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Personal Information Contracts: How to Protect Privacy Without Violating the First Amendment

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PERSONAL INFORMATION CONTRACTS: HOW TO PROTECT PRIVACY WITHOUT VIOLATING THE FIRST AMENDMENT

INTRODUCTION

Respect for privacy may soon prompt legislatures to impose new restrictions on the computerized collection and dissemination of personal information by commercial enterprises. Before enacting legislation for this purpose, lawmakers must consider the extent to which the Constitution permits commercial speech to be sacrificed for the sake of enhanced personal privacy. Despite the tendency of privacy advocates to characterize corporate data management practices in Big-Brotherish tones,[1] the right of big business to disclose personal information enjoys at least some degree of constitutional support.[2] Conversely, the Constitution nowhere guarantees the right to keep personal information secret from commercial entities.[3] To secure

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1 *See* GEORGE ORWELL, 1984 (1948).

A number of writers invoke Big Brother's image to describe the pernicious effect of computers on privacy. *See, e.g.*, ARTHUR R. MILLER, THE ASSAULT ON PRIVACY 39 (1971); ALAN F. WESTIN, PRIVACY AND FREEDOM 59, 166 (1967); Marsha Morrow McLauglin & Suzanne Vaupel, *Constitutional Right of Privacy and Investigative Consumer Reports: Little Brother is Watching You*, 2 HASTINGS CONST. L.Q. 773 (1975); Ann R. Field, *'Big Brother, Inc.' May Be Closer Than You Thought*, BUS. WK., Feb. 9, 1987, at 84; Pierre Passavant, *Beware!—Big Database is Watching You*, DIRECT MARKETING, Aug. 1985, at 30.

2 *See infra* parts I.C and III.

3 *See infra* note 86 and accompanying text.

their goals constitutionally, legislators must pay due respect to the First Amendment when designing regulations to safeguard privacy interests from the advances of credit bureaus, telemarketers, and mailing list brokers.[4]

This Note assesses common-law and federal legislative remedies for commercial disclosures of information that violate personal privacy.[5] Focusing on the privacy-invasive activities of credit bureaus, this

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[4] Legislators may also wish to reconsider the rules governing inaccurate credit reports. Although the solution to the privacy-free speech contest that this Note proposes also bears on the issue of defamatory credit reports, defamation presents an analytically distinct problem that other commentators have addressed with considerable insight. *See generally* George C. Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43 (1976); Joel D. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976); Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 GEO. L.J. 95 (1983); David W. Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199 (1976); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. REV. 915 (1978); Note, *Mediaocracy and Mistrust: Extending* New York Times *Defamation Protection to Nonmedia Defendants*, 95 HARV. L. REV. 1876 (1982).

[5] The quantity and content of the information contained in government databases also pose a significant threat to personal privacy. Together, corporate and government computers maintain roughly five billion files on 250 million Americans. JEFFREY ROTHFEDER, PRIVACY FOR SALE: HOW COMPUTERIZATION HAS MADE EVERYONE'S PRIVATE LIFE AN OPEN SECRET 17 (1992); THE WORLD ALMANAC AND BOOK OF FACTS 1995, at 375 (Robert Famighetti ed., 1994) (quoting the U.S. Census Bureau's 1990 population figures). *See also* ROBERT ELLIS SMITH, PRIVACY: HOW TO PROTECT WHAT'S LEFT OF IT 175 (1979) (reporting that the federal government maintains an average of 18 files per person in the United States and that Indiana maintains about 16 files per state citizen); ANNE WELLS BRANSCOMB, WHO OWNS INFORMATION? 164-68 (1994) (describing the size and contents of federal government databases).

Government databases contain information gleaned from criminal searches and seizures, police records, draft registrations, social security records, benefits applications, real estate records, tax returns, drivers' licenses, and vehicle registration forms. RAYMOND T. NIMMER, THE LAW OF COMPUTER TECHNOLOGY ¶ 16.08 (2d ed. 1992); *see also* SMITH, *supra*, at 35, 85 (discussing the information contained in the FBI's National Crime Information Center computers and the number of "names" maintained by various federal agencies, presumably as of 1978). Medical identity cards, as recommended by President Clinton's health care reform plan, would conceivably provide additional information to governmental databases. *See* Lawrence O. Gostin, *Health Information Privacy*, 80 CORNELL L. REV. 451 (1995).

Although various government agencies assemble different data for different purposes, state and federal governments as a whole maintain the following information, *inter alia*, about people: name, social security and driver's license numbers, age, birthplace, parents' birthplace, marital status, number of children, identity of siblings, race, physical appearance, physical disabilities, medical, dental, and psychological data, substance addictions, food consumption, educational level and performance, national origin, religious affiliation, current and past addresses, income, real property and vehicle ownership, other assets, debts, credit rating, mortgages, occupation, employment history, employer, and criminal and civil suit involvement. SMITH, *supra*, at 175-78. Of course, the government does not (yet?) maintain all of this information about everyone in the nation.

Computers have surely enhanced the government's ability to collect, maintain, transfer, and utilize information about individual Americans.

Note examines the ways in which courts and Congress balance individual privacy interests against the constitutional interest in commercial free speech. In light of the threats to privacy that credit bureaus pose and the uniqueness of credit reports as a form of speech, the law currently strikes an unprincipled balance between the relevant interests. A reevaluation of privacy, the privacy and publicity torts, and the constitutional status of credit reports suggests that an alternative legal regime grounded in property and contract law can protect privacy from credit bureau invasions without unreasonably infringing free commercial speech.

Part I clarifies the tension between privacy and commercial free speech by describing what credit bureaus do, how they reduce personal privacy, and why credit reports might nevertheless deserve constitutional protection. Part II reviews and analyzes the current common-law rules and federal statutes pertaining to privacy and credit bureaus. Part III then considers how much First Amendment protection credit reports deserve. Finally, Part IV analyzes the current law and proposes a theory of property and contract rights in personal information. This Note contends that the proposed theory is capable of protecting consumers' privacy interests from technologically sophisticated credit bureaus without encroaching upon credit bureaus' free speech rights.

> The 178 largest federal agencies and departments maintain nearly two thousand databanks, virtually all of them computerized . . . containing tens of millions of files each. Peppering these records are . . . Social Security numbers, names and addresses, and financial, health, education, demographic, and occupational information—obtained from individuals themselves and from external sources such as state government files, the Census Bureau, the credit industry, and insurance companies.

ROTHFEDER, *supra*, at 126. As of 1984, the U.S. government had collected four billion records about its citizens. DAVID BURNHAM, RISE OF THE COMPUTER STATE 51 (1984).

Among other public-sector gains generated by the computerized collection and maintenance of government data, rapid access to greater quantities of personal data enhances law enforcement, the development and execution of social policies, and, perhaps in the near future, the delivery of medical treatment. *See* ROTHFEDER, *supra*, at 129-33 (describing the FBI's National Crime Information Center, "NCIC," which permits 64,000 law enforcement agencies across the United States and Canada to access criminal and other unsavory data on 20 million Americans. By means of the NCIC, a police officer in one state can find out whether the suspect just arrested has a criminal record in any other state); SMITH, *supra*, at 85-86 (explaining that the federal government uses most of its individual records to evaluate its own programs, determine who is eligible for which benefits, collect taxes, and conduct other government business); PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 572-81 (1977) [hereinafter PRIVACY COMMISSION] (reporting that the federal government also uses its records to conduct statistical analyses of, for instance, drug and alcohol abuse); Gostin, *supra*, at 458-61 (1995) (predicting the emergence of state and federal health identification cards, which holders would use to obtain access to health care services, and which service providers would use to access patients' medical information); *see also* Robert Kuttner, *Why Not a National ID Card?*, WASH. POST, Sept. 6, 1993, at A23.

I
CREDIT BUREAUS AND THE TENSION BETWEEN PRIVACY AND FREE SPEECH

American consumers may understandably have mixed feelings about the production and dissemination of consumer credit reports. On one hand, the quantity and content of consumer information that credit bureaus collect, maintain, and sell poses a significant threat to the privacy interests of data subjects. On the other hand, the proliferation of credit reports makes it possible for American consumers to secure credit with relative ease. The economic benefits of credit reports make it unlikely that legislators or courts will significantly curtail credit bureau activities so as to enhance personal privacy. Additionally, credit reports may also evade privacy-protective restraints because they merit First Amendment protection. When the right to privacy runs up against the right to free speech, legislative and judicial players may well decide to cancel their bets.

This Part first explains how credit bureaus function. It then explores the tension between personal privacy and free speech that credit reports generate. This tension becomes clearer, and perhaps easier to resolve, once one understands the philosophical roots of personal privacy and the origins of the commercial speech doctrine.

A. Credit Bureaus

Credit bureaus are the principal private-sector collectors, managers, and sellers of consumer information. After culling a sizeable quantity of consumer information from a variety of sources, credit bureaus sell it in the form of consumer credit reports. Credit report buyers, such as VISA and other credit grantors, use this information to assess the credit worthiness of credit applicants.

The nation's three largest credit bureaus—Equifax, Trans Union, and TRW—maintain 450 million records on 160 million people.[6]

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6 ROTHFEDER, *supra* note 5, at 32. *See also What Price Privacy?*, CONSUMER REP., May 1, 1991, at 356 (claiming that together, "[t]he nation's credit bureaus keep files on nearly 90 percent of all American adults"). Compare Rothfeder's 1992 figure to the Privacy Commission's 1977 estimate that the largest *five* credit bureaus contain 150 million credit records. PRIVACY COMMISSION, *supra* note 5, at 55-56. Assuming that the numbers are accurate, that Equifax, Trans Union, and TRW store about the same number of credit records, and that these three credit bureaus were responsible for two-thirds of the 1977 figure, then the "big three" have each increased their total number of credit records from 34 million to 150 million in less than 20 years. This is consistent with David Burnham's 1984 estimate that at the time, TRW maintained 90 million consumer records. *See* BURNHAM, *supra* note 5, at 44. These numbers suggest that each of the three major credit bureaus currently maintains as many records as the largest five bureaus, combined, maintained in 1977.

According to Rothfeder, TRW sells 500,000 consumer credit records each day. ROTHFEDER, *supra* note 5, at 38. Less than 10 years before Rothfeder published his book, TRW sold only 200,000 credit records per day. BURNHAM, *supra* note 5, at 44.

Each consumer's credit record contains some or all of the following information: name, address, age, spouse's name, number of dependents, car ownership, magazine subscriptions, news stories, Social Security number, salary, employer, length of employment, prior employer, insurance information, outstanding mortgages, bank loans and account information, national credit cards, department store credit accounts, paid accounts, overdue accounts, accounts assigned for collection, repossessions, state and federal tax liens, bankruptcies, lawsuits filed against the consumer, and court judgments.[7]

Credit bureaus receive much of this information for free from private sources, such as banks, retail stores, credit unions, and doctors.[8] They also receive information from the public sector, including court clerks, the Postal Service, and government agencies.[9] Finally, credit bureaus buy information from the Census Bureau, state motor vehicle agencies, insurance companies, magazine subscription services, telephone book publishers, and roughly sixty other sources.[10] TRW buys "all the data [it] can legally buy"[11] and sells 500,000 credit reports to subscribers each day,[12] most of which it delivers by modem.[13]

Credit bureaus and their main customers, credit grantors, are among the "primary users" of credit information.[14] Generally, primary users collect information about people from a variety of sources and use it to make business decisions, such as which services to provide, to whom, and for how much, and which credit applicants represent good credit risks.[15] "Secondary users," such as magazine publishers, use information collected by primary users for their own

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7 *See* ROTHFEDER, *supra* note 5, at 38 (magazine subscriptions and insurance information); SMITH, *supra* note 5, at 47-49 (the rest); *see also* PRIVACY COMMISSION, *supra* note 5, at 56.

8 *See* ROTHFEDER, *supra* note 5, at 38. Rothfeder notes that credit report subscribers give credit bureaus information about their customers at no charge because they have significant incentives to do so. The best way for all credit report subscribers to get complete and relatively inexpensive reports is by downloading their customer information to credit bureaus on a regular basis. In this manner, credit bureaus can constantly update credit records and send them out to subscribers—this time for a fee. *See id.*

9 *Id.*; *see also* PRIVACY COMMISSION, *supra* note 5, at 56.

10 *See* ROTHFEDER, *supra* note 5, at 38.

11 *Id.* (quoting Dennis Brenner, a TRW vice-president). According to Rothfeder, the sole purpose of TRW's information-gathering practices is "to compile the most detailed description of the financial status, personal traits, ups and downs, and lifestyle of every American that can be assembled—and sold at a cool profit." *Id.*

12 *Id.*

13 *See* SMITH, *supra* note 5, at 45; *see also* BURNHAM, *supra* note 5, at 44.

14 *See* NIMMER, *supra* note 5, ¶ 16.17, at 16-45.

15 *See, e.g.*, SMITH, *supra* note 5, at 47-48 (describing the manner in which credit grantors, using credit report information, make their credit extension decisions).

business purposes—most often direct mail advertising[16]—and perhaps rent out their files to tertiary users.[17] Thus, as credit reports and other consumer data course through corporate computer networks,[18] businesses can purchase the raw material they require to compile information about consumers' credit worthiness, telephone calls,[19] grocery store purchases,[20] canceled checks,[21] automatic teller transactions,[22] air travel,[23] hotel accommodations,[24] car rentals,[25]

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16 Magazine publishers, car companies, and retail stores who advertise through the mail determine which households to target by renting mailing lists from brokers, who cull from master lists names and addresses of people who meet the advertiser's criteria. *See generally* PRIVACY COMMISSION, *supra* note 5, at 125-39.

17 Raymond Nimmer describes the distinction as follows: "[P]rivate enterprises, including banks, credit card companies, [and] insurance companies . . . collect information about virtually every event in a person's life. Once collected and entered into computer systems . . . the data are available for various secondary uses in the form of mailing lists and other information products." NIMMER, *supra* note 5 ¶ 16.17, at 16-45. Unlike TRW and Trans Union, Equifax no longer sells data to direct marketers. Ruth Simon, *Stop Them from Selling Your Financial Secrets*, MONEY, Mar. 1, 1992, at 106.

Lotus Development Corp. almost joined Nimmer's list of primary information users. The company had planned to begin distribution of "MarketPlace" in 1990. "MarketPlace" was a CD-ROM product containing information about the lifestyles and buying habits of 120 million Americans. *See Retail New Outlet for Lists on CD-ROM*, DIRECT MARKETING, May 1990, at 10; *see also* BRANSCOMB, *supra* note 5, at 17-19. Consumer outcry eventually convinced Lotus to cancel its plan. *Id.*

18 "[N]ew computer technology has made it easier for large organizations to collect and exchange information about individuals." Marc Rotenberg, *In Support of a Data Protection Board in the United States*, 8 GOV'T INFO. Q. 79, 80 n.9 (citing DAVID BURNHAM, THE RISE OF THE COMPUTER STATE (1983)); *see also* DAVID F. LINOWES, PRIVACY IN AMERICA 127 (1989) (discussing the impact of computer technology on credit bureau operations).

Of course, there are some checks on the flow of credit report information through computer networks. Like the common-law privacy rules they preempted, federal statutes limit credit bureaus' power over the personal information they manage. This Note addresses some of these federal controls below. *See infra* parts II.A, II.B.

19 *See* Rotenberg, *supra* note 18, at 80.

20 *Id.* at 81.

21 *See* SMITH, *supra* note 5, at 16.

22 The Electronic Funds Transfer Act, 15 U.S.C. § 1693(d)(1)-(5) (1994), requires financial institutions to record the amount, location, time, and type of such transactions, as well as the identity of any third parties to or from whom funds are transferred.

23 *See* Carole A. Shifrin, *American's Parent Company Developing Automation Products, Computer Services*, AVIATION WK. & SPACE TECH., Nov. 3, 1986, at 71, 77 (Drawing on SABRE, a large airline reservations system, and other sources, American Airlines built a "management information [system] that they can provide to business clients, including records of their employees' travel expenses, adherence to corporate travel policies, comparison between fares available and fares used and reconciliation of credit card charges with tickets used.").

24 *See* Joel R. Reidenberg, *Privacy in the Information Economy: A Fortress or Frontier for Individual Rights?*, 44 FED. COMM. L.J. 195, 203 & n.33 (1992).

25 *See, e.g., Data Protection, Computers, and Changing Information Practices: Hearings Before the Subcomm. of Gov't Information, Justice, and Agric. of the House Comm. on Gov't Operations*, 101st Cong., 2nd Sess. 2 (1990) (statement of Rep. Bob Wise) [hereinafter *Hearings*]; BURNHAM, *supra* note 5, at 40 (1984).

health,[26] and education.[27] Computers have refined the means by which businesses collect such information and expanded their ability to control it. They allow businesses to store massive amounts of personal data in a small space, thereby improving efficiency, and provide the means for data managers to accumulate, list, read, "merge-purge," delete, update, aggregate, segregate, and transmit data.[28] By enabling credit bureaus and other businesses to engage in these activities with relative ease, computers have facilitated incursions into personal privacy.

B. Privacy

A recent privacy survey confirms that seventy-one percent of Americans feel they have "lost all control over how personal information about them is circulated and used by companies."[29] According to the same survey, ninety percent of Americans think that information-collecting organizations request excessively personal information.[30] Finally, eighty-two percent of Americans think that the circulation of information about them within a single industry is problematic.[31] Notwithstanding the general disagreement among scholars, judges,

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26 *See* ROTHFEDER, *supra* note 5, at 184-87 (describing the Medical Information Bureau, "the largest repository of medical records in the United States," which functions like a credit bureau for insurance underwriters); SMITH, *supra* note 5, at 135-37 (explaining the flow of medical information and how Equifax, for example, secures access to patients' medical files).

27 *See, e.g., Hearings, supra* note 25, at 107 (testimony of Marc Rotenberg); BURNHAM, *supra* note 5, at 49 (noting the information collection practices of American educational institutions); PRIVACY COMMISSION, *supra* note 5, at 403-11 (discussing the record-keeping and disclosure practices of post-secondary educational institutions).

28 *See generally* Jonathan P. Graham, Note, *Privacy, Computers, and the Commercial Dissemination of Personal Information*, 65 TEX. L. REV. 1395, 1400-02 (1985); *see also* Passavant, *supra* note 1, at 32 ("Through the magic of overlay and enhancement and merge, I can build a record about George Orwell's Winston Smith today that would make the Orwellian future vision seem almost real.").

29 LOUIS HARRIS & ASSOCS., THE EQUIFAX REPORT OF CONSUMERS IN THE INFORMATION AGE 11 (1990) [hereinafter EQUIFAX REPORT]. On a more general note, in 1990, 79% of Americans expressed concern about their personal privacy; the percentages for 1983 and 1978 are 77% and 64%, respectively. *Id.* at 2.

30 *Id.* at 18 (Of the total number surveyed, 57% referred to this problem as major, while 33% called it minor.).

31 *Id.* (Of the total number of people surveyed, 39% thought that circulation of data about them was a major problem and 43% said that it was a minor problem.).

According to a 1986 American Express Survey, 90% of Americans think corporations should reveal more information about how they use marketing lists, and 80% think companies should refrain from distributing personal information to other companies. *See* Rotenberg, *supra* note 18, at 84 n.23.

Consumer attitudes about credit reporting and privacy may be changing. According to a 1994 Harris Poll, 51% of Americans believe that law or business practices adequately protect their privacy rights, and 66% prefer good credit industry self-policing to increased government regulation. Lamar Smith & Charlotte Rush, *Comment: U.S. Consumers Approve of Credit Bureaus' Activities*, AMERICAN BANKER, Apr. 29, 1994, at 17.

and legislators about the nature, function, and value of privacy in a democratic society,[32] these statistics suggest that legislators, at least, would do well to enact effective measures for securing it.[33]

In *Whalen v. Roe*,[34] the Supreme Court described privacy protection cases as involving "at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."[35] Philosophers usually label these two interests

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32 Privacy may serve a variety of social functions, some of which neither merit nor require judicial or legislative intervention. Similarly, the interests privacy protects may turn out neither to merit nor require such intervention.

33 Rather than attempt to present a comprehensive, let alone competent, sociological survey of privacy in America, the next Part of this Note serves two less ambitious goals. First, it provides an introduction to some judicial and scholarly grapplings with the concept of personal privacy, a slippery notion that future historians may well consider a sociological abnormality; second, it presents some of the moral, social, and psychological justifications for the way in which law treats, or ought to treat, personal privacy interests.

34 429 U.S. 589 (1977).

35 *Id.* at 599-600. *Accord* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989). Supreme Court cases involving the privacy interest in making certain important decisions independently include Roe v. Wade, 410 U.S. 113, 154 (1973) (holding that the right to privacy is sufficiently broad to encompass a woman's decision whether or not to terminate her pregnancy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); and Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (striking down state law forbidding contraceptives as violative of marital privacy).

In its early privacy cases, the Court interpreted the Constitution as more protective of decisional privacy than of nondisclosure privacy. Contrast the cases cited above with Paul v. Davis, 424 U.S. 693, 713 (1976), where the Court stated in dicta that although people have a fundamental privacy right to make certain decisions pertaining to marriage, procreation, contraception, family relationships, and child rearing, that right does not protect people from the State's publicizing records of official acts in which they are involved, such as arrests.

Only one year later, the Court reacted slightly more positively to nondisclosure privacy claims. In *Whalen*, the Court considered the constitutionality of a New York statute that required doctors to send files about prescription drug users to the Department of Health for input into its computerized database. The plaintiffs complained that statutory-required disclosures of their medical information to Health Department employees violated their privacy rights. Although the Court recognized that people have a privacy interest in preventing the disclosure of personal information, 429 U.S. at 599, it reasoned that the disclosure of medical information to Department of Health personnel, at least when security measures rendered public disclosure unlikely, was no more violative of privacy than its disclosure to doctors, hospital personnel, and insurance companies. *Id.* at 601-02. Although the Court did not reach the issue of whether a state's "unwarranted disclosure of accumulated private data whether intentional or unintentional" would violate the Constitution, *id.* at 605-06, Justice Stevens wrote in his majority opinion that "[t]he right to collect and use [personal] data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures . . . . [I]n some circumstances that duty arguably has its roots in the Constitution." *Id.* at 605. Finally, Justice Brennan argued in his concurrence that "[b]road dissemination by State officials of [private] information" would infringe constitutionally-protected privacy rights. *Id.* at 606; Justice Stewart, however, reached the opposite conclusion in his concurrence. *Id.* at 608-09.

as "autonomy" and "dignity," respectively.[36]

In Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 457 (1977), the Court stated that under *Whalen*'s nondisclosure principle, "at least when Government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity." The Court nevertheless held that under the circumstances, the public interest in preserving Nixon's presidential papers and tapes outweighed his privacy interest in preventing the disclosure of a proportionately small quantity of personal information to the statutory administrator. *Id.* at 465.

The Court appeared much more sympathetic to nondisclosure privacy claims in United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989), where it held that the disclosure to a third party of information contained in an FBI rap sheet could reasonably be expected to invade the privacy of the rap sheet subject. Although the Court's privacy discussion centered on a statutory exemption from the Freedom of Information Act, it asserted as a general proposition that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." 489 U.S. at 763. The Court also referred to its precedent as "recogniz[ing] the privacy interest inherent in the nondisclosure of certain information even wbere the information may have been at one time public." *Id.* at 767.

In *Whalen* and *Reporters Committee*, the Court noted that government computers maintain enormous quantities of information about U.S. residents. 429 U.S. at 607; 489 U.S. at 770. The Court also recognized in *Reporters Committee* that information compilations pose a significantly greater threat to privacy than any of their component parts do. 489 U.S. at 764-65. In light of the trend established in *Paul*, *Whalen*, *Nixon*, and *Reporters Committee*, these comments suggest that the Court may soon recognize that the Constitution protects individual privacy rights in the nondisclosure of personal information nearly as much as it protects the right to make certain important decisions without governmental interference.

Many legal commentators and philosophers disagree with the Court's conception of privacy. William Prosser, for instance, views privacy as protective of interests in emotional tranquility, reputation, and intangible property. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 398, 406 (1960). Moving even further away from the Court's view, Judge Richard Posner argues that sheer self-interest motivates the desire for personal privacy. Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978). If people can lie successfully about unseemly episodes in their past and unobservable physical characteristics (such as bad health or sterility), Posner argues, they stand a better chance of getting what they want from those with whom they interact. Posner, *supra* at 399.

This Note leaves the exploration and comparative analysis of rival privacy theories to scholars more competent to deal with such issues. For an excellent introduction to the disparity of philosophical views on privacy, see PHILOSOPHICAL DIMENSIONS OF PRIVACY (Ferdinand D. Schoeman ed., 1984) [hereinafter DIMENSIONS].

36 "Autonomy" and "dignity" arguably summarize the core privacy interests as characterized by Charles Fried and Edward Bloustein, two noted commentators on this subject. Fried's conception of privacy reflects its "autonomy" component: "Privacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves"; this dimension of informational control is "an aspect of personal liberty." Charles Fried, *Privacy [A Moral Analysis]*, 77 YALE LAW J. 475 (1968), *reprinted in* DIMENSIONS, *supra* note 35, at 209-10.

Bloustein, on the other hand, emphasizes the "dignity" component of privacy. He argues that when Warren and Brandeis refer to "inviolate personality" in their seminal privacy article, discussed *infra*, they mean an "individual's independence, dignity, and integrity; it defines man's essence as a unique and self-determining being." Edward J. Bloustein, *Privacy as an Aspect of Human Dignity*, *reprinted in* DIMENSIONS, *supra* note 35, at 156, 163.

Although legal commentators and philosophers express a respectable difference of opinion over the correct understanding of privacy, this Note focuses on the autonomy-dignity conception of privacy. It does so for three main reasons. First, the Court seemingly

The creation and dissemination of credit reports threaten these privacy interests in three main ways: by monitoring consumers' activities, by reducing their control over information about themselves, and by disclosing information about them that they would rather keep quiet.[37] To the extent that credit bureaus monitor consumers and reduce their control over such information, credit bureaus reduce consumers' autonomy. To the extent that they disclose to their customers information that consumers would otherwise withhold from them, credit bureaus diminish consumers' dignity.

1. *Privacy and Autonomy*

Human autonomy refers to the ability of persons to decide freely how to conduct themselves.[38] Privacy affects autonomy in two principal ways: by affecting peoples' decisions about which activities to en-

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has adopted it. *See supra* notes 35-36 and accompanying text. Second, it fits well with the tenor of Warren and Brandeis's pivotal privacy article. *See* Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Third, it explains some of the concerns Americans express about the impact of computers on their privacy. *See supra* notes 29-33 and accompanying text.

37 Assuming that incidents of improper access to database information are likely to rise as computer networks grow and become more interconnected, credit bureaus expose data subjects to an additional privacy threat when they fail to keep their files secure. Each new data link gives legitimate computer users additional access routes to greater quantities of information, which presumably increase the value of their passwords. A security vice-president for a New York bank describes how insecure personal data is in that industry:

> [G]etting the password for First Citizens' network—or any other bank's, for that matter—isn't very difficult. Heads of security at banks and stores know each other pretty well; many of them worked together in law enforcement. And they're feverish information junkies, even to the point of sharing intimacies about each others' computer systems. And when that doesn't happen, as most private investigators know, bank-system passwords are for sale, compiled by information resellers who purchase the codes from bank employees.

ROTHFEDER, *supra* note 5, at 80. Rothfeder's source described another method for accessing the same data. Calling up his own bank's ATM (automated teller machine) network gives him access to the wider "MAC" network, "and through the MAC system [I] access First Citizens' computer, where I can call up your account." The security VP continues, "[e]very time we build another computer network, private information is compromised even more; dozens of new lines of data communications are opened up." *Id.*

Armed with such passwords, private investigators and underground data merchants can scavenge through databases looking for valuable morsels of personal information. Conceivably, a healthy flow of black market passwords and a thick web of computer connections also provide "hackers" (many of whom are disaffected computer savants with a penchant for poking around in reputedly secure data reserves) with easier access to more computer files. Unless banks, credit bureaus, and other storers of personal information develop improved procedures for discovering and preventing unauthorized database access, the on-going expansion of computer networks may significantly reduce the security of personal information stored on computers.

38 Benn describes the Kantian ideal of a morally autonomous person as that of "the independently minded individual, whose actions are governed by principles that are his own." Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, *in* DIMENSIONS, *supra* note 35, at 223, 241.

gage in, and by reducing their control over information about themselves.

Insofar as people refrain from participating in certain activities because they cannot do so without being monitored, every reduction in personal privacy diminishes personal autonomy. Charles Fried sums up the effects of reduced personal privacy on the "decisional" dimension of autonomy as follows:

> If we thought that our every word and deed were public, fear of disapproval or more tangible retaliation might keep us from doing or saying things which we would do or say if we could be sure of keeping them to ourselves or within a circle of those who we know approve or tolerate our tastes.[39]

Reductions in personal privacy also impinge upon autonomy by reducing one's control over the flow of information about oneself.[40] Fried states that "[p]rivacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves."[41] He calls one's control over private information "an aspect of personal liberty."[42]

The connection between privacy and the control dimension of autonomy becomes readily apparent when one considers that a loss of control over personal information reduces one's ability to establish and maintain a variety of personal relationships.[43] In most situations, we have the ability to disclose personal information selectively, depending on the kind of relationship we have or hope to have with someone else. We reveal to friends, for example, information about ourselves that we would not ordinarily reveal to a casual acquaintance or employer. When we feel prepared to draw a friend closer, we disclose more intimate facts about ourselves—that is partly what defines a close friendship.[44] Conversely, when we want to maintain distance

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39 Fried, *supra* note 36, at 203, 210 (citation omitted). In a similar vein, Hubert Humphrey once wrote that "[w]e act differently if we believe we are being observed. If we can never be sure whether or not we are being watched and listened to, all our actions will be altered and our very character will change." Hubert H. Humphrey, *Foreword* to EDWARD V. LONG, THE INTRUDERS at viii (1967).

40 The Supreme Court stated in United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989), that "privacy encompass[es] the individual's control of information concerning his or her person." *Id.* at 763.

41 Fried, *supra* note 36, at 203, 209.

42 *Id.* at 210.

