Journal of Legislation

Volume 47 | Issue 1 Article 1

1-2021

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Cover Page Footnote

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Vincent J. Samar[*]

"[G]overnment of the people, by the people, and for the people shall not perish from the earth."

—Abraham Lincoln[1]

Large-scale data brokers collect massive amounts of highly personal consumer information to be sold to whoever will pay their price, even at the expense of sacrificing individual privacy and autonomy in the process. In this Article, I will show how a proper understanding and justification for a right to privacy, in context to both protecting private acts and safeguarding information and states of affairs for the performance of such acts, provides a necessary background framework for imposing legal restrictions on such collections. This problem, which has already gained some attention in literature, now becomes even more worrisome, as government itself becomes a consumer of this information to fight off a domestic instantiation of the global Covid-19 pandemic. This Article proposes some definite ways in which the courts and Congress might limit both the private sector and the government's use of such data to ensure individual autonomy will not be sacrificed.

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[1] Gettysburg Address (Nov. 19, 1863).

INTRODUCTION

How successful we, as a people, are at achieving a government that is truly "of the people" will depend in great part on our ability to know our own interests and our ability to act on them based on our own reflections. Humans appear to have this capacity of being autonomous insofar as we are able to generate options, deliberate on which option is best, and then stick to what we decide.[2] Should this capacity be lost, humans may no longer conceive of themselves as engaged in self-rule, and any government they are a part of will no longer be thought of as being "of the people." Of course, self-rule does not always reduce to being just able to act on one's own interests and desires. In cases where the very nature of our ability to act would be undercut, what appears as a personal choice may need to be temporarily set aside. But even where this is the case, it must be because our autonomy itself is in jeopardy of being undermined because the apparent personal choice of the individual is not really a personal choice of hers, but a highly sophisticated manipulation of her interests and desires originating from outside herself.

Recent developments in the field of cyber-technology allow large private companies called "data brokers" to gather a wide range of personal information about individuals' desires and wants, larger than even what would be gathered by

[2] Much disagreement exists regarding whether humans have free will. *See, e.g.*, Stephen Cave, *Free Will Exists and Is Measurable*, THE ATLANTIC (June 10, 2016, 9:45 AM), https://www.theatlantic.com/notes/2016/06/free-will-exists-and-is-measurable/486551/; Nicholas Clairmont, *There's No Such Thing as Free Will and Determinism*, THE ATLANTIC (June 1, 2016, 6:35 PM), https://www.theatlantic.com/notes/2016/06/free-will-exists-and-is-measurable/486551/. A classic view on this issue is found in Immanuel Kant's discussion of free will as connected with individual autonomy. According to the *Stanford Encyclopedia of Philosophy*:

> Kant's basic idea can be grasped intuitively by analogy with the idea of political freedom as autonomy. Consider how political freedom in liberal theories is thought to be related to legitimate political authority: A state is free when its citizens are bound only by laws in some sense of their own making—created and put into effect, say, by vote or by elected representatives. The laws of that state then express the will of the citizens who are bound by them. The idea, then, is that the source of legitimate political authority is not external to its citizens, but internal to them, internal to "the will of the people." It is because the body politic created and enacted these laws for itself that it can be bound by them. An autonomous state is thus one in which the authority of its laws is in the will of the people in that state, rather than in the will of a people external to that state, as when one state imposes laws on another during occupation or colonization. In the latter case, the laws have no legitimate authority over those citizens. In a similar fashion, we may think of a person as free when bound only by her own will and not by the will of another. Her actions then express her own will and not the will of someone or something else. The authority of the principles binding her will is then also not external to her will. It comes from the fact that she willed them. So autonomy, when applied to an individual, ensures that the source of the authority of the principles that bind her is in her own will. Kant's view can be seen as the view that the moral law is just such a principle. Hence, the "moral legitimacy" of the [Categorical Imperative] is grounded in its being an expression of each person's own rational will. It is because each person's own reason is the legislator and executor of the moral law that it is authoritative for her.

Kant's Moral Philosophy, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (citations omitted), https://plato.stanford.edu/entries/kant-moral/#Aut (last updated July 7, 2016).

companies such as Google and Facebook. These data brokers usually gather this information without the individual's knowledge, only to sell that information to other companies and users who will use it to target products, services, or solicit political or other actions.[3] A recent report by the Federal Trade Commission ("FTC")[4] states that the nine largest data brokers are:

> Acxiom, CoreLogic, Datalogix, eBureau, ID Analytics, Intelius, PeekYou, Rapleaf and Recorded Future[, and they] obtain and share vast amounts of consumer information, typically behind the scenes, without consumer knowledge. Data brokers sell this information for marketing campaigns and fraud prevention, among other purposes. Although consumers benefit from data broker practices which, for example, help enable consumers to find and enjoy the products and services they prefer, data broker practices also raise privacy concerns.[5]

Such companies pose a serious threat to individual autonomy and democracy when they are able to learn through "private commercial mechanisms of information capture, production, analysis and sales" more about those they surveil than may be known even by the people who are the targets of their surveillance.[6] In such circumstances, there is a real danger that individuals will be induced to act on interests, not necessarily of their own choosing, but that of those who use the information obtained to manipulate, or even manufacture, wants of their own. In such cases, individual freedom is lost if the behavior of the persons so affected no longer represents their own interests and desires, but those of some possibly unknown source. That threat becomes even more problematic if government gets involved in trying to influence people without their knowledge by co-opting the information gathered by the private sector in an effort to affect what individuals believe and how they vote or behave, beyond what may have started out as a legitimate governmental need for the information.

In the past, the right to privacy, which encompasses the right to gather information helpful in determining what to believe and how to act, provided a means for protection against this sort of threat, but that protection is now itself in danger of being lost or enfeebled by mechanisms of how information is gathered, as well as who is gathering the information.[7] If the way information is now gathered and by whom no longer guarantees that privacy will be protected, the result will be a loss of

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[3] Leo Mirani & Max Nisen, *The Nine Companies That Know More About You Than Google or Facebook*, QUARTZ (May 27, 2014), https://qz.com/213900/the-nine-companies-that-know-more-about-you-than-google-or-facebook/. *See also FTC Recommends Congress Require the Data Broker Industry to be More Transparent and Give Consumers Greater Control Over Their Personal Information*, FED. TRADE COMM'N (May 27, 2014), https://www.ftc.gov/news-events/press-releases/2014/05/ftc-recommends-congress-require-data-broker-industry-be-more?utm_source=govdelivery.

[4] FED. TRADE COMM'N, *supra* note 3.

[5] *Id.*

[6] Shoshana Zuboff, *You Are Now Remotely Controlled: Surveillance Capitalists Control the Scientists, the Secrets and the Truth*, N.Y. TIMES (Jan. 24, 2020), https://www.nytimes.com/2020/01/24/opinion/sunday/surveillance-capitalism.html.

[7] *See* Whalen v. Roe, 429 U.S. 589, 605 (1977) (acknowledging for the first time in dicta a constitutional [non-Fourth Amendment] right to informational privacy).

personal autonomy brought about because the private sector is inadequately regulated in the way it gathers information. And that loss of autonomy will not just occur in the private sector but will likely percolate into the public arena as well, especially if government officials, who may have their own agendas, become involved in accessing the information. The latter may occur initially very benignly when such officials or agencies react to a legitimate need for information to protect against a current crisis, like by tracking the movements of people to halt the spread of the novel coronavirus ("Covid-19"). But it can very quickly be fitted into other areas, if the barriers to its escalation are not well laid out.

This Article will describe some of the problems associated with maintaining individual autonomy in general, given new ways technology is used to support data collection methods, and how a more robust protection of individual privacy both by way of legislation and by court decisions might provide a defense. Especially of concern will be to protect against the use of private data to manipulate individual wants and desires so as to undermine a full appreciation of the background considerations to choices, especially when directed to the performance of private acts and participation in democratic institutions. It will also concern itself with protecting against benign and legitimate uses by government of underregulated information, which themselves could pose a threat to individual autonomy in the long run. The Article will draw on a theory of how privacy might be understood and applied in court decisions and legislation, as a background to ensuring individual autonomy is not undermined.

Section I will review a recent *New York Times* column that identifies types of manipulations commercial data collecting mechanisms can produce, as well as how they are used by companies to manufacture consumer behavior. It will also concern itself with how information collected by commercial data collecting companies is being sought by state and federal officials to help stall the spread of Covid-19. Section II will review how, by examining prior English and American case law and scholarly articles, the understanding of legal privacy in the United States evolved to affirm protections for private acts and states of affairs, the latter focusing on information and places, both of which are essential to assure real participation in democratic institutions. Section III will put forth a justification for the legal right to privacy, grounded in human autonomy, and notes how protecting private states of affairs guarantees both the protection of private acts and participation in democratic institutions. Section IV will follow with an application of what the background theory for privacy provides, first by articulating a strategy for resolving conflicts of rights involving privacy and state assertions of a compelling interest. Following that, this Section will consider how cyber-privacy concerns might be more fully protected in the future if legislation is introduced to afford greater authority to the FTC to produce regulations assuring the protection of personal information, as the technology continues to advance and government's need for personal information continues to rise. A brief conclusion will follow, emphasizing the vigilance needed to protect individual autonomy.

I. MANIPULATIONS OF COMMERCIAL DATA TO MANUFACTURE CONSUMER BEHAVIOR AND HOW THAT GETS TRANSFERRED TO PREVENT THE SPREAD OF COVID-19

In a very concerning article in the *New York Times*, prior to the recent Covid-19 pandemic, Shoshana Zuboff warned that those of us who shop, connect, explore, research, or do just about anything on the internet are being remotely controlled not only in what we know, but in what can be learned about us.[8] That information is further substantiated by the aforementioned FTC report on the nine largest data collection companies that gather tremendous amounts of personal data on nearly every U.S citizen and then sell that personal data, without a great deal of transparency, to whoever will pay the price. According to the FTC report:

- Data brokers collect consumer data from extensive online and offline sources, largely without consumers' knowledge, ranging from consumer purchase data, social media activity, warranty registrations, magazine subscriptions, religious and political affiliations, and other details of consumers' everyday lives.
- Consumer data often passes through multiple layers of data brokers sharing data with each other. In fact, seven of the nine data brokers in the Commission study had shared information with another data broker in the study.
- Data brokers combine online and offline data to market to consumers online.
- Data brokers combine and analyze data about consumers to make inferences about them, including potentially sensitive inferences such as those related to ethnicity, income, religion, political leanings, age, and health conditions. Potentially sensitive categories from the study are "Urban Scramble" and "Mobile Mixers," both of which include a high concentration of Latinos and African Americans with low incomes. The category "Rural Everlasting" includes single men and women over age sixty-six with "low educational attainment and low net worths." Other potentially sensitive categories include health-related topics or conditions, such as pregnancy, diabetes, and high cholesterol.
- Many of the purposes for which data brokers collect and use data pose risks to consumers, such as unanticipated uses of the data. For example, a category like "Biker Enthusiasts" could be used to offer discounts on motorcycles to a consumer, but could also be used by an insurance provider as a sign of risky behavior.

[8] Zuboff, *supra* note 6.

- Some data brokers unnecessarily store data about consumers indefinitely, which may create security risks.
- To the extent data brokers currently offer consumers choices about their data, the choices are largely invisible and incomplete. [9]

Such gatherings of so much personal information on individual U.S. consumers creates a serious knowledge gap between those in the industry that have the information and the persons whom the information is about. This gap in knowledge creates what Zuboff describes as an:

> Epistemic inequality [that] is not based on what we can earn but rather on what we can learn. It is defined as unequal access to learning imposed by private commercial mechanisms of information capture, production, analysis and sales. It is best exemplified in the fast-growing abyss between what we can know and what is known about us.[10]

Zuboff claims that "[t]he new centrality of epistemic inequality signals a power shift from the ownership of the means of production, which defined the politics of the 20th century to the ownership of the production of meaning."[11] As she describes it:

> It isn't only what you post online, but whether you use exclamation points or the color saturation of your photos; not just where you walk but the stoop of your shoulders; not just the identity of your face but the emotional states conveyed by your "microexpressions"; not just what you like but the pattern of likes across engagements.[12]

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[9] FED. TRADE COMM'N, *supra* note 3.

[10] Zuboff, *supra* note 6.

[11] *Id.*

[12] *Id.* Some states have already started restricting private entities, but not government entities, from gathering "biometric" information, mostly for the purpose of identity protection. *See, e.g.*, Illinois Biometric Information Privacy Act, 740 ILL. COMP. STAT. 14/5 (2008). In Illinois, the restrictions on gathering of "'[b]iometric information' means any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual." 740 ILL. COMP. STAT. 14/10 (2010). "Biometric identifiers" in Illinois are those physical features that "are biologically unique to the individual" such that "once compromised, the individual has no recourse, is at heightened risk for identity theft, and is likely to withdraw from biometric-facilitated transactions." 740 ILL. COMP. STAT. 14/5 (2008). Illinois law identifies the following biometric identifiers:

> [A] retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry. Biometric identifiers do not include writing samples, written signatures, photographs, human biological samples used for valid scientific testing or screening, demographic data, tattoo descriptions, or physical descriptions such as height, weight, hair color, or eye color.

