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Common Law Protection of Individuals' Rights in Personal Information

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NOTES

COMMON LAW PROTECTION OF INDIVIDUALS' RIGHTS IN PERSONAL INFORMATION

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INTRODUCTION

As you live your life you leave an explicit and revealing trail of electronic footprints.[1] Simply by being born;[2] getting married;[3] having a child;[4] or dying;[5] purchasing something with a check or a credit card;[6] subscribing to a magazine;[7] calling an 800 or 900 number;[8] using

1. *See* Joel R. Reidenberg, *Setting Standards for Fair Information Practice in the U.S. Private Sector*, 80 Iowa L. Rev. 497, 517 (1995) [hereinafter Reidenberg, *Setting Standards*] (describing how the direct marketing industry collects "discrete bits of personal information from many sources"); Michael W. Miller, *Hot Lists: Data Mills Delve Deep to Find Information About U.S. Consumers: Folks Inadvertently Supply It by Buying Cars, Mailing Coupons, Moving, Dying*, Wall St. J., Mar. 14, 1991, at A1 ("You go through life dropping little bits of data about yourself everywhere.... Most people don't know that there are big vacuum cleaners sucking it up." (quoting privacy advocate Evan Hendricks, editor of *Privacy Times*, a Washington, D.C., monthly)); Mary Zahn & Eldon Knoche, *Electronic Footprints: Yours Are a Lot Easier to Track Than You May Think*, Milwaukee J. Sentinel, Jan. 16, 1995, at 1A. Zahn and Knoche describe the results of their findings as follows:

> Write a check and somewhere a computer may log in your name. Buy an expensive dinner with a credit card and a databank may register you as an upscale consumer. Apply for a driver's license and anyone with a few bucks can know your age and address. Send for a video and someone will know your taste in movies. Use a discount card at a supermarket and the can of tuna fish you bought leaves an electronic fingerprint. Even breathing can be a spectator sport for your medical records may end up in a Boston information bank. As you are born, go to school, get a job, have a family, raise your kids, retire and die, nearly everywhere you go and everything you do leaves computer footprints behind. And in some cases, governmental agencies, which you probably thought would be sympathetic to protecting your privacy, work hand in hand with these merchants by making available to them intimate facts about your life. And it's all legal.

Id.

2. Zahn & Knoche, *supra* note 1, at 1A.

3. Miller, *supra* note 1, at A8.

4. *See id.* (noting marketing efforts targeted at women intending to have children); R.J. Ignelzi, *Mail and Telejunk: U.S. Marketers Have Your Number: Your Age and Shoe Size, Too*, San Diego Union-Trib., July 4, 1995, at E1.

5. *See* Miller, *supra* note 1, at A8 (noting statement by president of marketing firm that collects information on recent deaths, who stated that "[d]eath has always been a negative life style change nobody thought could be sold, but I differ ... I think it's a very good market").

6. Zahn & Knoche, *supra* note 1, at 1A.

7. *See* Avrahami v. U.S. News & World Rep., Inc., No. 96-203, slip op. at 10-11 (Cir. Ct. Arlington County June 13, 1996).

8. Zahn & Knoche, *supra* note 1, at 1A.

a discount card at a supermarket;[9] or applying for a driver's license;[10] you leave a record of where you were and what you did, and the holder of that record is free to do with it whatever he or she pleases. These transactional footprints have value because they can provide businesses a glimpse of your life that might indicate your receptiveness to products or services these businesses offer.[11] While each record has some individual value, the information develops its greatest value, and greatest power, when the individual pieces are gathered and layered on top of one another, creating a detailed profile of who you are and what you do.[12] This "personality profile"[13] allows marketing companies to make numerous assumptions about your interests and spending habits, thereby enhancing these marketers' ability to target solicitations to those people most inclined to respond.[14] As a result, you would inevitably find yourself categorized on one or more of the thousands of lists that are bought, rented, or sold each day.[15] This is particularly true of persons meeting certain identifiable and sensi-

9. *Id.*

10. *Id.* For a discussion of state sales of driver registration records, see infra notes 55-58 and accompanying text.

11. These discrete bits of information are traded widely among catalog and magazine publishers. For example, on the assumption that subscribers to *U.S. News & World Report* might be inclined to subscribe to *Smithsonian* magazine, the latter rented from the former a list of the names and addresses of *U.S. News* subscribers. This activity spawned a lawsuit by a *U.S. News* subscriber who argued that *U.S. News* unlawfully appropriated his name and likeness for commercial gain. *See Avrahami*, No. 96-203, slip op. at 7-8. For a more detailed discussion of the Avrahami case, see infra notes 291-97 and accompanying text.

12. *See* Zahn & Knoche, *supra* note 1, at 1A ("Bits of personal and financial facts about you, valuable in individual pieces, become more profitable as chunks of data are overlaid on each other. Layers and layers of easily acquired information are merged into a profile that is treasured by magazines, car dealerships, banks, insurance companies and anyone else who wants to market a product to you or determine that you are a poor health or credit risk."); *see also* Reidenberg, *Setting Standards*, *supra* note 1, at 516-23 (detailing the profiling techniques employed by direct marketing companies); Jonathan Berry, *Database Marketing: A Potent Tool for Selling*, Bus. Wk., Sept. 5, 1994 at 56 (describing how information is collected and combined "into the database maw" to generate complex profiles of consumers and their interests).

13. "Personality profiles" are those records, lists, or representations that combine multiple pieces of personal information about a given "data subject." *See* Reidenberg, *Setting Standards*, *supra* note 1, at 517 ("By cross-referencing numerous items of personal information, individual profiles are developed. These profiles may consist of a single characteristic, such as subscribers to *Penthouse* or denture adhesive buyers. They may also consist of a more complete set of characteristics."). A "data subject" is merely the individual whose personal information is gathered. *See infra* note 18 (detailing legislative proposals that define "data subject").

14. Zahn & Knoche, *supra* note 1, at 1A.

15. At least 10,000 lists of data about individuals are available for rent. National Telecommunications and Information Administration, Inquiry on Privacy Issues Relating to Private Sector Use of Telecommunications-Related Personal Information, 59 Fed. Reg. 6842, 6842 (1994) [hereinafter *NTIA Inquiry*].

tive characteristics.[16] The breadth and specificity of these lists can be astounding.[17]

Many Americans believe these practices to infringe upon their right to privacy. Recent cases demonstrate the scope and type of privacy violations emanating from unauthorized dissemination of personal information.[18] In one case, a woman from Burbank, California ordered

16. Zahn & Knoche, *supra* note 1, at 1A ("Troubling to many is the sale of lists of people who meet sensitive and personal criteria. Any lesbian or a diabetic has a good chance of being on a list. A Jew has an excellent chance of making some marketing list.").

According to a former head of a Federal commission charged with investigating personal privacy concerns, "[w]ithout our knowledge we are profiled and placed on many specialized lists, whether we like it or not. . . . You could be classified as a foreign policy hawk, affluent ethnic professional, black activist, person who frequents the dice table. You don't know what lists you are on." *Id.* (quoting David F. Linowes, former chairman of the U.S. Privacy Protection Study Commission).

17. For example, lists including the names of the following Americans have been sold by list brokers: more than 300,000 men who called various 800/900 phone fantasy numbers; 55,912 gay and lesbian magazine subscribers; 5000 women who responded to an 800 phone number offering information and samples of adult diapers (this list sold for $270); and 82,000 men 55 and older who sought help for impotency at a medical clinic. *Id.*

Additionally, one company, which deems itself the world's leading broker and manager of Jewish lists, claims it "can identify and mail to 85% of the 2.6 million Jewish households in the United States." *Id.* As the authors of this newspaper article note, "[g]enerally, these lists are rented for one-time use only by list brokers who are the real estate agents of the information industry." *Id.*

18. For the purposes of this Note, "personal information" is information that in any way concerns or reflects the personality of an individual. A similar definition is "information . . . gathered, stored, or disseminated in ways that make likely its association with particular individuals." Laurence H. Tribe, American Constitutional Law, §§ 15-17, at 967 (1978).

The scope of the definition is not as important as whether the information has value to those who seek to appropriate it. California has a statute that regulates governmental collection, transmission, and sale of personal information. Cal. Civ. Code § 1798.3 (West. Supp. 1996). While this Note concerns trade by private parties of personal information, California's definition helps delineate the possible scope of the definition. It reads:

> The term "personal information" means any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history. It includes statements made by, or attributed to, the individual.

Id.

Additionally, the statute exempts from its scope dissemination of newsworthy information: "The term 'commercial purpose' means any purpose which has financial gain as a major objective. It does not include the gathering or dissemination of newsworthy facts by a publisher or broadcaster." *Id.* § 1798.3(j).

A broader definition proposed by the European Community includes "any information relating to an identified or identifiable natural person ('data subject')." James R. Maxeiner, *Business Information and "Personal Data": Some Common-Law Observations About the EU Draft Data Protection Directive*, 80 Iowa L. Rev. 619, 619 & n.1 (1995) (*citing* Article 2(a) of the Commission of the European Communities "Amended Proposal for a Council Directive on the Protection of Individuals with

a maternity catalog after she became pregnant.[19] Not surprisingly, she was soon bombarded with "more catalogs, baby-product samples, calls from baby photographers and diaper services."[20] There was one problem with these offers, however: the woman's pregnancy ended with a miscarriage. She made repeated phone calls requesting that the product manufacturers stop soliciting her.[21] When she explained to the telephone solicitors what had happened to her pregnancy, they often hung-up on her. Her requests unheeded, the solicitations continued, and included birthday wishes and baby product offers which reminded the woman of her lost pregnancy.[22] She became so upset that her husband had to open all of the mail and answer all phone calls to the house. Finally, after almost two years of unanswered requests, she sent a letter to all the solicitors, as well as to the major list brokers, explaining what had happened and threatening legal action if the solicitations did not cease. The "enticing offers" finally subsided.[23]

In another example, an eighty-three year-old woman was targeted by marketers who learned from her purchases that she was elderly and lived alone.[24] Vulnerable to ostensibly "personal" calls from marketers who asked for her by name, the woman was induced to purchase many items for which she had no use but was made to think she needed.[25]

Regard to the Processing of Personal Data and on the Free Movement of Such Data" of October 16, 1992, 1992 O.J. (C 311) 38).

An appropriate understanding of personal information is closer to the EC proposal, i.e., any information relating to an identifiable person. In the case of the sale of a magazine subscriber's name, for instance, the actual information that is sold is not only the name and address, but also the subject's association with the seller. In this instance, the information quite literally "relates" to the "identified or identifiable natural person ('data subject')."

19. Ignelzi, *supra* note 4, at E1.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* In another case, a woman and her husband, a police officer, worked hard to keep their address secret. They were successful until the woman had her first child; she was immediately inundated with marketing offers personally addressed to her. It turns out that the hospital had sold her name and address to direct marketers on a list of new mothers. Mark Lewyn, *You Can Run, But It's Tough to Hide from Marketers*, Bus. Wk., Sept. 5, 1994, at 60.

It seems that the only definite way to protect personal privacy[26] is to leave no transactional trace as you live your life;[27] an exceedingly difficult task in a society becoming increasingly automated and computerized.[28] Indeed, most Americans would be surprised to learn the scope of businesses' use of personal information.[29]

But many Americans are aware of the increased unauthorized use of personal information. Public opinion polls and privacy surveys seem to indicate the widespread belief of many Americans that they cannot control information about their personal lives.[30] Many persons believe that they possess an innate right to control personal information,[31] but also feel that they have lost the ability to control that information.[32] Not surprisingly, most Americans seek to gain more control over the dissemination of personal information.[33]

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26. Most discussions of these issues take place under the vague rubric of "privacy." *See* Reidenberg, *Setting Standards*, *supra* note 1, at 498 (noting that "'[p]rivacy' serves as a catch-all term"). Public discourse concerning businesses' dissemination of personal information is usually couched in privacy terms. *See, e.g.*, Louis Harris & Associates & Alan F. Westin, 1995 Equifax-Harris Mid-Decade Consumer Privacy Survey (detailing results of survey monitoring consumer attitudes regarding privacy) [hereinafter Equifax Survey]; Yankelovich Monitor, Yankelovich Monitor 1995 Consumer Privacy Survey (same) [hereinafter Yankelovich Survey].

27. One commentator proposes a viable, albeit drastic, strategy: "Pay cash. Avoid credit. Don't sign up for government programs. Walk, don't drive. Live under a rock. In short, for most ordinary people, there is no way [to] keep yourself off these lists." Stephen Phillips, *Never Mind Your Number—They've Got Your Name*, Bus. Wk., Sept. 4, 1989, at 81.

28. Jay Greene, *Eluding Their Gaze: The Way to Protect Personal Info Is to Leave No Trace. But Remember - The Rules Aren't in Your Favor*, Orange County Reg., Apr. 25, 1996, at C1 ("The idea of becoming a hermit may seem a bit rash. But as Corporate America continues to whittle away at your privacy, the only way to protect personal information is to leave no trace.").

29. "Most Americans have no idea of the scope of record-keeping. . . . They would be surprised at how easy it is for others to obtain information the individual assumes is confidential." Zahn & Knoche, *supra* note 1, at 1A (quoting statement made to Congress by David F. Linowes, former chairman of the U.S. Privacy Protection Study Commission).

30. *See* Equifax Survey, *supra* note 26, at 17-33, 61 (detailing results of survey monitoring consumer attitudes regarding privacy); Yankelovich Survey, *supra* note 26, at 10-20.

Alan Westin, a professor at Columbia and author of an important book on privacy, Privacy & Freedom (1967), consulted on the Equifax survey. He concluded that the survey results indicated strong concern about the use and dissemination of personal information. Equifax Survey, *supra* note 26, at 9.

31. *See* J. Thomas McCarthy, *Melville B. Nimmer and the Right of Publicity: A Tribute*, 34 UCLA L. Rev. 1703, 1711 (1987) ("[N]othing is so strongly intuited as the notion that my identity is *mine* — it is my property, to control as I see fit.").

32. *See* Equifax Survey, *supra* note 26, at 23 ("The vast majority of Americans (80%) agree that 'consumers have lost all control over how personal information about them is circulated and used by companies.'"); Yankelovich Survey, *supra* note 26, at 18 (noting that Americans are feeling more protective of their privacy in 1995 than they did in the early 1990s).

33. *See* Claudia Montague, *Private Ayes*, Marketing Tools Magazine, Jan. 1996, at 1 (citing "alarming" figures in Yankelovich survey suggesting that nine out of ten Americans favor legislation to regulate business use of consumer information).

In contrast to the concerns of these individuals lie the interests of the direct marketing industry. Some estimates find that direct marketing in 1995 led to as much as $600 billion in sales of goods and services,[34] and employed over eighteen million people.[35] The annual market for mailing lists alone, without factoring in sales attributable to their use, has been estimated at approximately $3 billion.[36] Additionally, the American Telemarketing Association asserts that telephone salespeople made $159 billion in consumer sales in 1995.[37]

The balance of power between the direct marketing industry and the consumers upon whose information it depends is currently tilted strongly in favor of the marketers. Despite the apparent public concern over unauthorized uses of personal information, it remains legal to disseminate personal information without first obtaining the consent of the subject.[38] Individuals currently have no right to be informed of the number, names, or types of lists that contain their names,[39] nor do they have a right to have their names removed from these lists.[40] In fact, the direct marketing industry,[41] which has perhaps the largest stake in continued non-regulation of personal information sales, is not subject to any regulation at all.[42]

Against this backdrop of competing interests, attempts to vindicate individuals' rights in personal information have been made in both judicial and legislative forums. In the courts, as described in part IV,

34. *See* Robert J. Posch, *The 25-Year Privacy Debate Has an Institutional Memory*, Direct Mkt., Apr. 1, 1996, 2 (citing estimates by the Direct Marketing Association ("DMA") that place the 1995 volume of sales generated by the direct marketing industry at $600 billion).

35. Julian Beltram, *Homeowner's Suit over Junk Mail Turns Him into Folk Hero: Payment Demanded for Use of His Name*, Vancouver Sun, Nov. 6, 1995, at A6 (estimating that 18.2 million persons are employed by the direct marketing industry).

36. NTIA Inquiry, *supra* note 15, at 6842.

37. Richard Higgins, *Natick Consumer Fed Up at Being Dialed Up; Woman Spurs Bill to Curb Sales of Phone, Address Lists*, The Boston Globe, Sept. 1, 1996, at 1.

38. Greene, *supra* note 28, at C13 ("[R]ight now the deck is stacked in the favor of businesses. Williams-Sonoma, for example, is under no obligation not to collect transactional data about what you buy and sell it to others." (quoting Christine Varney, a commissioner of the Federal Trade Commission)).

39. Zahn & Knoche, *supra* note 1, at 1A ("Those lists are intended to help direct marketers target customers. Legally, consumers do not have to give permission to have their names sold, nor do they have to be notified of the lists they are on.").

40. *See* Privacy Protection Study Comm'n, Personal Privacy in an Information Society 147 (1977) [hereinafter Privacy Comm'n].

41. The direct marketing industry is represented in its lobbying efforts by the DMA. Established in 1917, the DMA is the "oldest and largest trade association for nonprofit and business organizations using direct marketing to reach their customers, members, and prospects." *Children's Privacy: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong., 2d Sess. (1996) [hereinafter *Children's Privacy Hearings*] (testimony of Richard A. Barton, Senior Vice-President for Congressional Relations, Direct Marketing Association). The DMA represents more than 3000 corporations and organizations in the United States and over 600 corporations in forty-seven other nations. *Id.*

42. Reidenberg, *Setting Standards*, *supra* note 1, at 517.

at least three cases have been brought claiming that the unauthorized sale of consumer information violates the appropriation tort.[43] Not one has been successful.

