii) (2000); 16 C.F.R. § 312.5 (1999).

from a child or immediately after determining that an individual from whom the operator previously collected PII is a child. Such consent includes "any reasonable effort (taking into consideration available technology)" to ensure parental authorization.<sup>105</sup> Under Section 5, no affirmative requirement to obtain consent exists.

COPPA and the COPPA Rule differ from Section 5 in a fifth and final way. The former impose access and security requirements on Web site operators that strengthen parental authority over a child's PII on the Internet. Under COPPA and the COPPA Rule, parents have a right to review and delete PII that a Web site may hold regarding their children.<sup>106</sup> The Web site operator must take steps to ensure that the person seeking access to a child's PII is the parent.<sup>107</sup> Parental consent and parental control are absolute. The parent, once properly identified, may forbid the Web site operator to collect any further PII from the child, and the Web site operator must comply.<sup>108</sup> In addition to establishing the parent's right of access, the COPPA Rule also requires a Web site operator to implement appropriate security technologies and mechanisms.<sup>109</sup> This security requirement appears to flow from Congress' decision to make informed parental consent the core of privacy protection for children online. In effect, the COPPA Rule requires a Web site operator to implement security measures sufficient to ensure that a child's PII will not be accessed or used in a manner that is inconsistent with the privacy commitments that the operator made in obtaining the parent's consent.

Under COPPA, the FTC has brought a number of actions against Web site operators. Typically, in these actions, a key allegation is that the Web site operator failed to obtain parental consent. For example, in April 2002, the FTC announced that the Ohio Art Company, operator of the Etch-A-Sketch Web site, collected PII without obtaining parental consent.<sup>110</sup> Instead, according to the FTC, the Web site told children to obtain a parent's permission before submitting PII. Furthermore, the FTC alleged that the Web site had collected more PII than necessary for its specified purposes and failed to post a COPPA-compliant privacy policy.<sup>111</sup> The FTC also has leveled accusations of failure to obtain parental consent against, among others, Monarch Services, Inc. and Girls Life, Inc., operators of [www.girlslife.com](http://www.girlslife.com); Bigmailbox.com and Nolan Quan, operators of [www.bigmailbox.com](http://www.bigmailbox.com); and Looksmart Ltd., operator of

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105. 15 U.S.C. § 6501(9) (2000); 16 C.F.R. § 312.2 (1999).

106. See 15 U.S.C. § 6502(b)(1)(B) (2000); 16 C.F.R. §312.6(a) (1999).

107. See 16 C.F.R. § 312.6(a)(3) (1999); 64 Fed. Reg. at 59,904-05.

108. 64 Fed. Reg. at 59,904.

109. *Id.* at 59,906.

110. FTC, *FTC Protecting Children's Privacy Online*, <http://www.ftc.gov/opa/2002/04/coppaanniv.htm> (Apr. 22, 2002).

111. *Id.*



www.insidetheweb.com.<sup>112</sup> The FTC made a similar charge against American Pop Corn Company's "Jolly Time" Web site.<sup>113</sup> In these cases, the FTC has collected civil penalties ranging from \$10,000 to \$35,000.

It was suggested above that by enacting COPPA, Congress implicitly endorsed and reinforced the FTC's approach to adult online privacy under Section 5 of the FTC Act.<sup>114</sup> Congress gave parents the legal authority over, and responsibility for, their children's PII and required Web site operators to respect that authority and responsibility. In taking this step, Congress must have presumed that an adult parent has the capability to determine (1) whether a Web site should collect PII from the child and (2) how, if at all, the Web site may be permitted to use the PII. This is, in a nutshell, the position that the FTC has taken with respect to protection of adult privacy under Section 5. The FTC presumes that an adult individual has the capability to determine whether a Web site's posted privacy policy, if any, is consistent with the individual's values concerning how his or her PII should be used. Through Section 5, the FTC recognizes the adult individual's legal authority over, and responsibility for, his or her PII, and imposes on Web site operators a requirement to respect the adult individual's decisions by adhering to any privacy statements that the Web site operator made before collecting the PII. If Congress had not trusted adults to make informed decisions about the use of their own PII, it is extremely difficult to believe that Congress would have reposed such trust in those same adults acting as parents with respect to children's PII.

#### IV. THE ADMINISTRATION OF PRIVACY

##### A. WHY DISCUSS ADMINISTRATION?

Section III outlined the rules that make up the U.S. Internet privacy regime; but rules alone, abstracted from their social and historical context, cannot convey the full significance of administration in the protection of online privacy. In order to understand the significance of administration, it is useful to view the Internet privacy regime in the broader context of U.S. administrative law and history, which incorporate several important presumptions about the relationships among individuals, markets, and agencies. These presumptions inform the FTC's approach to Internet privacy, and they reflect an analytical framework

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112. Press Release, FTC, *FTC Announces Settlements with Web Sites that Collected Children's Personal Data Without Parental Permission*, <http://www.ftc.gov/opa/2001/04/girlslife.htm> (Apr. 19, 2001).

113. Press Release, FTC, *Popcorn Company Settles FTC Privacy Violation Charges; "Jolly Time" Web Site Collected Information from Kids Without Parents' Consent*, <http://www.ftc.gov/opa/2002/02/popcorn.htm> (Feb. 14, 2002).

114. See *supra* n. 93 (and accompanying text).

very similar to the post-Enlightenment paradigm.<sup>115</sup>

#### B. FOUR REGULATORY MODELS

In a lengthy article examining the development of post-Civil War federal regulation in the United States, Professor Rabin distinguishes four regulatory “models” employed by the U.S. government at different times and in different sorts of circumstances.<sup>116</sup> On a continuum running from a “weaker model of government intervention” to a stronger model, these are (1) “common law tort and property,” (2) “policing,” (3) “market-corrective” or “associational”<sup>117</sup> and (4) “public control.”<sup>118</sup> The policing model was first used in the late 19th century in the Interstate Commerce Act (“IC Act”),<sup>119</sup> which established the Interstate Commerce Commission (“ICC”), and again in the early 20th century in the Trade Commission Act,<sup>120</sup> which established the FTC.<sup>121</sup> According to Rabin, the policing model “was premised on an autonomous market-controlled economy. But adherents to this view were willing to concede that the market systematically generated certain ‘excessively competitive’ practices such as the manufacture of products that seriously endangered health and safety or the setting of rates that were particularly discriminatory.”<sup>122</sup> In the face of such practices, traditional common law tort remedies were considered insufficient, so Congress created federal agencies with powers to police particular markets and prevent excessive competition.

Rabin contrasts the policing model with the market-corrective or associational model of regulation<sup>123</sup> embodied in New Deal programs such

115. See *supra* Section II.

116. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *Stan. L. Rev.* 1189 (1985-86).

117. *Id.* at 1192.

118. *Id.* at 1193.

119. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887). For a short history of the Interstate Commerce Commission, see Ari Hoogenboom & Olive Hoogenboom, *A History of the ICC: From Panacea to Palliative* (Norton 1976).

120. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914). For a standard short history of the creation of the FTC, see Gerald C. Henderson, *The Federal Trade Commission* 1-48 (Yale U. Press 1924). For a brief account of the development of FTC authority over false and deceptive advertising – the authority FTC has cited as the legal basis for enforcing Web site privacy policies – see Ira M. Millstein, *The Federal Trade Commission and False Advertising*, 64 *Colum. L. Rev.* 439, 450-54 (1964).

121. Rabin, *supra* n. 116, at 1191, 1225.

122. *Id.* at 1192.

123. *Id.* at 1243. For a different perspective on New Deal regulatory models and programs that is largely consistent with Rabin’s account, see Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 *Minn. L. Rev.* 299 (1983). For a standard, relatively brief history of the New Deal, see Paul K. Conkin, *The New Deal* (3d ed., Harlan Division 1992).

as the National Industrial Recovery Act ("NIRA"),<sup>124</sup> the Agricultural Adjustment Act ("AAA"),<sup>125</sup> and the National Labor Relations Act<sup>126</sup> ("NLRA"). As Rabin suggests, NIRA and the AAA reflected a "substantial shift in traditional conceptions of the separate spheres of public and private activity."<sup>127</sup> Similarly, "the NLRA served as a buffer against inequality of bargaining power in the labor market."<sup>128</sup> In general, proponents of market-corrective regulation doubted the ability of autonomous private markets to correct themselves, and these doubts resulted in a "commitment to permanent market stabilization activity by the federal government."<sup>129</sup> To promote stabilization, market-corrective legislation typically incorporated "price-fixing, information-sharing and market-allocating schemes . . ."<sup>130</sup> The overarching objective was to "control the output of goods, rather than stimulate demand directly by pumping money into the economy."<sup>131</sup> Government took on substantial responsibility for economic planning because, as Professor Gifford has remarked, "planning and supervision of growth are logical outcomes of price and entry regulation."<sup>132</sup>

Rabin's fourth regulatory model, about which he says little, is "public control," and he notes that in characterizing this as a regulatory model, he is "defining 'regulation' broadly . . ."<sup>133</sup> He offers as an example the Tennessee Valley Authority ("TVA"), "a massive government-run electrification and flood-control program."<sup>134</sup> Unlike the other three regulatory models, which presumed a private sphere to some extent separate from a public sphere, the TVA "involved an unprecedented rejection of private enterprise"<sup>135</sup> and, in the words of one scholar, "adopt[ed] forthrightly the principle of public development, ownership, and operation . . ."<sup>136</sup> In other words, under the public-control model, the public sphere essentially absorbs or supplants the private sphere and all signif-

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124. See Ch. 90, 48 Stat. 195 (1933), *invalidated by A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935).

125. See Ch. 25, 48 Stat. 31 (1933), *invalidated in part by U.S. v. Butler*, 297 U.S. 1 (1936).

126. See Ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-68 (2000)).

127. Rabin, *supra* n. 116, at 1192.

128. *Id.* at 1253.

129. *Id.* at 1192.

130. *Id.*

131. *Id.* at 1247.

132. Gifford, *supra* n. 123, at 303.

133. Rabin, *supra* n. 116, at 1193.

134. *Id.* at 1247. For a short history of the TVA, see Roscoe C. Martin, *The Tennessee Valley Authority: A Study of Federal Control*, 22 L. & Contemp. Probs. 351 (1957). For a discussion of the TVA's legal framework, see Richard Wirtz, *The Legal Framework of the Tennessee Valley Authority*, 43 Tenn. L. Rev. 573 (1976).