43 This argument draws upon those made by Fried, *supra* note 36, at 203, 203-22, and James Rachels, *Why Privacy is Important*, *in* Dimensions, *supra* note 35, at 290, 290-99.

44 *See* Rachels, *supra* note 43, at 290, 294. Similarly, Fried noted:

> [G]ifts of property or of service . . . without the intimacy of shared private information, cannot alone constitute love or friendship. The man who is generous with his possessions, but not with himself, can hardly be a friend, nor . . . can the man who, voluntarily or involuntarily, shares everything about himself with the world indiscriminately.

between ourselves and an acquaintance, we limit what we tell that person about our private affairs. The degree to which we keep personal information private determines, in large part, what kinds of relationships we have with others. As James Rachels observes: "our ability to control who has access to us, and who knows what about us, allows us to maintain the variety of relationships with other people that we want to have[;] it is . . . one of the most important reasons why we value privacy."[45]

Computers permit credit bureaus, as well as credit grantors and secondary users, to collect, maintain, and disclose great quantities of personal information. In doing so, credit bureaus affect both the decisional and control dimensions of personal autonomy. By collecting and storing information about consumers from various sources, such as retail stores, credit bureaus can monitor the shopping habits of almost any consumer who purchases goods on credit. Consumer monitoring impinges upon decisional autonomy when it alters consumers' buying decisions.[46] For instance, one may decline to purchase a magazine or birth control device in a grocery store for fear that the checkout machine will record and maintain records of these transactions that unknown others can peruse, sell, and use as the basis for personal judgments.[47] Consumers who fear that credit bureaus monitor their purchasing decisions, and that report recipients use this information

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Fried, supra note 36, at 203, 211.

45 Rachels, *supra* note 43, at 290, 295; *see also* ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 129 (1989) ("[The decline of] the sense of privacy itself, of the area of personal relationships as something sacred in its own right . . . would mark the death of a civilization, of an entire moral outlook.").

46 Computers may also reduce autonomy when employers program them to monitor the progress of data-entry workers. The Office of Technology Assessment reports negative responses to electronic monitoring in the workplace:

> Some workers complain that electronic monitoring is intrusive because it is making a constant minute-by-minute record, creating a feeling of "being watched" all the time. . . . Privacy can . . . refer to exercising one's autonomy; even in routine work, there is some personal variation in work style. . . . If the employer uses the information . . . to change the pace or style of work . . . then the employee loses a certain amount of control over his or her own job.

OFFICE OF TECHNOLOGY ASSESSMENT, THE ELECTRONIC SUPERVISOR: NEW TECHNOLOGY, NEW TENSIONS 8 (1987).

47 "Frequent shopper" programs at over 800 grocery stores across the nation use point of sale (POS) scanning technology to give shoppers automatic credit for store coupons applicable to their purchases. As they compute discounts with the swipe of a card, POS devices record customer purchases and transfer the information to the stores' POS suppliers, such as Citicorp Point-of-Sale Information Services. Citicorp sells to direct marketers its resulting ability to target specific customers. *Hearings*, *supra* note 25, at 85-87, 94-95, 125-26 (testimony of Jerry Saltzgaber); Rotenberg, *supra* note 18, at 81-82. According to Rotenberg, "[a] supermarket manager can now tell that a particular customer buys broccoli and not asparagus. . . and possibly whether that customer buys contraceptives, antidepressant drugs, or tabloid magazines." *Id.* at 81.

to form opinions about them, may well decline to participate in certain activities that they enjoy.

Credit bureaus' effect on the control dimension of autonomy is even clearer. When credit bureaus divulge personal information about consumers to third parties without consumer consent, consumers lose their ability to control how much others know about them. A credit bureau representative might respond that consumers consent to the dissemination of information about themselves when they apply for credit cards.[48] However, even if applying for credit constitutes consent, most consumers who consent in this manner probably fail to realize the comprehensiveness of the information exchanged about them or the breadth of its distribution.

When credit bureaus store and disseminate consumer information without consumers' informed consent to both the content of the data disclosed and the range of its distribution, they transform traditionally private information into public data, a process that reduces both the decisional and control aspects of personal autonomy. When they sell data composites of consumers to subscribers, credit bureaus also threaten consumers' dignity.

2. *Privacy and Dignity*

According to the theory under consideration, the autonomy and dignity aspects of privacy overlap. If being possessed of dignity means choosing freely which principles and goals to adopt, which behaviors to exhibit, which activities to engage in, and with whom to form intimate relationships, then autonomy and dignity reflect similar aspects of the Western liberal notion of humanity.[49] In its traditional Kantian formulation, human dignity nearly subsumes the concept of auton-

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48 On the back of its application form, Citibank Visa conditions its offer of credit as follows:

> By signing this application, I authorize Citibank . . . to check my credit history and, if I am issued a card, exchange information about how I handle my account with affiliates, proper persons, and credit bureaus. . . . I also authorize you and your affiliates to periodically exchange information regarding any account I may have with your affiliates.

Citibank Visa Credit Card Application, 1994. American Express offers some of its cardholders even less of an opportunity to consent. If a current Gold Card member applies for an additional card in someone else's name, neither the member nor the prospective additional card-holder needs to signify their written consent to the following provision: "The additional Gold Card applicant is aware that [American Express] may verify and exchange information on the applicant, including requesting reports from credit reporting agencies. . . . They are also aware that information about them may be used for marketing and administrative purposes and shared with [American Express] affiliates and subsidiaries." American Express Travel Related Services Co. Additional Gold Card Pre-Approved Acceptance Certificate, 1994.

49 In Isaiah Berlin's famous contribution to this concept of humanity, he argnes that liberty (or what this Note calls "autonomy") has both a negative and a positive component. "Negative liberty" refers to one's freedom to act without interference from others. BERLIN,

omy, in that creatures possessed of dignity have the freedom to set and pursue their own ends.[50] However, the impact of privacy upon dignity in and of itself differs from the impact of privacy upon autonomy.

Warren and Brandeis, the "founders" of the privacy tort, strongly suggest that concern for human dignity justifies the legal protection of privacy interests.[51] They regard privacy as protective of one's "inviolate personality"[52] and characterize privacy invasions as "spiritual" wrongs[53] that injure the victim's "estimate of himself."[54] Edward Bloustein interprets this language to mean that respect for human dignity underlies Warren and Brandeis's concern for privacy. He defines "inviolate personality" as one's "independence, dignity, and integrity; it defines man's essence as a unique and self-determining being."[55] Bloustein also contends that respect for human dignity underlies all forms of the privacy tort, as well as the Fourth Amendment's privacy prescriptions.[56]

Whether or not Bloustein characterizes Warren and Brandies's views accurately, he argues compellingly that invasions of privacy denigrate human dignity. They do so in much the same way that privacy invasions reduce personal autonomy—by subjecting victims to unwanted surveillance and by exploiting their lack of control over information about themselves. Bloustein contends that one's ability to define oneself as an individual depends to some degree on how much privacy one enjoys:

> The [person] who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such a being, although sentient . . . is not an individual.[57]

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supra note 45, at 121-22. "Positive liberty" refers to one's freedom to choose for oneself which goals and policies to adopt and in which activities to engage. *Id.* at 131.

50 IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 435-36 (James W. Elington trans., 1983).

51 Edward Bloustein argues that Dean William Prosser's treatment of the privacy tort, which the *Restatement (Second) of Torts* endorses, reflects a misunderstanding of Warren and Brandeis's central concern for dignity. *See* Bloustein, *supra* note 36, at 156; Prosser, *supra* note 35, *passim*; RESTATEMENT (SECOND) OF TORTS § 652 (1977).

52 *See* Warren & Brandeis, *supra* note 36, at 205.

53 *Id.* at 197.

54 *Id.*

55 Bloustein, *supra* note 36, at 156, 163.

56 *See* Bloustein, *supra* note 36, at 156, *passim*. Prosser, on the other band, denies that the privacy cases following Warren and Brandeis's article recoguized a unitary privacy interest. *See* Prosser, *supra* note 35, at 389-407, 422-23. Bloustein responded to Prosser's argument by demonstrating that each of the four torts into which Prosser divides privacy violations involves an injury to the victim's dignity. *See* Bloustein, *supra* note 36, at 156, 163-80.

57 Bloustein, *supra* note 36, at 188.

Thus, when credit bureaus monitor consumer purchases, they do more than violate consumers' autonomy by constraining their buying decisions. They also deprive consumers of dignity by subjecting their purchasing decisions to the scrutiny of credit grantors and direct-mail marketers. Similarly, consumers' lack of control over personal information diminishes both their autonomy and their dignity.

Bloustein argnes that the misappropriation of another person's name for one's own benefit deprives that person of dignity.[58] Consider an advertiser who commercially exploits someone's personality by using his name or photograph in an ad without his consent. For Bloustein, the exploitation injures the subject's sense of dignity by treating his name or photograph as a mere commodity, whose purpose is to serve the advertiser's economic interests.[59]

One who lacks sufficient control over personal information also lacks effective means for preventing others from misappropriating portions of it for their own economic advantage. Hence, the tendency of credit bureau computers to wrest control over personal information from the people to whom it pertains makes it difficult for consumers to prevent credit bureaus from selling their personal data profiles to others. As this Note argues below, credit bureau sales of detailed credit reports disrespect consumers' dignity at least as much as misappropriations and commercial exploitations of individuals' photographs or names do.[60]

Computers have enabled credit bureaus and their customers to form and operate an expansive consumer information market with astonishing efficiency. This Note describes some of the economic advantages of such a market below. As the preceding discussion suggests, however, the economic gains generated by a thriving consumer information market come at a cost. The market incentives for credit bureaus and other commercial entities to store, organize, and transmit personal information, combined with the ability of computers to

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58 *See id.* at 176. Under the common law, this kind of misappropriation constitutes an invasion of privacy. *See infra* part II.A.4.

59 *See* Bloustein, *supra* note 36, at 176. Insofar as the subject's name or photograph captures something essential about himself, Bloustein's comment clearly reflects a Kantian theory of human dignity. Respect for human dignity, Kant writes, requires one to treat other persons as "an end and never simply as a means." KANT, *supra* note 50, at 429. The commodification and nonconsensual commercial exploitation of another's name or photograph appears to violate this basic Kantian prescription, and thus the subject's personal dignity.

Of course, the nonconsensual appropriation and commercial use of one's name or photograph may cause one economic, as well as dignitary, harm. The common-law right of puhlicity, rather than the common-law right of privacy, provides relief in this situation. *See infra* part IV.C.3.

60 *See infra* part IV.C.2.

perform these functions efficiently, present a significant threat to personal autonomy, dignity, and personal privacy.

C. Commercial Speech

While contemplating and perhaps lamenting the extent to which personal information flows through the private sector, one should remember the benefits that accrue from institutional information gathering. The accessibility of extensive consumer information effectuates rapid credit approval and relatively low interest rates, informs manufacturers of consumer preferences, and allows direct mailers to channel advertisements to the most promising consumers.[61] American consumers or producers are unlikely to relinquish such benefits for only slight personal privacy gains.

Credit bureaus can thus justify many of their privacy-invasive practices on economic grounds. However, if privacy advocates convince legislators that economic benefits must at some point give way to other values, such as personal privacy, credit bureaus may have to look beyond strictly economic arguments to protect their industry. The First Amendment may provide credit bureaus with the legal protection they would likely seek.

Credit reports arguably fall into the constitutionally protected category of "commercial speech." A summary of the commercial speech doctrine and an analysis of whether courts should treat credit reports as commercial speech appears below.[62] The present discussion concerns the function and value of commercial speech in a modern democratic and capitalistic society in which free speech generally occupies a privileged position.

Two of the most compelling commercial speech commentators disagree on its constitutional importance relative to other kinds of speech. According to C. Edwin Baker's liberty theory of the First Amendment, free speech primarily serves the value of self-expression.[63] Because commercial speech serves values other than self-expression, he argues, it should receive zero First Amendment

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61 *See Hearings*, *supra* note 25, at 94 (testimony of Jerry Saltzgaber); David B. Klein & Jason Richner, *In Defense of the Credit Bureau*, 12 CATO J. 393, 395, 408-09 (1992) (arguing that credit bureaus serve numerous positive social and economic functions, such as making consumers more financially responsible, preserving consumers' access to relatively-low-priced credit, and creating economic efficiencies by helping direct marketers reach the most likely potential customers). *See also* BRANSCOMB, *supra* note 5, at 21 (reporting that the three major credit bureaus offer locater services to lawyers), 23 (describing FTC investigation of TRW, which revealed that the credit bureau had sold lists of consumer types to direct mailers); Simon, *supra* note 17, at 98 (explaining how computerized databases help marketers target potential customers).

62 *See infra* part III.

63 *See* C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 7 (1976) ("As long as speech represents the freely-chosen expression of the speaker

protection.[64] Steven Shiffrin's more expansive reading of the First Amendment recognizes a host of values served by free speech,[65] some of which commercial speech promotes.[66] For background purposes, this Note summarizes Shiffrin's view. His theory more closely reflects current judicial treatment of commercial speech[67] and more clearly reveals the tensions between such speech and personal interests in privacy.

In Shiffrin's view of the First Amendment, free speech promotes a number of values, including liberty, self-realization, the marketplace of ideas, equality, self-government, and government restraint.[68] Shiffrin agrees to some extent with the traditional "marketplace of ideas" argument that the free exchange of ideas protected by the First Amendment promotes the truth-seeking process.[69] By requiring the government to justify its attempts to suppress speech with more than a declaration of its falsity, Shiffrin contends, the First Amendment prevents the accidental or intentional suppression of true speech.[70]

Shiffrin proceeds to argue that line-drawing problems make it impossible to cut off the Constitution's protection of true speech at some boundary between political and commercial speech, non-profit and for-profit speech, or speech regarding matters of public interest and speech regarding matters of private interest. Hence, the government's attempts to suppress true commercial speech deserve just as much judicial scrutiny as government attempts to suppress any other kind of true speech.[71] Shiffrin nevertheless recognizes that competing values like privacy may justify the state's suppression of true commercial speech in situations in which those values would not justify the suppression of other forms of true speech.[72] Only by balancing the factors implicated in individual cases, however, can courts reach sensi-

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while depending for its power on the free acceptance of the listener, freedom of speech represents a charter of liberty for non-coercive action.").

64 C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 196 (1989).

65 Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1251-54 (1983) (expressing general agreement with the judicial tendency to recognize multiple First Amendment interests, including liberty, self-realization, the marketplace of ideas, equality, self-government, and government restraint).

66 *Id.* at 1256-57.

67 *See infra* part III.A.

68 Shiffrin, *supra* note 65, at 1252.

69 *Id.* at 1256. However, Shiffrin disagrees with the popular interpretation of John Stuart Mill's *On Liberty* as advocating the view that truth inevitably emerges from the marketplace of ideas. *Id.* at 1262.

70 *Id.* at 1256-57, 1262.

71 *Id.* at 1256-59.

72 *Id.* at 1261.

ble decisions about when to protect commercial speech and when to permit its suppression.[73]

True commercial speech may serve a number of values in addition to truth—the flourishing of a free market economy, for instance.[74] Moreover, credit reports may serve values that other forms of commercial speech, such as advertisements, do not serve.[75] As Shiffrin makes clear in *The First Amendment and Economic Regulation*, courts face the challenge of weighing the interests served by commercial speech against competing values such as privacy. Under what circumstances ought those competing values prevail over the First Amendment's protection of commercial speech?

D. Towards a Solution

Warren and Brandeis state that inherent in the right to be let alone is "the quality of being owned or possessed."[76] A number of commentators have developed this suggestion by proposing—and criticizing—strategies for protecting personal privacy that draw upon common-law property rules.[77] This Note argues in Part IV that a meaningful right to privacy demands an expansion of property law into the realm of personal information.[78]

Contract theory presents another common-law alternative to the privacy tort. At present, some magazines, credit card companies, and grocery stores offer their customers opportunities to withhold their consent to the sale of information about them to third parties, such as mailing list brokers.[79] Although this sort of contractual arrangement gives consumers some degree of control over the flow of personal in-

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73 *Id.*

74 *See infra* part III.B.2.

75 *See supra* note 62 and accompanying text.

76 Warren & Brandeis, *supra* note 36, at 205.

77 *See, e.g.*, WESTIN, *supra* note 1, at 324-25 ("Personal information, thought of as the right of decision over one's private personality, should be defined as a property right."); Diane L. Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 668-701 (1992) (claiming that although Warren and Brandeis framed "the right to be let alone" as a hasis for tort recovery, the right has its roots in the common-law notion of a copyright in one's life, and accusing modern courts of enlarging "the realm of property . . . [by] assign[ing] property and quasi-property rights to protect intangible [personal and dignitary] interests."); NIMMER, *supra* note 5, ¶ 16.02, at 16-3 ("Information privacy law entails property right in information. A parallel exists between the idea of personal privacy and the commercial law concept of trade secrecy. Both deal with restrictions on disclosure to and disclosure or use by third parties of information that has little value because of its secret (private) nature. In both cases, the right to retain exclusive control or knowledge of certain information lies at the heart of the asserted right."). For a more thorough review of property theory of privacy, see *infra* part IV.C.

78 *See infra* part IV.C.

79 *See, e.g.*, *Hearings*, *supra* note 25, at 119-20 (displaying a copy of Homeland's frequent shopper card application form, furnished by Jerry Saltzgaber). Jerry Saltzgaber, the

formation, other arrangements could give them even greater control, or at least help guarantee the confidentiality of personal information records that are beyond their control. For instance, court-imposed duties of confidentiality upon data custodians might limit the number and kind of recipients who receive personal data.[80] This Note proposes in Part IV a system of explicit personal information contracts that would forbid credit bureaus from disseminating personal information without the consumer's consent.[81]

Before we demand even slightly more respect for our personal privacy from credit bureaus, we should remember that each successful demand constrains the ability of credit bureaus to generate and disseminate credit reports. If we made similar demands of newspapers or other media members, they would probably counter with a First Amendment argument that a healthy level of free speech necessarily includes some privacy-invasive news reporting. Because commercial speech also receives some degree of First Amendment protection, legislative calls for less invasive credit reporting must satisfy the courts that they do not unjustifiably infringe constitutionally protected speech. The next two Parts of this Note explore the legal dissonance between personal privacy and free commercial speech.

II
CREDIT BUREAUS AND PRIVACY

Since the enactment of the Fair Credit Reporting Act (FCRA)[82] in 1970, most consumers who have brought legal actions against credit

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head of Citicorp POS, reported to the Senate that shoppers at all of the target stores were provided with such consent forms, which many of them signed. *Id.* at 101-02.

80 "Ideally, the mere fact that the authorized user is a custodian of sensitive personal information should establish a duty of confidentiality as a matter of law, but the willingness of the courts to imply such an obligation is quite conjectural at this time." Arthur R. Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1089, 1158 (1969) (citation omitted).

81 A consumer group called "Private Citizen, Inc." is trying to use contract theory to deter unsolicited telemarketing calls. The group sends telemarketing companies a list of its members' names, together with a letter informing them that none of the members wants to receive unsolicited calls. However, the letter continues, members will happily receive such calls in return for a prompt payment of $100. According to the letter, making an unsolicited marketing call to a group member constitutes acceptance of the "contract" terms. If the plan works, Private Citizens, Inc. has discovered a way to sell privacy rights. *See* Connie Lauerman, *Hype Tech: Now, it's 'Death and Taxes . . . . and Unsolicited Commercial Phone Calls'*, CHI. TRIB. MAG., Nov. 24, 1991, at 20; *see also* Consuelo Lauda Kertz & Lisa Boardman Burnette, *Telemarketing Tug-of-War: Balancing Telephone Information Technology and the First Amendment with Consumer Protection and Privacy, Part II*, 5 LOY. CONSUMER L. REP. 104 (Summer 1993).

Perhaps consumer groups could also draw on contract theory to dissuade credit bureaus from collecting and disseminating information about them without their consent. *See infra* part IV.C.3.

82 15 U.S.C. §§ 1681-1681t (1994).

bureaus for invading their privacy have proceeded under federal law. The FCRA prohibits consumers from bringing most kinds of common-law actions for invasion of privacy. If a credit bureau, in compliance with its statutory duty to provide consumers with copies of their credit reports, furnishes a consumer with the information that forms the basis of his legal complaint, then the consumer may only proceed against that credit bureau under the relevant provisions of the Act.[83] Although the federal statute has all but superseded common-law privacy actions against credit bureaus, one cannot fairly assess its merits without considering its principal common-law predecessors. Moreover, since Congress intended the FCRA to protect consumer privacy,[84] a fair assessment of the Act requires some familiarity with the common-law rules it displaced.

This Part first reviews the common law of privacy as it pertains to consumer actions against credit bureaus for violations of privacy. It then presents an overview of the primary federal law concerning these issues—the FCRA. Finally, it discusses some of the ways in which the existing legal rules are inadequate to safeguard personal privacy from invasive credit bureau activities.

A. Common Law: The Privacy Tort

The Supreme Court may come to recognize that a constitutionally protected right of privacy prevents the government from publicly disclosing personal information about United States residents.[85] Even if informational privacy comes to occupy a privileged position in the hierarchy of constitutional rights, however, that fact would furnish

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83 *See id.* § 1681h(e).

84 In the FCRA's preamble, Congress included as one of its factual findings: "There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right of privacy." *Id.* § 1681(a)(4). Congress's stated purpose for the Act is "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. § 1681(b); *see also A Bill to Enable Consumers to Protect Themselves Against Arbitrary, Erroneous, and Malicious Credit Information: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st. Cong., 1st Sess. 2413 (1969) (statement of Sen. Proxmire) ("At some point the individual's right to privacy takes precedent [sic] over the creditor's right to obtain information."); 115 CONG. REC. 33,408 (1969) (statement of Sen. Proxmire) ("The purpose of the fair credit reporting bill is to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report. The bill also seeks to prevent an undue invasion of the individual's right to privacy in the collection and dissemination of credit reports.").

85 *See supra* note 36.

only moral support to a plaintiff who claims that a private actor, rather than a state actor, violated his right of privacy.[86]

Traditionally, people seeking a legal remedy for the publication of private information about them have turned to the common-law privacy tort. Over a century ago, Samuel Warren and Louis Brandeis distilled from English case law the tort of invasion of privacy.[87] Distinguishing this tort from common-law copyright violations, slander, and libel, Warren and Brandeis argued that the principle of an "inviolate personality" engenders an individual right "to be let alone."[88] As Warren and Brandeis's privacy tort made its way into American common law, it underwent significant transformation. Dean Prosser, a noted chronicler and catalyst of this process, argued in 1960 that the "privacy" tort had mutated into four separate but loosely related torts, each protective of one interest reflected in the general right to privacy.[89] Prosser's categorizations, to which the *Restatement (Second) of Torts* largely adheres,[90] and explanations of these torts are summarized as follows:

> (1) Intrusion upon seclusion: intrusion upon one's solitude or into one's private affairs, including wiretapping, eavesdropping, and other forms of unauthorized prying into private activities;[91]
> (2) Public disclosure of private facts: an "extension of defamation"[92] that protects one's reputation against widespread disclosures of embarrassing (albeit true) private facts;[93]
> (3) False light publicity: publicity which misrepresents one to the public;[94]
> (4) Misappropriation: the nonconsensual use of one's name or likeness for the economic or other benefit of the appropriator.[95]

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86 The Fourteenth Amendment, which renders the Bill of Rights binding in each of the states, forhids states from "depriv[ing] any person of life, liberty, or property, without due process of law," but nowhere restricts the powers of private individuals. *See* U.S. CONST. amend. XIV, § 1. In Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974), the Supreme Court reiterated the principle that private actors are immune from Fourteenth Amendment restrictions.

87 Warren & Brandeis, *supra* note 36, *passim.*

88 *Id.* at 205.

89 Prosser, *supra* note 35, at 385-89.

90 *See* RESTATEMENT (SECOND) OF TORTS § 652 (1977).

91 Prosser, *supra* note 35, at 390-91.

92 *Id.* at 398.

93 *Id.* at 393-98.

94 *Id.* at 398-401.

95 *Id.* at 401-07. Under the common-law rule of misappropriation, plaintiffs can recover damages for dignitary harm even if the defendant receives a nonpecuniary benefit from his misappropriation. *See* DAVID A. ELDER, THE LAW OF PRIVACY § 6:3, at 387 (1991).

Aside from protecting privacy by preventing nonconsensual appropriations of identity, the misappropriation tort may protect it by treating personal information as the compensable sweat of one's brow. *See, e.g.*, Miller, *supra* note 80, at 1225-26 (discussing proprietary aspects of personal information).

As applied by the courts, none of these torts offers more than minimal assistance to a consumer who claims that a credit bureau's collection or disclosure of personal information has invaded his privacy.

1. *Intrusion Upon Seclusion*

Intrusion upon seclusion pertains generally to unauthorized prying into someone's private affairs. The basic recovery rule has three components: the intrusion must (1) be highly offensive to a reasonable person;[96] (2) be intentional;[97] and (3) occur in a place where the plaintiff has a reasonable expectation of privacy.[98] For three main reasons, this tort fails to protect people from the potentially privacy-invasive practices of credit bureaus.

First, credit bureaus enjoy a qualified privilege to disseminate credit reports to their subscribers without worrying about intrusion liability.[99] Courts rest this privilege upon economic grounds: The "formulation and communication of such confidential reports are 'an integral part of the business community.' "[100] The privilege shields credit bureaus from actions for invasion of privacy so long as the private information they collect and disclose is usable for legitimate business purposes.[101] Economic efficiency apparently justifies the existence of credit bureaus and credit reports, even if the generation of credit reports involves routinely privacy-invasive practices.[102]

Second, courts seem reluctant to impose liability upon defendants who solicit or report information "generally available through normal avenues of investigation, inquiry or observation."[103] Like the

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96 *See, e.g.*, ELDER, *supra* note 95, § 2:1, at 17; RESTATEMENT (SECOND) OF TORTS § 652B cmt. d (1977).

97 *See, e.g.*, ELDER, *supra* note 95, § 2:2, at 23; RESTATEMENT (SECOND) OF TORTS § 652B cmt. a (1977).

98 *See, e.g.*, ELDER, *supra* note 95, § 2:7, at 49.

99 *See, e.g., id.* § 2:13, at 75, and cases cited therein.

100 *Id.* § 2:13, at 75 (quoting Wilson v. Retail Credit Co., 325 F. Supp. 460, 467 (S.D. Miss. 1971), *aff'd*, 457 F.2d 1406 (5th Cir. 1972)). In Tureen v. Equifax, Inc., 571 F.2d 411 (8th Cir. 1978), for example, the Eighth Circuit found that credit reports serve two important public functions: minimizing the risks of extending credit and aiding in the detection of fraudulent credit applications and insurance claims. *Id.* at 416. The court reasoned that because credit reports only serve these functions if those who make the relevant judgments have access to private consumer information, credit bureaus' qualified privilege to generate consumer reports serves the public interest. *Id.*

101 *Tureen*, 571 F.2d at 416.

102 The *Wilson* court recognized that forming and issuing credit reports "necessarily involve[s] a certain amount of intrusion . . . into one's personal affairs." 325 F. Supp. at 467. Other decisions suggest that economic efficiency also justifies bank investigations of a potential litigant's finances on behalf of a customer and insurance company background checks of prospective policy-holders. *See* ELDER, *supra* note 95, § 2:13, at 75-76, and cases cited therein.

103 ELDER, *supra* note 95, § 2:1, at 21; *see also* Robyn v. Phillips Petroleum Co., 774 F. Supp. 587, 592 (D. Colo. 1991) (defendant employer not liable for obtaining and filing away plaintiff employee's bank statement); Tobin v. Michigan Civil Serv. Comm'n, 331

qualified privilege, this requirement effectively shields credit bureaus from intrusion suits because much of the personal information they disseminate is, almost by definition, available through "normal avenues of investigation, inquiry or observation."[104]

Finally, even in the absence of the preceding limitations, the broad consent exception to intrusion liability may protect credit bureaus from suit. Express or implied consent to an intrusion upon seclusion negates the tort.[105] Consumers who complete credit card applications arguably consent to the collection of information about them by the credit card company, the stores that honor its card, and the credit bureaus with which it deals.[106]

The common-law intrusion upon seclusion tort appears inhospitable to consumer violation-of-privacy claims against credit bureaus.[107] A consumer who complains that a credit bureau has violated his privacy must look elsewhere for relief.

2. *Public Disclosure of Private Facts*

Consumers are just as unlikely to secure relief against credit bureaus for public disclosures of private facts. In its traditional formulation, this tort involves the "publicity" of "highly offensive,"[108] albeit true,[109] private facts about someone that are "not of legitimate concern to the public."[110] To fulfill the publicity requirement, the disclo-

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N.W.2d 184, 190 (Mich. 1982) (Because employees routinely disclose their names and addresses to their employers, the common law privacy tort permits employers to disclose this information to other organizations.); DeAngelo v. Fortney, 515 A.2d 594 (Pa. 1986) (defendant may supply plaintiff-homeowner's name, address, and telephone number to companies for solicitation purposes).

104 *See supra* notes 6-10 and accompanying text. Credit bureaus would not be able to store and disseminate as much information as they do if it were not generally available from other sources.

105 ELDER, *supra* note 95, § 2.12, at 68.

106 This is an extrapolation from the rule that when people apply for and/or receive credit, they impliedly consent to intrusions upon their seclusion by creditors, such as intrusive demands for repayment of the loan. *See id.* § 2:20, at 116 & n.72. With respect to credit bureau intrusions upon seclusion, the credit applicant or recipient would have only a small chance of persuading a court that her consent was uninformed and hence invalid. Since implied consent is sufficient to negate the intrusion tort, *see id.* § 2:12 and cases cited therein, there is no reason to think that consent is only valid if it is informed. A credit applicant or recipient might have more success arguing that the credit bureau's collection of information about her exceeded the scope of her consent to its intrusive actions. *See, e.g., id.* § 2:12, at 72.

107 The intrusion tort also remains unavailable to most plaintiffs who sue credit bureaus for invasions of privacy because credit bureau intrusions seldom meet the "highly offensive to a reasonable person" standard. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1977) (describing the standard); ELDER, *supra* note 95, § 2:1, at 16-17 (same).

108 RESTATEMENT (SECOND) OF TORTS § 652D(a) (1977).

109 Truth is not a defense to public disclosure claims. *See* ELDER, *supra* note 95, § 3:1, at 149-50, and cases cited therein.