In addition to these judicial attempts, many commentators have advocated legislation that would grant individuals legal rights in their personal information.[44] These commentators argue that the legislature is better equipped than a court to establish such a right, which would require that any person or institution must obtain the affirmative consent of a data-subject before disseminating to third-parties that data-subject's name, address, and/or telephone number.[45] Actual legislative proposals have been introduced in a number of state legis-

43. *See infra* notes 157-59 (discussing tort); *infra* part IV.B (discussing Shibley v. Time Inc., 341 N.E.2d 337 (Ohio Ct. App. 1975), Dwyer v. American Express Co., 652 N.E.2d 1351 (Ill. App. Ct. 1995), and Avrahami v. U.S. News & World Rep., Inc., No. 96-203, (Cir. Ct. Arlington County June 13, 1996)).

At least one other commentator has argued that courts should remedy unauthorized sales of personal information, but through recognition of a new tort-based cause of action. *See* Jonathan P. Graham, Note, *Privacy, Computers, and the Commercial Dissemination of Personal Information*, 65 Tex. L. Rev. 1395, 1434-38 (advocating creation of tort of commercial dissemination of personal information). Graham suggests that the greatest impediment to legislative privacy protection is the legislature's lack of a coherent understanding of privacy, although he also acknowledges that legislatures, "faced with the task of balancing the uncertain interests of business against the undefined interests of individuals, might yield to business concerns and undervalue personal privacy." *Id.* at 1424-25.

This Note argues that interest group pressure has, in fact, distorted legislative consideration of proposals to vest individuals with rights in personal information, and further suggests that adequate protection can be achieved through extension of already-existing common law tort doctrine.

44. *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, 468 (1993) (proposing federal statute tracking European Community Draft Directive on Personal Data Management, Proposal for a Council Directive Concerning the Protection of Individuals in Relation to the Processing of Personal Data, art. 24.1, 1990 O.J. (C 277) 3, 10); Patricia Mell, *Seeking Shade in a Land of Perpetual Sunlight: Privacy as Property in the Electronic Wilderness*, 11 Berkeley Tech. L.J. 1, 2 (1996) (proposing federal statute granting individuals property rights in their electronic personas); Steven A. Bibas, Note, *A Contractual Approach to Data Privacy*, 17 Harv. J.L. & Pub. Pol'y 591, 606-07 (1994) (proposing a statute mandating that all consumer transactions include terms giving consumers an opportunity to either opt-in or opt-out of secondary use of personal information, which would then lead to a deregulated market-based system of personal information management); Scott Shorr, Note, *Personal Information Contracts: How to Protect Privacy Without Violating the First Amendment*, 80 Cornell L. Rev. 1756, 1818 (1995) (proposing federal statute that would grant individuals property rights in their personal information that would in turn serve as basis for "personal information contracts").

Bibas's Note eschews a broad regulatory scheme, and focuses primarily on the benefits of an unregulated market in personal information, the dynamics of which would be influenced by society's shared privacy expectations. Bibas, *supra*, at 606-07.

45. *See* Blackman, *supra* note 44, at 468; Mell, *supra* note 44, at 76-81; Bibas, *supra* note 44, at 606-07; Shorr, *supra* note 44, at 1818.

latures over the past year.[46] Again, not one, however, has been successful.

This Note argues that despite the theoretical appeal of a legislative solution to the issue of unauthorized dissemination of personal information, individuals should not wait for legislative action but rather should continue to litigate the issue in state courts. Courts are well suited to address the issue for two distinct but related reasons. First, when appropriate, state courts can extend and modify the common law to keep pace with technological and societal changes. Second, legislatures often are too beholden to special interests to thoughtfully and rationally consider certain questions. Courts, which possess greater independence than legislatures, must consider whether individuals should have legally enforceable rights in their names and personality profiles.

Part I examines the market for personal information, demonstrating the ways in which personal information is gathered and sold. It cites detailed survey data which suggests that many Americans feel they have lost all control over personal information and wish to regain that control.

Part II examines the current state of the law and the extent to which current laws protect individuals' rights in information about themselves. It examines the scattered patchwork of federal and state statutes that provide some protection of personal information, and concludes that this amalgam of reactive and industry-specific statutes does not adequately address concerns raised by personal information sales. Shifting to potential common law remedies against this practice, part II then examines the development of the right to privacy, and the potential utility of this strand of tort law.

Noting the deference to the legislature exercised by at least one court that considered application of state tort law to personal information sales, part III examines the threshold question of institutional competence, i.e., whether the court or the legislature is more competent to analyze potential legal responses to unauthorized dissemination of personal information. Part III focuses particularly on courts' roles in light of the legislative process. It endorses a "Reform Model" of judicial activity that urges courts to embrace their lawmaking function when interest group pressure distorts legislative processes. Part III finally demonstrates that courts can and must consider the personal information issue on its merits, and thereby serve as catalysts for legislative action to overcome interest groups' power to force on dispersed individuals the burden of inducing legislative action.

46. The state legislatures of California, New Jersey, and New York have entertained proposals that would restrict commercial dissemination of personal information. *See infra* notes 236-50 and accompanying text (discussing ill-fated proposals in various state legislatures).

Part IV examines the issue of individuals' rights in personal information in light of this view of the judicial role. It presents evidence that interest group pressure has distorted legislative consideration of proposals to vest individuals with such rights. Accordingly, part IV argues, courts should adopt a Reform Model approach and expand tort protection of individuals' rights in personal information. Finally, part IV demonstrates that such an extension would not be unduly activist, but rather a natural step in the reasoned judicial development of privacy tort doctrine.

I. COLLECTION AND DISSEMINATION OF PERSONAL INFORMATION

As described in the Introduction, businesses' ability to collect, process, store, and disseminate personal information is significant. This part explains the nature of the personal information industry and reviews accumulating evidence that American consumers are becoming increasingly concerned about their perceived loss of control over personal information.

Almost all day-to-day consumer and business transactions leave some sort of an electronic record.[47] Information about individuals is collected by computers during transactions and subsequently stored in computer databases.[48] Sources of information include: credit card transactions,[49] mortgage records,[50] magazine subscription information,[51] birth records,[52] warranty cards,[53] point-of-purchase plans,[54] and driver registration records. Driver registration records historically

47. *See* James Greiff, *Use of Credit Card Creates Mini-Profile of Consumer*, Portland Oregonian, Sept. 13, 1993, at B10 (recounting activities that leave electronic traces); *supra* note 1 (same).

48. Aryeh S. Friedman, *Law and the Innovative Process: Preliminary Reflections*, 1986 Colum. Bus. L. Rev. 1, 31 (noting ability of computers to process and cross-reference information quickly, leading to "creat[ion of] personal profiles of individual data subjects").

49. *See* Greiff, *supra* note 47, at B10; Miller, *supra* note 1, at A8.

50. *See* Miller, *supra* note 1, at A1.

51. *Id.*

52. *Id.*

53. *See Privacy Advocates Warn Against Warranty Cards*, Wis. St. J., Dec. 27, 1995, at 4D (noting that although many consumers believe that these cards are necessary to activate warranty protection, filing the card is not necessary for protection in the event that the product is defective).

54. Under "point-of-purchase" or "point-of-sales" plans, consumers receive a card with a magnetic stripe; when they make a purchase, they are automatically given credit for all store coupons then in effect and their purchase history is recorded by household. *Data Protection, Computers, and Changing Information Practices, Hearings on H.R. 685 Before the Subcommittee on Government Information, Justice, and Agriculture of the House Committee on Government Operations*, 101st Cong., 2nd Sess. 86 (1990) (statement of Jerry Saltzberger, Chief Executive Officer of Citicorp's Point-of-Sale (POS) Information Services); *see* Blackman, *supra* note 44, at n.1. These plans record tremendous amounts of detailed information, but are entered into on a more consensual basis than the bulk of methods described above.

have been a lucrative source of personal information.[55] For example, the state of Florida has quoted a price of $33 million for a one-time sale of its motor vehicle records database.[56] Because of recent cases where such information was used to advance criminal behavior,[57] however, distribution of such records has become subject to regulation.[58]

Direct marketers place these layers of information on top of one another, and form a profile of the individual that represents some or all of the above factors.[59] This practice results in the creation of an "electronic persona,"[60] and the resulting multi-faceted portrait is aptly known as a "personality profile."[61] People inadvertently leave traces that create this persona or profile simply by living their lives in an electronic society that forces them to leave electronic footprints almost wherever they go.[62]

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55. Driver registration records have traditionally been available for public inspection, and many state Departments of Motor Vehicles have prepared lists and sold them to interested direct marketers. *Drivers Privacy Protection Act of 1993: Hearings on H.R. 3365 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103rd Cong., 2d Sess. (1994) (statement of Mary J. Culnan, associate professor, Georgetown University School of Business). Marketers use both registration and drivers' license files to acquire a broad array of personal information. Each type of record has names and addresses; in addition, however, registration files have information on the types and years of cars that people own, and drivers' licenses contain information about age, gender, weight, height, and need for corrective lenses. These data are valuable to marketing profilers in a number of ways. For example, the make and model of an individual's car may allow inferences about that individual's income; the age of the car might signal the likelihood that the owner will soon purchase a new car; and vital statistics, as reflected on a driver's license, might indicate the subject's likelihood of buying a particular good or service. Professor Culnan cites the example of optometrists targeting senior citizens with bad eyesight who live in a certain area. One marketing executive has stated that "nothing says more about you than the car you drive." *Id.*; *see also* Jeffrey Rothfeder, *Looking for a Job? You May Be Out Before You Go In*, Bus. Wk., Sept. 24, 1990, at 128 (noting the use of motor-vehicle histories to investigate job applicants).

56. Larry Rohter, *Florida Weighs Fees for Its Computer Data: Some See Profits, Others Too High a Price*, N.Y. Times, Mar. 31, 1994, at B9.

57. In 1989, actress Rebecca Schaeffer was murdered in the doorway of her California apartment. Her assailant was an obsessed fan who had stalked her for two years; he finally obtained her home address when he hired a private investigator who simply requested the address from the California Department of Motor Vehicles. Ellen Alderman & Caroline Kennedy, The Right to Privacy 325 (1995).

58. In response to a California stalking case in which the murderer found his victim through state motor vehicle records, *see id.*, Senator Barbara Boxer proposed an amendment to the crime bill that would give drivers the opportunity to opt-out of disclosure of information such as height, weight, hair color, eye color, and corrected vision. *See* Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725 (1994); Reidenberg, *Setting Standards*, *supra* note 1, at 518 n.105.

59. *See* Friedman, *supra* note 48, at 31; Reidenberg, *Setting Standards*, *supra* note 1, at 517.

60. Mell, *supra* note 44, at 3.

61. *Id.*

62. *Id.* ("We have not consciously created such images of our personae. They are a function of the electronic trail of the information we leave in the wake of our use of

While a record of any one factor standing alone has minimal value, the compiled information which paints a comprehensive picture of the individual, enables direct marketers to "target" their audience and increase response rates on their promotions.[63] This "targeting" is extremely valuable to the marketers because it increases profits by focusing mailings, decreasing mailing costs, and increasing returns.[64]

Consumers are becoming increasingly aware that businesses gather and use personal information, and that there are occasionally dangerous consequences.[65] Two recent surveys have attempted to gauge Americans' concern over privacy issues. A 1994 *Yankelovich Monitor* survey found that ninety percent of those polled favored legislation to regulate business compilation of consumer information.[66] Another poll, part of an ongoing series commissioned by one of the "Big Three" credit reporting bureaus,[67] found that "[t]he vast majority of Americans [eighty percent] agree that 'consumers have lost all control

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any service that electronically records and/or stores information concerning our transactions."); Zahn & Knoche, *supra* note 1, at 1A.

63. *See* Privacy Comm'n, *supra* note 40, at 126 ("The key fact to understand about mailing lists . . . is that they are almost never free-standing; they are names and addresses of individuals who have some type of association, usually an active one, with a public or private organization.").

As Professor Reidenberg observed:

> It is probably not commonly known that credit card companies develop lifestyle profiles of card holders, that telecommunications companies track users' calling patterns, that product manufacturers track the habits of individual customers, and that credit reporting agencies also assemble data on household composition (such as marital status of occupants) and on legal disputes involving individuals.

Joel R. Reidenberg, *Privacy in the Information Economy: A Fortress or Frontier for Individual Rights?*, 44 Fed. Comm. L.J. 195, 205 (1992) [hereinafter Reidenberg, *Fortress or Frontier*] (citing David Churbuck, *Smart Mail*, Forbes, Jan. 22, 1990, at 107; Jeffrey Rothfeder, *Is Nothing Private?*, Bus. Wk., Sept. 4, 1989 at 74, 74-82; Eben Shapiro, *MCI Discounts Expected on Numbers Called Often*, N.Y. Times, Mar. 18, 1991, at D4).

The Standard Rate and Data Service mailing-list catalog is used widely in the direct marketing industry, and "includes lists that reflect religion, sexual orientation, medical information, and political contributions." Judith Waldrop, *The Business of Privacy*, American Demographics, Oct. 1994, at 46, 49.

64. Direct marketers testified at length to the 1977 Privacy Commission about the economic necessity of mailing list profiling, stating: "[T]he best direct-mail campaign is the one that mails the least. This is a business necessity. . . . A piece of mail to an individual who doesn't want to buy is wasted, and to direct mailers the elimination of this kind of waste is absolutely essential." Privacy Comm'n, *supra* note 40, at 135 (quoting testimony of Association of American Publishers).

65. *See* Equifax Survey, *supra* note 26, at 5 (noting a significant increase in the percentage of respondents believing that "technology has almost gotten out of control"); Yankelovich Survey, *supra* note 26, at 14.

66. *See* Yankelovich Survey, *supra* note 26, at 18; Montague, *supra* note 33, at 1.

67. The "Big Three" credit bureaus are Equifax, TRW, and Trans Union. In 1988 these three bureaus held a combined 410 million files on individuals. Jeffrey Rothfeder, *Is Nothing Private?*, Bus. Wk., Sept. 4, 1989, at 74, 81; *see What Price Privacy*, Consumer Rep., May 1, 1991, at 356 (estimating that the United States' credit bureaus maintain files on almost 90% of all adult citizens). Annually since 1990,

over how personal information about them is circulated and used by companies.'"[68] The 1995 numbers reflect a trend in which concern has grown steadily since 1990.[69]

Additionally, a 1991 *Time*/CNN poll found that ninety-three percent of Americans believe that "companies that sell information to others [should] be required by law to ask permission from individuals before making the information available."[70] Despite strong claims for regulation in some surveys, the 1995 Equifax survey found that seventy-two percent of the respondents agree that "if companies and industry associations adopt good voluntary privacy policies, that would be better than enacting government regulations."[71] Respondents to the second poll would back legislation, however, if these voluntary mechanisms were not effective.[72] Evidence suggests, however, that this self-regulation has not been effective.

As mentioned above, the direct marketing industry is entirely free from government regulation.[73] This fact is related to its successful lobbying efforts in 1977 which led to Privacy Commission recommendations that the industry be allowed to police itself.[74]

The Direct Marketing Association ("DMA") has established guidelines to self-monitor the industry.[75] The largest effort at self-regulation is the Mail Preference System ("MPS").[76] This service allows consumers to request that they no longer receive direct mail solicitation.[77] Consumers write or call the centralized service, request that mail or calls cease, and the service places their names on a "no solici-

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Equifax has commissioned privacy surveys conducted by Louis Harris and Associates. Equifax Survey, *supra* note 26, at 1.

68. *See* Equifax Survey, *supra* note 26, at 23.

69. From 1990 through 1995, the percentage of people agreeing with the statement that they had "lost all control over how personal information about them is circulated and used by companies" grew steadily from 71% to 80%. *Id.* at 24.

70. Richard Lacayo, *Nowhere to Hide*, Time, Nov. 11, 1991, at 34, 36. The poll also found that 88% believe that companies "[s]hould . . . be required by law to make the information [they collect about individuals] available to individuals so that possible inaccuracies may be corrected." In addition, 90% were found to believe that companies that collect and sell personal information should be prohibited by law from selling information about household income, and 86% believed that companies should be prohibited from selling information about bill-paying history. Finally, 68% were found to believe that the law should prohibit companies from selling information about consumers' product purchases. *Id.*

71. Equifax Survey, *supra* note 26, at 10.

72. *Id.* at 13.

73. Reidenberg, *Setting Standards*, *supra* note 1, at 517 ("[N]o identifiable sectoral law targets direct marketing.").

74. *See* Posch, *supra* note 34, at 3 (describing success of DMA lobbying efforts); Privacy Comm'n, *supra* note 40, at 147.

75. Waldrop, *supra* note 63, at 48.

76. Anne Wells Branscomb, Who Owns Information? 15 (1994); Privacy Comm'n, *supra* note 40, 144-46.

77. Branscomb, *supra* note 76, at 15.

tation" list.[78] Names are not removed from lists, however. Participating companies merely agree to cross-reference their marketing lists with the "no solicitation" lists from MPS and refrain from contacting those that have signed on to MPS. This means that name collection, trading, and personality profiling continues unimpeded.[79] Also, the request must be renewed after five years. The DMA requires that all of its members participate in and comply with both MPS and the analogous Telephone Preference Service ("TPS"), but this does not provide comprehensive relief.

First, there is evidence that many Americans are unaware that these services exist, and the participating companies do not make a particularly strong effort to publicize them.[80] "[T]his ignorance reflects either ineffectiveness or non-compliance even by those DMA members purporting to use the service."[81] Additionally, a significant percentage of companies that deal in personal information are not members of the DMA, and companies are not forced to join the DMA and thus comply with its standards.[82] Moreover, evidence suggests that many of those who are members do not comply with DMA standards.[83] In fact, it was estimated in 1994 that "fifty percent of catalogers don't give their customers a convenient way to remove their names from the company's list."[84] And companies that are members and do comply do not seem to exert influence on peer companies that choose to ignore the guidelines.[85] Finally, the guidelines provide neither enforcement mechanisms nor remedies in the event of breach.[86]

In short, as recent testimony before Congress indicates, "[i]ndustry self-regulation has not succeeded in establishing adequate privacy safeguards."[87] These conclusions are not limited to "legal scholars,"

78. *See* Privacy Comm'n, *supra* note 40, at 141-42.

