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# Toward a Positive Theory of Privacy Law

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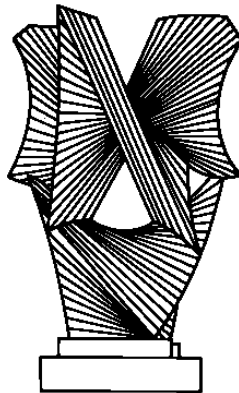
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## TOWARD A POSITIVE THEORY OF PRIVACY LAW

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## TOWARD A POSITIVE THEORY OF PRIVACY LAW

*Lior Jacob Strahilevitz\**

Privacy protections create winners and losers. So do the absence of privacy protections. The distributive implications of governmental decisions regarding privacy are often very significant, but they can be subtle too. Policy and academic debates over privacy rules tend not to emphasize the distributive dimensions of those rules,<sup>1</sup> and many privacy advocates mistakenly believe that “all consumers and voters win” when privacy is enhanced. At the same time, privacy skeptics who do discuss privacy in distributive terms sometimes score cheap rhetorical points by suggesting that only those with shameful secrets to hide benefit from privacy protections. Neither approach is appealing, and privacy scholars ought to be able to do better.

This Article reveals some of the subtleties of privacy regulation, with a particular focus on the distributive consequences of privacy rules. The Article suggests that understanding the identities of privacy law’s real winners and losers is indispensable both to clarifying existing debates in the scholarship and to helping us predict which interests will prevail in the institutions that formulate privacy rules. Drawing on public choice theory and median voter models, I will begin to construct a positive account of why U.S. privacy law looks the way it does. I will also suggest that a key structural aspect of U.S. privacy law — its absence of a catch-all privacy provision nimble enough to confront new threats — affects the attitudes of American voters and the balance of power among interest groups. Along the way, I will also make several other subsidiary contributions: I will show why criminal history registries are quite likely to become increasingly granular over time, examine the relationship between data mining and personality-based discrimination, and explain how the U.S. political system

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<sup>1</sup> One prominent exception is the feminist debate over privacy protections that shielded domestic abusers. See, e.g., Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996). Anita Allen’s recent work on the failures of the privacy torts to protect the rights of homosexuals is another important contribution. See Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CAL. L. REV. 1711 (2010).

might be biased in favor of citizens who do not value privacy to the same degree that it is biased in favor of highly educated and high-income citizens.

Part I assesses the distributive implications of two privacy controversies: the extent to which public figures should be protected from the non-consensual disclosure of information concerning their everyday activities, and the extent to which the law should suppress criminal history information. In both instances the United States is far less protective of privacy interests than Europe, and, as a result, the U.S. government has been subjected to criticism both here and abroad. The Article shows that defensible distributive judgments undergird the American position. The European approach to celebrity privacy is highly regressive, and causes elites and nonelites to have differential access to information that is valuable to both groups. The U.S. attitude toward criminal history information may be defended on pragmatic grounds: in the absence of transparent criminal history information, individuals may try to use pernicious proxies for criminal history, like race and gender. The Article then shows how these distributive implications affect the politics of privacy; California's interest groups are pushing that state toward European-style regulation, and there is an apparent emerging trend toward ever-increasing granularity in criminal history disclosures.

Part II analyzes the emerging issue of Big Data and consumer privacy. The Article posits that firms rely on Big Data (data mining and analytics) to tease out the individual personality characteristics that will affect the firms' strategies about how to price products and deliver services to particular consumers. We cannot anticipate how the law will respond to the challenges posed by Big Data without assessing who gains and who loses by the shift toward new forms of personality discrimination, so the Article analyzes the likely winners and losers among voters and industry groups. The analysis focuses on population segments characterized by high levels of extraversion and sophistication, whose preferences and propensities to influence political decisions may deviate from those of introverts and unsophisticated individuals in important ways.