110 RESTATEMENT (SECOND) OF TORTS § 652D(b) (1977).

sure must reach so many people that the information effectively becomes public knowledge.[111] At first blush, this tort looks like the natural home for privacy suits against credit bureaus. However, even though courts impose public disclosure liability upon store owners who "publicize" the names of debtors in their stores,[112] courts generally refuse to hold credit bureaus liable for disseminating this and much more information to their subscribers. Three factors seem to ground this disparate judicial treatment.[113]

First, credit bureaus enjoy the same qualified privilege with respect to the disclosure tort as they do with respect to the intrusion tort, provided the report recipient has a legitimate need for the information that the credit report provides.[114] If not, the credit bureau forfeits its qualified privilege and may indeed face liability under this variation of the privacy tort,[115] but only if its disclosure is "highly offensive,"[116] a standard few credit reports meet.[117]

Second, the majority rule on the extent of publicity of private facts necessary to trigger liability leaves credit bureaus free to distribute credit reports to their subscribers. Under the majority rule, defendants who "publicize" private facts about plaintiffs escape liability unless such communication reaches "the public at large" or reaches "so many persons that the matter must be regarded as sub-

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111 *See, e.g.*, ELDER, *supra* note 95, § 3:3, at 153; *see also* RESTATEMENT (SECOND) OF TORTS § 652D (1977) (providing examples of disclosures that meet the publicity standard).

112 *See* Brents v. Morgan, 299 S.W. 967, 968-71 (Ky. 1927) (holding that plaintiff has cause of action in tort for invasion of privacy against defendant who posted notice of plaintiff's indebtedness on a show window); Tuyes v. Chambers, 81 So. 265, 268 (La. 1919) (holding that defendant's publication of plaintiff's name on list of debtors was libel actionable per se, where inclusion of plaintiff's name imputed to her a refusal to pay her debts and destroyed her reputation for integrity and fair dealing); *see also* RESTATEMENT (SECOND) OF TORTS, § 652D cmt. a, illus. 2 (1977).

113 For an extended discussion of the public disclosure tort as it pertains to commercial data distributions, see George B. Trubow, *Protecting Informational Privacy in the Information Society*, 10 N. ILL. U. L. REV. 521, 532-38 (1990).

114 *See* ELDER, *supra* note 95, § 3:9, at 195; *see also* Bloomfield v. Retail Credit Co., 302 N.E.2d 88, 100 (Ill. 1973) (stating in dicta that credit bureaus have qualified privilege to disclose information concerning personality traits and family background for employment purposes). Language in the FCRA indicates that Congress intended to preserve this qualified privilege; the Act permits consumer reporting agencies to furnish consumer reports to "a person which it has reason to believe . . . has a legitimate business need for the information in connection with a business transaction involving the consumer." 15 U.S.C. § 1681(b)(3)(E) (1994). For an analysis of the FCRA's privacy-protective function, see *infra* part II.B.

115 *See* ELDER, *supra* note 95, § 3:9, at 197 & n.31.

116 *Id.* § 3:5, at 173-83.

117 Since a "defendant has not engaged in disclosures of a highly offensive or reprehensible nature where it merely discloses that plaintiff has engaged . . . in legally protected or normal conduct," *id.* § 3:5, at 181, it seems unlikely that a credit bureau meets the "highly offensive" standard merely by transmitting data about consumer debts, mortgages, employment, etc., no matter who receives it. *See id.* § 3:5 and cases cited therein; *see also* RESTATEMENT (SECOND) OF TORTS § 652D(a) cmt. c (1977).

stantially certain to become one of public knowledge."[118] Credit bureau distributions of consumer credit reports to a limited number of subscribers generally fall short of the publicity necessary to trigger liability.[119]

Third, consumer consent negates the public disclosure tort.[120] Even if a consumer claims that a credit bureau's disclosures exceeded the scope of his consent, the defendant may still escape tort liability.[121] In the absence of express consent, the defendant may imply consent from the plaintiff's conduct if the defendant does so reasonably and reasonably relies upon the implication.[122] These generous rules of consent help to render the public disclosure tort as ineffectual against credit bureau privacy invasions as the intrusion tort is.

3. *False-Light Publicity*

Unlike the first two subcomponents of the privacy tort, the false light tort involves false information. For that reason, a plaintiff who has a cause of action for false-light publicity often has a cause of action for defamation as well.[123] As with public disclosure, the defendant

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118 RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

119 The Eighth Circuit Court of Appeals' decision in Tureen v. Equifax, Inc., 571 F.2d 411 (8th Cir. 1978), although specifically applying Missouri's law of privacy, reflects the majority rule as it pertains to credit bureaus. In order for the plaintiff to get his public disclosure of private facts case to the jury, the court held, "there must be evidence of publicity in the sense of a disclosure to the general public or likely to reach the general public." *Id.* at 419. The court went on to state that since the defendant had limited its distribution of the plaintiff's credit report to a single customer, the district court should have granted the defendant's motion for a directed verdict on the plaintiff's violation of privacy claim. *Id.* Clearly, as long as credit bureaus limit their "publicity" of consumer credit reports to a finite number of subscribers, they have little to fear from privacy actions based on the public-disclosure-of-private-facts theory.

See also Houghton v. N.J. Mfrs. Ins. Co., 615 F. Supp. 299, 307 (E.D. Pa. 1985) (holding that plaintiff cannot recover against credit bureau for tortious disclosure of private facts where credit bureau distributed investigative report "to only a very small group of persons"), *rev'd on other grounds*, 795 F.2d 1144 (3rd Cir. 1986); Wilson v. Retail Credit Co., 325 F. Supp. 460, 463 (S.D. Miss. 1971) (holding that plaintiff cannot recover against credit bureau on public-disclosure-of-private-facts theory if disclosure is limited to credit bureau's customers), *aff'd*, 457 F.2d 1406 (5th Cir. 1972); ELDER, *supra* note 95, § 3:3, at 153-56; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117 (4th ed. 1971).

120 As mentioned above, consumers arguably consent to some public disclosures of personal information when they sign credit card application forms. *See supra* notes 48 & 106 and accompanying text.

121 *See* ELDER, *supra* note 95, § 3:8, at 192 (citing McCabe v. Village Voice, Inc., 550 F. Supp. 525, 529 (E.D. Pa. 1982)).

122 *See, e.g.*, ELDER, *supra* note 95, § 3:8, at 190; *see also* Bloomfield v. Retail Credit Co., 302 N.E.2d 88, 100 (Ill. 1973) (noting that credit bureau's disclosure of plaintiff's credit report to prospective employer counts as impliedly consensual when plaintiff offered names of former employers as references, fully expected reports to be prepared, and complained when defendant stopped sending them, thus relieving the credit bureau of tort liability).

123 Among the distinctions between the defamation and false-light torts, two seem most siguificant. First, a false-light defendant's liability depends on whether the disclosure

triggers false-light liability by "publicizing"—communicating to a large number of people[124]—highly offensive, albeit false, information about the plaintiff.[125] It thus appears that if a credit bureau's misrepresentations are insufficiently publicized or offensive, the false-light tort offers consumers no relief for subsequent injuries to their privacy interests. An injured consumer may improve his chances of recovering damages by suing the credit bureau for defamation.[126]

4. *Misappropriation*

Generally, plaintiffs injured by a credit bureau's sale of information to its subscribers will find none of the first three varieties of the privacy tort helpful. Recovery on the privacy theory of misappropriation also seems somewhat unlikely, mainly because it has evolved to protect images of the plaintiff, rather than information about him.

For a plaintiff to recover for misappropriation, he must show that the defendant has appropriated his name or likeness for the defendant's advantage.[127] In the typical suit for tortious commercial appropriation of identity, the plaintiff complains that the defendant used

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would have been highly offensive to a reasonable person, *see* RESTATEMENT (SECOND) OF TORTS § 652E cmt. c (1977), while a defamation defendant's liability turns in part on whether his false statement injured the plaintiff, *id.* § 559 (1977). Second, false-light liability requires widespread publicity, *see* ELDER, *supra* note 95, § 4:3, at 274, while defamation liability may flow from a single statement made to one person other than the plaintiff, *see* RESTATEMENT (SECOND) OF TORTS § 576 cmt. d (1977).

124 *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977); *see also id.* § 652E cmt. a (1977). Note that "the decisions have almost universally adopted the same definition [of publicity] as in the public disclosure of private fact tort." ELDER, *supra* note 95, § 4:3, at 274-75.

125 *See, e.g.*, ELDER, *supra* note 95, § 4:4, at 281; *see also* Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 90 (W. Va. 1983) ("[A] plaintiff . . . may not recover unless the false light . . . would be highly offensive to a reasonable person."); RESTATEMENT (SECOND) OF TORTS § 652E cmt. b (1977) (stating that false light privacy tort protects a person's interest "in not being made to appear before the public in an objectionable false light or false position, or in other words, other than as he is").

126 The defamation cause of action presents a different, but perhaps less demanding, set of obstacles to a consumer injured by an inaccurate credit report. The *Restatement* formulation of common-law defamation consists of four elements. A plaintiff has a cause of action for defamation if (1) the defendant made a false and defamatory (*i.e.*, injurious to reputation) statement about the plaintiff; (2) the defendant communicated this statement to at least one person other than the plaintiff; (3) the defendant communicated this statement at least negligently; and, for some kinds of defamatory statements, (4) the defendant's communication caused the plaintiff special harm. RESTATEMENT (SECOND) OF TORTS §§ 558-559 (1977). Because the First Amendment status of credit reports remains unclear, *see infra* part III, so does the application of these defamation liability rules to credit bureaus who issue erroneous credit reports. *See* sources cited *supra* note 4 for more information about credit bureaus' liability for defamation.

127 *See, e.g.*, ELDER, *supra* note 95, § 6:2, at 380; RESTATEMENT (SECOND) OF TORTS § 652C cmt. c (1977). Although the "advantage" is usually commercial, the common-law rule also permits recovery when the defendant uses the plaintiff's name or likeness for the defendant's non-commercial and non-pecuniary gain. *See also* RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (1977); ELDER, *supra* note 95, § 6:3, at 387, and cases cited therein.

his name, picture, or portrait to promote the defendant's products or business.[128] Such activities formed the basis of the plaintiff's claim in the first American case to recognize the right to privacy, *Pavesich v. New England Life Insurance Co.*[129] Since *Pavesich*, however, many courts have granted relief in situations in which the defendant used the plaintiff's identity for commercial purposes other than advertising the defendant's products or business. For example, courts generally seem willing to impose tort liability on defendants who simply sell photographs or other images without their subject's consent.[130] However, courts seem reluctant to impose liability on defendants who sell customer or subscriber lists to someone who will use the names for advertising purposes.[131]

Whether the privacy tort as applied by the courts is a legitimate descendant of Warren and Brandeis, or an entrenched misinterpretation thereof, none of the privacy tort's four subcomponents ensures relief to consumers whose privacy a credit bureau invades by disseminating personal information about them to a fixed set of subscribers. At present, plaintiffs who seek to recover damages from credit bureaus for invading their privacy have one other option—bringing a suit under the provisions of the Fair Credit Reporting Act.[132] In theory,

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128 *See* ELDER, *supra* note 95, § 6:2 *passim.*

129 50 S.E. 68 (Ga. 1905). The defendant in *Pavesich* produced a newspaper advertisement promoting its insurance services. A photograph of the plaintiff appeared in the ad, which portrayed him as a customer and appeared to quote him. The offended plaintiff had neither consented to the use of his picture, spoken the words attributed to him, nor bought insurance from the defendant's company. *Id.* at 68-69.

130 ELDER, *supra* note 95, § 6:2, at 385, and cases cited therein. Most of the cases Elder cites involve photographs of famous people, performers, and the unclad. The *Restatement*, however, generalizes the rule to include defendant's appropriations of "the reputation, prestige, social or commercial standing, public interest *or other values* of the plaintiff's name or likeness." RESTATEMENT (SECOND) OF TORTS § 652C cmt. c (1977) (emphasis added). For a discussion of whether this rule should sweep in credit reports, *see infra* part IV.C.2.

131 *See, e.g.*, Shibley v. Time, Inc., 341 N.E.2d 337 (Ohio Ct. App. 1975) (holding that magazine publishers' practice of selling and renting subscription lists to direct mail advertisers without subscribers' consent does not invade their privacy when lists are used solely to determine which subscribers receive which advertisements); *see also* Joel E. Smith, Annotation, *Invasion of Privacy by Sale or Rental of List of Customers, Subscribers, or the Like, to One Who Will Use it for Advertising Purposes*, 82 A.L.R.3d 772 (1978).

132 *See infra* part II.B.

In addition to common-law and federal measures for safeguarding privacy and reputation from commercial abuse, state legislation may assist people who claim that a credit bureau has invaded their privacy. Most states recognize some form of a right to privacy as a matter of common law or statute. *See generally* J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY, § 6.1[A] (1994). A few state constitutions recognize a right to privacy. *See* ALASKA CONST. art. I, § 22 (adopted 1972); CAL. CONST. art. I, § 1 (adopted 1974); HAW. CONST. art. 1, § 6 (adopted 1978); MONT. CONST. art. II, § 10 (adopted 1972). For a thorough review of state privacy laws, see MCCARTHY, *supra*, §§ 6.1-.15.

This Note only considers federal alternatives to the common law. A federal focus reflects the interstate nature of the credit reporting business and the idea that the most effective reformation of privacy law would occur, if at all, at the federal level. As Arthur

however, federal legislation modelled on the common-law right of publicity could assist victims of privacy violations more effectively than either the privacy tort or the Fair Credit Reporting Act by creating assignable property rights in personal information.[133]

B. Federal Legislation: The Fair Credit Reporting Act

In 1970, Congress responded to the shortcomings of the privacy tort by enacting the Fair Credit Reporting Act (FCRA).[134] The FCRA ostensibly protects consumers from privacy-invasive credit bureaus by cutting through the common-law debris, arming consumers with specific legal rights against the primary private institutions that collect, maintain, and sell information about them, and informing credit bureaus of their corresponding duties and liabilities. In practice, however, the FCRA permits credit bureaus and their customers to exchange large quantities of detailed consumer information with impunity.

The FCRA largely preempts common-law actions for invasions of privacy and replaces them with a federal consumer privacy law.[135] It

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Miller observes, "[e]specially in the context of computer transmissions on multistate media, national uniformity is an extremely desirable—and may be an imperative—goal." Miller, *supra* note 80, at 1225; *see also* WESTIN, PRIVACY AND FREEDOM, *supra* note 1, at 325 (stating that "circulation of personal information by someone other than the owner . . . is handling a dangerous commodity in interstate commerce, and creates special duties and liabilities on the information utility . . . handling it").

133 *See infra* part IV.C.

134 15 U.S.C. §§ 1681-1681t (1994). A number of other federal statutes limit the ability of commercial institutions to collect and disseminate personal information. They include: the Fair Credit Billing Act, Pub. L. No. 93-495, 88 Stat. 1511 (1974) (codified as amended in scattered sections of 15 U.S.C.); the Privacy Protection Act, Pub. L. No. 96-440, title II, § 201, 94 Stat. 1882 (1980) (codified as amended at 42 U.S.C. § 2000aa-11 (1988)); the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 18, 47, and 50 U.S.C.); the Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030 (1994); the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.); the Electronic Fund Transfer Act, 15 U.S.C §§ 1693-1693i (1994), the Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (1988), the Lanham Act, 15 U.S.C. §§ 1051-1127 (1994), and the Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1994). Federal privacy statutes constitute such a complex patchwork of protection from privacy invasions by commercial entities that few people are likely to know what their privacy rights are. *See, e.g.*, Joshua D. Blackman, *A Proposal for Federal Legislation Protecting Informational Privacy Across the Private Sector*, 9 SANTA CLARA COMPUTER & HIGH TECH. L.J. 431, 456 (1993).

135 15 U.S.C. § 1681h(e) (1994). This subsection forbids consumers to bring "any [non-statutory] action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to . . . this title." Consumers may, however, bring state law claims against credit bureaus for furnishing false information with malice or willful intent to injure. *Id.*

There are several interpretations of this FCRA provision. *See* Hood v. Dun & Bradstreet, Inc., 486 F. 2d 25, 32 (5th Cir. 1973) (noting that the FCRA only preempts common-law actions when the plaintiff obtains the information giving rise to the cause of action

imposes duties upon credit report generators as well as upon credit report users.[136] Under the Act, credit reporting agencies must use "reasonable measures" to protect the confidentiality of consumer information and to ensure proper utilization of that data.[137] Credit reporting agencies face civil liability for negligent or willful noncompliance with the Act.[138] The statute permits plaintiffs who prove negligent noncompliance to recover actual damages, costs, and reasonable attorney fees.[139] Plaintiffs who prove willful noncompliance may recover punitive damages as well.[140]

1. *Confidentiality*

The key statutory provision for ensuring the confidentiality of consumer credit information defines and restricts the class of permissible report recipients.[141] Credit bureaus may furnish consumer reports to two broad classes of recipients in addition to those specifically delineated by the Act. First, credit bureaus may provide requesting governmental agencies with basic consumer information.[142] Second, credit bureaus may issue consumer reports to any requesting party if they have reason to believe that the requestor has "a legitimate business need for the information in connection with a business transaction involving the consumer."[143]

In effect, the statute turns the common-law invasion of privacy tort into a federal tort of negligent or willful issuance of credit information to those who clearly intend to use it for non-statutory purposes. At a minimum, credit bureaus must maintain "reasonable

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pursuant to the Act's provisions), *cert. denied,* 415 U.S. 988 (1974); Freeman v. Southern Nat'l Bank, 531 F. Supp. 94, 96 (S.D. Tex. 1982) (noting that the FCRA does not preempt common-law actions for conveyance of false information with intent to injure); Henry v. Forbes, 433 F. Supp. 5, 10 (D. Minn. 1976) ("[The individual has] no remedy unless the information [is] used in violation of common law privacy rights (requiring highly public, outrageous conduct to make a cause of action). . . . [T]he Act clearly does not provide a remedy for all illicit or abusive use of information about consumers.").

136 15 U.S.C. § 1681m (1994).

137 *Id.* § 1681(b).

138 *Id.* §§ 1681n-1681o.

139 *Id.* § 1681o.

140 *Id.* § 1681n.

141 *See id.* § 1681b. According to this provision, credit bureaus may furnish a consumer report only to: (1) courts and federal grand juries who properly request them; (2) consumers themselves, upon written request; or (3) those who, the bureau has reason to believe, intend to use the information (a) in connection with a credit transaction involving the extension of credit to the consumer, or the review or collection of the consumer's account, (b) for employment purposes, (c) in connection with underwriting insurance involving the consumer, or (d) in connection with determining the eligibility of the consumer to receive a governmental benefit from an agency required by law to consider an applicant's financial status.

142 This information includes the consumer's name, address, former addresses, places of employment, and former places of employment. *Id.* § 1681f.

143 *Id.* § 1681b(3)(E).

procedures" to limit report distributions to permissible recipients.[144] To this end, the FCRA forbids credit bureaus from supplying consumer reports to prospective users without making a reasonable effort to verify their identity and the purposes for which they seek the information.[145]

2. *Access to Information*

Two FCRA provisions give consumers limited rights to monitor the distribution, use, and contents of their credit reports. Upon request, proper identification, and payment of a "reasonable" fee,[146] credit bureaus must disclose to consumers the "nature and substance" of the non-medical information their files contain on them, as well as some of its sources and recipients.[147] Additionally, if the credit bureau prepares a credit report for employment purposes that includes adverse public record information about a consumer, it must inform the consumer of that fact and of the recipient's identity.[148]

3. *Disputes*

Credit bureaus must reinvestigate disputed information and delete inaccurate and unverifiable data.[149] A consumer who remains dissatisfied with the credit bureau's resolution of the dispute can have the credit bureau add to the consumer's file a brief explanatory statement. This statement must accompany all subsequent credit reports containing the disputed information.[150]

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144 *Id.* § 1681e(a).

145 Credit bureaus "shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose." *Id.* § 1681e(a). Then, they must make a "reasonable effort to verify the identity of a new prospective user and the uses certified by such . . . user prior to furnishing such user a consumer report." *Id.* The FCRA imposes liability on those who lie to credit agencies about their intended use of the requested information. Someone who knowingly and willfully obtains a consumer report from a credit bureau under false pretenses "shall be fined not more than $5,000 or imprisoned not more than one year, or both." *Id.* § 1681q.

146 *Id.* § 1681j. TRW offers to supply one free credit report annually to each consumer in its files. *See* ROTHFEDER, *supra* note 5, at 37. The statute requires credit bureaus to issue free credit reports to consumers who so request within 30 days of receiving notification from a prospective creditor, insurer, or employer, pursuant to § 1681m(a) that it is taking adverse action on the basis of the consumer's credit report. *Id.* § 1681j.

147 *Id.* § 1681g(a). The credit bureau need not disclose to the consumer sources of information used solely to prepare an investigative consumer report. *Id.* It must disclose the recipients to whom it has furnished the report for employment purposes within the previous two years and all recipients who have received the report within the previous six months. *Id.*

148 *Id.* § 1681k(1).

149 *Id.* § 1681i(a). If the credit bureau has reasonable grounds to believe that a consumer's dispute is frivolous or irrelevant, it need not conduct a reinvestigation. *Id.*

150 *Id.* § 1681i(b)-(c).

4. *User's Duties*

The FCRA imposes minimal duties on credit report recipients. Although the statute requires potential recipients to "certify" to the credit bureau that they intend to use the requested information for permissible purposes,[151] recipients' statutory duties practically cease once they have the information in hand. If the information contained in the report plays any role in a prospective creditor's, insurer's, or employer's decision to take action adverse to the consumer—such as denying credit or offering it at an increased interest rate—the user must advise the consumer of its action and supply the name and address of the credit bureau that furnished the report.[152] To avoid liability under the Act, users need only maintain "reasonable procedures to assure compliance."[153]

C. Legal Inadequacies

In part because technology advances more quickly than privacy law advances, current law inadequately protects personal privacy from commercial intrusions. Over the last thirty years, computers have enabled credit bureaus to collect and maintain an enormous quantity of personal information and to disseminate it to a variety of users through a potentially unlimited network. Unfortunately, courts, in applying the common law of privacy, and Congress, in drafting the FCRA, overlooked what the ever-increasing power of computers should have made obvious: that privacy is nearly impossible to secure without effective control over personal information.

1. *Control Over Personal Information*

The notion of control over personal information encompasses four distinct elements: (1) overseeing its collection and maintenance; (2) consenting to, or withholding consent from, disclosures; (3) deciding which commercial uses of personal information to permit; and (4) having some ability to determine its price. This section traces the theoretical origins of control over personal information and exposes the ways in which the common law of privacy and the FCRA deny consumers adequate control over it.

Even though their article reflects the authors' concerns about the gossipy impropriety of the press,[154] Warren and Brandeis's main pri-

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151 *Id.* § 1681e(a). Anyone who knowingly and willfully obtains consumer information from a credit bureau under false pretenses is subject to a $5000 fine and up to one year's imprisonment. *Id.* § 1681q.

152 *Id.* § 1681m(a).

153 *Id.* § 1681e(a).

154 Warren & Brandeis, *supra* note 36, at 195-96. Warren and Brandeis wrote *The Right to Privacy* partially in response to "lurid" articles about the Warrens' social activities pub-

vacy argument is sufficiently broad to cover the methods credit bureaus use to communicate consumer information to their subscribers.[155] Subsequent interpretations of the right of privacy, however, have rendered it fairly impotent to protect consumers from credit bureaus' collections and disclosures of personal information.

Warren and Brandeis recognized a general connection between privacy and control over personal information.

> The common law secures to each individual the right of determining . . . to what extent his thoughts, sentiments, and emotions shall be communicated to others. . . .[156]
>
> . . . .
>
> [T]he protection afforded to thoughts, sentiments, and emotions . . . is merely an instance of the enforcement of the more general right of the individual to be let alone.[157]

Moreover, Warren and Brandeis contended that the right to privacy protects the expression of thoughts, sentiments and emotions, "whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression" as much as copyright protects the artistic expression of these inner phenomena.[158] Thus, as originally conceived, the right to privacy embraced the right to maintain control over personal information and had sufficient breadth to protect even public communications of private information.

A privacy law true to Warren and Brandeis's philosophical commitments and legal intentions would serve consumer interests by helping them to secure what the common law and the FCRA deny them: adequate control over information about themselves. As the law currently stands, consumers lack control over personal information in four fundamental ways.

a. *Collection and Maintenance*

While neither the common law nor the FCRA imposes significant data maintenance duties on credit bureaus, the former, at least

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lished in Boston's *Saturday Evening Gazette*. ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 70 (1946).

155 Even as expounded by its originators, the privacy tort extends beyond newspaper gossip; it arguably comprehends situations in which "a journalistic or other enterprise" discloses private information about one to the public without one's consent (causing actionable harm). *See* Warren & Brandeis, *supra* note 36, at 196. For Warren and Brandeis, "mental suffering" describes the compensable harm invasions of privacy cause. *Id.* at 213. They also describe the injury as "mental pain and distress, far greater than could be inflicted by mere bodily injury," *id.* at 196, a spiritual wrong, *see id.* at 197, and "injury to feelings," *id.* at 219. Conceivably, people suffer harm of a similar kind and degree whether a newspaper or a credit bureau invades their privacy.

156 Warren & Brandeis, *supra* note 36, at 198 (citation omitted).

157 *Id.* at 205.

158 *Id.* at 206.

facially, places more stringent restrictions on the collection of personal information. In the end, however, neither judge-made nor federal law affords consumers meaningful control over credit bureaus' collection and maintenance of information.

Under common-law rules, the intrusion tort presents the only barrier to credit bureaus' information collection practices. Thus, if credit bureaus turned to data collection methods such as wiretapping or video surveillance,[159] they would likely face intrusion liability. Short of those extremes, the common law leaves credit bureaus free to collect public record and other information "generally available through normal avenues of investigation, inquiry or observation."[160]

For two main reasons, the common-law collection rule is overly permissive. First, the rule ignores the possibility, recognized by the Supreme Court in *United States Department of Justice v. Reporters Committee for Freedom of the Press*,[161] that disclosures of information compilations may invade privacy even when their component pieces are matters of public record.[162] Second, the rule seems to encourage credit bureaus to gather as much information as possible and to disseminate it as widely as possible. The rule suggests that once a piece of personal information is "generally available," consumers are estopped from complaining that its collection intrudes upon their privacy. By the time a consumer discovers that her credit report contains intrusively private information, it may be too late to sue the credit bureau for intruding upon her seclusion.

On a plausible interpretation of the FCRA's common-law preemption provision, the Act gives credit bureaus considerable freedom to resort to intrusive collection methods. The FCRA does not attempt to limit credit bureaus' information collection methods. This presents few problems as long as the intrusion upon seclusion tort remains available to consumers. However, if a consumer wants to bring an action against a credit bureau based on information supplied to her in compliance with the FCRA, she may do so only for a negligent or willful violation of the statute.[163] The logical, albeit odd, result is that if a consumer learns from her credit report that the credit bureau has tapped her phone, for instance, she has neither a common-law intrusion claim[164] nor comparable recourse under the FCRA.

Rather than impose restrictions on the collection of information, the FCRA merely forbids credit bureaus to *report* certain information

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159 *See* ELDER, *supra* note 95, § 2:5, at 39-42, § 2:18.

160 *Id.* § 2:1, at 21.

161 489 U.S. 749 (1989).

162 *Id.* at 764; *see also infra* part IV.C.3.a.

163 15 U.S.C. § 1681h(e) (1994).

164 Under the conditions stated in the text, the statute preempts "any action or proceeding in the nature of . . . invasion of privacy." *Id.*

after seven or ten years.[165] Thus, the statute implicitly permits credit bureaus to *maintain* obsolete information, presumably until a consumer-requested reinvestigation reveals such information to be inaccurate or unverifiable.[166] Somewhat similarly, common-law rules punish sloppy maintenance procedures only when they result in the actionable publication of defamatory falsehoods.[167]

Together, the common-law rules and the FCRA tell consumers two things about controlling the commercial collection and maintenance of personal information. First, if consumers want to prevent credit bureaus from collecting personal information, they must make every effort to keep such information secret, even if that means subscribing to magazines under an assumed name and always paying cash for food, merchandise, and services. Second, to keep track of the personal credit information that bureaus maintain, consumers must buy copies of their credit reports regularly and challenge any inaccurate information. Alternatively, they can wait for a maintenance error to result in discoverable and actionable defamation.

b. *Consent*

Under the common law, one who expressly or impliedly consents to an invasion of one's privacy, in any of its forms, has recourse against the privacy-invader only if the invader exceeds the scope of one's consent.[168] Thus, merely by signing a credit card application form, one may consent to a number of arguably intrusive activities: the investigation of one's credit history, the transfer of information supplied on the application form to credit bureaus, and subsequent transfers of personal information from the creditor to credit bureaus.[169] Likewise, merely by purchasing goods on credit in a public place, one may impliedly consent to the store's disclosure of transactional data to

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165 *Id.* § 1681c(a).

166 Under 15 U.S.C. §1681i(a) (1994), consumer reporting agencies must delete inaccurate or unverifiable information. According to one federal court's dictum, the common-law intrusion upon seclusion rules permit credit bureaus to collect and retain a consumer's insurance history as long as the information pertains to a legitimate business purpose. Tureen v. Equifax, Inc., 571 F.2d 411, 416-17 (8th Cir. 1978).

167 RESTATEMENT (SECOND) OF TORTS § 580B (1977).

168 *See supra* note 121 and accompanying text.

169 According to the Privacy Commission:

> Industry spokesmen consistently maintain that the individual who applies for credit implicitly consents to the exchange of information about him among credit grantors. Because credit application forms almost invariably request the names of a few credit grantors with whom the applicant already has a relationship, it is argued that the individual must know third-party sources will be contacted to verify and supplement the information he himself provides. The industry relies mainly on this implied consent to justify the free flow of information within it.