740 ILL. COMP. STAT. 14/10 (2010). Not "include[d are] biological materials regulated under the Genetic Information Privacy Act" nor "information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996." *Id.* Additionally, Illinois does not include under biometric identifiers "an X-ray, roentgen process, computed tomography, MRI, PET scan, mammography, or other image or film of the human anatomy used to diagnose, prognose, or treat an illness or other medical condition or to further validate scientific testing or screening." *Id.* Still, despite Illinois' efforts to restrict biometric information that can give rise to identity theft, more needs to be done nationally to also limit opportunities for manipulation of individual behavior that might otherwise go unnoticed.

Another example she notes of this epistemic inequality and its use in altering individual behavior was found when:

> *The Australian* exposed [Facebook's] interest in applying "psychological insights" from "internal Facebook data" to modify user behavior. The targets were 6.4 million young Australians and New Zealanders. "By monitoring posts, pictures, interactions and internet activity in real time," the executives wrote, "Facebook can work out when young people feel 'stressed,' 'defeated,' 'overwhelmed,' 'anxious,' 'nervous,' 'stupid,' 'silly,' 'useless,' and a 'failure.'" This depth of information, they explained, allows Facebook to pinpoint the time frame during which a young person needs a "confidence boost" and is most vulnerable to a specific configuration of subliminal cues and triggers. The data are then used to match each emotional phase with appropriate ad messaging for maximum probability of guaranteed sales.[13]

This shift in power from industrial capitalism (often marked by large, multinational corporations' ownership of the means of production) to what Zuboff describes as "ownership of the production of meaning" challenges even governmental control over populations that previously was seen as supported by the means of production.[14] This may be responsible for a rise in government efforts to become more inclined to adopt similar technological means, when the opportunity permits, as a way to also regain lost authority against the growing and largely amorphous private sector of industry giants.[15]

The thrust of Zuboff's article also reaffirms the civil libertarian's concern that this new and growing surveillance reality presents "an unprecedented threat to individual freedom."[16] In reference to that threat, Zuboff writes:

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[13] Zuboff, *supra* note 6 (quoting *Facebook Targets 'Insecure' Kids*, THE AUSTRALIAN (May 2017), https://www.theaustralian.com.au/business/media/facebook-targetsinsecure-young-people-to-sell-ads/news-story/a89949ad016eee7d7a61c3c30c909fa6.).

[14] *Id.* Karl Marx argued that society's superstructure, including its ideology, politics, norms, religion, philosophy, education, art, family, culture, and science emerges from and is shaped and maintained by its base, the means of production, including the relations of production that means establish, which for modern Western democratic societies is capitalism. *See* Nicki Lisa Cole, *Definition of Base and Superstructure: Core Concepts of Marxist Theory*, THOUGHTCO. (Feb. 11, 2020), https://www.thoughtco.com/definition-of-base-and-superstructure-3026372. Moreover, as the superstructure becomes established, it, in turn, legitimizes and maintains the base that gives it rise. *See id.*

[15] *See* Nigel Barber, *Social Networks Challenge Government: Democratic Government is Challenged by the Internet on Two Fronts*, PSYCHOL. TODAY (Apr. 13, 2018), https://www.psychologytoday.com/us/blog/the-human-beast/201804/social-networks-challenge-government (pointing to both terror networks and Silicon Valley, illustrated by the Arab Spring, "and the widespread use of Twitter to organize protests"). Indeed, President Trump's use of Twitter to reshape the presidency might be seen as a way to enlist a similar process in service to his own political purposes. *See* Michael D. Shear et. al., *How Trump Reshaped the Presidency in Over 11,000 Tweets*, N.Y. TIMES (Nov. 2, 2019), https://www.nytimes.com/interactive/2019/11/02/us/politics/trump-twitter-presidency.html.

[16] Zuboff, *supra* note 6 (quoting John M. Broder, *F.T.C. Opens Hearings on Computers' Threat to Privacy and Liberty*, N.Y. TIMES (June 11, 1997), https://www.nytimes.com/1997/06/11/us/ftc-opens-hearings-on-computers-threat-to-privacy-and-liberty.html?searchResultPosition=34).

> Early on, it was discovered that, unknown to users, even data freely given harbors rich predictive signals, a surplus that is more than what is required for service improvement. . . .
>
> The data are conveyed through complex supply chains of devices, tracking and monitoring software, and ecosystems of apps and companies that specialize in niche data flows captured in secret. For example, testing by [t]he *Wall Street Journal* showed that Facebook receives heart rate data from the Instant Heart Rate: HR Monitor, menstrual cycle data from the Flo Period & Ovulation Tracker, and data that revealed interest in real estate properties from Realtor.com—all of it without user knowledge.[17]

What this *New York Times* column so pointedly perceived as a danger to individual autonomy becomes even more momentous given the outbreak of Covid-19, which has forced a large segment of the workforce to hibernate in their homes, doing whatever work they can online.[18] Indeed, because it is reasonable to expect that even after the virus eventually comes under control and people no longer suffer remaining at home, much of normal work life will have converted into an online *modus vivendi*.[19] This being likely, it becomes even more concerning that individual privacy be protected from the additional opportunities this will provide data collectors to gather information and their potential purchasers to use the information to affect consumer behavior in this new internet work environment.[20]

Currently, several software companies are developing programs to track cell phone users to see if they are complying with "stay-at-home" orders.[21] Even more significantly, several state governments are encouraging this development and making use of this service in order to try to get a better handle on how the Covid-19

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[17] *Id.*

[18] Prior to the outbreak of the coronavirus, the number of people working from home had already increased. U.S. census data indicates that the number of workers working from home in 2017 was 5.2%, or approximately eight million people. That number was up from 5% in 2016 and 3.3% in 2000. *See* Dan Kopf, *Slowly but Surely Working from Home is Becoming More Common*, QUARTZ AT WORK (Sept. 17, 2018), https://qz.com/work/1392302/more-than-5-of-americans-now-work-from-home-new-statistics-show/. A Gallup survey had shown that those who work remotely at least part of the time was up from 39% in 2010 to 43% in 2016. *See* Annemarie Mann & Amy Adkins, *America's Coming Workplace: Home Alone*, GALLUP (Mar. 15, 2017), https://news.gallup.com/businessjournal/206033/america-coming-workplace-home-alone.aspx?utm_source=link_wwwv9&utm_campaign=item_236222&utm_medium=copy.

[19] *See* Catherine Thorbecke, *As Coronavirus Spreads in the US, Employers Gear Up for Massive Work-From-Home Experiment: Experts Share Tips on How to Stay Afloat and Operational Amid an Outbreak*, ABC NEWS (Mar. 3, 2020, 5:30 AM), https://abcnews.go.com/Business/coronavirus-spreads-us-employers-gear-massive-work-home/story?id=69282662.

[20] It is interesting to note that given the prevalence of cloud computing and evidence for ordinary criminal investigations being increasingly held in servers in different countries, the U.S. and other foreign governments have had to confront privacy concerns, when sharing personal information, which for the U.S. fall under the Fourth Amendment, *See* Peter Swire & Justin Hemmings, *Overcoming Constitutional Objections to the CLOUD Act*, AM. CONST. SOC'Y (Feb. 24, 2020), https://www.acslaw.org/issue_brief/briefs-landing/overcoming-constitutional-objections-to-the-cloud-act-2/.

[21] *See* Geoffrey A. Fower, *Smartphone Data Reveal Which Americans Are Social Distancing (and not)*, WASH. POST (Mar. 24, 2020), https://www.washingtonpost.com/technology/2020/03/24/social-distancing-maps-cellphone-location/.

virus is spreading, so its spread can be halted.[22] Obviously, in this period of a global pandemic that so far has taken 2,174,702 lives worldwide[23] and over 419,827 lives in the United States alone,[24] with the further expectation that these numbers will be increasing in the U.S. to over 500,000, government efforts to halt the spread of this disease would appear to be a compelling interest.[25] And, no doubt, courts, if asked to consider the privacy of individuals when considering these matters, will likely uphold the state's compelling interest to gain whatever information is needed to halt the spread of this disease.[26]

Where the issue of protecting individual privacy and liberty really takes hold, now that government itself is getting into the act of accessing highly personal consumer information, is what happens after the Covid-19 threat is eliminated. Certainly, there are those in the government and the private sector who will want to keep available this tracking information. Obviously, many private businesses may find it helpful to identify markets where they might sell their products.[27] But beyond those private commercial interests is the likely government interest, both federal and state, to track those who might be suspected of criminal activity or, more urgently, those who might be involved in a terrorist plot.[28] Additionally, one can easily

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[22] *See* Hollie Silverman, *New Mexico Using Cell Phone Data to Create Social Distancing Models and Considering More Restrictive Travel Measures*, CNN (Apr. 10, 2020), https://www.cnn.com/2020/04/09/us/new-mexico-cell-phone-data-track-residents/index.html. Although the U.S. government has, as yet, not used cell phones "to enforce stay-at-home orders or track patients," it is engaged "in talks with Facebook, Google and other tech companies about using anonymous location data to combat the coronavirus, including tracking whether people are keeping at safe distances from one another." Fower, *supra* note 21; *see also* Tony Romm et. al., *U.S. Government, Tech Industry Discussing Ways to Use Smartphone Location Data to Combat Coronavirus*, WASH. POST (Mar. 17, 2020), https://www.washingtonpost.com/technology/2020/03/17/white-house-location-data-coronavirus/.

[23] *Covid-19 Coronavirus Pandemic*, WORLDOMETER, https://www.worldometers.info/coronavirus/ (last visited Jan. 27, 2021).

[24] *CDC COVID Data Tracker: Maps, Charts, and Data Provided by the CDC*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited Jan. 27, 2021).

[25] *See* Susannah Luthi, *U.S. on Pace to Pass 100,000 Covid-19 Deaths by June 1, 2020, CDC Director Says: This Marks the First Time Robert Redfield Has Explicitly Addressed the Grim Milestone*, POLITCO (May 15, 2020), https://www.politico.com/news/2020/05/15/us-on-pace-to-pass-100-000-covid-19-deaths-by-june-1-cdc-director-says-261468.

A "compelling interest" has been described as follows:

> A compelling state (or governmental) interest is an element of the strict scrutiny test by which courts exercise judicial review of legislative and executive branch enactments that effect constitutional rights, such as those found in the First Amendment.
>
> An interest is compelling when it is essential or necessary rather than a matter of choice, preference, or discretion.

Ronald Steiner, *Compelling State Interest*, THE FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest.

[27] *See* Haris Bacic, *Become a Data Genius: Track Everything in Your Small Business,* FORBES (June 20, 2016), https://www.forbes.com/sites/allbusiness/2016/06/20/become-a-data-genius-track-everything-in-your-small-business/#4d6d10748797.

[28] *See* Editorial, *The Government Uses 'Near Perfect Surveillance' Data on Americans: Congressional Hearings are Urgently Needed to Address Location Tracking*, N.Y. TIMES (Feb. 7, 2020), https://www.nytimes.com/2020/02/07/opinion/dhs-cell-phone-tracking.html. In an e-mail from U.S. Senator Richard J. Durbin to Vincent J. Samar, dated July 17, 2020, it is noted that "we have seen a worrying trend of companies like Clearview Al scraping photographs from social media platforms like Facebook and Twitter, and

understand, once this information becomes readily available, the government's concern to have access to it in order to plan for the next pandemic that might pose an even graver infection threat to the country.[29] In addition to the traditional Fourth Amendment concerns this poses with respect to law enforcement, there is the concern that this information may be used to track political dissent and other forms of legal anti-government activity.

That said, commercial interference with personal privacy should not be all that surprising. The twentieth-century economist John Kenneth Galbraith, in a now-famous article entitled *The Dependence Effect*, written long before the development of the internet, identified how commercial interference with personal privacy and liberty was already taking place back in the 1950s.[30] Then, he wrote that human "wants are dependent on production."[31] "As a society becomes increasingly affluent, wants are increasingly created by the process by which they are satisfied. This may operate passively. Increases in consumption, the counterpart of increases in production, act by suggestion or emulation to create wants."[32] Galbraith's point was to declare what was already known, the "more direct link between production and wants [that] is provided by the institutions of modern advertising and salesmanship."[33] As to that link, Galbraith writes, any "businessman and the lay reader will be puzzled over the emphasis which I give to a seemingly obvious point."[34] But if Galbraith's concern was real back in the 1950s, then all the more should his concern be applied to the way today's private commercial mechanisms of information gathering and information sale operate to control our needs and wants by offering us products to attend to them. If producers can, through the use of various private mechanisms of information technology, learn of an individual's developing wants and desires, perhaps even before the individual himself has become aware of them, then the likelihood of individuals being shuffled down a specific path toward satisfying their wants, without a chance to fully appreciate which wants are worth satisfying and

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amassing databases of Americans who have no idea that their photographs are in a facial recognition database for law enforcement use." E-mail from Senator Richard J. Durbin to Vincent Samar (July 17, 2020, 1:50 PM EST) (on file with author). That same e-mail also expressed concerns "about overuse or misuse of this technology, given that few laws or court rulings have established guidelines or boundaries on when or where this technology can or should be used." *Id.* It noted that "[f]acial recognition technology had been found to be far less accurate when analyzing the faces of women or people of color." *Id.* And that following the death of George Floyd, "[m]any expressed concern that law enforcement agencies could use facial recognition technology to identify who participated in these peaceful protests." *Id.*

[29] Currently,

> [i]n seeking to battle the coronavirus, the U.S. government is not seeking to collect and maintain a database of Americans' whereabouts, sources cautioned. Rather, U.S. officials have asked whether companies' vast stores of geolocation data might help epidemiologists spot trends, including vulnerable populations, or identify areas at risk, such as hospitals under strain, two people said.

