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Legitimate Business Interest: No End in Sight - An Inquiry into the Status of Privacy in Cyberspace

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Legitimate Business Interest: No End in Sight? An Inquiry into the Status of Privacy in Cyberspace

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The fundamental concern about privacy in cyberspace is about the ways in which the collection, processing, and use of personal information in the computer-network environment contribute to a loss of individual power and autonomy. I argue that the integration of computing power with advanced telecommunications networks accelerates the shift in the balance of power from individuals to the bureaucratic organizations with which they interact. While the government is usually identified as the most powerful bureaucratic force because of its warrant to use the ultimate sanction on individual liberty, this Article argues that individual corporations, and the corporate sector in general, exercise considerable, indeed, determinative influence over the kinds of choices available to individuals as they negotiate an increasingly risky terrain.[1]

The underlying argument of this Article is quite simple: businesses have an *interest* in being informed about individuals because of the strategic importance of that information to choices organizations make about their interaction with those individuals in their different roles as citizen, consumer, and employee. Businesses have the *resources* (technical, economic, and legal) to collect, process, and share this information with increasing efficiency. As a result, there is a growing disparity between what

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[1] The influence of uncertainty and risk, including risks which are perceived erroneously, is argued to be a defining attribute of the current age. See Ulrich Beck, *Risk Society: Towards a New Modernity* (Mark Ritter trans, Sage, 1992); Anthony Giddens, *The Consequences of Modernity* (Stanford University Press, 1990); Kenneth R. Foster, David E. Bernstein, and Peter W. Huber, eds, *Phantom Risk: Scientific Inference and the Law* (MIT Press, 1993).

individuals know about the organizations whose actions influence their lives and what these organizations know about them. This disparity has consequences for the operation of the economy, the political system, and the evolution of the cultural environment in which we make sense of our lives.[2]

The choices individuals make—regarding what they say, what they do, what kinds of questions they ask, where they go, and with whom they interact—are governed in part by their expectations regarding the extent to which knowledge of their actions may be used to their detriment.[3] Concerns about privacy are not only concerns about ungranted access to personal information, but are more fundamentally concerns about the consequences that flow from the loss of control over that information. Information about an individual's current status and past decisions can be used strategically by others with whom he must interact. Control over access to this kind of personal information is among the most important rights that the laws of privacy are designed to protect.

Because our use of networked computers may be subject to surveillance,[4] and the resultant data used to facilitate the production of strategic intelligence, our search for information and understanding may ironically limit the options available to us in other aspects of our lives. Information about our status, choices, and communication behavior often forms the basis for differentiation, and such difference forms the basis for discrimination.

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[2] This is a direct challenge to the assumption that what is good for business is good for America! This challenge is part of a more general set of challenges to the application of the Bill of Rights to corporations. In the view of Carl Mayer, "[t]he legal system thus is creating unaccountable Frankensteins that have superhuman powers but are nonetheless constitutionally shielded from much actual and potential law enforcement as well as from accountability to real persons such as workers, consumers, and taxpayers. . . . The actions of large modern corporations have a state-like impact on the lives of individuals." Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 Hastings L J 577, 659 (1990).

[3] This is the fundamental claim made by Spiros Simitis, *Reviewing Privacy in an Information Society*, 135 U Pa L Rev 707, 732-37 (1987). More generally, within the law, the extent to which an individual's expectation of privacy is considered reasonable and legitimate describes a circle with a shrinking circumference. See, for example, Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (University of North Carolina Press, 1995) (especially ch 2).

[4] I define surveillance to mean the capture of information for the purpose of producing intelligence or strategically useful knowledge. It may be captured directly or indirectly, in real time or historically. Just as trackers make use of signs like broken twigs, disturbed leaves, and the characteristics of footprints in order to estimate the number, weight, and condition of persons being tracked, surveillance of transaction records provides a similar basis for strategic inference.

Thus, my concern about the status of privacy in cyberspace is fundamentally a concern with discrimination.[5]

The collection of information about an individual's use of networked information informs and enhances the operation of a discriminatory technology that depends on the reliable assignment of individuals to groups. All groups are social constructs. The definition of a group and the specification of its boundaries is usually made on the basis of a set of attributes that have been selected, refined, and valued institutionally. The administrative use of knowledge regarding such groups contributes to the establishment and maintenance of a kind of categorical vulnerability where people assigned to, or identified with, such groups become the victims of discrimination. This vulnerability represents a challenge to the egalitarian ideals underlying contemporary and traditional understandings of both polity and market.[6]

Although the consequences are paradoxical, evolving legal standards suggest that as an individual's expectation that he is under surveillance increases, the scope of his expectation of privacy decreases. Under a governing interpretation of the Fourth Amendment (and common law extensions to private entities), individuals who engage in activities that they know, or should know, may be subject to surveillance are often treated as having granted consent for such surveillance.[7] Thus, organizational actors that wish to establish the legitimacy of their invasion of personal space have an incentive to publicize the fact or likelihood of surveillance.[8] Privacy activists and scholars also

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[5] See, for example, Oscar H. Gandy, Jr., *It's Discrimination Stupid!*, in James Brook and Ian A. Boal, eds, *Resisting the Virtual Life: The Culture and Politics of Information* 35 (City Lights Books, 1995).

[6] See, generally, Oscar H. Gandy, Jr., *Toward a Political Economy of Personal Information*, 10 Critical Studies in Mass Communication 70, 83-85 (1993).

[7] Paul Schwartz, among others, makes this point. Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 Iowa L Rev 553 (1995). Schwartz suggests that "the Supreme Court's search for reasonable expectations of privacy is tautological. . . . [T]he Supreme Court accepts as a given the apparently lowered expectations of privacy resulting from new technology." In one bizarre example, the Court suggests that hidden audio bugs are to be expected. "According to the Court, we all know, after all, that anyone we talk with might wear such a device; thus, there can be no reasonable expectation of privacy in such conversations." Id at 573-74, citing *United States v White*, 401 US 745, 753 (1971). See also, Laurence A. Benner, *Diminishing Expectations of Privacy in the Rehnquist Court*, 22 John Marshall L Rev 825 (1989).

[8] At the same time, recognizing the increasing salience of privacy concerns has led some organizations to differentiate themselves from their competitors in terms of their privacy stance. A most interesting example is the series of advertisements introduced by AT&T in 1995 that label the "calling circles" of MCI's "Friends and Families" tariff an

have an incentive to publicize this threat to privacy. Thus, by pointing to areas in which private space and associated liberties are increasingly open to assault, activists seeking to protect privacy and organizations seeking to differentiate their treatment of consumer privacy may actually help to crystallize its decline.

Thus, while I may view with some skepticism the claims made on behalf of an "information superhighway" that is supposed to take us to that wonderful Land of Oz we have named cyberspace,[9] I also realize that by emphasizing the privacy risks therein, I may contribute to a narrowing of the sphere of reasonableness. While it is unlikely that such a decline can actually be reversed, this Article is written with the hope that legislative intervention and judicial review may at the very least slow down the rate of contraction. This goal will be pursued in part by focusing on an aspect of the legislative and judicial construction of reasonableness that is a critical determinant of privacy's demise. I refer here to the privileged status given to "legitimate business interest" as the basis for limiting the exercise of an individual's right of privacy.

This Article is organized into four sections. Part I explores the nature of business interests in personal and group information. Part II describes the means through which information is gathered and transformed into strategic intelligence. This section also includes special reference to the capture and use of transaction-generated information in the network environment. Part III outlines the traditional basis for informational privacy concerns. Part IV argues for an expansion of traditional approaches to data protection in order to address the problem of categorical vulnerability and then recommends a set of principles and policies for institutionalizing the control of personal information in the individual and collective interests of citizens, consumers, and employees.

I. THE NATURE OF BUSINESS INTERESTS

A. The Business Interest in Information

Corporate decisionmakers have an interest in being informed about all aspects of the environment in which they operate. This environment includes individuals to the extent that they may, in

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affront to privacy.

[9] Oscar H. Gandy, Jr., *The Information Superhighway as the Yellow Brick Road*, National Forum 24-27 (Spring 1994).

some identifiable way, affect the corporation's ability to realize its goals of survival, growth, and increasing profitability. As corporations' operating environments change, their need for information increases, sometimes exponentially. Access to this information is necessarily limited by the cost of available resources. For example, raw data may have to be subjected to expensive and uncertain processing in order to be transformed into useful information. A great many constraints, many of them legal,[10] may also serve to limit an organization's access to raw data. At the same time, however, advances in information technology serve to reduce the cost of transforming raw data into strategic intelligence. Increasingly, these technological advances also succeed in overcoming some of the obstacles that social, cultural, or legal regimes may have represented in the past.

I am unwilling to grant that all corporate interest in information is legitimate, especially if such legitimacy makes the corporate interest superior to other relevant interests. My willingness to grant the legitimacy[11] of business interests in individual information varies as a function of the character of the relationship between an individual and an organization. My comments will be focused on three fundamental relationships: between employer and employee, producer and consumer, and corporation and citizen. The differences between these relationships may be understood in terms of functional proximity, although the parallels to physical distance and constructs like "arms length" inadequately capture the multidimensional character of such relations. A critical aspect of these relations is the degree of power and influence that each may exercise over the other.[12]

While it seems that there will almost always be some structural aspect of a relationship that favors the organization over the individual, such asymmetry is more problematic and distaste-

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[10] Rules regarding intellectual property that limit corporate access to product, process, and market defining information are among the more serious constraints.

[11] Here I mean legitimacy to include both the expectations (which may vary) and legally specified boundaries on reasonableness, even though I believe they often differ dramatically when we consider the views of individuals and groups.

[12] An influential discussion of the nature of power in the economic realm may be found in Randall Bartlett, *Economics and Power: An Inquiry into Human Relations and Markets* (Cambridge University Press, 1989). Several authors have explored the nature of consumer expectations regarding the relationship between them and private concerns. Ellen Foxman and Paula Kilcoyne discuss these expectations in relation to privacy expectations as engaging ethical considerations. See Ellen R. Foxman and Paula Kilcoyne, *Information Technology, Marketing Practice, and Consumer Privacy: Ethical Issues*, 12 J Public Policy & Marketing 106 (1993).

ful in some relationships than in others. The relationship between an individual and an employer, or potential employer, is substantially different from the relationship between a consumer (also actual or potential) and a provider of goods and services because of the options that each party can reasonably pursue. Moreover, an imbalance that is merely troublesome, disturbing, or objectionable in the first two cases becomes unacceptable when the relationship between the individual and the corporation is in the political realm, or the public sphere,[13] where the assumptions of equality are more fundamental.

B. Corporate Interest in Discrimination

The corporate interest in discrimination has raised concerns about the use of personal information within the context of civil rights, where the use of racial identification may affect the equality of economic opportunity. However, the corporate interest in discriminating between individuals on the basis of other kinds of personal information has not enjoyed a comparative level of attention. At various times, and in different areas of business activity, "suspect classes" have been expanded to include gender, age, religion, and marital status. Restrictions on the use of information about membership in these suspect classes apply primarily to matters of employment, housing, credit, and insurance. Even though the classification of individuals into groups on the basis of these attributes may have predictive utility because of a high and relatively stable correlation or association between group status and some other criterion, as a society we have come to see their use as illegitimate.[14]

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[13] The public sphere is understood as that social space beyond the private in which conversation and other forms of communicative action can form the basis for the kind of authentic, rather than manipulated, public opinion that enables democracies to function. Considerable scholarly debate about the status of the public sphere, and of the democratic prospect, has been influenced by the work of Jürgen Habermas, especially, *The Structural Transformation of the Public Sphere* (Thomas Burger and Frederick Lawrence trans, MIT Press, 1989). The linguistic style of Habermas's theoretical argumentation is precise, but difficult to represent simply. My effort to examine the relations between the firm and the individual covers similar ground to Habermas's project to examine the "subsumption of the lifeworld under system imperatives." Steven K. White, *The Recent Work of Jürgen Habermas: Reason, Justice and Modernity* 108 (Cambridge University Press, 1988). Habermas argues that "to comprehend the true dimensions of the loss of freedom in advanced capitalism, one must take into account all four roles [employee, consumer, client, citizen] and their changing relationship." Id.

[14] Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgement*, 88 Yale L J 1408, 1414-20 (1979). Underwood identifies several concerns, including perceived legitimacy of the predictive

Sorting by traits such as race and gender raises objections in the ethical sphere because the attributes that define the trait are frequently the product of forces beyond the willful choice of individuals. Our sense of fairness seems to imply that individuals should not be made to suffer because of factors that are beyond their control.[15] Sorting by traits raises objections in the economic sphere because the assumption of causal links between traits and performance is often unwarranted. Both moral and economic concerns are raised when those who would sort individuals on the basis of shared traits assume that the average or central tendency for a population should be attributed equally to all members of that population.[16]

At the same time, critics argue that to restrict the use of traits is economically inefficient.[17] It is far more costly to gather information about each individual than to assign an average score or rating. However, it is also recognized that activities that may be seen as efficient or productive for particular individuals (or collectives) may also generate inefficiencies or externalities that assign costs to still others in ways we hold to be unfair.[18] These external effects often operate as a constraint on the ability of other economic actors to make rational, efficient choices.[19] Actors that have substantial market power are able to assign costs to other less powerful participants in those markets.[20]

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scheme and respect for the autonomy of the individual, that argue against the use of predictive technologies.

[15] The legal doctrine of suspect classifications implies an empirical assessment of individual and institutional behavior with regard to particular classes that results in departure from a social norm, such as equal protection before the law. See Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S Cal L Rev 1001, 1023-25 (1983).

[16] See, generally, Lea Brilmayer, Douglas Laycock, and Teresa A. Sullivan, *The Efficient Use of Group Averages as Nondiscrimination: A Rejoinder to Professor Benston*, 50 U Chi L Rev 222 (1983); Regina Austin, *The Insurance Classification Controversy*, 131 U Pa L Rev 517 (1983); Kenneth S. Abraham, *Distributing Risk: Insurance, Legal Theory, and Public Policy* 64-100 (Yale University Press, 1986).

[17] See, for example, Richard A. Epstein, *Standing Firm, on Forbidden Grounds*, 31 San Diego L Rev 1 (1994); Underwood, 88 Yale L J at 1408 (cited in note 14). Compare Leah Wortham, *Insurance Classification: Too Important to be Left to the Actuaries*, 19 J L Reform 349 (1986).

[18] Walter Adams and James W. Brock, *The Bigness Complex: Industry, Labor and Government in the American Economy* 254-56 (Pantheon Books, 1986); Bailey Kuklin, *The Gaps Between the Fingers of the Invisible Hand*, 58 Brooklyn L Rev 835, 857-60 (1992).

[19] Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 Alabama L Rev 375 (1995); Robert Cooter, *Market Affirmative Action*, 31 San Diego L Rev 133, 160-66 (1994).

[20] An obviously extreme example is the now generally despised tradition of slavery. Clearly the institution can be seen as efficient and rewarding for slaveholders, although

A concern with productivity or efficiency that recognizes the long-term consequences of power asymmetries leads necessarily toward a consideration of the distributive aspects of a socioeconomic system such as capitalism. When the presence of external effects or other departures from the competitive ideal is recognized, serious questions about the rational basis upon which to frame policy recommendations arise. These questions are most salient in the context of discussions about discrimination.

In a social system governed by perfectly competitive markets, irrational discriminatory preferences would be punished, perhaps to extinction. Of course, in the ideal world of a perfect market, there is also perfect information, or else information that is either costless or easily redistributed. We do not, however, enjoy such a world. Corporate decisions continue to proceed on the basis of traits that assign costs to individuals in ways that may contribute perversely to a weakening of the normative basis of society.[21]

Although networked computers will increase the variety of means by which corporate actors may learn more about the individuals with whom they interact, these systems will never eliminate irrational trait discrimination. Individuals are almost always compared with some group standard. Those standards are traits (such as honesty, ambition, mathematical maturity, verbal acuity, etc.), and they are necessarily flawed as representations of the qualities of any particular individual. Trait-based decisions will thus always be in error because no single individual will ever share the exact same attributes of the ideal, aggregate, or "average person" that is reflected in cultural stereotypes, or in sophisticated mathematical models. Indeed, since many of the

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the costs of maintaining a submissive labor force were bound to rise over time. In addition, forms of exploitation that include discrimination in labor markets on the basis of race, gender, national origin, and immigrant status continue to reward the powerful. The general failure of mainstream economic theory to take due note of the influence of this sort of asymmetry is discussed in Walter Adams and James W. Brock, *Economic Theory: Rhetoric, Reality, Rationalization*, in Robert E. Babe, ed, *Information and Communication In Economics* 125-135 (Kluwer Academic Publishers, 1994).