PRIVACY COMMISSION, *supra* note 5, at 71. Whether the implied consent is informed or not is a question beyond the scope of this Note.

credit bureaus. The intrusion tort is inapplicable when the allegedly intrusive activity consists of "viewing, observing, or recording 'matters which occur in a public place or a place otherwise open to the public eye.' "[170]

The FCRA is silent with respect to consumer consent. It does, however, limit the class of permissible report recipients.[171] The statutory requirement that credit bureaus furnish credit reports only to those who have a legitimate business need for them[172] approximates the result of the common-law consent rule. Under both the common law and the FCRA, consumers only gain a claim for public disclosures of private facts when a credit bureau distributes such information to an audience far larger than its regular subscribers.[173] In sum, the law currently affords little weight to whether consumers consent to disclosures of personal information to credit bureaus or from credit bureaus to report subscribers.

c. *Uses of Personal Information*

Neither the common law nor the FCRA confers upon consumers significant power to determine the purposes for which those with access to their personal information may use it. This aspect of control over personal information takes on special importance when commercial users of such information receive it for one stated purpose, but use it for other purposes or resell it.[174]

The common law deals with credit report recipients' unauthorized use and third-party disclosures of personal information in two ways. First, consumers can conceivably sue credit report recipients directly for violating their privacy, although discovering recipients' privacy-invasive activities and proving that they satisfy the conditions of

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170 *See* ELDER, *supra* note 95, § 2:7, at 45 (quoting Fogel v. Forbes, Inc., 500 F. Supp. 1081, 1087 (E.D. Pa. 1980)); *see, e.g.*, Mark v. Seattle Times, 635 P.2d 1081, 1095 (Wash. 1981) (defendant situated in a public area may film plaintiff inside a store and televise the clip), *cert. denied*, 457 U.S. 1124 (1982). However, an event may occur in a public place without thereby becoming a public event. *See* ELDER, *supra* note 95, § 2:7, at 47-49; United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 753 (1989).

171 *See supra* notes 142-45 and accompanying text.

172 15 U.S.C. § 1681b(3)(E) (1994).

173 For a discussion of the relevant privacy tort, see *supra* parts I.B.1-2.

174 According to the Privacy Commission, "information is shared widely within the credit community and is disclosed to institutions that are not credit grantors either directly by credit grantors or indirectly through credit bureaus." PRIVACY COMMISSION, *supra* note 5, at 85. The Commission also notes that "credit grantors disclose information to collection agencies without restrictions on subsequent use or disclosure by these agencies." *Id.* at 72. Even credit bureau defenders admit that the information they manage flows beyond creditors to employers, landlords, and insurance companies. *See, e.g.*, Klein & Richner, *supra* note 61, at 399.

the relevant privacy tort appear unlikely.[175] Second, at least in the Eighth Circuit, credit bureaus violate the intrusion tort if they issue credit reports that include information irrelevant to legitimate business purposes.[176] The irrelevancy standard seems difficult to meet. In *Tureen v. Equifax*, the Eighth Circuit Court of Appeals suggested that because a consumer's thirty-year-old insurance information was relevant to a legitimate business purpose, the credit bureau's disclosure of it did not violate his privacy.[177]

Similarly, the FCRA limits credit report distributions to those who, the credit bureau has reason to believe, have a legitimate purpose for it.[178] A number of commentators accuse courts of construing "legitimate business needs" so broadly as to make this limitation ineffectual.[179] Although some courts do take a liberal view of "legitimate business needs,"[180] the rule still possesses some bite.[181]

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175 *See, e.g.*, Shibley v. Time, Inc., 341 N.E.2d 337 (Ohio 1975) (holding that magazine publishers' practice of selling and renting subscription lists to direct mail advertisers without subscribers' consent does not invade their privacy, when lists are used solely to determine which subscribers receive which advertisements).

176 Tureen v. Equifax, Inc., 571 F.2d 411, 417 (8th Cir. 1978).

177 *Id.* at 416-17.

178 15 U.S.C. § 168Ib(3)(E) (1994). As mentioned above, the Act also designates certain classes of permissible report recipients. *Id.* § 1681(b). The Act spells out the "reasonable procedures" credit bureaus must take when determining whether to issue credit reports to a requesting party. *Id.* § 1681(e)(a); *see also supra* notes 143-45 and accompanying text. At least in New York, this standard is not hard to meet. In Klapper v. Shapiro, 586 N.Y.S.2d 846, 849-50 (N.Y. Sup. Ct. 1992), the court held that a credit report subscriber's primary business purpose and its certification constitute the credit bureau's " 'reason to believe' that the subscriber has a legitimate business need for the credit profile report requested."

179 *See, e.g.*, ROTHFEDER, *supra* note 5, at 55 (describing the "legitimate business needs" rule as "a sloppy and vague loophole that is all the worse because nobody has ever bothered to police it."); BRANSCOMB, *supra* note 5, at 21 (calling violations of this FCRA provisions "common" and citing as an example the ease with which a *Business Week* reporter—Jeffrey Rothfeder—obtained Vice-President Dan Quayle's credit information); Steven A. Bibas, Note, *A Contractual Approach to Data Privacy*, 17 HARV. J.L. & PUB. POL'Y 591, 596 (1994) (claiming that the exception for legitimate business needs "has swallowed the statute"); Bonnie G. Camden, Comment, *Fair Credit Reporting Act: What You Don't Know May Hurt You*, 57 U. CIN. L. REV. 267, 267 (1988) ("The FCRA, as interpreted today, frequently allows dissemination of credit reports to people without a legitimate need for [them].").

180 *See, e.g.*, Estiverne v. Sak's Fifth Ave., 9 F.3d 1171, 1173 (5th Cir. 1993) (noting that store has legitimate business need for consumer report when deciding whether or not to accept customer's check); Yonter v. Aetna Finance Co., 777 F. Supp. 490, 492 (E.D. La. 1991) (holding that FCRA permits credit bureau to supply list of prescreened consumers to requesting party who intends to grant credit to everyone on the final list).

At least one court has circumvented the "legitimate business need" rule by construing a request for consumer information as a request for something other than a consumer report, and thus beyond the scope of the FCRA. *See, e.g.*, Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144, 1149 (3rd Cir. 1986) (holding that report on plaintiff prepared by Equifax upon insurer's request and containing information regarding plaintiff's finances, activities, and health history was not a consumer report under § 1681b(3)(E) of the FCRA because insurer and plaintiff did not have a "consumer relationship").

181 The Ninth Circuit Court of Appeals held that the FCRA forbids credit bureaus to

From a consumer's perspective, however, what report subscribers do with the information they receive from credit bureaus and to whom they send it may be more important than whether they have a legitimate business need for credit reports in the first place. Although the FCRA requires credit bureaus to determine the purpose for which prospective recipients seek consumer information,[182] the statute barely limits the recipients' subsequent use or resale of it.[183] Although consumers have a statutory right to receive from credit bureaus copies of their credit reports and lists of recent recipients,[184] these documents fail to reveal the ways in which the recipients used the information or to whom the recipients may have further disseminated it.

Even if the common law and the FCRA tightened restrictions on the flow of credit reports from credit bureaus, report recipients would retain their power to use consumer information for undisclosed and perhaps privacy-invasive purposes. Misuse of consumer information is likely to occur unless consumers gain a greater measure of control over its use.

d. *Price*

According to *Business Week*, American companies spent $2 billion on market research in 1989.[185] The same source reported that in 1988, TRW, Equifax, and Trans Union had revenues of $335 million, $259 million, and $300 million, respectively.[186] How much did these credit bureaus pay consumers for the information about them that they sold? Zero.[187]

Neither the common law nor the FCRA requires credit bureaus to pay consumers for the personal information they compile and sell.

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provide a consumer report to an employer who seeks it for purposes unrelated to a former employee's employment. Mone v. Dranow, 945 F.2d 306, 308 (9th Cir. 1991) (holding that former employer does not have a legitimate business need to acquire former employee's credit report for purpose of determining whether former employee would be able to satisfy a judgment against him in employer's contemplated lawsuit). *Contra*, Allen v. Kirkland & Ellis and TRW, Inc., No. 91C 8271, 1992 WL 206285, at *2 (N.D. Ill. Aug. 17, 1992) (holding that under the FCRA, preparation for litigation to collect a business debt constitutes a permissible purpose for obtaining a credit report).

182 15 U.S.C. § 1681e (1994).

183 The statute does require the recipient to certify to the credit bureau that it will only use credit information for the purpose for which the recipient claims to seek it, *id.* § 1681e(a), but it contains no mechanism for ensuring that recipients keep their word. As the court admitted in Klapper v. Shapiro, 586 N.Y.S.2d 846, 850 (N.Y. Sup. Ct. 1992), "it is impractical to require that [credit bureaus] verify the purpose of each report and insure its use only for that purpose."

184 15 U.S.C. § 1681g (1994).

185 Jeffrey Rothfeder, et al., *Is Nothing Private?*, BUS. WK., Sept. 4, 1989, at 74-76.

186 *Id.* at 81.

187 Creditors, who also get personal information from consumers for free, often transfer it to credit bureaus gratis. *See supra* note 8 and accompanying text.

On the contrary, the FCRA permits credit bureaus to charge consumers for copies of their reports.[188] If consumers had some say in who pays what to whom for access to their personal information, they would presumably gain the ability to control its flow, to the benefit of either their privacy or their financial interests.

2. *Summary*

Despite the common law's reputation for adaptability to changing social conditions, the privacy tort seems structurally incapable of securing for consumers the control over personal information that they need to prevent computer-assisted commercial privacy violations. As applied to credit bureaus, the tort seems better at promoting economic goals than at protecting consumer privacy. It restricts the means by which credit bureaus may collect personal information, but permits the collection and maintenance of any information relevant to a "legitimate business purpose." It refuses to recognize credit bureau disclosures to thousands of subscribers as sufficiently "public" to permit recovery for the disclosure of private facts, but infers from a consumer's signature on a credit application a degree of consent arguably sufficient to bar the consumer's privacy claims. Finally, the common law gives credit bureaus an economically justified conditional privilege that may often prevent consumers from recovering for privacy violations even if they can establish each element of a privacy tort. Rather than empowering consumers to control the collection, distribution, use, and price of the personal information they generate, the privacy tort permits credit bureaus to collect such information extensively, to distribute it widely for a variety of purposes, and to profit from doing so.

The FCRA, which all but replaces the privacy tort, places too few restrictions on the kind and quantity of consumer information credit bureaus can sell[189] and ineffectively limits report distributions to permissible recipients for permissible purposes.[190] Instead of granting consumers a meaningful degree of control over their personal information, Congress merely imposed disclosure duties upon consumer report generators and certain report recipients. A right to receive a copy of one's credit report permits access to the information it contains, provided one knows one's statutory rights, but access to personal information compilations is only part of what one needs in order to control their circulation and use.

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188 15 U.S.C. § 1681j (1994).

189 The FCRA forbids credit bureaus to report certain obsolete information, *id.* § 1681c, and requires them to delete all inaccurate and unverifiable information from their files, *id.* § 1681i(a).

190 *See supra* notes 184-87 and accompanying text.

III
COMMERCIAL SPEECH

The common law recognizes, and legislatures have created, causes of action for invasions of privacy. However, when a defendant's privacy-invasive actions include speech, writing, or other communicative media, the laws upon which the plaintiff relies in seeking relief may conflict with the defendant's First Amendment rights. Although the Supreme Court has considered the tension between individual interests in reputational integrity and the First Amendment rights of newspapers,[191] the Court has never squarely addressed the weight of consumer privacy interests relative to credit bureaus' free speech interests. The common law of privacy and the FCRA also pass over this constitutional question, whose answer depends upon (1) whether credit reports constitute "commercial" speech, and (2), if not, whether credit reports deserve more or less constitutional protection than commercial speech.

A. Origins of Commercial Speech

The commercial speech doctrine first appeared in the 1942 case of *Valentine v. Chrestensen*,[192] in which the Supreme Court declared that the First Amendment leaves states free to restrict "purely commercial advertising."[193] In the 1970s, the Court retreated from this categorical statement and ensured some measure of First Amendment protection for commercial speech. The retreat began with *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[194] in which the Court upheld a state ordinance construed to prohibit newspapers from listing help-wanted ads by gender. Notably, the holding rests upon the ground that states may regulate such ads because they propose illegal discriminatory hirings, rather than because a categorical commercial speech rule applies to help-wanted ads—"classic examples of commercial speech."[195]

One year later, in *Bigelow v. Virginia*,[196] the Court narrowed *Valentine*,[197] cited its *Pittsburgh Press* "reaffirm[ation]" that "commercial ad-

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191 *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (holding that a public figure may recover damages for libel from a newspaper only if she can prove that the defendant published the defamatory material with "actual malice").

192 316 U.S. 52 (1942).

193 *Id.* at 54.

194 413 U.S. 376 (1973).

195 *Id.* at 385. The Court further noted that "[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Id.* at 389.

196 421 U.S. 809 (1975).

197 *Id.* at 819-20.

vertising enjoys a degree of First Amendment protection,"[198] and rejected the argument that the First Amendment leaves newspaper advertisements unprotected because they qualify as commercial speech.[199] Commenting on the constitutional status of commercial speech, the Court noted that "[t]he relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."[200]

The Court completed its retreat from *Valentine* in 1976. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*,[201] the Court held that unless its content removes it from the protective embrace of the First Amendment—*i.e.*, because it contains fighting words or obscenities—"speech which does 'no more than propose a commercial transaction' " enjoys some degree of constitutional protection.[202] Although the Court declined to state the precise degree of First Amendment protection afforded commercial speech, it did state in dicta three kinds of permissible state restraints on it: reasonable time, place, and manner restrictions;[203] laws forbidding false, misleading, and deceptive speech;[204] and bans on speech proposing illegal transactions.[205] Thus, by the mid-seventies, the Court had retreated from the apparent meaning of *Valentine* and carved out of the Constitution an indeterminate space for the free flow of commercial speech.

Returning to the issue in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[206] the Court condensed its prior holdings with the assertion that the First Amendment "protects commercial speech from unwarranted governmental regulation," but "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[207] The Court went on to announce a four-part test for determining the constitutional status of commercial speech. First, commercial speech only receives constitutional protection if it neither misleads nor proposes an unlawful transaction. Second, a state may not restrict commercial speech unless it has a substantial interest in doing so. Third, if the speech at issue passes the

198 *Id.* at 821.

199 *Id.* at 818. The newspaper advertisements, concerning the availability of abortions in New York, were circulated in Virginia in violation of a criminal statute prohibiting any circulation or publication encouraging or promoting the procurement of abortions. *Id.* at 811.

200 *Id.* at 826.

201 425 U.S. 748 (1976).

202 *Id.* at 762 (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); Roth v. United States, 354 U.S. 476, 484 (1957)).

203 *Virginia Pharmacy*, 425 U.S. at 771.

204 *Id.*

205 *Id.* at 772.

206 447 U.S. 557 (1980).

207 *Id.* at 561-63.

first test and the state's interest passes the second, the Court asks whether the restriction imposed directly serves the interest asserted. Finally, the Court determines whether a narrower restriction would serve the government interest just as well; if so, the restriction imposed is constitutionally impermissible.[208] Although *Central Hudson* added a necessary degree of coherence to the Court's commercial speech cases, the test announced there has undergone a significant change.

In *Board of Trustees v. Fox*,[209] Justice Scalia transformed the Court's earlier dicta regarding the third and fourth parts of the *Central Hudson* test into a holding.[210] Writing for the majority, Justice Scalia declared:

> What our decisions require is a " 'fit' between the legislature's ends and the means chosen to accomplish those ends," . . . a fit that is not necessarily perfect, but reasonable . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may be best employed.[211]

Fox and its progeny strongly suggest[212] that the First Amendment now protects commercial speech less than it did immediately following the Court's *Central Hudson* decision. If the Court refrains from altering the *Central Hudson* test any further, commercial speech regulations are likely to succeed when the speech misleads or proposes an illegal activity, or when the state has a substantial interest in regulating nonmisleading and lawful commercial speech and its regulatory means are

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208 *Id.* at 564-66. Applying the test to the facts of *Central Hudson*, the Court found that the commercial speech at issue (promotional advertising of utilities) neither misled nor proposed an unlawful transaction, *id.* at 566-68; that the State's interests in regulating it (conserving energy and preventing inequitable rates) were substantial, *id.* at 568-69; and that the regulation (banning such advertisements) directly served one of those interests (conserving energy), *id.* at 569; but that the regulation was more extensive than necessary to serve the State's interests, *id.* at 570-71. The Court thus struck down New York's ban on promotional advertising by utilities.

209 Board of Trustees v. Fox, 492 U.S. 469 (1989).

210 Justice Rehnquist hinted at an alteration of the *Central Hudson* test in Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986). The *Posadas* Court characterized the third and fourth elements of the *Central Hudson* test as "basically involv[ing] a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Id.* at 341. Without discussing what he meant by "fit," Justice Rehnquist proceeded to assess whether Puerto Rico's commercial speech regulation directly served its substantial interest, *id.* at 341-43, and whether any less restrictive regulations would have served that interest as well, *id.* at 343-44.

211 *Fox*, 492 U.S. at 480 (quoting *Posadas*, 478 U.S. at 341).

212 The Court recently applied Scalia's interpretation of the third and fourth *Central Hudson* prongs in United States v. Edge Broadcasting Co., 113 S. Ct. 2696, 2704-05 (1993). In Cramer v. Skinner, 931 F.2d 1020, 1034-35 (5th Cir. 1991), the Fifth Circuit did the same.

reasonably and narrowly tailored to secure those interests, though not necessarily the narrowest available.

B. Are Credit Reports Commercial Speech?

Despite shifts in the Court's commercial speech jurisprudence, one tenet remains firm: nonmisleading, lawful commercial speech receives less protection under the First Amendment than other forms of constitutionally protected speech.[213] This means that whether credit reports count as commercial or noncommercial speech significantly affects how much legislators can protect consumers from privacy-invasive disseminations of credit reports. Unfortunately, federal courts have yet to reach a consensus on whether credit reports count as commercial speech.

The Supreme Court faced this question in *Dun & Bradstreet v. Greenmoss Builders, Inc.*,[214] a credit bureau defamation case, but left it unanswered.[215] Although a plurality of the Justices noted that credit reports and commercial speech share many of the same characteristics, the plurality expressly declined to decide whether credit reports constitute commercial speech.[216] Perpetuating the plurality's ambivalence in *Greenmoss*, the circuit courts of appeal have yet to reach an agreement as to whether consumer credit reports constitute commercial speech or as to how much First Amendment protection they

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213 *See* Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 & n.5 (1985) (stating Supreme Court's long-estahlished principle "that not all speech is of equal First Amendment importance" and that although "certain kinds of speech are less central to the interests of the First Amendment than others[,]" speech involving matters of public concern is " 'at the heart of the First Amendment's protection' " (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 776 (1978)) (plurality opinion)). The Court has made it clear that commercial speech occupies a relatively low tier in the First Amendment hierarchy. *See Central Hudson*, 447 U.S. at 562-63 (1980) ("The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. . . ."). *Accord* United States v. Edge Broadcasting Co., 113 S. Ct. 2696, 2703 (1993); City of Cincinnati v. Discovery Network, 113 S. Ct. 1505, 1513 (1993); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-65 (1983).

214 472 U.S. 749 (1985).

215 The *Greenmoss* plurality held that in defamation cases in which the defamatory statements do not involve matters of public concern, plaintiffs may recover presumed and punitive damages absent a showing of actual malice. *Id.* at 763. Although the plurality opinion includes a fair amount of dicta comparing credit reports and commercial speech, only one of its conclusions resembles a holding about First Amendment protection for credit reports. The plurality stated that when a credit bureau issues a credit report containing false and damaging information to only five subscribers, the credit report does not involve matters of public concern, and is hence undeserving of special First Amendment protection from libel suits. *Id.* at 762.

216 *Id.* at 762 n.8 ("We . . . do not hold . . . that the [credit] report is subject to reduced constitutional protection because it constitutes . . . commercial speech. We discuss such speech . . . only to show how many of the same concerns that argue in favor of reduced constitutional protection in those areas apply here as well.").

merit.[217] Given this degree of constitutional uncertainty about the status of credit reports, the extent to which credit bureaus can overcome tort and FCRA liability by raising a First Amendment defense remains unclear.

A three-step inquiry will help determine the level of constitutional protection credit reports deserve. First, strictly as a definitional matter, do credit reports constitute commercial speech? Second, do the reasons courts cite for protecting commercial speech apply to credit reports? Third, do the reasons courts give for protecting commercial speech less than noncommercial speech apply equally well to credit reports?

1. *"Commercial Speech"*

Despite the *Greenmoss* plurality's attempt to analogize credit reports to commercial speech, the connections between credit reports and commercial speech as traditionally defined are tenuous. The Supreme Court has offered two general definitions of commercial speech. In *Pittsburgh Press*,[218] the Court defined it as speech that does "no more than propose a commercial transaction."[219] The *Central Hudson* Court, in apparent reliance upon *Virginia Pharmacy*, described commercial speech as "expression related solely to the economic interests of the speaker and its audience."[220] In all three cases, the speech at issue consisted of advertisements.[221]

Even assuming the adequacy of the definitions for some forms of commercial speech, neither definition readily applies to credit reports. First, consumers and report users, rather than credit bureaus and credit reports, propose commercial transactions. Second, credit reports relate to the economic interests of report subjects,[222] as well as

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217 *See, e.g.*, Millstone v. O'Hanlon Reports, 528 F.2d 829, 833 (8th Cir. 1976) (holding that consumer credit reports merit relaxed First Amendment protection because they constitute commercial speech); Hood v. Dun & Bradstreet, 486 F.2d 25, 29-30 (5th Cir. 1973) (noting that private subscription credit report "coincides with the doctrine of commercial speech" mainly because it "was distributed . . . for commercial purposes and clearly without regard to social concerns or grievances"); Grove v. Dun & Bradstreet, 438 F.2d 433, 438 (3d Cir. 1970) (holding that credit reports are not entitled to the extended constitutional protections of New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

218 413 U.S. 376 (1973); *see also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976) (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973), for its definition of commercial speech).

219 *Pittsburgh Press*, 413 U.S. at 385.

220 *Central Hudson*, 447 U.S. at 561 (citing *Virginia Pharmacy*, 425 U.S. at 762).

221 *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (utility company advertisements); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748 (1976) (prescription drug advertisements); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1976) (gender-specific help-wanted ads).

222 *See infra* part III.B.3.a and accompanying text.

to the economic interests of the speaker and its audience. Credit reports thus fail the definitional commercial speech test.

They also fail the categorical commercial speech test. The Supreme Court has never applied the term "commercial speech" to commercial communications other than advertisements.[223] Indeed, *Greenmoss* reflects the Court's tendency to keep the commercial speech doctrine confined to advertisements. There, the plurality analogized credit reports to commercial speech, but explicitly declined to classify credit reports as commercial speech.[224]

Like the Supreme Court, federal appellate courts seem willing to push credit reports off of the first tier of constitutionally protected expression, but reluctant to assign them to the commercial speech level. Without heeding any of the distinctions between advertisements and credit reports set forth above, the Eighth Circuit has, without explanation, categorized credit reports as commercial speech.[225] In contrast, the Third Circuit has merely indicated that credit reports merit less First Amendment protection than political speech receives.[226]

2. *Commercial Speech Protections*

Even though the Court's definitions of commercial speech are facially inapplicable to credit reports, its reasons for affording commercial speech some First Amendment protection may suggest the appropriate degree of constitutional protection for credit reports. If analysis of these reasons shows that credit reports deserve at least as

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223 Of course, the kinds of advertisements that the Court has treated as commercial speech vary considerably. *See* Board of Trustees v. Fox, 492 U.S. 469 (1989) (tupperware demonstrations); Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986) (casino gambling ads); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (promotional advertising by utilities); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (lawyer advertisements); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (same); Linmark Assoc., Inc. v. Willingboro, 431 U.S. 85 (1977) (commercial real estate "for sale" and "sold" signs); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748 (1976) (drug price ads); Pittshurgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (want ads).

224 *Greenmoss*, 472 U.S. at 762 n.8 ("We . . . do not hold . . . that the [credit] report is subject to reduced constitutional protection because it constitutes . . . commercial speech. We discuss such speech, along with advertising, only to show how many of the same concerns that argne in favor of reduced constitutional protection in those areas apply here as well.").

225 Millstone v. O'Hanlon Reports, Inc., 528 F.2d 829, 833 (8th Cir. 1976). Earlier, the Fifth Circuit had gone so far as to declare in dicta that credit reports "coincide[ ] with the doctrine of commercial speech." Hood v. Dun & Bradstreet, Inc., 486 F.2d at 30 (5th Cir. 1973). *Accord* Kansas Electric Supply Co. v. Dun & Bradstreet, Inc., 448 F.2d 647 (10th Cir. 1971).

226 Grove v. Dun & Bradstreet, 438 F.2d 433 (3rd Cir. 1970) (holding that credit reports are not entitled to the extended constitutional protections of New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

much protection as commercial speech, then the question remains whether they deserve the same degree of protection or more.

Virginia Pharmacy contains the Supreme Court's most comprehensive rationale for why the Constitution protects commercial speech. The Court cited four reasons for extending First Amendment protection to this category of speech. First, the commercial speaker's "purely economic interest" in his speech weighs in favor of First Amendment protection for commercial speech.[227] Second, on some occasions, particular consumers' interests in the free flow of commercial information may match or exceed their interests in political debate.[228] Third, on a broader level, society has an interest in the free flow of some commercial information because of its content.[229] Finally, and most generally, society also has an interest in the free flow of commercial information because it is "indispensable" to a free enterprise economy that its participants have the ability to make intelligent and well-informed purchasing decisions.[230] In short, commercial speech merits First Amendment protection because the economic decisions people make are as important to the functioning of a free enterprise economy as their political decisions are to the functioning of free representative democracy.[231]

The first rationale for protecting commercial speech—the economic interest of the speaker[232]—supports the extension of such protection to credit reports. It goes almost without saying that First Amendment protection for credit reports would serve credit bureaus' significant economic interests in selling consumer credit information. Clearly, the easier it is to regulate the dissemination of credit reports, the harder it becomes for credit bureaus to make money by doing so.

Although this first rationale for protecting commercial speech also provides justification for protecting credit reports, it should perhaps receive less consideration than others. The Court's four-part

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227 *Virginia Pharmacy*, 425 U.S. at 762-66. Four years later, the *Central Hudson* Court stated that the "informational function of advertising" grounds First Amendment protection for commercial speech. 447 U.S. at 563 (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978)). The Court also admitted, however, that "[c]ommercial expression . . . serves the economic interest of the speaker, . . . assists consumers and furthers the societal interest in the fullest possible dissemination of information." 447 U.S. at 561-62.

228 *Virginia Pharmacy*, 425 U.S. at 763. In that case, the state's regulation limited consumers' access to prescription drug price information by banning its advertisement. As a result, the Court reasoned, the people who most needed easy access to such information—the sick, poor, and elderly—were hindered in their efforts to receive it.

229 *Id.* at 764. The Court distinguished between advertisements containing matters of general public interest, such as those concerning the availability of abortion referral services, *see* Bigelow v. Virginia, 421 U.S. 809 (1975), from those of little interest to the general public, but to which an advertiser might easily add a public interest element.

230 *Virginia Pharmacy*, 425 U.S. at 765.

231 *Id.* at 765.

232 *Id.* at 762-66; *Central Hudson*, 447 U.S. at 561-62.

Central Hudson test strongly suggests that commercial speakers enjoy First Amendment protection mainly because their speech benefits their audience, rather than because commercial speech benefits commercial speakers.[233]

The second *Virginia Pharmacy* rationale suggests that credit reports may deserve at least as much constitutional protection as commercial speech receives. That there are roughly 1000 credit bureaus[234] proves that individual credit report recipients place a relatively high value on the consumer information that credit reports reveal and thus that they have a keen interest in the free flow of consumer credit information. The harder it is for report recipients to receive accurate information about credit applicants, the more difficult it becomes to make prudent decisions about to whom to extend credit, in what amount, and at what price.

As a matter of practice and of federal law, credit reports lack a content-based public interest element, rendering the third *Virginia Pharmacy* rationale inapplicable. Credit bureaus needlessly expose themselves to liability if they disseminate credit reports to anyone beyond those subscribers who intend to use them for legitimate business purposes.[235] However, because the content-based public interest rationale seems ancillary to the other three,[236] its inapplicability to credit reports arguably should not exclude them from the domain of constitutionally protected speech.

Turning to the fourth *Virginia Pharmacy* rationale, society generally has an interest in the free flow of consumer credit information. Substantial obstacles to the collection, preparation, and dissemination

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233 Recall that the *Central Hudson* test for protecting commercial speech leaves states relatively free to regulate commercial speech that "do[es] not accurately inform the public about lawful activity." 447 U.S. at 563. If the First Amendment protected commercial speech mainly out of concern for commercial speakers, one would not expect the Court to restrict such protection to nonmisleading and lawful speech. The First Amendment's shield excludes misleading and unlawful commercial speech because such speech impedes, rather than assists, informed decision-making, not because the exclusion promotes the economic interests of those who communicate misleading or unlawful commercial speech.

With uncharacteristic adherence to Supreme Court doctrine, the *Greenmoss* plurality wrote that the interest of someone who issues a "wholly false and clearly damaging" credit report "warrants no special [First Amendment] protection." *Greenmoss*, 472 U.S. at 762.

234 Klein & Richner, *supra* note 61, at 398.

235 *See supra* part II.B.1. Trubow's discussion of the misappropriation tort, however, suggests that the content of credit reports does serve a public interest. This Note argues that when credit reports sell consumer informational profiles without consumer consent, they should be liable for misappropriating consumers' identities. *See infra* part IV.C.2. Trubow agrees. Trubow, *supra* note 113, at 538-39. However, he points out that "it is the very fact of a 'public interest' that encourages the commercial appropriation" of a data subject's persona in the first place. *Id.* at 539-40.

236 Neither subsequent Court decisions nor commentators emphasize the third rationale for protecting commercial speech.

of such information could paralyze the economy. Credit grantors, for example, would have to expend additional resources to collect information about credit applicants in order to ascertain credit risks. Arguably, the flow of credit would constrict, interest rates would climb, prices would rise, and many consumers would find themselves unable to secure credit.[237]

The second and fourth *Virginia Pharmacy* rationales suggest that commercial speech merits First Amendment protection because the free flow of commercial information permits private economic agents to make well-informed resource allocation decisions, thereby promoting free enterprise. If so, then the First Amendment should forbid any regulations on credit reports that would substantially reduce the ability of report subscribers to make well-informed credit extension decisions. In addition, if concerns for general economic efficiency lurk beneath these *Virginia Pharmacy* rationales,[238] then the likely effects of credit report restrictions on the supply of credit create a strong economic justification for protecting credit reports at least as strongly as commercial speech.