Romm et al., *supra* note 22.

[30] John Kenneth Galbraith, *The Dependence Effect*, *in* THE AFFLUENT SOCIETY 126 (40th Anniversary ed., 1998).

[31] *Id.* at 126, 129.

[32] *Id.* at 131.

[33] *Id.* at 129.

[34] *Id.* at 130.

by how much, is greatly increased. This is where human freedom and individual privacy become most at risk.

As a consequence of this concern, some may wish for an earlier time where such personal interference by use of technology with a person's private life was not possible. But even aside from the fact that we cannot turn back the clock, it remains doubtful that we should want to. The above discussion of information mechanisms following where people travel or what they might desire has legitimate uses, as the social distance tracking involved in responding to the coronavirus teaches. Where society fails is not with regard to allowing such legitimate uses, but with failing to provide the equally important attention needed to contain such uses only to their legitimate purposes. The genie may be out of the bottle, but the space in which the genie is allowed to operate should be controlled. Proper use of laws to protect basic privacy rights is essential if society is to continue to evolve technologically while still remaining democratic. So, it is to the privacy side of this equation, what it means and how it is justified, that we must now turn.

II. PRIVACY AND THE LAW

Our current discussion of privacy and technological intrusions needs to be clarified. How exactly does technology intrude on privacy? Does it only potentially threaten private information? Might private acts be involved? Additionally, what is a private act? How does information about one's wants, desires, current psychological state, or places one visits on websites implicate not only private information, but private acts as well? Together, answering these questions should unravel at least some of the more obvious concerns commercial-information-gathering technology places on the performance of private acts. More importantly, it should provide a framework for how questions about information gathering should get decided. The previous Section expressed a concern over the clandestine use of personal information to affect private behavior. The next Section will show how the protection of private acts is logically, if not temporally, prior to protecting autonomy. Given this arrangement, the discussion here will first focus on making sense of what is meant by a private act and its prudential connection to private information and places.

Ultimately, this arrangement hopes to show how private acts describe a basic liberty at the core of our concern for protecting individual autonomy. A concern closely related to protecting private acts is protecting private information and states of affairs, which turns out to be prudentially necessary for private acts to occur. Because performance of private actions can be attenuated when too much personal information is made generally available, limits are needed on just how much personal information should legally be available for use in influencing private behavior. Such limits are also needed to offset potential illegal uses, even in contexts where government legitimately seeks to gain information from private sector data banks to respond to a global pandemic. So, let us begin by first stating what is meant by a private act.

The definition that will be put forth is derived from an analysis of how cases arising in the Fourth Amendment,[35] tort,[36] and constitutional areas of the law appear to overlap.[37] This is important because the privacy right to be offered is broader than what any one area of the law would recognize. Early understandings that gave rise to the Fourth Amendment (such as reasonable expectations of privacy),[38] the tort area

[35] Berger v. New York, 388 U.S. 41, 62–63 (1967) (striking down a New York statute that would allow an *ex parte* order for eavesdropping if there were a reasonable belief that it might produce evidence of a crime); Katz v. United States, 389 U.S. 347, 359 (1967) (holding that an FBI wiretap of a phone booth was subject to Fourth Amendment protections). Justice Harlan's concurring opinion in *Katz* introduces the idea of a "reasonable expectation" of privacy, which occurs with regard to what might be overheard when the glass door of a phone booth is shut. *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

[36] In an important article on tort privacy, Professor William Prosser identifies the following four areas of tort privacy questions, sometimes giving rise to constitutional questions when the government acts to promote or restrain common law privacy torts:

> (1) Regarding seclusion and solitude, see Breard v. City of Alexandria, 341 U.S. 622, 626 (1951), which allowed a municipality to ban commercial solicitations at private residences on the basis of "the living right of [people] to privacy [in the sense of being left alone] and repose." *See also* Pub. Utils. Comm'n of D.C. v. Pollak, 343 U.S. 451 (1952) (holding that the privacy of bus passengers was violated because busses carried FM receivers, which broadcast music, news, and sometimes commercial advertising).
>
> (2) Regarding the reporting of embarrassing private facts, see Melvin v. Reid, 297 P. 91 (Cal. Dist. Ct. App. 1931) (allowing a former prostitute who had been involved in a murder trial to sue when, seven years after her acquittal and after she had made new life for herself, a movie, *The Red Kimono*, was made depicting her earlier life). *Contra* Sidis v. F-R Publ'g Co., 113 F.2d 806 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1940) (upholding the First Amendment right of the *New Yorker* magazine to report on an infant prodigy who intentionally disappeared from public life because the matter was of public interest).
>
> (3) Regarding being placed in a false light in the public eye, see Lord Byron v. Johnson, 35 Eng. Rep. 851 (1816), in which the court held fixing Byron's name to a poem he did not write was actionable. *But see* Time Inc. v. Hill, 385 U.S. 374, 394 (1967) (holding *Life* magazine's publication of a story falsely depicting the infliction of violence on the Hill family taken as hostages by three escaped convicts was not actionable because it was not published "with knowledge of [its] falsity or in reckless disregard of the truth"). Justice Douglas, in his concurring opinion, noted that "[s]uch privacy as a person normally has ceases when his life has ceased to be private." *Id.* at 401 (Douglas, J., concurring).
>
> (4) Regarding the appropriation of a person's name or likeness, see Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902), *superseded by statute*, N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2020), *as recognized in* Lohan v. Take-Two Interactive Software, Inc., 31 N.E.3d 389 (N.Y. 2018). Following a ruling in favor of the defendant, after a woman's likeness had been made to adorn a package of Flour of the Family without her permission, the New York legislature passed a statute affording privacy protection from commercial exploitation.

William Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

[37] Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a Connecticut statute that prohibited married couples from using contraceptives and doctors from advising on their use violated a constitutional right to privacy); Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that a constitutional right to privacy extends to unmarried persons); Roe v. Wade, 410 U.S. 113 (1973) (holding that a constitutional right to privacy includes a woman's right to terminate a pregnancy before the third trimester); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (holding that a constitutional right to privacy extends to minors to purchase contraceptives); Lawrence v. Texas, 539 U.S. 558 (2003) (holding that state criminal laws prohibiting same-sex consensual intimacy in the home violate basic interests in constitutional privacy and intimacy under the Due Process Clause of the Fourteenth Amendment).

[38] Long before the Fourth Amendment came into existence was the Magna Carta provision providing, "[n]o freeman shall be taken or (and) imprisoned and diseased or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or (and) by the law of the land." SAMUEL E. THORNE ET AL., THE GREAT CHARTER: FOUR ESSAYS ON MAGNA CARTA AND THE HISTORY OF OUR LIBERTY

(including seclusion and solitude, not having embarrassing facts disseminated, not being placed in a false light, or having one's likeness exploited for commercial purposes),[39] and constitutional privacy (involving intimate decisions)[40] are well known. The overlap is found in the fact that issues of privacy in all three of these areas of the law assert a claim to negative freedom in the sense of "the self-to-be-let-alone"[41] but must also be "self-regarding," in the sense that no other person's basic interest is involved.[42] This is an important background recognition in uniting the three areas, for, on their own, the Fourth Amendment and tort areas are more related to privacy of information, whereas the constitutional area (other than Fourth Amendment criminal procedure) is more related to intimate actions that the government has little business in preventing. Additionally, privacy claims under the Fourth Amendment and other constitutional areas are against the government, since the Constitution and Bill of Rights only pose restrictions on the government, whereas tort privacy claims involve civil actions between individual persons or groups.[43] As an assurance that any claim to privacy will not be open to wide speculation about just how another's interest may be affected, it is necessary to impose a requirement that the mere description of the act "without the inclusion of any additional facts or causal theories" would not suggest a conflict with any other person's interest.[44] This requirement is necessary to ensure the definition will stand on its own, establishing a prima facie case prior to any additional evidence being brought forth to show the privacy claim should be overridden in a particular case. One other factor that needs to be considered concerns the possible range of the interest involved. Obviously, if the idea of an "interest" is left too open-ended, the possibility arises that no action

132 (1965). *See also* Semayne's Case (1603) 77 Eng. Rep. 194 (K.B.) (holding that, absent prior notice of the sheriff's arrival, a joint tenant can refuse an attempted execution on the personal property of the decedent judgment-holder).

[39] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (providing the foundation for recognizing a tort right to privacy).

[40] In Olmstead v. United States, 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967), Justice Brandeis dissented with a statement far broader than the Fourth and Fifth Amendment issues the case turned on. Brandeis wrote:

> The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized men.

Id. at 478 (Brandeis, J., dissenting).

[41] VINCENT J. SAMAR, THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION 65 (1991).

[42] *Id.* at 65–67.

[43] A tort is "a civil wrong or wrongful *act*, whether intentional or accidental, from which injury occurs to another." *Tort*, THE PEOPLE'S LAW DICTIONARY (emphasis added), https://dictionary.law.com/Default.aspx?selected=2137 (last visited 1/1/21).

[44] SAMAR, *supra* note 41, at 67.

might ever be considered private.[45] Thus, to have a meaningful definition of a private act, the interests it must affect are limited to only basic interests in freedom and well-being. This is necessary to ensure that the scope of the interest involved is not overbroad but restricted to only encompass such basic concerns, which, on the freedom side, include "freedom of expression, privacy, freedom of thought, worship" and, on the well-being side, are "life, health, physical integrity (as in not being assaulted), and mental equilibrium (as in not be subject to mental harassment)."[46] Such interests are separate from any derivative concerns that presuppose conceptions "about facts or social conventions."[47] The latter could undermine the notion of a private act if not segregated out by making the very idea of a private act open to challenge by others who might have a derivate interest in the outcome. Thus, adjusting for these concerns, a definition of a private act emerges. That definition states, "*[a]n action is self-regarding (private) with respect to a group of other actors if and only if the consequences of the act impinge in the first instance on the basic interests of the actor and not on the interests of the specified class of actors.*"[48]

What is also interesting to note about the definition is that it is a relational definition. That is to say, what may be private between one group of people may not be private if a different group were involved. Whether I wear a toupee, for example, would not likely be private to my immediate family but should, all else being equal, be private to the IRS.[49] By the same token, what my income was last year may be private as regards certain family members but certainly not private to the IRS. Consequently, in making a privacy claim, it is necessary to specify the particular group the claim is being applied to. Additionally, it is necessary to limit the meaning of "in the first instance" in the definition to only what a "mere description of the act" would entail, when confined to only basic interests. This will provide the basis for when a claim to an act being private can be plausibly set forth. It does not, however, explain why the law should care about protecting private acts, nor does it provide the conditions under which a private act might be intruded upon. That would require a justification for a right to privacy separate from any understanding of its meaning. Before addressing that issue, however, it should be helpful to also explain more precisely what is meant by private "states of affairs," which include both information and places, and how this area of privacy law relates to private actions. In the case of privacy of information and places, a corollary definition to the first reads: "*[a] state of affairs is private with respect to a group of other actors if and only if there is a*

[45] *See id.* at 66. For example, if a person had an interest in never having to see a red stop sign because seeing red stop signs made them sick in the stomach, the placement of a red stop sign outside the home would violate the person's privacy right to freely travel where one wanted to.

[46] *Id.* at 68.

[47] *Id.* "An example of a derivative interest [on the well-being side] is to receive a good education," since the interest combines "the basic interest in well-being . . . with the factual conception that one's well-being will be benefited by education." *Id.* On the freedom side, "being allowed to marry is derivative of the basic interest in freedom combined with the social convention of marriage." *Id.*

[48] *Id.* (emphasis in original).

[49] *See id.* at 64–65.

convention, recognized by members of the group, that defines, protects, preserves, or guards that state of affairs for the performance of private acts."[50]

Here a state of affairs might include limiting the availability and use of information only to a limited number of people, as well as to provide a convention for determining the places where private acts might be performed. What is particularly interesting to note about this second definition is how it is connected to private acts. It is saying that private states of affairs provide for the possibility of private acts occurring. This will need further explanation below. For the moment, one notes that the second definition, unlike the first, is culturally relative in the sense that a convention will need to be recognized by members of the relevant group to protect the state of affairs for the performance of private acts. That convention could be simply the closing of shutters to one's windows or of a glass door on a phone booth (as in the past), the locking away of papers, or adopting certain notices or behaviors to signal that confidentiality is expected. As will be explained, societies that seek to protect private acts will find it necessary to set out a set of conventions to limit the availability of information about private acts and prevent intrusion into places where they may occur.

Why should it be necessary to protect certain states of affairs as private in order for private acts to be practicable? The problem here is one of psychology.[51] People are often intimidated by what others may learn about them.[52] The intimidation may assume many forms, from public disagreement with what one plans to do, to challenges to one's beliefs, to attacks on one's thinking process and personal choices as being immoral, irreligious, or possibly illegal. In short, protection of private states

[50] *Id.* at 73. (emphasis in original).

[51] A recent article that appeared on NBC's website notes:

> Psychology says that part of human nature's default mode is to be social. One theory: people have an innate (and very powerful) need to belong. Some key arguments (published in the journal *Psychological Bulletin* in 1995) [present] evidence that shows most people make social ties under most conditions—and most people try to avoid breaking those ties if they can.