135. Rabin, *supra* n. 116, at 1294.

136. Martin, *supra* n. 134, at 354.

icant decisions are made by public officials who pursue public policy objectives<sup>137</sup> rather than by private individuals who pursue personal objectives in the market.<sup>138</sup>

For purposes of this Article, there are three additional points to note about Rabin's typology of regulatory models. First, although he describes the regulatory models diachronically as a series of historical stages or innovations, he recognizes that the models can be deployed synchronically as analytical tools. For example, although the New Deal ushered in an era of market-corrective regulation, the New Deal also continued to see the creation of agencies such as the Securities and Exchange Commission ("SEC") that emphasized the policing model.<sup>139</sup> The policing model also reemerges, according to Rabin, in the 1970s during the "Public Interest Era" of regulation with the National Environmental Policy Act of 1969<sup>140</sup> ("NEPA") and the Clean Air Amendments of 1970<sup>141</sup> ("CAA"), among other regulatory schemes.<sup>142</sup> Thus, as shown below,<sup>143</sup> one can use Rabin's models as analytical constructs to illuminate certain aspects of existing regulatory structures such as, for example, the U.S. Internet privacy regime, regardless of the particular point in history at which these structures originated.

A second important feature of Rabin's typology of regulatory models is that each of them is embedded in, and justifies itself by reference to, a broader account of the life of the community, including in particular an

137. Professor Martin noted, *id.* at 370, that the TVA's main policy objectives can be found in a list of areas in which the Tennessee Valley Authority Act instructs the President to recommend legislation as needed to promote:

- (1) the maximum amount of flood control; (2) the maximum development of said Tennessee River for navigation purposes; (3) the maximum generation of electric power consistent with flood control and navigation; (4) the proper use of marginal lands; (5) the proper method of reforestation of all lands in said drainage basin suitable for reforestation; and (6) the economic and social well-being of the people living in said river basin.

16 U.S.C. § 831v (1952).

138. Illustrating the extent to which the TVA operated independently of the market for electric power in the 1950s, Professor Martin noted that "the average residential use of electricity in the TVA area in 1956 was double the national average, while the cost was quite considerably less than half – 1.16 cents per kilowatt-hour for the TVA region as compared with 2.62 cents for the nation." Martin, *supra* n. 134, at 365. The TVA also evolved into a major player in the private market for electric power. According to Professor Wirtz, by 1975 the TVA sold (less than) 40 percent of its electricity to other government agencies and "private industrial firms" that, one presumes, could have bought electricity from other sources if the price were right. Wirtz, *supra* n. 134, at 582.

139. Rabin, *supra* n. 116, at 1247.

140. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. § 4331 (1982)).

141. Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified at 42 U.S.C. § 7401 (1982)).

142. For Rabin's discussion of NEPA and the CAA, see Rabin, *supra* n. 116, at 1284-1295.

143. See *infra* Section 0.

account of the extent to which “private” people and organizations do or do not need significant “public” oversight or control in order to pursue their affairs and interactions successfully. The common law tort regulatory model presumes that individuals and organizations can conduct their affairs and interactions successfully without significant external assistance but that they occasionally need, and will call on, the services of a particular set of public institutions, *i.e.*, courts of law, to resolve disputes that may arise. The policing model also presumes that individuals and organizations can and do successfully pursue their affairs and interactions without significant outside assistance, but that overly aggressive competitive behavior by particular individuals and organizations may require active intervention by public institutions to restore the successful functioning of the community of individuals, understood as a market. Where the common law tort and policing models see the market established by the actions of individuals and organizations as largely but not entirely self-sufficient and self-regulating, the market-corrective and public-control models see this same market as intrinsically deficient and disordered, if not self-destructive, without substantial external assistance and direction. The market-corrective model allows some opportunities for individuals and organizations to conduct their own affairs and interactions, but only under the supervision of public officials dedicated to alleviating potential deficiencies and disorder. By contrast, the public-control model gives public administrators command over all affairs and interactions that individuals and organizations might have undertaken on their own in a particular field or sector, thereby seeking to eliminate any deficiencies that otherwise might have arisen and any disorder that might have occurred.

A third important point to note is that each of Rabin’s regulatory models reflects a different degree of reliance on, or faith in, agency expertise. Under the common law tort model, judges are not expected to be experts in the economic sectors and fields of activity over which they hold sway.<sup>144</sup> On the contrary, as Karl Llewellyn wrote in his distinctive style,

we have a legal system which entrusts its case-law-making to a body who are specialists only in being unspecialized, in being the official depositaries of as much general and balanced but rather uninformed horse sense as can be mustered. Such a body has as its function to be instructed, case by case, by the experts in any specialty, and then, by combination of its very nonexpertness in the particular with its general and widely buttressed expert roundness in many smatterings, to reach a judgment which adds balance not only . . . against the passing flurries

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144. Rabin does not discuss the expertise of common law courts under his first regulatory model, but their relative absence of expertise regarding particular economic sectors or the operation of the marketplace generally is a clear implication of his typology.

of public passion, but no less against the often deep but too often jug-handled contributions of any technicians.<sup>145</sup>

Under the policing model, regulatory expertise assumes greater importance. The establishment of the ICC reflected a belief that informed regulators could police the rail industry and eliminate cutthroat behavior that threatened the industry's economic health.<sup>146</sup> The first chairman of the ICC was a law professor and not a railroad specialist.<sup>147</sup> Under his stewardship, the ICC adopted a "case-by-case approach"<sup>148</sup> to the application of the IC Act instead of "developing its own railroad policy."<sup>149</sup> The legal regime for the second major federal agency – the FTC – provides an even better illustration of the role of expertise under a policing model. The FTC Act originally authorized the FTC to police "unfair methods of competition in or affecting commerce" and later empowered the FTC to combat "unfair or deceptive acts or practices" affecting most areas of interstate commerce.<sup>150</sup> FTC commissioners did not have to acquire or possess expertise in a particular industry, such as railroading, but they did have to develop expertise in adapting their organic statute to the facts of specific cases arising in many different sectors of private industry. The FTC's objective has been to police the market for violations of the FTC Act, not to manage the market after the fashion of a market-corrective agency.

By contrast, New Deal regulation based on the market-corrective model demonstrated a "faith in the ability of experts to develop effective solutions to the economic disruptions created by the market system."<sup>151</sup> As Rabin notes, sometime in 1938, Harvard Law professor and Dean, FTC Commissioner, and SEC Chairman James Landis provided a ring-

145. Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* 263 (Little, Brown & Company 1960).

146. The Hoogenbooms describe the railroad practices that led to calls for regulation as well as the political compromises that led to creation of the ICC. Hoogenboom, *supra* n. 119, at 1-17.

147. *Id.* at 19 (discussing the background of Thomas M. Cooley). As a historical matter, it is interesting to note that Congress dramatically expanded the power of the ICC beginning in the early 1900s, *id.* at 46-118, and it could be argued that the ICC mutated from a policing agency into a market-corrective agency in Rabin's typology.

148. *Id.* at 25.

149. *Id.*

150. Federal Trade Commission Act, 15 U.S.C. § 45(a)(1). For a discussion of the evolution of the FTC's approach to deceptive advertising, see Patricia P. Bailey & Michael Pertschuk, *The Law of Deception: The Past As Prologue*, 33 Am. U.L. Rev. 849 (1984).

151. Rabin, *supra* n. 116, at 1266; see also James O. Freedman, *Expertise and the Administrative Process*, 28 Admin. L. Rev. 363, 364 (1976) (New Dealers shared "a commitment to expertise as a principal justification for the administrative process."). Richard Hofstadter has provided a useful, if overly laudatory, history of the emergence of the "expert" as a key actor in the U.S. government. Richard Hofstadter, *Anti-Intellectualism in American Life* 197-229 (Alfred A. Knopf 1979).

ing defense of administration by experts.<sup>152</sup> According to Landis, “the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate . . . and the power through enforcement to realize conclusions as to policy.”<sup>153</sup> Landis’s assertion reflects Professor Gifford’s contention that “under the conventional wisdom, administrators were said to possess expertise developed from their experience in regulating as well as from their ability to draw on their staff of technicians.”<sup>154</sup> For Landis, the New Deal market-corrective regulatory model demands a “public/private managerial partnership”<sup>155</sup> in which government administrative experts assume many key managerial tasks, thereby preventing or correcting the mistakes that private managers might make if allowed to operate in a free market or a market subject only to the limited oversight typical of the policing model of regulation.<sup>156</sup>

Although Rabin does not spell out the point, it is useful to note that the public-control model represents the next logical step in the direction of reliance on administrative expertise. Instead of public experts and private owners working together to manage the market, public officials simply assume ownership and/or control of the relevant enterprise and their expertise becomes an important, if not the primary, basis for all decisions about how the enterprise will operate.<sup>157</sup> If legislators had entertained serious doubts about the expert capacity of the TVA to engage in “comprehensive governmental planning as a tool for developing a social infrastructure in a regional economy suffering from perpetual depression,”<sup>158</sup> it seems unlikely that they would have created the TVA in the first place. Thus, the public-control model appears to presume the highest level of agency expertise as a basis for eliminating the private

152. James Landis, *The Administrative Process* (Greenwood Press 1938). For a critical discussion of Landis’s work, see Louis L. Jaffe, *James Landis and the Administrative Process*, 78 Harv. L. Rev 319 (1964).

153. Landis, *supra* n. 152, at 23-24.

154. Gifford, *supra* n. 123, at 306.

155. Rabin, *supra* n. 116, at 1267.

156. Summarizing the mindset of influential New Deal leaders such as Rexford Tugwell, Professor Conkin writes: “Guided by expert planners, disciplined by long-range economic goals, the government should make the important management decisions for the whole economy and not be content to act as a mere referee. Allocation of resources, priorities in production, profits, wages, prices – all should be determined by government in behalf of the whole nation . . .” Conkin, *supra* n. 123, at 35. Conkin points out, however, that President Roosevelt never endorsed Tugwell’s vision of a planned economy. *Id.* at 36.

157. According to Professor Martin, the TVA administers many of its programs in cooperation with state and local governments and private industry, and “the chief commodity the TVA has to offer is the technical knowledge and competence of its staff.” Martin, *supra* n. 134, at 372.

158. Rabin, *supra* n. 116, at 1253.

sector from the decision-making process.<sup>159</sup>

### C. THE U.S. INTERNET PRIVACY REGIME AND THE POLICING MODEL

This section of the Article employs Rabin's typology of regulatory models to develop a richer account of the socio-economic premises of the U.S. Internet privacy regime, focusing first on the U.S. regime's treatment of adult PII and then on its treatment of children's PII. In both contexts, this section argues that the U.S. regime reflects a policing model rather than a market-corrective or public-control model. The section then explores the implications of attempting to understand and protect the privacy of PII through the policing model, focusing on the significance of the presumption that there exists an autonomous private sphere in which individuals trade PII via a market that requires administrative oversight.