The Court's reasons for affording commercial speech some degree of First Amendment protection suggest that credit reports deserve at least the same degree of protection. Next, this Note asks whether credit reports deserve more.

3. *Second-Tier Speech*

The *Greenmoss* plurality argued that some credit reports merit relatively weak First Amendment protection because, like commercial speech, credit reports do not involve matters of public concern.[239] The plurality furnished three main reasons for affording commercial

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237 Klein & Richner, *supra* note 61, at 393-94.

From an allocative efficiency perspective, tight restrictions on the dissemination of credit reports would produce suboptimal results. Without a reliable source of consumer credit information, credit grantors would extend credit to irresponsible or dishonest people more often and withhold it from those who pay their debts consistently. (The argument could be extended to other credit report subscribers, such as insurance companies.) On the other side of the credit relationship, the tendency of severe credit report restrictions to reduce the supply of credit would cause the range of consumers' allocative decisions to contract. Without a ready supply of affordable credit, consumers' ability to divide their expenditures between the present and the future would decrease, which might lead them to make relatively inefficient purchasing decisions.

238 *See Virginia Pharmacy*, 425 U.S. at 765 ("[Commercial information] is indispensable to the proper allocation of resources in a free enterprise system. . . .").

239 *Greenmoss*, 472 U.S. at 761-63. The plurality held that because the credit report at issue in *Greenmoss* did not involve matters of public concern, the plaintiff could recover presumed and punitive defamation damages from the credit bureau without proving actual malice. *Id.* This particular credit report contained false and damaging information and reached only five subscribers, who were contractually forbidden to disseminate the information to others. *Id.* at 762. However, the plurality left open the possibility that other credit reports could involve matters of public concern, depending on their "content,

speech, as well as the credit report at issue, less protection than noncommercial speech: (1) it has a finite business audience;[240] (2) the market gives commercial speakers incentives to communicate their information;[241] and (3) the market gives commercial speakers incentives to communicate accurate information, which is relatively easy for them to do.[242] If the plurality is correct that credit reports share these features of commercial speech, then there is some reason to protect them less than noncommercial speech, though perhaps more than commercial speech.

a. *The Audience*

The *Greenmoss* plurality noted that the information contained in the plaintiff's credit report, like commercial speech, was "*solely* in the individual interest of the speaker and its specific business audience."[243] This interest, the Court continued, "warrants no special pro-

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form, and context." *Id.* at 761-62 & n.8 (quoting Connick v. Meyers, 461 U.S. 138, 147-48 (1983)).

240 *Greenmoss*, 472 U.S. at 762 (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980)). To support its proposition, the plurality apparently relies upon *Central Hudson*'s definition of commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561. Such reliance is both misleading and misplaced.

It is misleading because it suggests that commercial speech, the kind of speech at issue in *Central Hudson*, does not concern matters of public interest because it has a "specific business audience." To the contrary, although the issue in *Central Hudson* was not whether commercial speech concerns matters of public interest, the *Central Hudson* Court argued that commercial speech deserves constitutional protection because it "assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Id.* at 561-62.

For a similar reason, the plurality's reliance on *Central Hudson* is misplaced. As just mentioned, *Central Hudson* does not address the issue of whether commercial speech involves matters of public concern. Moreover, unlike the audience in *Greenmoss*—five credit report subscribers who were contractually forbidden to disseminate the credit report information they received—the audience envisioned in the relevant portion of *Central Hudson* is consumers generally. *Compare Greenmoss*, 472 U.S. at 762 *with Central Hudson*, 447 U.S. at 561-62.

241 This rationale for affording commercial speech relatively low First Amendment protection originated in footnotes to the majority opinions in *Central Hudson* and *Virginia Pharmacy*. *See Central Hudson*, 447 U.S. at 564 n.6; *Virginia Pharmacy*, 425 U.S. at 771-72 n.24. Both footnotes seem at odds with the rest of the respective opinions.

242 *Greenmoss*, 472 U.S. at 758, 762-63 n.5 ("[Commercial speech] is more easily verifiable and less likely to be deterred by proper regulation" than noncommercial speech.) (citing *Virginia Pharmacy*, 425 U.S. at 771-72 n.24); *see also Central Hudson*, 447 U.S. at 564 n.6 (reasoning that because "commercial speakers have extensive knowledge of both the market and their products[,] . . . they are well situated to evaluate the accuracy of their messages").

243 *Greenmoss*, 472 U.S. at 762 (citing *Central Hudson*, 447 U.S. at 561) (emphasis added). The plurality's paraphrase of the *Central Hudson* Court's definition of commercial speech contains slight inaccuracies. In the earlier case, the Court stated that "commercial speech [is] expression related solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561; *see also infra* note 247.

tection when . . . the speech is wholly false and clearly damaging to the victim's business reputation."[244] The Court's statements contain two contradictions. First, as discussed above, one of the reasons commercial speech receives constitutional protection at all is because the general public may have an interest in its content and often has an interest in the free flow of all kinds of commercial information.[245] Second, as the plurality itself obliquely admitted, in addition to the "speaker and its specific business audience," the *victims* of false credit reports have an interest in the effect of the reports on their business reputations.[246]

These errors highlight two immediate disparities between commercial speech and credit reports. First, while the general public may have an interest in the content of certain advertisements,[247] it almost never has an interest in the content of private consumer credit reports, whose distribution, at least as a formal matter, is limited to a specific audience of report subscribers. Second, although report subscribers and report issuers have an interest in credit report information, they are not, *pace* the *Greenmoss* plurality, the only ones who do. As this Note has argued and as the *Greenmoss* plurality suggested, report subjects also have a strong interest in the contents of their reports.[248] Consumers have a privacy interest in knowing what their credit reports contain, a reputational interest in their accuracy, and an economic interest in their impact on credit and employment opportunities.

Without addressing the plurality's other contentions in this part of *Greenmoss*,[249] the foregoing analysis supports two conclusions. First, distinguishing between commercial and noncommercial speech on the basis of the number of people whose interests the speech affects is inaccurate and inconsistent with the Court's prior rationales for protecting commercial speech. Second, even if the size of the affected audience was a reliable way to distinguish commercial from noncommercial speech, it would not be a valid reason for treating credit reports as a form of commercial speech, since credit reports are *not* "solely in the individual interest of the speaker and its specific business audience."[250] Either way, the *Greenmoss* plurality's first reason for

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244 *Greenmoss*, 472 U.S. at 762 (citing *Central Hudson*, 447 U.S. at 566).

245 *See supra* notes 233-36 and accompanying text.

246 *Greenmoss*, 472 U.S. at 757-58.

247 In addition to the interest prospective customers have in the content of product ads, the public at large may have an interest in the content of particularly troubling ads, such as those for violent movies, offensive magazines, or radical political organizations.

248 *See supra* part I.B.1.

249 The issues of whether credit reports involve issues of public concern and whether false commercial speech and false credit reports deserve any constitutional protection are distinct from the issue of whether credit reports should qualify as commercial speech.

250 *Greenmoss*, 472 U.S. at 762.

analogizing credit reports to commercial speech is suspect.

b. *The Profit Motive to Communicate*

The *Greenmoss* plurality's second commercial-speech-driven reason for denying credit reports full constitutional protection concerns the reason why credit bureaus produce them. Since the production of credit reports "is solely motivated by the desire for profit," the plurality contends, "incidental state regulation[s]" are unlikely to deter their issuance.[251] Here, the plurality hit upon another cloudy distinction between commercial and noncommercial speech. Even granting that commercial speakers and credit bureaus generate and sell their information primarily to make money, this fact seems irrelevant to the issue of constitutional protection. Newspapers, magazines, and television stations communicate information primarily to turn a profit, and yet their communications seldom receive less constitutional protection than do handbills, political rallies, coffee shop chats, and other financially uncompensated expressive activities.[252]

If all profit-motivated speech were commercial speech, the plurality would have achieved an analytical victory. However, since many forms of noncommercial speech share this characteristic with credit reports and commercial speech, the profit-motive distinction gets extremely low mileage.

c. *Incentives for Accuracy*

According to the *Greenmoss* plurality, credit reports are also analogous to commercial speech because credit bureaus and commercial speakers have similar incentives and opportunities to communicate accurate information. According to the plurality, because commercial speech is "more objectively verifiable" than noncommercial speech, commercial speakers can verify the accuracy of their communications more easily than can authors of speech meriting greater protection, such as political commentators.[253] Moreover, the plurality asserts, because the market gives commercial speakers and credit bureaus a "powerful incentive" to issue accurate commercial information, the threat of libel suits has a relatively insignificant chilling effect on

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251 *Id.* at 762 (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748, 771-72 (1976)).

252 Insofar as there is a profit-motive distinction between commercial and noncommercial speech, it is also insufficient to explain why an "incidental" state regulation would chill commercial speech or credit reports any less than it would newspaper columns. Given the financial and reputational interests of advertisers, credit bureaus, and newspapers, there is little reason to think that any of these speakers would fail to take reasonable measures to comply with a regulation that might otherwise leave them exposed to increased liability.

253 *Greenmoss*, 472 U.S. at 762; *see also Virginia Pharmacy*, 425 U.S. at 771 n.24.

them.[254] Indeed, the plurality implies that due to their relatively objective content and their audience, credit reports and commercial speech are more likely than noncommercial speech to contain accurate information in the absence of legal incentives for verifying it.[255] The plurality concludes that because the threat of libel suits is less likely to silence credit report disseminators and commercial speakers than noncommercial speakers, the former are less deserving of constitutional protection from them.[256]

The *Greenmoss* plurality's reasons for analogizing credit reports to commercial speech on the basis of "objective verifiability" are nearly as unsatisfying as its reasons for using this factor to distinguish commercial from noncommercial speech.[257] First, the objective verifiability

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254 *Greenmoss*, 472 U.S. at 762-63; *see also Virginia Pharmacy*, 425 U.S. at 771 n.24.

255 *Greenmoss*, 472 U.S. at 762-63.

256 *Id.*

257 The *Greenmoss* plurality borrowed its verifiability argument from *Virginia Pharmacy*, in which the majority mentioned in a footnote that the truth of commercial speech "may be more easily verifiable by its disseminator than . . . news reporting or political commentary." 425 U.S. at 771 n.24. Disseminators of advertisements, the *Virginia Pharmacy* Court reasoned, know more about the products and services they sell than anyone else does, and are therefore in a better position than noncommercial speakers to verify the accuracy of their statements. *Id.* Although neither case explains how speakers' knowledge of their subject renders their communications about it "objective," both cases rely on this rationale in characterizing commercial speech as "more objectively verifiable" than noncommercial speech. *See Greenmoss*, 472 U.S. at 762; *Virginia Pharmacy*, 425 U.S. at 771 n.24. This basis for distinguishing between commercial and noncommercial speech is misleading in two ways.

First, it confuses speakers' knowledge of their subjects with the objectivity of their communications about them. A reputable political commentator presumably gathers and verifies as much relevant information as possible about subjects before writing and disseminating opinions about them. A careful advertiser probably goes through a similar procedure before disseminating a price list, for instance, to potential customers, who will no doubt rely on that information in deciding whether and from whom to purchase. Even if advertisements and consumer credit reports contain more objectively verifiable data than subjective opinion, this fact seems to have little relevance to the speaker's knowledge of her subject, and thus (at least on the Court's rationale), to her ability to verify the accuracy of her communications.

Second, the Court has never drawn a line, for purposes of the First Amendment, between speech which is more and less objectively verifiable. Newspaper articles and television newscasts are filled with objectively verifiable information, and yet the Court has never suggested reducing their First Amendment protection for that reason. On the other hand, advertisers make a number of objectively unverifiable claims—"best value," "fashionable," and "tastes great," for example—whose noncommercial analogues seldom appear in respectable news articles.

Even if the Court were right that the content of commercial speech is more objectively verifiable than the content of noncommercial speech, it would still have a weak foundation for its argument. Just because a factual proposition is objectively verifiable (*e.g.*, "the airplane flew at an altitude of 10,000 feet"), it is not necessarily easy to verify. The quantity of information to be verified and the availability of reliable verification sources seem more relevant to this issue than whether the information is more or less objectively verifiable. If newspapers choose carefully which stories to cover, establish reliable contacts, send a camera and tape recorder to news scenes, and employ an experienced corps of fact-checkers,

argument for banishing credit reports to the lower tier of constitutionally protected speech presumes that commercial speakers know more about the products they sell than anyone else does.[258] However, individual consumers, rather than credit bureaus, presumably know more than anyone else about their credit histories. Credit bureaus simply collect consumer data from various sources and use it to generate consumer credit reports. Their informational sources may pay little attention to the accuracy of the information they transmit.[259]

Second, the relative ease of verifying information depends more upon the quantity of information to be verified and the availability of reliable verification sources than upon its objective verifiability.[260] Thus, credit bureaus probably have at least as much difficulty checking accuracy as advertisers and newspapers do. Their economic interest in maintaining a good reputation for quality among report subscribers and their legal interest in avoiding liability for inaccurate reports give credit bureaus good incentives to issue completely accurate credit reports. If it were easy to verify, credit bureaus would presumably verify every piece of consumer information they place in a consumer report.

However, the vast amounts of consumer data credit bureaus manage,[261] combined with the complexities of verification in that industry[262] and the fact that, unlike newspapers and other media members,

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all of which they apparently do, then arguably they are in at least as good a position as commercial speakers to verify the accuracy of their communications.

The plurality failed to make a meaningful distinction between commercial and noncommercial speech. Neither commercial speakers' supposedly greater knowledge of their subjects nor the supposedly greater objective verifiability of their communications renders commercial speech less deserving of constitutional protection than noncommercial speech.

258 *Virginia Pharmacy*, 425 U.S. at 771 n.24.

259 *See infra* note 262.

260 *See supra* note 257.

261 Credit bureaus distribute nearly half a billion consumer records each year; each of the major three bureaus maintains roughly 150 million such records. *See supra* note 6 and accompanying text. By itself, the quantity of information they report places a limit on credit bureaus' abilities to verify its accuracy.

262 Verification sources are available, but accessing and deriving useful information from the most relevant sources probably requires a great deal of time and money. Information verification may involve some or all of the following steps:

(1) contacting and gathering information from creditors, employers, banks, landlords, and insurance companies. *See, e.g.*, Bryant v. TRW, Inc., 689 F.2d 72, 79 (6th Cir. 1982) (noting that compliance with FCRA accuracy provision in conducting reinvestigation would involve advising sources of the alleged errors of the plaintiff's dispute, asking them to reinvestigate his credit status in light of new data, and inquiring as to the methods they had used to arrive at their original conclusions about the consumer); PRIVACY COMMISSION, *supra* note 5, at 59-60 (discussing credit bureau procedures for maintaining the currency of reports);

(2) cross-checking computer files; and

(3) conducting personal interviews with a subject's neighbors. *See, e.g.*, Millstone v.

credit bureaus may not learn of errors until long after they report them, suggest that credit report information is exceedingly difficult to verify in a timely manner. Hence, even if the plurality were right to distinguish commercial from noncommercial speech on the basis of objective verifiability, it would be wrong to classify credit reports as commercial speech on such grounds.

The second premise of the *Greenmoss* plurality's accuracy argument also mischaracterizes the similarities between commercial speech and credit reports. According to the plurality, the strong market incentive for credit bureaus and commercial speakers to disseminate accurate information renders it unnecessary to afford them a very high degree of constitutional protection from libel actions.[263]

Even if market incentives for accuracy distinguish credit bureaus and commercial speakers from noncommercial speakers,[264] the plurality's second premise would remain unpersuasive. The market incentive credit bureaus have to issue factually correct credit reports assists report subscribers more than it assists report subjects. Consumers worry that their reports falsely declare them to be worse credit risks than they are, not that they falsely declare them to be better ones. In other words, consumers worry more about false negatives in credit reports than false positives. If their credit reports contains false negatives, they will have a difficult time securing credit anywhere until the error is corrected.[265] On the other hand, report subscribers probably worry more about false positives—that a report will falsely declare

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O'Hanlon Reports, 528 F.2d 829, 831, 834 & n.5 (8th Cir. 1976) (credit report contained biased information garnered from subject's neighbors).

Determining the accuracy of these sources presents a further barrier to verification, for some or all of the following reasons:

(1) retailers may keep sloppy records. *See, e.g., Bryant*, 689 F.2d at 79 (creditor reported the same incorrect information during credit bureau's reinvestigation that it had originally reported);

(2) different sources may report the same inaccuracy. *See, e.g.*, PRIVACY COMMISSION, *supra* note 5, at 58 ("Information flows into, within, and out of credit bureaus in the form of reports. The same information may be used to prepare a standard credit profile, contribute to a credit guide, trigger a warning to a group of subscribers, or locate a debtor."); *id.* at 60 ("No description can do justice to the dynamic interchange of information that credit reporting represents."); and

(3) neighbors may lie. *See, e.g., Millstone*, 528 F.2d at 831, 834 (credit report contained biased information garnered from subject's neighbors).

263 *Greenmoss*, 472 U.S. at 762-63.

264 The plurality is wrong. The most obvious difficulty with its premise is that many noncommercial speakers also have a market incentive to disseminate accurate information. *See* text accompanying *infra* note 270. News-hungry consumers presumably prefer news sources who strive for and attain consistent factual accuracy to those whose sloppy verification procedures result in numerous mistakes of fact. It is difficult to imagine a newspaper surviving much longer than its readers' trust in its factual accuracy.

265 If consumers worry about false positives, they probably do so in a less direct way. First, they may prefer that credit grantors not extend them more credit than they can reasonably manage. Second, they may realize that the more false positives that slip

a bad credit risk good—than about false negatives—that a report will falsely declare a good credit risk bad.[266]

Report subscribers, rather than report subjects, furnish credit bureaus with their market incentive to produce accurate reports.[267] As a consequence, credit bureaus have more of a market incentive to root out false positives than to limit false negatives.[268] Although other factors may help explain why report subscribers seldom sue credit bureaus,[269] it makes sense to suppose that, while market incentives probably lead credit bureaus to minimize false positives, the threat of consumer lawsuits provides the strongest incentive for reducing the number of false negatives.

This analysis undercuts the *Greenmoss* plurality's argument that because the market leads credit bureaus to issue accurate reports, they have less to fear from libel actions than noncommercial speakers do and therefore require less First Amendment protection from libel ac-

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through, the more money credit grantors lose, and thus the more they have to charge for credit.

266 Credit grantors presumably have more to lose from extending credit to someone who will never repay it than from declining credit to someone who would have. Because credit grantors compete for credit customers, they surely incur losses for passing up good credit risks, but if the demand for credit remains strong and consumers disparaged by inaccurate credit reports have an incentive to correct them, these losses should be relatively inconsequential.

267 "[C]redit bureaus are almost entirely responsive to the needs to business and have little responsibility to consumers." 115 CONG. REC. 2410, 2413 (1969) (statement of Sen. Proxmire).

268 *See, e.g.*, Maurer, *supra* note 4, at 128 (credit bureaus have stronger user-driven incentives to avoid false positives than consumer-driven incentives to avoid false negatives); Equifax Inc. v. F.T.C., 678 F.2d 1047 (11th Cir. 1982) (upholding credit bureau's practice of rewarding branch offices and employees for the amount of adverse consumer information they uncover against FCRA negligence claim, where evidence fails to show that the practice unreasonably increases the likelihood of error).

269 A survey of reported suits against credit bureaus for alleged inaccuracies supports the point that consumers sue credit bureaus for reporting false negatives with much greater frequency than subscribers sue them for reporting false positives. Prominent cases in which credit report subjects sued credit bureaus for issuing false and defamatory credit reports include Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (construction contractor sued credit reporting agency for issuing false and defamatory credit report to contractor's creditors) (plurality opinion); Thompson v. San Antonio Retail Merchants Ass'n, 682 F.2d 509 (5th Cir. 1982) (consumer sued credit reporting agency); Millstone v. O'Hanlon Reports, 528 F.2d 829 (8th Cir. 1976) (private insurance applicant sued credit reporting agency); Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973) (building contractor sued credit reporting agency), *cert. denied*, 415 U.S. 985 (1974); Oberman v. Dun & Bradstreet, Inc., 460 F.2d 1381 (7th Cir. 1972) (businessman sued credit reporting agency); Kansas Electric Supply Co. v. Dun & Bradstreet, Inc., 448 F.2d 647 (10th Cir. 1971) (wholesale electric supply company sued credit reporting agency), *cert. denied*, 405 U.S. 1026 (1972); Grove v. Dun & Bradstreet, Inc., 438 F.2d 433 (3d Cir. 1970) (brick and tile corporation sued credit reporting agency), *cert. denied*, 404 U.S. 898 (1971). On the other hand, a March 1995 Westlaw search of all federal and state courts failed to locate a single instance of a credit report subscriber suing a credit bureau or credit reporting agency for issuing an inaccurate report.

tions. Indeed, if market incentives for accuracy and the fear of libel suits were valid bases for determining the degree of First Amendment protection speech receives, then credit reports, commercial speech, and noncommercial speech would all receive the same amount of protection.

As this Note argues above, credit bureaus have both market and legal incentives to produce accurate information. Similarly, the market motivates advertisers to publish accurate information about products and services, but when sales promotions involve people, such as product endorsers, advertisers also have legal incentives to avoid defaming them or portraying them in a false light.[270] Noncommercial speakers, such as newspapers, have a significant market incentive to report accurate information about newsworthy events, but also a strong legal incentive—avoiding libel suits—to publish accurate information about people.

This events-people distinction sets credit reports apart from the main speech categories, because unlike commercial and noncommercial speech, they necessarily depict particular people. As demonstrated above, however, the market's accuracy incentive is unlikely to siguificantly reduce the threat of libel actions by report subjects.[271] Thus, if the likelihood of libel suits to chill speech prompts heightened First Amendment protection, as the *Greenmoss* plurality suggests,[272] then credit reports deserve such protection at least as much as noncommercial speech.

C. Commercial Speech Summary

Credit bureaus can argue plausibly and forcibly that commercial speech doctrine is inapposite to credit reports. Even assuming that the Court's reasons for distinguishing commercial from noncommercial speech are persuasive,[273] the *Greenmoss* plurality's reasons for anal-

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270 *See supra* note 129 and accompanying text; *see also* Lane v. Random House, Inc., Civ. A. No. 93-2564 (RCL), 1995 WL 46376 (D.D.C. Jan. 26, 1995) (Author brought false light publicity and defamation claims against advertiser whose ad suggested that author had been intellectually dishonest, but lost at summary judgment stage.); Rejent v. Liberation Publications, Inc., 611 N.Y.S.2d 866 (1994) (professional model sued publisher of gay and lesbian magazine for placing his photograph in defamatory advertisement without his consent). Note that advertisers can also be liable for "defaming" a competitors' goods or services. Two recent examples of common-law product disparagement actions are BASF Corp. v. Old World Trading Co., 41 F.3d 1081 (7th Cir. 1994), and Honeywell, Inc. v. Control Solutions, Inc., No. 3:94 CV 7358, 1994 WL 740883 (N.D. Ohio Sept. 7, 1994).

271 Because their communications always depict people, about whom the market gives them a relatively strong incentive "to err on the side of producing overly negative information," credit bureaus appear to have considerably more to fear from libel suits than do commercial speakers. Maurer, *supra* note 4, at 128.

272 *Greenmoss*, 472 U.S. at 762-63.

273 Credit bureaus could attack the arbitrariness of the commercial/noncommercial distinction and then argue that courts' justifications for extending First Amendment pro-

ogizing credit reports to commercial speech remain unpersuasive. First, the traditional definition of commercial speech is too narrow to encompass credit reports. Second, whereas all of the most important reasons for extending First Amendment protection to commercial speech also apply to credit reports, few of the reasons for affording commercial speech less protection than noncommercial speech apply to credit reports. Third, a few of the reasons for which courts refrain from regulating noncommercial speech also apply to credit reports. This implies that credit reports have more in common with noncommercial than with commercial speech and thus, according to the rationale of the *Greenmoss* plurality, deserve a higher degree of constitutional protection than commercial speech receives.

This argument probably lacks force sufficient to convince a court that credit reports deserve as much protection as, say, political commentary.[274] Together with the arguments offered in the preceding analysis, however, it may have enough power to persuade a court or legislature that credit reports merit more constitutional protection than commercial speech receives, but less than noncommercial speech receives. At the very least, the argument should convince courts to pause before relegating credit reports to the commercial speech bin.

IV

PRIVACY V. FREE SPEECH: A RESOLUTION

Credit bureaus may have a strong constitutional defense, as yet unasserted,[275] to judicial and legislative efforts to curtail their activities for the sake of enhanced personal privacy. If credit reports deserve greater First Amendment protection than do traditional forms of commercial speech—typically advertisements—then some permissible restrictions on commercial speech may be impermissible when applied to credit reports. For example, although the *Virginia Pharmacy* Court suggested that the First Amendment tolerates relatively broad time, place, and manner restrictions, as well as prior restraints, on commercial speech,[276] perhaps such restrictions would violate the First Amendment when applied to credit reports.

If credit reports merit greater First Amendment protection than

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tection to any form of speech also support a relatively high level of such protection for credit reports.

274 *See, e.g.*, Saenz v. Playboy Enter., Inc., 841 F.2d 1309, 1320 (7th Cir. 1988) ("[T]he Constitution stands as a safe harbor for all but the most malicious political speech.").

275 One exception is Equifax Servs., Inc. v. Cohen, 420 A.2d 189 (Me. 1980), *cert. denied*, 450 U.S. 916 (1981) (holding that certain provisions of Maine's Fair Credit Reporting Act violate the First Amendment rights of credit reporting agencies). For a more thorough discussion of the *Equifax* case, *see infra* notes 292-99 and accompanying text.

276 *Virginia Pharmacy*, 425 U.S. at 771 n.24.

do commercial ads, then imposing liability under the common-law privacy tort or the FCRA may unconstitutionally restrain credit bureaus' freedom to distribute credit reports. This Part explores the tension between privacy and free commercial speech and suggests one way to resolve it.

A. The Common Law

Given plaintiffs' low success rate in common-law privacy actions against credit bureaus, extending greater First Amendment protection to credit reports would have a relatively insignificant effect on the freedom of credit bureaus to issue their reports.[277] In jurisdictions that adhere to the *Restatement*'s description of the tort, the common law already shields credit bureaus from invasion-of-privacy liability, albeit for reasons more to do with economics than with free speech.[278]

Supreme Court cases involving conflicts between privacy and free speech are factually dissimilar from credit bureau invasion-of-privacy actions.[279] In both of the leading cases, private plaintiffs brought false-light invasion-of-privacy actions against media defendants who published matters of public interest.[280] The Court has provided few clues as to how it might resolve the quite different First Amendment issues that arise when a consumer sues a credit bureau for distributing

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277 For instance, at least one federal court has held that a credit bureau's collection, retention, and disclosure of a plaintiff's insurance history to one subscriber does not constitute an actionable intrusion, provided the information pertains to a legitimate business purpose. Tureen v. Equifax, Inc., 571 F.2d 411 (8th Cir. 1978). Ironically, the collection and retention of outdated biographical data may strike some as one of the key ways in which credit bureaus violate consumer privacy.

The FCRA forbids credit bureaus to report certain consumer information after seven or 10 years, with certain exceptions, but nowhere requires them to delete obsolete information from their files. *See* 15 U.S.C. § 1681c (1994).

278 *See supra* part II.A.1-2.

279 *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 490, 495 (1975) (holding that First and Fourteenth Amendments forbid states to impose sanctions on the press for accurately reporting the name of a rape victim contained in judicial records already available for public inspection and a matter of legitimate public concern; stating in dicta that to recover for invasion of privacy by false or misleading publication that concerns a matter of public interest, plaintiff must show knowing or reckless falsehood); Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967) (holding that under New York right-to-privacy statute, plaintiff must prove knowing or reckless falsehood in order to recover damages from magazine for invading privacy by publishing article falsely reporting a matter of public interest).

280 The Court extended *New York Times* protection to the defendants in both *Cox* and *Time*. *Cox*, 420 U.S. at 490; *Time*, 385 U.S. at 387-88; *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (holding that a public figure may recover damages for libel from a newspaper only if he can prove that the defendant published the defamatory material with "actual malice"). Although Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), casts a shadow over these cases, the shadow stops at the edge of false-light privacy cases. In *Gertz*, the Court permitted a private defamation plaintiff to recover actual damages from a newspaper or broadcaster on a showing of negligence, rather than *New York Times* actual malice. 418 U.S. 323 (1974). As noted above, *supra* part II.A.3, false-light privacy claims are similar to defamation actions; hence, *Gertz* calls the holdings of *Time* and *Cox* into question.

a report containing completely accurate but highly personal information. If credit reports do deserve greater First Amendment protection than commercial advertisements, the conflict between consumer privacy and commercial credit reports promises to become more bitter—and its resolution more difficult.

B. The Fair Credit Reporting Act

Presumably because Congress enacted the FCRA at the nadir of First Amendment protection for commercial speech,[281] it never seriously addressed the constitutional status of credit reports.[282] The Act remains open, of course, to First Amendment challenges that have gained credence since 1970.[283] A slightly outdated First Amendment

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281 Congress enacted the FCRA in 1970. In 1942, the Court held that "purely commercial advertising" lies beyond the First Amendment's domain. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942). Commercial speech languished in Nod until the mid-seventies, when the Court decided Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973), Bigelow v. Virginia, 421 U.S. 809 (1975), and Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). *See supra* part III.A.

282 *See A Bill to Enable Consumers to Protect Themselves Against Arbitrary, Erroneous, and Malicious Credit Information: Hearings on H.R. 16340 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 91st Cong., 2d Sess. 236 (1970) (statement of Lawrence Speiser, Director, Washington Office, American Civil Liberties Union). Mr. Speiser deemed "frivolous" the concern that restrictions on the collection and dissemination of consumer credit data would violate the First Amendment. He supported his opinion partly by invoking the *Valentine* Court's refusal (since disavowed) to extend First Amendment protection to commercial advertising. *See supra* part III.A. It is unreasonable, of course, to blame Congress for failing to consider fine distinctions between commercial advertising and credit reports before the Court had even begun to construct rules for protecting commercial speech.