Sarah DiGiulio, *In Good Company: Why We Need Other People to be Happy*, NBC NEWS: BETTER HEALTH (Jan. 9, 2019, 1:50 PM), https://www.nbcnews.com/better/health/good-company-why-we-need-other-people-be-happy-ncna836106. The article goes on to point out that a strong social network allows our brains to work better and tends to give people a longer lifespan. But the article then goes on to warn:

> The exception is when a relationship's negatives outshine its benefits. Be wary if a relationship encourages bad habits or causes distress, says Debra Umberson, PhD, Professor of Sociology and Director of the Population Research Center at the University of Texas at Austin. "A bad relationship is worse than no relationship when it comes to health."

Id.

[52] Even in situations where the psychological effect may be thought to be benign or in service to a good cause, it should not be dismissed.

> The psychological effect of being watched by others has been proven a powerful tool in boosting honest or charitable behaviors while reducing dishonest behaviors. This watching effect increases self-awareness and causes individual[s] to consciously modify their behavior to increase compliance with social standards.

Jiaxin Yu et al., *Being Watched by Others Inhibits the Effect of Emotional Arousal on Inhibitory Control*, FRONTIERS IN PSYCH. (Jan. 20, 2015) (citations omitted), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4299288/.

of affairs turns out to be indirectly connected to the protection of an individual's autonomy, self-identity, and well-being.[53] One does not have to reach very far into the history of the United States to find examples where individual autonomy might have been constrained when hotly contested viewpoints were debated, such as occurred over abolishing slavery,[54] affording women the right to vote,[55] providing equality of opportunity to racial minorities,[56] and granting equal liberty to same-sex couples to marry.[57] Human nature is such that people are concerned with how they are viewed by relatives, friends, neighbors, and other members of society.[58] If that concern has no boundaries, the effect may very well be to constrain individual autonomy. Additionally, democratic societies in particular stand to lose if "the permanent interests of man as a progressive being"[59] could be undercut by adverse public opinion, where such society's interests in controlling individual autonomy may be, at most, only indirect,[60] and where such adverse public opinion would undermine an individual's ability to figure out what really is in her own best interests.

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[53] In a 2009 report by the Institute of Medicine, it is noted that:

> There are a variety of reasons for placing a high value on protecting the privacy, confidentiality, and security of health information. Some theorists depict privacy as a basic human good or right with intrinsic value. They see privacy as being objectively valuable in itself, as an essential component of human well-being. They believe that respecting privacy (and autonomy) is a form of recognition of the attributes that give humans their moral uniqueness.
>
> The more common view is that privacy is valuable because it facilitates or promotes other fundamental values, including ideals of personhood such as:
>
> - Personal autonomy (the ability to make personal decisions)
> - Individuality
> - Respect
> - Dignity and worth as human beings

INST. OF MED., BEYOND THE HIPAA PRIVACY RULE: ENHANCING PRIVACY, IMPROVING HEALTH THROUGH RESEARCH 77 (Sharyl J. Nass et al. eds., 2009) (citations omitted), https://www.ncbi.nlm.nih.gov/books/NBK9579/.

[54] *See 1832 Speech Given in the House of Delegates Regarding Abolition*, THE HISTORY ENGINE, https://historyengine.richmond.edu/episodes/view/3883 (last visited May 17, 2020).

[55] *See* JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN'S L.J. 103 (1994).

[56] *See The Civil Rights Movement and the Second Reconstruction, 1945–1968,* HISTORY, ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Keeping-the-Faith/Civil-Rights-Movement/ (last visited May 17, 2020).

[57] *See* Murray Dry, *The Same-Sex Marriage Controversy and American Constitutionalism: Lessons Regarding Federalism, the Separation of Powers, and Individual Rights*, 39 VT. L. REV. 275 (2014).

[58] In *Politics*, Aristotle remarks, "[M]an is by nature a political animal. And he who by nature and not by mere accident is without a state, is either a bad man or above humanity . . . ." ARISTOTLE, POLITICS (Benjamin Jowett trans., 2009), http://classics.mit.edu/Aristotle/politics.html. Psychologists talk about the need to belong as influencing human behavior and motivation. *See* Kendra Cherry, *How the Need to Belong Influences Human Behavior and Motivation*, VERYWELL MIND (Apr. 28, 2020), https://www.verywellmind.com/what-is-the-need-to-belong-2795393.

[59] John Stuart Mill, *On Liberty* (1859), *reprinted in* ESSENTIAL WORKS OF JOHN STUART MILL 264 (Max Lerner ed., 1961). Although Mill was a utilitarian, he stated that "it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being." *Id.*

[60] See *id.* at 265, where Mill acknowledges that:

> [t]here is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and

Since this article is focused on cyber-security and privacy, the reader might be inclined at this point to consider how protecting human autonomy by protecting privacy relates, by analogy, to shielding the core processor of a computer from being infected by malware or the human brain from being subject only to indoctrinating propaganda without any allowance for critical thinking. The goal of the protection is not to disallow information from being considered by either the processor or the mind but, in the case of the human mind, because it has the capacity to deliberate, it is to ensure that any consideration of the information's merits is critically evaluated.[61] Were such limits not imposed, the choices even of the human mind, like the results put forth by the processor, may very little reflect the purposes animating its use.

Even if, when deliberating over whether to adopt a particular belief or set of beliefs, the person's choice turns out to be faulty (leaving aside how that would be measured), there would still be a major loss to autonomy if the person was not allowed to discover this error for herself by critical thinking on her own. This is not to say that the purpose of protecting private states of affairs should be to allow people to do wrongful actions or to exclude others from helping them consider relevant information. Nor is it to say that engaging others in thinking through a problem may not add significantly to the process of deliberation. It is to say that the process of determining how one's own life goes forward, including what policies one will support or beliefs one will hold, should not be constrained from outside, unless there is a clear indication that harm to others will occur. For indeed, if people did not have a space to determine their own beliefs regarding how to live their own lives, society itself would suffer the real harm of being unsure in whose interest it was operating. As is shown by social influence studies, individuals do not always just follow the group but sometimes actually do evaluate the information they are presented, and when they do, depending on their strength of will, may be in a better position to make up their own mind and be a part of a democratic process that upholds individual rights and affirms the authority of the law.[62] Especially should this be true when the matter

conduct which affects only himself, or if it affects others, only with their free, voluntary, and undeceived consent and participation.

[61] Christine Korsgaard makes an important point in discussing how the human mind operates as a source of normativity. In her book, *The Sources of Normativity*, Korsgaard writes:

> [O]ur capacity to turn our attention on to our own mental activities [something Korsgaard claims other animals do not do] is also a capacity to distance ourselves from them, and to call them into question. I perceive, and I find myself with a powerful impulse to believe. But I back up and bring that impulse into view and then I have a certain distance. Now the impulse doesn't dominate me and now I have a problem. Shall I believe? Is this perception really a *reason* to believe? I desire and I find myself with a powerful impulse to act. But I back up and bring that impulse into view and then I have a certain distance. Now the impulse doesn't dominate me and now I have a problem. Shall I act? Is this desire really a *reason* to act? The reflective mind cannot settle for perception and desire, not as such. It needs a *reason*. Otherwise, at least as long as it reflects, it cannot commit itself or go forward.

CHRISTINE KORSGAARD, THE SOURCES OF NORMATIVITY 93 (1996).

[62] *See, e.g.*, Anahad O'Connor, *The Struggle for Iraq: Psychology; Pressure to Go Along with Abuse Is Strong, but Some Soldiers Find Strength to Refuse*, N.Y. TIMES (May 14, 2004), https://www.nytimes.com/2004/05/14/world/struggle-for-iraq-psychology-pressure-go-along-with-abuse-strong-but-some.html.

affects their own immediate health or well-being or the health and well-being of those whom they most care about.[63] None of this is meant to suggest how an individual should necessarily approach deciding what is the best way to carry on their private lives. But before one may decide to join or take a position in the public arena, on an issue of private or public concern, she needs the security of knowing, while in the formulating stage of her thinking, that her willingness to deliberate on the issue will not be opened up to public ridicule. The old aphorism "it is no one else's business" operates in such cases to afford the social distance necessary for one to make up one's own mind unhampered by what others might think.[64]

Having specified two significant definitions of "privacy" for legal purposes, it is important to state more fully how they might operate to decide a legal case. The definition of "private state of affairs" operates both in the Fourth Amendment area and the torts area, depending on whether the claim being brought is against another person as in the torts area or presents a legitimate challenge to the police power of the state under the Fourth Amendment. In both cases, the first question that will need to be resolved is whether there existed, at the time of the challenged act, a socially recognized convention creating a zone of privacy that "defines, protects, preserves, or guards that state of affairs for the performance of private acts."[65] Referencing society here, rather than the law, as the place where such conventions might arise allows for zones of privacy to accommodate changes in technology before being recognized by the law in much the same way that new kinds of ownership for intangible goods gave rise to the legal recognition of patents, copyrights, trademarks, and trade secrets.[66] In this respect, society and not law should be the original source of conventions that identify what information gets recognized as private.

With regard to private acts, if the claim is that a seemingly legal prohibition in a state or federal statute, regulation, or executive order violates an individual's constitutional right to privacy, the first challenge will be to show that the government's characterization of the prohibited action reveals an infringement of either a basic interest in freedom, including of expression, privacy, thought, worship, etc., or a basic interest in well-being, including life, physical integrity, and mental equilibrium.[67] This result, of course, will require that no additional facts or social conventions be discretely made part of the interest so described as to convert it from a basic into a derivative interest. Were the latter to become the norm, no prima facie

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[63] *See generally* JEREMIAH J. GARRETSON, THE PATH TO GAY RIGHTS: HOW ACTIVISM AND COMING OUT CHANGED PUBLIC OPINION 6–7 (2018) (ebook) (arguing that "exposure to lesbians and gays was the defining factor that has caused distinctive change on gay rights attitudes as compared to other issues—the theory of *affective liberalization*").

[64] *No One Else's Business*, REVERSO DICTIONARY, https://dictionary.reverso.net/english-definition/no+one+else%27s+business (last visited Apr. 25, 2020).

[65] *See* SAMAR, *supra* note 41, at 73.

[66] *See* Rich Stim, *Overview of Intellectual Property Laws*, STANFORD UNIV. LIBRARIES, https://fairuse.stanford.edu/overview/introduction/intellectual-property-laws/ (last visited Dec. 16, 2020); Michael J. Formica, *Why We Care About What Other People Think of Us*, PSYCH. TODAY (Dec. 31, 2014), https://www.psychologytoday.com/us/blog/enlightened-living/201412/why-we-care-about-what-other-people-think-us.

[67] *See* SAMAR, *supra* note 41, at 67–68.

claim for privacy protection would ever be secure since the government could always stretch the definition of an interest to extend beyond the well-recognized categories of basic interests.[68] However, an exception to this rule might arise if the government were successful at convincing the Supreme Court of the United States that the current understanding of private acts falls outside the scope of protections that had been previously deemed worthy of constitutional protection.[69] In such a circumstance, the constitutional right to privacy for private acts would be called into question and so would the background analysis being presented here. So, the question of whether a right to privacy for private acts is properly grounded in a constitutional value needs now to be considered.

III. JUSTIFYING A LEGAL RIGHT TO PRIVACY

Thus far, this Article has described serious privacy concerns arising from an "unequal access to learning" personal individual information created by "private commercial mechanisms of information capture, production, analysis and sales."[70] The Article has pointedly acknowledged the dominance over aspects of consumers' personal liberty and privacy that the private sector of the economy maintains by the use of this technology. It has also recognized an even greater threat to individual privacy and personal liberty, as state (and maybe the federal) governments begin to draw upon the massive amount of data collected by data brokers to fight a global war against the Covid-19 pandemic.[71] Currently, there are over 101, 087,195 confirmed cases of the virus worldwide and the number of deaths worldwide is 2,174,702.[72] But these numbers change substantially every day. In the United States alone, as of January 27, 2021, the reported number of cases of Covid-19 infections is 25,172,433 and the number of deaths is 419,827.[73] What these numbers attest to is the likely need

[68] *See id.*

[69] This is because the Constitution was interpreted by the Supreme Court in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) to afford the Supreme Court the sole power of judicial review as to what the Constitution means and whether acts of Congress comport with it. In the words of Chief Justice Marshall:

> [I]f a law be in opposition to the [C]onstitution; if both the law and the [C]onstitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the [C]onstitution; or conformably to the [C]onstitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the [C]onstitution; and the [C]onstitution is superior to any ordinary act of the legislature; the [C]onstitution, and not such ordinary act, must govern the case to which they both apply.

Id. at 178.

[70] Zuboff, *supra* note 6.

[71] *See Covid-19: People: How Governments Are Using Personal Data to Fight Covid-19 (UK)*, HERBERT SMITH FREEHILLS (Apr. 8, 2020), https://www.herbertsmithfreehills.com/latest-thinking/covid-19-people-how-governments-are-using-personal-data-to-fight-covid-19-uk; *see also FAQ: Data and Surveillance*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 19, 2020), https://www.cdc.gov/coronavirus/2019-ncov/covid-data/faq-surveillance.html.

[72] *Covid-19 Coronavirus Pandemic,* WORLDOMETER, https://www.worldometers.info/coronavirus/?utm_campaign=homeAdvegas1?%22%20%5Cl%20%22countries (last visited Jan. 27, 2021).