#### 1. *Privacy Regime for Adults – Pure Policing*

The U.S. Internet privacy regime for adults is easily classified under Rabin's typology of regulatory methods. Before the FTC became involved in regulation of Internet privacy, there was essentially no Internet privacy regime for adults – or children – in the United States. To the extent that there were any legal protections for PII moving over the Internet, they arose under tort law and thus would have fit into Rabin's private property/tort regulatory model.<sup>160</sup> As discussed above,<sup>161</sup> in the mid-

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159. The purpose of this discussion is not to defend or criticize reliance on experts in general or the particular level of reliance found in any of the four regulatory models. The objective is solely to show that administrative expertise becomes an increasingly important presumption as one moves from the relatively "weaker" regulatory models – common law tort and policing – to the relatively "stronger" models – market-corrective and public-control. Professor Jaffe wrote two classic articles expressing skepticism about the wisdom of relying on the supposed expertise of administrators. Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 Harv. L. Rev. 1105 (1954) and Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 Harv. L. Rev. 1183 (1973). Professors Getman and Goldberg provided a detailed critique of claims about the National Labor Relation Board's expertise in assessing the coercive impact of employer or union conduct on employee behavior. Julius G. Getman & Stephen B. Goldberg, *The Myth of Labor Board Expertise*, 39 U. Chi. L. Rev., 681 (1972). For general discussions of the literature criticizing the theory of agency expertise, see Gifford, *supra* n. 123, at 312-319, and Freedman, *supra* n. 151, at 367-375.

160. Louis Brandeis initiated the discussion of the right to privacy and its protection under tort law in 1890. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). For an interesting history of the academic discussions provoked by the Brandeis article, see David W. Leeborn, *The Right to Privacy's Place in the Intellectual History of Tort Law*, 41 Case W. Res. L. Rev. 769 (1991). Dean Prosser provided a now-canonical account of the four basic privacy torts. William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960). Professor Bloustein among others criticized Dean Prosser's approach but failed to dislodge it from the canon, perhaps because Prosser also authored the canoni-



1990s, the FTC began developing a regime for protection of Internet privacy under Section 5 of the FTC Act based on the FTC's long-standing authority to regulate misleading and deceptive advertising. According to Rabin, the FTC is an archetype of the policing agency.<sup>162</sup> Thus, it is reasonable to treat the U.S. Internet privacy regime for adult PII as a policing regime in Rabin's sense, and to examine the basic elements of the U.S. regime in light of Rabin's policing model. By contrast, it would be difficult to make the case that the U.S. regime reflects a market-corrective approach in Rabin's terms, because of the relatively minimal level of FTC intervention in the ongoing exchanges of PII among individuals and other actors. A fortiori, the U.S. regime could not be described as public-control regulation, because it is clear that the FTC has not assumed TVA-like control or ownership of the production and sale of PII.

As the policing model suggests, the FTC's approach to Internet privacy presumes and reflects a relatively clear dichotomy between a private sphere and a public sphere. The private sphere is understood to consist of individual adults who, as it were, produce PII and then trade PII with other private actors – businesses, organizations, other individuals – via the Internet in much the same way that one might produce and trade wool or wheat. Thus, the relationship of the individual to his or her PII is analogous to the relationship of the individual to a commodity that he or she might produce and thereby own or possess. I am tall, male, gay, 46 years old, and a law professor and thus, qua actor in the private sphere. I am therefore deemed to own, or at least exercise, a legally protected interest in<sup>163</sup> each of these items of PII about myself. As a commodity, an individual's PII is alienable. Of course, I cannot sell my tallness per se, but I can sell, or at least grant authority to use, PII about my height to other interested actors in the private sphere. The other party wishes to obtain the use of this PII for his or her own purposes and is prepared to trade something of value to me for the opportunity to use my PII. Under the policing model, the network of such exchanges between and among actors in the private sphere constitutes a market or a portion of the broader market for goods and services. Thus, a key premise of the policing model is the existence of a market in which an indi-

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cal hornbook. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962 (1964); W. Page Keeton et. al., *Prosser and Keeton on the Law of Torts* 849-869 (5th ed., West 1984).

161. See *supra* n. 64-89 (and accompanying text).

162. See *supra* n. 120-122 (and accompanying text).

163. As a matter of black letter intellectual property law, "the United States does not recognize any substantial ownership right in a collection of data." Ronald Mann & Jane Winn, *supra* n. 62, at 380. Thus, it is more accurate to say that the FTC has recognized a legally protected interest in PII under Section 5. For a summary of the distinctive features of information as a form of property, see *id.* at 380-381.

vidual may agree to exchange particular items of PII under specified terms for things that the individual values more than the PII. For example, I might provide my email address to Amazon.com in exchange for Amazon.com's promise to notify me whenever a new book by Paul Russell is published.

In the context of exchanges in the market, particular items of an individual's PII acquire a price, and this price becomes the value of those items within the market.<sup>164</sup> Assuming that the market is functioning properly, information about my height or my sexual orientation is worth what the market will pay for it. Of course, information about my height or my sexual orientation may have special value to me, and I can refuse to trade this PII except at my price. But until I find a buyer in the market who is prepared to pay "my" price, my PII will not circulate in the market and could be said to have no market value. Once I have found a buyer for my PII, "my" price is the buyer's price, and the value of my PII is that assigned by a market in which this buyer could have purchased other commodities from other individuals and I could have sold my PII to other potential buyers for other possible prices. Thus, while my PII may retain an idiosyncratic value for me, that value has little or no significance in the private sphere except insofar as it leads to an agreement on a market price at which my PII can circulate.

An individual's PII can have a market value only because the market treats PII as a commodity that, at least in principle, can circulate freely, a commodity in which the individual has a legally protected interest. Moreover, the individual's protected interest in this commodity is his or her ticket to participate in the market. Insofar as every online transaction requires an individual to authorize use of some items of PII such as name, address, and possibly a credit card number, an individual who was unable to or refused to exchange such information under any circumstances would be excluded from the online marketplace. Other actors in the market would be unable to identify him or her as a particular individual. Amazon.com cannot determine that it is this particular individual who ordered the Penguin edition of *Middlemarch* without several items of this individual's PII. The individual who has no PII to trade, or who refuses to trade PII, is indistinguishable from other individuals and thus in an important sense has no individual existence, at least from the perspective of the market in Rabin's private sphere. Thus, the individuality of the individual within the private sphere seems to depend in part upon the individual's ability and willingness to circulate PII as a commodity.

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164. For a general discussion of the role of prices in a competitive market, see Richard A. Posner, *Economic Analysis of Law* 4-10 (6th ed., Aspen 2003).

It was remarked above that from the perspective of the policing model of regulation, an individual's PII is worth what the market will pay for it *if the market is functioning properly*. If the market malfunctions, the source of value for PII in the private sphere does not change, but the price paid in particular instances might be incorrectly high or low. It is to confront and diminish the possibility of such a market malfunction that the policing model may assign the public sphere a role. In the field of Internet privacy, the FTC represents or embodies the public sphere. As entailed by the policing model, the premise of the FTC's approach to Internet privacy is that an overly aggressive competitor in the private sphere occasionally will exceed acceptable limits on market behavior. In particular, such a competitor may provide false or misleading information to individuals about how their PII will be used, thereby inducing individuals to exchange or sell PII that they perhaps otherwise would not have exchanged or sold had they known how their PII in fact would be used. Returning to the language of the market for PII, one might say that individuals thus deceived have sold their PII at an incorrect price because they were misled about the terms of the sale. In order to prevent such situations from arising, Section 5 of the FTC Act<sup>165</sup> tasks the FTC with deterring false and misleading claims by aggressive competitors and thereby ensuring that the market's pricing mechanism functions properly, *i.e.*, that an individual has the opportunity to exchange his or her PII at his or her preferred price on terms that are stated in a truthful and non-misleading manner.<sup>166</sup>

As MacIntyre and Rabin have noted, the administrative state typically justifies intervention in the private sphere by claiming expertise not shared by private actors. Under the policing model, officials are assumed to be knowledgeable about the sorts of excessively competitive behaviors that could undermine the self-regulating operation of the market. However, officials are not thought to know better than the market itself or the participants in the market how to allocate whatever may be traded in a properly functioning market.<sup>167</sup> As the policing model entails, FTC Commissioners and staff possess, or are thought to possess, considerable expertise in policing deceptive and misleading claims in advertising. Accordingly, the FTC assumes ultimate responsibility for ensuring that any claims or representations made by website operators

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165. *See supra* n. 64-67 (and accompanying text).

166. Not surprisingly, some scholars have argued market disciplines would suffice to prevent many, if not all false and misleading claims and that the FTC's authority in this area may be superfluous. Richard A. Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47, 61-70 (1969).

167. By contrast, under the market-corrective model, officials are generally thought to know better than the market itself or the participants how to allocate the commodities traded.

concerning collection and use of PII are neither deceptive nor misleading. But FTC personnel are not thought to possess and presumably do not possess special expertise regarding the proper terms for collection and use of PII. One might say the FTC presumes that each informed individual is sufficiently expert to consent (or not) to the collection and use of his or her own PII according to his or her own scheme of values, and certainly no less expert or qualified than the FTC itself. By eschewing any further authority to dictate rules that would overrule the individual's consent, the FTC, representing the public sphere, excludes itself from the private sphere in which informed individuals produce and consent to exchange their PII. The U.S. regime thus protects the privacy of PII in significant part by ensuring that PII remains subject only to the accurately informed consent of the individual transacting through a self-regulating market in a properly functioning private sphere, and not subject to prevaricating private actors or inexperienced government officials.