Part III glances across the Atlantic, using Europe's quite different legal regime governing Big Data as a way to test some of the hypotheses articulated in Part II. Although U.S. and European laws differ significantly, the attitudes of Americans and Europeans toward privacy seem rather similar. The Article therefore posits that different public choice dynamics, especially the strength of business interests committed to data mining in the United States, are a more likely cause of the observed legal differences. But this conclusion raises the question of why European business interests committed to data mining do not have similar sway. The Article hypothesizes that structural aspects of U.S. and European privacy laws substantially affect the contents of those laws. In Europe, open ended, omnibus privacy laws permit regulators to intervene immediately to address new privacy challenges. The sectoral U.S. approach, which lacks an effective "catch-all"

provision, renders American law both reactive and slow to react. As a result, by the time U.S. regulators seek to challenge an envelope-pushing practice, interest groups supporting the practice have developed, social norms have adjusted to the practice, and a great deal of the sensitive information at issue will have already been disclosed by consumers.

Part IV examines a rare case in which U.S. regulators were able to combat a substantial privacy harm despite these structural and interest group dynamics. The fact that the National Do Not Call Registry took more than a decade to be implemented, despite its enormous popularity with voters, shows just how difficult regulating privacy can be, especially since many other privacy regulations will create a substantial number of losing consumers who are likely to buttress the interests of prospective loser firms in opposing the new regulation.

### I. PRIVACY FOR THE WEAK AND STRONG

Harmonizing the trans-Atlantic divide in information privacy is one of the most profound challenges that legal regulators and judges must confront in the twenty-first century. As Paul Schwartz's excellent essay in this volume demonstrates,<sup>2</sup> the topic remains a worthwhile one despite a burgeoning academic literature in both the United States and Europe. The Atlantic gulf seems particularly wide in the areas of public figure privacy and criminal history privacy. In both domains, the United States legal regime provides very little in the way of personal privacy protection, and the effect is manifest for both elites and marginalized people. Each of these policy choices has important distributive implications. Moreover, distributional analysis may help us understand why the law looks the way it does.

I will rely on median voter models and public choice theory to explain the content of U.S. privacy law. These are complementary models with different foci. The median voter model posits that the content of the law is pitched toward the voter who will determine whether democratically accountable government actors remain in power.<sup>3</sup> Its focus is entirely on the policy demand side, and empirical evidence for the theory is strongest when elections are highly competitive.<sup>4</sup> Voters are arrayed on a continuum from left to right, with the median voter representing the voter who supplies a candidate with the margin necessary to win an election (e.g., 50% plus one). Credibly articulating the policies that win over that voter, plus

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<sup>2</sup> See Paul M. Schwartz, *The E.U.-U.S. Privacy Collision: A Turn to Institutions and Procedures*, 126 HARV. L. REV. \_\_\_\_ (2013).

<sup>3</sup> The classic median voter model work is ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

<sup>4</sup> See Randall G. Holcombe, *The Median Voter Model in Public Choice Theory* 61 PUB. CHOICE 115, 122 (1989).

all the voters to her left or right, ensures victory for a presidential or gubernatorial candidate.

The broader public choice model incorporates both demand-side and supply-side effects and assumes that the content of legislation and regulation is driven by a combination of what voters and well-organized interest groups want and what it is in the interests of government officials to give them.<sup>5</sup> Public choice models incorporate well-known pathologies of governance, such as the role that campaign contributions play in electing candidates, the power that organized interest groups with a vested stake in particular policy domains have over candidates, and the tendency of some government actors to further their own interests at the expense of the broader public. Although median voter models have not been employed effectively in privacy scholarship, public choice theory more generally has occasionally played a helpful role in the literature.<sup>6</sup> We need not subscribe fully to either model here, since each has some explanatory power and the models are not mutually exclusive.<sup>7</sup> Used together, the two models provide a rather compelling framework for understanding the content of U.S. law in general, including its privacy rules.