[73] *U.S. Covid-19 Cases and Deaths by State*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited Jan. 27, 2021).

to continue gathering information at least until this pandemic comes under control. But even if that becomes true in the next several months as various vaccines become available, decision-makers will likely want to plan for the next pandemic or crisis. If they do, they will likely still want access to the information contained in data banks, and the private sector will likely want to continue gathering information to create new markets, even after Covid-19 is swept into the dustbin of history. Additionally, this Article has articulated a framework drawn from prior case law in the United States for understanding the concept of privacy as engaging two separate, but interrelated, ideas: the notion of a private act and the idea of a private state of affairs. Before, however, we can proceed to use this information to suggest what might be done to protect individual privacy and liberty in the present and future, we need to make explicit the normative foundation for concluding that a robust right to privacy should be found to exist as part of American law. It is to justify just such a right to privacy in American law that we now turn.

The justification for a right to privacy can be located in human autonomy as a value widely shared both in the United States and much of Western Europe.[74] And while there is certainly evidence that some other cultures value autonomy, it should not be thought that valuing autonomy is just a culturally relative phenomenon. For every moral theory to be prescriptive presupposes that the persons it addresses are free agents, and so autonomy must be an important baseline for any moral theory to operate.[75] Indeed, there has been much literature on the value of autonomy in moral theory, and although the question of a more universal construction need not concern us here,[76] autonomy is a centrally important value in such highly influential moral theories as those of Immanuel Kant, J.S. Mill (in his discussion of self-regarding goods), and Alan Gewirth.[77] Furthermore, although there are different ways

[74] Mahmut Alpertunga Kara, *Applicability of the Principle of Respect for Autonomy: The Perspective of Turkey*, J. MED. ETHICS 627 (2007) ("The concept of autonomy is a manifestation of Western culture, which emphasizes individualism, personal happiness and self-actualization. In this context, 'personhood' is viewed from the perspective of autonomy and individual rights." (citing Charles Olweny, *The Ethics and Conduct of Cross-Cultural Research in Developing Countries*, PSYCHO-ONCOLOGY 3:11–20 (1994))).

[75] *See* ALAN GEWIRTH, REASON AND MORALITY 16–17, 138 (1978).

[76] I do not mean to suggest that there may not be other justifications for autonomy not contingent on a society's existing beliefs. But for purposes of treating American law, I need not go this further step toward a universal human rights justification. *See* SAMAR, *supra* note 41, at 205–08.

[77] For a broader understanding of the role autonomy plays in moral and political philosophy, including the important role of autonomy to Kant and Mill, see generally *Autonomy in Moral and Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 28, 2003), https://plato.stanford.edu/entries/autonomy-moral/. Alan Gewirth acknowledges the importance of autonomy when he distinguishes rational autonomy as having two senses, a broad sense and a strict sense. *See* GEWIRTH, *supra* note 75, at 138. In the broad sense, every person sets his or her own laws or principles of conduct. *See id.* Here, autonomy will not mean that one will always act in a manner consistent with liberal tradition. *Id.* In the strict sense, it means that the principles "one chooses for oneself will have been arrived at by a correct use of reason, including true beliefs and valid inferences." *Id.* Laws properly made should impose no intrusion on this. "For the rational agent views the law [here meaning the justified moral law] not as something imposed on him from without but rather as something he imposes on himself . . . ." *Id.* at 303. Gewirth's understanding of human autonomy is consistent with human dignity. His idea is "that human beings possess a special value intrinsic to their *humanity* and as such are worthy of respect simply because they are *human* beings." *Human Dignity*, CTR. BIOETHICS & HUM. DIGNITY, https://cbhd.org/category/issues/human-dignity (last visited Apr. 26, 2020).

autonomy might be understood, common among all of them is that it is "directed by considerations, desires, conditions, and characteristics that are not simply imposed externally upon one, but are part of what can somehow be considered one's authentic self."[78] For our purposes, I shall follow the more baseline etymological description for 'autonomy' that derives "from the Greek roots *auto* meaning 'self' and *nomos* meaning 'custom' or 'law.'"[79] This reflects both "the political sense of the word" in terms of "a group's right to self-government or self-rule" as well as the more common usage of independent control.[80] Indeed, autonomy allows for the recognition of moral and cultural values in society, even in cases where the law has not afforded them recognition.[81]

So, starting with this understanding of autonomy, which seems certainly consistent with our earlier discussion of the concept of privacy, we can now say that if a society values autonomy, it must certainly value protection of private acts. For these represent actions undertaken where no other rights or basic interests are involved. But our definition of a private act does more than just make clear the way that privacy is related to autonomy; it opens the door to an understanding of why private acts need to be protected. If a society values autonomy in the sense of self-rule, it must assign equal value to private actions, as they constitute the ideal case examples for valuing autonomy. That is because, under the definition posited above, such actions are "self-regarding" in that no other person's basic interest (outside the relevant group) are intruded upon. This description also helps to make sense of the reason put forth earlier that absent a court's determination that the action is not protected, it should be thought, prima facie, as one which the Constitution should rightly protect.[82] Especially this is true if the action is one that the Supreme Court

[78] STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 77.

[79] *Autonomy*, VOCABULARY.COM, https://www.vocabulary.com/dictionary/autonomy (last visited Apr. 26, 2020).

[80] *Id.*

[81] Consider, for example, jury nullification. Jury nullification "occurs when a jury returns a verdict of 'Not Guilty' despite its belief that the defendant is guilty of the violation charged. The jury in effect *nullifies* a law that it believes is either immoral or wrongly applied to the defendant whose fate they are charged with deciding." Doug Linder, *Jury Nullification*, UMKC SCH. OF L. (2001), http://law2.umkc.edu/faculty/projects/ftrials/zenger/nullification.html.

[82] It has been noted that:

> The Supreme Court does not use the phrase "personal autonomy" very often. Unlike privacy, it is not a fundamental right. As such, it is still a very limited concept regarding its impact on legal jurisprudence.
>
> In *Planned Parenthood v. Casey* (1992), the Court emphasized the impact that *Roe v. Wade* (1973) had on the importance of personal autonomy, especially with regard to reproductive rights. The *Casey* Court wrote, "[I]f *Roe* is seen as stating a rule of personal autonomy . . . [then the Supreme Court's] post-*Roe* decisions accord with *Roe's* view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims . . .
>
> [N]o erosion of principle going to liberty or personal autonomy has left *Roe's* central holding a doctrinal remnant."
>
> In *Washington v. Glucksberg* (1997)[,] however, the Court appeared to oppose the concept that personal autonomy creates personal protections for individuals. "And although *Casey* recognized that many of the rights and liberties protected by the Due

should find necessary to the preservation of the democratic order that has as its end the promotion of individual autonomy, then clearly it should be protected. The reason for saying an end of the democratic order is protection of individual autonomy will be made clear below.

As was also earlier explained, a private state of affairs presupposes the presence of recognized conventions for identifying the information covered as private or the place designated as one where performance of a private action should be allowed. Along with that understanding is why we are even concerned with protecting information and places. It was earlier noted that human beings are affected because of their social nature by what other people think about them, whether or not they should be so affected.[83] This can easily give rise, if a person's private activities are brought into a public spotlight, to cause him to refrain from performing actions that may cause him ridicule, even in circumstances where the actions may have assisted him toward developing a greater understanding of himself or the decisions he is making.[84] Obviously, it has to be reasonably undeniable that the actions do not harm any non-consenting person outside the relevant group, if the protection is to be maintained. All this is to say that a society which views private actions as worthy of protection, because they represent ideal case examples of human autonomy (*a priori*), must also value the protection of information and places without which such private acts would be unlikely to occur (*a posteriori*).[85] Granted the latter protection may be the product of our human need for social acceptance and the costs that sometimes arise from failure to gain acceptance; still, as this need is widespread throughout society, it should not be easily dismissed. Certainly, there are points where people

> Process Clause sound in personal autonomy, it does not follow that any and all important, intimate, and personal decisions are so protected. *Casey* did not suggest otherwise."

Personal Autonomy, LEGAL INFO. INST. https://www.law.cornell.edu/wex/personal_autonomy (last visited May 21, 2020) (first quoting Planned Parenthood v. Casey, 505 U.S. 833, 835, 860 (1992); and then quoting Washington v. Glucksberg, 518 U.S. 1057 (1996)).

Evidently, while the final significance of a right to personal autonomy may be far from certain, there is reason to believe it is becoming a more central value focus of the law. Note, for example, the Court's statements in Obergefell v. Hodges, 576 U.S. 644, 671 (2015):

> *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.

The Court's *Obergefell* decision clearly limited the scope of the *Glucksberg* decision while expanding the Fourteenth Amendment Due Process Clause's conception of liberty to include same-sex marriage even though same-sex marriage, unlike marriage, was not part of a long-standing tradition as recognized in *Glucksberg.*

[83] Cass Sunstein notes how:

> [s]ocial influences can lead people to go quite rapidly in identifiable directions, often as a result of 'cascade' effects, involving either the spread of information (whether true or false) or growing peer pressure. Sometimes cascade effects are highly localized and lead members of particular groups, quite rationally, to believe or do something that members of other groups, also quite rationally, find to be silly or worse.

CASS SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 16 (2001).

[84] *See* SAMAR, *supra* note 41, at 100–01.

[85] *Id.* at 88–89.

need to overcome the need for acceptance, as in the case of joining a violent gang, but such cases are best set aside as unworthy of privacy protection when non-consented-to violence is clearly present or may be inferred to be present because there is evidence of serious immaturity or the intellectual inability to understand what is expected. Otherwise, people can fall into the trap of always just following the status quo without affording much thought to why this should be the case.

A final point for this Section relates to the connection between privacy of information and places and participation in democratic society. The first thing to note is that being allowed to participate in governmental decision-making customarily takes place in representative republics by electing those who will make decisions for the society.[86] Use of the popular vote might be thought to be the foundation of a democratic society and certainly is justified under an autonomy principle meant to affirm citizens' right to decide who are best to fill positions in the government. But here one must be cautious. Societies like the Democratic People's Republic of Korea ("DPRK or "North Korea"), the People's Republic of China, and the Republic of Cuba may all make use of a ballot box, but if there is no real opposition to the party in power when choosing the candidate, let alone any real opposing points of view to governmental policies and laws publicly disseminated, the effect will not be to further the citizens' ability to choose the person they believe is best for the position but, more accurately, to merely rubber stamp the candidate the party has already chosen for them.[87] In such circumstances, it cannot be said that individual citizenship autonomy is affirmed, notwithstanding the procedural nicety of the vote, and one would have to conclude that such a practice cannot satisfy valuing autonomy generally absent a real opportunity for changing the system. I point this out because the way the concern for protecting autonomy in democratic decision-making might be met is to guarantee privacy of information and provide citizens the space to figure out what their interests are so that when they do vote, they will be voting based on their own interests.[88] This

[86] In his book *Democracy and Distrust: A Theory of Judicial Review*, Professor John Hart Ely argues for a representation-reinforcing theory of judicial review that attempts to resolve the two paragraphs of the now-famous footnote four in United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938) concerning popular control and egalitarianism by focusing on process. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). He argues that "a system of equal participation in the processes of government is by no means self-evidently linked to a system of presumptively equal participation in the benefits and costs that process guarantees; in many ways it seems calculated to produce just the opposite effect." *Id.* at 77. In essence, Professor Ely argues that courts should opt to preserve majority government while at the same time preserving minority rights by ensuring real participation in the democratic process. In regard to privacy specifically, he notes the "Fourth Amendment can be seen as another harbinger of the Equal Protection Clause, concerned with avoiding indefensible inequities in treatment." *Id.* at 97.

[87] *See North Koreans Vote in "No Choice" Parliamentary Elections,* BBC NEWS (Mar. 10, 2019), https://www.bbc.com/news/world-asia-47492747; *Party Tricks: Cuba's Communists Bar "Alternative" Candidates from Local Elections: How the Castro Regime Keeps Serious Challenges Off the Ballots*, THE ECONOMIST (Nov. 23, 2017), https://www.economist.com/the-americas/2017/11/23/cubas-communists-bar-alternative-candidates-from-local-elections. China is more complex. Under Article 97 of the Constitution for the Peoples Republic of China, competitive elections of People's Congresses at various levels are allowed. However, "[t]hese elections are still dominated and controlled by the [Chinese Communist Party], which firmly upholds the one-party rule and allows only one official ideology." Jie Chen & Yang Zhong, *Why Do People Vote in Semicompetitive Elections in China?*, 64 J. POL. 178, 178–89 (2002).

[88] *See* SAMAR, *supra* note 41, at 95.

is why earlier I noted that protecting individual autonomy (in this case the privacy of information and places) needs be an end of democratic government. Thus, the claim that democratic governments should affirm autonomy as an end is based on the idea that citizens will need sufficient privacy of information and places to determine what persons, polices, and laws truly represent their views.[89] So, there is clearly an internal arrangement between democratic process and privacy of information and places that must be present to guarantee that the resulting social order is truly grounded in valuing autonomy. In the next section, I will take up how best to satisfy autonomy in the context of resolving conflicts between a privacy right's protection and protections afforded by other rights. I will also consider the case where not a right but a compelling state interest is involved and how a court might resolve that sort of conflict.