## 2. *Administering the Market for PII*

Before reexamining the U.S. Internet privacy regime's treatment of children's PII in light of Rabin's administrative models, it may be useful to pause and try to focus on the strangeness – at least to a non-economist – of the basic premise of the policing model as applied to PII. How and why has it come to pass that we treat PII as a commodity and the space within which PII circulates as a market? Given the ubiquity of PII, is it correctly seen as a “valuable (meaning scarce as well as desired) resource,”<sup>168</sup> and if it is not a valuable resource in this sense, how can there be a market for it? Is it appropriate that the value of the information that forms an individual's identity is a market price, a value that arises only in comparisons with other commodities that also circulate in a market? And what if people do not view the PII they provide to a website operator as a valuable resource sold for a price? Does this mean we have a market with inadequate information or no market at all? No doubt someone would respond to these questions – correctly – that Rabin and the originators of the policing model did not invent an electronic market for PII. Rather, the electronic market for PII arose spontaneously with the development of the Internet as parties addressed the problems involved in transacting at a distance. The FTC responded in a policing mode when the emerging market for PII began to malfunction. Thus, the policing model reflected and responded to the realities of the Internet. But this response begs a key question. Does the fact that individuals may make available items of PII on the Internet in the course of their activities entail that there is a market for PII and does it follow that there should be such a market? The policing model presumes the

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168. Posner, *supra* n. 164, at 33.

existence of an independent, autonomous market. Those operating within the terms of the model employ the conceptual apparatus outlined in the previous subsection to interpret the fact that people make available information about themselves on the Internet. Even if this supposed market for PII lacks any intrinsic justification, the policing model would not, and indeed could not, question the existence of the market because the model presumes the existence of such a market and interprets the behavior of people in light of that presumption. The market is, therefore, not given as a fact but rather is an interpretation of human action and interaction.

But the point is not simply that the policing model cannot call into question its own premises – a somewhat obvious if easily overlooked point. Rather, the point is that by taking the existence of a malfunctioning market for PII as a premise, the policing model of Internet privacy regulation actively supports the creation and expansion of a properly functioning market for PII. So while people clearly began making PII available online spontaneously, such making available quickly comes to be understood as a market – albeit a malfunctioning market – in the context of demands for, and the establishment of, a policing regulatory regime. In response, the FTC took upon itself the task of making this market function properly, *i.e.*, of ensuring that people make PII available online only in the context of a properly functioning market for PII. Thus, the market for PII is both the premise, the raw material, and the conclusion, the final product, of the regulatory regime.

Moreover, because the market is the premise and conclusion of the regulatory regime, the regime tends to require and reinforce a particular understanding of privacy among regulators and regulated. Privacy comes to mean the assurance that the market is pricing PII properly. The privacy of my PII is protected in a legal sense if and apparently only if the terms on which the PII might be collected and used, *i.e.*, the price broadly conceived, are not false or misleading. To violate my privacy means to induce me to circulate my PII at the wrong price, *i.e.*, under terms and conditions different from those to which I would have consented had I not been misinformed about how my PII would be collected and used. The FTC protects my privacy by seeking to ensure that overly aggressive competitors do not induce me to consent to circulate my PII at the wrong price. My privacy seems to depend, therefore, upon the presumption that in principle there always will be a right price for my PII, a market price at which I would trade items of my PII to other actors in the private sphere. Thus, the market is a conclusion of the policing model in the sense that under the U.S. Internet privacy regime my privacy is assured only insofar as my PII is treated as a commodity trading in a properly functioning market. The significance of this point will become clearer after the discussion of the rather different treatment that the

U.S. privacy regime affords to a child's PII.<sup>169</sup>

The market is not, however, the only premise or the only conclusion of the policing model. As discussed above, the continuing operation of the private sphere demands the watchful presence of a particular type of public sphere, *i.e.*, one tasked with preventing private actors from behaving in an overly aggressive manner that could undermine the autonomous operation of the private sphere. Thus, the need for a certain type of public sphere is also a premise of the policing model, and not surprisingly, once the model is accepted, the call for action by such a public sphere becomes the self-reinforcing conclusion of the analysis. In respect to PII, while the individual comes to understand privacy as the assurance that he or she can make PII available on a properly functioning market, the individual simultaneously comes to recognize that his or her privacy depends on the continuing oversight of a regulatory agency committed to maintaining such a properly functioning market. Thus, a demand for enhanced privacy protection inevitably manifests itself as a demand for more public action by an agency such as the FTC.

### 3. *Privacy Regime for Children – More Privacy, More Administration*

As discussed above, the decision to adopt COPPA reflected a determination by the FTC and Congress that the Internet posed a special risk to the privacy of children's PII.<sup>170</sup> Faced with this supposed risk, Congress could have adopted a range of legal responses, including an outright ban on the collection and use of children's PII or an elaborate legal and administrative regime of the sort found in the European Union.<sup>171</sup> But Congress took no such steps. Instead, Congress adopted a regime that remains well within the conceptual structure of the policing model of regulation. Indeed, a brief reexamination of COPPA will show how the conceptual structure of the policing model produced an approach to privacy protection that simultaneously extends the scope of the market for PII and expands, within relatively clear limits, the role of administration.

COPPA addressed a recent development in the realm of human behavior: with the advent of the Internet, a website operator can collect PII directly from a young child without making any commitments to protect the information or hold it in confidence. COPPA responds to this development on two levels, reflecting the policing model's division of the world into an autonomous private sphere and a policing public sphere. At the level of the private sphere, COPPA treats collection of PII from young

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169. *See infra* Section 0.

170. *See supra* Section 0.

171. *See* Ronald Mann & Jane Winn, *supra* n. 62, at 209-212 (briefly describing the European regime).

children as a source of malfunction or potential malfunction in the pricing mechanism of the market for PII. The market malfunction is that website operators might collect PII from children who are too young to appreciate the value of the PII that they make available or to understand the terms on which the website proposes to collect and use the PII. Because the child cannot grasp the value of her PII or the significance of the terms of use, the child may agree to make the PII available at a price that differs from the price the website operator would have paid to obtain the same sorts of PII from an adult. To correct this market malfunction, COPPA requires a website operator who wishes to collect PII from children under 13 years of age to provide specific information to the child's parent about the use(s) that will be made of the child's PII and to obtain verifiable consent from the child's parent before collecting and using the child's PII.<sup>172</sup> By empowering the parent to evaluate the proposed terms for collection and use of a child's PII, COPPA in effect authorizes the parent to set the market price for the child's PII. COPPA thereby forces the website operator to deal with the parent, rather than the child, over that price. Thus, COPPA protects the privacy of a child's PII by seeking to ensure that that PII is made available only at the "correct" price, defined here to mean the price that the child would have demanded in the market for PII if the child had possessed the capabilities of her adult parent.

In order to implement these changes at the level of the private sphere, COPPA also makes changes at the level of the public sphere. Specifically, COPPA empowers the FTC to enforce the new information and consent requirements that COPPA imposes on website operators. COPPA accomplishes this by declaring violations of the new requirements to be violations of Section 5 of the FTC Act.<sup>173</sup> By tying COPPA to Section 5, Congress affirmed that COPPA did not grant the FTC a new kind of authority to intervene in the market but rather enhanced or clarified the FTC's existing authority to deter false and misleading claims – an archetypal form of policing regulation. And this is not simply an example of Congress deciding to call a duck a chicken. Rather, it is an accurate characterization of the FTC's task under COPPA, *i.e.*, ensuring that the market functions properly in establishing a price for children's PII by ensuring that adult individuals receive truthful and non-misleading information about how the PII will be collected and used. Indeed, the fact that Congress chose to characterize its actions in COPPA as an enhancement of the FTC's authority under Section 5 reveals the degree to which Congress understood the problem of information privacy on the Internet as a problem of market malfunction to which expanding the

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172. See *supra* n. 100-104 (and accompanying text).

173. See *supra* n. 90-92, 113 (and accompanying text).

FTC's authority over false and misleading claims represented a reasonable and seemingly obvious response. Thus, even if one believes that Congress called a duck a chicken when it treated information privacy on the Internet as a problem of market malfunction, Congress probably did so because it thought the duck was a chicken.

It is now possible to link this discussion of COPPA to a broader point made above about the impact of the policing model's conceptual framework. When Congress confronted the evidence that website operators were collecting PII from children, Congress saw a threat to children's privacy. But within the conceptual framework of the policing model, this threat appeared both as a market problem in the private sphere, and an administrative problem in the public sphere. Consistent with the policing model, Congress took two inextricably linked steps. On the one hand, Congress expanded the existing market for PII, a market that by hypothesis was functioning properly under FTC oversight, to include children's PII. Congress thereby officially recognized a market for children's PII where before there had been no such recognition and arguably no such market. On the other hand, because administrative oversight is a precondition of a properly functioning market in the policing model, Congress enhanced, albeit in a carefully limited way, the existing administrative authority to meet the needs of the newly expanded market. Thus, COPPA illustrates very well the earlier point that the market for PII and the administration of that market are the premises and the conclusions of any analysis under the policing model. A child's PII comes to be seen as a commodity with a price, and a child's parent comes to hold a legally protected interest in distribution of that commodity to website operators in the market. As the administrator of the market, the FTC comes to be seen as the guarantor of the parent's ability to exercise that ownership interest or legal control.

It is useful at this point to consider two counterarguments to the claim that COPPA follows the policing model of regulation. According to the first counterargument, COPPA is actually a market-corrective regime because COPPA presumes that the market alone will not produce sufficient information to protect the privacy of children's PII. Rabin stated that market-corrective regimes often contain an information-sharing requirement,<sup>174</sup> and one could argue that COPPA's notice rules establish just such a requirement, thus transforming the FTC's policing regime under Section 5 of the FTC Act into a market-corrective regime. Although this counterargument focuses attention on a key element of COPPA, it misconstrues the significance of that element. COPPA's requirements clearly seek to correct a perceived failure of the market to produce sufficient information for adult individuals concerning the use

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174. *See supra* n. 130 (and accompanying text).



that websites make of children's PII. But the "market failure" that COPPA addresses is the possibility that website operators can communicate directly with small children via the Internet, cutting parents out of the loop. At bottom, COPPA is designed to ensure that a responsible adult, the parent, stands between the website operator and a child who is too young to understand the implications of providing PII to a website and who lacks the legal capacity to enter a contract and thereby participate in a market.<sup>175</sup> Thus, as suggested above, COPPA actually creates a market where one might not otherwise exist – a market involving websites and their operators on one side and adult individuals with children on the other.

From the standpoint of Rabin's typology of regulatory methods, the issue of whether COPPA is a policing regime or a market-corrective regime turns not on the presence or absence of an information-sharing requirement. It instead turns on the degree to which the public sphere, here the FTC, intervenes in the functioning of the private sphere, here the market for PII. COPPA does require website operators to share more information with a parent than they otherwise might share, but unlike a typical market-corrective regime in Rabin's analysis, COPPA does not mandate "information sharing" between competitors<sup>176</sup> in a way that encourages cooperation rather than competition in the market. Moreover, with respect to this information-sharing requirement, the FTC's primary function is not to encourage cooperation, but to police compliance and thereby encourage robust competition within an independent private sphere.