[21] It has been suggested by several sources that members of minority groups may underinvest in education or other self-improvement strategies because they interpret evidence of continuing racial discrimination as an index of the true returns on such investments. That same discrimination weakens their trust of public institutions and their commitment to the moral and ethical principals that legal equality assumes. See, for example, Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (Basic Books, 1992). Distributional consequences not specifically related to race, but more generally to the poor are discussed in C. Edwin Baker, *Posner's Privacy Mystery and the Failure of Economic Analysis of Law*, 12 Ga L Rev 475, 477-79 (1978).

differences between people exist only in the context of theoretical models with idiosyncratically defined variables, the number of potentially relevant traits is unlimited, and each of them will be marked by various degrees of measurement and specification error. In the context of predictive models that make use of numerous variables claimed to indicate particular qualities or traits of individuals, the fact that these estimates are based on unreliably measured theoretical constructs should lead us to expect these errors to multiply.[22] Despite the presence of error in such models, this kind of trait-based discrimination seems likely to continue for two important reasons. First, the costs of gathering more reliable information about productivity are often quite high, perhaps infinite, when the information needed relates to future productivity in tasks that are as yet barely imagined. Second, the identifiable costs of choosing on the basis of traits are not so high for market actors with sufficient power such that survival, or even prosperity, is seriously threatened. This is especially true, for example, when unemployment is high, and an employer can afford to reject large numbers of applicants. It seems likely that a great many that are rejected could perform as well or better than those that are hired, but it is primarily the worker, rather than the employer, that bears the cost of rejection.

C. Areas of Corporate Interest: Employees

A corporation has an interest in knowing about individuals in their roles as potential, and current, employees. This interest is linked to a rational desire to make informed selections on the basis of expectations about productivity and about a variety of associated costs, especially as they might be related to health, disability, and other work-related expenses. Richard Posner has argued that "[t]here is no economic reason to suppose that employers would demand from employees and job applicants more information than was cost-justified in terms of its benefits to the employer in screening out unsuitable employees."[23] Unfortunately, there is no way for the employer to know conclusively how

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[22] Computer scientists provide us with GIGO, an acronym for "garbage in; garbage out," as a warning against reliance on computer models that depend upon data of questionable reliability. Similar criticism of multivariate models is raised within the discourse on econometrics and in the evaluation of causal models. See, for example, Robert McPhee and Austin Babrow, *Causal Modeling in Communication Research: Use, Disuse, and Misuse*, 54 Communication Monographs 344, 350-52 (Dec 1987).

[23] Richard A. Posner, *The 1978 James McCormick Mitchell Lecture: Privacy, Secrecy, and Reputation*, 28 Buff L Rev 1, 43 (1979).

much information is needed to make the initial and subsequent decisions that will have to be made regarding any employee. Employers are uncertain about the "quality" of the information, the utility of the information for prediction, and, more problematically, the aspects of this relationship that will evolve in the future that might be reliably predicted on the basis of information gathered in the present. Thus, there is always a pressure to gather more and more information, and the demand for personal information must increase as the costs of gathering, storing, and processing it decline.

This interest in "knowing the employee" is pursued by an expanding array of techniques for gathering information as raw material to be used in attempting to predict individual behavior. For the corporation, an acceptable level of predictability is achieved in part through a process that assigns individuals to a group sharing "relevant" traits, and where accumulated data on the group as a whole may provide an empirical basis for estimating an actuarial probability.[24]

It is important to understand that the assignment of individuals to groups, which may entail assigning them a score representing the mean of the distribution of scores for the group to which they have been assigned, is only part of the process of classification or characterization. An auxiliary market has developed to assist corporations in assigning applicants to groups. The numbers of applicants that major corporations must process during the average week supports the development of several competing software packages that allow personal computers to process resumes and application forms automatically.[25]

The job seeker provides an extensive amount of personal information as a condition of being considered for the job. Information provided directly on the application represents only a fraction of the information that employers believe they need, and frequently require, from applicants. In addition, applicants often must submit themselves to physical examination by health-care professionals—examinations that increasingly may involve as-

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[24] It is important to note here, and at each occasion in which I refer to group characteristics, that the entire population is never measured. Estimates are made on the basis of samples—samples of persons and samples of status that differ markedly in terms of the conditions under which measurements are taken.

[25] *Resumix Introduces First Expert System-Based Tool that Allows Companies to Manage People*, Business Wire (Nov 1, 1993). See also, Glenn Rifkin, *Virtual Recruiter: Software that Reads Resumes*, NY Times § 3 at 12 (Mar 24, 1996).

sessments of blood, urine, and genetic material. Frequently, they must authorize the release of medical records.

Depending upon the nature of the job, prescreening may involve a battery of psychological tests that utilize physiological measures, such as those that are believed to indicate dishonesty or other aspects of an individual's personality. Much has been written about the reliability of these indicators of productivity.[26] Some of the measures operationalize cultural or ideological assumptions that are widely shared, even though they have not been empirically validated.

The problems in discriminating among individuals for the purpose of making employment, assignment, and compensation decisions are legion,[27] and in an increasingly litigious environment, the pressure to collect more and more information can only increase.[28] The rapidly rising costs of providing medical benefits have increased employers' determination to gather information about employee behavior off the job, and worker opposition has not been sufficient to deny them access.[29]It should be clear that I am not arguing that the search for information about actual and potential employees is an indication of irrational behavior on the part of businesses. Even though I have suggested that the tools and strategies used in screening and assessment are fraught with error, there is a rational basis for their use. Indeed, in some quarters the fact that these methods are in widespread use might serve as evidence that their use is "efficient."[30] What I am suggesting, however, is that the choices that are likely to be made are not the only choices possible from among equally efficient options. In addition, if those choices were made on the basis of some trait that replicates and reinforces a bias that produces or reproduces a systematic cultural bias in the distribution of life

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[26] See Susan Gardner, *Wiretapping the Mind: A Call to Regulate Truth Verification in Employment*, 21 San Diego L Rev 295 (1984); Note, *Protecting Employees and Neglecting Technology Assessment: The Employee Polygraph Protection Act of 1988*, 55 Brooklyn L Rev 1315 (1990); Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 Harv L Rev 1157 (1991).

[27] Arthur L. Stinchcombe, *Information and Organizations* 240-73 (Berkeley: University of California Press, 1990).

[28] Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* 177-79 (Basic Books, 1988).

[29] An analysis of public opinion regarding off-the-job activities indicates a rather broad expectation of privacy in those activities. *Whose Business Is It Anyway? A National Opinion Survey on Workplace Decisions and Employee Privacy* v-viii (National Consumers League, Jan 1990).

[30] Adams & Brock, *The Bigness Complex* at 81-82 (cited in note 18) suggest that much of the discourse on efficiency is tautological.

chances, then this is a form of discrimination that deserves attention, even if it is not presently against the law.[31]

D. Owning the Consumer

The corporate interest in actual and potential consumers is centered in a rational desire to maximize the future streams of revenue from sales while minimizing the future sum of expenses related to producing those sales. Gathering information about the tastes, preferences, and responsiveness of consumers to monetary and other incentives is believed to be critical to the realization of these goals.[32] Marketing specialists believe that learning more about consumers is necessary in order to increase the ability of the firm to control the relationship, to literally "own the customer."[33]

While some may prefer to think that the relationship between stores and their customers is akin to that which obtains between master and servant, I think a more accurate metaphor is one which describes the relationship between an angler and a trout. The most successful anglers are those who know the tastes, preferences, and habits of particular species and the environments in which they dwell. They also know just how to present the fly and how to set the hook to ensure that the prey cannot escape. The greater the angler's store of knowledge, the more likely is her creel to be filled with the largest fish in the brook. This knowledge, often jealously guarded, clearly serves the angler, not the trout, even though, I must confess, no trout of my acquaintance has ever been "forced" to bite.[34]

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[31] Kelman, 104 Harv L Rev at 1183-97 (cited in note 26). After an extensive review of economic and moral concerns related to job testing and its many consequences, especially those affecting African Americans, Kelman argues against the use of any method which might be marginally predictive if it would "disproportionately exclude capable blacks." Id at 1245. I wish to raise the lens higher still to speak against the use of discriminatory sorts that disproportionately exclude *any* identifiable capable "others." See Oscar H. Gandy, Jr., *It's Discrimination Stupid!*, in James Brook and Ian A. Boal, eds, *Resisting the Virtual Life: The Culture and Politics of Information* 35 (City Lights Books, 1995)(cited in note 5).

[32] Of course, success in business is much more complicated as it involves not only the actions of a particular entity, but the actions of competitors as well.

[33] Jim Bessen, *Riding the Marketing Information Wave*, Harv Bus Rev 150, 153 (Sept-Oct 1993). See also Itamar Simonson, *Get Closer to Your Customers by Understanding How They Make Choices*, 35 Cal Management Rev 68 (1993).

[34] Of course, the marketing literature does not use this metaphor—it is far too peaceful. Instead, an unabashedly military discourse about targets, maps, and strategies is widespread. See John Goss, *"We Know Who You Are and We Know Where You Live": The Instrumental Rationality of Geodemographic Systems*, 71 Econ Geography 171 (1995).

While the language of "customer service" can certainly be found, there are also numerous examples within the marketing literature that suggest that marketing resources are directed more toward manipulation than informing rational consumer choice. One reviewer of the contemporary "framing" literature concludes that "the findings of these studies suggest that consumers' purchase decisions can be influenced by a variety of seemingly irrelevant manipulations of the manner in which options are evaluated."[35] And while this particular scholar forthrightly discusses the moral and ethical dilemmas involved in using this information, I have little reason to expect that opportunistic behavior of this sort will be controlled substantially by self-discipline and moral reasoning.[36] Instead, the pressures will only increase on product and brand managers to learn even more about consumers, including the most efficient and effective way to capture their attention and secure their agreement to buy.

Decisions about where to focus marketing resources, including the placement of advertising and promotion, are usually based upon information about classes or categories of consumers. As with employment decisions, personal information is required both to assign identifiable individuals to existing categories, as well as to enhance the reliability of statistical techniques that characterize individuals and predict their behavior.

Some of the more active users of personal information for marketing purposes are those who communicate directly with individuals. These "direct marketers" are among the most active users of commercially available information about individuals that supports the "profiling" of consumers.[37] Profiles are used by direct marketers to estimate the probability of an affirmative response by consumers they have assigned to different categories or groups.

A variety of statistical techniques are used to predict the response of individuals to different kinds of promotional offers.

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[35] Simonson, 35 Cal Management Rev at 74 (cited in note 33). Simonson discusses the insights to be derived from consumer decision theory and the kinds of success that markets might enjoy through strategic "choice set manipulations." This work underscores the insights derived from an extensive body of research performed by Amos Tversky and Daniel Kahneman that demonstrates that the "framing" of alternatives helps to shift preferences between objectively equivalent options. See Amos Tversky and Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J Business S251 (1986).

[36] See Foxman & Kilcoyne, 12 Public Policy & Marketing at 114 (cited in note 12).

[37] Joel Reidenberg discusses direct marketing and profiling in the context of related information practices. Joel R. Reidenberg, *Setting Standards for Fair Information Practice in the U.S. Private Sector*, 80 Iowa L Rev 497, 516-23 (1995).

Various scoring methods produce a single score that indicates the probability of an affirmative response. "Prospects" can be ranked on the basis of that probability. At some point in the distribution of scores a "cut-off" will be established, and prospects below that point will not be provided an opportunity to respond. For applications, a similar distribution can be used to determine which groups receive which discounts or premiums and those which will receive no offers at all. In one example described in a banking journal, an organization established a "hard exclusion," which meant that customers whose rating fell below a particular score would not receive the promotion under any condition. This exclusion actually eliminated half of the portfolio![38] From the perspective of the firm, reducing communications with individuals unlikely to respond often means a sizeable savings. In another example from the same article, a firm's initial investment costs for developing the prospect model were reportedly recouped through a reduction in the size of its mailing by 10 percent.[39]

While the use of predictive models can obviously represent substantial savings for individual firms, this discriminatory technology also has negative consequences for segments of the population. These consequences are aspects that I refer to as categorical vulnerability. Some observers have characterized the exclusionary aspects of predictive models as "socially negative" because

> [c]ertain groups can be substantially underrepresented in targeted campaigns, in effect widening the gulf between lower- and upper-income groups. . . . Campaigns based on past purchasing patterns and tied to future discounts can become a self-fulfilling prophecy, targeting upscale consumers with economic incentives while excluding poorer clusters from increasingly important sources of product information and exchange.[40]

The use of data derived from interactions with consumers has come to be known as database marketing. According to Thomas McManus,

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[38] Christopher Frothinger, *Results Oriented Direct Marketing*, 25 Bank Marketing 24, 26 (June 1993).

[39] Id.

[40] Frank V. Cespedes and H. Jeff Smith, *Database Marketing: New Rules for Policy and Practice*, 34 Sloan Management Rev 7, 13 (1993).

> [d]atabase marketing is the notion that the computer is a revolutionary tool for identifying, locating, and characterizing customers. It is the belief that if you understand the characteristics of a customer, you can find other people with similar characteristics and make them customers, too. Most of all, it involves a synthesis of internal customer information with externally available information as part of a system for communicating with and obtaining feedback from the market.[41]

Database marketing has become something of a fad within the marketing profession. Although there are numerous reports of the success that individual firms have had in capturing market share, the empirical basis for confidence in the technique has not been firmly established. It may be the case that expectations have outrun the evidence, a circumstance that Arthur Stinchcombe suggests is quite common: "fashions in rational technique can spread faster than their value justifies, and value choices can be concealed in the choice of technique not understood by the people or organizations whose utilities are supposedly being maximized by rational means."[42] This uncertainty, however, has not limited the extent to which corporations have used these techniques to modify their strategic marketing plans, at the same time that they have begun to use them in their relations with individuals as citizens.[43]

E. The Corporation and the Citizen

Although this section refers primarily to relations between corporations and citizens who may have no other relationship with the firm, it should be emphasized that corporations have a genuine interest, and make substantial investments, in determin-

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[41] Thomas E. McManus, *Telephone Transaction-Generated Information: Rights and Restrictions* 30 (Harvard University Program on Information Resources Policy, 1990).

[42] Arthur L. Stinchcombe, *Reason and Rationality*, in Karen Schweers Cook and Margaret Levi, eds, *The Limits of Rationality* 285, 310 (University of Chicago Press, 1990).

[43] A recent assessment of this trend is clear on this point: "Politics and campaigns are structured around how, where, and to whom a candidate or issue should be presented. In developing such strategies and tactics, campaign managers and political consultants do not turn to texts on American government or treatises on democratic theories. Instead, they consult experts in product development and advertising. Marketing has become the area of expertise in modern political campaigns." Mary J. Culnan and Patricia M. Regan, *Privacy Issues and the Creation of Campaign Mailing Lists*, 11 Information Society 85, 86-87 (1995).

ing the best ways to approach and influence their own employees in their roles as citizens. This is the realm of internal public relations in which firms seek to: (a) determine which public policies employees favor, (b) identify which employees are likely to want information about public-policy changes that could effect their company, (c) ascertain which information can help them decide whether to support the company stance on public policy, (d) locate the employees who are willing to communicate on behalf of the company, and (e) give them the information they want to be responsible corporate spokespersons in letters and phone calls to legislators and regulators.[44]

The potential for using information gathered in pre-employment interviews and background checks, as well as from the various forms of employee monitoring, to guide corporate decisions about involving employees in political action is quite high and is itself worthy of a lengthy discussion. However, corporations also have an interest in knowing as much as possible about other presumably unrelated citizens in order to improve the efficiency with which they can influence their political behavior. As I will discuss, one way to influence public policy is to mobilize public opinion through the mass media—through the exercise of speech rights that corporations have won over time. Another, and perhaps more insidious way, is through private communications targeted to individual citizens.

The corporation need not have any direct relationship with an individual citizen to be interested in influencing her political activity, since any individual might, by her action, influence the environment in which the corporation does business.[45] Of the many ways by which corporations may attempt to influence the impact of government action, corporate-sponsored grass-roots lobbying represents a particularly troublesome distortion of the democratic participatory ideal.[46]

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[44] Robert Heath, William Douglas, and Michael Russell, *Constituency Building: Determining employee's willingness to participate in corporate political activities*, 7(4) Journal of Public Relations Research 273, 274 (1995).

[45] Amitai Etzioni, *The Moral Dimension* (The Free Press, 1988) (especially chs 12-13).

[46] William L. Renfro describes a dramatic shift in the locus of political influence. The political sphere is described as being incapable of arriving at decisions while the private sector has moved increasingly to act in its own interest and make decisions which have the effect of public policy. He discusses this shift in terms of a new social contract: "This de facto shift in power from the political arena to the private sector—changing the economic contract to a social one and creating a de facto private sector constitution—is the most important political and management development of the last century." William L. Renfro, *Issues Management in Strategic Planning* 30 (Quorum Books, 1993). See also,

1. *Grass-roots lobbying.*

Through a variety of means, including the creation of "front organizations" with names that are designed to imply that the founders of the group are individual concerned citizens,[47] corporations make use of their substantial financial resources to mobilize public opinion in ways that have dramatically shifted the outcome of numerous elections and referenda.[48] Corporate interests in policy debates are pursued actively through specialized industry associations that have professional staff responsible for mobilizing segments of the electorate as circumstances dictate.[49] Here it is important to note that not all corporate actions in the policy arena can be identified as clear wins. However, a mere delay in government action may substantially benefit business interests.[50]

Frank J. Sorauf, *Political Action Committees in American Politics: An Overview*, in Twentieth Century Fund Task Force on Political Action Committees, *What Price PACS?* 87-97 (1984). One author who is less troubled by corporate involvement in the public sphere is Donald Wittman, who believes that the majority rules governing political decisions reduce the consequences of the few who might be persuaded by corporate speech. Donald A Wittman, *The Myth of Democratic Failure: Why Political Institutions are Efficient* 174-177 (University of Chicago Press, 1995).