IV. APPLYING THE LEGAL RIGHT TO PRIVACY

A. CONFLICTS OF RIGHTS AND COMPELLING STATE INTEREST

A conflict of rights involving privacy occurs when a prima facie claim to privacy conflicts with another active right that is also necessary to fostering individual autonomy. Such rights "are those that permit the holder of the right to perform an action, such as making a speech [including the gathering of public information], publishing a news report, or practicing a particular religious belief."[90] In each of these instances there is an implied claim to negative freedom in the sense of the self-to-be-let-alone. This implied claim justifies the right being grounded in autonomy and allows autonomy to operate as the common denominator for deciding among the right claims which one will dominate. In such cases, "any conflict between two or more active rights should be resolvable on the basis of which right better promotes autonomy in general."[91] Put another way, the "determination should be based on which action is most likely to promote the autonomy of all persons who stand in the same relation," reflecting the relational nature of a privacy claim.[92]

This approach, however, will only work for conflicts among active rights where both rights can be found to support autonomy. Passive rights, by contrast, are those that afford the rights' holder "a benefit, such as trial by his or her peers, a speedy and public trial, the right to compulsory process to obtain the testimony of witnesses, and the right to the assistance of counsel."[93] Consequently, when an actor performs

[89] *Id.*
[90] *Id.* at 104.
[91] *Id.* at 107.
[92] *Id.* at 108.
[93] *Id.* at 104. Passive rights are best thought of as interests that "are intrapersonal in the sense that they represent specific benefits due the holder, rather than an unspecified freedom to act." *Id.* at 105. "Active rights are signaled by statements of the form '*A* has a right to φ'[where A is the rights holder and B is the respondent]; while passive rights are signaled by statements of the form '*A* has a right that *B* φ' (in both of these formulas, "φ" is an active verb)." *Rights*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Rev. ed 2020), https://plato.stanford.edu/entries/rights/ (last visited 1/1/21).

an action that impinges a passive right, "the conclusion has to be (at least where the interest is a basic interest) that between the two parties involved that there is no valid claim to privacy." This follows from the definition of a private act.[94] Thus, in the Fourth Amendment area where autonomy would normally support protecting the selective disclosure of information to protect private actions, a privacy right will not be recognized if there is probable cause to believe another's basic interest (e.g., life or physical integrity) might be at stake. Similarly, in tort law, certain kinds of intrusions are allowed and not considered violations of privacy if they are consented to because individual autonomy would be undermined if such intrusions were not allowed. For example, "cases allowing reasonable investigations into a person's credit status can be explained in terms of an explicit consent that is rendered on applying for credit. However, the situation becomes more troublesome when companies that receive these reports, then attempt to sell or give the information to others without the applicant's permission."[95] In that case, an active rights conflict arises between the credit company, which wants to sell information for profit, and the credit applicant, who wants the information to remain private. When this situation occurs, autonomy is best served by restrictions on the release of information obtained solely for the purpose of supporting a credit application.

In the context of a compelling state interest, the concern is not over which interests foster maximal autonomy but whether the state's interest "is more fundamental to fostering autonomy than [it] is [to] protecting privacy."[96] Here I will focus on the government's interest in stopping the spread of Covid-19, as it presents a broad range of privacy concerns that implicate cyber-security and other matters. Covid-19 is a very harmful and deadly disease that spreads when droplets of saliva come into contact with the face of another person as by a cough, sneeze, or just by speaking too closely.[97] As a consequence, the Centers for Disease Control and Prevention ("CDC") recommends that people limit themselves from being in public, except when absolutely necessary, such as when a person needs to buy groceries, see a doctor, or work in an "essential" industry. The CDC also recommends wearing facemasks made of cloth when in public and engaging in social distancing of at least six feet.[98] Because the disease is so prevalent and so deadly (especially for older people; people with chronic health conditions like diabetes, asthma, or serious

[94] SAMAR, *supra* note 41, at 105.

[95] *Id.* at 107. *See also* DAVID F. LINOWES, PRIVACY IN AMERICA: IS YOUR PRIVATE LIFE IN THE PUBLIC EYE? 107, 126–39 (1989).

[96] SAMAR, *supra* note 41, at 107.

[97] *CDC Coronavirus Disease 2019 (COVID-19): Frequently Asked Questions: How Does the Virus Spread?*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/faq.html (last visited May 7, 2020).

[98] *CDC Coronavirus Disease 2019 (COVID-19): How to Protect Yourself and Others*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited May 7, 2020).

respiratory illnesses;[99] and some children[100]), and because it is easily spread by simply being in close proximity to another person where precautions are either not available or not undertaken, the government has a compelling interest in imposing restrictions on what otherwise would be a private right to travel and visit with other people. The restrictions are compelling insofar as they are the minimum necessary to provide protection for individual autonomy against a disease that, if left alone, would cause loss of life or otherwise seriously impair victims' well-being. Of this concern there is little doubt. Consequently, it should not be surprising that governments will seek to gather information on individual behavior from all sources, including private sector data banks. However, the fact that the government has a compelling interest does not mean that it is free to impose any restrictions it pleases, nor to use the information obtained for purposes unrelated to preventing the spread of the disease.

The way privacy operates where a compelling state interest overrides a right to privacy is to have privacy provide the regulatory standard against which the maximum amount of intrusion on the right is the minimum necessary to achieve the government's compelling interest.[101] Where to draw the line on what is minimally necessary in the Covid-19 case may be legitimately debated among medical experts, especially as it bears, for example, on what kinds of tests or restrictions are best to detect and prevent the virus from spreading.[102] The standard proposed here is the minimum necessary to achieve the government's compelling interest to protect against loss of life or serious physical harm. But how is this standard to be assessed? One of the means the government uses to protect against the spread of the virus is to

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[99] George Citroner, *Here's What Older At-Risk People Should Know About the Coronavirus*, HEALTHLINE (Mar. 6, 2020), https://www.healthline.com/health-news/what-older-people-with-chronic-conditions-need-to-know-about-covid-19.

[100] Perri Klass, *Rethinking Covid-19 in Children*, N.Y. TIMES (May 12, 2020), https://www.nytimes.com/2020/05/12/well/family/coronavirus-children-covid-19.html.

[101] *See* SAMAR, *supra* note 41, at 115. This standard has been recognized by the Supreme Court of the United States in regard to racial classifications in public university admissions programs under the Fourteenth Amendment's Equal Protection Clause that are justified by a compelling state interest. In Grutter v. Bollinger, 539 U.S. 306, 327 (2003), for example, the Court stated: "As we have explained, whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." But that observation

> says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny. When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.

Id. (citations omitted). In *Grutter,* the compelling interest was to ensure student body diversity in an educational environment, which at the time, and probably for a generation, thereafter, would not have been possible without an admissions procedure that considered race as one of several admissions factors. Recall Justice O'Connor's comment at the end of her majority opinion: "The requirement that all race-conscious admissions programs have a termination point 'assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.'" *Id.* at 342 (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 510 (1989)). Similarly, in regard to Covid-19, the compelling interest that in some circumstances justifies overriding privacy is preservation of autonomy, the end and ground of privacy itself.

[102] *See* Madeline Johnson, *Experts Debate Whether Point of Care COVID-19 Testing Can Help Flatten the Curve*, MODERN HEALTHCARE (Apr. 8, 2020), https://www.modernhealthcare.com/clinical/experts-debate-whether-point-care-covid-19-testing-can-help-flatten-curve.

require in most states that, at various stages of the pandemic, individuals will need to "shelter in place," meaning not leave their residences to go to work or school, but only leave to go grocery shopping, see a doctor, or perform a state-recognized essential service.[103] Needless to say, this has had a great short-term effect on the economy, leading to millions of lost jobs.[104] And this itself raises an intriguing question: how much loss of life or threat of serious infection needs to be present in order for the government to restrict these activities? The formula described above is based on individual rights, not on a utilitarian calculation of how much death is acceptable. Still, does that mean the government is free to restrict any activity, even where loss of life or the threat of serious infections are minimal? Can it even be known for sure how much loss of life or how many serious infections are likely to occur? I do not rest this matter just on an appeal to the limitations of our current knowledge, even less on some kind of utilitarian calculation.

Part of the problem here is that any model developed to serve the public interest will necessarily be inductive.[105] That is to say, it will draw together probabilities of various events occurring, including accidents to the extent they can be predicted, to determine the probability of predicted results. As a consequence, no model based on human behavior or even just the behavior of physical phenomena will ever be 100% certain. The most it will ever be able to produce is a reasonable prediction of what is likely to happen, if all the conditions specified come about.[106] In the case of Covid-19, many, but not all, of these conditions will involve how carefully human beings follow CDC and other appropriate medical advice. (I say "not all" because there could be other factors in the environment, including in the way the virus itself gets transmitted, that are, as yet, unknown.) Still, such models offer a reasonable basis for limiting governmental regulation to only what appears needed to effectively respond to the crisis. This is not a backdoor to some kind of utilitarian calculation of how many deaths may be acceptable, but a substantive ground for determining reasonableness in protecting individual autonomy by establishing a criterion for when a restriction is the minimum necessary to further the government's compelling interest. Consequently, if the current standards set for preventing infections are likely to protect human autonomy, assuming everything works as

[103] *See* Sarah Mervosh et al., *Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html.

[104] *See* Brian Menickella, *Covid-19 Worldwide: The Pandemic's Impact on the Economy and Markets*, FORBES (Apr. 8, 2020), https://www.forbes.com/sites/brianmenickella/2020/04/08/covid-19-worldwide-the-pandemics-impact-on-the-economy-and-markets/#12e2de6f28c3. *See also COVID-19: Impact Could Cause Equivalent of 195 Million Job Losses, Says ILO Chief*, UN NEWS (Apr. 8, 2020), https://news.un.org/en/story/2020/04/1061322. In the United States, the number of people unemployed is over twenty million as of April 16, 2020. Lucia Mutikani, *Coronavirus: Over 20 Million Americans Have Now Applied for Unemployment Benefit*, WORLD ECON. FORUM (Apr. 16, 2020), https://www.weforum.org/agenda/2020/04/united-states-unemployment-claimants-coronavirus-covid19/.

[105] *See* Afschin Gandjour, *Inductive Reasoning in Medicine: Lessons from Carl Gustav Hempel's "Inductive-Statistical" Model*, 9 J. EVALUATION CLINICAL PRAC. 161 (2003), https://www.researchgate.net/publication/10725309_Inductive_reasoning_in_medicine_Lessons_from_Carl_Gustav_Hempel's_'inductive-statistical'_model.

[106] *Id.*

predicted, and if additional restrictions are not deemed necessary, unless chosen at the individual level, then the government's imposition of these standards is narrowly drawn for present purposes. And should further restrictions be needed in the future or should existing restrictions be justifiably lessened (because the viral spread comes under control), then the fact that privacy remains a regulatory standard should call attention to making these further adjustments.

A related matter is very important because it has been seriously affected by the Covid-19 pandemic. This is the right to engage in productive labor as a type of private action.[107] There is a serious disagreement among those who are unemployed: some consider it dangerous to return to work too early, while others wish to return to work right away to be able to continue to survive financially.[108] For reasons already identified, the state's concern to protect against the spread of the Covid-19 virus satisfies being a compelling interest for restricting going back to work too soon. What may not be satisfied is the further requirement that the interest be narrowly drawn so to not unnecessarily overburden the economic context in which shelter-in-place orders operate.

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[107] The right to productive labor has not been recognized by the Supreme Court of the United States, and where it has been recognized, for example, by the Supreme Court of Appeals of West Virginia, it was recognized to support a state statute that allows workers in union-shops to opt out of having to pay union dues in return for continued employment. *See* Steven Alan Adams, *State Supreme Court Upholds Right to Work Law After Five-Year Long Court Battle*, THE PARKERSBURG NEWS AND SENTINEL (May 7, 2020), https://www.newsandsentinel.com/news/local-news/2020/04/state-supreme-court-upholds-right-to-work-law-after-five-year-long-court-battle/. This is not the sense of the right being discussed here. For my purposes, I am considering the right to work as a privacy right that the state should not interfere with absent a compelling interest. Such a right fits the definition of a private act and fits the idea of a human right as described by Professor Alan Gewirth:

> The right to employment is both a negative and a positive right. It is a negative right in that all other persons and groups have the correlative duty, consistent with moral requirements of the principle of human rights, to refrain from interfering with an agent's obtaining, performing, or retaining productive and remunerative work. This duty to refrain includes the duty not to impose obstacles that prevent persons from working because of considerations of race, religion, gender, or other criteria that are irrelevant to the ability to perform the kind of work that is in question. It also includes the duty not to exclude persons from jobs, or fire them from jobs they already have, because they have objected to their work conditions on grounds of health or safety.

ALAN GEWIRTH, THE COMMUNITY OF RIGHTS 217–18 (1996). This right does not, however, prohibit union membership because of the serious unequal bargaining position between the worker and the employer. With regard to the way this right to work has been interpreted by the Supreme Court of Appeals of West Virginia, it is worth taking note of Gewirth's further comment that:

> The negative right to work receives a further interpretation wherein its correlative respondents or duty-bearers are labor unions. This interpretation is used by employers who object to having union membership made a condition of employment. The inequalities of power [between management and labor], however, make this interpretation of the right morally unacceptable.

Id. at 218.

[108] *See* Quint Forgey, *Poll: Large Majority of Americans Think it's More Important to Stay Home than Return to Work: Only 30 Percent of Respondents Think the Top National Priority Should be to Get the Economy Up and Running Again*, POLITICO (Apr. 23, 2020), https://www.politico.com/news/2020/04/23/poll-majority-americans-important-to-stay-home-than-return-to-work-203427.