A second counterargument in favor of the view that COPPA is a market-corrective regime, focuses not on particular COPPA requirements but on COPPA's increased reliance on agency expertise. COPPA

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175. See E. Allan Farnsworth, *Contracts* § 4.2 (4th ed., Aspen 2004).

176. Rabin is more than a little vague about what he means by "information-sharing" requirements. At one point, he refers to "private information-sharing agreements and consolidation efforts" as a Progressive initiative to protect against the harsh effects of competition. Rabin, *supra* n. 116, at 1225. Rabin also quotes FTC historian Gerald Henderson to the effect that trade associations at one point sought permission to share cost and price information among members as a less expensive alternative to costly industry consolidation. *Id.* at 1223; see Henderson, *supra* n. 120, at 21-22. In addition, Rabin mentions the New Deal objectives of "eliminating price competition, and fostering intra-industry cooperation . . . to restore business confidence." Rabin, *supra* n. 116, at 1248. These admittedly disjointed comments suggest that in Rabin's view, the information-sharing provisions typical of a market-corrective regime are intended to permit or force companies to share cost, pricing, and other market information with the government and with one another to foster cooperation rather than potentially ruinous competition. Information sharing with consumers, though perhaps desirable, is a secondary goal from the standpoint of a market-corrective regime, a goal arguably more closely related to traditional "policing" concerns about false and misleading information.

requires<sup>177</sup> the FTC to adopt implementing regulations under Section 553 of the Administrative Procedure Act.<sup>178</sup> Section 553 mandates use of “notice and comment” procedures that are designed, according to Professor Schwartz, to “educate the agency, thereby helping to ensure informed rulemaking. The APA sought to ensure that the broadest base of information would be provided by those most interested and informed on the subject of the rulemaking at hand.”<sup>179</sup> In other words, one might say that “notice and comment” procedures are supposed to give the agency an opportunity to acquire sufficient expertise to promulgate regulations and thereby exercise a measure of control over an industry beyond that typically associated with the policing model. Since COPPA requires “notice and comment” rulemaking, it seems to follow that COPPA must demand a degree of agency expertise beyond that demanded by Section 5 of the FTC Act and the policing model. As Rabin has shown, increased reliance on agency expertise in regulating the private sector is an important element of the market-corrective model.<sup>180</sup>

It would be a mistake, however, to overestimate the extent to which COPPA’s grant of rulemaking authority demands or relies on FTC expertise. In fact, COPPA lays out in considerable detail the substantive content of the regulation the FTC was required to adopt, leaving the FTC relatively little leeway to fashion additional substantive requirements.<sup>181</sup> To date, the FTC has focused most of its rulemaking resources under COPPA on determining what sort of technical mechanism a Web site operator should be required to use to obtain verifiable parental consent – *e.g.*, a written response on paper, a toll-free telephone number, an email with an electronic signature, or some combination of these.<sup>182</sup> No one would dispute that the FTC has developed some expertise on this important but very narrow and technical topic. Moreover, it is clear that expertise on the technical mechanisms of consent differs from expertise on whether advertising is false or misleading under Section 5 of the FTC Act. Thus, implementing COPPA has resulted in a broadening of the FTC’s expertise as well as reliance on that broadened expertise. Presumably, however, no one would argue that expertise on consent mechanisms would equip the FTC to second-guess decisions made by Web sites

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177. 15 U.S.C. § 6502(b)(1) (2000).

178. 5 U.S.C. § 553 (2000).

179. Bernard Schwartz, *Administrative Law* 194 (3d ed., Little Brown & Company 1991)(footnotes omitted).

180. See *supra* n. 151-154 (and accompanying text for a discussion of the role of agency expertise in the market-corrective model).

181. See 15 U.S.C. § 6502(b) (2000).

182. See Children’s Online Privacy Protection Rule, 70 Fed. Reg. 2580 (proposed Jan. 14, 2005)(to be codified at 16 C.F.R. pt. 312); Children’s Online Privacy Protection Rule, <http://www.ftc.gov/os/2005/04/050420coppafinalrule.pdf> (Apr. 21, 2005)(to be codified at 16 C.F.R. pt. 312).

and/or parents concerning the terms on which a child's PII will be collected and used, *i.e.*, decisions concerning the appropriate "price" of a child's PII in the market. Because the kind of expertise required by COPPA apparently does not equip the FTC to rectify – or claim to rectify – the terms and conditions assigned by the market, COPPA would not qualify as market-corrective in Rabin's sense.

## V. INTERNET PRIVACY AND THE POST-ENLIGHTENMENT PARADIGM

This Section reexamines the premises and the significance of the U.S. Internet privacy regime in light of the outline of the post-Enlightenment paradigm presented in Section II. In particular, this Section shows that the U.S. regime is built around the three key elements of the paradigm: (1) the individualization of privacy and the attendant emphasis on consent, (2) the fundamentally ambivalent market relationship of the individual to his or her PII, and (3) the overarching need for expert impersonal bureaucratic administration by corporations and public officials. This Section also shows that the U.S. regime reflects certain fundamental tensions afflicting each of these elements, as one would expect if MacIntyre is correct in his argument that post-Enlightenment thought about human nature and human action reflects the failure of philosophy to resolve various problems bequeathed by the Enlightenment to later generations.

### A. THE INDIVIDUALIZATION OF PRIVACY AND THE ROLE OF CONSENT

In Section II it was suggested that, in a world operating under the post-Enlightenment paradigm, an information-privacy regime would focus on protecting individuals and enhancing individual consent. The U.S. Internet privacy regime does focus on individuals and consent. First, at the level of express legal requirements, the U.S. regime seeks to protect and enhance the significance of informed adult individual consent by requiring Web site operators to abide by their express privacy commitments.<sup>183</sup> Web site operators are free to promise as much or as little information privacy protection as they wish, and each individual is free to consent or not to the level of protection offered in light of his or her scheme of personal values. The law simply requires the Web site operator to provide the level of protection promised.

Second, at the level of the underlying regulatory model, individuals and individual consent are the driving forces in a properly functioning market where PII circulates as a commodity. Since the time of Adam Smith, it has been understood that each person participates in the mar-

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183. See *supra* n. 64-66 (and accompanying text).

ket as an individual pursuing his or her self-interest in transactions with other individuals pursuing their self-interest(s).<sup>184</sup> Qua individual market participant, I supply others with things that they value in exchange for things that I value. In the electronic marketplace, one of the things about me that others may value is my PII. Thus, as part of a transaction, I may be asked to supply information about my name and address, my credit card, my personal preferences, and so forth. To facilitate such trading, the U.S. Internet privacy regime implements the market-based premises of the policing model by treating my PII as a commodity in which I have a legally protected interest and over which I may exercise authority through informed consent to collection and use. In this respect, the U.S. regime treats my PII and its privacy as matters of fundamentally individual interest and concern. Indeed, like the PII market itself, the individualization of interest and concern seems to be both a premise and a conclusion of the U.S. Internet privacy regime. The regime presumes that each person is unquestionably an individual with PII to trade in the market and, consequently, the regime empowers each person as an individual to engage in such trading with some confidence that the Web site operators with whom the individual trades will live up to any commitments they have made concerning the privacy protection they will accord to PII. The individual bears the entire burden of determining whether a Web site operator's privacy commitments are sufficient in light of the value that the individual personally attaches to PII and its privacy.

The individualization of interest and concern is not, however, the entire story. The U.S. Internet privacy regime also presumes that, at the margins of the market, a person may have a very different status as a member of a group rather than as an individual. Evidence that the U.S. Internet privacy regime acknowledges the significance of something other than the individual who trades PII in a market is not difficult to find. COPPA presumes that there are persons – *i.e.*, children below the age of 13 – who should not participate in the market without parental permission and who should be permitted to trade PII only on terms approved in advance by a parent. COPPA thus recognizes a child *as* a member of a group – *i.e.*, the family – rather than as an individual with legal authority. COPPA accomplishes this by empowering the parent to establish the market price of the child's PII. In what sense, then, is the PII in question the child's PII? The child apparently does not have a legally protected interest in the PII, because the parent determines whether and under what terms the PII might be traded. It seems more accurate to say that under COPPA the child's PII *is* the parent's PII be-

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184. For a summary of Adam Smith's account of the market, see Robert L. Heilbroner, *The Worldly Philosophers* 52-56 (4th ed., Simon & Schuster 1972).

cause the parent exercises the relevant legal interest. COPPA thus explicitly presupposes a distinction between PII *about* someone and PII that *belongs to* someone. The information that Christopher is ten, blond, blue-eyed, and very fond of *The Lord of the Rings* may be information about Christopher but from the point of view of COPPA the information does not belong to Christopher. Rather, it belongs to his parents, who may approve or disapprove its collection and use on terms offered by Web site operators.

This seemingly obvious distinction between “PII about X” and “PII that belongs to X” reveals an important limit or margin of the U.S. Internet privacy regime’s focus on the individual. To see why, it is useful to ask how a parent is supposed to set a price for PII that belongs to, but is not about, him or her. Clearly the parent cannot set the price by bargaining with the child for the PII. First of all, from a legal perspective, the PII does not belong to the child, so bargaining with the child is unnecessary. Moreover, even if the parent were to treat the PII as though it belonged to the child, a key premise of COPPA is that the child is not yet capable of valuing his or her PII correctly and therefore not qualified to bargain over PII. This means that one would be hard put to offer a persuasive market-based account of the transaction(s) between parent and child concerning PII about the child. In this respect, COPPA implicitly acknowledges that within the family, people typically do not bargain over PII as individuals in a market, but take responsibility for PII about one another in quite a different way.

The family stands at, or just beyond, the margin of the U.S. Internet privacy regime in the sense that COPPA does not purport to regulate the way a parent takes responsibility for PII about a child. Under COPPA, a parent may make decisions about such PII that are entirely self-interested, *i.e.*, in the self-interest of the parent qua individual market participant, and that ignore any supposed interests or concerns of the parent qua parent. Daddy can sell Christopher’s name, address, and shopping preferences to the highest bidder and pocket the market price. But COPPA also empowers the parent to act not from self-interest, but in the interest of the child or the family as a whole by sheltering children from the impact of the market for PII until the children are, at least in theory, old enough to participate in that market themselves. Accordingly, Daddy’s decisions about whether to permit collection and use of Christopher’s PII may be – and presumably will be – influenced by parental interests and concerns that are quite different from the interests and concerns that influence Daddy’s decisions about whether to allow collection and use of PII about himself. Following MacIntyre’s account of the old Aristotelian paradigm, one might say that Daddy’s decisions do not reflect his status as an individual, but rather his role as a parent in a

family with a shared vision of the good of its members.<sup>185</sup> Accordingly, any criticism of Daddy's decisions likely will focus on his adequacy as a parent in light of that shared vision and not on the adequacy of his bargaining skills as an individual in the market.