[47] During the health-policy campaign, numerous groups with names like Empower America, The Health Care Reform Project, and Citizens for a Sound Economy avoided identifying the organizations that were the actual sponsors of the advertisements. See Annenberg Public Policy Center, University of Pennsylvania, *Media in the Middle: Fairness and Accuracy in the 1994 Health Care Reform Debate* (Feb 1995). See also *Public-Interest Pretenders*, Consumer Rep 316 (May 1994), which notes that, "[t]oday, 'councils,' 'coalitions,' 'alliances,' and groups with 'citizens' and 'consumers' in their names could as likely be fronts for corporations and trade associations as representatives of 'citizens' or 'consumers.'" Grass-roots lobbying includes the "planned and orchestrated demonstration of public support" that includes letters and calls to legislators. See Ron Faucheux, *The grassroots explosion*, Campaigns & Elections (Dec 1994/Jan 1995).

[48] Kevin L. Kramer and Edward J. Schneider describe the successful implementation of targeting strategies to influence local referenda. In one case where funds were sought by a local Zoo-Museum coalition, the strategy included increased communication with segments of the population believed likely to support the initiative, and at the same time "[a] related objective was to keep the salience of the Cultural Institutions Referenda as low as possible in precincts where opposition was ascertained to be the highest. A strategy of 'out of sight, out of mind' was followed." Kevin L. Kramer and Edward J. Schneider, *Innovations in Campaign Research: Finding the Voters in the 1980s*, in Robert G. Meadow, ed, *New Communication Technologies in Politics* 17, 29 (The Washington Program of the Annenberg School of Communications, 1985).

[49] A well-informed discussion of the techniques of issue management, including grass-roots lobbying, are described in Meadow, ed, *New Communication Technologies in Politics* (cited in note 48). See, especially, the article by Matt Reese, a political consultant who traditionally supports positions favored by Democrats. Matt Reese, *From Telephone to Telelobby: Two Decades of Targeted Communications*, in Meadow, ed, *New Communications Technologies in Politics* at 97-108 (cited in note 48). See also an update compiled by Joel L. Swerdlow, ed, *Media Technology and the Vote: A Source Book* (Westview Press, 1988).

[50] Jeff and Marie Blyskal have provided numerous examples of such corporate actions

The recent debate over the Clinton Administration's health-care initiative saw a great many of these associations move into action in an effort to manage the debate. While these associations are in themselves quite large and represent a potent political force that a politician ignores only at great personal risk, they do not limit their outreach efforts to their membership, but reach out to any segment of the general population that can be identified as sharing a common interest with the association. For example, forty-nine groups pledged more than $50 million to produce and place issue ads to influence the debate over health care.[51] Other estimates put the total expenditure on the health-care debate in the neighborhood of $100 million, with 60 percent of these funds being devoted to advertising.[52] This health-care debate is estimated to have accounted for at least two-thirds of the $320 million increase in expenditures for grass-roots lobbying between 1991-92 and 1993-94.[53]

Considerable resources are devoted to mass-communication channels for the presentation of slickly produced issue advertisements.[54] For example, $15 million was reportedly allocated for the production and use of the "Harry and Louise" spots by the Health Insurance Industry of America ("HIIA"). This series of advertisements showing a young middle class couple in a variety of settings discussing aspects of the health care debate generated an extensive amount of coverage in the press.[55] A very impor-

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in their book, *PR: How the Public Relations Industry Writes the News* (William Morrow & Co., 1985). James Measell discusses one of these examples, an aerosol spray trade association, and argues that it was created "for the specific purpose of delaying government regulation of the industry." James S. Measell, *Trade Associations: Whose Voice? Whose Vice?*, in Elizabeth L. Toth and Robert L. Heath, eds, *Rhetorical and Critical Approaches to Public Relations* 225, 235 (Lawrence Erlbaum Associates, 1992). This delay allowed the industry sufficient time to develop an alternative propellant. In the view of these critics, "[t]he rhetoric of the public relations campaigns generated by the trade associations was designed primarily to impede or stall public opinion favorable to legislation, not to provide information relevant to the scientific debate over aerosols." Id at 235-36.

[51] Annenberg Public Policy Center, *Media in the Middle* at 8 (cited in note 47).

[52] Darrell M. West and Diane J. Heith, *Harry and Louise Go To Washington: Political Advertising and Health Care Reform* 6 (American Political Science Association, Sept 1994) (conference paper) (citing estimates made by the Center for Public Integrity). They estimate that the largest spenders were the Pharmaceutical Research and Manufacturers Association and the Health Insurance Association of America. Id.

[53] Faucheux, Campaigns & Elections (cited in note 47).

[54] It should be noted that information about the composition of audiences for particular programs is of considerable utility as guidance about where to place particular kinds of ads. Data about the composition of the audience, in combination with research about the attitudes, opinions, and responsiveness of audience segments to particular kinds of political appeals, enables a considerable amount of targeting even within what we generally think of as mass media.

[55] Faucheux, Campaigns & Elections (cited in note 47). It should be noted, however,

tant part of these campaigns involves targeting communications directly to individuals if possible, or to groups and communities if there is sufficient information available to make the differences between communities meaningful.[56] Direct mail, delivered by hand or electronically over the Internet, has become an important resource for the management of political issues because of the personal information that is used to develop the classifications that guide the segmentation and targeting of grass-roots populations. Segmentation strategies frequently involve identifying those citizens most likely to vote. By ignoring unlikely voters, these campaigns may contribute to the further discouragement and disengagement of these marginal participants.[57]

It is difficult to estimate the amount of corporate resources devoted to grass-roots lobbying. This is due in part to the fact that there are no disclosure requirements that apply to this form of political action.[58] Indeed, many corporate contributors to these campaigns incorporate strict confidentiality agreements in their contracts with professional grass-roots lobbying firms.[59] Some observers suggest that politicians are fully aware that corporate-sponsored grass-roots groups do not represent authen-

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that these ads were "targeted" in terms of the limited number of cities in which they were placed. And perhaps more importantly, they were targeted toward a particular segment of the population by virtue of the "fact that Harry and Louise were portrayed in the ads as a yuppie professional couple." West & Heith, *Harry and Louise Go To Washington* at 13 (cited in note 52). See also, Thomas Scarlett, *Killing Health Care Reform. How Clinton's Opponents Used a Political Media Campaign to Lobby Congress and Sway Public Opinion*, Campaigns & Elections (Oct 1994) (referring to the case study section).

[56] The techniques of geodemographic clustering, developed to a high art by Jonathan Robbins and his Claritas Corporation, provide for the multidimensional classification of neighborhoods defined by zip code and census tract boundaries. Michael J. Weiss, *The Clustering of America* 10-14 (Harper & Row, 1988). The application of these classifications to political ends is described well by Weiss. Id at 21-25. The importance of geographic regions as the basis for assessments of aggregate and then individual orientation is discussed in substantial detail by Goss, 71 Economic Geography 171 (cited in note 34).

[57] Segmentation of the electorate is also seen as a fundamental problem for democracy in that great differentiation among citizens makes the maintenance of a civil society or a body politic quite difficult. This difficulty emerges in part because the "profiling or stereotyping of voters involves a fragmentation of the individual and the deindividualization of political views. The individual is not treated as a 'whole person' but as components that can be packaged and related in certain ways to gain a desired effect." Culnan & Regan, 11 Information Society at 96 (cited in note 43).

[58] Phil Kuntz, *Attempt to Toughen Lobbyist Disclosure Law Leaves Huge Loophole for 'Grass-Roots' Money*, Wall Street J A18 (Sept 6, 1995). While organizations whose principle activity is lobbying must file campaign disclosures identifying their major funders, there is no requirement that sources be linked with particular messages. See *Public-Interest Pretenders*, Consumer Rep at 320 (cited in note 47).

[59] Kuntz, Wall Street J at A18 (cited in note 58).

tic public opinion, but they still use the groups' statements to justify their actions on particular legislation.[60]

To the extent that grass-roots lobbying mobilizes authentic supporters of a particular position (unlike "astroturf," where deception or other strategies are used to recruit the uninformed and uncommitted to pressure elected officials), political strategists still need to identify those individuals who have a relatively high potential for recruitment. Strategists need personal information to facilitate recruiting in a cost-effective manner. A competitive industry exists to supply voter files and specialized mailing lists. One organization claims that it "maintains a database of every registered voter in the United States. Voter records are enhanced with telephone number, post office address correction, census geography, ethnic surname identification and if the voter has contributed to a political campaign or party."[61] Segmentation and targeting of policy-related advertisements is improved on the basis of information about different "categories" of individual citizens and the probability that they will be in one audience rather than another. Audience assessment at a less precise level determines which broadcast markets will be ignored in the scheduling of issue advertisements.

2. *Corporate speech.*

The production of targeted communications that are designed to influence the outcome of elections and referenda is only part of the reason we should be concerned about an increase in the presence of corporate sources in the information environment. Public relations and other forms of corporate propaganda help to determine the ways in which we understand the day-to-day realities that from time to time rise to the level of a public issue. Strategic communications may actually help to keep many social and economic problems from rising to the level of an issue that attracts the attention of a political entrepreneur and from evolving into social policies that limit the ways in which corporations pursue their primary interests.[62] The reach of such communications seems likely to expand dramatically with the development of a corporate presence on the Internet.

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[60] *Public-Interest Pretenders*, Consumer Rep at 318 (cited in note 47).

[61] See advertisement by Aristotle Industries, Campaigns and Elections 83 (Feb 1995).

[62] William Renfro describes the issues life cycle of public issues that affect business interests in his book. Renfro, *Issues Management in Strategic Planning* (cited in note 46).

In 1978, with the Supreme Court's ruling in *First National Bank of Boston v Bellotti*,[63] corporate speech was set free to reach well beyond those areas that formerly had to be justified in terms of identifiable business interest.[64] In some circumstances, the Court has recognized the potential for corporate wealth to "corrupt" the political process.[65] For example, in *Austin v Michigan State Chamber of Commerce*, the Court agreed that routing corporate funds through segregated funds or political action committees ("PACs") was a reasonable form of restriction that still enabled a corporate form of political expression.[66] However, the restrictions it allows have only the appearance, rather than the reality, of constraint.

The application of the evolving "marketplace of ideas" theory of the First Amendment as a justification for corporate political speech raises a number of critical issues. First, while citizens have a fundamental interest in robust debate, those interests are not likely to be served if robustness actually comes to mean confusion. Furthermore, critical perspectives on the practice of public relations as a form of corporate political speech suggest that "despite the straight-faced attempts of a few public-relations practitioners to deny it, these methods embrace massive attempts at obfuscation, misrepresentation, and deceit."[67] In such cases where distorted speech is problematic, more distorted speech is not the solution, even though more of such speech is likely because of the extensive resources available to corporate sources. Second, failures in the market for speech occur for some of the same reasons that failures occur in the market for goods and services—the existence of substantial market power. Some have argued that there is a fundamental power asymmetry between individuals and the combined power of corporations expressed through sectoral associations.[68]

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[63] 435 US 765 (1978).

[64] Id at 784-86. The Court argued that even though the particular issue was a referendum regarding a graduated income tax, there was a societal interest in public debate. Id at 776. This construction of the issue, as one where the public interest in debate was superior to any concerns about illegitimate corporate power, is significant in terms of the way in which corporate interest can be equated with the public interest against the interests of individuals that might have realized a direct benefit from a progressive income tax policy. Indeed, the fact of unequal corporate power, if provable, but not assumed, was subordinated to the higher interest in "unfettered debate." Id at 789.

[65] *Austin v Michigan State Chamber of Commerce*, 494 US 652, 658-60 (1990).

[66] Id at 668-69.

[67] Charles E. Lindblom, *Inquiry and Change: The Troubled Attempt to Understand and Shape Society* 106 (Yale University Press, 1990). See also various authors in Toth & Heath, eds, *Rhetorical and Critical Approaches to Public Relations* (cited in note 50).

[68] Charles Lindblom, for example, argues that "the advantages in communication and

Robert Posch, an articulate and vocal supporter of commercial interests,[69] argues that the direct marketing industry's success in the "battle against the privacy agenda" results from the industry's decision to frame the debate in First Amendment terms, invoking the corporation's right to communicate with consumers.[70] The underlying logic of Posch's argument is that because consumer lists are a resource that direct marketers utilize, and perhaps even need, to reach their intended audience, any limitations on their use restricts the corporation's ability to engage in commercial speech.

Not only does Posch argue that consumer lists are protected by the First Amendment, he also suggests that these lists are technologies essential to commercial speech:

> the content of the message is impossible to create without a thorough understanding of the targeted customer. This is built into your database. Restrictions on the creation of your database constitute a prior restraint on the content of your message and a general restraint on the free flow of ideas in the commercial marketplace.[71]

This is not a view without opposition. Judge James Buckley, in a concurring opinion for the D.C. Circuit, reasoned that an organization

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other influences of some participants severely weaken and narrow the competition of ideas . . . through a predominance of ideas that defend the varied advantages of the advantaged." Charles E. Lindblom, *Inquiry and Change: The Troubled Attempt to Understand and Shape Society* 81 (Yale University Press, 1990). He identifies corporations and their executives as being among advantaged elites and suggests further that their advantage is enhanced by the fact that on many issues, "big business approaches unanimity." Id at 105. C. Edwin Baker suggests that the corporate advantage within the marketplace of ideas goes beyond the massive financial resources that corporations expend in the production and delivery of speech; he argues that there are also secondary benefits of organization that deliver a comparative advantage in that members of the public must invest in building organizations to address issues effectively. C. Edwin Baker, *Human Liberty and Freedom of Speech* 349 n124 (Oxford University Press, 1989). See also, Herbert I. Schiller, *Culture Inc.* 46-65 (Oxford University Press, 1989); Herbert I. Schiller, *Information Inequality: The Deepening Social Crisis in America* 43-56 (Routledge, 1996).

[69] Robert Posch is vice president of legal affairs for Doubleday Book and Music Clubs and publishes a regular column (Legal Outlook) in Direct Marketing magazine.

[70] Robert J. Posch, Jr., *The 25-Year Privacy Debate has an Institutional Memory*, Direct Marketing (Apr 1996). Robert J. Posch, Jr., *Commercial free speech. The Argument for Our Side*, Direct Marketing (Feb 1983); Robert J. Posch, Jr., *Speak up: Only Way to Counter Legal Threat to List Usage*, Direct Marketing 154 (Apr 1984); Richard Barton [moderator], *Privacy vs Free Speech. A debate between Robert Posch and Roy Schwedelson*, Direct Marketing 41 (May 1989).

[71] Robert J. Posch, Jr., *How The Law(s) of 'Privacy' Impact Your Business*, Direct Marketing 74, 80 (Oct 1987).

> has no more right to convert such a list to its own commercial uses than Thomas Jefferson would have had to steal the quill from which he fashioned the pen with which he wrote the Declaration of Independence. A list of names and addresses has no more direct a relationship to speech than a goose feather had to the Declaration. Each can be put to uses that may facilitate the production of speech; neither is speech itself.[72]

Although the relative openness and accessibility of cyberspace excites the democratic imagination of advocates like Howard Rheingold,[73] the corporate presence seems likely to be felt here as well. Excitement about the coming of "cyberdemocracy" as an era of grass-roots political activism in which "virtual PACs" will be organized by individual citizen activists is based in part on the successful intervention of such groups in the transformation of Congress in 1994.[74] There is, however, little basis for assuming that the lower costs of establishing a presence in cyberspace will mean that individual citizens and associations representing consumer and labor interests will be able to use that presence to overcome, or even balance, the influence of the corporate sector.[75]

First, because of their resources, corporations and their organizations will be able to overwhelm the influence of the average individual speaker with the number, quality and sophistication of their networked communications. Second, businesses will be able to take advantage of the particular features of cyberspace that will facilitate the segmentation and targeting of political messages, thereby increasing the efficiency of those communications. Third, and somewhat ironically, participation by the general public in those parts of the Internet environment that were designed to facilitate the development of the public sphere and the enhancement of political discourse will actually provide additional information that can be used to improve the targeting of strategic messages. One public relations organization already promotes its ability to provide business customers with assessments

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[72] *Federal Election Commission v International Funding Institute, Inc.*, 969 F2d 1110, 1119 (DC Cir 1992) (Buckley concurring).

[73] See, generally, Howard Rheingold, *The Virtual Community: Homesteading on the Electronic Frontier* (Addison-Wesley, 1993).