In a capitalist society, personal survival is usually dependent on being able and willing to engage in productive labor.[109] Consequently, if such labor is absent, because of a shelter in place order, the very concern that supports imposing a compelling interest to not go to work, namely, support of personal autonomy, now works the other way. The minimum intrusion on one's privacy right to work obliges the state in these circumstances to provide, where possible, the means for remaining healthy and financially secure during the shelter-in-place period. Thus, the government violates individual autonomy when it legitimately imposes a shelter-in-place order but does not, at the same time, provide the means necessary to counter the financial effects arising from having to follow the order by, for example, not going to work.[110] Of course, the government can only go as far to counter financial effects as its resources allow. However, this acknowledgement of "ought implies can" should not be a serious deterrent for a first world country, like the United States, which presumably could draw upon a variety of different resource possibilities, including adding to its deficit.[111] This does not mean that the state has to provide the same revenue that someone might make if they were working in a high-paying job, but especially for low-paying jobs and jobs that cannot be performed offsite and online, the amount of support an individual receives during a health crisis such as Covid-19 should be nearly the same as what they would have received were they at work, including healthcare and other essential benefits.[112] And although this is a matter of legislative prerogative, nevertheless, since a fundamental right to privacy in the form of returning to productive work is being impacted when the right to work is barred, it would seem that this alone should impose an immediate moral and political duty on Congress to provide all financial and health assistance within its capacity to offset the economic and health effects of shelter-in-place orders.[113]

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[109] *See* Adam Hayes, *Important Features of Capitalism*, INVESTOPEDIA (Mar. 26, 2020), https://www.investopedia.com/ask/answers/040715/what-are-most-important-aspects-capitalist-system.asp.

[110] Kelsey Snell, *What's Inside the Senate's $2 Trillion Coronavirus Aid Package*, NPR (Mar. 26, 2020), https://www.npr.org/2020/03/26/821457551/whats-inside-the-senate-s-2-trillion-coronavirus-aid-package.

[111] Immanuel Kant describes "ought implies can" as follows: "[t]he action to which the '*ought*' applies must indeed be possible under natural conditions. These conditions, however, do not play any part in determining the will itself, but only in determining the effect and its consequences in the [field of] appearance." IMMANUEL KANT, CRITIQUE OF PURE REASON 540 (1787). As of the time of this writing, Congress is discussing a second stimulus bill to further offset the financial and health effects of Covid-19 following its recent support for small businesses and testing. *See* Erica Werner, *House Passes $484 Billion Bill with Money for Small Businesses, Hospitals, and Testing to Prevent Coronavirus,* WASH. POST (Apr. 23, 2020), https://www.washingtonpost.com/us-policy/2020/04/23/congress-coronavirus-small-business/; *see also* Erica Werner, *House Democrats Pass $3 Trillion Coronavirus Relief Bill Despite Trump's Veto Threat*, WASH. POST (May 15, 2020), https://www.washingtonpost.com/us-policy/2020/05/15/democrats-pelosi-congress-coronavirus-3-trillion-trump/. For information on the first stimulus bill, see *supra* note 110 and accompanying text.

[112] Although this Section of the Article focuses on privacy invasions caused by the government's recent efforts to protect against the spread of Covid-19, it should be assumed that much of the argument here would also support providing financial protections for workers suffering other unexpected, non-voluntary disruptions, including downturns in financial markets. *See generally* GEWIRTH, *supra* note 107 (providing a broader discussion of the right to productive agency and what should be done to sustain and protect it).

[113] For purposes of this discussion, I ignore the fact that many shelter-in-place orders are imposed by state governments, not the federal government, because the federal government is certainly involved in responding to this national crisis and should be coordinating a national response. *See, e.g.*, Sharon Parrott et al., *CARES Act*

B. DEALING WITH COMMERCIAL TECHNOLOGICAL INTRUSIONS ON INDIVIDUAL PRIVACY

So far, we have considered some ways the right to privacy limits government intrusion on personal choices, even in the face of a global pandemic. What I now wish to consider is how a right to privacy might limit private sector data banks from gaining unequal access to information about personal wants and desires that might then be used to manipulate not only sales but other personal and political choices one might make. It has already been briefly explained in Section I how such information might be gathered usually without knowledge of the person from whom the information is acquired. And it was also explained how, once gathered, the information might then be turned toward not only satisfying existing desires but promotion of new wants and desires.[114] What is particularly significant about both uses, especially when treated in combination, is how they can be manipulated to affect individual behavior in the targeted audience. Recall from Section III how our human psychology allows information to affect the performance of private acts. Such manipulations, as arise when massive amounts of personal information are directed toward affecting behavior, raise a serious threat to personal autonomy, even when it appears the targeted audience's wants and desires are being satisfied, especially if those desires are either manufactured or so narrowly routed as to blind the targeted audience from other considerations.[115] Moreover, if the private sector is left to its own devices, such abuses will likely continue because they are also highly profitable.[116] So, what is to be done to avoid such manipulations of private information?

Obviously, the government will need to be involved to offset the commercial financial motivations that promote intrusions on personal privacy,[117] but that may itself become problematic, if the government wishes to use information gathered by the private sector for its own purposes. What is needed is a way to constrain the private sector, not so much from collecting information (provided there is not a reasonable expectation of privacy that is being intruded upon), but from then manipulating the data so collected to affect the behavior of private individuals and groups. If the government is to be the guarantor of this protection, how can protection be ensured, given the government's own legitimate concern for sometimes having

Includes Essential Measures to Respond to Public Health, Economic Crises, but More Will Be Needed, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 27, 2020), https://www.cbpp.org/research/economy/cares-act-includes-essential-measures-to-respond-to-public-health-economic-crises. *See also* Liz Alderman, *Paid to Stay Home: Europe's Safety Net Could Ease Toll of Coronavirus*, N.Y. TIMES (Mar. 6, 2020), https://www.nytimes.com/2020/03/06/business/europe-coronavirus-labor-help.html.

[114] *See supra* Section I (discussing Galbraith).

[115] *See* Galbraith, *supra* note 30, at 128–29.

[116] *See* GeoCities, 127 F.T.C. 94, 97–98 (1999) (involving a company's violation of the Federal Trade Commission Act by selling personal information gathered from its member applications to use its website despite having promised its members it would not disclose their information).

[117] *See, e.g.*, *id.*

access to the information to protect the autonomy of all? It would appear that the latter interest might attenuate affording too much protection to private information, but if that is the case, where is the line to be drawn?

A good way to begin this presentation is to see first how privacy might apply in the area of private commercial gatherings of information. It has already been stated that privacy in the torts area encompasses seclusion and solitude, which include interests in not having embarrassing not-newsworthy facts revealed about oneself, not being placed in a false light, and not having one's likeness taken for commercial purposes without permission.[118] That said, how should the commercial mechanisms for gathering information by monitoring "posts, pictures, interactions and internet activity in real time" be properly restricted?[119] Since some of these sources are placed in the public realm by the internet user, there cannot be a complete expectation of privacy as to who may ultimately obtain them. For example, even if limits are placed on one's Facebook account so that content is shared only with friends, how friends may further disseminate the information when using other apps cannot be guaranteed.[120]

At first glance, it may appear that posting photos or information only to friends is, like closing the shutters to one's windows, a convention socially recognized "that defines, protects, preserves, or guards" that information only to be shared among the designated users.[121] If so, then in the same way a peeping Tom may be sued for violating privacy, the law should recognize a similar tort claim against those who knowingly violate an established convention designed to protect private information from getting disseminated broadly.[122] However, this presupposes that the further dissemination of the information is intentional. What if the information dissemination occurs because of a benign use of apps already on one's phone or computer?[123] Additionally, should the receiver of the information bear any liability provided they did not conspire to obtain the information by offering an inducement to the non-original holder?

Particularly problematic challenges arise in the tort area when those against whom a privacy claim is made themselves claim a First Amendment right to receive the information.[124] This will likely be the case where information is gathered (perhaps widely) without any obvious intrusion on the seclusion or solitude of anyone else, and

[118] For a discussion of the cases in this area, see *supra* Section II.

[119] Zuboff, *supra* note 6.

[120] David Baser, *Hard Questions: Should People Be Able to Share Their Facebook Information with Other Apps?*, FACEBOOK (July 26, 2018), https://about.fb.com/news/2018/07/sharing-info-with-apps/.

[121] SAMAR, *supra* note 41, at 73. Note that violations of privacy in this area are viewed as intentional torts. *See* RESTATEMENT (SECOND) OF TORTS § 652 (AM. L. INST. 1977).

[122] Daniel Solove provides a helpful discussion of the kinds of interests a tort right to privacy should encompass. *See* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PENN. L. REV. 477, 560 (2006) (discussing privacy problems arising from the use of technology to increase accessibility, surveillance, and facilitate "the gathering, processing and dissemination of information").

[123] *See* Emily Eposito, *The Five Best Data Collection Tools in 2019: The Best Apps for Gathering Data in the Field*, ZAPIER (May 10, 2019), https://zapier.com/learn/forms-surveys/best-data-collection-apps/.

[124] *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969) (stating that "[i]t is now well-established that the Constitution protects the right to receive information and ideas . . . regardless of their social worth").

even more so if the privacy claim is directed against having merely gathered the data from sources that appear in the public domain.[125] In such circumstances, courts will have to decide where the privacy claim leaves off and a First Amendment right begins. This can be particularly difficult where the party who claims her privacy was intruded upon is far removed from the actual gathering or compiling of the information. Here, it is important to remember that autonomy can provide a justification for both the First Amendment right to receive information as well as the individual's privacy right to not have personal information revealed about oneself. Still, finding a bright-line rule to discern the boundary between these two rights will not be easy and may produce inconsistent results depending on exactly how the information was obtained. Of course, such a claim might be handled by a conflict of rights analysis in which autonomy provides the common denominator to determine in a particular case which right should dominate. But the problem there is not that such an analysis will not work, but that it would have to be employed in possibly a great many cases where factual differences arising from the application of different and evolving technologies may be relevant.[126] For this reason, limiting decisions in these cases to just a conflict of rights approach or a traditional common law tort approach, even when adjusted for First Amendment claims, may not be the most efficient way to go about resolving these issues on a broad scale. And so, the question becomes how to best protect individual autonomy in a way that is both consistent and uniform, but also recognizes the legitimate interests of those seeking information as well as those seeking to keep personal information about themselves private.

Federal legislation limiting not so much the gathering of information from public portals but its use to affect individual behavior would seem to be the better approach. Such legislation would avoid running afoul of the First Amendment right to receive information by focusing only on limiting its clandestine use when directed toward affecting private individual behavior. In other words, information gathered about the wants and desires of various groups, even when developed along geographical, political, or cultural lines, could still be obtained, provided the information was not obtained illegally, was primarily commercial in nature, and was not specifically directed to affecting any particular individual user's behavior without their knowledge. This limitation, however, would not apply if the source (or its well-identified affiliate) had been approached by the ultimate user to gain information

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[125] *See Gathering Private Information*, DIGIT. MEDIA L. PROJECT (May 22, 2020), http://www.dmlp.org/legal-guide/gathering-private-information.

[126] It has been noted that:

> [R]ecent advances in information technology threaten privacy and have reduced the amount of control over personal data and open up the possibility of a range of negative consequences as a result of access to personal data. In the second half of the 20th century data protection regimes have been put in place as a response to increasing levels of processing of personal data. The 21st century has become the century of big data and advanced information technology (e.g. forms of deep learning), the rise of big tech companies and the platform economy, which comes with the storage and processing of exabytes of data.

Privacy and Information Technology, STANFORD ENCYC. OF TECH. (Oct. 30, 2019), https://plato.stanford.edu/entries/it-privacy/.

about oneself, as, for example, in obtaining a credit report.[127] Because this is an area of commercial speech, legal restrictions on information dissemination (especially where it is likely to be directed at affecting individual behavior) are fought with less concern for protecting autonomy generally than would be the case if the information disseminated was, for example, political in nature. Indeed, restrictions on commercial speech usually invoke only an inquiry as to whether the "governmental interest is substantial" and "not more than necessary to service that interest."[128]

Such a statute, as I am suggesting here, should pass constitutional muster when challenged on the basis of this First Amendment commercial speech test, since protection of private information certainly constitutes a substantial governmental interest, provided the intrusion is narrowly drawn to not bar a commercial advertiser or marketer from gaining legitimate access to publicly available consumer information. Where the issue becomes more complex is when the information gathered in a general data bank is used to promote not commercial but specifically political advertising.[129] In that instance, the limitation set out by the statute would, of course, need to be justified as serving a stronger, perhaps compelling interest of the state, as well as being narrowly drawn, because such information is often associated with becoming a knowledgeable voter.[130] But presumably, this higher scrutiny test could be satisfied by further showing how advances in the technology of gathering and compiling information have undermined the very autonomy the First Amendment itself is designed to protect. That is to say, while previously a governmental unit may not substitute its view as to which solicitations a householder may wish to receive, it

[127] *See* Fair Credit Reporting Act, 15 U.S.C. § 1681 (1970).

[128] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980). There, the Supreme Court, per Justice Powell, set out a lesser standard from strict scrutiny for when the government may restrict commercial speech. According to Justice Powell, that lesser standard

> must [first] determine whether the expression is [even] protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

Id.

[129] In Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761, 771 (1976)), the Court, per Justice Powell, stated:

> In rejecting the notion that [commercial] speech 'is wholly outside the protection of the First Amendment,' we were careful not to hold "that it is wholly undifferentiable from other forms" of speech. We have not discarded the "'common-sense" . . . distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.