Beyond the field of COPPA, the distinction between "PII about X" and "PII that belongs to X" points to other non-individualist, non-market interests and concerns that arguably receive at least tacit recognition at the margins of the U.S. Internet privacy regime. For example, I know, or at least have very good reasons to believe, that the man I am dating is gay. This item of PII seems to be about him. But does it belong to him? In one sense it does because under Section 5 of the FTC Act he may consent or not to its collection and use by a Web site operator when the operator seeks to collect the information from him. But what if a Web site operator somehow asks me for this information? Clearly, I too can trade this information on the market, and Section 5 apparently would protect my authority to insist on adherence to any terms offered by the Web site operator. Thus, from the market's perspective, the information appears to belong to both of us, even though it is about him. Carrying the inquiry a step further, if we decide to become boyfriends or partners, is that information about him or about me or about us? And to whom does that information belong? The information would seem to be about both of us or about each of us, only insofar as we have a relationship with each other. Thus, the statement "X is the boyfriend of Y" is true if and only if the statement "Y is the boyfriend of X" also is true. And again, it would seem that each of us or both of us could trade this information on the market and, under the protections offered by Section 5 of the FTC Act, each of us could insist on his own price and terms.

At least two important points emerge from this brief discussion. First, from the perspective of Section 5 of the FTC Act, PII belongs to whichever adult individual is in a position to trade it on the market, regardless of whether the PII is about the individual, about someone else, or about a relationship between them. Thus, although in the simplest scenario, the properly functioning market may ensure that I receive the appropriate price for PII about me, the market cannot resolve threshold questions regarding whether and when the PII that I possess is about me

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185. For the classic(al) exposition of this view of the family, written long before the discovery – or invention – of the market by political economists, see Aristotle, *Politics*, 18-29 (Ernest Barker trans., 1952). In a later statement of the same idea, Hegel argued that the family bond is based on love and that, because one's family is essential to who one is, "one is in it not as an independent person but as a member." George Wilhelm Friedrich Hegel, *Hegel's Philosophy of Right* 110 (T. M. Knox trans., Oxford U. Press 1967) (originally published 1821). By contrast, in the marketplace, which is part of what Hegel terms "civil society," people exist not as members of a unit but as individuals who pursue "selfish ends." *Id.* at 123.

and whether or when it belongs to me as an individual participating in a market.<sup>186</sup> Second, by protecting my ability to trade PII about someone else or about my relationship with someone else, Section 5 of the FTC Act tacitly recognizes – or at least does not foreclose the possibility – that I may have to take into account another person's interests and concerns when determining the price to place on such PII in the market. Thus, even though I am not my boyfriend's parent under COPPA, I may have responsibilities to my boyfriend that affect my handling of PII about him or us and that are not determined by my interests as an individual in the market. Such responsibilities seem to escape the conceptual framework of the post-Enlightenment paradigm. Of course, I can ignore those responsibilities and/or attempt to treat them as private values that I may affirm or reject as a sovereign individual, thereby rationalizing a decision to sell PII about my boyfriend in the market to the highest bidder. In this way, the post-Enlightenment paradigm might reassert itself. Section 5 will not foreclose this move because it does not purport to regulate my reaction to the responsibilities attending my relationship to my boyfriend. The old Aristotelian paradigm may help, however, to explain those responsibilities in a way that the post-Enlightenment paradigm does not. They are, one might say, defined not by my status as an individual exercising sovereignty over my personal values but by my role in a couple seeking to discover and pursue a shared vision of the good.<sup>187</sup> Thus, if I do sell PII about my boyfriend to the highest bidder and my boyfriend takes umbrage, he is unlikely to chastise me for cutting a bad deal, *i.e.*, for getting the wrong price. Rather, he will chastise me for failing to live up to my responsibilities to protect and support him qua boyfriend. He will denounce me, in short, as a bad boyfriend.

A couple of important caveats should be inserted at this point. First, the suggestion that adult persons have non-market responsibilities to and for one another regarding collection and use of PII is, at best, only implicit in Section 5 of the FTC Act. Unlike COPPA, Section 5 does not create a legal structure under which PII about one person explicitly falls under the consensual authority of another person in the market. Rather, Section 5 leaves open this possibility by remaining silent on the issue. Second, by remaining silent, Section 5 simply follows the lead of the properly functioning market that is both its premise and conclusion. The market has no interest in the influences on the individual that shape the bargains he or she might make in setting a market price for PII. A person's market behavior can reflect the person's thinking qua parent or

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186. Randy Barnett has made the related point that the rules of contract law presuppose a theory of entitlements and, in particular, a theory of alienable rights to property. See Randy E. Barnett, *A Consent Theory of Contract*, 86 Colum. L. Rev. 269, 291-307 (1986).

187. See *supra* n. 14 & 37 (and accompanying text).

qua boyfriend or girlfriend, but in the market, the person remains an individual. The market treats the interests that the person pursues, including the privacy interests, as individual interests. One might say that any shared or communal interests and concerns animated by a shared vision of the good will disappear from sight in a market viewed through the lens of the post-Enlightenment paradigm, just as such shared interests and concerns all but disappear under Section 5, coming to light only in an examination of the circumstances in which a person might find himself or herself at the margins of the market. In this respect, the market promotes the individualization of privacy and Section 5 supports the proper functioning of the market.

#### B. AMBIVALENCE AND DEPERSONALIZATION IN THE MARKET FOR PII

It was suggested in Section 0 that under the post-Enlightenment paradigm a modern information-privacy regime would reflect the deep ambivalence of the individual to his or her PII. On the one hand, one would anticipate that individuals would place a high value on information privacy and thus reveal considerable anxiety about maintaining consensual authority over PII. On the other hand, one would expect an effort to establish and maintain a market that permits the individual to disseminate PII to the highest bidder. The U.S. Internet privacy regime appears to reflect precisely this ambivalence. On the one hand, the FTC developed the U.S. regime as an explicit response to growing evidence of consumer anxiety about the collection and use of PII via the Internet,<sup>188</sup> anxiety presumably rooted in the supposedly high personal value the individual places on PII. On the other hand, the primary focus of the U.S. regime, as one would expect under the policing model and the post-Enlightenment paradigm, is to establish and maintain a properly functioning market in which a person can alienate or disseminate PII for a price. Indeed, in electronic transactions with others, the individual typically needs those others to recognize the individual *as this particular individual*, as the individual with these particular items of PII that distinguish him or her from other individuals. It is I who want the Penguin edition of *Middlemarch*, and who want it sent to *my* address after charging the purchase to *my* credit card number. Thus, even to establish my identity in the market *as this individual* I must be willing to circulate my PII and cede at least some of my authority over it. The U.S. Internet privacy regime reflects the individual's ambivalence about his or her PII by seeking to maintain a properly functioning market in which the individual can sell PII, but only for a price that accurately reflects the supposedly high value the individual places on PII.

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188. See *supra* n. 71-74 (and accompanying text).



The ambivalent relationship of the individual to PII under the U.S. Internet privacy regime becomes even more apparent if one considers the individual's PII from the perspective of the market. The market's interest in the individual's PII, including the individual's most "personal" secrets, is fundamentally impersonal and tends to depersonalize PII in at least two ways. First, the market depersonalizes PII by assigning it a price. On the market, PII about me – *e.g.*, my name and address, my credit card number, my telephone number, and my "personal" interests – may be worth a certain number of dollars and cents to a Web site operator. But many other people's PII will be worth exactly the same amount of money. Thus, the market value of my PII does not reflect anything unique or personal about me. Indeed, the market value of my PII will allow me or others to equate it with goods and services available in the market. Thus, one's PII might have the same value as a can of Fresca™ or a package of Scott™ towels. From the perspective of the market, any idiosyncratic value that I might assign to my PII is largely irrelevant. Of course, anxiety about loss of control over PII can drive a person to refuse to circulate any PII, but from the market's perspective, that means the person overvalues his or her PII. Eventually, the market may present an opportunity that is "too good to pass up," and then the person will agree to treat PII as just another commodity with no more significance than the market price reflects. Anxiety dispelled.

The market also depersonalizes PII in a second way. Why, one might ask, does Amazon.com wish to obtain and retain the item of PII that Mark Kightlinger enjoys reading gay-themed novels? Is it because some person at Amazon.com headquarters is snickering or taking a prurient interest in my sexual behavior? Viewed through the lens of the market for PII, the answer to this question clearly is "no". Amazon.com "cares" about the sexual orientation implicit in my reading habits only insofar as that item of PII assists Amazon.com in predicting and influencing my future purchases, *i.e.*, my behavior qua consumer in the online marketplace. Amazon.com seeks only to build a profile of me qua individual market actor and to offer to sell things to me that people who share my characteristics, whatever those may be, happen to buy. In general, Web site operators "care" about PII only insofar as it is a commodity that can be collected and put to productive use in the purchase and sale of other commodities. Any further significance that PII about me might have to me in my personal life or in the formation of my personal identity is irrelevant. Thus, although a Web site operator may develop a rather detailed market profile of people like Mark Kightlinger by analyzing PII about them, the profile is actually "nothing personal."

It should be clear now that the U.S. Internet privacy regime reflects a fundamental ambivalence toward the value of PII. On the one hand, the rationale for the regime is protection of individual privacy because of

the supposedly high personal value of PII to individuals and the threat that misappropriation and misuse of PII may pose.<sup>189</sup> On the other hand, the regime's response is to maintain a properly functioning market that disseminates all PII for a price and strips PII of any personal significance. This response accurately reflects a key tenet of the post-Enlightenment paradigm: as a set of value-free facts that individuals may or may not value, an individual's PII has no intrinsic significance. An individual may value those facts but that says nothing about their "true" value because they have no true value. They simply are. Facts may attain value, however, in the market, which is nothing more than a nexus of evaluation and exchange. The supposedly high value of PII to the individual is ultimately the price at which the individual will let it go.