[74] See, for example, Rick Henderson, *Cyberdemocracy*, Reason 43 (Apr 1995); Robert Wright, *Hyperdemocracy*, Time 15 (Jan 23, 1995).

[75] Herbert I. Schiller, *Information Inequality* (cited in note 68) (see especially ch 5).

of this kind of cybertalk as well as assistance in framing an appropriate corporate response.[76]

II. SOURCES OF INFORMATION

As I have suggested, the concern with privacy in cyberspace is a concern with the uses to which information about individuals and groups can be used to affect the quality of the options that people face in their roles as employees, citizens, and consumers. I have described the ways businesses use this information to improve their position in relation to the individuals they encounter in each of these roles. I turn now to a brief review of the ways this information is currently gathered and is likely to be gathered in the future.

A. Current Sources of Personal Information

Corporations have a myriad of sources for acquiring information about individuals. The corporation has the greatest capacity for gathering information about individuals through the employment relationship. With the exception of the family and a few other special long-term relationships, the employer/employee relationship is the closest. It is also the relationship in which the asymmetry in power is the greatest.[77] Generally, with regard to employment, consumer, and political relations, this asymmetry is likely to be greater when the corporation enjoys some degree of monopoly power, and where, as a result, the individual has fewer opportunities to control disclosure by terminating the relationship.

This information may be gathered through direct responses to inquiries, including applications and surveys. Information may also be captured as a by-product of transaction-generated recordkeeping, such as those that record sales and purchases made in supermarkets. Phil Agre describes a variety of tracking systems used to keep records of such transactions and refers to the process generally as one in which data are "captured."[78] The

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[76] The advertisement claims "eWatch can scan thousands of Internet and commercial online forums and news groups continuously for messages about your campaign, your issues, your constituency and your competitors. Reporting this wealth of information is just the beginning. We'll help you draft and place the appropriate responses." Campaigns & Elections 35 (July 1995).

[77] Samuel Bowles and Herbert Gintis, *The Political Economy of Contested Exchange*, in Thomas E. Wartenbert, ed, *Rethinking Power* 202-05 (State University of New York Press, 1992).

[78] Philip E. Agre, *Surveillance and Capture: Two Models of Privacy*, 10 Information

raw data gathered by these automated systems are transformed into strategic intelligence through increasingly sophisticated statistical methods, many of which are available in standardized software for use in a personal computer environment.

When there is no existing relationship between corporation and individual, or when that relationship does not provide sufficient information, corporations can acquire individual and group information through hundreds of organizations that market lists, provide access to consumer databases, and offer related information services.[79] The United States Government remains a primary source of information about individuals that has proven to be of vital importance to corporations. The Census, for example, provides a "windfall of data" about citizens. While there are confidentiality requirements that severely restrict the ability of users to gather individually identifiable information, the kinds of data that are available are still critical to the development of useful profiles of groups to which individuals can be reliably assigned.

1. *Surveys and market research.*

It is important to understand the role of surveys and market research in the development of profiles. Organizations may collect information from a sample of individuals selected to represent the populations from which they are drawn. These respondents may or may not know what the purposes of the inquiry are when they respond to questions about their knowledge, attitudes, and behavior. As often as not, people provide information in surveys because they believe that they are improving the quality of products that businesses provide.[80]

The information derived from specialized surveys is combined with information from larger surveys, such as the United States Census and periodic surveys of consumers.[81] These data are used to develop the categories or classes to which individuals may be assigned based on whatever limited information their interaction with an organization may generate. Thus, a person's

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Society 101, 106-07 (1994).

[79] Eleanor Novek, Nikhil Sinha, and Oscar Gandy, *The value of your name*, 12 Media, Culture and Society 525, 526-28 (1990); Oscar H. Gandy, Jr., *Toward a Political Economy of Personal Information*, 10 Critical Studies in Mass Communication 70, 85-88 (1993)(cited in note 6).

[80] Stephen Schleifer, *Trends in Attitudes Toward and Participation in Survey Research*, 50 Pub Opinion Q 17 (1986).

[81] George T. Duncan, Thomas B. Jabine, and Virginia A. de Wolfe, eds, *Private Lives and Public Policies: Confidentiality and Accessibility of Government Statistics* 8-9 (National Academy Press, 1993).

zip code may be used to assign an estimated income on the basis of the average or median income within this zip code. If additional information is available, such as race or gender, then this information can be combined, enhancing the level of detail in the profile. Furthermore, any information gathered directly from the individual can be used to replace estimated information and to improve the accuracy of estimation models.

Unless it is explicitly barred by law or by an actively enforced industry code of fair information practices, information that a corporation may gather from individual employees or consumers can be utilized to influence individuals in their roles as citizens. Corporate publications developed for communication with employees about corporate status and policies frequently contain policy-relevant content. Information gathered from applicants, information developed through surveys, monitoring, or other interactions, and information gathered from third parties may be used to direct targeted appeals to employees in an effort to influence their political activity, such as writing to Congress or to state legislatures.

Information about consumers is similarly useful when a firm seeks to oppose government policy. For example, Phillip Morris is reported to have used its lists of "tens of millions of smokers" to organize a grass-roots organization called the National Smokers Alliance to help the industry combat increasingly restrictive legislation.[82]

2. *List vendors.*

Commercial vendors of information about individuals are an important source of information relevant to all three relations between individuals and corporations. Mary Culnan and Patricia Regan discuss the importance of political mailing lists and the ways they can be compiled directly or with the assistance of list vendors.[83] They identify a number of list vendors who specialize in providing information about individuals' political orientation. These compiled lists use public records, census data, and, on occasion, survey data acquired from third parties.[84] Sophisticated vendors use a variety of "enhancement" techniques that in-

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[82] David A. Andelman, *Big Tobacco=Big Money=Big Headaches*, 83 Management Rev 48, 51 (1994).

[83] Mary J. Culnan and Patricia M. Regan, *Privacy Issues and the Creation of Campaign Mailing Lists*, 11 Information Society 85, 87-88 (1995) (cited in note 43).

[84] Id at 93.

clude "matching" several files against each other. On the basis of a common identifier, such as the social security number or an address, a "match" provides the basis for combining the information from two discrete files into an elaborated profile of an individual.

Jeff Smith identifies six kinds of data indicative of purchasing power, three indicative of purchasing activity, one detailing shopping psychographics, and five kinds of basic demographic information that one can acquire on the open market for personal information.[85] A single vendor was able to provide all this information to one of its banking clients.[86] Smith indicated further that none of the firms he researched had policies that would limit the combination of information from different sources.[87]

State governments are an important source of data about individuals ranging from the information included in drivers' license applications to the details required when individuals are called to jury duty.[88] Many states either market this information directly or license it for sale through professional list vendors. Even though the Driver's Privacy Protection Act of 1994[89] limited states' ability to sell access to motor-vehicle records, the law included several permissible uses that reflect the primacy of business interests.[90]

Since much of this information is now available from vendors online, and thus available quickly with relatively little effort and without the inconvenience of standing in long lines to gain access to public records, the use of such services will likely increase. The National Telecommunications and Information Administration ("NTIA") identifies LEXIS and CompuServe as being among the major information providers who are joining hundreds of smaller entrepreneurs seeking to transform public records into a reliable cash stream.[91]

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[85] H. Jeff Smith, *Managing Privacy: Information Technology and Corporate America* 114-15 (University of North Carolina Press, 1994).

[86] Id at 112.

[87] Id at 103.

[88] Robert Gellman, Center for Democracy and Technology Consultation on Public Records, *Public Records: Access, Privacy, and Public Policy* 68-69 (Mar 28, 1995).

[89] 18 USC §§ 2721 et seq (1994).

[90] 18 USC §§ 2721-2725 (1994). For example, business may use the information to "verify the accuracy of personal information submitted by the individual to a business" and the statute provides an opportunity for individuals to object or to "opt-out" of bulk distribution of marketing information. 18 USC §§ 2721(b)(3)(A), (b)(12).

[91] Inquiry on Privacy Issues Relating to Private Sector Use of Telecommunications-Related Personal Information, 59 Fed Reg 6842 n4 (1994).

B. Cyberspace and the Capture of Personal Information

Cyberspace is a relatively popular term for the global computer network that "transcends physical space and national boundaries."[92] A competing metaphor, the "information superhighway," is attractive to the Federal Government which sees the network as a public good—a necessary infrastructure similar to the network of roads that supports development through interstate transportation.

With the rapid commercialization of that portion of the superhighway known as the World Wide Web, notions of an "electronic marketplace" or "electronic shopping mall" are also gaining currency. Uneasiness about the connections between this marketplace and the "marketplace of ideas" in the evolving public sphere raises concerns about access, power, and accountability.

The networked environment of cyberspace will become increasingly important for the pursuit of corporate interests in each of the three primary relationships I have discussed. It seems, however, that the role of the individual as consumer has attracted the greatest share of corporate attention. The dramatic increase in the commercial presence on the Internet—as measured by the increase in the registration of corporate domains and in the numbers of corporate "home pages" on the multimedia segment of the global network known as the World Wide Web—provides strong evidence of that interest.[93] What appears to be so attractive to these firms is the ease with which one can produce a specially tailored message for delivery to an "audience of one." Personal information derived from interactions between individuals and networked computers will be the primary source of guidance for the design of these messages.

C. Surveillance and Capture in a Network Environment

The following discussion aims to provide a broad outline of the information-gathering features of cyberspace that will contribute to the narrowing of the scope of reasonable expectations for control of personal information in this environment.

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[92] Dorothy E. Denning and Herbert S. Lin, eds, *Rights and Responsibilities of Participants in Networked Communities* 12 (National Academy Press, 1994).

[93] Dianne Trommer, *Opportunities Abound for Business on Internet—However, Net Access is Still Far from Universal*, Electronic Buyers' News 66 (Mar 25, 1996) (available in the LEXIS/NEXIS library); Jane Hall, *Cyberspace for Sale: From Madison Avenue to Silicon Valley, Companies are Rushing to Market Products Over the Internet*, LA Times D1 (May 21, 1995).

1. *Identifiers.*

Within the environment of networked computers, reliable forms of identification and authentication are believed to be of paramount importance.[94] The use of transaction-processing systems, programmed decision-making systems, and decision-support systems nearly always "entail[ ] the collection and processing of personal information."[95] While it is standard practice for information systems to require identification and authentication for most transactions, it is not at all clear that the user's identity is necessary.[96]

The unique identification system for computers, or IP addresses, facilitates the routing of messages, including the return of messages that were undeliverable for one reason or another, and the restriction of access to machines, sites, or users to those who are authorized on the basis of membership, fees paid, or presumed legitimate interest. Here, the use of passwords increases the system operator's confidence that only authorized access occurs. Network protocols vary in the amount of detail they reveal about the routes or paths messages take, but it is not uncommon for the identity of each of the hosts that have been involved in forwarding a message to be included in the information forwarded downstream.[97]

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[94] Comment, *Who Are You?: Identity and Anonymity in Cyberspace*, 55 U Pitt L Rev 1177 (1994) (discussing the availability of anonymity as it exists in various forms of electronic media).

[95] Registratiekamer (Netherlands) and Information and Privacy Commissioner (Ontario, Canada), 1 *Privacy-Enhancing Technologies: The Path to Anonymity* 5 (Aug 1995).

[96] Privacy commissioners argue that a user's identity is needed only for authorization and accounting. Other functions can proceed by means of "pseudo-identities." See 1 *Privacy-Enhancing Technologies* (cited in note 95). See also Roger Clarke, *When do they need to know 'Whodunnit?' The Justification for Transaction Identification; The Scope of Transaction Anonymity and Pseudonymity* (background paper for Computers, Freedom & Privacy Conference, 1995) (Mar 20, 1995 version).

[97] While using a resource offered online, http://www.uiuc.edu/cgi-bin/info, as recommended in an article, *A Note About Web Browsers & Privacy*, published online by Ed Kubaitis at http://www.uiuc.edu/~ejk/www-privacy.html (Nov 20, 1994), I received a detailed specification that included the referring server, the browser software, my remote IP address, as well as the number assigned to my machine in my office at work, which was part of the identification of my registered university site. At Michael Froomkin's suggestion (e-mail, Nov 27, 1995), I pursued additional information about information-gathering features being developed by Netscape Communications Corporation for their currently dominant web browser. In describing a technique ("cookies") for enhancing web-server data management, Netscape suggests:

> This simple mechanism provides a powerful new tool which enables a host of new types of applications to be written for web-based environments. Shopping

Depending upon the protections designed into the system, and upon the level of awareness and care exercised by the individual to protect her own privacy interests, information about her use of networked resources may be available to a broad range of unseen observers. Institutional networks, especially those based on UNIX servers, support a utility ("finger") that allows anyone to identify other users of the system and to monitor what they are doing on the system at that time.[98]

Because of the growing demand for personal information, organizations will use readily available software to gather information about individual access to data. The corporate interest in the individual as consumer is clearly expressed in relation to information about the nature of visits to World Wide Web sites.[99] Corporations with a presence on the network will gather information directly in much the same way they capture information from other transactions, only this time the capture is likely to be automatic and thus more likely to be gathered without the individual being aware of that fact.

2. *Telephone transaction-generated information.*

Thomas McManus defines telephone transaction-generated information ["TTGI"] as the "information generated by telephone usage and transactions related to telephone service."[100] In addition to information about telephone subscribers gathered from application forms, credit checks, and the billing information generated by some fee-based uses of the telephone,[101] call-detail re-

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applications can now store information about the currently selected items, for fee services can send back registration information and free the client from typing a user-id on next connection, sites can store per-user preferences on the client, and have the client supply those preferences every time that site is connected to.

See *Persistent Client State Http Cookies*, Netscape Handbook (info@netscape.com) (1995). Other Web browsers are also reported to support cookies, see J.H.B., *Net.News: The Trouble With Cookies*, Netguide 24 (May 1996).

[98] Lawrence Lessig, *The Path of Cyberlaw*, 104 Yale L J 1743, 1748 (1995).

[99] *Who Can Measure the Net?*, The Economist 61 (July 22, 1995); Amy C. Shurr, *Look Who's Surfing; Tools for Qualifying Your Audience; Auditing Web Site Visitors on the Internet; Business on the Net: The New Gold Rush; Industry Trend or Event*, 12 PC Week 102 (October 30, 1995); Laurie Flynn, *In Search of Nielsens for the Internet*, NY Times 37 (May 29, 1995).

[100] Thomas E. McManus, *Telephone Transaction-Generated Information: Rights and Restrictions* 1 (Harvard University Program on Information Resources Policy, 1990) (cited in note 41).

[101] Such as personal information required for third party information services billed through the carrier or access provider.

cords provide the most comprehensive and potentially most valuable information about individuals. These records provide the details of "exchange and interexchange phone calls including the date and time of call, the number called, the calling number, the geographic location of the called number, the duration of the call, and the charge."[102] In addition, for purposes of forwarding calls to portable telephones, cellular and personal communications service ("PCS") instruments, information about geographic location must be continually available within the network.[103] Many forms of TTGI share the potential to affect a person's "right to control the release of information about one's status, preferences, and activities selectively, even if there is no risk of embarrassment or harassment."[104]

The development and implementation of several calling number identification services, such as the Custom Local Area Switching Service ("CLASS") or Caller-ID services in general, has generated considerable concern about the ways in which these services facilitate the capture of TTGI.[105] Although the claim is made that individuals have only a minimal interest in their telephone numbers, it is the association of that number with an implied interest or relationship with another number or service that makes TTGI so valuable.[106] Other number identification technologies ("ANI") have also been identified with the capture of personal information. Consumers generally were not aware that calls made to 800 and 900 number information services, especially to "976" or other sexually oriented services, generated transaction records.[107]

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[102] McManus, *Telephone Transaction-Generated Information* at 9 (cited in note 41).

[103] Marvin A. Sirbu, *Telecommunications Technology and Infrastructure*, in *A National Information Network: Changing Our Lives in the 21st Century* 155 (Institute for Information Studies, 1992).

[104] See generally, Glenn Chatmas Smith, *We've Got Your Number! (Is it Constitutional to Give It Out?): Caller Identification Technology and the Right to Informational Privacy*, 37 UCLA L Rev 145, 219 (1989).

[105] Id. Caller-ID services involve the sale or rental of devices that display the billing number of the incoming call before the call is answered. More sophisticated systems in some service areas may also forward the billing name of the calling party. The instruments are able to capture and store this information, including the time of day at which the call was made.

[106] While the decision of the court in *Smith v Maryland*, 442 US 735, 742 (1979), asserted that calling parties have no reasonable expectation of privacy in numbers that they dial, Glenn Smith suggests that the fact that an individual's telephone number may be published in a directory cannot be compared to the sensitivity of the information indicating that this person called an AIDS hotline. Smith, 37 UCLA L Rev at 202 (cited in note 104).