79. Children's Privacy Hearings, *supra* note 41 (testimony of Marc Rotenberg, Director of Electronic Privacy Information Center and faculty member of Georgetown University Law Center) (noting that whatever the guidelines purport to do with regard to reducing the amount of junk-mail that participating individuals may receive, they "[do] nothing to prevent the extensive profiling that companies pursue when data is gathered").

80. Joel Reidenberg & Paul Schwartz, Data Privacy Law 333 (1996).

81. *Id.*

82. *Id.*

83. A recent study of direct marketing practices found that only 53% of DMA members are reported to the service to screen their mailings. *Id.* at 339. As privacy-in-business expert Professor Mary Culnan states, "[Some c]ompanies sell their lists and don't offer an opt-out box or tell people what they're doing with the information. They think everybody else does business in that way." Waldrop, *supra* note 63, at 48.

84. Waldrop, *supra* note 63, at 48 (quoting Professor Mary Culnan and citing figures provided at the DMA's spring 1994 meeting).

85. *Id.* at 49 (citing Professor Culnan's statement that "[c]ompanies need to call other companies that violate industry guidelines. I don't think the DMA does this.").

86. Reidenberg & Schwartz, *supra* note 80, at 338.

87. Children's Privacy Hearings, *supra* note 41 (testimony of Marc Rotenberg).

but also extend to public opinion polls[88] and editorials in major newspapers.[89] This failure detracts from the industry's claim that self-regulation will always work because it is in the best interest of businesses to narrow their mailing and respect consumers' opt-out choices.[90] Even industry insiders acknowledge that self-regulation is not the effective solution that it is often presented to be:

> MPS and TPS alone will not do it for us. . . . They put the onus on the consumer . . . and participation is voluntary. And there are far too many companies using databases and renting mailing lists who are not members of DMA and wouldn't know MPS from PMS. . . . "[B]ad guys don't self-regulate."[91]

This widespread disregard for the industry's "self-policing" guidelines "does not bode well for the industry's claims of effective self-regulation."[92]

However one interprets this survey data and the evidence of the industry's failed self-regulation, it is clear that Americans are concerned about control over personal information, so much so that some legal protection of rights in that information seems appropriate.[93] As part II demonstrates, however, the current level of legal protection is inadequate.

II. CURRENT LEGAL PROTECTION OF PERSONAL INFORMATION

The current legal framework does not adequately address the sale of personal information. Specifically, privacy law has failed to keep pace with advancing computer technology.[94] This part examines the

88. *See supra* notes 65-72 and accompanying text (detailing the results of public opinion polls that indicate consumers' private sector privacy concerns).

89. A recent *USA Today* editorial remarked: "While voluntary compliance might be preferable in an ideal world, it is not likely to work in the real world. The result is that the absence of government prodding has resulted in too many companies doing too little to protect consumers privacy rights." *Editorial*, USA Today, Oct. 25, 1995, at A12.

Similar sentiments were echoed by *The Economist*, a conservative British magazine that "virtually always defers to the private sector over government." Children's Privacy Hearings, *supra* note 41. "Enforcing the consent-rule will be difficult," remarked the editors, "[b]ut it will be worth a try. It would give information-gatherers a push in the right direction. Companies would collect and resell information more discriminately. And people who cherish digital privacy would have the means to protect it—which is as it should be." Virtual Privacy, *The Economist*, Feb. 10, 1996, at 20.

90. Waldrop, *supra* note 63, at 50.

91. Karl Dentino, *Taking Privacy into Our Own Hands; Direct Mail and Telemarketing; Creative Strategies*, Direct Marketing Mag., Sept. 1994, at 38.

92. Waldrop, *supra* note 63, at 48.

93. As one commentator who advocates a legislative solution to the problem has stated, "these [privacy survey] statistics suggest that legislators, at least, would do well to enact effective measures for securing [privacy rights in personal information]. Shorr, *supra* note 44, at 1764.

94. Mell, *supra* note 44, at 2-3. As Professor Mell notes:

> Despite almost fifty years of experience with the information-management ability of computers, society has not yet reformulated traditional notions of

current legal protection against unauthorized dissemination of personal information, and concludes that neither federal nor state law adequately protects individuals' privacy interests in information about them.

A. *Legislative Enactments*

Both federal[95] and state[96] statutory enactments that touch in some way on personal information. Congress enacted the first federal legislation dealing directly with privacy in 1974.[97] This statute, however, deals exclusively with governmental threats to citizens' privacy, and does not address privacy between citizens.[98] Because the personal information sales at issue here involve private persons and organizations, the 1974 act is inapplicable.[99]

In 1977, the United States Privacy Protection Study Commission (the "Privacy Commission") released a report that addressed a number of issues concerning privacy relations among private citizens.[100] The Privacy Commission made recommendations, but Congress has never acted on them.[101] In fact, Congress's activity with regard to personal information protection has been largely reactive,

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privacy, which restrict third-party access to personal information, to accommodate the tremendous storage capacity and instantaneous retrieval ability afforded by computers. Concepts of privacy, property and the individual's rights to both, take on a new dimension when the use of computer-stored information allows images of the individual—the "electronic persona"—to be created and used by a variety of third parties without the individual's knowledge.

Id. at 3.

95. For a detailed description of federal statutes which in some way relate to personal information, see *id.* at 82-85. These statutes do not effectively protect individuals' rights in personal information. *See* Reidenberg, *Fortress or Frontier*, *supra* note 63, at 199. As Professor Reidenberg notes, "[T]he American legal system responds incoherently and incompletely to the privacy issues raised by existing information processing activities in the business community." *Id.*

96. *See infra* notes 135-40 and accompanying text.

97. Federal Privacy Act, 5 U.S.C. § 552(a) (1994).

98. NTIA Inquiry, *supra* note 15, at 6847 (noting that the Privacy Act of 1974 "provide[s] federal guidelines governing the compilation, use, and dissemination of personal information gathered by government agencies"); Waldrop, *supra* note 63, at 49 (recounting statement of Rob Veeder, privacy advocate for the Internal Revenue Service, that "[t]he Federal Privacy Act . . . governs how federal agencies use data about U.S. Citizens. It doesn't cover the rest of the world.").

99. *Id.*

100. *See* Privacy Comm'n, *supra* note 40. The commission addressed: (1) the consumer-credit relationship, (2) the depository relationship, (3) mailing lists, (4) the insurance relationship, (5) the employment relationship, (6) record keeping in the medical care relationship, (7) investigative reporting agencies, and (8) record keeping in the education relationship. *Id.* at xiii.

101. Reidenberg, *Fortress or Frontier*, *supra* note 63, at 197, 208. Significant recommendations advocated self-regulation and recommended that companies not be required to remove consumers names from lists. *See* Privacy Comm'n, *supra* note 40, at 147, 151.

targeting industries on a case by case basis,[102] and often responding only after extreme instances of privacy infringement.[103]

Relatively strict, but objectively tame, regulation exists in the home entertainment industry.[104] In 1988 Congress enacted a law to regulate the videocassette rental industry.[105] The law is a prime example of reactive lawmaking, developed in response to the controversial Supreme Court nomination proceedings of Robert Bork.[106] During Bork's nomination hearings, a Washington newspaper reporter acquired a list of Bork's videocassette rentals.[107] This action highlighted individuals' vulnerability to privacy violations by outsiders with access to consumer records, and spurred a quick legislative reaction.[108] The resulting law affords some protection of consumer information related to videocassette rental, but successful lobbying efforts by the Direct Marketing Association limited its effectiveness.[109] As originally drafted, the bill would have banned disclosure of any video lists that in any way indicated the content and type of the customer's rentals.[110] For instance, stores would have been prohibited, even, from distributing lists organized by themes, such as "action/adventure," "romantic comedy," or "adult," because such categories would by themselves indicate the customers' rental preferences.[111] The DMA successfully lobbied, however, and the bill was amended.[112] It now allows stores to distribute customer names and addresses categorized by subject matter for direct marketing purposes, provided that the customer has been given the opportunity to opt out of such a program.[113]

Similarly, the cable television industry is subject to restrictions on uses of its customers' personal information.[114] Cable systems may not be used to gather personal information without prior consent from the subscriber.[115] Subscriber information may be disclosed to third par-

102. Reidenberg, *Fortress or Frontier*, *supra* note 63, at 209 (describing "mosaic" approach to privacy that responds to specific defined problems).

103. *See* Reidenberg, *Setting Standards*, *supra* note 1, at 505-06 ("Following the principle of free flow of information, legislatures respond only to specific issues; legal rules, if any, are justified only when they narrowly target particular problems. These legal rules tend to develop as an ad hoc response to public scandal.")

104. 18 U.S.C. §§ 2710-11 (1994).

105. *Id.*

106. *See* Stephen Advokat, *Publication of Bork's Video Rentals Raises Privacy Issue*, Chi. Trib., Nov. 20, 1987, at 106.

107. *Id.*

108. *Id.*

109. Posch, *supra* note 34, at 3.

110. *Id.*

111. *Id.*

112. *Id.*

113. Disclosure of any other "personally identifiable information . . . [requires] informed, written consent of the consumer given at the time the disclosure is sought." 18 U.S.C. § 2710(b)(2)(B) (1994).

114. 47 U.S.C. § 551 (1994) (as amended by Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 § 20, 106 Stat. 1460, 1497 (1992)).

115. *Id.* § 551 (b)(1) (1994).

ties only: 1) for a legitimate business activity related to the provision of the service;[116] or 2) when the subscriber consents in advance.[117] Again, however, direct-marketing use survives the statute, as mailing lists of subscribers may be disseminated if each subscriber has an opportunity to opt out.[118]

Congress has targeted other industries with respect to personal information dissemination, although with considerably less force. The Fair Credit Reporting Act ("FCRA"),[119] which targets the financial services industry, is widely acknowledged as inadequate.[120] In fact, FRCA's weakness is widely acknowledged to be a result of extreme lobbying pressure.[121] Other limited statutes regulate other aspects of

116. *Id.* § 551 (c)(2)(A).
117. *Id.* § 551 (c)(2)(C).
118. *Id.*
119. 15 U.S.C. §§ 1681 (1994). The Act is limited to Credit Reporting agencies only, i.e., organizations that prepare and disseminate personal information in a consumer report bearing on the individual's: credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, and mode of living. *Id.*
120. *See* Reidenberg, *Fortress or Frontier*, *supra* note 63 at 210-14 (analyzing Act in context of informational privacy concerns and revealing its shortcomings); Shorr, *supra* note 44, at 1784 ("In practice . . . the FCRA permits credit bureaus and their customers to exchange large quantities of detailed consumer information with impunity.").
121. *See* Jeffrey Rothfeder, Privacy for Sale 17 (1992) (noting that the bill was "butchered; it was drawn and quartered and its vitals were left on the committee's chopping block" by the insertion of a "remarkably broad exception" as a result of industry lobbying pressure (quoting Harvard Law School Professor Arthur Miller)); Bibas, *supra* note 44, at 596 & n.39.

finance,[122] as well as telecommunications,[123] education,[124] and the postal service.[125]

With regard to the sale of personal information in the mailing list context, the 1977 Privacy Commission recommended that businesses not be required to remove consumers' names from mailing lists.[126] Rather, the Privacy Commission merely recommended that organizations provide consumers with notice as to possible secondary use of gathered information and allow consumers the opportunity to opt-out of such uses.[127]

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122. *See* Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 (1994) (requiring prior notification and other procedures for the disclosure of financial information by a depositary institution); Electronic Fund Transfer Act, 15 U.S.C. §§ 1693 (1994) (requiring that electronic fund transfer service contracts with consumers establishing fund services include the circumstances under which the financial institution will disclose information about the consumer).

123. 18 U.S.C. §§ 2510-2522, 2701-2711 (1994); Telephone Consumer Protection Act of 1992, 47 U.S.C. § 227; Communications Privacy Act, 18 U.S.C. § 2702 (1994) (prohibiting persons operating an electronic communication service or providing remote computing services from knowingly divulging the contents of a communication if not authorized by agreement to access the contents).

One particularly unsettling potential abuse of telecommunications technology concerns private parties' use of PEN registers. A PEN register is a device attached to a telephone line that records only the numbers dialed from a given phone; it neither records nor monitors any conversation that may occur, because it disconnects immediately after the call is dialed and before the dialed party answers the call. Susan Friewald, *Uncertain Privacy: Communication Attributes After the Digital Telephony Act*, 69 S. Cal. L. Rev. 949, 982-83 (1996).

Using the PEN register, marketers record consumers outgoing calls to track calling patterns and use this information to enhance profiles. *See* Reidenberg, *Fortress or Frontier*, *supra* note 63, at 215-16 ("The use by private parties of PEN registers to record outgoing call information and trap and trace devices to record incoming call data is even permitted. Companies are increasingly using such technology to collect information on consumers without their knowledge." (citing 18 U.S.C. § 2511(2)(h); United States v. New York Tel. Co., 434 U.S. 159, 166 (1977))).

124. *See* Family Educational Rights Act, 20 U.S.C. § 1232(g) (1994) (restricting disclosure of education files).

125. *See* 39 U.S.C. §§ 3008, 3011 (1994). These postal anti-pandering laws permit consumers to block mail which they find to be sexually provocative.

126. The Commission believed that businesses would voluntarily adopt privacy safeguards. Privacy Comm'n, *supra* note 40, at 150-51. Seeking a balance "between the interests of individuals and the interests of mailers," the Commission recommended "[t]hat a person engaged in interstate commerce who maintains a mailing list should *not* be required by law to remove an individual's name and address from such a list upon request of that individual, except as already provided by law." *Id.* at 147. The Commission was swayed by the economic importance of direct-mail, the reliance of non-profits and political candidates on direct mail, and the technological impracticability of mandating a system of name removal. *Id.* at 147-48.

127. The recommendation reads:

> That a private-sector organization which rents, sells, exchanges, or otherwise makes the addresses, or names and addresses, of its customers, members, or donors available to any other person for use in direct-mail marketing or solicitation, should adopt a procedure whereby each customer, member, or donor is informed of the organization's practice in that respect, including a description of the selection criteria that might be used in selling, renting or exchanging lists, such as ZIP codes, interest, buying patterns, and level of

The Privacy Commission refused to recommend that information collectors be obligated to notify individuals of information practices or honor their objections to dissemination. The Privacy Commission found such an obligation unnecessary because of a perceived willingness by information collection organizations to undertake this responsibility voluntarily.[128] As Professor Reidenberg has noted, however:

> [I]n the last few years, both the development of industry norms and the implementation of appropriate business practices for self-regulation, as well as the consensus on a self-regulatory model, have broken down. Public opinion no longer views industry treatment of personal information as benign, and Congress is waking up from years of dormancy.[129]

The Privacy Commission report is outdated, and its findings have been overcome by technology. Indeed, enhanced computer technology has left private citizens defenseless against businesses' gathering, processing, and disseminating personal information.[130] This has led at least one commentator to reflect that "[t]his subject is not going to go away. As technology develops and people get more and more of an ability to sort and slice and dice information, we're going to have to talk about this and stay on top of it. Otherwise, it will get completely out of control."[131]

In this regard, three United States Senators recently sent a letter to the Federal Trade Commission ("FTC") requesting that it "conduct a

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> activity, and, in addition, is given an opportunity to indicate to the organization that he does not wish to have his address, or name and address, made available for such purposes. Further, when a private-sector organization is informed by one of its customers, members, or donors that he does not want his address, or name and address, made available to another person for use in direct-mail marketing or solicitation, the organization should promptly take whatever steps are necessary to assure that the name and address is not so used, including notifying a multiple-response compiler or a credit-bureau to whom the name and address has been disclosed with the prospect that it may be used to screen or otherwise prepare lists of names and addresses for use in direct-mail marketing or solicitation.

Privacy Comm'n, *supra* note 40, at 151.

128. *Id.* at 152-53.

129. Reidenberg, *Setting Standards*, *supra* note 1, at 498.

130. *See* Reidenberg, *Fortress or Frontier*, *supra* note 63, at 197-98. Professor Reidenberg notes:

> During the 1980s, the dramatic advances in telecommunications and information technology changed the relationship between individuals and corporations with respect to the circulation of personal information. Information technology and networking significantly enhanced the extent of available personal information and eliminated inefficient record-keeping practices that once kept personal information from public scrutiny.... Vast quantities of personal information containing greater detail than ever before about an individual's financial status, health status, activities and personal associations are now readily available through commercial information services and list brokers.

Id. (footnotes omitted).

131. Waldrop, *supra* note 63, at 54.

study of possible violations of consumer privacy rights by companies that operate computer data bases."[132] The letter reflects the growing public concern over compilation and unauthorized dissemination of personal information:

> We have received calls and letters from constituents who are greatly disturbed about the compilation, sale, and usage of these data-bases. They, as well as consumers in general, are concerned about the potential intrusion upon, and violation of, individual privacy rights. There also is concern about the potential abusive and unlawful usage of the data.[133]

It is too early to tell whether the Commission will accept this invitation, and what the study will yield. As discussed below, however, interest groups will likely have a significant effect on the FTC response to the report, as well as on the fate of any legislative proposals that may grow from it.[134]

Like their federal counterparts, state enactments often target specific areas and fail to provide comprehensive privacy protection. The level of protection varies from state to state, but generally protection exists in industry-specific settings.[135] Virtually all states recognize the

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132. Letter from Senators Richard Bryan, Larry Pressler, and Ernest Hollings to The Honorable Robert Pitofsky, Chairman of the Federal Trade Commission (Oct. 8, 1996). The letter requests that the study address four specific questions:

> (1) Is the non-consensual compilation, sale, and usage of data-base a violation of private citizens' civil rights?
>
> (2) Are the data-bases subject to unlawful usage? Do they create an undue potential for fraud on consumers?
>
> (3) Are the compilation, sale and usage of consumers' personal data consistent with the Fair Credit Reporting Act and federal telemarketing regulations?
>
> (4) Are there ways consumers can prevent data-based service companies from including their personal background information in commercial data bases absent their consent?