283 For instance, in Equifax Servs., Inc. v. Cohen, 420 A.2d 189 (Me. 1980), *cert. denied*, 450 U.S. 916 (1981), Equifax challenged the Maine Fair Credit Reporting Act (MFCRA), which closely resembles the FCRA, on First Amendment grounds. The court, having assumed for purposes of appellate review that credit reports constitute commercial speech, *id.* at 195, held that a number of MFCRA provisions violated the Constitution. Only two of these provisions are mentioned here.

First, the statutory provision requiring credit report users to notify consumers and receive their written consent before procuring investigative reports from credit reporting agencies imposed an unconstitutional prior restraint on reporting agencies' commercial speech rights. *Id.* at 196-97. The bearing of this holding on the constitutionality of the FCRA is discussed *infra* notes 292-300 and accompanying text.

Second, the *Equifax* court declared unconstitutional the MFCRA's prohibition on reporting information that the credit reporting agency has reason to believe is irrelevant. Because some irrelevant information is accurate and nonmisleading, and therefore worthy of protection under the first prong of *Central Hudson*, the MCRA relevance provision was unconstitutionally overbroad. *Id.* at 206-07.

As a formal matter, the FCRA permits credit reporting agencies to report "irrelevant" information, but § 1681c of the Act forbids them to report statutorily-defined "obsolete" information. 15 U.S.C. § 1681c (1994). The legislative history of the Act reveals, however, the link between its sponsors' concern over credit reports containing irrelevant consumer information and the FCRA provision barring credit bureaus from reporting certain "obsolete" information. When Senator Proxmire presented the FCRA to the Senate, he contended that prohibiting credit bureaus from reporting outdated information would serve to deter them from reporting irrelevant information. 115 CONG. REC. 2410, 2414-15

analysis of the FCRA already exists.[284] Only two potential problems are mentioned here.

One problem is that § 1681b of the FCRA restricts the size as well as the identity of the audience who may receive consumer credit reports. From a purely First Amendment perspective, audience restrictions are highly unusual. Indeed, one might expect courts to be especially vigilant when applying the First Amendment to speech that commands only a small audience, since the majority could silence such speech with relative ease.

If credit reports deserve only as much First Amendment protection as commercial advertising, the FCRA's audience restriction is arguably constitutional under the *Central Hudson/Fox* test for permissible commercial speech regulations. Assuming that credit reports satisfy the first prong of the test—that they neither contain misleading information nor propose an illegal transaction[285]—the next question is whether the restriction on commercial speech serves a substantial government interest.[286] Congress apparently intended the restriction to protect consumer privacy,[287] in which the federal government arguably has a substantial interest.[288] Finally, the FCRA's restriction, which limits the credit report audience to those who have a legitimate business need for them, passes the *Fox* Court's rendition of the third and fourth prongs:[289] it is a reasonable and narrowly-tailored means of

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(1969). Congress later identified relevance as one of the concerns prompting the FCRA, 15 U.S.C. § 1681b (1994), but only included a provision dealing with "obsolete" information, a word the statute defines in terms of age. 15 U.S.C. § 1681c (1994). For the argument that this provision fails the third and fourth prongs of *Central Hudson*, see Comment, *The New Commercial Speech and the Fair Credit Reporting Act*, 130 U. PA. L. REV. 131 (1981) [hereinafter *New Commercial Speech*]. It remains possible that § 1681c satisfies the *Fox* Court's recasted version of the *Central Hudson* test.

284 *See New Commercial Speech*, *supra* note 283.

285 *Central Hudson*, 447 U.S. at 564.

286 *Id.*

287 *See supra* note 84.

288 The Court's privacy jurisprudence suggests that the State has a substantial interest in protecting its citizens' privacy. *See, e.g.*, United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 766 (1989) (noting that Freedom of Information Act provisions "reflect a congressional understanding that disclosure of records containing personal details about private citizens can infringe significant privacy interests"); Carey v. Brown, 447 U.S. 455, 471 (1980) (remarking that privacy in the home is an interest of "the highest order"); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465-66 (1978) (holding that state's interest in protecting citizens' privacy, writ large, is sufficient to justify ban on in-person solicitation of lawyers' services); Whalen v. Roe, 429 U.S. 589, 605-06 (1977) (concluding that New York statute enabling state agency to maintain computer database with names and addresses of prescription drug users "evidence[s] a proper concern with, and protection of, the individual's interest in privacy"); *see also New Commercial Speech*, *supra* note 283, at 155 (concluding that "[t]he high level of constitutional protection accorded to an individual's privacy interest provides a persuasive argument that the privacy interest the FCRA seeks to protect is substantial").

289 Board of Trustees v. Fox, 492 U.S. 469, 480 (1989).

protecting consumer privacy.

On the other hand, if credit reports deserve more First Amendment protection than commercial advertisements, then the *Central Hudson/Fox* test is inapplicable, and the FCRA audience restriction may represent an impermissible prior restraint on free speech.[290] If the Supreme Court reached this conclusion, then credit bureaus could avoid liability under the Act until they had disseminated credit reports to such a large audience that they actually invaded consumers' privacy. In this scenario, Congress would in all likelihood search for some other way to vindicate its interest in protecting privacy from widely disseminated credit reports.

A second potential constitutional problem with the FCRA is its requirement that credit report users who request investigative consumer reports notify consumers before they procure them from credit reporting agencies and, upon the consumer's timely written request, disclose the nature and scope of the requested investigation.[291] In *Equifax Services, Inc. v. Cohen*,[292] the Maine Supreme Court struck down a similar provision of the Maine Fair Credit Reporting Act (MFCRA) as an unconstitutional prior restraint on credit reporting agencies' commercial speech rights.[293] The MFCRA provision required credit report users to notify consumers and receive their written consent before procuring investigative reports from credit reporting agencies. Even though the prohibition appears to restrain credit report users more than it restrains credit reporting agencies, the court reasoned that it "impairs the ability of Equifax to respond effectively and promptly to requests from out-of-state users of reports . . . [and thus] operates as . . . a prior restraint . . . on [Equifax's commercial speech rights]."[294] Applying the *Central Hudson* test, the court concluded that the MFCRA provision was unconstitutional either because the restraint it imposed failed to advance the state's interest in protecting consumer privacy or because it failed to advance that interest sufficiently directly and narrowly.[295]

The MFCRA's notification and consent provision was more strict than the analogous FCRA provision, which would likely survive First Amendment scrutiny, assuming credit reports constitute commercial speech. First, when a credit report user requests an investigative report, the FCRA provision requires only disclosure, rather than con-

290 *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931) (holding that state procedure for enjoining publication of newspaper potentially critical of local officials is unconstitutional prior restraint on free speech).

291 15 U.S.C. § 1681d(a), (b) (1994).

292 420 A.2d 189 (Me. 1980), *cert. denied*, 450 U.S. 916 (1981).

293 *Id.* at 196-97.

294 *Id.* at 197 (footnote omitted).

295 *Id.* at 200.

sumer consent.[296] The *Equifax* court explicitly declared the MFCRA provision unconstitutional because of its consumer consent requirement.[297] Second, the Supreme Court's view that commercial speech is "a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation' "[298] indicates that the Court would hesitate to strike down the FCRA's narrow disclosure requirement on the basis that it chills credit bureaus' exercise of their First Amendment commercial speech rights. Under the *Central Hudson/Fox* test, the provision is arguably a reasonable and narrowly tailored means of advancing the government's substantial interest in protecting consumer privacy.

If credit reports deserve more protection than commercial speech receives, however, the outcome of the First Amendment analysis is quite different. Because the *Central Hudson/Fox* test applies only to commercial speech, the FCRA provision requiring notification and disclosure to consumers prior to the procurement of an investigative report must be considered a content-based prior restraint on credit bureaus' First Amendment rights. Outside of the commercial speech context, such restrictions are almost presumptively unconstitutional.[299] If credit reports lie closer to the core of protected expression than commercial speech does, then perhaps a credit bureau could persuade a court to strike down the FCRA notification and disclosure provision as violative of the First Amendment.

Until the Supreme Court clearly declares the level of First Amendment protection credit reports deserve, credit bureaus will have available to them persuasive constitutional arguments for cutting back existing statutory restrictions on credit reporting and fending off new legislative attempts to constrain it. Such arguments could further reduce the potency of consumer invasion-of-privacy suits against credit bureaus.

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296 15 U.S.C. § 1681d (1994).

297 *Equifax*, 420 A.2d at 197.

298 *Central Hudson*, 447 U.S. at 564 n.6 (quoting Bates v. State Bar, 433 U.S. 350, 381 (1977)).

299 *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 270 (1981) (holding that content-based restriction imposed on speech which does not fall within an unprotected category (*e.g.*, obscene or defamatory speech) is only constitutional if "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end"); Kunz v. New York, 340 U.S. 290, 293 (1951) (holding that New York ordinance making it illegal to hold public worship meetings on the streets without a permit, but failing to provide city officials with any standards for issuing them, was "clearly invalid as a prior restraint on the exercise of First Amendment rights"); Near v. Minnesota, 283 U.S. 697 (1931) (holding that state's procedure for permanently enjoining publication of newspaper critical of local officials was unconstitutional prior restraint on exercise of First Amendment rights).

C. Towards a Solution

To date, courts have slighted individual privacy interests for economic reasons in common-law actions against credit bureaus. In doing so, they have unintentionally promoted First Amendment values. Meanwhile, some courts have slighted those First Amendment values by treating credit reports as mere commercial speech. For its part, Congress passed a federal statute that insufficiently respects consumer privacy, completely ignores the First Amendment, and may impose a constitutionally impermissible prior restraint on free speech. In theory, a solution lies within reach.

The preceding criticism of current law demonstrates that courts and legislatures need to strike a more thoughtful balance between individual interests in privacy and commercial interests in free speech. Assuming that greater control over personal information enhances privacy, it remains to be seen how a legal system might grant people more control over personal information without depriving credit bureaus of their First Amendment rights to free speech—not to mention depriving credit bureaus of their existence.

Over a hundred years ago, Warren and Brandeis established the legal precedent for the privacy tort by extrapolating from a few English property cases.[300] This Note argues that a federal statute focussed on the proprietary origins of privacy could improve substantially upon current law by recognizing property rights in personal information and enabling personal information contracts to govern major informational transactions.[301] Properly drafted, such a statute would provide consumers with sufficient control over information about themselves to safeguard their privacy, without violating credit bureaus' First Amendment rights.

1. *Property Rights in Information*

The first step towards establishing contract as the legal regime under which consumers transact with credit bureaus is legal recognition of property rights in personal information.[302] Despite the somewhat odd connotations of this phrase,[303] the law already recognizes analogous rights in four areas: copyright law, trade secret law, the mis-

300 *See* Warren & Brandeis, *supra* note 36.

301 Although rooted in common law, this alternative would be ineffective unless enacted nation wide. The necessity of a federal statute brings into play the free speech concerns previously addressed. *See infra* part IV.D.1.

302 One commentator recently proposed a contractual regime for governing personal information transactions, but never explained how people come to have any rights in that information sufficient to support a contract for their sale. *See* Bibas, *supra* note 179.

303 One might be tempted to object that "property rights in personal information" would lead to absurd, or at least economically inefficient results, such as cocktail parties at which the host must negotiate complex financial transactions before introducing anyone

appropriation variant of the common-law privacy tort, and the common-law right of publicity. This Note argues that the theory of property underlying the misappropriation tort and the right of publicity provides the strongest legal foundation for the recoguition of property rights in personal information. A reasonable extension of these torts—consistent with their historical origins and reflective of modern contingencies—seems ideally suited to defending personal privacy from credit bureau invasions.

a. *Copyright*

In a recent article, Diane Zimmerman traced the roots of what she identified as a judicial tendency to treat information as private property, rather than as speech.[304] She argued that historically, copyright served as the legal means by which people secured property rights in information about themselves.[305] Three lines of British and American cases extending common-law copyright protection to private letters, lecture notes, and art works, Zimmerman contended, helped prepare American judges to accept the idea that people could have property rights in information.[306]

Zimmerman argued that Warren and Brandeis drew upon common-law copyright principles to support their claim that people can have property rights in "personal interests" such as the right to be let

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to a new group of people. The property rights proposed in this Note stop well short of such extremes. *See infra* part IV.C.2.

304 Zimmerman, *supra* note 77, at 667, 673. Zimmerman identified Locke as the intellectual father of the notion that people have exclusive property rights in "emanations of individual personality." *Id.* at 676, 703.

305 *Id.* at 681-703. The Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1994), consumed the common law of copyright and preempted state actions for copyright violations. *See* 17 U.S.C. § 301 (1994). *See generally* PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 773-86 (3d ed. 1993). Generally, the Copyright Act gives authors of expression "fixed in a tangible medium of expression," and their successors, exclusive rights (subject to exceptions) to reproduce, distribute copies of, display, and perform their works during the author's life and for 50 years after the author's death. *See* 17 U.S.C. §§ 102, 106, 302 (1994).

306 Zimmerman, *supra* note 77, at 692-703. In one of these cases, Prince Albert v. Strange, 64 Eng. Rep. 1171 (Ch. 1849), the court stated that common-law copyright protects three interests of authors of unpublished works: privacy, reputation, and seclusion. *Id.* at 309-12. The plaintiff in *Prince Albert* sued a printer's employee for making and trying to circulate unauthorized copies of engravings the Prince had made with Queen Victoria. Although the court partially based its holding (in favor of the royals) on breach of implied contract, it offered, as an alternative ground, violation of the common law of copyright. *Id.* at 312-13. According to the court, common-law copyright conferred upon the Prince a property right in his engravings sufficiently forceful to prevent others from displaying copies of them or publicizing descriptions of them without his consent. *Id.* at 312-13. Not surprisingly, Warren and Brandeis relied quite heavily on *Prince Albert* in their privacy article. *See* Warren & Brandeis, *supra* note 36, at 199 n.6, 200 n.3, 201 n.1, 202 & n.1, 203 n.1, 204-05, 207 n.1, 208, 217 n.4.

alone.[307] She went on to acknowledge their article as the culmination of a "trend toward freeing intellectual property rights from their original attachment to some physical res, like a drawing or a letter."[308] Modern courts continue that trend, according to Zimmerman, by rewarding plaintiffs who characterize their efforts to restrict defendants' speech as copyright infringement claims, rather than as privacy violation claims.[309]

The copyright expansion Zimmerman described helps to lay a theoretical foundation for a system of personal property rights in information.[310] For philosophical reasons, however, that system should be modeled on some area of the law other than copyright.[311] As Zimmerman claimed, Warren and Brandeis drew heavily from common-law copyright in their attempt to construct a right of privacy. However, they viewed their result as another corollary of a general principle—inviolate personality—that also grounds copyright law, rather than as an expansion of copyright.[312] Warren and Brandeis made this

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307 Zimmerman, *supra* note 77, at 699.

308 *Id.*

309 *Id.* at 669-72 (citing Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987) (holding that famous author may recover for copyright infringement when unauthorized biographer paraphrased plaintiff's unpublished letters, deposited by their recipients in university libraries), *cert. denied*, 484 U.S. 890 (1987)).

310 It would be a mistake to suppose that Zimmerman argued for the expansion of copyright law into the realm of personal information. The entire *Information as Speech* article articulates Zimmerman's discomfort with attempts to extend property rights to speech, a phenomenon she characterized as directly opposed to First Amendment principles. *See, e.g.*, Zimmerman, *supra* note 77, at 667.

311 There are also legal reasons for finding a non-copyright home for property rights in information. The Supreme Court recently rendered the Copyright Act incapable of supporting property rights in personal information. In Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991), the Court emphasized the well-known copyright rule that denies protection to facts, *id.* at 344, and then soundly repudiated the "sweat of the brow theory," which some courts had used as a basis for extending copyright protection to factual compilations as "a reward for the hard work that went into compiling facts." *Id.* at 352. The Court instead held that fact compilations are only protectable if their selection and arrangement are original; if so, then the selection and arrangement are copyrightable, but the underlying facts are not. *Id.* at 360. It would seem both facetious and unhelpful for consumers to argue that copyright protects the way in which they select and arrange the commercial events in their lives.

Feist makes clear that whatever the efficacy of common-law copyright in protecting "personal interests" such as privacy, *see* Zimmerman, *supra* note 77, at 699, modern statutory copyright law is unable to serve that function for consumers who seek greater protection from credit bureaus. The Copyright Act does not, however, preempt all of common-law copyright. 17 U.S.C. § 301 (1994).

312 Warren and Brandeis made this clear in two ways. First, they argued that until an author communicates his "production" to the public, the common law that protects his right to prevent others from publishing the material is "entirely independent of the copyright laws, and their extension into the domain of art." Warren & Brandeis, *supra* note 36, at 199-200. Warren and Brandeis frequently reiterated the independence of the "general right of the individual to he let alone" from common-law copyright. For example, they wrote that:

clear when they asserted the novel claim that "[t]he principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality."[313] The property laws that protect authors' unpublished writings do not protect other people's "unpublished" daily activities; rather, Warren and Brandeis argued, respect for "inviolate personality" justifies legal protection for them both.[314]

b. *Trade Secret*

A second intellectual property approach to establishing property rights in personal information analogizes this information to commercial trade secrets.[315] The common law of trade secrets imposes liability for the unauthorized disclosure or use of "any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it."[316]

Raymond Nimmer argues in his privacy treatise that the doctrine of commercial trade secrets furnishes a legal basis for efforts to secure personal privacy protection.[317] Nimmer draws out three similarities between personal privacy and trade secret claims to support his point. First, they both "deal with restrictions on disclosure to and disclosure or use by third parties of information that has value because of its secret (private) nature."[318] Second, both involve "the right to retain exclusive control or knowledge of certain information."[319] Third, "both trade secret and personal privacy laws define the scope of the right based on balancing interests."[320] After exposing these general connections between trade secrets and privacy, Nimmer proceeds to draw specific analogies between legal requirements for establishing

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> it may now be considered settled that the protection afforded by the common law to the author of any writing is entirely independent of its pecuniary value, its intrinsic merits, or of any intention to publish the same, and . . . wholly independent of the material, if any, upon which, or the mode in which, the thought or sentiment was expressed.

Id. at 204.

313 *Id.* at 205 (citation omitted).

314 *See id.* at 198-205.

315 *See, e.g.*, NIMMER, *supra* note 5, ¶ 16 *passim.*

316 RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939).

317 *See* NIMMER, *supra* note 5, ¶ 16.02.

318 *Id.* at 16-3.

319 *Id.*

320 *Id.* Nimmer explains that "[w]idely known, public information does not qualify as a private matter or as a trade secret. Similarly, claims to privacy (property) in personal information never receive absolute protection against all competing social and individual interests." *Id.*

the existence of commercial trade secrets[321] and individuals' efforts to retain control over sensitive information about themselves.[322]

Like proposals for protecting personal information through copyright law, Nimmer's trade secret argument does more to support the theoretical plausibility of property rights in personal information than it does to establish the foundations of a system that would grant and protect them. There are two main barriers to grounding such a system in trade secret law.

First, in order to have a trade secret, claimants must take reasonable precautions to keep the information at issue secret.[323] Consumers, however, would find unreasonable and unhelpful a rule requiring them to take reasonable measure to keep information secret in order to prevent credit bureaus from collecting and distributing it. The law can hardly require that consumers use only cash, subscribe to magazines under assumed names, and refrain from discussing their purchases, if they ever hope to acquire a cause of action against a privacy-invasive credit bureau.[324]

Second, in order for the claimant's information to count as a trade secret, it must be difficult to acquire from alternative sources.[325] However, one reason that credit bureaus pose a substantial threat to privacy is that they collect relatively little information from individual consumers and great quantities of it from alternative sources, such as banks and insurance companies.[326] Unless the current system of commercial transactions undergoes revolutionary change, credit bureaus

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321 Courts treat information as a trade secret only when it satisfies the following conditions: (1) few outside the claimant's business know the information; (2) the claimant has limited disclosure of the information within his business; (3) the claimant has taken reasonable precautions to ensure the secrecy of the information; (4) the information is valuable to the claimant and gives him a competitive business advantage; (5) the claimant has developed or acquired the information at some expense; and (6) the information is difficult to acquire from other sources. *See* RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939).

322 *See* NIMMER, *supra* note 5, ¶ 16.02[2].

323 *See supra* note 321.

324 Given the electronic sophistication of magazine publishers and grocery stores, less enthusiastic attempts to keep such information secret seem unlikely to succeed. Ironically, credit bureaus appear to have little interest in the contents of consumers' private diaries and other records of personal, noncommercial events, which consumers have both the means and the desire to protect from nonconsensual disclosure.

As discussed below, contracting with sellers to restrict the use and disclosure of purchasing information would help to keep it secret for the purposes of trade secret law. However, considering the benefits that producers who sell on credit receive from credit bureaus (*i.e.*, consumer credit records), it seems unlikely that they would sign such contracts, for which they might incur the wrath of credit bureaus, without demanding consideration from customers far beyond the value consumers place on keeping such information quiet. If a large number of consumers desired and could afford to enter such contracts, they would probably disrupt the entire credit system. For a more workable theory of personal information contracts, *see infra* part IV.C.3.

325 *See* RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939).

326 *See supra* part I.A.

will continue to seek and collect information, usually for free,[327] from sources other than individual consumers.

Although Nimmer's arguments support the proposition that people ought to have property rights in personal information, trade secret principles are too disanalogous to assist in the practical construction of a system of personal information rights. A contractual theory of personal information rights must turn elsewhere for its underlying theory of property rights in personal information.

c. *Misappropriation and Privacy*

Under the misappropriation variant of the common-law right to privacy, a noncelebrity[328] plaintiff has a cause of action for any dignitary harm a defendant causes by using the plaintiff's name or physical likeness, without consent, for the defendant's own advantage.[329] Likewise, under the related common-law right of publicity, a plaintiff—typically a celebrity—has a cause of action for any economic harm to the value of her identity a defendant causes by using her name or physical likeness without the plaintiff's consent.[330] As revealed by the operation of the right of publicity, the theoretical underpinnings of the misappropriation tort contain the seeds of a workable theory of individual rights in personal information that melds neatly with a contractual scheme for controlling it.[331]

Warren and Brandeis identified the "unauthorized circulation of portraits of private persons" as one of the two most worrisome privacy invasions facilitated by the technological advances of the late nineteenth century.[332] They also stated that the right to privacy should extend to protect "[t]he right of one who has remained a private individual, to prevent his public portraiture,"[333] just as it extends to protect "personal appearance, sayings, acts, and . . . personal relation[s]."[334] In sum, the principle underlying the right to privacy—"inviolate personality"[335]—protects people from "invasion[s]

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327 *See* ROTHFEDER, *supra* note 5, at 38 ("Most of the [credit] information is supplied to TRW for free.").

328 *See infra* part IV.C.3.

329 *See supra* part II.A.4.

330 *See infra* part IV.C.2.b.

331 One immediate advantage of proceeding within the misappropriation framework is that if the full-blown contract-based system for protecting personal information proves unworkable, an expanded tort of misappropriation can stand alone as a effective means of recovery for plaintiffs who wish to bring privacy actions against credit bureaus.

332 Warren & Brandeis, *supra* note 36, at 195-96, 211.

333 *Id.* at 208-14. Such statements are difficult to reconcile with Dean Prosser's contention that Warren and Brandeis were largely unconcerned with the misappropriation of names and likenesses. Prosser, *supra* note 35, at 401.

334 Warren & Brandeis, *supra* note 36, at 213 (footnote omitted).

335 *Id.* at 205. They also call this principle the "right to one's personality." *Id.* at 207.

either by the . . . press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds."[336] Taken together, these comments suggest that privacy-invasive "portraiture" goes beyond the mere circulation of photographs without the subject's consent. Warren and Brandeis's statement that "[t]he right of property in its widest sense . . . embrac[es] the right to an inviolate personality" also suggests vaguely something proprietary about personality.[337]

From its inception, the misappropriation tort has forbidden more than the misuse of a plaintiff's name, photograph, or other representation of her physical qualities.[338] Courts have also permitted plaintiffs to recover for misappropriations of their *identities* for the defendant's advantage.[339] Indeed, according to the *Restatement*, the misappropriation tort protects the plaintiff's interests "in the exclusive use of his own identity."[340] Judicial applications of the tort to a plaintiff's "identity" indicate that misappropriation concerns something more fundamental than mere names and photographs.[341]

Commentators and cases have also suggested that the misappropriation tort protects some kind of property interest in one's identity. For example, Dean Prosser wrote that "[t]he interest [the tort] protect[s] is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity."[342] One court characterized New York's right of privacy statute as protecting "the essence of [a] person, his or her identity or *persona* from being unwillingly or unknowingly misappropriated for the profit of

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336 *Id.* at 206.

337 *Id.* at 211. Warren and Brandeis seemed eager, however, to distance their theory of privacy from traditional theories of property. Although they recognized that all legal rights involve a proprietary element, they argued that the right to privacy is not derived from principles of private property; rather, both privacy and private property derive from "the principle . . . of an inviolate personality." *Id.* at 205. The authors admitted that the "principle of private property," albeit in an "extended and unusual sense," can protect one's "rights as against the world," but they preferred to call the principle that affords protection to this special range of personal interests, "the right to privacy." *Id.* at 213.

338 Prosser defined the appropriation variant of the privacy tort as the unpermitted use of a person's name, picture, or likeness for the appropriator's benefit or advantage. Prosser, *supra* note 35, at 401. But soon after he put this definition in play, Prosser explained that "[i]t is the plaintiff's name as a symbol of his identity that is involved here. . . . It is when [one] makes use of the name to pirate the plaintiff's identity for some advantage of [one's] own . . . that [one] becomes liable." *Id.* at 403.

339 *Id.*; *see also* ELDER, *supra* note 95, § 6:2, at 380-87, and cases cited therein; MCCARTHY, *supra* note 132, § 8.7[E], at 8-41.

340 *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652C cmt. a, b & c (1977); ELDER, *supra* note 95, § 6:2.

341 *See* Prosser, *supra* note 35, at 403 ("It is the plaintiff's name as a symbol of his identity that is involved [in misappropriation], and not his name as a mere name.").

342 *Id.* at 406.

another."[343] A number of courts have stressed that the tort protects a "valuable right of property in the broadest sense of that term."[344]

It only requires a small step from the statements in the preceding three paragraphs to reach the conclusion that a property right in one's personality or identity grounds the misappropriation tort. As a Missouri court put it in 1911, "[i]f there is value in it, sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?"[345] Even if one rejects the claim that people have property rights in their own identities, however, the common-law misappropriation tort makes it fairly clear that people have legal rights in them.[346]

d. *Misappropriation and Publicity*

The common-law right of publicity, an offshoot of the misappropriation form of the privacy tort, demonstrates the theoretical and practical feasibility of treating personal information as personal property. When someone profits from the nonconsensual use of another person's name or likeness, the victim may suffer both dignitary and economic harm. An invasion of privacy suit for misappropriation of

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343 Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 260 (Sup. Ct. 1984), *aff'd*, 488 N.Y.S.2d 943 (App. Div. 1985). The court's description of the statute demonstrates the confusing similarity between the misappropriation wing of the privacy tort and the right of publicity. For an extended discussion of the relationship between these two common law torts, see MCCARTHY, *supra* note 132, ¶ 5.8[C]-[F].

344 *See* ELDER, *supra* note 95, § 6:1, at 375 & n.2.

345 Munden v. Harris, 134 S.W. 1076, 1078 (Mo. App. 1911); *see also* ELDER, *supra* note 95, § 6:1, at 379 ("[T]o limit a private person only to recovery for mortification of feelings and deny him or her recovery for the value of the appropriated interest would provide an inadequate remedy and permit unjust enrichment of defendants who appropriate the value of the identity of private persons.").

346 Other commentators have suggested that people should have property rights in personal information. Thirty years ago, Alan Westin argued not only for the recognition of a similar property right—"the right of decision over one's private personality"—but also that it should receive a full compliment of statutory and Due Process protections. WESTIN, *supra* note 1, at 324-25. Nimmer and Krauthaus acknowledged the "emerging principle that an individual owns some rights in information about himself if the information is personally sensitive . . . private, and . . . used or disclosed in a form related specifically to the individual." Raymond T. Nimmer & Patricia Ann Krauthaus, *Information as a Commodity: New Imperatives of Commercial Law*, 55 LAW & CONTEMP. PROBS., Summer 1992, at 103, 124.

Although a thorough defense of the notion that people have property rights in their own identities lies beyond the scope of this Note, nothing in the discussion that follows really turns upon its accuracy. As Prosser wrote when he defined the misappropriation tort over 30 years ago,

> [i]t seems quite pointless to dispute over whether such a right [to the exclusive use of one's name and likeness as aspects of one's personality] is to be classified as 'property'. If it is not, it is at least, once it is protected by the law, a right of value upon which the plaintiff can capitalize by selling licenses.

Prosser, *supra* note 35, at 406 (citation omitted).

identity may remedy the dignitary harm,[347] but the victim must also assert the right of publicity in order to recover damages for any economic harm.[348] By recognizing right of publicity actions, common-law courts endorse the notion that at least some people have a valuable property interest in their own identities.

Common-law courts carved out an exception to the privacy tort of misappropriation for celebrity plaintiffs, whose claims against misappropriators of their identities went unheard until common-law courts created the right of publicity. Like the other privacy torts, misappropriation only shields people from dignitary harms.[349] In the opinion of some common-law judges, this feature of the tort rendered it inapplicable to celebrities because celebrities suffer no indignity by reason of increased public exposure, even if it occurs without their consent.[350] Celebrity status, in other words, nullifies one's right to avoid nonconsensual public exposure. Until state courts recognized the right of publicity, this bit of legal reasoning left celebrities practically remediless against nonconsensual appropriations of their identities that caused economic, as opposed to dignitary, harm. Once state courts recognized the right of publicity, they were able to accommodate—without invoking the privacy tort—these celebrity claims.[351]

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347 *See supra* part IV.C.1.c.