[107] Rohan Samarajiva and Roopali Mukherjee, *Regulation of 976 Services and Dial-A-*

3. *E-mail.*

The ability of people to access business computers remotely, including those who occasionally work from home or who must reach headquarters from the field, increases the normalization of e-mail use, and consequently, the likelihood that employees will use the company e-mail system for personal communications,[108] that may be subject to occasional, or even routine surveillance. The importance of e-mail for intra- and inter-organizational communications[109] has meant that managers have become concerned about nonbusiness uses of this resource and have implemented tracking and surveillance routines similar to those developed for use with traditional telephones.[110]

One survey of employers indicated that a substantial proportion of them have engaged in searches of employee communications, generally without the employees' knowledge or consent.[111] As with employee use of the telephone, a tension exists between the expectation that corporate resources will be used primarily for business-related purposes and the expectation of the employee that not even her business-related conversations will be subject to surveillance. In general, employers argue that they "need to reserve the right to electronically monitor job performance and work-related activities in order to investigate and prevent theft, fraud, insider trading, drug dealing, and other illegal conduct, as well as to assure productivity, efficiency, and quality control."[112]

Porn: Implications for the Intelligent Network, Telecommunications Policy 151, 163-64 (Apr 1991).

[108] Michael Putzel, *New Voice of America: Increasing Numbers of People Use E-mail to Stay in Touch*, Boston Globe 65 (Apr 29, 1994) (discussing increased use of e-mail for personal and family communications). A recent study by the Rand Corporation underscores the value of e-mail, suggesting that access to e-mail and to other Internet services might be included in the definition of "universal service." See generally, Robert H. Anderson, et al, *Universal Access to E-Mail: Feasibility and Societal Implications* (RAND, 1995).

[109] Laurie Thomas Lee, *Watch your E-mail! Employee E-mail Monitoring and Privacy Law in the Age of the "Electronic Sweatshop"*, 28 John Marshall L Rev 139, 140 n8 (1994) ("Corporate E-mail has grown 83 percent among the Fortune 2000 firms between 1991 and 1993, and nine out of ten locations employing over 1,000 workers in the U.S. now use [] E-mail."); See also, Erini Doss and Michael C. Loui, *Ethics and the Privacy of Electronic Mail*, 11 Information Society 223 (1995).

[110] Comment, *E-mail and Voice Mail: Employee Privacy and the Federal Wiretap Statute*, 44 Am U L Rev 219 (1994).

[111] Charles Piller, *Bosses with X-Ray Eyes*, Macworld 118, 123 (July 1993) (indicating that 21.6 percent of employers engaged in such searches).

[112] Lee, 28 John Marshall L Rev at 145 (cited in note 109).

The Electronic Communications Privacy Act of 1986 ("ECPA")[113] amended the 1968 federal wiretap law[114] to protect previously unprotected forms of electronic communications. However, the ECPA still allows substantial leeway for businesses to monitor employee communications. For example, one reading of the ECPA defines the employer as the *provider* of the communication service and therefore entitled to greater latitude in monitoring stored communications where they may be considered to be a company record.[115] Thus, e-mail represents just one more means of monitoring employees, and as a technical form that generates relatively permanent records of communication, it may be easier to "intercept" than a telephone call that takes place in real time. These records can be screened at leisure, and indeed, may be screened by means of automated programs that scan text in search of names, phrases, or other references that indicate the nature, source, or target of the communication.

In the case of the telephone, a limited amount of personal use, such as in the coordination of family obligations, has been treated as reasonable. However, courts have held that when supervisors continue to listen to such private or personal conversations beyond the time needed to determine that it is a personal call, such interceptions are impermissible.[116]

On the other hand, numerous interpretive complications have produced uncertainty about what kinds of interception are generally barred by law. One widely shared perception of the leeway granted corporations is that some forms of monitoring ought not to be treated as interceptions as long as they were made in the "ordinary course of business."[117] Employees whose work primarily involves use of the telephone for interaction with consumers are subject to frequent monitoring, ostensibly for purposes of assessing performance and ensuring that quality services are provided.[118] The courts generally have held that no reasonable expectation of privacy exists when an employee uses an employer's telecommunications equipment, and employers can

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[113] Pub L No 99-508, 100 Stat 1848 (1986), amending 18 USC §§ 2510-2521 (1994).

[114] Omnibus Crime Control and Safe Streets Act of 1968, 18 USC §§ 2510-2521 (1994).

[115] Comment, 44 Am U L Rev at 238 (cited in note 110) (explaining stored communications provisions of ECPA).

[116] *Watkins v L.M. Berry & Co.*, 704 F2d 577, 584 (11th Cir 1983); *Deal v Spears*, 980 F2d 1153, 1158 (8th Cir 1992).

[117] See for example, Comment, 44 Am U L Rev at 235-36 (cited in note 109) (explaining "ordinary course of business" exceptions to ECPA); Lee, 28 John Marshall L Rev at 144-45 (cited in note 109).

[118] Comment, 44 Am U L Rev at 239-40 (cited in note 110).

readily demonstrate a legitimate business interest in intercepting or monitoring business-related communications.[119]

It is also important to note the critical distinction between gaining access to the content of a communication in real time and gaining access to the record of a transaction. While individuals may have some expectation of privacy with regard to the content of personal phone calls made on the job, there is no similar expectation regarding the use of call-detail records that would allow employers to make assessments of an employee's use of the telephone.[120] Yet, there is frequently more than enough information available within call-detail records for employers to initiate actions against employees, including more formal investigations of their performance, their contact with competitors, journalists, or government officials. These transaction records may include the identification of places called, as well as places from which calls were received, time of day, and the length of the call or contact. With computers, transaction logs may become even more detailed.

4. *Computer transaction logs: web browsers.*

A number of commercial firms provide software that facilitates the production of useful information by analyzing data generated by visits to an organization's server.[121] The dramatic increase in corporate presence on the Internet through multime-

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[119] See, for example, *Briggs v American Air Filter Co.*, 455 F Supp 179 (ND Ga 1978), aff'd 630 F2d 414 (5th Cir 1980) (holding that where manager of employer's branch office used business extension phone to monitor conversation between employee and former employee because manager had reason to believe that employee was disclosing confidential information in violation of a loyalty agreement, manager's use of business telephone was in the ordinary course of employer's business and was therefore exempt from provisions of the Omnibus Crime Control & Safe Streets Act prohibiting interception of wire communications); *James v Newspaper Agency Corp.*, 591 F2d 579 (10th Cir 1979) (holding that because supervisory personnel monitored employees' phone calls to give training and instruction as to how to better deal with the public and to serve as some protection from abusive phone calls, and employees were notified, in writing, of this decision, the company's activity was exempted from act making it unlawful to intercept wire communication); *Simmons v Southwestern Bell Telephone Co.*, 452 F Supp 392 (WD Okla 1978), aff'd 611 F2d 342 (10th Cir 1979) (holding that company's monitoring of phone calls did not violate constitutional right of privacy and fell within exemption of Omnibus Crime Control & Safe Streets Act). See also Lee, 28 John Marshall L Rev at 139 (cited in note 109) (concluding that current law appears to favor employers in e-mail monitoring in the workplace); David Neil King, *Privacy Issues in the Private-Sector Workplace: Protection from Electronic Surveillance and the Emerging "Privacy Gap"*, 67 S Cal L Rev 441 (1994) (suggesting legislation for improving protection of employee privacy rights).

[120] See *Smith v Maryland*, 442 US 735, 738 (1978) (holding that a telephone user has no expectation of privacy in a phone number dialed).

[121] See generally references in note 99.

dia World Wide Web ("Web") pages is supporting an active competition among audience assessment firms to deliver the most useful information that particular servers and user clients might provide.[122] While there presently are some difficulties in establishing the unique identification of individuals who visit any site, it is recognized that such identification "would make the Web the best measured of all commercial media."[123] Rather than being based on samples, log analysis would provide a complete and continuous census of all hits made by individuals on a particular corporate page or on an associated link pursued from that page. In the view of observers of the emerging industry in Web measurement,

> [t]he big task for the new Web-monitoring services is analyzing the raw traffic statistics and turning them into useful marketing data, like determining how many times the same people viewed an ad, how long they lingered and what route they took to get there. Advertisers might also want to know what Web site they visited next, to determine where else it might pay to advertise to reach similar types of people.[124]

As I have suggested, information derived from an analysis of information-seeking behavior has substantial utility for enhancing the "resolution" or level of useful detail in the profiles of individuals and groups.

Commercial providers of access to electronic periodicals, such as *Wired* Magazine's electronic alternative, *HotWired*, require users to register a unique identifier in addition to a user name and a password.[125] This provides a reliable means of linking individuals with their informational choices.[126] Competitors recog-

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[122] Kevin Goldman, *Nielsen, I/Pro Form Internet Joint Venture*, Wall Street J B2 (Sept 6, 1995). One of I/Pro's early ventures involved the "$1 million Internet Hunt from Compuserve." *Compuserve Launches the World's First $1 Million Internet Scavenger Hunt*, PR Newswire (June 20, 1995). According to the promotional material, "The $1 million Internet Hunt provides an unprecedented opportunity for sponsors to promote their offerings and receive valuable demographic information in return. . . . The I/PRO system will allow CompuServe to easily register participants, track usage patterns and quantify activity generated by the Hunt while protecting end-users' privacy." Id.

[123] Denman F. Maroney, *Security, Privacy and Marketing on the World Wide Web*, 4 PRIVACY Forum Digest (Sept 15, 1995) (available online at http://www.vortex.com/privacy/priv.04.20.Z).

[124] Flynn, NY Times at 40 (cited in note 99).

[125] Daniel Dern, *Net.Dern*, Netguide 29 (Jan 1996).

[126] As in other circumstances, those who are especially privacy sensitive, and sufficiently sophisticated, such as the "cyberpunks" described to me by Michael Froomkin (e-

nize that the amount of time and the complexity of the registration process may serve to reduce the number of individuals who actually follow through and become regular users of their service.[127] However, the development of a "universal registration system" is reportedly under way. Such a system would allow individuals to "access content at multiple sites without having to fill out multiple registration forms, and content providers [would be] able to collect demographic information without compromising the privacy of end users."[128]

One of the features of the "browsers" or special programs that facilitate searching the Web is the use of an internal or local area network ("LAN") directory cache[129] to record the unique addresses of individual "pages" or file identifiers that one has visited. This is an automatic feature that makes use of the network more efficient. When enabled (the default), links to files or locations that have been visited previously appear in a different color on whatever page or site one is displaying at the time. Individual users might disable this feature on some machines (like the Apple Macintosh) by setting the preference for cache deletion to "now." Others may have to actively delete the cache from the directory. This means that depending upon the nature of the access rights available to other users, or upon the policies estab-

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mail, Nov 27, 1995), may use commonly known ID numbers and passwords to subvert the intentions of information providers who require user identification. Daniel Dern notes the possibility of using a "proxy server" to shield identifying information. Dern, Netguide at 30 (cited in note 125).

[127] Registration for HotWired required me to answer sets of questions designed to establish my identity, my association with an institution, my e-mail address, and an assessment of my level of computer sophistication and experience with online systems. In addition, a unique identification key, described as an authentication device of value to their supporters, was forwarded to my e-mail address, but the process required me to sign on again, using name and password, and then to provide this code.

[128] This is a reference to the I/CODE Universal Registration system being developed by Nielsen Media Research, the premier supplier of audience assessment services for the broadcast and cable industry. *Nielsen Media Research and I/PRO Join Forces to Measure the Internet*, Business Wire, Lexis/Nexis (Sept 5, 1995). See also, Goldman, Wall Street J at B2 (cited in note 122). As I discuss later on, the use of demographic information may not raise the kinds of privacy concerns traditionally associated with personal, or "individually identifiable information," but the use of demographic information is quite useful for the purposes of classifying and characterizing individuals and groups in ways that support discrimination.

[129] The Netscape Handbook describes a cache as a temporary store. *What is a Cache and How Does it Work?*, Netscape Handbook (available online at http://www.chicago.avenew.com.infodesk/help.atozindex.html) (1995). If you wish to see a page that you have already downloaded, rather than going out onto the network to capture it again, the client will display that page from the cache specifically for the purpose of reducing network traffic.

lished by the system administrator, highly detailed records of the kinds of information sites a user had visited may be gathered, stored, and used for administrative or other purposes.[130]

5. *Newsgroups and bulletin boards.*

Because of the growing importance of cyberspace as an arena for public discussion among that part of the population possessing modems or direct connections to the Internet, it is not surprising to see that firms have begun to provide services that track the discussion of issues in newsgroups and online fora in the same way that summaries of popular media are subjected to content analysis.[131] Amid considerable public controversy around the sexually explicit character of discussions within this environment of shared communication, some system administrators have limited the availability of certain newsgroups.[132] Unsuspecting participants in some Usenet newsgroups might be surprised and concerned to learn that a commercially sponsored service provides boolean subject and author searching of an extensive subset of newsgroups. The output of a search is provided in a hypertext markup language ("HTML") format so that clicking on the name of an author connects you with a profile of that author, including the number of recent posts the author made to specific newsgroups, as well as a summary index indicating what percentage of the posts were met with a follow-up response. Information about the service from its home page[133] suggested that "researchers have turned to Usenet to identify experts or uncover areas where research is needed."[134] The author profile "help[s] you assess the value of an article by showing you some useful statistics on Usenet articles originating from a particular e-mail address."[135] This and similar programs[136] that scan

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[130] David Wilson describes the great variety in the official policy that system administrators have established and enforce with regard to computer records or transaction logs. David L. Wilson, *The Network Has Eyes*, Chronicle of Higher Educ A17 (July 21, 1995). Observers note that "[w]hile the ability to flush the cache gives users a small amount of control over the information stored on their own computers, they are helpless to prevent records being created on other Internet computers that they may visit." Id at A18.

[131] PR Newswire announced the availability of its eWatch subscription service in Campaigns & Elections 35 (July 1995). They claimed to be able to "scan thousands of Internet and commercial online forums and news groups continuously for messages." Id.

[132] See, for example, Paul De Groat, *Sun Setting on Internet's Frontier Days*, Montreal Gazette F6 (Feb 13, 1995); *Reaction to Compuserve Access Limits Upset Enthusiasts*, The Milwaukee Journal Sentinal 1 (Dec 30, 1995).

[133] http://www.dejanews.com. One test identified an active poster: 125 articles in a month, with 96 percent follow-ups, with five primary groups posted to.

[134] *Deja News: It's What You Need*, http://www.dejanews.com/onwhy.html (1996).

[135] *Deja News Frequently Asked Questions: Searches*,

Internet sites gathering data may provide similar benefits. However, other uses of this service may raise some concern about the consequences that might flow from knowledge of one's active participation in newsgroup discussions. For example, Steve Madere, president of Deja News in Austin, Texas, reportedly "checks the Usenet posts of job applicants to get clues about their technical skills and their public conduct. 'I can see if they posted in an intelligent or offensive way.'"[137] Hasty words posted to a discussion group may, as this example suggests, have consequences for a person's employability.

Users of bulletin boards and newsgroups who have a substantial concern about threats to their privacy may maintain anonymity through a number of anonymous servers or remailing services that remove any identifying information. However, these services may still subject the individual to identification if the system administrator is forced to reveal the identity of clients under court order[138] or in response to a well-constructed inquiry by a "researcher."[139]

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http://www.dejanews.com/help/dnfaq.html (1996). See also, Australian National University Library Access on Outreach Team, *Introduction to the Internet*, http://info.anu.edu.au/courses/intro/wkbk/loc.html (Feb 1996).

[136] Thomas E. Weber describes the use of Alta Vista, Open Text and other "search engines" or "spiders" to collect the material stored in World Wide Web sites as providing the possibility for "fame" in addition to more mundane uses, such as finding former classmates. *World-Wide Fame is at Your Fingertips*, Wall Street J B1 (Mar 4, 1996).

[137] Mitch Betts, *Privacy fades for Web visitors*, 2(3) Privacy & Am Bus 19 (Oct 1995) (quoting Steve Madere).

[138] Comment, *Who Are You? Identity and Anonymity in Cyberspace*, 55 U Pitt L Rev 1177, 1205-1207 (1994) (cited in note 91) (discussing the applicability of a standard like the Title III Wiretap Standard to compel sysops to reveal the identity of users); Larry Detweiler, *Identity, Privacy, and Anonymity on the Internet* § 2.4, ftp://www.cdrom.com/pub/security/coast/doc/policy/Eff-Policy/Privacy/privacy_anonymity.faq (Aug 1, 1993).

[139] A high volume debate was carried out through the Internet in response to a prepublication release of an article by Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 Georgetown L J 1849 (1995). Rimm does not describe precisely how the research team obtained access to the records of bulletin board users. He reports that "the research team obtained demographics from several leading 'adult' BBS which indicate the age, sex, and city of origin of subscribers. These demographics were based on verified credit card information and were obtained either directly from the logfiles of 'adult' BBS or various methodologies developed by the research team programmers." Id at 1895. Rimm also claimed to have utilized the kind of access to records that UNIX computers provide to "examine the online habits of 4,227 users" of what many presume to have been Carnegie Mellon University's computer system. Id at 1865. A detailed critique (accessed July 5, 1995, but updated regularly) was provided by Donna L. Hoffman and Thomas P. Novak, *The Cyberporn Debate*, http://www2000.ogsm.vanderbilt.edu/cyberporn.debate.cgi.