Id. The letter, which requests that the investigation begin immediately, asks that a report be submitted six months after the Commission gathers its findings and formulates conclusions for legislative action. *Id.*

133. *Id.*

134. *See infra* part IV.A (discussing the influence that powerful and organized interest groups such as the DMA can exert on legislative consideration of issues that would extend rights to individuals who do not possess such organized strength); *see also* Posch, *supra* note 34, at 3 (noting successes of direct marketing lobby at the Federal level and observing that the DMA is "a lobby group always in place with a track record better than the NRA, AARP or any other big name lobby group"). As stated by an aide to former Senator William Proxmire in reference to credit bureau attempts to quell privacy legislation, "[t]he credit bureaus tend to know their local congressmen very well." Rothfeder, *supra* note 67, at 81-82 (quoting former Senate aide Kenneth McLean).

135. *See generally* Reidenberg, *Fortress or Frontier*, *supra* note 63, at 227-36 (detailing state statutes addressing the financial services, telecommunications, home entertainment, information services, and insurance industries). For a general overview of state privacy statutes, see Robert E. Smith, Compilation of State and Federal Privacy Laws (1992).

right of privacy in some form, either at common law or by statute.[136] California increased its protection in 1993 when it passed a bill requiring credit card issuers to notify their customers that their names and addresses may be sold to direct marketers;[137] the law also mandates that these companies give customers a way to opt-out of having their names sold or rented.[138] Although this statute is a positive legislative step, there is evidence that it is misdirected because credit card companies are not very active in the reselling of customer data.[139] It is also questionable whether such protection would be successful on a broader scale, given the ill-fated introduction in 1996 of legislation that would vest individuals with rights in personal information.[140]

B. *The Right to Privacy*

Questions about control over personal information traditionally have been conceived under the privacy rubric.[141] It is therefore useful to look to that right as a potential source of protection against the unauthorized dissemination of personal information. Currently, this area of law does not vest individuals with a right to prevent unauthorized dissemination of personal information. This section discusses the current state of the right to privacy and examines how this doctrine might apply to unauthorized sales of personal information. It concludes by noting one court's observation that legislatures, rather than courts, should address the issue of individuals' rights in personal information.

As an initial matter, it is important to distinguish among the distinct kinds of privacy in American law.[142] Unlike constitutional notions of privacy, which focus on the rightholder's conduct and "immunize"

136. For a comprehensive overview of state privacy law, see McCarthy, *supra* note 155, §§ 6.1-.15.

137. Cal. Civ. Code. § 1748.12 (West 1996).

138. *Id.*

139. Greiff, *supra* note 47, at B10 ("The California bill 'singles out credit card issuers for invasion of privacy attention, when credit card issuers aren't really much of a culprit in this thing' .... Catalog companies and magazines violate consumer privacy much more often." (quoting Nationsbank spokesman)).

140. *See infra* notes 236-50 and accompanying text (detailing interest group pressure leading to failure of proposal that would have granted individuals' rights in personal information).

141. *See* Reidenberg, *Setting Standards*, *supra* note 1, at 498 (noting how "[p]rivacy serves as a catch-all term").

142. *See* J.D. Lee & Barry Lindahl, Modern Tort Law: Liability & Litigation § 48.01 (1996) (distinguishing constitutional privacy from common law and statutory privacy); Reidenberg, *Setting Standards*, *supra* note 1, at 501-04 (contrasting constitutional restraints on government, which emphasize "protection[ ] of the citizen against the government," with the right to privacy as between private citizens); Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 740 (1989) (distinguishing among privacy expectations secured by the Constitution, the Fourth Amendment, and state tort law).

some of that conduct from state action,[143] the privacy rights at issue here are concerned primarily with individuals' power to "limit[ ] the ability of others to gain, disseminate, or use information about oneself."[144] Protection against governmental intrusion of this kind comes from the Fourth Amendment[145] and similar provisions of state constitutions.[146] Protection against intrusion made by private persons, however, comes almost exclusively from state tort law.[147]

American courts addressing privacy between private persons have been influenced largely by the work of Professor Prosser. In his 1960 law review article, *Privacy*,[148] Professor Prosser surveyed cases decided under the privacy rubric, and argued that the right to privacy was in fact four separate torts:[149] intrusion upon seclusion;[150] public

143. *See* Whalen v. Roe, 429 U.S. 589, 599-600 n.25 (1977). As noted in *Whalen*, privacy in this Constitutional context, in contrast to the Fourth Amendment and tort contexts, concerns the individual's "interest in independence in making certain kinds of important decisions." *Id.* at 599-600. In Paul v. Davis, 424 U.S. 693 (1976), the court stated that in areas such as "marriage, procreation, contraception, family relationships, and child rearing . . . there are limitations on the States' power to substantively regulate conduct." *Id.* at 713.

144. Rubenfeld, *supra* note 142, at 740; Westin, *supra* note 30, at 7 (defining privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others").

145. *See* Katz v. United States, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring).

146. *See, e.g.*, N.Y. Const. art. 1, § 12 (protecting against unlawful searches and seizures); People v. Gonzalez, 347 N.E.2d 575, 577 (N.Y. 1976) (applying art. 1, § 12 of the New York Constitution to invalidate illegally executed search of individual's residence).

147. *See* W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 117, at 849-69 (5th ed. 1984) (detailing state law development of privacy doctrine).

148. William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960).

149. *Id.* at 389. The tort previously had been undifferentiated. The First Restatement addressed privacy by stating merely that "[a] person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." Restatement of Torts § 867 (1939).

150. Prosser, *supra* note 148, at 389. The intrusion tort has been characterized as intentional intrusion "upon the solitude or seclusion of another or his private affairs." Restatement (Second) of Torts § 652(B) (1977); *see, e.g.*, Pearson v. Dodd, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969) (extending "tort of invasion of privacy to instances of intrusion, whether by physical trespass or not, into spheres from which an ordinary man in a plaintiff's position could reasonably expect that the particular defendant should be excluded").

Because it is concerned with plaintiff's activity in obtaining information, this tort's utility in the personal information context is limited to data collection, rather than dissemination. *See* Reidenberg, *Fortress or Frontier*, *supra* note 63, at 222-23 (noting that the intrusion tort "does not address other data protection practices such as the storage, use and disclosure of personal information").

disclosure of private facts;[151] false light;[152] and appropriation of one's name or likeness for commercial gain.[153] The *Restatement (Second) of Torts* has acknowledged these distinctions,[154] and most states enforce some or all of the causes of action.[155]

Of these four torts, it appears that the appropriation tort[156] is the most likely to provide protection against unauthorized dissemination of personal information.[157] This tort enjoys recognition in virtually every state through statute or case law.[158] Plaintiffs in three separate cases have attempted to use the appropriation tort to enjoin direct-

151. Prosser, *supra* note 148, at 392. According to the Restatement (Second), this tort applies to the giving of "publicity to a matter concerning the private life of another," where such information is not of legitimate concern to the public, and the nature of the disclosure is "highly offensive" to a reasonable person. *See* Restatement (Second) of Torts § 652(D) (1977); Reidenberg, *Fortress or Frontier*, *supra* note 63, at 223-24; Shorr, *supra* note 44, at 1779-80. This tort is not likely to apply to unauthorized dissemination of personal information, because any information voluntarily disclosed in the first instance would be removed from its coverage, and the publication requirement is of a magnitude not reached in the course of intercompany personal profile sales. Reidenberg, *Fortress or Frontier*, *supra* note 63, at 223-24.

152. Prosser, *supra* note 148, at 398. The false light tort guarantees one's right to be "secure from publicity that places [a] person in a false light before the public." Restatement (Second) of Torts § 652(E) (1977). This tort would not apply to unauthorized dissemination of personal information because the information here is in most cases true, and the tort requires that the information in question be false or erroneous. Further, the tort requires public dissemination, and the intercompany exchange that would most often occur in the context of personal information exchanges would not reach the necessary threshold of publication. *See* Reidenberg, *Fortress or Frontier*, *supra* note 63, at 224-25.

153. Prosser, *supra* note 148, at 401.

154. *See* Restatement (Second) of Torts § 652(A) (1977).

155. *See generally* J. Thomas McCarthy, *The Rights of Publicity and Privacy* §§ 6.1-.3 (1996) (discussing generally the states' adoption of some or all of Prosser's privacy causes of action).

156. The appropriation tort is defined in the Restatement as follows:

> Appropriation of Name or Likeness: One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

Restatement (Second) of Torts § 652(C) (1977); *see also* Keeton et al., *supra* note 147, § 117, at 851-54; Prosser, *supra* note 148, at 389.

157. *See* Mell, *supra* note 44, at 25 ("The appropriation tort, being a mix of property and privacy concepts, would be the most likely tort to protect the individual's interest in his persona."); Reidenberg, *Fortress or Frontier*, *supra* note 63, at 225 ("[The tort-based] protection against the misappropriation of one's name may offer coverage . . . to ban . . . dissemination of personal information for commercial purposes without consent."); Graham, *supra* note 43, at 1414 ("[T]he appropriation tort could be stretched to cover the situation in which an individual profile, instead of a name or likeness, is used by another."); Shorr, *supra* note 44, at 1818 ("[T]he theory of property underlying the misappropriation tort and the right to publicity provides the strongest legal foundation for the recognition of property rights in personal information.").

158. Keeton et al., *supra* note 147, § 117 at 851-54 (discussing acceptance of privacy appropriation tort); McCarthy, *supra* note 155 § 6.1 (same).

marketing related sales of their names and addresses,[159] but none of these attempts has been successful. The first case, *Shibley v. Time, Inc.*,[160] which was decided on questionable grounds,[161] is particularly notable for the manner in which the court suggested that the legislature, rather than the court, is competent to consider the issue in the first place. After stating that *Time Magazine* was not liable under a privacy theory for selling subscriber lists without first obtaining the consent of the subscribers, the court stated that it was not competent "to create a specific right which is not recognized at common law."[162] It continued to note that:

> The founders of our nation constitutionally set up a government composed of three branches—the legislative, executive and judicial. It is improper for one to invade the province of the other. This is a case peculiarly within the province of the legislative branch and it would be improper for the judicial branch to usurp the legislative function. The judicial branch may interpret the laws enacted by the legislative branch but it may not legislate, and that is what would be required if the plaintiff is to succeed here.[163]

In this regard, the *Shibley* court raised an important issue: what institution—a court or a legislature—is competent to decide whether individuals should be vested with legal rights in personal information? Part III addresses this threshold question of institutional competence.

III. A Threshold Question of Institutional Competence

When a court is asked to change the law, as in a case seeking to establish individuals' rights in personal information, the threshold question is one of institutional competence: what institution—the court or the legislature—is best suited to make the proposed change?[164] As stated by Justice Stevens in a case that involved federal common lawmaking,

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159. *See infra* part IV.B (discussing Shibley v. Time, Inc., 341 N.E.2d 337 (Ohio Ct. App. 1975), Dwyer v. American Express Co., 652 N.E.2d 1351 (Ill. App. Ct. 1995), and Avrahami v. U.S. News & World Rep., Inc., No. 96-203, (Cir. Ct. Arlington County June 13, 1996)).

160. 341 N.E.2d 337 (Ohio Ct. App. 1975).

161. *See infra* part IV.B.1.

162. 341 N.E.2d at 340.

163. *Id.* (quoting Shibley v. Time, Inc., 321 N.E.2d 791, 795 (Ct. C.P. Ohio (1974)).

164. *See, e.g.*, Shands Teaching Hosp. & Clinics, Inc. v. Smith, 480 So. 2d 1366, 1372 (Fla. Dist. Ct. App. 1985) (Barfield, J., concurring). In *Shands*, a Florida appeals court refused to overrule state Supreme Court precedent and accordingly deferred to the legislature on whether the common law "necessaries" doctrine should be extended to hold a female spouse liable for debts incurred by her husband, absent a contractual obligation to that effect. *Id.* at 1366.

In concurrence, Judge Barfield took the opportunity to expound at length on the threshold institutional competence issue, arguing strongly against what he saw as "the expanding judicial activism seen in this country over the last several decades." *Id.* at 1373. He noted that the institutional competence question could be reduced to "by whom and to what extent the [law] should be changed," noting further that the ques-

> When judges are asked to embark on a lawmaking venture . . . they should carefully consider whether they, or a legislative body, are better equipped to perform the task at hand. . . . . [W]hen we are asked to create an entirely new doctrine—to answer "questions of policy on which Congress has not spoken,"—we have a special duty to identify the proper decisionmaker before trying to make the proper decision.[165]

Institutional competence questions of this kind were explored extensively when twentieth-century American jurisprudence moved away from formalist notions of law[166] and toward realist conceptions of judicial decision-making that acknowledged judges do, in fact, make law.[167] Recognition of courts' lawmaking abilities naturally entailed questions concerning when and under what circumstances courts should be authorized to create, or be prevented from creating, changes to the law.[168] The questions were first explored at length by scholars who spawned what has come to be known as the "Legal Process School."[169] This conception of the judicial role acknowledges the lawmaking function of judges but simultaneously imposes restraints on their ability to craft new legal rules. The restraint of this "Legal

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tion "is one which requires an examination of the requirements of effective change and the relative abilities of courts and legislatures to satisfy those requirements." *Id.* at 1372. "In brief," he continued, "those arguments center on considerations of the relative competence of judges and legislators to formulate and enforce social policy." *Id.* at 1372-73.

165. Boyle v. United Technologies Corp., 487 U.S. 500, 531 (1988) (Stevens, J., dissenting) (citation omitted).

166. Formalism can be characterized by the belief, on one level, that "there exist[s] a handful of permanent, unchanging, indispensable principles of law imperfectly embodied in the many thousands of published judicial opinions, and that the goal of legal reasoning was to penetrate the opinions to the principles." Richard Posner, The Problems of Jurisprudence 15 (1990). At another level, formalism views law as an inductive science. *Id.* At either level, formalism views justice as independent from the world of facts. *Id.* at 16.

167. *See* Edmund Ursin, *Judicial Creativity and Tort Law*, 49 Geo. Wash. L. Rev. 229, 236 (1981); Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 Mich. L. Rev. 875, 876-77 (1991) (revealing that "since the time of the legal realists, the policymaking role of the courts has become undeniable, and that policymaking has taken an increasingly conscious ex ante perspective") (citing M. Eisenberg, The Nature of the Common Law 1-3, 26-37 (1988)).

168. Ursin, *supra* note 167, at 236 ("Once recognized, however, judicial creativity also must be restricted, both because of democratic theory and because of the potential misuse of unbridled judicial power.").

169. The pioneers of Legal Process thinking were Henry Hart and Albert Sacks. *See id.* at 230 (noting that Hart and Sacks "exemplify and have shaped" the Legal Process Model). Their work, for many years only in a tentative edition, *see* Henry A. Hart, Jr. & Albert M. Sacks, The Legal Process (1958), has recently been published. *See* Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law xi (William N. Eskridge & Phillip P. Frickey eds., 1994).

Process Model"[170] grows out of respect for "the tenet of democratic theory that lawmakers should be accountable to the electorate."[171]

The mid-to-late twentieth century saw the development of a more activist view of the judicial role, in what has been termed a "Reform Model."[172] Rather than restrict courts for fear that they will usurp democratic lawmaking functions, the Reform Model confronts the "practical necessity of judicial innovation to meet constantly changing conditions and values."[173]

The two models differ most significantly in the faith they place in legislative processes. This part continues by examining each model and comparing their faith in the legislative process.

A. *The Legal Process Model*

Under the Legal Process formulation, courts should consider various factors to determine their competence to make changes in the law. Broadly, courts should examine, among other factors, "the magnitude of a proposed change, the controversiality of the change, and . . . whether the change would be characterized as 'political.'"[174] Courts must evaluate whether the reforms at issue "affect or become involved in current political controversy," and should "abstain from initiating

170. The "Legal Process Model" and "Reform Model" terminology was used by Professor Ursin in his 1981 article, the thesis of which is borrowed from heavily here. *See* Ursin, *supra* note 167, at 230-31.

171. *Id.* at 230.

172. *Id.* at 231.

173. *Id.* at 231.

174. *Id.* at 239 (citing Robert E. Keeton, Venturing To Do Justice 43 (1969)). One recent commentator, influenced by the Legal Process Model, proposed an analytical construct that courts could use to evaluate their competence to create new legal rules. Comment, *Reforming the Common Law: A Factor Analysis for Alabama Courts*, 34 Ala. L. Rev. 631, 632 (1983). The relevant factors include, among others: the ability of the court, as opposed to the legislature, to gather data concerning society's "needs and attitudes" with regard to the proposed change; the likelihood that the legislature will evaluate fairly the data that it gathers "without ignoring the social needs of less organized segments of society;" whether the change in the law can be achieved through a "clear and simple rule" that the court can enunciate in the case before it; "the comprehensiveness of the change," with regard to the degree that the new rule will change, create, or destroy a large set of social relations; the reliance interest of certain segments of the population in the current status of the law, and whether imposition of a new rule would harm them; the court's ability to employ remedies to implement the rule; and the effect that judicial action would have on future legislative action or inaction. *Id.* at 632-33. Additionally, courts are often criticized because they are seen as less able to weigh the "empirical data" that should be factored into decisions on legal rules and policies. Bernard S. Meyer, *Justice, Bureaucracy, Structure, and Simplification*, 42 Md. L. Rev. 659, 679 (1983).