348 A right-of-publicity plaintiff must plead and prove: (1) that the plaintiff owns an enforceable right in his identity; (2) that the defendant (a) used some aspect of the plaintiff's identity or persona, (b) without the plaintiff's consent, and (c) in a manner that rendered the plaintiff identifiable; and (3) that the defendant's use is likely to damage the commercial value of the plaintiff's identity. MCCARTHY, *supra* note 132, § 3.1[B], at 3-3. "Persona" signifies "the cluster of commercial values embodied in personal identity as well as . . . that human identity 'identifiable' from defendant's usage." *Id.* § 4.9. For example, if a plaintiff is identifiable by his name, photograph, picture, vocal style, body movement, or costume, his persona consists of any one or any combination of these features. *Id.*

349 Thus the misappropriation branch of the privacy tort remedies only the dignitary harm caused by the nonconsensual exploitation of one's identity. MCCARTHY, *supra* note 132, § 1.5[D]; *see also supra* part I.B.2 and accompanying text.

350 *See, e.g.*, O'Brien v. Pabst Sales Co., 124 F.2d 167, 170 (5th Cir. 1941) (holding that because professional football player was not a "private person," he had no cause of action for invasion of privacy against brewery that used his photograph in its product advertisements without his consent). *See generally* MCCARTHY, *supra* note 132, § 1.11[C], at 1-47, § 1.6.

351 The publicity tort is designed to recompense any economic damage to one's identity that the nonconsensual commercial appropriation of one's identity causes. MCCARTHY, *supra* note 132, § 3.1[B], at 3-3. The Second Circuit Court of Appeals was the first court to recognize the right of publicity explicitly. In Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953), a professional baseball player entered a fixed-term contract with the plaintiff chewing gum manufacturer that gave the plaintiff an exclusive right to use the player's photograph in connection with its sales promotions. The defendant, a rival chewing gum manufacturer, used the baseball player's photograph in its own ads, without his consent, during the term of the player's contract with the plaintiff. When the plaintiff sued the defendant for intentional interference with its contractual relations, the defendant argued that the baseball player's contract with the plaintiff amounted simply to a release of liability for invading his privacy, "because a man

Thus, the right of publicity arose as a commercial analogue of the misappropriation tort, but only a limited class of plaintiffs could successfully invoke it.[352]

Although the right of publicity traditionally protected celebrities from nonconsensual commercial uses of their identities, extending the tort to protect noncelebrities from similar commercial exploitation is both logical and consistent with its legal predicates. One is hard-pressed to identify any theoretical obstacles to recoguizing a right of publicity for noncelebrities. If one's identity has commercial value, one should have a right to control and benefit from its commercial uses, regardless of whether one is a celebrity. McCarthy acknowledges this general principle in his treatise on the rights of privacy and publicity, where he defines the right of publicity as "the inherent right of every human being to control the commercial use of his or her

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has no legal interest in the publication of his picture other than his right of privacy, *i.e.*, a personal and non-assignable right not to have his feelings hurt by such a publication." *Id.* at 868. Judge Jerome Frank disagreed:

> We think that, in addition to and independent of the right of privacy . . . a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made "in gross", *i.e.*, without an accompanying transfer of a business or of anything else. . . . This right might be called a 'right of publicity.'

Id. at 868. Because the plaintiff held an exclusive grant of the baseball player's "right of publicity," Judge Frank concluded, it had a valid claim against the defendant for knowingly using the player's photograph during the term of his contract with the plaintiff.

Despite Prosser's failure to distingnish explicitly between appropriation privacy and the right of publicity in his influential *Privacy* article, published in 1960, a number of courts have recognized a separate right of publicity, especially with respect to celebrity plaintiffs. *See, e.g.*, Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 825 (9th Cir. 1974) (holding that California law "afford[s] legal protection to an individual's proprietary interest in his own identity"); Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979) (defining the right of publicity to mean that "the reaction of the public to name and likeness . . . endows the name and likeness of the person involved with commercially exploitable opportunities"); State *ex rel.* Elvis Presley v. Crowell, 733 S.W.2d 89, 97 (Tenn. Ct. App. 1989) (recognizing that under Tennessee common law, "a celebrity's right of publicity has value" and "is a species of intangible personal property" that can be possessed, used, and assigned).

352 The two torts are so closely related, however, that Prosser and the *Restatement* failed to distingnish between them. Melding the torts together, Prosser wrote that the fourth category of the privacy tort, misappropriation, protects both commercial and dignitary interests. *See* Prosser, *supra* note 35, at 415. The *Restatement* reflects Prosser's view:

> Although the protection of [the plaintiff's] personal feelings against mental distress is an important factor leading to a recognition of the rule [of appropriation of name or likeness], the right created by it is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person, which will entitle the licensee to maintain an action to protect it.

RESTATEMENT (SECOND) OF TORTS § 652(C) cmt. a (1977).

Perhaps the third *Restatement* will take a different view. A recent draft of the unfair competition *Restatement* explicitly distinguishes between the right of privacy and the right of publicity. RESTATEMENT OF THE LAW OF UNFAIR COMPETITION § 46 cmt. b (Tentative Draft No. 4, 1993).

identity."[353] A number of commentators and a majority of courts agree with McCarthy that both celebrities and noncelebrities possess a right of publicity.[354]

They also agree that the right of publicity protects property interests in identity.[355] A name or face usually becomes commercially valuable when the person associated with it has achieved widespread notoriety as, for example, an athlete, performer, or politician. In the usual case, the name or face becomes a marketable commodity for use in advertising. Like other rules in tort law for protecting personal property, the right of publicity helps ensure that only the "owner" of that commodity and her licensees reap the financial rewards of its use or sale. The right of publicity thus recognizes that people have assignable property interests in their own names and faces—their "identities"—and prevents others from misappropriating their commercial value, if any, through nonconsensual use.

Copyright and trade secret law seem like natural sources of legal

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353 MCCARTHY, *supra* note 132, § 3.1[A], at 3-2.

354 The Ninth Circuit cautiously expressed this idea in Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824 n.11 (9th Cir. 1974):

> Generally, the greater the fame or notoriety of the identity appropriated, the greater will be the extent of the economic injury suffered. However, it is quite possible that . . . the appropriation of the identity of a relatively unknown person may result in economic injury or may itself create economic value in what was previously economically valueless.

See also Tellado v. Time-Life Books, 643 F. Supp. 904, 913 (D.N.J. 1986) (recognizing that a noncelebrity has the right "to be compensated for the commercial use of his or her likeness"); Dora v. Frontline Video, Inc., 18 Cal. Rptr.2d 792 (Cal. Ct. App. 1993) (assuming without discussion that noncelebrities have a right of publicity); Canessa v. J.I. Kislak, Inc., 235 A.2d 62, 75-76 (N.J. 1967) (The court stated that regardless of whether a plaintiff's identity is of low or high value, a defendant who appropriates it must pay for it, for the reason that "plaintiffs' names and likenesses belong to them. As such they are property. They are things of value. Defendant has made them so, for it has taken them for its own commercial benefit."); Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 260 (N.Y. 1984) (concluding from a review of cases interpreting New York's privacy statute that "all persons, of whatever station in life, from the relatively unknown to the world famous, are to be secured against rapacious commercial exploitation"), *aff'd*, 488 N.Y.S.2d 843 (N.Y. 1985); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (Tentative Draft No. 4, 1993) (recognizing that the "identity of even an unknown person may possess commercial value"). *See generally* MCCARTHY, *supra* note 132, § 4.3.

355 *See, e.g.*, Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1103 (9th Cir. 1992) (characterizing plaintiff's right of publicity claim as "one for invasion of a personal property right"); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 825 (9th Cir. 1974) (holding that California law "afford[s] legal protection to an individual's proprietary interest in his own identity"); People for the Ethical Treatment of Animals v. Berosini, Ltd., No. 21580, 1995 WL 313060, at *15 (Nev. May 22, 1995) (stating in dicta that "the right of publicity refers to a property right in a person's identity"); Gracey v. Madden, 769 S.W.2d 497, 501 (Tenn. Ct. App. 1989) (stating in dicta that "[a] person has a property right in the use of his name which he may assign"); MCCARTHY, *supra* note 132, § 10.2[A] and cases cited therein; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. g (Tentative Draft No. 4, 1993); RESTATEMENT (SECOND) OF TORTS §§ 652A cmt. b, 652C cmt. a (1977). *See infra* part IV.C.1.c for a discussion of how proprietary concepts inform the misappropriation branch of the privacy tort.

justification for property rights in personal information because these realms of intellectual property already treat certain kinds of information as personal property.[356] From there, one needs only to ask whether these rules can be construed or expanded to confer proprietary status on other sorts of information, such as the data that appear in consumer credit reports. For reasons mentioned above, neither copyright nor trade secret law can supply an adequate foundation for a system of property rights in information. This Note earlier suggested that the privacy tort of misappropriation and the right of publicity provide a surer footing for such a system, but plaintiffs typically invoke these common-law torts when challenging nonconsensual appropriations and uses of their names or photographs. Such appropriations constitute violations of victims' property rights in their own identities,[357] which may cause dignitary harm, economic harm, or both. Now the task is to determine whether the concept of "identity" is sufficiently broad to encompass personal information.

2. *Identity Expanded*

Recall that in order to recover under the misappropriation tort or the right of publicity, a plaintiff must prove that the defendant appropriated the plaintiff's identity for the defendant's advantage.[358] Neither common usage nor logic confines the scope of "identity" to one's name and physical likeness. Indeed, a biographical or other informational summary of a person's profession, family, spending habits, health, transportation preferences, and newspaper and magazine subscriptions arguably reveals more of one's personality, if not one's "identity," than does one's name alone, or a simple photograph or portrait. The ability of modern computers to amass and organize great quantities of personal information calls for a reasonable expansion of the misappropriation tort consistent with its common-law purpose of protecting names and identities from nonconsensual commercial use. Warren and Brandeis, after all, worried not only about the circulation of unauthorized photographs of private parties: their privacy concerns about "portraiture" extended to "invasion[s] either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds."[359]

Jump forward 100 years from "The Right to Privacy." TRW, the nation's largest credit bureau, currently sells half a million consumer

356 *See supra* parts IV.C.1.a, IV.C.1.b.

357 *See infra* part IV.C.1.c.

358 *See supra* part II.A.4; part IV.C.3.d.

359 Warren & Brandeis, *supra* note 36, at 206.

credit records each day.[360] For each data subject, those records contain some or all of the following information: name, address, age, spouse's name, number of dependents, car ownership, magazine subscriptions, news stories, Social Security number, salary, employer, length of employment, prior employer, insurance information, outstanding mortgages, bank loans and account information, national credit cards, department store credit accounts, paid accounts, overdue accounts, accounts assigned for collection, repossessions, state and federal tax liens, bankruptcies, lawsuits filed against the consumer, and court judgments.[361] A picture may paint a thousand words, but its colors fade in comparison to a well-crafted credit report.[362]

a. *Privacy*

Courts could expand—or Congress could expand and codify—the misappropriation tort to allow plaintiffs to recover for any emotional harm caused by defendants who develop and sell informational composites or personality profiles of them without their consent. Such an expansion would give some plaintiffs a reasonably good chance of recovering damages from credit bureaus for making nonconsensual disclosures of their informational identities.[363] The scope and specificity of modern credit reports arguably renders them high-tech informational equivalents of photographs or paintings, but with a far greater ability than either of those media to capture and reveal the subject's identity or personality.[364] To fulfill the purpose of the misappropriation component of the privacy tort in the computer age, the law should treat credit reports and other informational composites as

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360 *See* ROTHFEDER, *supra* note 5, at 38.

361 With the exception of magazine subscriptions and insurance information, these examples come from SMITH, *supra* note 5, at 47-49. The first two appear in ROTHFEDER, *supra* note 5, at 38. Rothfeder reports that TRW buys or otherwise gathers information from as many as 60 varieties of sources and quotes Dennis Benner, a TRW vice-president: "we buy all the data we can legally buy." *Id.* According to Rothfeder, the sole purpose of TRW's information-gathering practices is "to compile the most detailed description of the financial status, personal traits, ups and downs, and lifestyle of every American that can be assembled—and sold at a cool profit." *Id.*

362 In a related context, direct marketers place a high value on detailed informational composites because they are thought to reveal a consumer's "inner self." *See infra* note 364.

363 Privacy plaintiffs' ability to sue credit bureaus for common-law torts is, however, restricted by the Fair Credit Reporting Act. *See supra* note 135 and accompanying text.

364 According to the president of a large mail order merchandiser, computer database information enables the company to predict their customers' buying behavior and will soon permit it "to analyze and segment customer buying behaviors as a reflection of their inner selves." Henry A. Johnson, *Computer Technology is Key to Segmentation and Service*, DIRECT MARKETING, June, 1985, at 66-68. Underlying such efforts at divining customers' inner selves by extrapolation from their outward behavior is the notion that "the entire constellation of a person's attitudes, beliefs, opinions, hopes, fears, prejudices, needs, desires, and aspirations that, taken together, govern how one behaves . . . finds holistic expression in a lifestyle." ARNOLD MITCHELL, THE NINE AMERICAN LIFESTYLES at vii (1983).

"portraitures" for purposes of the tort when they contain sufficiently detailed and extensive information to amount to personality profiles.[365]

Along with setting a limit on the amount and kind of information credit bureaus could report, an expanded tort of misappropriation would confer upon plaintiffs certain legal advantages that overcome some of the hurdles erected by the other three privacy torts. The advantages of proceeding on misappropriation grounds include: (1) even inoffensive uses of plaintiff's identity are actionable;[366] (2) plaintiffs need not prove publicity in order to recover; (3) credit bureaus do not enjoy a qualified privilege; (4) "[a] limited waiver or consent by plaintiff for one purpose does not give an unfettered privilege to the defendant to commercially appropriate plaintiff's name, picture or identity";[367] and (5) as a proprietary tort, it is assignable in gross.[368] Considering the relative liberality of these rules, the biggest obstacle facing plaintiffs who wish to sue credit bureaus for invasion of privacy via the misappropriation tort is that it has seldom been tried.[369]

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365 *See, e.g.*, PRIVACY COMMISSION, *supra* note 5, at 9 ("[I]t is now perilously easy for . . . [an accumulation of records containing personal information] . . . to crystallize into a personal profile . . . .").

366 *See* ELDER, *supra* note 95, § 6:1, at 378, and cases cited therein.

367 *See id.* § 6.6, at 399-400.

368 *See, e.g., id.* § 6:1, at 377; RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (1977) ("[T]he right created by [the appropriation rule] is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person. . . .").

369 When a group of Ohio magazine subscribers relied on the misappropriation tort 20 years ago, they failed, but for inadequate reasons. In Shibley v. Time, Inc., 341 N.E.2d 337 (Ohio 1975), the plaintiffs claimed that the defendant magazine publishers and credit card company had violated their privacy by renting and selling subscription lists to direct mail advertisers without their consent. The plaintiffs argued that the rental and sale of their personality profiles amounted to privacy-violative misappropriations of their personalities. *Id.* at 339. Relying on inapposite case law from another jurisdiction and an irrelevant fact, the court rejected the consumers' privacy claim.

The court first asserted that "[t]he right of privacy does not extend to the mailbox." *Id.* It apparently gleaned this statement from Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880 (S.D.N.Y. 1967), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968), but its reliance on *Lamont* is misplaced. At issue in *Lamont* was whether the right to privacy prevents marketers from mailing solicitations to consumers' homes, not whether the sale of motor vehicle registration information to marketers constitutes a misappropriation of registrants' personalities. When the court discussed the latter question in dicta, it concluded that the sale of motor vehicle registration records does not violate registrants' privacy rights, but it drew a distinction between sales of public record information, such as that contained in vehicle registration records, and sales of "vital or intimate" information, *id.* at 883, which the subscription lists in *Shibley* may well have contained.

Second, the court declared that the sale or rental of subscription lists to direct mail advertisers, even if they include personality profiles, does not invade the plaintiffs' privacy when the advertisers only use the information to determine which advertisements to send. *Shibley*, 341 N.E.2d at 339-40. The court never explained how the buyer's use of the data determines whether the nonconsensual sale of personality profiles constitutes an invasion of the subject's privacy. Traditionally, it is the seller who appropriates the plaintiff's iden-

b. *Publicity*

If it is true that an informational composite captures one's identity in the same way that a photograph does, then the right of publicity could provide consumers with an additional cause of action against credit bureaus who cause them economic harm by collecting and selling information about them without their consent. Because the right of publicity, even more clearly than the privacy tort of misappropriation, is a proprietary right,[370] the nature of the violation is easier to understand.

When credit reporting agencies sell consumer credit reports without consent, they arguably appropriate for their own gain that which a consumer could otherwise assign in gross[371] or license[372] to her own economic advantage. A credit reporting agency might counter that a noncelebrity consumer's informational identity is valueless, and thus unprotected by the right of publicity, but the very fact that the agency sells such information undercuts this line of defense.[373]

Consumer plaintiffs who feel that a credit bureau has exploited the commercial value of their identities by selling credit reports can argue persuasively that their claims against credit reporting agencies satisfy the three elements of a successful right-of-publicity claim. A right-of-publicity plaintiff must plead and prove: (1) that the plaintiff owns an enforceable right in his identity; (2) that the defendant (a) used some aspect of the plaintiff's identity or persona, (b) without the plaintiff's consent, and (c) in a manner that rendered the plaintiff identifiable; and (3) that the defendant's use is likely to damage the commercial value of the plaintiff's identity.[374]

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tity and uses it to enhance the value of his product who becomes liable for invading the plaintiff's privacy. *See supra* part II.A.4 and note 330 and accompanying text.

Shibley thus presents an eminently surmountable barrier to consumers who wish to argue that credit bureaus violate their privacy when they sell or rent informational composites to subscribers.

370 *See supra* part IV.C.3.d.

371 *See, e.g.*, Acme Circus Operating Co. v. Kuperstcok, 711 F.2d 1538, 1544 (11th Cir. 1983) (holding that under California law, where the right of publicity has been exercised and converted into a contract right, it becomes assignable property that, if assigued, gives the assignee the benefit of the assigument after the assignor's death); Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (asserting that one may assign one's right of publicity " 'in gross,' *i.e.*, without an accompanying transfer of a business or of anything else"); Martin Luther King, Jr., Ctr. for Social Change, Inc. v. American Heritage Prods., Inc., 296 S.E.2d 697, 704 (Ga. 1982) (stating in dictum that unless "[t]he right of publicity is assignable during the life of the celebrity, . . . [it] could hardly be called a 'right'"); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. g (Tentative Draft No. 4, 1993); MCCARTHY, *supra* note 132, § 10.3[B][1].

372 *See generally* MCCARTHY, *supra* note 132, § 10.4[A] and cases cited therein.

373 McCarthy makes a similar point with respect to nonconsensual uses of a plaintiff's identity for advertising purposes and argues that the existence of commercial value in the plaintiff's identity should be presumed from the defendant's use. *Id.* § 4.3[D].

374 *Id.* § 3.1[B], at 3-3.

In any jurisdiction that recognizes the right of publicity, a consumer could satisfy the first element of the claim. As for the second element, one could try to establish that the credit bureau used some aspect of one's identity by arguing that an assemblage of information about one's shopping habits, magazine subscriptions, vehicle ownership, and so on, captures one's identity in the same way that a photograph does.[375] Proving lack of consent should present few problems. When applying for credit, the consumer may have consented to a credit check, and perhaps to some sharing of information among credit bureaus,[376] but that falls short of consenting to a credit bureau's collection and sale of the consumer's informational identity. The plaintiff is identifiable from the defendant's use of the plaintiff's identity; credit reports would be worthless unless they rendered data subjects identifiable.

Finally, to prove the third element of the publicity claim, the plaintiff may only need to show that the defendant "has made an unpermitted use of some identifiable aspect of identity in such a commercial context that [he] can state that [damage to the commercial value of his identity] is likely."[377] If the defendant were an advertiser, rather than a credit bureau, and had used the noncelebrity plaintiff's photograph in an advertisement without consent, the plaintiff could satisfy this requirement because a market exists for the identities of noncelebrities in advertising.[378] In the even larger market for the personal information of noncelebrities, data collectors make money by selling consumer information to companies who use it to avoid bad credit risks or target potential customers.[379] Damage to the commercial value of a consumer's informational identity is therefore likely whenever a credit reporting agency sells personal information without consent, a practice that deprives the consumer of both control over its use and the financial rewards of its sale. Of course, the consumer who seeks monetary rather than equitable relief will also need to prove and quantify the alleged commercial damages.[380]

Treating nonconsensual appropriations of informational identity as violations of a proprietary tort would give consumers considerably more power than they have under the FCRA to control the flow of personal information. Because the right of publicity is assignable in

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375 *See supra* part IV.C.2.

376 *See supra* notes 48, 174-76 and accompanying text.

377 MCCARTHY, *supra* note 132, § 3.1[B].

378 *See, e.g.*, Bowling v. Missionary Servants, 972 F.2d 346 (6th Cir. 1992) (upholding trial court's award of $100 to noncelebrity three-year-old child whose photograph defendant appropriated for use in charity solicitation pamphlet).

379 *See supra* part I.A.

380 MCCARTHY, *supra* note 132, § 3.1[B].

gross and licensable,[381] consumers would gain the ability to "sell" personal information to those who value it most highly, in much the same way that celebrities currently license their names and faces to companies who use them for promotional purposes.[382] Like the misappropriation tort, the right of publicity bars inoffensive as well as offensive uses of identity[383] and permits plaintiffs to recover even if the defendant limited dissemination to relatively few recipients.[384] The right of publicity offers another advantage, however, that the misappropriation tort cannot offer. Provided that consumers can convince a court to extend "identity" in the way suggested here, the right of publicity is immediately available—the FCRA preempts only common-law privacy, defamation, and negligence actions.[385]

3. *Personal Information Contracts*

Either the misappropriation tort or the right of publicity could serve plaintiffs whose property rights in their own identity have been violated. If one accepts the claim that people have such property rights, then some interesting contractual questions arise: Can people sell, assign, or license their own identities? In what situations? Who would buy them, and for how much? Perhaps most importantly, would it be reasonable or efficient for people to make such contracts? The notion of individual property rights in identity supports and complements a contractual theory of personal information.[386]

Preliminarily, one should keep in mind that the subject matter of the proposed contracts is a relatively tangible "informational identity," rather than a metaphysical essence. This phrase is broad enough to encompass photographs of people (which are simply composites of data points arranged in visually suggestive patterns) personality

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381 *See supra* notes 371-72 and accompanying text.

382 *See infra* part IV.C.3.

383 *See, e.g.*, Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1138-39 (7th Cir. 1985) (holding that Illinois courts would recognize a violation of plaintiff's right of publicity when magazine company published nude photographs of her without her consent), *cert. denied*, 475 U.S. 1094 (1986); Cardtoons v. Major League Baseball Players Ass'n, 838 F. Supp. 1501 (N.D. Okla. 1993) (players association sued publisher of baseball card parodies under state's right of publicity statute); Mendonsa v. Time Inc., 678 F. Supp. 967 (D.R.I. 1988) (holding that plaintiff stated cause of action under state statute barring nonconsensual uses of names, portraits, or pictures for advertising or trade purposes, against magazine that sold, without his consent, well-known photograph of plaintiff kissing a nurse in Times Square at the close of World War II).

384 Unlike most of the privacy torts, the right of publicity does not contain a "publicity" requirement.

385 15 U.S.C. § 1681h(e) (1994).

386 Steven Bibas recently proposed a contractual solution to the privacy problems credit bureaus present, but he ignored the legal rights that would support such contracts and argued for them mainly on economic efficiency grounds. Bibas, *supra* note 179, at 605-11.

profiles, and credit reports that are sufficiently extensive to convey at least as much about a consumer's identity as a photograph does.

Contractualizing the informational identity domain is hardly a new idea. The historical origins of this practice are particularly apparent if one agrees that although photographs capture peoples' informational identities better than their metaphysical identities, the unauthorized circulation of such photos violates the subject's legal rights. Indeed, in the first reported case involving misappropriation, a British court permitted a plaintiff to recover on breach-of-implied-contract grounds when the defendant-photographer sold his photograph without authorization.[387] During the first half of this century, some American courts also based misappropriation liability on breach of implied contract.[388] In the latter half of this century, the common-law right of publicity has permitted those whose identities possess commercial value to assign and license them to others.[389] It has also given licensors the right to sue licensees for breach of contract if their use of the licensor's identity exceeds the scope of the licensor's consent.[390]

The common-law right of publicity permits celebrities and noncelebrities to assign or license the use of their identities to third parties. It also affords them a cause of action against defendants who harm the commercial value of their identities through nonconsensual use.[391] At present, however, few consumers may realize that their informational identities are valuable to parties who profit by connecting consumers' personal traits to a product or service. Credit bureaus, of course, are the parties most interested in exploiting the qualities,

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387 Pollard v. Photographic Co., 40 Ch. D. 345, 349-50 (1888).

388 As of 1936, breach of implied contract remained one basis upon which American courts fixed liability for misappropriation. *See, e.g.*, McCreery v. Miller's Grocerteria Co., 64 P.2d 803 (Colo. 1936) (holding that plaintiff had cause of action for breach of contract against photographer who used her photo for advertising purposes without her consent); Bennett v. Gusdorf, 53 P.2d 91 (Mont. 1935) (same); Fitzsimmons v. Olinger Mortuary Ass'n, 17 P.2d 535 (Colo. 1932) (holding that plaintiff has cause of action against undertaker who took photos of funeral and used them for advertising purposes without her consent); *see also* Rotenberg, *supra* note 18, at 81 (arguing for an implied contractual promise between consumers and the institutions to whom they reveal personal information to refrain from using it for nonconsensual purposes; "[w]hen the institution breaks that trust, they have undermined your expectation of privacy and acted without regard to your interest in controlling records of your personal life").

389 *See supra* part IV.C.3. Models, actors, and professional athletes routinely form contracts to give advertisers rights to use their identities in the promotion of goods and services. *See generally* MCCARTHY, *supra* note 132, ch. 10 (explaining how publicity and privacy rights are transferred); *see also* Zimmerman, *supra* note 77, at 735 (noting that those possessed of "fame, beauty, or other desirable personal assets" use formal and informal contracts to govern the use of these attributes by parties willing to pay for the right to do so).

390 *See* MCCARTHY, *supra* note 132, § 10.5 and cases cited therein; *see also* ELDER, *supra* note 95, § 6:6, at 399-400, and cases cited therein.

391 *See supra* part IV.C.3.

characteristics, financial status, and buying habits of noncelebrities by linking this information to a product and a service—credit reports.

"Personal information contracts" would allow consumers to sell, license, or rent their informational identities to credit bureaus for a specified term in exchange for compensation. The compensation need not be monetary.[392] In return, consumers would supply credit bureaus with a quantity of personal information proportionate to the services or money the credit bureaus offer for it. Consumers would also give credit bureaus exclusive rights to use the information for purposes specified in the contract.[393] The basic use provision would permit the credit bureau to sell or rent all or portions of the consumer's informational identity to credit grantors.

This overview of personal information contracts contains enough detail to inform an analysis of their merits. In the following analysis, this Note assumes away the political barriers to creating a system of personal information contracts. Instead, it assesses the conceptual coherence of such contracts, the ways in which they could affect the contracting parties, problems that might arise from legislation enabling their formation, and the costs they might generate. This Note then returns to the legal tensions between privacy and the First Amendment to ask whether personal information contracts would protect these interests better than do current laws.

a. *Conceptual Coherence*

As a conceptual matter, it makes more sense for consumers to form personal information contracts with credit bureaus than with individual businesses. Efficiency concerns aside, credit bureaus appear to have the best resources for assembling consumer informational profiles and the strongest incentives for doing so.[394] If people have legal or property interests in information about themselves, they have such interests in their informational identities, rather than in widely-

392 Credit bureaus could offer financial services to consumers, provide information about which credit card company currently offers the lowest rate, supply statistics on how likely various insurance companies are to honor certain kinds of claims, or furnish the balance sheets of companies whose stock consumers are considering purchasing. Indeed, some credit bureaus already provide financial counseling services to consumers who fail to pay their bills on time. *See* SMITH, *supra* note 5, at 48.

393 As part of the exclusivity requirement, consumers would probably also have to agree not to sell any other information to rival bureaus. To guarantee consumer loyalty, the agreement might instead call for the consumer to relinquish a complete informational profile and for the credit bureau to keep all of the information secret except for that which the consumer expressly permits the credit hureau to distribute. Consumers would presumably demand additional consideration and a complete privacy guarantee from credit bureaus before entering one of these contracts.

394 Linowes describes credit bureaus as "clearinghouses" for information that they receive from credit grantors, collection agencies, and government sources. LINOWES, *supra* note 18, at 126-27.

dispersed fragments of personal information.[395] Since credit bureaus gather numerous fragments of information and organize them into informational composites, they present a greater threat to consumers' property rights in their identities, and to their privacy interests, than do any of their individual sources of information.

The Supreme Court recognized the significance of this distinction, albeit in a different context, in *Department of Justice v. Reporters Committee for Freedom of the Press*.[396] In that case, the Court held that the Freedom of Information Act's law-enforcement exemption prohibits the FBI from releasing a criminal rap sheet—containing the subject's date of birth, physical characteristics, indictments, convictions, and sentences, most of which are matters of public record[397]—when such a disclosure would invade the subject's privacy.[398] The Court drew a privacy-based distinction between "scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole."[399] Once an individual item of information about a rap-sheet subject has been publicly disclosed, the Court noted, his "privacy interest in avoiding disclosure of a . . . compilation of these events [does not] approach[ ] zero."[400]

Applied to private sector privacy issues, the Court's comments suggest that one piece of consumer information may affect the consumer's privacy differently depending on its context.[401] Consider a consumer's grocery purchases over the course of a year as an example. In the hands of a grocery store owner, this information poses a relatively insignificant privacy threat, but when an information compiler combines it with the consumer's address and lists of other recent purchases, magazine subscriptions, drug prescriptions, and restaurant bills, the privacy threat becomes significant. As the Supreme Court noted in *Reporters Committee*, the consumer's "privacy interest in avoiding disclosure of a . . . compilation" of personal information may re-

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395 *See supra* part IV.C.2.

396 489 U.S. 749 (1989).

397 *Id.* at 752-53.