6. *Remote sensing.*

There is no imaginable end to the computer-based systems that generate information useful to developing predictive models and to controlling individual behavior. Anthony Giddens[140] offers the concept of "time-space distanciation" to describe how social systems of control can be extended in time and space. Those in authority can develop and coordinate relationships without the requirement of being in the presence of persons being controlled through observation. Telecommunications facilitate the remote surveillance of individuals, and computation provides analytical insights into aspects of personhood that are not directly observable.

The pressure to manage more and more aspects of a complex economic system has led governments to participate actively in the development and implementation of sophisticated systems that depend upon remote sensing and the capture of information about the identity and status of individuals. The new "Intelligent Vehicle Highway Systems" (increasingly referred to simply as "ITS") is just the latest bit of technical debris being carried forward in this rapidly moving stream.[141]

Critical observers of the development and implementation of ITS systems identified ten reasons why an ITS system raises fundamental privacy concerns:

> ITS applications can be used
> [1.] invisibly to track a targeted individual's movements from place to place. . . .
> 2. . . . automatically to collect comprehensive information about when and where every person travels. . . .
> 3. . . . [to] create a computerized personal travel profile which will be used to make decisions about an individual, as well as to predict and to manipulate the individual's future choices about transportation and other matters. . . .

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[140] Giddens is an important source of my thinking of the role of information in the reproduction of social relations. His primary contributions are present in *The Constitution of Society* (University of California Press, 1984). Critical discussions of his theoretical contributions are available in Ian Craib, *Anthony Giddens* (Routledge, 1992); and David Held and John B. Thompson, eds, *Social Theory of Modern Societies: Anthony Giddens and His Critics* (Cambridge University Press, 1989).

[141] See the *Santa Clara Symposium on Privacy and IVHS*, 11 Santa Clara Computer & High Tech L J 13 (1995). ITS is being designed to improve the efficiency and safety of a federally aided highway system, with corollary benefits such as reduced emissions to be derived from reductions in traffic congestion.

> 4. . . . [to] aggregate, or connect up, stored information about an individual's travel patterns with other information regarding that individual. . . .
> 5. . . . [to] use or disclose information about an individual's travel history or profile in ways which may both reflect him or her and affect his or her future opportunities and choices. . . .
> 10. . . . [by] [p]rivate entities, especially large corporations, . . . to collect, to manipulate and to disclose transportation information about individuals and use ITS to take over control of travel.[142]

The concerns expressed by these observers are similar to those enumerated by the National Telecommunications and Information Administration ("NTIA") in its Notice of Inquiry and in the draft proposal from NII Privacy Working Group.[143] It is in the nature of decisionmaking which depends on the use of generalized profiles and predictive models, that all varieties of information about individuals may have predictive utility for organizations. While it is unlikely that *any single bit* of information, including information about when and where one travelled on a particular day, would pose an obvious and serious threat to any individual's well-being; in combination, these discrete bits may add up to a substantial risk. It is the further normalization of this process that I have referred to as a panoptic sort[144] that generates concern among advocates of information privacy. These are concerns about power.[145] Concern about privacy is best understood as a concern about the power to discriminate.

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[142] Dorothy J. Glancy, *Privacy and Intelligent Transportation Technology*, 11 Santa Clara Computer & High Tech L J 151, 163-68 (1995).

[143] Inquiry on Privacy Issues Relating to Private Sector Telecommunications-Related Information, 59 Fed Reg 6842 (Feb 11, 1994). Privacy Working Group, Information Policy Committee, Information Infrastructure Task Force, *Privacy and the National Information Infrastructure: Principles for Providing and Using Personal Information* (Final Version adopted, June 6, 1995).

[144] Oscar H. Gandy, Jr., *The Panoptic Sort: A Political Economy of Personal Information* (Westview, 1993).

[145] John Goss states it succinctly: "the issue is not privacy per se, but the capacity of marketing organizations to marshall, cross-reference, and analyze relatively innocent, and even public, information on individuals and aggregations of individuals in order to obtain social power over them." John Goss, *"We Know Who You Are and We Know Where You Live": The Instrumental Rationality of Geodemographic Systems*, 71 Econ Geography 171, 179 (1995) (cited in note 34).

III. PRIVACY AS A PROBLEM OF DISCRIMINATION

A. Information Privacy

Alan Westin is generally credited with the most well known definition of information privacy: "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[146] This definition clearly establishes the privacy interest as a concern with power and autonomy. Because the focus on informational privacy in the United States has historically been oriented toward the development of means to restrain the power of government,[147] and only occasionally on similar terrain with regard to private corporations,[148] I have chosen to focus in this Article on the corporate threat. While Westin's definition characterizes the privacy interest as a "claim," I think it more appropriate to discuss this interest in terms of rights.

B. A Question of Rights

A scenario presented for participants in a National Research Council meeting on rights and responsibilities in networked communities involved the collection and sale of transaction-generated information.[149] Regulations were seen to have limited the ability of the firm to exercise the full range of rights that *possession* of such information might imply.[150] The limitations on any actor's rights are most generally based on the actual or potential use of force, or other instrument of power. From this perspective,

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[146] Alan F. Westin, *Privacy and Freedom* 7 (Atheneum, 1967).

[147] Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* 3 (University of North Carolina Press, 1995) (cited in note 3); David H. Flaherty, *Protecting Privacy in Surveillance Societies: The Federal Republic of Germany, Sweden, France, Canada, and the United States* 310-14 (University of North Carolina Press, 1989).

[148] H. Jeff Smith, *Managing Privacy: Information Technology and Corporate America* 168-78 (University of North Carolina Press, 1994) (cited in note 85).

[149] Dorothy E. Denning and Herbert S. Lin, eds, *Rights and Responsibilities of Participants in Networked Communities* 105-12 (National Academy Press, 1994) (cited in note 92).

[150] Anne Branscomb identifies a complex of rights with regard to information that may be modified as the result of legislative debate and judicial determination. These rights include: the right to know; the right to collect information (investigate); the right to acquire information (from others); the right to withhold information; the right to control its release; the right to receive compensation (exploitative right); the right to protect information (security); the right to destroy or expunge information; and the right to correct or alter information. Anne Wells Branscomb, *Property Rights in Information*, in Bruce R. Guile, ed, *Information Technologies and Social Transformation* 81-120 (National Academy Press, 1985).

the formation of rights, even rights under the law, may be consistent with the charge that "might makes right." I have suggested that corporate power is a determining influence on the assignment of rights in the realm of personal information. Differences in power, which may shift from time to time between organizations within the market, or between industry and organized consumer interests, may explain differences in the extent to which rights are protected by different statutes and regulations.

Because of the nature of relationships between individuals and corporations, there is likely to be a substantial informational asymmetry in terms of what one actor "knows" about the other.[151] First, the corporation will interact with far more individuals than any individual is likely to interact with comparable corporations. Thus, on the basis of direct experience alone, the asymmetry seems likely. In fact, it is almost assured because of the absence of coercive resources that individuals might use in order to force disclosure by corporations. Corporations are most unwilling to reveal potentially damaging information about themselves, even for what is presented to them as scholarly research.[152] It is unlikely that such concern on the part of business could be explained in terms of anxiety about threats to its competitive position, as it might be with regard to proprietary information about technical processes or trade secrets. The concern seems instead to be about the negative consequences that would flow from public disclosure of the kinds of practices that are common within an industry.[153]

The individual's right to informational privacy is generally subordinated in deference to the interests of corporations for

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[151] Bailey Kuklin, *The Asymmetrical Conditions of Legal Responsibility in the Marketplace*, 44 U Miami L Rev 893, 936-60 (1990).

[152] See discussion of problems in gathering information from corporations in Smith, *Managing Privacy* at 51-54 (cited in note 85).

[153] In my own research on corporate information practices, I wrote to companies who had announced products that had privacy implications. I indicated my interest in marketing technology, specifically the use of customer information. The response was varied, in terms of the information they provided. Only 25 percent responded at all. I used a systematic sample of American Businesses identified in *Dun's Market Identifiers*. Out of the 859 establishments I asked to complete a two page questionnaire, only 181 were at all responsive, and only 139 met minimal data requirements. Similarly, Jeff Smith characterized his research as "a study that almost wasn't" because of the large number of refusals from firms. Smith, *Managing Privacy* at 51 (cited in note 85). The primary response from these firms indicated that the policy relevance of the topic was too sensitive for their organizations to participate. Details of the study conducted by Gandy are found in Oscar H. Gandy, Jr., *The Panoptic Sort: A Political Economy of Personal Information* at 108-22 (Westview Press, 1993) (cited in note 144).

several reasons. The most important reason is because the "balancing" of interests that courts and legislatures are understood to pursue makes use of an ideologically distorted scale that gives the "benefit of the doubt" to corporate interests.[154] Indeed, in the few instances where an idealized "public interest" is seen to weigh explicitly in this balance, the interest of the firm is more readily identified with the social collective than are the narrow selfish interests of the individual.[155] A recent review concludes, after noting that "most states recognize a tort cause of action for invasion of privacy in some form, . . . [that] they do not receive them favorably. Indeed, a review of court decisions involving privacy claims raises doubts as to whether there really is a tort remedy for invasion of privacy."[156] Indeed, the author continues, "Review of the case law discloses a judicial wariness—if not outright hostility towards—the invasion of privacy torts."[157] A right of privacy that cannot be exercised is not much of a right, and in the face of such evidence, belief in the existence of such a right seems at the very least naive.

C. The Expectation of Privacy

The expectation of privacy is socially constructed and has its basis in everyday practice, evolving social norms, and, on occasion, within formalized systems that bear the weight of law. This expectation is based in part upon an awareness of the ways in which privacy may be threatened, including which actors, with what kinds of power, may choose among what range of options to pursue interests involving access to personal information. Some aspects of this expectation may be assessed by and reflected in public opinion regarding privacy, and the evidence suggests that

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[154] Kim Lane Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* (University of Chicago Press, 1988). Scheppele suggests that the benefit of the doubt is readily granted on the basis of relevance. Id at 203. She cites *Tureen v Equifax*, 571 F2d 411 (8th Cir 1978), as a good example because the organization needed information in order to make a decision regarding credit and to detect fraudulent claims. All that is required is for the "information to be legitimately related to a legitimate purpose of the decision maker." Scheppele, *Legal Secrets* at 228. This seems a particularly easy standard to meet in her view "whenever relevance appears as the standard of judgment, all the defendant has to do is give some plausible reason why the information is relevant to something that the dependent is entitled to do." Id.

[155] Regan, *Legislating Privacy* at 213-43 (cited in note 3).

[156] Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 NC L Rev 989, 999 (1995).

[157] Id at 1004.

people generally feel that their privacy is at risk and that their options are narrowing. They are not paranoid.

Despite the volumes that have been written about the existence of a right to privacy, very few areas of personal information have been defined as off-limits, sensitive, or presumptively confidential. Beyond minimal, but important, restrictions on the collection and use of credit information and videotape rentals, and cable-television viewing, the generalized sense is that all bets are off. This includes "medical records, telephone calls, electronic mail, bank files or criminal histories."[158]

The region within which individuals have a reasonable expectation of privacy has been narrowed by courts.[159] Courts tend to rule that if an individual has, or should have, knowledge that surveillance and capture of personal information are possible, and yet they continue to interact with those systems or make use of those services, then they have demonstrated tacit consent to be sensed, observed, or measured, and therefore have no reasonable expectation of privacy.[160] While the narrowing of the scope of reasonableness in the context of the Fourth Amendment is quite clear with regard to government searches, it also seems clear that this narrowing is occurring with regard to private employers.[161] David King argues that "court decisions premised on unreasonable expectations of privacy have functionally conceded privacy rights on a broad scale to employers and their interest. . . . Employers will almost certainly subjugate any privacy right that diminishes legitimate interests, even though employees may have legally enjoyed the same rights at a different point in the employment relationship."[162] In citing the case of *Baggs v*

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[158] Jeffrey Rothfeder, *Nothing Personal*, Netguide 61 (July 1995).

[159] See Laurence A. Benner, *Diminishing Expectations of Privacy in the Rhenquist Court*, 22 John Marshall L Rev 825 (1989).

[160] See, generally, James J. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 Hastings L J 645, 651-61 (1985); Benner, 22 John Marshall L Rev at 852-73 (cited in note 59); C. Dennis Southard IV, *Individual Privacy and Governmental Efficiency: Technology's Effect on the Government's Ability to Gather, Store, and Distribute Information*, 9 Computer L J 359, 371-73 (1989); Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust between Government and Citizen?*, 94 Colum L Rev 1751, 1756-63 (1994).

[161] With regard to communications, Frank Tuerkheimer argues, "Certainly if the 'reasonable expectation' standard is the legal basis for private privacy protection, an employer, by notice, can effectively remove such expectation from an employee by simply stating that all information placed on a company computer is the property of the employer, a practice that has been followed." Frank M. Tuerkheimer, *The Underpinnings of Privacy Protection; History of Privacy Protection Issues*, 36 Communications of the ACM 69, 73 (Aug 1993).

[162] David Neil King, *Privacy Issues in the Private-Sector Workplace: Protections from*

Eagle-Picher, Industries, Inc.,[163] King suggests that the court "explicitly stated what other courts have only ruled implicitly: An employer possesses the practical equivalent of an *absolute* employment-related necessity defense when it comes to 'intrusive or even objectionable' invasions of an employee's privacy."[164] Even though Congress failed to pass the Privacy for Consumers and Workers Act of 1993,[165] it seems to me that the primary protections specified within that act were for employees, rather than for consumers.[166]

There is substantial ignorance about the ways in which individuals may act, or fail to act, to protect their privacy interests in an electronic environment. As Jeffrey Reiman suggests, it is impossible to have an expectation of privacy in the kinds of "public" behavior one might engage in because we are unaware of the ways in which panoptic surveillance makes it possible to view numerous sites of activity from a single vantage point.[167] Reiman refers to behaviors which have taken place at different times and different locations, each providing a different bit of information about an individual. When combined, these individual bits allow the construction of a behavioral profile. This profile describes and represents "knowledge" about behaviors, in probabilistic terms, that never *actually* took place.[168] Because of this paradoxical circumstance, it is impossible for an individual to act to protect such interests by attempting to keep them private.

This aspect of profiling makes something of a mockery of the public policy initiatives that emphasize providing individuals

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Electronic Surveillance and the Emerging 'Privacy Gap', 67 S Cal L Rev 441, 460-61 (1994) (cited in note 119).

[163] 957 F2d 268 (6th Cir 1992).

[164] King, *Privacy Issues* at 463 (cited in note 19) (quoting *Baggs*, 957 F2d at 274).

[165] HR 1900, 103d Cong, 1st Sess (1993).

[166] An instructive, but ironic, example of this claim is found in the section discussing privacy protections, "no employer may intentionally collect personal data about an employee through electronic monitoring if the data are not confined to the employee's work, unless the employee is a customer of the employer at the time of the electronic monitoring." Id § 9(a)(1).

[167] 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, 37-38 (1995).

[168] This is even more clearly the case if these behaviors are predictions, or the constructions of models or simulations generated in response to some sort of "what if" tinkering with the parameters of the model, rather than in response to some behavior of the individual. See generally, John Goss, *"We Know Who You Are and We Know Where You Live": The Instrumental Rationality of Geodemographic Systems*, 71 Econ Geography 171 (1995) (cited in note 34).

with access to their records so that they can correct the errors that are bound to occur. As aspects of predictive technology based on probability, *all* profiles contain some amount of error, and prediction is never perfect. These days, fairly sophisticated predictive models contain hundreds of variables, many of which are estimates that have been drawn from the reported means of aggregations, like zip-coded neighborhoods. It seems unlikely that individuals would be able to contest the accuracy of individual components of such models, and then prevail in a claim of discrimination.[169]

1. *Understanding the risks.*

The public simply does not understand the ways in which profiling results in the narrowing of the options they are presented with.[170] In a telephone survey in 1994, 26 percent of the respondents who indicated that they were concerned about an "interactive profiling system" were unable to indicate what it was about the system that troubled them.[171] In the same survey, 61 percent of those who were concerned indicated that their concerns were linked to informational privacy.[172] In this particular case, profiling was described as a technology that would be used

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[169] The case of *Cherry v Amoco Oil Co.*, 490 F Supp 1026 (ND Ga 1980), illustrates this point well. The plaintiff, a white woman, applied for a gasoline credit card. She lived in a predominately black neighborhood in Georgia, and her zip code was one of the components used in a rating system used by Amoco. She was denied credit, and she claimed that she was a victim of discrimination because the scoring system assigned low scores to her zip code. In fact, Amoco used a system with 38 objective factors. While it was true that her zip code received the lowest of five possible scores, in rejecting her appeal, the court held that her test was inadequate because it did not "test the effect of zip code as a criterion involved but rather tests the effect of the overall 38-criteria grading scheme . . . ." Id at 1031. It seems that it was, in fact, impossible for the plaintiff to win: "even if the Court were to take liberal judicial notice of facts not presented to it by counsel, there would nonetheless be insufficient evidence from which to draw a conclusion as to whether Amoco's use of zip code ratings treats otherwise qualified white applicants and otherwise qualified black applicants in a significantly different manner." Id at 1032. What use would greater accuracy serve? Could she argue that the 38-item scheme was inadequate and could have been improved if it included two additional, or two other, variables? Could the petitioner ever make that case? I think not.