Of particular relevance in the personal information context are those factors implicating the legislature's willingness to act and ability, when it does take action, to do so fairly. This Note suggests that courts should be more willing to make law in those instances where interest group pressure adversely affects legislative determination of whether and how to address proposals.

reforms that, in the context, would be generally regarded as essentially political in nature."[175]

Legal Process adherents maintain that in order to avoid such political and social controversy, courts should only decide those issues which they can neutrally adjudicate.[176] Neutrality in this context means that "a court should not use a policy if it imposes disproportionate burdens on a particular group (as contrasted with the population generally), unless there are special reasons that can be adduced for imposing those burdens."[177] In short, the Legal Process Model advocates judicial restraint to ensure neutral decision-making by a judiciary that is not accountable to the electoral process.[178]

Many courts have adopted a Legal Process approach to judicial lawmaking and have deferred to their respective legislatures, on issues including: comparative/contributory negligence standards;[179] apportionment of damages among joint tortfeasors in wrongful death cases;[180] creation of a duty upon insurance companies to investigate potential existence of heirs in wrongful death claims;[181] recognition of

175. Keeton, *supra* note 174, at 92.

176. *See* Ursin, *supra* note 167, at 240; Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 236 (1973).

177. Wellington, *supra* note 176, at 236.

178. Ursin, *supra* note 167, at 240. As Professor Wellington states, because "many policies which might serve as justification for rules fail of neutrality, in that they are too partisan, common law courts, if they are to exercise power legitimately, are drastically limited in their capacity to implement policies." Wellington, *supra* note 176, at 241.

179. *See* Fuller v. Buhrow, 292 N.W.2d 672, 674 (Iowa 1980). In this negligence action, the court acknowledged that comparative negligence doctrine is superior to contributory negligence doctrine, but nonetheless deferred to the legislature. *Id.* The dissent, after noting that the majority declined to adopt the doctrine despite conclusive evidence of its superiority to contributory negligence, observed that:

> If the legislature wishes to disapprove our common-law decisions and rule changes, it has the right to do so, but the mere existence of that right should not chill the court's initiative in making the changes. We ought to put our own house in order. It is neither necessary nor appropriate to defer to the legislature in the first instance.

Id. at 678 (McCormick, J., dissenting).

180. *See* Black Belt Wood Co. v. Sessions, 514 So. 2d 1249, 1263 (Ala. 1986) ("After full consideration we think, however, that such a far-reaching change, if desirable, should be made by the legislature rather than by the court. The [legislature] is the department of government to which the constitution has entrusted the power of changing the laws." (quoting Golden v. McCurry, 392 So. 2d 815, 817 (Ala. 1981) (quoting Maki v. Frelk, 239 N.E.2d 445, 447 (Ill. 1968))).

181. *See* Spearman v. State Farm Fire & Casualty Co., 230 Cal. Rptr. 264, 268 (Ct. App. 1986) ("We defer the imposition of such a duty to the State Legislature if it deems it advisable in the public interest.").

claims for loss of parental consortium;[182] and extension of necessaries doctrine to female spouses.[183]

In these cases and others, courts acting under the Legal Process Model are driven by a concern that laws in political or social areas be made only by a body that is "subject to the check of the ballot box."[184] Accordingly, the brunt of lawmaking responsibility rests with legislatures. In light of this conclusion, Legal Process adherents concede imperfections in legislative processes, specifically that legislative action is not equally available to all, but rather favors those groups with the interest and energy to plead their case.[185] Unfortunately, however, the Legal Process Model does not embrace the consequence that this reality has on its theory of legislative supremacy.[186] Their observation fails to acknowledge that those groups with interest and energy may nonetheless lack the money necessary to induce legislative consideration of the issue at hand.[187] If, in fact, legislative action is not equally available to all, one must question whether the legislative branch truly protects and furthers the democratic ethos in the manner that the Legal Process Model suggests.

B. *The Reform Model*

In contrast to the Legal Process Model, the Reform Model[188] is not concerned with an overreaching judiciary but rather fears that the common law will not be responsive enough to social change.[189] Imperfections in legislative processes lead to the belief that "[t]he judiciary's responsibility when exercising its lawmaking function may be greater than that of the other branches because of its greater accessibility and its responsiveness."[190] Accordingly, the Reform Model

182. *See* Morgel v. Winger, 290 N.W.2d 266, 267 (N.D. 1980); Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318, 324 (Or. 1982).

183. *See* Shands Teaching Hosp. & Clinics, Inc. v. Smith, 480 So. 2d 1366, 1366 (Fla. Dist. Ct. App. 1985).

184. *See* Ursin, *supra* note 167, at 248.

185. Wellington, *supra* note 176, at 240-41.

186. Ursin, *supra* note 167, at 248.

187. *See id.*; *see also* Robert A. Dahl, Who Governs? Democracy and Power in an American City 109-14 (1961); Harry Eckstein, Pressure Group Politics 34 (1960); Harold D. Lasswell, Politics: Who Gets What, When, How 24-25 (1936); Geraint Parry, Political Elites 109-14 (1969); Posner, *supra* note 166, at 354 (noting that "legislators are rational maximizers of their satisfactions just like everyone else. . . . [T]hey want to be elected and reelected, and they need money to wage an effective campaign. This money is more likely to be forthcoming from well-organized groups than from unorganized individuals.").

188. The "Reform Model" terminology was employed by Professor Ursin, and the model itself is said to have been exemplified and influenced by the work of the California Supreme Court in the 1960s and 1970s, especially in the opinions of Justice Roger Traynor. *See* Ursin, *supra* note 167, at 229, 231.

189. *Id.*

190. Meyer, *supra* note 174, at 662.

views courts as completely competent to make law, and demands that courts embrace this role.

A vast body of public-choice literature[191] informs the Reform Model analysis of institutional competence. These writings support the Reform Model's criticism that legislatures are not truly independent lawmaking bodies because of interest groups' pervasive effect on legislative processes.[192] A useful description of an "interest group" theory of legislation is the economic model described by Professor Landes and Judge Posner:

> In the economists' version of the interest-group theory of government, legislation is supplied to groups or coalitions that outbid rival seekers of favorable legislation. The price that the winning group bids is determined both by the value of legislative protection to the group's members and the group's ability to overcome the free-rider problems that plague coalitions. Payment takes the form of campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes. In short, legislation is 'sold' by the legislature and 'bought' by the beneficiaries of the legislation.[193]

Political and social scientists have made great efforts to study the underlying forces that may drive this legislative operation.[194] The results suggest that pure representative democracy does not consistently flourish in state houses and that judicial intervention is often warranted to cure legislative defects.[195] Even despite the difficulty of empirically testing or proving the theory,[196] many scholars agree that "special interest groups undoubtedly wield too much collective influence in the legislative process."[197]

Generally, interest group influence is likely to be strongest:

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191. *See generally* Dahl, *supra* note 187; Eckstein, *supra* note 187; Lasswell, *supra* note 187; Parry, *supra* note 187.

192. A significant segment of the population seems to agree with this skeptical view. Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 Tex. L. Rev. 873, 873 (1987) (noting 1982 survey results indicating that over 60% of respondents agreed with the statement that "government is pretty much run by a few big interests looking out for themselves" rather than run "for the benefit of all the people" (citing Miller, *Is Confidence Rebounding?*, Pub. Opinion, June-July 1983, at 16, 17)).

193. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & Econ. 875, 877 (1975) (citation omitted).

194. Farber & Frickey, *supra* note 192, at 877-79.

195. *Id.* at 875 ("Even the more sophisticated recent literature [on interest group effects on legislation] . . . suggests that the flaws in the legislative process are sufficiently serious to warrant cautious judicial intervention.").

196. *See id.* at 879; Sinclair, *Purposive Behavior in the U.S. Congress: A Review Essay*, 8 Legis. Stud. Q. 117, 126 (1983).

197. Farber & Frickey, *supra* note 192, at 925. Although interest groups' "influence on particular legislation is often difficult to isolate, their overall systemic influence is indisputable. Although the extent of this influence occasionally is overstated, it nevertheless is quite real." *Id.* at 906.

> When the group is attempting to block rather than obtain legislation; when the group's goals are narrow and involve low-visibility issues; when the group has substantial support from other groups and public officials, who are themselves important figures and not merely referees of the group struggle; and when the group is able to move the issue to a favorable forum such as a sympathetic congressional committee.[198]

Even though organized interest groups are often successful when they seek legislative enactment of proposals they endorse,[199] interest groups are most powerful when they face "a proposal [which] moves forward with nothing more than its merit to support it."[200] In such a case, "an opposing interest group can easily dispatch [the unrepresented proposal] to oblivion."[201] Indeed, "[t]he social science literature indicates that interest groups . . . often exercise more power when they block legislation than when they support it."[202] This type of lobbying is insulated from direct review.[203]

This phenomenon has serious consequences in the tort context. Often, interest groups never have to act because potential tort plaintiffs do not recognize their common interest "in urging reform of a common law they may not even comprehend."[204] Accordingly, dispersed and disorganized individuals who may have the greatest stake in obtaining a right, and may in fact represent a majoritarian consensus on an issue, will be helpless to obtain legislative action if they are not organized.[205] And when organized political groups do bring tort issues to the attention of the legislatures, the "pressure exerted . . . is generally hostile to change and impedes legislative efforts to enact needed reforms."[206]

Disproportionate interest group pressure "redistributes wealth and political power away from segments of the population that do not be-

198. *Id.* at 887 (citing Kay L. Schlozman & John T. Tierney, Organized Interests and American Democracy 314-16, 396-98 (1986)).

199. Cornelius J. Peck, *Comments on Judicial Creativity*, 69 Iowa L. Rev. 1, 6 (1983) ("The desires of lobbies and pressure groups provide the inspiration for the proposal of legislation. . . . Legislation is not adopted merely because it is good; competing demands for use of limited legislative time are too strong to permit that to happen with any frequency.").

200. *Id.* at 8.

201. *Id.* at 8-9 ("Faced with organized resistance on one side and no organized support on the other, the choice is obvious to a legislator whose approval is necessary to obtain release of a bill from committee, particularly if the legislative rules permit secrecy on votes to refer.").

202. Farber & Frickey, *supra* note 192, at 906.

203. *Id.* at 908.

204. Ursin, *supra* note 167, at 249 (citation omitted).

205. Farber & Frickey, *supra* note 192, at 874 ("[L]egislatures speak only for well-organized groups, and not for the general public.").

206. Ursin, *supra* note 167, at 249; *see* Kenneth G. Crawford, The Pressure Boys (1939); V.O. Key, Jr., Politics, Parties and Pressure Groups (5th ed. 1964); Dayton D. McKean, Pressures on the Legislatures of New Jersey (1938)).

long to any organized interest group."[207] The influence of special interest groups also undermines the democratic ethos that is vital to the maintenance of a democratic society.[208] Paradoxically, this undermining is a direct result of the very restraints on judicial lawmaking that the Legal Process Model requires in order to preserve respect for underlying tenets of democratic theory. Because of inherent weaknesses in the legislative process, especially with regard to issues that pit an organized and financed lobby against a dispersed constituency with no organized strength, the Legal Process Model's advocacy of judicial restraint in deference to the democratically superior legislature becomes suspect. Legal Process Model deference is predicated upon false assumptions that legislatures: act in the interest of the majority; have studied and are knowledgeable about the bills they vote on; and act, or fail to act, based on an awareness and understanding of court decisions on the issue.[209]

A more realistic view of the legislative process would recognize, however, that:

> what presently blocks the legislative origination of substantive laws or revision of ambiguous or obsolete statutes is usually either inertia or the political pressures of one or more powerful groups rather than the considered decision of the majority. The same political pressure, of course, can produce legislative change or a veto of a court-originated or court-revised rule, but doing so will be more difficult once a court has spelled out the need for the rule or revision than if, as at present, the pressure is applied behind the scenes.[210]

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207. Farber & Frickey, *supra* note 192, at 906 (citing Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1965)).

208. *Id.* at 907.

> The successful functioning of a democracy requires voters, and sometimes government officials, to act in economically irrational ways. Because these behaviors are not reinforced by economic incentives, they depend on a somewhat fragile public adherence to a social code. Special interest groups create the impression that government is simply an arena of self-interest and thus foster an atmosphere of cynicism that is incompatible with a healthy democracy.

Id. (citations omitted).

Another problem is a "pogo effect," wherein no one "group can afford to drop out of the contest for government handouts; [because] members of a group that did would pay the same taxes but receive fewer benefits, thus redistributing income to the remaining contestants." *Id.* at 906.

This pogo effect creates a result like that found in the prisoners dilemma game, where an individual's rational behavior leads to a result where everyone is worse off. "This creates a kind of 'race to the bottom,' in which pork-barrel politics displaces pursuit of the public interest—a situation individuals may deplore even as they find themselves compelled to participate." *Id.*

209. Meyer, *supra* note 174, at 678 (citing Richard Neely, How Courts Govern America (1981); Luther M. Swygert, *In Defense of Judicial Activism*, 16 Val. U. L. Rev. 439, 448 (1982)).

210. *Id.* at 677-78 (citing Cornelius J. Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 Minn. L. Rev. 265, 281-82, 286, 293-94 (1963); Neely, *supra* note 209, at 23-57).

From the Reform Model viewpoint, the judicial independence from political pressure allows courts to make necessary reforms to the law "when the political processes are unresponsive."[211] This is vital because "the beneficiaries of . . . judicial creativity are persons who are unlikely to have lobbied for legislation that would solve the problem."[212] Courts can play a vital role in advancing principled consideration of novel issues, by shifting the burden of "overcoming legislative inertia . . . from those who are unlikely and unable to act, to those who are organized and capable of acting."[213] In fact, justifications for "judicial creativity"—judicial exercise of the lawmaking functions—are strongest when legislative failure precludes meaningful consideration of legislative proposals.[214] Courts must be allowed to act creatively in order to overcome the deadening force of special interest groups, the "impotence" of potential tort plaintiffs with regard to obtaining legislative activity, and the legislative inertia that tilts the initial balance in favor of the status quo.[215]

Further, the tripartite nature of government addresses the Legal Process Model's fear that a judiciary unaccountable to the electorate is incompetent to make new law with broad social policy consequences. But courts are always ultimately accountable to the electorate because anything they do is subject to legislative reconsideration or veto.[216] Accordingly, one must view "[j]udicial creativity . . . not [as] a usurpation of legislative power; [but] rather . . . an entirely appropriate part of a joint lawmaking responsibility."[217]

State courts are the proper forum to hear the claim at issue. The state judicial system, the arena in which the right to privacy saw its greatest development, must be charged with the task of developing doctrine to protect individuals' rights when legislatures refuse or fail to act. State courts determine a majority of all legal disputes and accordingly,[218] because they are "both literally and figuratively closest to

211. Ursin, *supra* note 167, at 250.

212. Peck, *supra* note 199, at 41.

213. *Id.* at 42. In this regard, Peck discusses the development of common-law recognition of palimony causes of action in California. *See id.* at 41.

214. *See* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. Rev. 1, 3 (1995) (noting vital role of state courts in development of common-law doctrine); Peck, *supra* note 199, at 12 ("In this country, tort law still is produced primarily by judges following common-law traditions. It is not surprising, then, to find that it is an area in which judicial creativity is apparent.").

215. *See* Ursin, *supra* note 167, at 272 (discussing Holmesian views about modifying common law doctrines).

216. *See* Cornelius J. Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 Minn. L. Rev. 265, 281-82, 286, 293-94 (1963).

217. Ursin, *supra* note 167, at 256.

218. "We should remind ourselves that it is state court decisions which finally determine the overwhelming aggregate of all legal controversies in this nation." Kaye, *supra* note 214, at 3 (quoting William J. Brennan, Jr., *State Supreme Court Judge Ver-*

the people, . . . state courts . . . play a vital role in shaping the lives of our citizenry."[219]

On varied occasions and in different areas of law state courts have undertaken the challenge to advance the law. These areas include a shift from contributory to comparative negligence[220] and a change of law with regard to exculpatory clauses.[221] State courts have stripped municipal corporations of immunity from liability for the wrongful acts of their agents acting within the line and scope of their employment,[222] removed restrictions on a wife's ability to sue for loss of consortium,[223] and recognized a cause of action for loss of parental consortium.[224]

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sus United States Supreme Court Justice: A Change in Function and Perspective, 19 U. Fla. L. Rev. 225, 236 (1966)).

219. *Id.* at 5. As Chief Judge Kaye of the New York Court of Appeals notes, "[O]verwhelmingly, our nation's legal disputes are centered in the state courts, which handle more than ninety-seven percent of the litigation—tens of millions of new filings each year compared to some 250,000 in the federal courts." *Id.* at 3 (citing National Center for State Courts, State Court Caseload Statistics: Annual Report 1992, at 3 (1994)).

220. Peck, *supra* note 199, at 20. The court-induced shift from contributory to comparative negligence demonstrates the power of interest groups in legislative processes. Lobbyists aided in adoption of comparative negligence statutes. Twenty-three state legislatures adopted the comparative negligence doctrine, a figure that might fly in the face of arguments that the question is better decided by a court. *Id.* But the lobbyists sought adoption of comparative negligence for reasons other than its superiority on the merits. *Id.* Insurance interests sought to avoid adoption of no-fault automobile accident reparation plans, and believed that comparative negligence schemes, although not ideal for their interests, would be better for them than the no-fault paradigm. As one commentator has noted, "[t]he legislative adoption of comparative negligence thus stands as an illustration of how interested lobbyists can achieve action that did not occur solely upon consideration of reform on its merits." *Id.*

221. This rule change was made by the Alabama Supreme Court in Lloyd v. Service Corp. of Ala., 453 So. 2d 735, (Ala. 1984), where the court stated that "it is clearly within the power of the judiciary, and at times, appropriate for the judiciary, to change an established rule of law." *Id.* at 740.