398 *Id.* at 780.

399 *Id.* at 764.

400 *Id.* at 762-63.

401 According to the Court, another factor affecting the privacy impact of personal information is its degree of availability. *See id.* at 763-64. The fact that credit bureaus are statutorily forbidden to disseminate credit reports to anyone not covered by the FCRA has little bearing on this analysis, however. Someone with a "legitimate business purpose," for example, could more easily secure a data compilation from a credit bureau than she could assemble her own compilation. Although consumers may fear that credit bureaus sell their reports to people who fall beyond the statutory categories, it seems reasonable to suppose that consumers also fear credit report sales to legitimate business users of the information. Here, they might worry simply that one more business entity possesses information about them, or that the legitimate business user will improperly use or disclose the information after satisfying her legitimate use.

main strong despite the fact that many of the activities generating its component parts took place in public.[402]

The contractual scheme proposed here has conceptual appeal because it recognizes that consumers have stronger privacy interests in informational compilations than in individual pieces of information about themselves. Because credit bureaus compile personal information, generate informational profiles, and disseminate the finished products more than any other single commercial entity does, it makes sense for consumers to strike their personal information contracts with credit bureaus, if they are to strike them with anyone.

b. *Consumer Benefits*

Contracts between consumers and credit bureaus would benefit consumers by encouraging credit bureaus to compete for their business and by allowing consumers to receive compensation for the information that credit bureaus currently appropriate and disseminate without reimbursement.[403] The contractual system also furthers consumers' privacy interests by increasing their control over informational profiles.

As this Note suggested above, control over information is a central component of privacy,[404] especially in an era when computers collect, organize, and swap personal data in great quantities and at great speed. By giving consumers the power to choose which credit bureau will manage their "informational identities," if any,[405] the contractual

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402 *Id.* at 762-63.

403 *See supra* part II.C.1.d.

404 *See supra* part II.B.

405 One might argue in opposition to the contractual system proposed here that it denies consumers a meaningful opportunity to refrain from selling their informational identities to credit bureaus. Although credit and insurance are necessary components of modern American life, credit grantors and insurance companies are rather reluctant to extend credit and sell insurance to people about whom they know so little that risks of doing business with them outweigh the expected benefits of doing so. Thus, in a practical sense, even privacy-sensitive consumers would be forced to sell their information to credit bureaus.

The best response to this argument is to point out that under the current system, people who are most concerned about privacy probably do not have credit cards, bank loans, or insurance (or if they do, they do not have them in their own names) because they know that acquiring any of them involves divulging information that will quickly end up in credit bureau databases. None of these people would be worse off under the proposed contractual scheme if they refrained from selling their informational identities and as a consequence became unable to secure credit, bank loans, or insurance in their own names.

Conceivably, some of these privacy enthusiasts would be better off under the contract alternative. They could negotiate with a credit bureau for the right to disseminate only certain information about themselves and then ask the credit bureau to determine which credit grantors, lenders, and insurance companies are most willing to deal with them, and at what price, on the basis of that information alone. The credit bureau might agree to enter this relationship to earn a new customer. If the credit bureau can locate a source of credit for even the most privacy-sensitive consumers while honoring all of its privacy main-

scheme gives people far more control over personal information than they currently enjoy. Moreover, the contractual scheme makes consumers' control over their informational identities meaningful by creating realistic opportunities for consumers to form information contracts.[406]

As one incident of their enhanced control over personal information, consumers would be able to negotiate contractual limits on the kind and quantity of information a credit bureau may supply and to whom. Whichever transaction brings the consumer and the credit bureau together initially would inform the first contractual use and disclosure provision.[407] After that, consumers and credit bureaus could bargain over the disclosure and use of additional consumer information.[408]

The contractual scheme would also benefit consumers by ensuring that they receive compensation for their informational disclosures. In the "information economy," the demand for credit reports, mailing lists, and other personal data compilations is relatively strong.[409] Although credit bureaus sell their data compilations—credit reports—at some level of profit, they receive most of the com-

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tenance obligations, these consumers would, for the first time, enjoy both credit and privacy. Gradually, these consumers might accept the credit bureau's offers of additional compensation in exchange for the right to distribute more of their information, or to distribute an informational minimum more widely.

406 If the correlative contracting units were individual businesses, such as grocery stores, restaurants, and retailers, instead of credit bureaus, the complexities of negotiating individual personal information contracts with each one would make consumers and businesses alike loathe to form them.

407 For instance, well-to-do consumer A wants to secure credit and chooses credit bureau Z to manage his informational identity because Z has earned a strong reputation in the market for arranging excellent credit rates for its customers. Credit bureau Z, having performed a preliminary check on the accuracy of the information supplied by A, would like to sell or rent A's information to five credit grantors for whose low rates A seems to qualify. Thus, A and Z originally agree to a use and disclosure provision covering the five credit grantors and a certain range of personal information.

408 Continuing the preceding example, suppose that later on, credit bureau Z offers to provide A with one year's free access to one of Z's on-line databases if A will permit Z to sell some of A's information to a direct marketer who wants to compile a list of people who share some of A's features. If A dislikes receiving catalogues and advertisements more than he values Z's offer, A may withhold his agreement. Assuming the credit hureau is economically rational, it will sweeten its offer to A to the extent that the inclusion of A's information in Z's sale increases its overall value to the direct marketer.

409 For example, during the economic slowdown in 1989, the credit reporting industry increased 5%, while Equifax processed 50% more credit report transactions than it had in 1988. That year, its Credit and Marketing Services sector generated revenues of $327 million. *Equifax's Credit and Marketing Services Reports Gain*, IDP REPORT, Apr. 6, 1990, at 6. From 1989 to 1993, Equifax's sales of credit reports used for employment purposes rose 51%. According to Equifax, in 1992, it sold 530,000 credit reports to 15,000 companies. Michelle Lavender, *Employers Turning to Credit Reports: Databases Answer the Questions They Can't Ask*, KANSAS CITY STAR, Aug. 22, 1993, at F1, F12.

ponent information for free.[410] If consumers themselves generate the information that credit bureaus collect, organize, and sell, then it seems only fair that consumers play a role in determining who may use which information and that they receive a benefit commensurate to the value that their information adds to the credit bureaus' products.[411]

Finally, a system of personal information contracts would give credit bureaus an incentive to compete for exclusive rights to manage consumers' informational composites. To attract new consumers, credit bureaus would offer different services to different potential consumer-customers. Some would offer consumers superior data privacy;[412] others would offer cash bonuses for especially valuable bits of information. Competition among credit bureaus for consumer-customers would thus give consumers more opportunities to further whatever interests they have in preserving the sanctity of their informational identities.[413]

c. *Credit Bureau Benefits*

At first glance, the proposed contractual scheme appears to harm credit bureaus' economic interests—the proposal requires them to pay consumers for much of the information that they currently receive for free. It would also encourage credit bureaus to increase marketing costs and perhaps to hire squadrons of consumer-relations people.[414] By creating a competitive market for consumer informa-

410 ROTHFEDER, *supra* note 5, at 38. Credit bureaus receive consumer information from many of the same businesses who subscribe to their credit reporting services. Business people need to receive complete and accurate credit information from credit bureaus. They no doubt realize that each time a business refuses to supply a credit bureau with consumer information, it becomes more likely that the credit reports all businesses receive contain gaps or inaccuracies. *See also* SMITH, *supra* note 5, at 48 ("Information about you . . . becomes a barter commodity for credit grantors, saving them money. Credit grantors that do not disclose [customers'] financial information are charged higher rates for credit reporting services.").

411 A repetition of the eighty-year-old rhetorical question is apropos: "If there is value in it, sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?" Munden v. Harris, 134 S.W. 1076, 1078 (Mo. Ct. App. 1911).

412 Credit bureaus could do so, of course, even in the absence of statutory prodding. "If enough consumers express privacy concerns, it is conceivable that [credit reporting agencies] and other firms will offer confidentiality of subscription and billing information as a marketing tool." U.S. DEPARTMENT OF COMMERCE, NTIA TELECOM 2000: CHARTING THE COURSE FOR A NEW CENTURY 135 (1988).

413 For example, some credit bureaus would entice consumers who value their privacy highly with promises of data security, extremely thorough verification procedures, and quick responses to consumer complaints about errors. Others would cater to consumers who, for example, desire cash or commercial financial information more than they crave data protection.

414 Competition has already inspired Equifax and TRW to improve their customer service methods. In 1991, Equifax created a $9 million consumer-service center, with a staff of

tion, however, the contractual scheme promises efficiency gains that may ultimately advantage credit bureaus.[415]

Increased competition among credit bureaus for exclusive rights to consumer information would presumably improve the efficiency of credit bureau computers, since each consumer's credit report would be stored on only one credit bureau's computer system. Credit bureaus might also experience efficiency gains by receiving all of the initial personal information, as well as periodic updates, from consumers themselves, rather than having to track it down from other sources.[416] Finally, credit bureaus could plan their litigation expenses more efficiently by negotiating with consumers for contractual provisions limiting consumers' means of legal recourse to those specified in the contract, or by negotiating liquidated damages provisions. Such provisions would permit credit bureaus to expend their legal resources on activities other than calculating potential common-law liability for right-of-publicity violations and FCRA liability for privacy violations.[417]

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500 customer assistance representatives. This was part of Equifax's strategy, conceived by its president, C.B. Rogers, Jr., "to position Equifax as the company most responsive to consumer concerns." During 1990 and 1991, TRW increased its consumer assistance budget to $20 million per year and increased its consumer assistance representatives by 50%. Walecia Konrad & Zachary Schiller, *Credit Reports—With a Smile*, BUS. WK., Oct. 21, 1991, at 100, 102.

415 Certain of the efficiency gains resulting from competition would perhaps benefit credit bureaus because they benefit consumers. For instance, credit bureaus who want to gain a reputation for responding quickly to consumer complaints will become more efficient as they strive to do so. If they succeed, they will probably attract consumers, and thus make more money by providing more information, or more accurate or thorough information, to their commercial customers.

416 Of course, credit bureaus would still want to expend resources to check the accuracy of the information consumers provide. Again, however, the contractual method seems more efficient than the one currently in place. First, credit bureaus may find extensive verification procedures less necessary because consumers (a) have a contractual incentive to be honest (i.e. the desire to avoid liability for breach) and (b) expect credit bureaus to use extensive verification procedures. Second, to the extent that credit bureaus do attempt to verify the information, verification sources become easier to locate because the consumer has voluntarily identified, for instance, her bank, credit card companies, and employer.

417 Joshua Blackman makes the general point well when he advocates the enactment of a federal statute, administered by a Data Protection Board, that would protect privacy from private sector incursions:

> A broad privacy law would release the private sector from carrying the cost of conforming to patch-work legislation and varying judicial standards of privacy. In the absence of such as standard, technologies appear to be changing the traditional legal definitions of trespass, property, and privacy faster than the government's ability to keep pace. When basic definitional ground rules shift, this threatens the stability on which sound business decisions are based.

Blackman, *supra* note 134, at 463.

d. *Counter-Arguments*

Three arguments against contractualizing the consumer-credit bureau relationship are readily apparent. Generally, they concern fraud and transaction costs. The transaction costs problem has two components: (1) whether consumers and credit bureaus would find it worthwhile to negotiate personal information contracts, and (2) whether such contracts would drive up the price of credit bureaus' commercial customers' products, such as credit and insurance, to a level that would render such products unaffordable to many of the people who would like to purchase them.

i. *Consumer Fraud*

The proposed contractual regime may appear to afford dishonest plaintiffs opportunities to deceive credit bureaus and credit grantors. However, fraud is unlikely to present a significant problem. To prevent fraud in the formation of the contractual relationship, credit bureaus could insist on a basic provision that permits them to verify the accuracy of the information consumers provide. If a consumer is unwilling to agree to such a provision, then the credit bureau has good reason to refuse that consumer's business. The consumer's informational identity is, in effect, worthless to the credit bureau because of its unverifiability. If the consumer tries to secure credit or purchase insurance, the credit grantor or insurer will quickly discover that the consumer lacks a personal information manager. The credit grantor or insurer will then determine whether and under what conditions to engage in business with that consumer.[418]

Consumers might be tempted to lie to credit bureaus during the contractual term, perhaps by supplying false updating information. To prevent fraud, the contractual verification provision could extend to consumer-supplied updating information. Alternatively, the original contract might establish that the consumer's willful provision of false information at any time during the term of the contract renders the consumer liable to the credit bureau for breach of contract. Consumers who are found guilty of breaching a credit bureau contract more than once or twice would predictably have a difficult time selling

418 Of course, the consumer may succeed in locating a credit bureau that is willing to compensate her for her information without having the right to verify it. In that case, the risk of fraud on the credit bureau is negligible because the credit bureau is on notice. Consumer fraud on credit grantors becomes more of a problem in this situation. However, one would expect a reasonably careful credit grantor to know that the credit reports generated by the consumer's credit bureau are unreliable, or at least that a credit report is unreliable unless it contains some sort of accuracy guarantee by the credit bureau. Credit bureaus might try to commit fraud on credit grantors by issuing unverified reports as verified, but the risk of this happening seems no greater under the proposed system than it is today.

their informational identity to another credit bureau, thus decreasing the likelihood of their bilking credit grantors. Properly drafted contractual provisions would give consumers a significant incentive to provide credit bureaus with reasonably accurate information.

ii. *Transaction Costs*

The relatively high transaction costs involved in the formation of consumer-credit bureau contracts might cause consumers and credit bureaus alike to refrain from entering them. Moreover, if consumers and credit bureaus entered such contracts despite the transaction costs, credit bureaus would probably pass these costs on to their commercial subscribers, who would in turn pass them on to consumers. For example, personal information contracts might cause credit card rates to rise substantially, thus depriving consumers of one of the principal benefits they receive under the current system: relatively fast and inexpensive credit.

Admittedly, requiring credit bureaus to enter contracts with consumers in order to sell informational products about them raises both parties' transaction costs. Consumers would have to shop for a credit bureau, negotiate a contract, and assemble the initial information whose transfer substantively begins the contractual relationship. Credit bureaus would have to draft (presumably form-pad) contracts, hire workers to negotiate special contractual terms with certain consumers, and pay programmers and information managers to change the ways in which credit bureaus collect, organize, and disseminate information.

In one sense, the question of whether these transaction costs would deter consumers and credit bureaus from entering contracts is moot. Because credit bureaus are unlikely to begin voluntarily compensating consumers for the information they collect, enabling legislation would be required to commence the contractual system.[419] Once obligated to contract with consumers for the exclusive right to manage their informational identities, credit bureaus will simply have to incur the additional transaction costs of doing so. Similarly, once consumers find themselves unable to secure credit because their

419 Given the likelihood that consumers, the credit bureaus who maintain information about them, and credit report subscribers are all located in different states, and that thousands of credit reports probably cross state lines every day, it makes more sense to have federal legislation in this area than a mishmash of state laws and regulations. Bibas also envisions federal legislation as the impetus for contracts between data subjects and data gatherers. *See* Bibas, *supra* note 179, at 606. Blackman agrees that only a federal statute can effectively deter private sector invasions of privacy: "The degree of behavior change required to be made by businesses to protect . . . personal privacy is not likely unless compelled by legislation and administrative oversight." Blackman, *supra* note 134, at 464.

credit information is unavailable from any credit bureau, they too will bear the additional transaction costs of contracting.

On a more substantive level, increased transaction costs seem an insufficient reason to refrain from instituting the proposed contractual system. One might respond to credit bureau complaints by noting that transaction and other costs rise whenever a business is forced to pay for its raw materials instead of appropriating them.[420] One might also suggest to an irked credit bureau that it can minimize the additional transaction costs, at least on the margin, by attracting a sufficient number of consumer-customers and by drafting fair and comprehensible form-pad personal information contracts.

In response to consumer complaints about increased transaction costs, one could argue that the net privacy gains far outweigh the hassles of forming contracts with credit bureaus. One could also point out that contractualization benefits consumers in a variety of ways.[421] If these arguments convince consumers to accept the additional transaction costs of contracting as relatively insiguificant, perhaps they can also persuade consumers that the foreseeable consequences of such contracts, such as more expensive credit, are worth paying for.

The second transaction-costs counter-argument to personal information contracts suggests that any additional credit bureau expenditures necessitated by contracts-enabling legislation will ultimately disadvantage consumers. That is, if credit bureaus have to pay more for the information they compile into credit reports, then they will have to charge more for their credit reports, which will lead credit grantors, for example, to raise their interest rates. This argument is unlikely to motivate consumers to reject legislation enabling personal information contracts.

Consumer support for personal information contracts would depend upon consumers' preferences for inexpensive credit relative to

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420 In an analogous situation, few would object to a federal statute that requires lumber companies to compensate land owners for the trees they fell and remove from their land on the basis that such a requirement imposes excessive transaction costs on lumber companies.

The compensation point helps shape a response to the criticism that personal information contracts are undesirable because they treat people as mere commodities. If personal information contracts were to replace a system in which everyone enjoyed complete control over his or her informational identity, then this criticism might have some force. However, personal information contracts would replace a system in which credit bureaus and other information managers gain control over this information without the explicit consent of the people who generate it and sell it to others. Seen in this light, personal information contracts merely require credit bureaus to compensate people for information that they currently commandeer. If personal information is to be commodified at all, commodification with contracts seems more fair to consumers than commodification post-appropriation.

421 *See supra* part IV.C.3.b.

their preferences for control over personal information, or privacy.[422] Some consumers will surely object to the contractual system proposed here. These people prefer the ability to secure credit as cheaply as possible to the ability to control information about themselves. For them, the contractual system raises the cost of credit without providing commensurate benefits.

A second group of consumers—those who are indifferent between securing relatively inexpensive credit and maintaining adequate control over personal information—would probably approve of the contractual system. First, these people arguably value the benefits contractualization would create.[423] Second, they might approve because increased competition among credit bureaus will help to minimize any increases in the cost of credit that result from the implementation of the proposed system.

Recall that credit bureaus operating under a contractual regime would search for ways to attract consumers as clients.[424] One way to do so would be to help consumers secure credit at the lowest available rate, other things being equal. With that qualification in place, the credit bureaus that offer consumers access to the lowest available interest rates on credit should attract the most consumers. Thus, credit bureaus interested in attracting consumers in this manner would have an incentive to keep the credit rates that their commercial clients offer as low as possible. The expected result is that each credit bureau, in competition with the others for commercial and consumer clients, would keep the price of its credit reports low, so that its credit-grantor customers can keep their credit rates low. By providing credit bureaus with incentives to compete for consumer clients, the contractual system promises to minimize the upward pressure on credit prices that it creates. Assuming that the niceties of economic theory persuade consumers who are indifferent between inexpensive credit and privacy, these consumers should embrace the proposed system.

A third group of consumers, whose members prefer greater privacy to less expensive credit, will clearly support a system of personal information contracts with credit bureaus. For these consumers, the benefits of such a system will outweigh the system's expected tendency to drive up credit rates. If all three groups of consumers contain roughly equal numbers[425] and if the analysis of the second group of

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422 For a closer analysis of the value consumers place on privacy, see Bibas, *supra* note 179, at 609-11.

423 *See supra* part IV.C.3.b and accompanying text.

424 *See supra* notes 412-13 and accompanying text.

425 None of the well-known privacy surveys contains any evidence that clearly supports or undermines this assumption. According to two credit card company executives' interpretation of a recent Harris poll, a majority of Americans believe that the current credit reporting system benefits consumers and that "law or business practice" adequately pro-

consumers is correct, then contractualization should gain more adherents than detractors among consumers overall.

These responses indicate the unpersuasiveness of the transaction cost arguments. Requiring credit bureaus to form personal information contracts with consumers will certainly increase the transaction costs of credit bureaus and consumers who choose to deal with one another, but this has little bearing on the desirability of such contracts. The upward pressure on credit rates generated by these transactions and the other costs of contractualization should bother only a minority of consumers. Enhanced privacy and built-in mechanisms for keeping credit rates low should earn the majority's support for personal information contracts.

D. Legal Consequences

A federal statute enabling personal information contracts would largely preempt common-law privacy actions against credit bureaus. To be completely effective, the statute would also have to nullify the FCRA. Once enacted, such a statute would improve upon current law by benefitting courts, consumers, and credit bureaus alike. In order for the statute to achieve these benefits, however, its supporters would have to rebut the argument that it imposes an impermissible prior restraint on free speech.

1. *The Constitutional Challenge*

This Note previously suggested that credit reports merit a higher degree of First Amendment protection than commercial advertisements receive.[426] If that argument fails to persuade, then the proposed legislation for personal information contracts must pass the *Central Hudson/Fox* test for permissible regulations on commercial speech.[427] However, if the earlier argument is persuasive, it raises the possibility that constitutionally permissible restrictions on traditional commercial speech are impermissible as applied to credit reports. For instance, the Constitution might permit prior restraints on one form

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tects their privacy rights. Smith & Rush, *supra* note 31, at 17. The authors of this article fail to indicate whether the consumers who responded to the survey were told exactly how credit reporting works, how comprehensive their credit reports could be, or how accessible their credit information is to commercial entities other than credit grantors and their affiliates and subsidiaries. The results of a Septemher 1993 Harris Poll suggest that they were not. According to that poll, 83% of survey respondents "expressed anxiety or serious concerns over the widespread, unauthorized dissemination of personal data." Bob Geske, *Commentary: Protecting Our Privacy through the Electronic Keyhole of the '90s*, VIRGINIAN-PILOT & LEDGER-STAR, Oct. 31, 1993, at C1. It is unclear whether either Harris poll attempted to gauge consumers' preferences for various combinations of privacy protection and credit costs.

426 *See supra* part III.B.

427 *See supra* part III.A.

of speech, but not the other.[428]

a. *Central Hudson/Fox*

Assuming that courts insist on treating credit reports as a form of commercial speech, the proposed statute would have to pass the four-part *Central Hudson/Fox* test for permissible regulations on commercial speech.[429] Credit reports would still qualify for protection under the first prong, provided that they neither mislead nor propose unlawful transactions.[430] The statute would pass the second prong because it furthers the federal government's substantial interest in protecting individual privacy.[431] Finally, the proposed statute arguably would satisfy *Fox*'s version of the third and fourth prongs: a "reasonable fit" between the legislature's means and ends.[432] As this Note has suggested throughout, a federal statute enabling personal information contracts is perhaps the most reasonable way to secure individual privacy interests.[433] Thus, if credit reports are commercial speech, the proposed statute would probably survive a First Amendment challenge.

b. *Prior Restraints*

The *Central Hudson/Fox* test for commercial speech may be irrelevant if the earlier arguments for affording credit reports a higher degree of First Amendment protection are sound. If so, credit bureaus could use such arguments to raise a more substantial constitutional challenge to a statute calling for the formation of personal information contracts. In the same way that the FCRA's audience restriction arguably violates the First Amendment,[434] a statute prohibiting credit bureaus from issuing credit reports without prior consumer consent might impose an impermissible prior restraint on credit bureaus' free

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428 *See supra* part IV.B.

429 Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564-66 (1980).

430 *Id.* at 564-66.

431 *See supra* note 288 and accompanying text. In its commercial speech cases, the Court has never acknowledged the protection of personal privacy as a substantial state interest, although it has recognized two arguably less substantial state interests as substantial: energy conservation and the maintenance of a fair and efficient utility rate structure. *Central Hudson*, 447 U.S. at 568-69. Included on the list of state interests the Court has deemed substantial in commercial speech cases are the regulation of alcohol, *see, e.g.*, Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995) and gambling, *see, e.g.*, Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986).

432 *See Fox*, 492 U.S. at 480.

433 Whether it would also be sufficiently narrow to satisfy the *Fox* Court's test depends on how the enabling statute is drafted and on subsequent judicial interpretation of the statute and the test.

434 *See supra* part IV.B.

speech rights.[435]

A statute requiring credit bureaus to execute personal information contracts, however, is likely to withstand the prior restraint argument. In *Pavesich v. New England Life Insurance Co.*, the first American case to endorse the common-law right to privacy, the court stated that publishing someone's picture without his consent, for a commercial purpose, is an activity unprotected by the First Amendment.[436] Courts have long respected this aspect of *Pavesich* by restricting free expression when it functions mainly as a means of commercially exploiting someone's name or likeness without consent.[437] Under these circumstances, the speaker's right to free expression is "abridged only insofar as it is required to share some of its profits with the individual whose likeness is helping to stimulate those profits."[438]

The Supreme Court recognized a similar First Amendment limitation in *Zacchini v. Scripps-Howard Broadcasting Co.*[439] In this right-of-publicity case, the Court held that although the First Amendment protects television broadcasters who report newsworthy information about entertainment, it does not shield broadcasters who televise a performer's entire act without his consent.[440] The Court reasoned that broadcasters cannot appropriate someone's economically valuable activity and then wrap themselves in the First Amendment to avoid paying for it.[441] Applying the same reasoning, credit bureaus arguably lack a First Amendment right to appropriate economically valuable information from consumers and sell it to others without compensating consumers or receiving their consent. In light of the foregoing arguments for extending the misappropriation tort and the right of

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435 Recall Equifax Servs., Inc. v. Cohen, 420 A.2d 189 (Me. 1980), *cert. denied*, 450 U.S. 916 (1981). In that case, the Supreme Judicial Court of Maine, applying the *Central Hudson* test, struck down as an unconstitutional content-based prior restraint on commercial speech a provision of the MFCRA that prohibited credit report subscribers from procuring investigative consumer reports in the absence of written consumer consent. *Id.* at 196-97, 200. *See supra* notes 292-299 and accompanying text.

436 50 S.E. 68, 79-80 (Ga. 1905).

437 *See* ELDER, *supra* note 95, § 6:13, at 436, and cases cited therein.

News and information disseminators, however, have a privilege to disseminate photographs of people without their consent. *See, e.g.*, Mendonsa v. Time, Inc., 678 F. Supp. 967, 971-72 (D. R.I. 1988) (holding that although magazines are privileged to use names and photographs in connection with news stories, the privilege does not extend to their use of names and photographs for commercial purposes unrelated to the dissemination of news); Gautier v. Pro-Football, Inc., 107 N.E.2d 485, 488 (N.Y. 1952) (The privilege television broadcasters have to use names or photographs for purposes of news "does not extend to commercialization of [someone's] personality through a form of treatment distinct from the dissemination of news or information.").

438 Tellado v. Time-Life Books, Inc., 643 F. Supp. 904, 913 (D. N.J. 1986).

439 433 U.S. 562 (1977).

440 *Id.* at 573-79.

441 *Id.* at 575-76.

publicity to credit reports,[442] a statute preventing the exploitation of consumers' informational identities falls well within a long-recognized exception to First Amendment rights.

2. *The Legal Benefits*

One of the most significant benefits of a statute enabling personal information contracts would be the preemption of many current common-law rules and statutes regulating credit bureau activities.[443] Because both courts and Congress have somehow managed to protect neither consumers' privacy interests nor credit bureaus' free speech interests adequately, perhaps they would benefit both groups by enabling a contract regime, policing it, and otherwise excusing themselves from the area. Courts would be free of their burden to apply shop-woru common-law rules and factors to high-tech activities for which they are poorly designed. They could also give up an unworkable commercial-noncommercial speech distinction, at least when credit reports are at issue. Finally, the proposed statute would enhance judicial economy by requiring courts to apply familiar contract rules and a few statutory provisions to a legal area currently clouded by a myriad of conflicting, arbitrary, and ineffective laws.

The statute would benefit consumers by giving them a legally cognizable right to control personal information about themselves. Diane Zimmerman argues that as the law currently stands,

> [e]fforts to control the use of information or ideas by others will generally be doomed from the outset if the claim is classified as an attempt to interfere with freedom of speech. If, however, a claimant can march the same basic dispute onto the field and successfully raise the standard of property rights, her likelihood of success will improve markedly.[444]

This Note has pointed out numerous obstacles to consumer victories in their common-law and statutory privacy actions against credit bureaus. If Zimmerman is right that courts are more sensitive to property than to privacy claims, then whether consumer-plaintiffs argue convincingly for an extension of the misappropriation tort to credit reports[445] or sue for breach of a personal information contract, the

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442 *See supra* part IV.C.2.

443 In his privacy treatise, Raymond Nimmer argues that even though personal information is analogous to commercial trade secrets, the law regulates the use and disclosure of personal information because consumers "are not realistically in a position" to contract for such restrictions. NIMMER, *supra* note 5, ¶ 16.02[2], at 16-7. If consumers gained the ability to form contracts with credit bureaus, then presumably the law could replace current use and disclosure provisions with general guidelines for the formation of such contracts.

444 Zimmerman, *supra* note 77, at 669.

445 A reasonable extension of the misappropriation tort would provide an effective

legal recommendations in this Note would vindicate consumers' privacy rights more often and more thoroughly than does current law.

Credit bureaus would also gain legal benefits from the proposed enabling statute. Of course, credit bureaus would initially incur costs in drafting and negotiating personal information contracts. On the positive side, consumers and credit bureaus would conceivably reach agreements concerning which subscribers were entitled to receive what information, thus freeing credit bureaus of the responsibility to decide which credit report requestors have a "legitimate business need" for the information.[446] Overall, the statute would reduce credit bureaus' legal research expenses and provide greater legal certainty by removing vague standards of behavior and enhancing credit bureaus' control over their liability obligations.

CONCLUSION

This Note has drawn attention to a number of practical and legal deficiencies in the common-law and statutory treatment of privacy actions brought by consumers against credit bureaus. Perhaps because computer technology has intensified the doctrinal conflict between privacy and free speech interests faster than courts and legislators can adjust the law to accommodate them, both interests have suffered under current law. A careful consideration of the policies underlying each of the interests has prompted a proposal for overhauling privacy and commercial speech laws and establishing a contractual regime for controlling the production and dissemination of consumer information. If courts and legislators were to recognize a proprietary right in one's informational identity, they might then consider authorizing the formation of contracts for buying, selling, renting, and utilizing such information. "Personal information contracts" would give consumers more control over personal information than they have ever enjoyed and would respect credit bureaus' First Amendment right to distribute consumer credit reports.

Scott Shorr†

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alternative to contract for consumers who seek to recover for certain technologically-enabled privacy violations. *See supra* part IV.C.2.

446 *See, e.g.*, 15 U.S.C. § 1681(b)(3)(E) (1994).

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