[170] The ways that organizations of business and government use personal information, including that derived from transactions, to assign people to categories that determine the opportunities that are denied to them are components of the operational definition of the panoptic sort. This construct is outlined in some detail in Oscar H. Gandy, Jr., *The Panoptic Sort: A Political Economy of Personal Information* at 53-94 (Westview Press, 1993) (cited in note 144).

[171] Louis Harris & Assoc, Inc, *Interactive Services, Consumers and Privacy Study 943007* 8 (New York, 1994).

[172] Id.

to determine which advertising messages they would receive while they made use of an interactive programming service.[173]

Survey respondents are rarely if ever provided with a explanation of profiling that emphasizes that they might be *denied access* to some goods or services on the basis of information about their viewing habits. Even so, there is sufficient evidence within the context of this narrow framing of the problem to suggest that the general public believes that even the affirmative use of their personal information for marketing purposes is troublesome. Some 69 percent of the public *agreed* that it was a "bad thing" that information about consumer characteristics, "such as your income level, residential area, and credit card use" could be used to "offer goods and services to you."[174] Only 4 percent of the public suggested that they were not at all concerned about the selling of lists of consumer practices.[175] What do the rest fear?

2. *The loss of autonomy.*

This strongly felt, but poorly articulated, fear about the risks of surveillance is hidden below the surface of the popular discourse about privacy but is revealed in the analysis of some privacy scholars. Jeffrey Reiman identifies four classes of risks that frame privacy in terms of things we value that are lost as privacy is threatened.[176] Many of these are clearly identified with threats to fundamental liberties.

First, he suggests that people may be limited in their freedom to engage in legal activities that are merely unpopular or unconventional because of the social pressures, including ostracism, that others might apply if they were to learn about these activities. Hence, there is an interest in keeping this information private. Privacy "'functions to promote liberty of action' . . . [and] [i]t applies equally to unpopular political actions which have nothing immoral or illegal about them."[177]

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[173] Id. The question given to the survey participants was set up as follows: "In order to keep the price of home interactive services reasonable, companies operating these services [sic] may make use of something called *subscriber profiling*. This involves collecting information about your viewing and purchasing patterns. This information is then used by companies to present advertising and information about products and services that match your particular interests."

[174] *The Equifax Report on Consumers in the Information Age* 69 (Atlanta GA: Equifax Inc., 1990)

[175] Id.

[176] Reiman, *Driving to the Panopticon*, 11 Santa Clara Computer & High Tech L J at 34 (cited in note 167).

[177] Id at 35 (quoting Ruth Gavison, *Privacy and the Limits of Law* in Ferdinand

Second, and more directly, Reiman suggests that actions taken under the awareness of being watched are quite different from those same actions when pursued in private.[178] Making love in public seems to be possible for only a very small number of people. Because we think of showering, and many other normal bodily functions, as "private," we hesitate to perform them in public, or while under surveillance. The argument, like the one that Simitis[179] and others make, is that as more and more activities generate records, and as people become more aware that such surveillance is occurring, people will act spontaneously less and less. Spontaneous action is autonomous action because it is not under the control or influence of others. Surveillance threatens spontaneity. In addition, from Reiman's perspective, "[w]hen you know you are being observed, you naturally identify with the outside observer's viewpoint, and add that alongside your own viewpoint on your action. This double vision makes your act different, whether the act is making love or taking a drive."[180] Surveillance thus results in the loss or denial of options whose exercise requires, by virtue of cultural conditioning, privacy or anonymity.

Third, Reiman suggests that invasions of privacy are insults, even where there is no identifiable harm; indeed, even if the subject is unaware that they have been observed, or sensed.[181] This harm is inherent in the denial of dignity. This is the theft of dignity that the Peeping Tom commits. The consequence is an insult rather than a palpable injury. Reiman also provides an important insight into the privacy interests that reach beyond the individual harms that come from the surveillance of a particular individual. Again, his view is like that of Simitis,[182] in that it suggests that there is a loss to society that occurs when people mature without the kind of moral ownership of themselves that development with dignity provides.

Reiman attaches this social loss to conceptions of maturity and social development. "The deprivation of privacy stunts maturity, keeps people suspended in a childish state."[183] Public ob-

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Schoeman, ed, *Philosophical Dimensions of Privacy* 349-50 (1984)).

[178] Reiman, 11 Santa Clara Computer & High Tech L J at 37 (cited in note 167).

[179] Spiros Simitis, *Reviewing Privacy in an Information Society*, 135 U Pa L Rev 707, 732 (1987) (cited in note 5).

[180] Reiman, 11 Santa Clara Computer & High Tech L J at 38 (cited in note 167).

[181] Id at 39.

[182] Simitis, 135 U Pa L Rev at 707 (cited in note 3).

[183] Reiman, 11 Santa Clara Computer & High Tech L J at 40 (cited in note 167).

servation necessarily is experienced in part as public review, and to be under constant review serves to reinforce conformity to what is understood to be acceptable. This is the operational definition of "correct training."[184] It results in the elimination of the unconventional, the creative, the exploratory, and the inventive risk taking that is the source of great value in a dynamic social system. According to Reiman, people's "inner lives will be impoverished to the extent that their outer lives are subject to observation."[185]

Finally, Reiman suggests that there is even more at risk—in a sense, a kind of deskilling that occurs—a loss of the internal basis of self-control.[186] The more control is externalized, the less effort is made by the individual toward developing internal controls. Isn't self-control what we seek for ourselves and value in others? Paradoxically, then, increased surveillance makes it more and more likely that our citizens will develop less and less self-control. As a result, our presumed need for more state-sanctioned, publicly financed, objectively coercive controls (including the ultimate sanction) seems likely to grow.

D. The Privacy Tort

In addition to statutes that focus primarily on constraining a powerful government, the right to privacy has also evolved in the United States through common law tort litigation between private parties. While recognition of an intellectual debt to the scholarly arguments of Warren and Brandeis in 1890 is substantial,[187] the formulations provided by the Restatement (Second) of Torts (§ 652A) in 1977 that incorporated the perspective of

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[184] Michel Foucault, *Discipline and Punish: The Birth of the Prison* 170-94 (Alan Sheridan trans, Vintage Books, 1979).

[185] Reiman, 11 Santa Clara Computer & High Tech L J at 41 (cited in note 167); See also C. Edwin Baker, *Posner's Privacy Mystery and the Failure of Economic Analysis of Law*, 12 Ga L Rev 475, 479 (1978) (cited in note 21).

[186] Reiman, 11 Santa Clara Computer & High Tech L J at 40 (cited in note 167).

[187] Warren and Brandeis are considered the founders of privacy tort law based on their article *The Right to Privacy*, 4 Harv L Rev 193 (1890). See also Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 Cath U L Rev 703 (1990); Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 Case W Res L Rev 647 (1991).

William Prosser[188] have generally resulted in a tort without substance.

The Restatement limited cognizable claims to four kinds of invasions of privacy: a) unreasonable intrusion upon the seclusion of another; b) appropriation of the other's name or likeness; c) unreasonable publicity given to the other's private life; or d) publicity that unreasonably places the other in a false light before the public.[189] Of those four, only misappropriation has been pursued with any force.[190] In the view of Robert Post, the collapse of an interest in personality to a far more narrowly defined interest in property and exploitative rights is a misapprehension of Warren and Brandeis's original intent.[191]

Contemporary efforts to operationally define and institutionalize the commercial property aspects of the privacy interest[192] show very little promise for reversing the trend toward the collapse of our reasonable expectations for privacy. While the creation of a market in personal information might help establish some justification for informed consent for the use of personal information, it would not address the quite substantial problems of inequality that would distort such a market. While many well-articulated critiques address the shortcomings of the idealized markets of economic theory,[193] there are more serious problems

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[188] William L. Prosser, *Privacy*, 48 Cal L Rev 383 (1960). The influence has been suggested to have been quite substantial. In the view of Andrew Jay McClurg, "for all practical purposes, there is no separate identity between Prosser's observations concerning the tort of intrusion in his law review article and the text of the Restatement (Second) of Torts pertaining to intrusion." Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 NC L Rev 988, 998 n 40 (cited in note 156). Jonathan P. Graham suggests that "Dean Prosser's explication of privacy invasions as falling into four distinct categories has exercised virtual hegemony over privacy law." Note, *Privacy, Computers, and the Commercial Dissemination of Personal Information*, 65 Tex L Rev 1395, 1417 (1987).

[189] Restatement (Second) of Torts § 652A (1976).

[190] See generally, the discussion of "the shrinking right of privacy in tort law" in McClurg, 73 NC L Rev at 996-1009 (cited in note 156). Some commentators have even argued for expanding the definition of the tort of appropriation so that it might cover consumer profiles as property. See, for example, Note, 65 Tex L Rev at 1427 (cited in note 188).

[191] Post, *Rereading Warren and Brandeis*, 41 Case W Res L Rev at 674 (cited in note 187).

[192] See Kenneth C. Laudon, *Markets and Privacy*, Amelia Island Conference Paper, *Civilizing Cyberspace: Priority Issues in a National Information Infrastructure* (Jan 1993). In this paper, Laudon describes the unauthorized use of personal information by organizations as a major threat to individual privacy, and he suggests a solution might lie with the establishment of a "National Information Market" with "National Information Accounts."

[193] See, for example, Randall Bartlett, *Economics and Power: An Inquiry into Human*

to be addressed in understanding and coordinating markets in personal information.[194] These problems are based in part upon the peculiar characteristics of information as a resource[195] and as a commodity[196] that make it different from traditional goods,[197] and make market coordination, the reduction of transaction costs, the internalization of substantial external effects, and the suppression of the tendency toward opportunistic behavior exceedingly difficult to achieve.[198] The fundamental asymmetry between individuals and bureaucratic organizations all but guarantees the failure of the market for personal information.[199] As Kuklin suggests, the failure of this market will raise fundamental moral issues as this market's inefficiency "is systematically beneficial to the merchant"[200] and reflects strategic intervention by the merchant to take advantage of the limitations on consumers' (and I would add, employees' and citizens') ability to make rational choices.[201]

Relations and Markets 3-13 (Cambridge University Press, 1989) (cited in note 12); Brian Burkitt, *Radical Political Economy: An Introduction to the Alternative Economics* 139-46 (New York University Press, 1984); Daniel M. Hausman, *The Inexact and Separate Science of Economics* 205-26 (Cambridge University Press, 1992); Bailey Kuklin, *The Gaps between the Fingers of the Invisible Hand*, 58 Brooklyn L Rev 835 (1992) (cited in note 18); Donald McCloskey, *If You're So Smart: The Narrative of Economic Expertise* (University of Chicago Press, 1990); Uskali Mäki, Bo Gustafsson, and Christian Knudsen, eds, *Rationality, Institutions and Economic Methodology* (Routledge, 1993).

[194] Kim Lane Scheppele focuses explicitly on the outcomes that might be expected if rules governing secrets were based on concerns with efficiency, as compared with concerns for fairness or equality. See generally, Scheppele, *Legal Secrets* at 24-42 (cited in note 154).

[195] Dan Schiller, *How to Think About Information*, in Vincent Mosco and Janet Wasko, eds, *The Political Economy of Information* 27, 31-32 (University of Wisconsin Press, 1988).

[196] See, generally, Roger G. Noll, *The Economics of Information: A User's Guide*, in *The Knowledge Economy: The Nature of Information in the 21st Century* 25 (Institute for Information Studies, 1993).

[197] Benjamin Bates, *Information as an Economic Good: Sources of Individual and Social Value*, in Mosco & Wasko, eds, *The Political Economy of Information* at 76.

[198] See generally, Kuklin, 58 Brooklyn L Rev at 835 (cited in note 18); Michael Dietrich, *Transaction Cost Economics and Beyond: Towards a New Economics of the Firm* (Routledge, 1994).

[199] Oscar H. Gandy, Jr., *Toward a Political Economy of Personal Information*, 10 Critical Studies in Mass Communication 70 (1993) (cited in note 6).

[200] Kuklin, 44 U Miami L Rev at 1004 (cited in note 151).

[201] Id at 1005.

IV. WHAT IS THERE TO BE DONE?

A. Informed Consent

In the absence of a well-disciplined market that constrains the influence of unequal power and resources, a statutory requirement of fully informed, affirmative consent should be the basis upon which privacy interests are preserved for individuals. An alternative approach to informed consent, one that favors the individual, is one that assumes that all information is private and confidential unless the individual indicates otherwise.

This approach is opposed by business and industry and has been defeated consistently in legislative battles, including those that some privacy advocates believe they have won.[202] Business representatives have argued successfully that the markets for personal information would dry up, and the direct marketing sector that depends on such information would be destroyed.[203]

Consent should be evaluated in the context of the alternatives available. By this I mean that consent is not actually freely granted if no meaningful alternatives exist. Consumers are generally identified as price and contract takers.[204] They have little opportunity to set or to negotiate the terms of the contracts through which they may "grant" consent. Supporters of a market in personal information frequently suggest that consent might be exchanged for a price discount. Eventually, such a market is likely to reflect the discriminatory interests of some advertisers who place little or no value on the information they might gather about individuals who are exploring the Web from a "freenet" or library terminal. However, this lack of interest should not justify their denying such a user the opportunity to "pay" the higher fee, just because their informational value is not worth the "standard discount."

What are the options facing individuals who do not want to trade personal information for access to networked resources? There are examples of individuals who have been denied service in stores because they refused to provide the marketing informa-

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[202] I refer here to the Video Privacy Protection Act, 18 USC §§ 2710-2711 (1988), which established a limit on the disclosure of specific information, 18 USC § 2710(b)(1), at the same time that it established "opt-out" as the normative policy. 18 USC § 2710(b)(2)(B).

[203] Robert J. Posch, Jr., See *Keep Privacy Laws Out of Cyberspace*, Direct Marketing 52 (Mar 1995).

[204] Meheroo Jussawalla and Chee-Wah Cheah, *The Calculus of International Communications* 75-102 (Libraries Unlimited, 1987).

tion that management had requested.[205] Should this option always be a "take it or leave it" choice?

I believe that we can expect considerable resistance to consumer demands for anonymity, especially in the context of advertiser-supported information services, where information about the "kinds" of consumer is thought to be vitally important. The protection of individual interests in aggregate information will be even more difficult to achieve.

B. Aggregate Information

Because privacy legislation traditionally focuses on individual or personal information, an exception is generally made for aggregate information.[206] This is an exception I would like to challenge.

The recent FCC ruling on Caller ID services prohibits Caller ID subscribers from using caller information in certain ways in order to protect the privacy of callers. One exception to these restrictions allows subscribers to use caller information for "compiling, using and disclosing *aggregate* information."[207] Aggregate information is defined as "collective data that relate to a group or category of services or customers, from which individual customer identities or characteristics have been removed."[208] This definition of aggregate information ignores the fact that the *purpose* behind the collection of personal information is to develop strategically useful categories—categories that form the basis for dis-

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[205] Robert Gellman recently shared his own similar experience in a post to Computer Privacy Digest. A clerk at Sears requested his phone number. He refused. The clerk entered a false number, 555-1212. The clerk then requested his address. This too, Gellman refused. Even though he was paying with a non-Sears credit card, the salesman would not sell Gellman the appliance. Another retailer asked for the same information but was willing to sell the appliance even though Gellman refused to supply the requested information. Robert Gellman, *Information Collection at Sears*, 7 Computer Privacy Digest #7 (available online at gopher://miller.cs.uwm.edu:70/11/computer%20privacy%20digest/volume7/v7%23008) (July 29, 1995).

[206] In discussing the exception for aggregate information in what became the Cable Communications Act, the Senate argued that "[i]t is not intended to cover the electronic collection process used to produce aggregate records that are not individually identifiable. Such aggregate records indicate how groups of subscribers—such as males or residents of a certain neighborhood—use the system, and therefore pose no perceivable privacy threat to individuals." Of course, this view denies the existence of group or collective interests. Cable Telecommunications Act of 1983, S Rep No 98-67, 98th Cong, 1st Sess 28 (1983).

[207] Federal Communications Commission, Calling Number Identification Service—Caller ID, 60 Fed Reg 29489, 29491 (1995) (amending 47 CFR § 64.1607(a)(3)(iii)) (emphasis added).