222. Jackson v. City of Florence, 320 So. 2d 68, 73-74 (Ala. 1975).

223. Schreiner v. Fruit, 519 P.2d 462, 465 (Alaska 1974) ("We find no wisdom in abdicating to the legislature our essential function of re-evaluating common-law concepts in the light of present day realities. . . . We are of the view that in . . . this litigation it would be inappropriate for this court to wait for legislative action.").

224. *See, e.g.*, Ferriter v. Daniel O'Connell's Son's, Inc., 413 N.E.2d 690, 695-96 (Mass. 1980). In recognizing a cause of action for loss of parental consortium, the court stated that, "In a field long left to the common law, change may well come about by the same medium of development. Sensible reform can here be achieved without the articulation of detail or the creation of administrative mechanisms that customarily come about by legislative enactment.'" *Id.* (quoting Diaz v. Eli Lilly & Co., 302 N.E.2d 555, 563 (Mass. 1973)). The court perceived that the legislature could cure any ill effects of the court's extension of the law, stating that "[i]n the end the Legislature may say that we have mistaken the present public understanding of the nature of the [parent-child] relation, but that we cannot now divine or anticipate." *Id.* at 696 (quoting *Diaz*, 302 N.E.2d at 563-64).

In *Berger v. Weber*, 303 N.W.2d 424 (Mich. 1981), the court addressed the criticism that a flood of plaintiffs might arise if the doctrine were recognized, and reiterated the lower appellate courts' statement that "[t]he rights of a new class of tort plaintiffs

A strong argument on behalf of the courts' ability to break new ground in its interpretation of novel situations is found in the dissenting opinion in *Turpin v. Sortini*.[225] Stating that the argument of judicial restraint in deference to the legislature "is really out of vogue,"[226] the judge cited a litany of California cases where courts extended, modified, or otherwise changed existing law.[227] He also relied on the reasoned arguments of the preeminent tort scholar of this century, Dean Prosser, who remarked:

> The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.[228]

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should be forthrightly judged on their own merits, rather than engaging in gloomy speculation as to where it will all end." *Id.* at 426 (quoting *Berger*, 267 N.W.2d 124, 129 (Mich. Ct. App. 1978)); *see also* Weitl v. Moes, 311 N.W.2d 259, 265-66 (Iowa 1981) (noting that development of the common law is within the proper sphere of the court's authority); Ueland v. Reynolds Metals Co., 691 P.2d 190, 193 (Wash. 1984) (en banc) (observing the development of the law and expressing concern that deferring to the legislature would be abdicating the court's "responsibility to reform the common law to meet the evolving standards of justice"); Theama v. City of Kenosha, 344 N.W.2d 513, 514 (Wis. 1984) (noting that the "'genius of the common law is its ability to adapt itself to the changing needs of society'" and stating that "resolution of [whether a cause of action for loss of parental consortium should be recognized] is yet another step along the evolution of how the courts of this state views of the changing nature of the family unit" (quoting Moran v. Quality Aluminum Casting Co., 150 N.W.2d 137, 141 (Wis. 1967))).

225. 174 Cal. Rptr. 128, 133 (Ct. App. 1981) (Andreen, J., dissenting), *rev'd*, 643 P.2d 954 (Cal. 1982) (en banc).

226. *Id.* at 135.

227. *Id.* Among the cases cited are People v. Drew, 583 P.2d 1318 (Cal. 1978) (overturning *M'Naghten* test); Serrano v. Priest, 569 P.2d 1303 (Cal. 1977) (en banc) (recognizing "private attorney general doctrine"); Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975) (en banc) (adopting comparative negligence rule); Rodriguez v. Bethlehem Steel Corp., 525 P.2d 669 (Cal. 1974) (en banc) (recognizing spousal action for loss of consortium); Rowland v. Christian, 443 P.2d 561 (Cal. 1968) (en banc) (eliminating distinctions between trespasees, licensees, and invitees in broadening liability of negligent land owners); Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1963) (en banc) (creating strict products liability); Muskopf v. Corning Hosp. Dist., 359 P.2d 457 (Cal. 1961) (en banc) (abrogating law of governmental immunity); Silva v. Providence Hosp. of Oakland, 97 P.2d 798 (Cal. 1939) (en banc) (overruling charitable immunity doctrine).

228. William L. Prosser, Handbook of the Law of Torts § 1, at 3-4 (4th ed. 1971) [hereinafter Prosser 4th ed.] (footnotes omitted), cited in *Turpin*, 174 Cal. Rptr. at 135-36. Professor Prosser full comments are as follows:

> New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before. The intentional infliction of mental suffering, the obstruction of the plaintiff's right to go where he likes, the invasion of his right of privacy, the denial of his right to vote, the conveyance of land to defeat a title, the infliction of prenatal injuries, the alienation of the affections of a parent, and injury to a man's reputation by entering him in a rigged television contest, to name only a few instances, could not be fitted

Some commentators have advocated taking these urgings one step farther and having courts officially adopt an expanded, activist role when considering novel legal issues:[229]

> Expansion of the role of the courts beyond that permitted by notions of legislative primacy and myopic concentration on the factual matrix of a particular litigation can conform the legal system (legislative, executive, and judicial) more nearly to the needs of those who are governed by it. . . . [C]ourts [should] be authorized, when appropriate, to look beyond the particular litigants and to make substantive law of equal effect with, or in modification of, statute and to change court-made rules that could have been, but were not, changed by the legislature, subject, however, as to either, to legislative veto or recall.[230]

Courts as institutions should not be uncomfortable adopting a lawmaking function. "The plain and simple fact is that judges, of necessity, must from time to time make, rather than interpret, law and that they are perfectly justified in so doing. Indeed, no clear line actually can be drawn between making and interpreting law and the distinction is therefore illusory."[231] That courts in fact do accept this role is borne out in practice. "Every day . . . state courts delineate the limits of tort liability, thereby defining socially acceptable conduct."[232]

The Reform Model advocates judicial creativity in areas "when . . . political processes are unresponsive."[233] With this in mind, part IV examines legislative and judicial attempts to vest individuals with protectable rights in personal information, and analyzes these attempts in light of Reform Model imperatives.

IV. A "REFORM" MINDED APPROACH TO JUDICIAL PROTECTION OF PERSONAL INFORMATION

As noted above, the Reform Model advocates an active lawmaking role for the judiciary in situations where interest group pressure distorts legislative consideration of an issue. This part demonstrates that interest group pressure has, in fact, distorted legislative consideration of individuals' rights in personal information. Accordingly, it argues

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> into any accepted classifications when they first arose, but nevertheless have been held to be torts. The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.

Prosser, 4th ed., *supra*, §1, at 3-4.

229. Meyer, *supra* note 174, at 677.

230. *Id.*

231. Robert N. Clinton, *Judges Must Make Law: A Realistic Appraisal of the Judicial Function in a Democratic Society*, 67 Iowa L. Rev. 711, 711 (1982).

232. Kaye, *supra* note 214, at 6-7 (citing examples of New York courts' development of common law negligence liability).

233. Ursin, *supra* note 167, at 250.

that courts should face the issue on its merits. After examining three cases in which courts failed to act in the Reform Model sense and refused to make what would have been principled extensions of existing privacy doctrine, it demonstrates the legal basis upon which these and other courts could extend privacy protection to rights in personal information. Finally, this part presents privacy cases in which courts acted in a "reform" sense to develop the very right to privacy which now forms the basis upon which courts should, in light of social and technological change, protect individuals' rights in personal information. In this manner, this part demonstrates that courts expanding common law privacy protection to personal information will in fact be acting consistently with the reasoned development of privacy doctrine throughout the twentieth century.

A. *Interest Group Effects on Personal Information Legislative Proposals*

As noted in part III, the Reform Model demonstrates that interest groups distort legislative processes, especially in situations where they block, rather than promote, legislative activity.[234] Accordingly, because they would be blocking rather than advocating legislation, interest groups' power would be particularly strong with regard to proposals to vest individuals with rights in personal information.[235] Recent examples in fact bear out the difficulties in this arena.

A stark example of legislative process failure in the context of individuals' rights in personal information was recently played out in the California legislature. State Senator Steve Peace, Chairman of the California Senate Committee on Energy, Utilities and Communications introduced a bill that would have vested in individuals an enforceable right in their personal information.[236] The pertinent portion of the bill provided that "[n]o person or corporation may use or distribute for profit any personal information concerning a person without that person's written consent. Such information includes, but is not limited to, an individual's credit history, finances, medical history, purchases, and travel patterns."[237] The bill contained the following legislative finding concerning the California right to privacy:

> Advances in technology have made it easier to create, acquire, and analyze detailed personal information about an individual;

234. *See supra* notes 198-206 and accompanying text.

235. *Id.* ("[G]roup influence is likely to be strongest when the group is attempting to block rather than obtain legislation . . . ." (citing Schlozman & Tierney, *supra* note 198, at 314-15, 395-96)).

236. S. 1659, Cal. 1995-96 Reg. Sess. (Feb. 21, 1996) *amended* Sept. 21, 1996. *See* Julie Forster, *California, Minnesota and New York Lawmakers Push Internet Privacy Bills*, West's Legal News, Mar. 15, 1996, at 1310, *available in* Westlaw 1996 WL 259030.

237. *See* Forster, *supra* note 236.

> [p]ersonal information, including information about a person's financial history, shopping habits, medical history, and travel patterns, is continuously being created; [t]he unauthorized use of personal information concerning an individual is an infringement upon that individual's right to privacy.[238]

The bill was proposed in reaction to the proliferation of online services and their capacity to gather and store personal information, but was drafted to cover personal information gathered and stored in any manner.[239] Further, the bill was proposed against the backdrop of the California Constitution which provides that all people have certain inalienable rights, including the right to privacy.[240] Senator Peace called the bill "a simple implementation of California's existing constitutional protection of privacy."[241]

When the bill was introduced in February, 1996, there were predictions that the bill would not be "likely to move out of committee due to corporate opposition which has mustered a formidable lobbying presence."[242] A committee consultant who helped draft the bill explained how interest groups dominate consideration of such a measure:

> The organized constituency in Sacramento [California's capital] is the larger business interests and they are against the bill.... There aren't any organized constituencies in support of the bill. They're just ordinary people. They send us mail and tell us, 'We agree with you completely,' but they are not organized in any effective way up here. You can't counterbalance the opposition, and because of that it will be a tough bill to [pass].[243]

Indeed, privacy commentators noted that the legislation "will be lobbied to the max—ferociously.... The legislation ... does not have an easy road ahead of it."[244] Senator Peace himself understood from the start that his bill faced an uphill battle,[245] but nonetheless desired to get the fight underway: "Every day those computers keep cranking out of our control, more information is absorbed, more mistakes are made, and the task of bringing things back under control just gets bigger and bigger."[246]

These predictions were borne out in practice. Soon after it was introduced, the bill was "bombarded" by commercial enterprise interest

238. *Id.*
239. *Id.*
240. *See* Cal. Const. art. 1, § 1.
241. Forster, *supra* note 236.
242. *Id.*
243. *Id.* (quoting Randy Chinn, consultant to California Senate Committee on Energy, Utilities and Communications).
244. *Id.* (quoting Beth Givens, Project Director of the Privacy Rights Clearinghouse at the University of San Diego School of Law).
245. Rep. Steve Peace, *Editorial*, San Diego Union-Trib., Feb. 21, 1996, at B9 (acknowledging that it would take a long time before his privacy bill is enacted).
246. *Id.*

groups, led by the large national credit reporting agencies.[247] A compromise was forced, and now the bill merely creates a task force, comprised of three Senators and three Assemblymen, charged with evaluating how current California law conforms with the privacy protection mandate of the state constitution.[248] The task force's report is due in March 1998, in time for that year's legislative session.[249] There was minimal press coverage of the initial proposal, and no coverage of the compromise that resulted after commercial interests exerted pressure.[250]

This experience is common with regard to consumer legislation.[251] Similar proposals introduced in the New Jersey[252] and New York[253] state legislatures in early 1996 were also expected to "languish[ ] in committee."[254] Massachusetts state legislators have announced their intention to introduce a similar proposal in their 1997 session, which commences in January.[255]

The role of interest groups in determination of personal information issues is not new. As mentioned in part II, Congress in 1977 considered the privacy implications of mailing list sales, and held hearings on the issue. The direct marketing industry made a strong showing at these hearings, and their testimony and proposals pervade the Commission's report.[256]

Direct-marketers testified at length to the 1977 Privacy Commission about the economic necessity of mailing list profiling, and sought to convince them that the industry should be left to police itself because the industry itself would want to discriminate among consumers with varying levels of privacy concerns. "[T]he best direct-mail campaign is the one that mails the least. This is a business necessity. . . . A piece of mail to an individual who doesn't want to buy is wasted, and to

247. Telephone Interview with Randy Chinn, consultant to California Senate Committee on Energy, Utilities and Communication (Oct. 11, 1996) [hereinafter *Telephone Interview*].

248. S. 1659, Cal. 1995-96 Reg. Sess. (Feb. 21, 1996), *amended* Sept. 21, 1996.

249. *Id.*

250. *See* Telephone Interview, *supra* note 247.

251. Forster, *supra* note 236.

252. The New Jersey proposal, Senate Bill, No. 795, was introduced on February 15, 1996. It sought specifically to regulate sale of mailing lists, and proposed that "[n]o person, including any public or private entity, shall rent, sell or otherwise release the names, addresses, or telephone numbers of individuals to any other person for use in commercial solicitation without the prior written or electronic consent of those individuals." S. 795, 207th Leg. (Feb. 15, 1996).

253. Forster, *supra* note 236.

254. *Id.*

255. Higgins, *supra* note 37, at 1. The citizen who motivated her legislator to propose the legislation complained of "the widespread attitude that there's nothing we can do about these mailings and calls, that they are somehow part of the air we breathe and the water we drink." *Id.*

256. *See* Posch, *supra* note 34, at 2. As one direct marketing insider describes the effort: "DMA leaders taught and sold the Commission . . . and set in place the set-piece of self-regulation." *Id.* at 2-3.

direct mailers the elimination of this kind of waste is absolutely essential."[257] Self-regulation has not proven successful, however.[258] Additionally, the Fair Credit Reporting Act's current inability to adequately safeguard personal privacy is attributable to provisions that were inserted at the behest of an aggressive commercial interest lobby.[259]

Although these events cannot conclusively prove that interest groups will always defeat meaningful consideration of proposals to establish legal rights in personal information, they do shed clear light on the difficulty of passing such proposals in the face of organized and financially powerful interest groups.

B. *Unsuccessful Attempts To Apply the Appropriation Tort To Prevent Nonconsensual Dissemination of Personal Information*

Plaintiffs in three separate cases have unsuccessfully attempted to apply some form of the appropriation tort to stop unauthorized dissemination of personal information. This part examines these decisions and suggests that a legitimate basis exists for expanding existing common law privacy doctrine to protect against unauthorized dissemination of personal information.

1. *Shibley v. Time*

In *Shibley v. Time, Inc.*,[260] a 1977 decision that has been widely criticized,[261] plaintiffs sought an injunction requiring *Time Magazine* to obtain subscriber consent before selling subscription lists.[262] The Ohio Court of Appeals held that the magazine's sale of the lists to direct mail advertisers without first obtaining the subscribers' consent was not an invasion of privacy, even if the practice amounted to sale of "personality profiles," because the information was used only to determine what type of advertisement would be sent.[263]

The plaintiffs attempted to fit their claim within the "appropriation" branch of the right to privacy, which, under Ohio common law, prohibits the "unwarranted appropriation or exploitation of one's personality."[264] Plaintiffs argued that defendants' sale of subscription lists

257. Privacy Comm'n, *supra* note 40, at 135 (quoting testimony of Association of American Publishers).

258. *See supra* notes 75-92 and accompanying text (detailing ineffective self-regulation in direct-marketing industry).

259. *See supra* note 121.

260. 341 N.E.2d 337 (Ohio Ct. App. 1977).

261. *See* Reidenberg, *Fortress or Frontier*, *supra* note 63, at 216; Graham, *supra* note 43, at 1413; Shorr, *supra* note 44, at 338. For a comprehensive discussion of *Shibley* and other related cases, see Graham, *supra* note 43, at 1413-17.

262. 341 N.E.2d at 337. Plaintiffs also sought damages and costs. *Id.*

263. *Id.* at 339-40.

264. *Id.* at 339 (quoting *Housh*, 133 N.E.2d at 341).

amounted to sales of "personality profiles," which subjected the subscribers to solicitations from direct mail advertisers.[265] Plaintiffs then, somewhat vaguely, alleged that this practice amounted to an invasion of privacy that was not consented to nor made part of the original subscription contract.[266] The court dismissed this argument on two questionable grounds. First it held that the appropriation tort only applies where the plaintiff's name or likeness is displayed to the public.[267] This argument is suspect, however, because it is arguable whether, once the information is spread to a multitude of third-parties, it might be considered "displayed" for the purposes of the rule; also, not all jurisdictions require publicity as such in misappropriation cases.[268]

Second, the court held that plaintiffs have no expectation of privacy in their mailboxes.[269] In so holding, the court looked to the Ohio legislature's provision allowing third parties to compile and sell lists of the names and addresses of motor vehicle registrants. The court held that this act implied that an individual's rights of privacy are not compromised by sale of personal information.[270] The court also relied upon *Lamont v. Commissioner of Motor Vehicles*,[271] a federal case that found constitutional a New York statute that authorized the New York State Department of Motor Vehicles to sell driver registration lists.[272] In dismissing the complaint, the *Lamont* court used the following language, upon which the *Shibley* court relied heavily:

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265. *Id.* Plaintiffs alleged that buyers of the lists drew inferences about the "financial position, social habits, and general personality of the persons on the lists by virtue of the fact that they subscribe to certain publications and that this information is then used in determining the type of advertisement to be sent." *Id.*

266. *Id.* It is worth noting that the plaintiffs seemed to erroneously place the thrust of their complaint on the fact that they received unwanted solicitations, rather than on the sale of the information by the magazine to the advertiser in the first place. As one commentator has noted, "Plaintiff obfuscated the privacy question by complaining that the sale of personality profiles subjected magazine subscribers to solicitations from direct mail advertisers." Graham, *supra* note 157, at 1413.