Again, however, this is not the entire story. As discussed in Section V. A, the U.S. Internet privacy regime appears to recognize, at least at the margins, that PII may have a significance unrelated to market value in the context of certain groups or relationships, such as the family or the union of two lovers. In such contexts, the "key tenet" of the post-Enlightenment paradigm, *i.e.*, that facts are value-free, arguably is shadowed, or perhaps haunted, by a different understanding of the significance of PII, an understanding rooted not in the "values" of individuals facing a value-free world, but in the shared trust and respect that support disclosure and discretion between and among members of families, couples, groups, and communities. In practice, such trust and respect typically would reflect an ongoing effort to become a good or better parent, a good or better son or daughter, a good or better boyfriend, and ultimately a good or better member of a good or better community. In other words, what dwells at the margins and what arguably haunts the modern information-privacy regime may be the specter of the old quest to find and achieve a shared vision of the human good or *telos*, a quest that was supposed to have been interred along with the Aristotelian paradigm some four hundred years ago.<sup>190</sup>

In working to formulate a credible teleological account of our experiences in groups and communities, we would, MacIntyre suggests, formulate an account of the "hierarchy of goods which provide the ends of

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189. The title of a recent article about identity theft in the ABA Journal illustrates the supposed high value of PII to the individual. Jason Krause, *Stolen Lives*, 92 A.B.A. J. 36 (Mar. 2006).

190. MacIntyre argues that the good human life is in part a quest for knowledge of the human good or *telos* and self-knowledge of one's character and potential. MacIntyre, *After Virtue*, *supra* n. 10, at 219. He also argues that each of us is a "proto-Aristotelian" before being educated into other ways of seeing the world. See MacIntyre, *supra* n. 8, at 146. Thus, it would not be surprising if we sometimes revert to an Aristotelian framework when trying to understand and justify our lives.

human action."<sup>191</sup> In light of that hierarchy, it might be possible to explain and defend the true significance – or lack of significance – of particular categories or items of PII to overcome the fundamental ambivalence to PII that is a key characteristic of our post-Enlightenment situation. Indeed, a credible teleological account of human nature might help to explain the nagging conviction that at least some items of our PII have intrinsic significance unrelated to market value or the individual's sovereign evaluations. For the reasons that MacIntyre outlines, this nagging conviction is difficult to explain, except as an atavism, within the framework of the post-Enlightenment paradigm. However, the conviction would be explicable and, perhaps, too obvious to need explanation if a teleological account of human nature were in fact true.

### C. IMPERSONALITY, EXPERTISE, AND THE ADMINISTRATION OF PRIVACY

It was suggested in Section II that an information-privacy regime operating under the post-Enlightenment paradigm would rely heavily on administrative bureaucracy as a counterbalance to individual will expressed in consent, leading to the phenomenon that MacIntyre characterizes as "bureaucratic individualism." In the absence of a shared vision of the good, unbounded exercise of individual will may engender disorder and conflict. In the modern world, the "obvious" counterbalance to the multiplicity of individual needs and values is an impersonal institution that coordinates or channels such needs and values toward unified, or at least orderly, ends. The modern business organization is one such institution. As commentators (including MacIntyre) who follow Max Weber have noted, the typical modern business organization is, in key respects, a bureaucracy, and as Professor Mommsen observes, for Weber "the further advance of capitalism was inevitably tied up with the rise of ever more efficient bureaucracies . . ."<sup>192</sup> As Weber wrote, "[t]he development of modern forms of the organization in all fields is nothing less than identical with the development and continual spread of bureaucratic administration."<sup>193</sup>

As Talcott Parsons argued in his classic exposition of Weber's social theory, a bureaucracy is

an organization devoted to what is from the point of view of the participants an impersonal end. It is based on a type of division of labor which involves specialization in terms of clearly differentiated functions, di-

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191. *Id.* at 84.

192. Wolfgang J. Mommsen, *The Age of Bureaucracy: Perspectives on the Political Sociology of Max Weber* 57 (Oxford 1974).

193. Max Weber, *Economy and Society* 223 (Guenther Roth & Claus Wittich eds., Bedminster Press 1968). For a concise account of Weber's views on the significance of bureaucratic organization in the modern capitalist economy, see Anthony Giddens, *Capitalism and Modern Social Theory* 158-160 (Cambridge U. Press 1971).

vided according to technical criteria, with a corresponding division of authority hierarchically organized, heading up to a central organ, and specialized technical qualifications on the part of the participants. The role of each participant is conceived of as an "office" where he acts by virtue of the authority vested in the office and not of his personal influence.<sup>194</sup>

As Parsons notes, a key characteristic of bureaucracy is its impersonality. In Weber's words, "[b]ureaucracy develops the more perfectly, the more it is 'dehumanized,' the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational, and emotional elements which escape calculation."<sup>195</sup> Summarizing Weber's view, Dean Kronman has written that "[i]mpersonal rule . . . means that the bureaucrat's personal affairs – his own interests and feelings – must be excluded, insofar as is humanly possible, from the performance of his official duties; the ideal modern officeholder is one who rules '*sine ira et studio*, without anger or passion, and hence without affection or enthusiasm'.<sup>196</sup> One might say that the bureaucrat in a modern business organization is expected to check his or her personal distinguishing characteristics and interests – his or her PII – at the company door.

Following Weber in this respect,<sup>197</sup> one could characterize the typical employee at Amazon.com as a bureaucrat seeking to achieve efficiently the company's specified aims, e.g., to succeed in the market by increasing revenue, profits, and/or share value. As an office holder in a bureaucracy, the employee would be expected to deal with PII about customers or potential customers impersonally, calculating the PII's value for the corporation within the marketplace and making use of it accordingly. The employee should have no personal interest in the PII or in what it might tell us about particular persons. Thus, although an item of PII in the hands of the employee remains "personal" in that it is about a

194. Talcott Parsons, *The Structure of Social Action* 506 (2d ed., Free Press 1949).

195. Max Weber, *supra* n.183, at 975; see also Robert K. Merton, *Bureaucratic Structure and Personality*, in *Social Theory and Social Structure* 249, 256 (Free Press 1968).

196. Anthony T. Kronman, *Max Weber* 65 (Stanford U. Press 1983), *quoting* Max Weber, *supra* n. 183, at 225.

197. As MacIntyre points out, MacIntyre, *After Virtue*, *supra* n. 10, at 86, Weber is not above criticism. See Alasdair MacIntyre, *Social Science Methodology as the Ideology of Bureaucratic Authority*, in *The MacIntyre Reader* 53, 64-67 (Kelvin Knight ed., U. Notre Dame Press 1998). For an aggressive critique of Weber, see, Rodney Stark, *Putting an End to Ancestor Worship*, 43 *J. Sci. Stud. of Rel.* 465, 465-68 (2004). It is beyond the scope of this article to enter the debate about the continuing significance of Weber's work, but in that connection, it is worth noting Professor Gorski's recent remark that "[e]ven today, Weber's definition [of bureaucracy] still serves as the starting point for most work on the subject." Philip S. Gorski, *The Protestant Ethic and the Bureaucratic Revolution: Ascetic Protestantism and Administrative Rationalization in Early Modern Europe*, in *Max Weber's Economy and Society* 267 (Charles Camic et al. eds., Stanford U. Press 2005).

particular identifiable person, the employee should depersonalize the item of PII by treating it merely as one more factor to be bought, used, and/or sold in the pursuit of gain in the market. By treating each item of PII as a factor in an impersonal market, the bureaucrat at Amazon.com can channel and coordinate the potentially divergent interests of large numbers of individuals, each with his or her own personal scheme(s) of values, to achieve the corporate interests of Amazon.com itself. Any other use of PII, specifically any use related to the personal characteristics or interests of the employee, would be a misuse from the standpoint of the bureaucracy.

The technology of modern electronic data processing and communications networks, including the Internet, complements and, in many ways, perfects this bureaucratic tendency toward depersonalization of PII by removing, or seeking to remove, the employee and his or her personal interests and concerns from the loop. Thus, although we continue to speak as though a person called a Web site operator collects PII about individuals for online companies such as Amazon.com, this language arguably is no longer apt. At least in a "pure play"<sup>198</sup> Internet-based business, a machine called a web server collects a consumer's PII and processes it through one or more networked computers according to a set of rules laid down in the software that governs the network. Another set of networked computers collects money from the consumer's bank or credit-card account. Eventually, of course, a person may have to assist in processing an order, perhaps by packing books or DVDs in a box, but that person need have little or no access to a customer's PII. Thus, with Internet technology, a company can buy, use, and possibly sell PII in an entirely impersonal manner for the impersonal economic benefit of the company. In this respect, the Internet reflects and facilitates the impersonal channeling and coordinating function of the corporate bureaucracy under the post-Enlightenment paradigm.

Section 5 of the FTC Act and COPPA implicitly endorse the central role of the bureaucratic business organization in the protection of information privacy. They do so by encouraging or, under COPPA, requiring each business organization operating a Web site to post a privacy policy and thereby define the extent to which the organization will protect PII. Section 5 and COPPA then require the business organization to abide by that policy. This means, however, that the bureaucracy running the organization has almost unlimited authority to define the level of privacy protection that a great many individuals – all users of the relevant Web site – will share, and to define that level in a way that serves the imper-

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198. Professors Mann and Winn define a "pure play" as an "Internet company that has no off-line presence for dealing with its customers." Mann & Winn, *supra* n. 62, at 760.

sonal objectives of the business organization itself.<sup>199</sup> Each individual can accept or reject the bureaucracy's "offer" of privacy protection by consenting or refusing to provide PII to the Web site. The corporate bureaucracy thus plays a central role in setting the price for PII in the properly functioning market that Section 5 and COPPA protect and maintain. As the post-Enlightenment paradigm requires, the bureaucracy thereby channels diverse individual beliefs about the value of privacy into the service of an impersonal order, an arrangement that is the hallmark of bureaucratic individualism.

The importance of the impersonal bureaucrat under the U.S. Internet privacy regime is not limited to his or her role as an office holder in a business organization. The impersonal bureaucrat also plays a key role in the policing model of regulation that supports the independent, self-regulating market in which business organizations and individuals trade PII. Under the U.S. Internet privacy regime, FTC officials, who are clearly bureaucrats in Weber's and MacIntyre's sense of the term, administer Section 5 of the FTC Act and COPPA. Their intervention in the market to police overly aggressive behavior is tolerated and, indeed, encouraged in part because it is understood to be impersonal in at least two respects. First, FTC officials are expected to apply the law in a manner that is not influenced by the personal identities or characteristics of the regulated parties or of those individuals in the marketplace whom the regulated parties allegedly harmed in violating the law.<sup>200</sup> Second, and perhaps more importantly, FTC officials are expected to apply the law not on the basis of their own personal identities and interests, their own PII, but on the basis of their expertise in identifying overly aggressive market behavior and policing such behavior under Section 5 of the FTC Act and COPPA. In Weber's words,

[b]ureaucratization offers above all the optimum possibility for carrying through the principle of specializing administrative functions according to purely objective considerations. Individual performances are allocated to functionaries who have specialized training and who by constant practice increase their expertise. 'Objective' discharge of business primarily means a discharge of business according to *calculable rules* and 'without regard for persons.'<sup>201</sup>

As Reinhard Bendix observed, for Weber, bureaucratic "organizations operate more efficiently than alternative systems of administration and . . . they increase their efficiency to the extent that they 'depersonal-

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199. The business organization enjoys somewhat less freedom under COPPA, which imposes some substantive restrictions on the types of privacy policies that Web site operators may adopt if they wish to collection PII from children under 13. *See supra* Section 0).