[208] Id at 29490 (amending 47 CFR § 641600(a)).

crimination. The management of relations between individuals and corporations is based on the treatment of individuals as members of these constructed classes, rather than as unique and autonomous individuals. Indeed, as one observer notes, "[a]t present marketers can treat people in geographic groups on an economic basis provided they treat each individual in such group similarly. Rejection based on the performance of the group in the area, rather than individual performance, is permitted within the bounds of the qualifications set forth . . . ."[209]

The tortured history of anti-discrimination law in the United States has emphasized the importance of a small set of "protected groups" or "suspect classifications."[210] The underlying rationale for constructing such classes—a shared history of mistreatment, such as the experience of slavery, persecution, and the denial of fundamental rights—has been shaken by the continuing assault of a vocal opposition.[211] This opposition has used the core assumptions of the neoclassical economic model as the primary arguments against not only affirmative action, but anti-discrimination laws as well. The theory suggests that, all other things being equal, irrational personal preferences, such as discrimination, cannot withstand the press of competition, because freely accessible information would guarantee that competitive forces punish such inefficient discrimination.[212] Opponents of this view have argued (convincingly to my way of thinking) that the market has not operated as the theory suggests, in part because the market has never existed in the idealized form that might produce the desired corrective results.[213] As a result, objection-

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[209] Robert J. Posch, Jr., *The Complete Guide to Marketing and the Law* 765 (Prentice-Hall, 1988).

[210] The first groups so identified and offered protection were the former slaves and their descendents, African-Americans. Later, women, other hyphenated ethnic Americans, and the foreign born were offered similar protections. More recently, and with increasing controversy, groups forming protected classes have been identified on the basis of age, sexual orientation, and handicapping condition.

[211] Neoclassical economists have argued that racial discrimination in the labor market represents an irrational personal preference that would, under optimal conditions, be punished by the marketplace and would therefore be extinguished as an effective social force. Based on the modern legal theory that marries economic theory with jurisprudence, Richard Epstein has argued that there ought not be any restrictions on private discrimination in employment. See Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard University Press, 1992); Richard A. Epstein, *Standing Firm, on Forbidden Grounds*, 31 San Diego L Rev 1 (1994) (cited in note 17).

[212] See, for example, Richard A. Posner, *The Economics of Justice* (Harvard University Press, 1981); more generally with regard to discrimination, see Gary S. Becker, *The Economics of Discrimination* 39-54 (University of Chicago Press, 2d ed 1971).

[213] In the area of insurance, see Regina Austin, *The Insurance Classification Contro-*

able discrimination continues, and, in some respects, has expanded.

Racial stereotypes are examples of efforts to assign estimations of group characteristics or attributes to individuals. The development and elaboration of racial stereotypes has much in common with other forms of classification. One group (or organization) develops the classificatory scheme and applies it to others—generally others that occupy a subordinate position. Classifications form the basis for differentiation and comparison and the benefit of the doubt always tends to favor the dominant group. Understandably, political opposition to stereotyping is often based in the claim that such stereotypes are usually a set of negative attributes that define the members of one group as inferior to those with whom they are compared. The acrimonious debate occasioned by the publication of *The Bell Curve* by Richard Herrnstein and Charles Murray[214] underscores this point while raising serious questions about the reliability of estimates of a broad range of population parameters.

Where group membership is relatively easy to ascribe, and where the links between group membership and the distribution of benefits and satisfactions we associate with life chances are strong,[215] we should not be surprised to see that members of such groups often act in ways designed to improve the comparative status of their own group. The maintenance of dominant status for certain groups would suggest that the investments have been rational and efficient. Along these lines, Richard McAdams suggests that the promotion of negative racial stereotypes as applied to members of competing groups is objectively

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versy, 131 U Pa L Rev 517 (1983) (cited in note 16); Leah Wortham, *Insurance Classification: Too Important to be Left to the Actuaries*, 19 J L Reform 349 (1986) (cited in note 17). With regard to continuing racial inequality, see Michael Reich, *Racial Inequality: A Political-Economic Analysis* (Princeton University Press, 1981). Regarding employment discrimination, focusing primarily on race, see David A. Strauss's symposium article, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 Georgetown L J 1619 (1991). In the area of discrimination and gender, in an approach that moves toward the general concern with equality, see Maureen B. Cavanaugh, *Towards a New Equal Protection: Two Kinds of Equality*, 12 L & Inequality 381 (1994).

[214] *The Bell Curve* (Free Press, 1994), discussed extensively in a broad range of critical comments in a compilation edited by Russell Jacovy and Naomi Glaubermann, *The Bell Curve Debate: History, Documents, Opinions* (Times Books, 1995).

[215] Ralf Dahrendorff defines life chances in terms of the "opportunities for individual development . . . provided by social conditions." *Life Chances* 30 (University of Chicago Press, 1979). The "chances" that individuals face are socially constructed, which then defines social structures as "arrangements of chances." Id at 67.

rational to the extent that such assessments of status influences the allocative decisions by those with the power to act.[216]

Institutionalized racism thus exemplifies the use of strategically constructed impressions of racial groups to reinforce group status and privilege. This process operates to reward, rather than to punish, invidious distinctions.[217] However, because of broadly ascribed moral opposition to racial discrimination, a pragmatic ideology evolves to provide nonracial justifications for choices that are fundamentally racially based.

But what is the nature of the group interests that operate when invidious distinctions are made on the basis of other shared attributes of groups? They are precisely the same.[218] While a variety of social influences may operate to weaken the connection between objective social conditions and the development of group or class consciousness,[219] powerful forms of group identification can be readily established.[220] Individuals who recognize the benefits that may be derived from identifying with a particular group (however defined), participate in reinforcing the advantages that such a class enjoys by their articulation of an ideology of difference that devalues those outside the class.[221] This ideology

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[216] See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 Harv L Rev 1005, 1063-1074 (1995).

[217] Robert Cooter argues that "[i]n general, sustaining discriminatory norms requires the collusion of many people, which presupposes sanctions to enforce the discriminatory norms. Informal sanctions such as gossip, ostracism, and boycotts can operate spontaneously, especially when a culture stresses group solidarity." Robert Cooter, *Market Affirmative Action*, 31 San Diego L Rev 133, 153-54 (1994) (cited in note 19).

[218] In interpreting the Equal Credit Opportunity Act, 15 USC §§ 1691-1691f (1994), the courts accept as evidence of a legitimate business purpose the demonstration of statistically significant discriminability. Posch notes that "The ECOA states that a statistically sound system must separate creditworthy from noncreditworthy applicants at a statistically significant rate." Posch, *The Complete Guide to Marketing and the Law*, at 766-67 (cited in note 209). This means that the coefficient for one of a large number of variables in the predictive model must be statistically significant.

[219] Arthur Stinchcombe discusses the barriers to the development of authentic working class consciousness that have emerged in the context of a service economy in chapter 8 of his more comprehensive work, *Information and Organizations* 274-311 (University of California Press, 1990). Related discussions about contradictory class positions are provided by Erik Olin Wright, ed, *The Debate on Classes* (Verso, 1989).

[220] McAdams, 108 Harv L Rev at 1005 (cited in note 214), cites numerous examples from experiments that demonstrate that group identity is quite readily established. Citing results from one study, McAdams notes that "whenever subjects were divided into groups, people consistently evaluated members of their own group more favorably than members of other groups." Id at 1014.

[221] This is the process by which novel classifications are normalized and institutionalized with the active consent of individuals who adopt classifications provided by a variety of institutions. See, generally, Mary Douglas, *How Institutions Think* (Syracuse University Press, 1986).

of difference provides a ready rationalization for discriminatory decisions in employment, in marketing, and in political communication, that cannot be easily shown to have been made on the basis of meaningful efficiency criteria.[222]

However, even if an individual firm *can* demonstrate that the choices *it* has made on the basis of the intelligence derived from a predictive model have increased sales, or reduced costs (granting that *ceteris paribus* never obtains), we are still likely to find that objectionable social consequences result from their actions.[223]

The privacy interests of individuals are inextricably linked to the consequences that befall members of the groups or classes to which they are assigned,[224] whether that assignment has been made by the forces of nature or by a flood of decisions informed by the solution of a system of equations in some multivariate statistical model designed to identify groups or "clusters" of persons.[225]

It is, of course, quite difficult for us to determine at which point the specification of the boundaries of an aggregation would be sufficiently linked to individual identity to raise privacy concerns under the dominant legal construction of "individually

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[222] I want to be clear here to underscore my opposition to the careless, tautological assessments of efficiency that are so common in contemporary talk about markets. I oppose and reject the bald circularity of arguments that define the status quo as efficient *because* "rational" actors are presumed to have "chosen" it. See Walter Adams and James W. Brock, *Economic Theory: Rhetoric, Reality, Rationalization*, in Robert E. Babe, ed, *Information and Communication in Economics* 125-35 (Kluwer Academic Publishers, 1994) (cited in note 20).

[223] This is a claim rooted in an egalitarian stance that is increasingly unpopular. Sydney Verba and Gary R. Orren, *Equality in America: The View from the Top* (Harvard University Press, 1985); Christopher Jencks, *What Must be Equal for Opportunity to be Equal?*, in Norman E. Bowie, ed, *Equal Opportunity* 47-74 (Westview, 1988). This is also a perspective that underscores the unwillingness of individuals to be comforted by assertions that decisions which may victimize them, actually work out well "on the average." Kim Scheppele agrees: "Economists who argue that individuals are *on average* better off under an efficiency-valuing scheme will generally not be convincing to a particular individual on whom the burden falls, particularly if that individual is asked to shoulder a great deal while those around her have to sacrifice nothing." Kim Lane Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* 309 (University of Chicago Press, 1988) (cited in note 154).

[224] Edward Bloustein discusses numerous reasons for protecting the privacy interests of individuals that are linked to the personal utility of group or associational membership. See Edward J. Bloustein, *Group Privacy: The Right to Huddle*, 8 Rutgers Camden L J 219, 222 (1977).

[225] See generally, John Goss, *"We Know Who You Are and We Know Where You Live": The Instrumental Rationality of Geodemographic Systems*, 71 Econ Geography 171 (1995) (cited in note 34).

identifiable information." Ruth Gavison usefully discusses the kind of indirect concern raised when a great deal of information is known about a group, and then one discovers that a particular individual is a member of that group.[226]

The privacy concerns of individuals that are based on assessments of the social and economic opportunities that are available to members of the groups to which they have been assigned are at some point affected by the decisions of legislatures and courts. And, as I have argued, when their interests are compared with those of the firm, the individual is likely to lose.

C. General Principles as Public Policy

I have suggested that collapsing our individual and collective interest in personhood to those aspects of personal information that can be governed by contracts and the discipline of the marketplace ignores the quite severe problems that characterize the market for personal information. Other observers agree.[227]

It must be recognized that the interests of the corporate sector, or of any individual corporation, cannot be assumed to be wholly, or even primarily, coincident with the interests of an entire society. Thus, while individual interests may conflict with, and sometimes ought to prevail over, the interests of the social collective, the "interests" of a corporate entity can never be assumed to be anything other than subordinate to those of society. Indeed, the rationale for the creation of the corporate form was, and ought to remain, the realization of a public purpose that the grant of special privileges would enable.[228]

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[226] Ruth Gavison, *Privacy and the Limits of Law*, 89 Yale L J 421, 429-432 (1980).

[227] Joel Ridenberg, for example, suggests that the "marketplace does not have a level playing field and contains destructive internal inconsistencies." Joel L. Reidenberg, *Setting Standards for Fair Information Practice in the U.S. Private Sector*, 80 Iowa L Rev 497 (1995) (cited in note 37). He suggests that "political weight is greatly skewed in favor of the collectors and manipulators of personal information." Id at 533. The fact that these actors participate so actively in the political process is an inherent distortion of that process. Reidenberg apparently shares the view that this marketplace is rife with sources of inefficiency: "high transaction costs, important externalities, and a significant level of imperfect information." Id.

[228] See, for example, Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 Hastings L J 577 (1990). Mayer argues that even though the Constitution does not mention corporations, the "Framers certainly were aware of corporations. In that era, most corporations were chartered by state legislatures for specific purposes, including banks, canal companies, railroads, toll bridge companies, and trading companies." Id at 579 n 8. The association of the corporate form with the public interest is clear in terms of the "public utility" attributes of most of those granted a charter. See also Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* 17-35 (Harvard University

I have argued that corporations have pursued their interests in personal information almost without hindrance. I have suggested that the courts and the legislatures have tended to privilege corporate interests against those of individuals because an ideological frame links the corporate interest with the collective public interest. Yet it is considered untoward and irresponsible to conclude on a note of defeat and resignation.

I suppose it is possible, even if it is unlikely, that we might establish anonymity as the default condition for all transactions in cyberspace.[229] As with Caller ID, where some jurisdictions now allow subscribers to establish "blocked" status as their preferred mode of interacting with the telephone network (and thereby preserve the calling party's control over the transmission of identifying information), it should be possible to allow the same status to be selected by computer users. This would allow consumers to indicate their interest in privacy and would increase the need for those requiring identification to indicate the reasons, including likely uses, for requiring any form of personal identification.

I expect, however, that there will be fierce opposition mounted against efforts to increase the ability of individuals to assert their rights in this area. Robert Posch argues that the protection of individual privacy is incompatible with the rapid growth of cyberspace and the information-intensive industries that support it.[230] He argues that "[t]hose advocating the restriction of aggregate data to satisfy an imagined problem could take us out of the leadership of the 21st Century economy" because "reducing privacy burdens on the free flow of information is the surest way to stimulate the information economy."[231] And, he celebrates the success with which corporate interests have been able to defeat most other attempts to establish the right of privacy as a restriction on business freedom.[232]

Press, 1991).

[229] This is the view frequently espoused by Marc Rotenberg. See, for example, Dorothy E. Denning and Herbert S. Lin, eds, *Rights and Responsibilities of Participants in Networked Communities* 106-07 (National Academy Press, 1994) (cited in note 92).

[230] Posch, Direct Marketing at 53 (cited in note 203).

[231] Id. Of course, there is considerable debate about whether the information economy represents genuine growth, or a representation of increased costs of coordination of the underlying material economy that involves the production and distribution of manufactured goods. See generally Jorge Schement and Terry Curtis, *Tendencies and Tensions of the Information Age: The Production and Distribution of Information in the United States* (Transaction Publishers, 1995).

[232] Robert J. Posch, Jr., *The 25-Year Privacy Debate has an Institutional Memory,*

The best we might expect to see is that the principles underlying the notion of fair information practices[233] might find their way into law. Those principles might be summarized in this way:

1. *Collection principles* would operate to limit the collection of information to that which is genuinely necessary for the purposes for which it is gathered and would dictate that this information should be gathered from the individual, rather than from third parties.

2. *Transparency principles* assure that individuals are informed about the ways in which information is to be collected and used by the organization.

3. *Access and correction principles* assure that individuals would have access to the information that organizations have compiled, and that they would be able to correct information that they believed to be in error.[234] Related principles would assign responsibility to the data gatherer to insure that the information was accurate and protected against unauthorized use.

4. *Use principles* are among the most important, and therefore the most difficult to establish, because they demand that once gathered, information is not to be used for purposes other than those for which it was initially collected.

5. *Disclosure principles* would require that consent be granted before personal information could be disclosed to third parties.

Direct Marketing 54 (Apr 1996) (cited in note 70).

[233] Similar principles have been discussed in many places over the years, and there may, in fact, be a substantial movement toward their realization in law. See, for example, David H. Flaherty, *Protecting Privacy in Surveillance Societies: The Federal Republic of Germany, Sweden, France, Canada, and the United States* 371-407 (University of North Carolina Press, 1989) (cited in note 147); Privacy Working Group, Information Policy Committee, Information Infrastructure Task Force, *Privacy and the National Information Infrastructure: Principles for Providing and Using Personal Information* (Final Version adopted June 6, 1995) (cited in note 143); Charles Firestone and Jorge Schement, eds, *Toward an Information Bill of Rights and Responsibilities* (The Aspen Institute, 1995); *Comments of the Privacy Rights Clearinghouse on the 'Inquiry on Privacy Issues Relating to Private Sector Use of Telecommunications-Related Personal Information'* (Center for Public Law, Mar 30, 1994); Electronic Privacy Information Center, *Privacy Guidelines for the National Information Infrastructure: EPIC Report 94-1. A Review of the Proposed Principles of the Privacy Working Group*, Washington, DC: EPIC (available online at http://cpsr.org/cpsr/privacy/epic/ EPIC_report_94-1.txt).

[234] There will undoubtedly need to be considerable negotiation about the requirements on individuals to demonstrate that the information and the impressions it creates are incorrect. This is, of course, quite difficult if the information in the file is merely raw data. It will be quite difficult for an individual to demonstrate that a summary assessment is false. Realization of the values that are inherent in the establishment of this principle may require that individuals have the opportunity to include their response to the assessment. Clearly there will be dramatic differences among individuals in their ability to produce a compelling response to this kind of an assessment.

It is here that concerns about the sensitivity of the information are thought to play an important role. For less sensitive information, there seems to be a willingness to allow implied consent, where consent is assumed unless the individual "opted out" of the disclosure. For more sensitive information, express consent would be required.