267. *Shibley*, 341 N.E.2d at 339. The court stated "[i]t is clear from a reading of the authorities dealing with invasion of privacy that the 'appropriation or exploitation of one's personality' referred to . . . those situations where the plaintiff's name or likeness is displayed to the public to indicate that the plaintiff indorses the defendant's product or business." *Id.* (citing W. Prosser, Law of Torts § 117 (4th ed. 1971)). The court then summarily dismissed the argument by stating that "[t]he activity complained of here does not fall within that classification." *Id.*

268. *See* McCarthy, *supra* note 155, § 6.1; Reidenberg, *Fortress or Frontier*, *supra* note 63, at 226-27.

269. *Shibley*, 341 N.E.2d at 339-40.

270. *Id.* at 339 (referring to Ohio Rev. Code Ann. § 4503.26 (Anderson 1993)).

271. 269 F. Supp. 880 (S.D.N.Y.), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968).

272. *Id.* at 884. In *Lamont*, the plaintiff claimed that subjecting motor vehicle registrants to the kind of solicitation that would flow from sale of registration lists was a "violation of the right to privacy and constitute[d] deprivation of . . . liberty and property under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United

> The mail box, however noxious its advertising contents often seem to judges as well as other people, is hardly the kind of enclave that requires constitutional defense to protect 'the privacies of life.' The short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.[273]

Shibley's reliance on *Lamont* is incorrect for two reasons. First, *Lamont* dealt with a constitutional right of the individual to privacy as against the state; it did not address relations between private actors. This distinction is clear in cases and the literature.[274] Second, the *Shibley* court focused only on the end-use of the information, citing precedent that mail solicitation does not violate individuals' privacy. Regardless of whether or not the end-use may infringe on privacy rights, the end-use is not the violation in these cases. Rather, it is the sale of the information to the end-users in the first place that constitutes the tortious appropriation of the plaintiffs personality.[275] Accordingly, whether there is an expectation of privacy in the mailbox is irrelevant to the claim asserted by plaintiffs in *Shibley*.[276]

Finally, as discussed above, the court noted its incompetence to even handle the question presented in the first place.[277]

2. *Dwyer v. American Express*

A recent Illinois case, *Dwyer v. American Express Co.*,[278] reconsidered the sale of personal information and relied heavily upon *Shibley*. Similar to *Shibley*, the *Dwyer* complaint alleged that American Express, through its practice of compiling and selling lists of cardmembers names and addresses arranged by "personality profiles," invaded the cardmembers' privacy and violated the Illinois Consumer Fraud statute.[279] The Illinois Appeals Court affirmed the trial court's

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States Constitution." *Id.* at 882. The *Lamont* court found that there was no "captive quality" in the solicitation. *Id.* at 883.

273. *Id.*

274. *See supra* notes 142-47 and accompanying text.

275. *See* Reidenberg, *supra* note 63, at 226; Graham, *supra* note 43, at 1417; Shorr, *supra* note 44, at 1831 & n.369.

276. As to *Shibley's* logic, Professor Reidenberg points out: "[i]n general, courts do not require an expectation of privacy or publicity as elements of this invasion of privacy. The *Shibley* court did not, in fact, assess whether the mailing list reflected Shibley's personality." Reidenberg, *Fortress or Frontier*, *supra* note 63, at 226-27.

277. *See supra* note 163 and accompanying text, recounting deference to legislature exercised by *Shibley* court.

278. 652 N.E.2d 1351 (Ill. App. Ct. 1995).

279. *Id.* at 1356. Plaintiffs' claim grew out of a May 1992 settlement between American Express and the New York State Attorney General's Office whereby American Express agreed to disclose to all cardmembers the fact that it compiled information from cardmember card usage and sold that information to marketers and merchants. It further agreed to give cardmembers the opportunity to "opt out" of having their names included on these lists. Peter Pae, *American Express Co. Dis-*

grant of defendant's motion to dismiss for failure to state a claim.[280] The Illinois Supreme Court denied certiorari.[281]

Plaintiffs made three unsuccessful claims. The first was a privacy claim fashioned under the intrusion upon seclusion tort.[282] Plaintiffs' second claim was fashioned under Illinois' Consumer Fraud statute.[283] The plaintiffs' third claim was brought under the appropriation tort, recognized at common law in Illinois.[284] The court cited the *Restatement*'s position that the purpose of the tort is to protect the "interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness."[285] Defendant argued rental of the information did not interfere with plaintiff's "exclusive use of his own identity"; the names themselves had no value; and if there is in fact value in the list, defendants created such value through their efforts to compile the information and make aggregate lists.[286] Plain-

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closes It Gives Merchants Data on Cardholders' Habits, Wall St. J., May 14, 1992, at A3.

According to news articles released at the time of the settlement, American Express categorized and ranked cardmembers into six tiers based on spending habits (e.g., "Rodeo Drive Chic" or "Value Oriented"). *Id.* To achieve this categorization, American Express analyzed "where [cardmembers] shop and how much they spend, and also consider[ed] behavioral characteristics and spending histories." *Dwyer*, 652 N.E.2d at 1353.

American Express also created lists to target cardmembers who purchase specific types of items, and cardmembers who fell into various categories of shoppers, including "mail-order apparel buyers, home-improvement shoppers, electronics shoppers, luxury lodgers, card members with children, skiers, frequent business travelers, resort users, Asian/European travelers, luxury European car owners, or recent movers." *Id.*

280. *Id.* at 1357.

281. 662 N.E.2d 423 (Ill. 1996).

282. The elements of intrusion upon seclusion under Illinois law are: 1) unauthorized intrusion or prying into defendant's seclusion; 2) intrusion which is objectionable to a reasonable man; 3) intrusion into a private matter; and 4) causation of anguish and suffering. *Id.* at 1354 (citing Melvin v. Buling, 490 N.E.2d 1011, 1013-14 (Ill. App. Ct. 1986)).

The court held that plaintiffs failed to establish the first element, "unauthorized intrusion," reasoning that when the cardmembers use the card, they are "voluntarily, and necessarily, giving information to defendants that, if analyzed, will reveal a cardholder's spending habits and shopping preferences." *Id.*

283. The court dismissed this claim because the Illinois Consumer Fraud Act only provided private causes of action to "[a]ny person who suffers damage as a result of a violation of th[e] Act." *Id.* at 1357 (quoting 815 Ill. Comp. Stat. 505/10a(a) (West 1992)). Because plaintiffs did not, and could not, allege damage from disclosure of this sort of information, their claim under the act was dismissed as well. *Id.*

284. The elements of tortious appropriation under Illinois law are: 1) appropriation, 2) without consent, 3) of one's name or likeness, 4) for another's use or benefit. *Id.* at 1355. This definition is fairly consistent with that of the Restatement and the majority of jurisdictions. *See* Restatement (Second) of Torts § 652(C) (1977); McCarthy, *supra* note 155, §§ 6.1-.15.

285. *Id.* (citing Restatement (Second) of Torts § 652(C) cmt. a (1977)).

286. *Id.* at 1356.

tiffs countered by citing cases finding appropriation even where the name or likeness is used for a non-commercial purpose.[287]

The court, however, looked no further than *Shibley* to decide the case.[288] Without explaining *Shibley*'s rationale for dismissing the appropriation claim, the court dismissed plaintiffs' claim on the ground that there is no value in one name.[289] The court ruled that the defendants created the valuable product when they analyzed the cardmember information and compiled aggregate lists of cardmembers' names.[290]

The *Shibley* court, however, based no part of its decision on the relative value of individual names versus a compiled list of names. Accordingly, the *Dwyer* court based its dismissal of the appropriation claim on precedent that does not exist. Despite *Dwyer*'s citation to *Shibley*, no precedent supports its argument that there can be no appropriation because there is no value in a single name.

3. *Avrahami v. U.S. News & World Report*

In the most recent court case of this nature, *Avrahami v. U.S. News & World Report*,[291] a subscriber to *U.S. News & World Report* ("U.S. News") sued the magazine because it sold his name and address to *Smithsonian Magazine* without his consent.[292] The plaintiff, Ram Avrahami, claimed that he has a property right in his name, and that *U.S. News* violated this right by renting his name and address to *Smithsonian* without first obtaining his consent.[293] Avrahami's claim was based on a Virginia statute stating that no one may use another person's name, portrait, or picture "for advertising purposes or for the purposes of trade" without written consent.[294] The case was dismissed

287. *Id.* (citing Zacchini v. Scripps-Howard Broad. Co., 351 N.E.2d 454 (Ohio 1976), *rev'd on other grounds*, 433 U.S. 562 (1977)); Douglass v. Hustler Magazine, 769 F.2d 1128, 1138 (7th Cir. 1985); Annerino v. Dell Publ'g Co., 149 N.E.2d 761 (Ill. App. Ct. 1957); Eick v. Perk Dog Food Co., 106 N.E.2d 742 (Ill. App. Ct. 1952).

288. After reciting the parties' arguments, the court simply stated: "Even more persuasive is *Shibley v. Time* . . . ." *Id.* It provided neither an explanation of *Shibley*'s reasoning nor any independent reasoning to dismiss the appropriation claim.

289. *Id.*

290. *Id.*

291. Avrahami v. U.S. News & World Rep., Inc., No. 96-203, slip op. (Cir. Ct. Arlington County June 13, 1996).

292. Bruce Knecht, *Privacy: Junk-Mail Hater Seeks Profits from the Sale of His Name*, Wall St. J., Oct. 13, 1995, at B1.

293. *Id.* Avrahami's suit is different from *Shibley* and *Dwyer* because he focuses his claim, at least in part, on an asserted property right in his name or personality. Avrahami's claim is based on the Virginia appropriation statute, which has been interpreted by the Virginia Supreme Court as protecting an individual's property right in name and likeness. *See* Lavery v. Automation Mgmt. Consultants, Inc., 360 S.E.2d 336, 342 (Va. 1987) (holding "that Code § 8.01-40(A) creates in an individual a species of property right in their [sic] name and likeness").

294. The statute, which codifies the common law appropriation tort, reads:

> § 8.01-40: Unauthorized use of name or picture of any person; exemplary damages . . .

upon *U.S. News*'s motion on June 13, 1996, because it was discovered that in order to track U.S. News' sale of his name, Avrahami had intentionally misspelled his name as "Avrahani."[295] Accordingly, the court found that even if Avrahami were to have a property right in his own name—a point on which the court expressed no opinion—he certainly did not have such a right in someone else's, or in a fictional, name. Avrahami has filed a petition for appeal to the Virginia Supreme Court.[296] As expected, the DMA has shown great interest in the case.[297]

As *Shibley*, *Dwyer*, and *Avrahami* demonstrate, the appropriation tort, which potentially could protect against the unwanted sale of personal information—in fact, on its face it seems to directly apply—has yet to be successfully utilized to protect individuals in this regard.

C. *Appropriation and Publicity Bases for Protection of Individual Rights in Personal Information*

Despite the results in *Shibley*, *Dwyer*, and *Avrahami*, both the appropriation tort and the right of publicity, each of which has a firm basis in property, provide a basis from which courts can vest individuals with a right against the unauthorized sale of personal information.[298] In light of interest group problems described above[299] courts should follow the Reform Model of judicial activism and seek to extend existing common law privacy protection. As this section suggests, a principled basis exists for that extension.[300] This section

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> A. Any person whose name, portrait, or picture is used without having first obtained the written consent of such person . . . for advertising purposes or for the purposes of trade, such person may maintain a suit in equity against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use.

Va. Code Ann. § 8.01-40 (Michie 1994).

295. Avrahami v. U.S. News & World Report, Inc., In Chancery No. 96-203, slip op. at 21 (Cir. Ct. Arlington County June 13, 1996).

296. Doug Henschen, *Avrahami Seeks Appeal of* U.S. News *Case*, Direct Marketing News, Sept. 30, 1996, at 1.

297. Knecht, *supra* note 292, at B5.

298. *See* Shorr, *supra* note 44, at 1819 (arguing that "the theory of property underlying the misappropriation tort and the right of publicity provides the strongest legal foundation for the recognition of property rights in personal information");

299. *See supra* notes 234-59 (discussing interest group distortion of legislative processes with regard to proposals to vest individuals with rights in personal information).

300. *Shorr*, *supra* note 44, at 1819 ("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."); *see supra* note 157 (compiling commentators who advocate extension of appropriation and publicity doctrine to personal information sales).

Some have argued that the restrictions that these torts would place on information dissemination would run afoul of the First Amendment. *See* Shorr, *supra* note 44, at 1846-49 (summarizing and analyzing constitutional objections to statute vesting indi-

briefly describes the misappropriation tort and the right to publicity, and examines how the theories underlying these torts justify extension of the law to cover unauthorized dissemination of personal information.

In 1890, Samuel D. Warren and Louis D. Brandeis wrote a groundbreaking law review article advocating the creation of a right to privacy.[301] They argued for protection of the individual's "right to be let alone."[302] This right extended the common law protection of the body, reflected in the torts of assault and battery, to recognition and protection of personality; of "man's spiritual nature, . . . his feelings and his intellect."[303]

New York was one of the first states to consider the proposed doctrine, and it was not receptive to the theory. *Roberson v. Rochester Folding Box Co.*[304] involved the defendant's unauthorized use of plaintiff's picture in a flour advertisement. The plaintiff alleged that defendant's use constituted misappropriation of her portrait. The New York Court of Appeals rejected the doctrine despite its acceptance by the two lower courts that heard the case.[305] The Court of Appeals denied the existence of any common law right of privacy and expressed concern over the flood of litigation that it believed would follow recognition of such a right.[306] It concluded that such a significant change in the law would have to be made by the legislature.[307] The dissenting opinion advocated forcefully for adoption of the doctrine.[308]

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viduals with rights in personal information). A number of commentators, however, have argued convincingly that restrictions would survive First Amendment scrutiny because of the distinct commercial nature of the speech involved. Graham, *supra* note 43, at 1434-38 (analyzing Supreme Court commercial speech doctrine and concluding that limited tort-based restrictions on commercial dissemination of personal information would survive First Amendment scrutiny); Shorr, *supra* note 44, at 1846-49 (suggesting Constitutionality of proposed statute which vests individuals with initial rights in personal information and creates framework for personal information contract scheme).

301. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). The article reviewed cases where relief had "been afforded on the basis of defamation, or breach of confidence, or of implied contract, in the publication of letters, portraits and the like." John W. Wade et al., Prosser, Wade and Schwartz's Cases and Materials on Torts 947 (9th ed. 1994). The article broke new ground by proposing that these cases really were based on a right to privacy. *Id.*

302. Warren & Brandeis, *supra* note 301, at 195 (quoting T. Cooley, A Treatise on the Law of Torts 29 (1888)).

303. *Id.* at 193.

304. 64 N.E. 442 (N.Y. 1902).

305. *See* 71 N.Y.S. 876, 881 (App. Div. 1901); 65 N.Y.S. 1109, 1113 (Sup. Ct. 1900).

306. 64 N.E. at 443.

307. *Id.* at 443-44.

308. *See infra* notes 340-46 (noting Judge Gray's forceful arguments in dissent which recounted the flexibility of common law and advocated its extension to recognize what has now come to be known as the appropriation form of privacy invasion).

In response to the *Roberson* decision, the New York legislature passed laws prohibiting the use of the name, portrait, or picture of any living person for "advertising purposes" or for "purposes of trade" without prior written consent.[309] New York's privacy law has, for the most part, been constrained with little variation to the terms of these statutes since their initial passage.[310] Accordingly, there is no common law right to privacy in New York,[311] and any claim for relief must demonstrate that the defendant's invasion or appropriation was for advertising purposes or for the purposes of trade.[312]

The Georgia Supreme Court was the first state high court to recognize the right to privacy. In *Pavesich v. New England Life Insurance Co.*,[313] the defendant used plaintiff's name and picture in an advertisement along with language purportedly from the plaintiff suggesting plaintiff's endorsement of defendant's product.[314] The Georgia Supreme Court fully accepted Warren and Brandeis's reasoning, rejected *Roberson*, and recognized the right to privacy.[315] By the 1930s, the doctrine was generally accepted throughout the country.[316] The right of privacy now is "clearly recognized, in one form or another, in all but two or three states."[317]

309. N.Y. Civ. Rights Law §§ 50-51 (McKinney 1992 & Supp. 1996).

310. *See* J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 28.04[4], at 28-37 (3d ed. 1996) (noting that New York courts have refused to find a common law right to privacy and that all privacy rights "must fit, if at all, within the 1903 . . . statute").

In 1995, however, the legislature amended the statute to cover appropriation of a person's voice. N.Y. Civ. Rights Law § 51 (amended by 1995 N.Y. Laws ch. 674, § 1).

311. *See* Howell v. New York Post Co., 612 N.E.2d 699, 703 (1993) (noting that New York has "no common law of privacy" and asserting that adoption of such a right is "best left to the Legislature"); *see also* Kent Greenawalt, *New York's Right of Privacy: The Need for Change*, 42 Brook. L. Rev. 159, 162 n.13 (1975) (attacking *Roberson* as wrongly decided and asserting that the legislative response to *Roberson* should not be interpreted as preempting the entire privacy field and disabling the court's ability to recognize common law privacy); William S. Gyves, *The Right to Privacy One Hundred Years Later: New York Stands Firm as the World and Law Around It Change*, 64 St. John's L. Rev. 315, 325-26, 333 (1990) (criticizing the rigidity and inflexibility of New York courts in their unwillingness to expand common law doctrine to recognize common law right to privacy).