200. The FTC does respond differently to an injured person if one item of PII about the person comes to the FTC's attention, *i.e.*, that the person is under the age of 13.

201. Max Weber, *supra* n. 183, at 975.

ize' the execution of official tasks."<sup>202</sup> Thus, an FTC official acting from specialized knowledge of Section 5 and COPPA is expected to adopt an impersonal stance that brackets out or subordinates his or her own PII and that of the individuals under administrative scrutiny. In this respect, applying administrative expertise to the market for PII entails depersonalizing PII. However, applying administrative expertise to the market for PII is necessary under the policing model, which presumes a market for PII that is under threat and seeks to ensure through bureaucratic intervention that the market will continue to function autonomously. Thus, depersonalizing PII also seems to be necessary under the policing model.

The policing model's reliance on the impersonal activity of the bureaucrat points to another paradox or tension within the U.S. Internet privacy regime. The bureaucrat achieves the ability to act impersonally by bracketing out, or at least minimizing the influence of, his or her PII and the PII of others on his or her behavior. In other words, the bureaucrat is qua bureaucrat, a PII-less person for whom PII has no value or significance, aside from that assigned to it by the rules that the bureaucrat enforces. Each item of PII is one more value-free fact to be subjected to the applicable rules. Indeed, to the bureaucrat, the values of individuals participating in the market are themselves simply facts, simply more items of PII, to be subjected to the rules. Thus, a modern information-privacy regime requires for its operation a type of public functionary or official for whom PII should have no personal significance, no personal value, except as a means to the impersonal ends of the bureaucracy.<sup>203</sup>

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202. Reinhard Bendix, *Max Weber An Intellectual Portrait* 427 (Anchor Books 1962).

203. Paul du Gay has criticized MacIntyre for misrepresenting Weber's bureaucrat as an emotionless, soulless, instrumentally rational abstraction from a chimerical "integrated moral personality . . ." Paul du Gay, *In Praise of Bureaucracy* 31 (Sage Publications 2000). It is beyond the scope of this article to evaluate the accuracy of MacIntyre's interpretation of Weber. Two points are, however, worth making in this context. First, du Gay's criticism of MacIntyre appears to be based solely on du Gay's examination of one text – *i.e.*, the first edition of *After Virtue*. Thus, whatever the merits may be of du Gay's comments on the latter, he is not a reliable expositor or critic of MacIntyre's broader position.

Second, the claims made in this article concerning the impersonal stance of the bureaucrat for Weber and MacIntyre do not require a rejection of du Gay's thesis that bureaucrats develop a distinctive "ethical demeanor." *Id.* Rather, this article argues that, in du Gay's words, "[t]he ethical attributes of the good bureaucrat – strict adherence to procedures, commitment to the purposes of the office and so forth," *id.* at 32, require the bureaucrat to bracket out or subordinate as far as possible the personal attributes and interests, the PII, that might influence him or her to make decisions that deviate from the requirements of the rules of the office.

Moreover, there is no suggestion here that FTC officials actually succeed in bracketing out their PII when performing official functions. This discussion relates to the ideal type of the bureaucrat, not to actual bureaucrats who, like the rest of us, are simply trying to do their jobs as best they can. For a discussion of "ideal types," *see, e.g.*, Anthony Giddens, *supra*

The privacy regime seeks to protect the personal, *i.e.*, PII, by positing the existence and activity of the purely impersonal, *i.e.*, the official who embodies only the expertise required to perform the duties of his or her office. Demands for personal privacy by individuals come to be seen as demands for further intervention by the impersonal bureaucracy. Thus, in this respect, the U.S. Internet privacy regime again reflects and reinforces a key tenet of the post-Enlightenment paradigm and promotes the culture of bureaucratic individualism. Indeed, it is difficult to imagine what areas of personal life or experience might lie beyond the reach of the post-Enlightenment paradigm if an area as allegedly important as the privacy of our personal information can fit so tidily within the paradigm and the culture it supports. Bureaucratic administration of the individual's PII in the market has come to seem "obvious," and this obviousness renders other approaches increasingly unimaginable.

It is illuminating to contrast the radical depersonalization of PII in the hands of impersonal bureaucracies (administrative or corporate) with the highly personal nature of the authority that COPPA grants a parent over his or her child's PII. Unlike the business organization, which would be expected to view a child's PII as a factor to be purchased and used in pursuit of the organization's business objectives, or the FTC, which would be expected to view a child's PII as a commodity in a market subject to impersonal application of policing rules set forth in COPPA, the parent has the opportunity – and presumably the extra-legal justification – to treat a child's PII in a highly personal manner as PII about this particular child here who is "mine." The parent does not apply objective standards such as calculable rules without regard to persons. Rather, the parent may treat – and typically is expected to treat – the child as a unique person for whom the parent is uniquely responsible *qua* parent.<sup>204</sup> If the parent were to treat the child's PII impersonally, the parent would risk undercutting precisely the parental and familial nexus that COPPA recognizes in granting the parent legal authority over the child's PII. Of course, saying that a parent should not treat a child's PII impersonally is not the same as saying how a parent should treat a child's PII. An exposition of the virtues of parenting is, however, beyond the scope of this Article.<sup>205</sup> Nevertheless, it is worth remarking that,

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n.183, at 141-143; Talcott Parsons, *Introduction*, in *Max Weber: The Theory of Social Action* 3, 12-13 (ed. and trans. by A.M. Henderson and Talcott Parsons, Free Press, 1964).

204. COPPA specifically recognizes the unique relationship between the parent and his or her child in the requirement that the Web site operator obtain verifiable parental consent – *i.e.*, obtain the opt-in consent of an adult who is verifiably the parent of the child whose PII the Web site operator wishes to collect. *See supra* n. 103-105 (and accompanying text).

205. For a recent discussion of this large and very important topic, *see* MacIntyre, *Dependent*, *supra* n. 10, at 81-98.



insofar as we appeal to a measure such as the “good parent” in discussing a parent’s highly personal responsibilities, we may find that we have relied at least implicitly upon a version of the old teleological paradigm that seems to lurk in the shadows cast by the post-Enlightenment paradigm’s manner of illuminating experience. Perhaps, only from the perspective of a shared vision of what a good parent is, what a good family is, and what a good community of families is, can one hope to advise a parent of what he or she should allow (or not allow) with respect to a child’s PII. And from the perspective of such a shared vision, we might be able to do away with – or at least imagine a limit to the sway of – the post-Enlightenment paradigm, which presumes that an impersonal bureaucrat is needed to channel the behavior of sovereign individuals confronting a value-free world.

## VI. CONCLUSION

This Article began by constructing a new theoretical framework from the writings of Alasdair MacIntyre on the failure of post-Enlightenment thinkers to produce an account of human nature and action that could replace an older Aristotelian account and command the assent of all rational persons. Applying the new theoretical framework to the U.S. regime governing information privacy on the Internet, this Article has shown how and why that regime reflects and reinforces three key elements of the “post-Enlightenment paradigm,” *i.e.*, the sovereign individual, the market, and the administrative bureaucracy. The U.S. regime emerges from, and helps to maintain, a world in which the individual’s power to construct an identity increasingly depends on his or her ability to consent to the sale of personal information to an impersonal corporate bureaucracy in a properly functioning market under the regulatory supervision of an impersonal government bureaucracy.

This Article also has shown that the U.S. Internet privacy regime reflects some of the limits and problems of the post-Enlightenment paradigm. In particular, this Article has shown that the U.S. regime appears to recognize at its margins the possibility that people may be more than simply sovereign individuals choosing their private values, and that their efforts to identify and pursue a shared vision of the good may require a different understanding of the significance of personal information from that found in the U.S. regime. Moreover, this Article has shown that the U.S. regime “protects” personal information by treating such information as an impersonal commodity in the market and by placing the information under the supervision of bureaucratic officials who are themselves expected to act and think impersonally. The impersonal thus becomes a precondition of the personal, and action by an impersonal bureaucracy becomes a precondition of the individual’s identity. Para-

doxically, in the era that MacIntyre labels "bureaucratic individualism," each new assertion of individual control over personal information enhances bureaucratic power.

In addition to providing a new perspective on the U.S. Internet privacy regime, an underlying objective of this Article has been to illustrate the potential usefulness of the post-Enlightenment paradigm as part of a new theoretical framework for examining legal problems. Assuming that this objective has been achieved with respect to the particular legal regime discussed here, at least two questions immediately arise. First, is the theoretical framework robust enough to be applied more broadly? For example, if the post-Enlightenment paradigm reflects the way that thoughtful 21st Century people in general have learned to understand their world, it should be possible to find traces of the paradigm operating in other Internet privacy regimes that appear to differ from the U.S. regime. This possibility will be explored in a future article on the European Union's regime for protecting information privacy on the Internet. Assuming for the sake of argument that the European Union's regime does reflect and reinforce the post-Enlightenment paradigm, this conclusion would lend support to the suggestion made at the outset of this Article that the paradigm limits our ability to imagine genuine alternatives to the existing approach(es) to information privacy.

Second, as noted in Section I *supra*, identifying a paradigm is not the same thing as freeing oneself from that paradigm or supplying an alternative to it. Recognizing that the U.S. approach to Internet privacy is dominated by notions of the sovereign individual, the market, and the administrative bureaucracy is not the same thing as providing an alternative account of Internet privacy or persuading anyone to accept that account. As noted above,<sup>206</sup> MacIntyre has argued in a number of contexts that an updated Aristotelian approach to the problems of human nature and moral action will provide the best alternative to the approach embodied in what I have called the post-Enlightenment paradigm. A future article will examine MacIntyre's claims in this regard and seek to determine whether his extensive discussions of Aristotle and Thomas Aquinas provide the only or the best way forward. A key question will be whether MacIntyre provides a genuine alternative to the post-Enlightenment paradigm or just another example of a post-Enlightenment individual spelling out his personal values and then selling them in the market.

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206. See *supra* n. 8 and accompanying text.