[130] In Vill. of Schaumburg v. Citizens for a Better Gov't, 444 U.S. 620, 631–32 (1980), the Court in finding unconstitutionally overbroad, in violation of the First and Fourteenth Amendments, the Village's ordinance prohibiting door-to-door solicitations for charitable organizations that did not ensure 75% of its receipts were for charitable purposes, abrogated an earlier case, Breard v. Alexandria, 441 U.S. 622 (1951), which had upheld a criminal ordinance applied to door-to-door solicitations of magazine subscriptions but "did not indicate that the solicitation of gifts or contributions by religious or charitable organizations should be deemed commercial activities, nor did the facts of *Breard* involve the sale of religious literature or similar materials."

could nevertheless "punish those who call at a home in defiance of the previously expressed will of the occupant."[131] Technology has now transformed this previous First Amendment test so that persons operating computers and using the internet, which are now used in the regular course of living,[132] cannot just put out a no-solicitation sign to those sending information the person does not desire or want to receive, and even attempts to "unsubscribe," after the fact, are not always very successful.[133] What a federal statute might do in such a circumstance to protect the internet user's privacy would be first to create a national "Do Not Solicit" registry, analogous to the National Do Not Call Registry that puts telemarketers on notice that the user does not wish to be bothered.[134] Beyond this, Congress could adopt a statute empowering the Federal Trade Commission to more broadly regulate the data collection industry (and especially the nine largest brokers of information) to ensure their data collection will not affect individual autonomy. One way for Congress to do this might be to codify the following FTC recommendations regarding data collection and its use, since that would allow a line to be drawn where data brokers' gathering and use of information ends and consumer privacy begins.

For data brokers that provide marketing products, Congress should consider legislation to:

- *Centralized Portal.* Require the creation of a centralized mechanism, such as an Internet portal, where data brokers can identify themselves, describe their information collection and use practices, and provide links to access tools and opt- outs;
- *Access.* Require data brokers to give consumers access to their data, including any sensitive data, at a reasonable level of detail;
- *Opt-Outs.* Require opt-out tools, that is, a way for consumers to suppress the use of their data;
- *Inferences.* Require data brokers to tell consumers that they derive certain inferences from raw data;
- *Data Sources.* Require data brokers to disclose the names and/or categories of their data sources, to enable consumers to correct wrong information with an original source;
- *Notice and Choice.* Require consumer-facing entities—such as retailers—to provide prominent notice to consumers when they

[131] Martin v. Shutters, 319 U.S. 141, 148 (1948) (involving conviction of a member of the Jehovah Witnesses for delivering a leaflet to the inhabitant of a home in violation of a city ordinance prohibiting any such solicitation). *See also* Barr v. American Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335 (2020) (holding that the robocall restriction of the Telephone Communications Act of 1981 is unconstitutional, but only the exception for calls to collect on a debt owed the government, as a content-based exception, in violation of the First Amendment).

[132] Andrew Perrin & Maeve Duggan, *Americans' Internet Access: 2000-2015*, PEW RES. CTR. (July 26, 2015), https://www.pewresearch.org/internet/2015/06/26/americans-internet-access-2000-2015/.

[133] Eric Griffith, *How to Unsubscribe from Unwanted Email*, PCMAG (Dec. 2, 2019), https://www.pcmag.com/how-to/how-to-unsubscribe-from-unwanted-email.

[134] *See, e.g.*, Do Not Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003) (codified as amended at 15 U.S.C. §§ 6151–6155 (2008)).

share information with data brokers, along with the ability to opt-out of such sharing; and

- *Sensitive Data.* Further protect sensitive information, including health information, by requiring retailers and other consumer-facing entities to obtain affirmative express consent from consumers before such information is collected and shared with data brokers.

For brokers that provide "risk mitigation" products, legislation should:

- When a company uses a data broker's risk mitigation product to limit a consumers' ability to complete a transaction, require the consumer-facing company to tell consumers which data broker's information the company relied on;
- Require the data broker to allow consumer access to the information used and the ability to correct it, as appropriate.

For brokers that provide "people search" products, legislation should:

- Require data brokers to allow consumers to access their own information, opt-out of having the information included in a people search product, disclose the original sources of the information so consumers can correct it, and disclose any limitations of an opt-out feature.[135]

It needs to be emphasized that the above protections do not prevent the mere gathering of consumer information; all that is being prevented is publication of the personal information that has been gathered and its use to affect behavior, usually without the knowledge of the person whom the information is about. This it does by requiring, before any personal information about a person is shared, and especially where the information may be used to affect that person's market behavior, that the information be made known to the person about whom it is about and the person be given an opportunity to opt-out from any further sharing or use. Such conventions as these operate less to warn of information that may be private, as would be the case in the traditional torts area, and more to reassert the information's status as private after it is acquired. Still, the conventions are ideal for handling information that may have been gathered without a direct intrusion on the seclusion or solitude of the targeted individual or where the targeted individual would have otherwise had a reasonable expectation of privacy. Because the area is technologically complex, the details of how exactly such restrictions might operate is perhaps best left for a congressional committee, taking testimony from experts and then drafting a statute to empower and endorse the FTC's rulemaking authority to regulate the industry. Following this

[135] FED. TRADE COMM'N, *supra* note 3. The recommended restriction for "*Sensitive Data*," including health information, is likely to be seen as content-based but of sufficiently high enough privacy importance as to be justified by a compelling state interest. *Id.*

approach would also leave open the door for further regulations by the FTC, as needed, to meet future challenges resulting from new technologies yet to be devised. Certainly, such an approach would ensure greater consistency in this area of the law than just leaving such matters to the courts to be decided de novo after hearing cases.

Before concluding, some more specific attention should be paid to the government's current and future uses of data gathered on individuals by the private sector in fighting Covid-19. Earlier it was suggested that some state governments, and perhaps the federal government, are inclined to use data gathered from the private sector to try and track the spread of Covid-19.[136] Here the question arises whether the state's interest in obtaining information from data brokers will likely result in a relaxation of the aforementioned conditions to protect the privacy of individuals.

In order to evaluate the state's use in this context, it is first necessary to classify the data being used and then to specify exactly how the state intends to use the information. Arguably, since the data contained in these data banks includes highly personal information, certain uses (like to determine political party affiliation or willingness to engage in legal protests) need to be subject to the most exacting scrutiny (depending on the reason for the use), and the state will need to show a compelling interest that is narrowly drawn to gain access to the information.[137] However, if the state is only seeking to identify patterns of behavior leading to transmission of the disease without seeking to further identify other aspects of the particular individuals or groups to be screened, heightened scrutiny should be enough, and the state should only need to provide an important reason for its use.[138] Certainly, such an important use would be shown in trying to identify patterns of behavior that likely lead to transmission of the virus, such as public congregation on beaches or in parks. The fact that the state might also use this information to determine where it needs to provide greater policing to prohibit congregations of people should not alter this conclusion. Obviously, if the state were to go further by trying to use the information gathered in a criminal proceeding, such a use ought to require that the usual Fourth Amendment standard be met, namely, that the state first obtain a warrant from a judge after providing sufficient facts to suggest that there exists probable cause of criminal activity.[139] Even provided these concerns are followed and their

[136] *See supra* Section I.

[137] *See generally* CONG. RESEARCH SERV., LSB10451, FREEDOM OF ASSOCIATION IN THE WAKE OF CORONAVIRUS (2020).

[138] In Skinner v. Railroad Labor Executives, Inc., 489 U.S. 602 (1989), the Supreme Court recognized a diminished expectation of privacy for railroad workers having to submit to drug tests to ensure railroad safety under the then Railroad Safety Act of 1970, 45 U.S.C. § 437(a) (1994). What the Court first enunciated in *Skinner* has taken on a broader application to now include, under the rubric "special needs doctrine," drug testing of high school athletes, *see* Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995); testing at "sobriety" checkpoints on the highway, *see* Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990); and twenty-four-hour lifetime GPS monitoring of persons released from civil commitments after having served their time for committing sexual offenses, arguably to reduce recidivism, *see* Belleau v. Wall, 811 F.3d 929 (7th Cir. 2016). *See also* 14AA Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 675 (4th. ed. 2020).

[139] *But see Belleau*, 811 F.3d at 940 (Flaum, J., concurring in judgment) (noting that information gathered from a program that seeks to reduce recidivism of sex offenders "may, at some later time, be used as evidence in a criminal prosecution, but that is not the primary purpose of the program").

corresponding restrictions implemented, there may still be reason for concern that the state's interest in gaining access to private data banks will unduly attenuate the necessary privacy restrictions that need to be put in place for people to feel free to perform private actions. But perhaps the best approach here, where information on how the material is used is still developing, is to be watchful for uses that seem less justified and to be ready to challenge them in both the courts and public arena.

A related problem to anticipate is where the executive branch of the federal government might actually encourage data brokers not to lose interest in developing banks of information by itself becoming the primary consumer for such information. This might occur if it were thought that the information gathering was necessary to avert an existing or even future crisis. Alternatively, the various departments of the executive branch might seek to create their own data banks of personal information on U.S. citizens beyond what is constitutionally allowed.[140]

Here I believe the private-public separation can provide some safeguard, but only if the private sector is willing to uphold its interest in not having the government compete in creating unrestricted data banks of information. In regard to the federal government, the way this might work would be if public interest groups, like the American Civil Liberties Union, challenged any such attempt at information gathering by the government as raising a separation of powers issue when not approved by Congress. Private industry might also challenge such an effort by the government arguing that a diminution of a property interest under the Fifth Amendment's Takings Clause is likely to occur, if such an action were perceived to undermine user confidence in how private information gathered is being used.[141] Additionally, private nonprofits, acting on behalf of the public, could launch a

[140] *See, e.g.*, EDWARD C. LIU & CHARLES DOYLE, CONG. RESEARCH SERV., R44042, GOVERNMENT COLLECTION OF PRIVATE INFORMATION: BACKGROUND AND ISSUES RELATED TO USA PATRIOT ACT REAUTHORIZATION IN BRIEF (2011). It should be noted that several existing federal statutes already limit how the federal government can use information; others allow greater use. *See* National Security Act of 1947, 50 U.S.C. §§ 3001–3234 (1947) (creating the Department of Defense and Central Intelligence Agency). *See also* Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3701 (1968) (controlling interception of wire and oral communications by both the government and private parties); Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 *et seq.* (1978) (detailing how government can use physical and electronic surveillance to gather information on foreign powers and those operating as agents of other nations if there is a suspicion of terrorism or espionage); Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510–2523 (1988) (extending the Fourth Amendment warrant requirement to electronic communications); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, 18 U.S.C. § 2709(b) (2006); PATRIOT Sunsets Extensions Act of 2011, Pub. L. No. 112-114, 125 Stat. 216 (2011) (permitting enhanced surveillance of foreign nationals and Americans suspected of terrorism); Communications Assistance for Law Enforcement Act of 2006, 47 U.S.C. §§ 1001–1010 (2006) (requiring telecommunications companies to cooperate with government efforts to obtain information); Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2008) (codified at 50 U.S.C. §§ 1805(a)-(c)) (altering the definition of "electronic surveillance" under FISA so the government could gather information without a warrant from persons outside the United States whether American citizens or not and be able to demand information from telecommunications companies); USA Freedom Act of 2015, 12 U.S.C. § 3414 (2015) (ending the National Security Agency's mass telephone data collection program). Additionally, sixteen federal agencies are part of the national intelligence community including the CIA, the FBI, and the NSA, the latter two being created by executive order. *See* Exec. Order No. 12333, 3 C.F.R. § 1981 (1981).

[141] *See generally* Jennifer J. Kruckeberg, Note, *Can Government Buy Everything?: The Takings Clause and the Erosion of the Public Use Requirement*, 87 U. MINN. L. REV. 543 (2002).

political campaign against the government having too easy access to highly personal information, analogous to what they did with regard to the reauthorization of the PATRIOT Act in 2011.[142] These different approaches support individual autonomy even if they are not directly grounded in autonomy. For they continue both politically and legally the kinds of approaches that are most likely to advance greater protection of information privacy into the future. All this goes to suggest only that while government's involvement with private data brokers may not be an easy connection to sever, still, the possibility of its severance is not improbable, provided the public remains vigilant of individual autonomy and determined in its willingness to protect personal privacy.

CONCLUSION

This Article has sought to give further recognition to some of the difficult privacy issues that have arisen in the U.S. by large private sector data brokers being able to create wide-ranging, unrestricted banks of highly personal information on U.S. consumers. It has also sought to raise concerns over how some state governments (and maybe the federal government) are seeking to access this information to halt the spread of the deadly Covid-19 disease. These problems do not arise in a vacuum but arise in the context of our various human interactions with technology and our willingness to protect our own individual autonomy in the process.

The history of the law of privacy, as it has developed in the Fourth Amendment, tort, and constitutional areas, combined with a theory of privacy's meaning and justification, can provide the needed tools for preventing the most egregious invasions of personal information, provided the institutions of our democracy are willing to afford these tools their necessary attention. But in the end, this will depend on how attentive the public is to make sure privacy protections remain in place and are sufficient to meet the challenges of our ever-evolving, technologically advancing society. The tools themselves open up avenues that Congress and state legislatures can take, but those will only be as good in how well they protect individual privacy and autonomy as the public demands. What is of upmost importance now, especially as the government becomes more involved in gathering personal information to fight off a deadly disease, is to not lose our way by failing to protect individual autonomy, but instead to remain vigilant in guarding the protection of private acts, as well as private information and states of affairs, so they do not get lost in the struggle for how best to protect society.

[142] *See* LIU & DOYLE, *supra* note 140.