312. *See* Frank v. National Broadcasting Co., 506 N.Y.S.2d 869, 871 (N.Y. App. Div. 1986) (holding that the use of comedic character in skit on Saturday Night Live with same first name and occupation as plaintiff not actionable use in "trade" under statute); Moreno v. Time, Inc., 11 Media L. Rep. (BNA) 2196, 2200 (N.Y. Sup. Ct. 1985) (holding that a comedic impersonation in a theatrical television broadcast is not for the "purposes of trade" within the meaning of the New York privacy statute). *See generally* Beverly v. Choices Women's Medical Ctr., Inc., 587 N.E.2d 275, 278 (N.Y. 1991) (explaining that "advertising purposes" and "for purposes of trade" in statute are distinct and give rise to separate invasions).

313. 50 S.E. 68 (Ga. 1905).

314. *Id.* at 68-69.

315. *Id.* at 77-81.

316. *See* McCarthy, *supra* note 155, §§ 6.1-.15 (detailing states' recognition of privacy rights).

317. Wade, et. al., *supra* note 301, at 948.

The causes of action asserted in both *Roberson* and *Pavesich* are what Prosser would later characterize as the appropriation tort.[318] This tort basically prohibits one from appropriating another's name or likeness without consent.[319] Accordingly, it appears to closely fit the sale of personal information. Indeed, as one commentator has stated with regard to sale of personal information, "the buying and selling of individuals' addresses and other characteristics without their consent violates the privacy principle against exploiting a person's name, face, or personal facts for another's profit."[320] Other commentators have suggested the potential applicability of the appropriation tort to the sale of personal information. For example, Professor Reidenberg suggests the possibility of linking personality (upon which the tort is built) with personal information.[321]

As mentioned above, statutes in some states limit recovery to commercial appropriation of one's name or likeness.[322] Other states allow recovery for noncommercial appropriations.[323] The appropriation

318. This tort is defined as follows: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." Restatement (Second) of Torts, § 652(C) (1977).

319. *See id.* § 652(C) cmt. b, illus. 4, 5 & cmt. c.

320. Robert E. Smith, Privacy: How to Protect What's Left of It 125 (1979).

321. Reidenberg, *Fortress or Frontier*, *supra* note 63, at 225-27 & n.177 (citing Shibley v. Time, 341 N.E.2d 337, 339-40 (Ohio Ct. App. 1975) and Arrington v. New York Times, 434 N.E.2d 1319, 1323-24 (N.Y. 1982) to support "the view that § 51 of the N.Y. Civil Rights Law should be applicable to sales of name-linked information"). Professor Reidenberg suggests a basis in privacy law for exactly the property right sought to be established here:

> Although the use of a name and address in itself . . . might not constitute an appropriation of that individual's personality, if the degree of personal information portrays aspects of the individual's lifestyle (e.g., wine collecting based on a list of all wealthy wine drinkers with an affinity for fine French cognac), the information profile could be considered a reflection of the individual's personality. As such, it might thus be within the scope of this protection. In these instances, the right would restrict the use giving rise to commercial gain rather than the collection or storage of that personal information.

Id. at 226.

In fact, another respected privacy scholar predicts that the law will adapt and recognize new privacy rights in personal information in the same way that it embraced the appropriation and publicity torts at the beginning of the twentieth century. Alan Westin, *Consumer Privacy Protection: Ten Predictions*, Mobius, February, 1992 (predicting that the law "will construct a similar concept for consumer personal profile data acquired by businesses from consumer submissions and transactions. . . . All consumer data bases used for direct marketing will be consensual, based on the consumer's knowing agreement to their use and the payment of fair market value."), *cited in* H. Jeff Smith, Managing Privacy 186 n.34 (1994).

322. *See* Wade et al., *supra* note 301, at 952 ("Most of the cases have involved advertising, or pictures accompanying an article sold.").

323. *See, e.g.*, Hinish v. Meier & Frank Co., 113 P.2d 438, 448 (Or. 1941) (holding liable a defendant who, without plaintiff's knowledge or consent, signed plaintiff's name to a telegram urging the governor to veto a bill); Hamilton v. Lumbermen's Mut. Casualty Co., 82 So. 2d 61, 61-62 (La. Ct. App. 1955) (finding liable a defendant who used name of plaintiff in advertisement to find witnesses to accident).

tort is based in property,[324] which further enhances its flexibility as a common law doctrine, and opens up its ability to adapt to changing standards of technology and value.[325] An analysis of the right of publicity, which grew out of the appropriation tort, highlights this mixed characterization.

The right of publicity,[326] which developed as an offshoot of the appropriation branch of the privacy tort, provides further justification for protecting individuals' rights in personal information. It has a distinct basis in property.[327] The right to publicity was first explicitly recognized by Judge Jerome Frank in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[328] The right was endorsed by Professor Nimmer's 1954 law review article,[329] and acknowledged by the Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*[330] The right of publicity

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324. Robert C. Post, *Rereading Warren & Brandeis: Privacy, Property and Appropriation*, 41 Case W. Res. L. Rev. 647, 649 (1991); Prosser, *supra* note 148, at 389. The appropriation tort is founded on an interest that 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." *Id.* at 389, 406.

325. Property definitions evolve to match technological growth, and to meet "new definitions of wealth." Blackman, *supra* note 44, at 448. For example, with regard to the right of publicity "the right of publicity developed for the same reasons that property rights generally are thought to develop: technological advance and social change generated new demands, new scarcity, and new opportunities." Jesse Dukeminier & James E. Krier, Property 68 (3d ed. 1993). As one commentator has noted:

> [P]ictorial and representational graphics and celebrity endorsements increased considerably in the period 1890 to 1930. . . . In the process the advertising community created a legitimate market for items such as name and likeness which had previously been out of commerce. The rapid evolution of legal doctrine during this period demonstrates the growing acceptance [by] judges [of] the notion that the persona might be a commodity and the individual's right to exclude others from his name and likeness was well established by the second decade of this century. In later years the further expansion of this market encouraged judges to endow the persona with other characteristics of property: alienability and hereditability.

George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 La. L. Rev. 443, 457 (1991).

326. "[T]he right of publicity is simply the inherent right of every human being to control the commercial use of his or her identity." McCarthy, *supra* note 31, at 1704.

327. The *Restatement (Second) of Torts* states that the appropriation tort creates "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).

328. 202 F.2d 866 (2d Cir. 1953).

329. Melville B. Nimmer, *The Right of Publicity*, 19 Law & Contemp. Probs. 203 (1954).

330. 433 U.S. 562 (1977).

is recognized in twenty-four states, either by statute[331] or by incorporation into the common law.[332]

The theoretical underpinnings of the appropriation tort and the right of publicity support arguments that individuals have protectable rights in personal information. In his seminal article, Professor Nimmer made clear that the right of publicity is not to be bestowed solely upon celebrities:

> It is impractical to attempt to draw a line as to which persons have achieved the status of celebrity and which have not; it should rather be held that every person has the property right of publicity, but that the damages which a person may claim for infringement of the right will depend upon the value of the publicity appropriated which in turn will depend in great measure upon the degree of fame attained by the plaintiff. Thus, the right of publicity accorded to each individual "may have much or little, or only a nominal value," but the right should be available to everyone.[333]

Indeed, as another prominent commentator on the subject has stated, "[t]he modern view of the right of publicity is that it is an inherent right of identity possessed by everyone at birth. . . . If [non-celebrity] plaintiffs only want the fair market value of their identity, then the right of publicity should be available."[334] The majority of courts have followed this line of reasoning and held that noncelebrities have a right of publicity.[335] McCarthy concludes that:

> Each and every human being should be given control over the commercial use of his or her identity. This is because nothing is so strongly intuited as the notion that my identity is *mine*—it is my property to control as I see fit. Those who criticize this principle must articulate some important social policy that negates this natural impulse of justice. So far, the critics have failed.[336]

This strong support for a right of publicity in all persons—the famous and non-famous alike—as seen in the works of Nimmer, McCarthy and in case law, suggests that despite decisions rendered to date, ap-

331. State statutes codifying the right of publicity or a form of the appropriation tort include: Cal. Civ. Code § 3344 (West 1996); Ind. Code Ann. §§ 32-13-1-1 to -20 (Burns 1995); Ky. Rev. Stat. Ann. § 391.170 (Michie/Bobbs-Merrill 1989); Mass. Ann. Laws ch. 214, § 3A (Law. Co-op. 1986); Neb. Rev. Stat. §§ 20-201 to -211 (1991); Nev. Rev. Stat. Ann. §§ 597.770 to .810 (Michie 1994 & Supp. 1995); N.Y. Civ. Rights Law §§ 50, 51 (McKinney 1992 & Supp. 1996); Okla. Stat. Ann. tit. 21, § 839.1 (West 1983); R.I. Gen. Laws §§ 9-1-28 to 28.1 (1985); Tenn. Code Ann. §§ 47-25-1101 to -1108 (1984); Utah Code Ann. §§ 45-3-1 to -3-6 (1993); Va. Code Ann. § 8.01-40 (Michie 1995); Wis. Stat. Ann. § 895.50(1)(b) (West 1983).

332. McCarthy, *supra* note 155, §§ 6.1 to 6.1-3.

333. Nimmer, *supra* note 329, at 217.

334. McCarthy, *supra* note 31, at 1710.

335. *See, e.g.*, Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824 n.11 (9th Cir. 1974); Canessa v. J.I. Kislak, Inc. 235 A.2d 62, 75-76 (N.J. Super. Ct. Law. Div. 1967); Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 260 (N.Y. Sup. Ct. 1984).

336. McCarthy, *supra* note 31, at 1711-12.

plication of either the appropriation tort, or the right of publicity form, is a sound method to protect against the unwanted use of individuals' identities for commercial purposes.

Further, in light of legislative problems detailed above,[337] courts should adopt the Reform Model of jurisprudence and extend the common law to protect individuals rights in personal information. In so doing, these courts should not fear that they are acting excessively activist; rather they should realize that they will be acting in accordance with the line of cases in which courts have adopted and developed the right to privacy. The next section presents a number of these cases as examples of the steps that courts can and have taken to move forward to protect individuals against privacy violations.[338]

D. *Twentieth Century Privacy Arguments Favoring Recognition of Rights in Personal Information*

The common law is a flexible mechanism that can and has adapted to technological and cultural change; accordingly, it can adapt to the technological growth that has spawned increases in the collection and dissemination of personal information.[339] As the right to privacy developed throughout the century, many courts adopted a Reform Model jurisprudential posture and moved to adopt the right to privacy through bold judicial moves that were termed by many as activist. This section sets forth some of these courts arguments, from the persuasive arguments set out in Judge Gray's dissent in *Roberson v. Rochester Folding Box Co.*,[340] to a number of subsequent privacy cases adopting the right to privacy. As this section demonstrates, courts which would today expand privacy doctrine to personal information sales would not be acting beyond their competence, but rather would join in a well-reasoned line of decisions extending privacy to protect individuals' privacy against encroachments created by advancing technology.

Dissenting in *Roberson* almost one-hundred years ago, Judge Gray made strong arguments recognizing how the case before the court involved a right to privacy, and how recognition of that right was, in fact, a logical extension of tort liability that the court had recognized in the past. His observations were built upon in the majority decision

337. *See supra* part IV.A (detailing interest groups effects on legislative attempts to vest individuals with protectable rights in personal information).

338. *See supra* part II.C (discussing failed judicial attempts at extending tort protection to unauthorized sales of personal information).

339. McCarthy, *supra* note 155, § 6.1[c]; *see* Oliver W. Holmes, The Common Law 1 (1881); Armstrong, *supra* note 325, at 457 (citing the evolution of legal doctrine to protect the individual's name and likeness). For details on the manner in which technological advances have enhanced businesses's ability to gather and use personal information, and the accompanying threat individual privacy, see *supra* notes 48, 94, 130 and accompanying text.

340. 64 N.E. 442 (N.Y. 1902).

in *Pavesich v. New England Life Insurance Co.*,[341] which was the first decision from a state high court acknowledging the right to privacy. Judge Gray's reflections shed light on how courts today can, and should, view the new cases seeking redress for unauthorized sales of personal information.

Noting that the case before him involved photography, Gray discussed technology's role in the development of the common law. He suggested that courts should not ignore technological change, but rather must recognize its effects and mold the law accordingly.[342] Gray's comments on the development of photographic technology provide a useful analogy to the development of computerized information collection technology. In the same way that a camera allows for instantaneous reproduction of a person's likeness, so too does the process of data compilation and layering render a personality profile of the data subject. The resulting profile is, in effect, a portrait of the individual.

The reproduction itself would not be impossible without technology; but just as painting a portrait would involve a major investment of time and resources, the act of compiling and layering mass quantities of personal information about people would be significantly more time consuming without computer technology.[343] Moreover, mere possession of the information could not be actionable, as Judge Gray noted. Rather, the commercial dissemination of this information—of this "informational portrait"—is what interferes with the individual's ownership rights and warrants legal protection. Judge Gray's statement regarding photographic likenesses is applicable to personality profiles:

> But if it is to be permitted that the portraiture may be put to commercial or other uses for gain by the publication of prints therefrom, then an act of invasion of the individual's privacy results, possibly more formidable and more painful in its consequences than an actual bodily assault might be.[344]

Similarly, if the personality profile is put to commercial use without the consent of the subject, an invasion of privacy results. Although Gray spoke of an invasion of privacy, his general discussion emphasized that any privacy rights are based on property rights.[345] Gray focused on the nature of property rights, stressing that "property" is

341. 50 S.E. 68 (Ga. 1905).

342. 64 N.E. at 449.

343. For instance, a marketer could theoretically follow a subject around all the time, all day, and record the stores that person shops in, the car he drives, the neighborhood he lives in, the clothes he wears, etc. Clearly, however, the effort involved in such a process would be prohibitively expensive.

344. *Id.*

345. *Id.* ("I think that this plaintiff has the same right of property in the right to be protected against the use of her face for defendant's commercial purposes as she would have if they were publishing her literary compositions.").

not the object that is owned, but rather a right of the owner as to that object:

> Property is not, necessarily, the thing itself which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing or in one's privilege, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it; and so it is called forth for the protection of the right to that which is one's exclusive possession as a property right.[346]

These arguments laid the foundation for the growth of common law privacy throughout the twentieth century.

Judge Gray was not alone in his belief that the common law had ample flexibility to accommodate development of a right to privacy. The Hawaii Supreme Court had no precedent to rely upon when it first recognized the right to privacy.[347] Referring to the vitality of the common law, the court stated that "the absence of precedent is a feeble argument."[348] The Court further noted that common law system would have withered centuries ago had it lacked the ability to expand and adapt to the social, economic, and political changes inherent in a vibrant human society.[349] The court also answered the criticism that recognizing the tort would lead to a flood of litigation, noting that such arguments accompany all innovations in the law.[350]

In *McCormack v. Oklahoma Publishing Company*,[351] the Oklahoma Supreme Court noted that "[t]he common law is not static, but is a dynamic and growing thing and its rules arise from the application of reason to the changing conditions .... Flexibility and capacity for growth and adaptation is its peculiar boast and excellence."[352] As to whether the legislature is better suited to identify such a right, the court remarked that "[i]t is unnecessary for the Legislature to enact a law to create this tort in abrogation of the common law."[353] It noted that the common law was more than the "ancient unwritten law of England," but included the body of law created and embodied in the decisions of the state's courts.[354] The Connecticut Supreme Court established a right to privacy, it held specifically that recognition of the right was properly a matter for judicial consideration.[355]

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346. *Id.*
347. Fergerstrom v. Hawaii Ocean View Estates, 441 P.2d 141, 143 (Haw. 1968).
348. *Id.*
349. *Id.*
350. *Id.* at 143-44.
351. 613 P.2d 737 (Okla. 1980).
352. *Id.* at 740 (citing Hurtado v. California, 110 U.S. 516, 530 (1884)).
353. *Id.*
354. *Id.*
355. Goodrich v. Waterbury Republican Am., Inc., 448 A.2d 1317, 1328 (Conn. 1982).

Similarly, in *Hinish v. Meier & Frank Co.*,[356] the Supreme Court of Oregon recognized the appropriation branch of the right to privacy. In answering the claim that no precedent supported the decision, the court argued that "natural justice and the needs of the society in which we live should prevail over objections based upon the novelty of the asserted cause of action."[357] It embraced the ability of courts to make law "without waiting on the legislature," asserting that some of the best law is that made by judges.[358] The court correctly recognized that courts cannot, as Sir Frederick Pollock stated, "lay down any rule they choose."[359] They must "supplement and enlarge the law as they find it, or rather they must do so from time to time, as the novelty of questions coming before them may require; but they must not reverse what has been settled."[360]

Indeed, in the present case the courts today will follow the path set forth by Pollock and Holmes and practiced by the courts listed above; they will "supplement and enlarge" an already vibrant body of law to address the "novel" questions that are coming before them in light of technological development, and "the needs of the society in which we live."

CONCLUSION

Recent evidence indicates that individuals have mounting concerns over unauthorized dissemination of personal information. In light of these concerns, commentators have suggested legislative solutions to this problem, and seek legislative enactments that would vest individuals with protectable rights in personal information. Despite the theoretical appeal of such solutions, however, this Note has suggested that because of weaknesses in legislative processes, courts can, and in fact should, advance tort-based consideration of the issue, to grant individuals privacy rights in personal information.

Disproportionate interest-group pressure distorts the legislative process and gives courts the responsibility to address the personal information issue on its merits, so as to weaken the legislative inertia amassed against meaningful consideration of proposals to grant individuals rights in personal information. This jurisprudential model can liberate the lawmaking capabilities of our republican government without providing judges with unrestrained power, because any court-created rule is always subject to review, and even veto, by the legislature.

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356. 113 P.2d 438 (Or. 1941).

357. *Id.* at 447.

358. *Id.*

359. *Id.*

360. *Id.* (quoting Sir Frederick Pollock, The Expansion of the Common Law 49 (Rothman Reprints 1974) (1904)).