#### A. *Public Figure Privacy*

In the United States, privacy protections for public figures are relatively weak, largely because judges have chosen to interpret the First Amendment in a way that places privacy and speech interests at loggerheads. It is easy to get the wrong impression from focusing on some of the most famous judicial opinions in privacy cases. After all, the landmarks include major victories for Jacqueline Kennedy Onassis<sup>8</sup> and Pamela Anderson,<sup>9</sup> and a split decision for Ralph Nader.<sup>10</sup>

Yet even if we look at the substance of those decisions, we realize that the sorts of protections those public figures were seeking were rather minimal. Onassis was seeking an injunction against a paparazzo who had already seduced a family servant to obtain information about Onassis's movements, and had physically endangered the Onassis/Kennedy family

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<sup>5</sup> See Dennis C. Mueller, *Public Choice: An Introduction*, in READINGS IN PUBLIC CHOICE AND CONSTITUTIONAL POLITICAL ECONOMY 31, 31–42 (C.K. Rowley & F.G. Schneider eds., 2008).

<sup>6</sup> The public choice scholarship usually confines itself to a portion of privacy law. Jonathan Macey analyzes the effects of the Gramm Leach Bliley banking reform legislation, including its privacy provisions — suggesting that the provisions helped some types of producers and hurt other types of producers. Jonathan R. Macey, *The Business of Banking: Before and After Gramm-Leach-Bliley*, 25 J. CORP. L. 691, 713–15 (2000). Steven Hetcher's well-known study of the Federal Trade Commission uses public choice theory to understand what motivates the agency. Steven Hetcher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041, 2044 (2000).

<sup>7</sup> See Holcombe, *supra* note 4, at 123.

<sup>8</sup> See *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

<sup>9</sup> See *Michaels v. Internet Entm't Grp., Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998).

<sup>10</sup> See *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765 (N.Y. 1970).

on multiple occasions.<sup>11</sup> She had no right to prevent paparazzi who had not yet targeted her from coming near her.<sup>12</sup> Pamela Anderson was able to enjoin a web site from publishing an explicit video sex tape that had not been intended for public consumption.<sup>13</sup> Finally, while the *Nader* court held that GM could not lawfully wiretap Ralph Nader's phones or get sufficiently close to him at a bank to see how much money he was withdrawing from his account, it also held that GM faced no invasion-of-privacy liability for hiring girls to seduce Nader, no liability for interviewing his friends and business associates under the false pretense of an employment background check in an effort to dig up dirt, and no liability for "making . . . a large number of threatening and harassing telephone calls to [Nader's] home at odd hours."<sup>14</sup> In short, while it is true that celebrities sometimes win privacy cases involving extreme facts, we must understand these victories against a Priest-Klein backdrop, where only highly uncertain cases are litigated to the courts of appeals.<sup>15</sup> As one recent survey of the U.S. cases and commentary concluded, privacy protections for people voluntarily in the public eye in the United States are basically negligible.<sup>16</sup>

In Europe, the situation is very different.<sup>17</sup> Under the European Court of Human Rights' decision in *Von Hannover I*,<sup>18</sup> Princess Caroline of Monaco — the heiress presumptive to Monaco's throne — enjoys the right under Article 8 of the European Convention on Human Rights to dine with a male companion at a crowded restaurant without worrying that photographs taken there will be disseminated. She also has the right under European human rights law to walk on the beach (and fall down unceremoniously) without having the photograph documenting her fall published in a tabloid.<sup>19</sup>

In *Von Hannover II*, decided in February of 2012, the European Court of Human Rights held that Article 8 did not require Germany to prevent the publication of a photograph of Caroline and her husband walking down the middle of a street in the Swiss resort of St. Moritz.<sup>20</sup> The German courts had held that the publication of said photograph in a fluff story discussing Princess Caroline's fabulousness and her role at a gala event was

<sup>11</sup> See *Onassis*, 487 F.2d at 991–92.

<sup>12</sup> See *id.* at 998.

<sup>13</sup> See *Michaels*, 5 F. Supp. 2d at 828.

<sup>14</sup> *Nader*, 255 N.E.2d at 770–71.

<sup>15</sup> See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 15–17 (1984). The Priest-Klein hypothesis posits that cases whose results are fairly clear under existing law will generally settle, while cases whose outcomes are uncertain under extant precedents are much more likely to be tried and appealed.

<sup>16</sup> Scott J. Schackelford, *Fragile Merchandise: A Comparative Analysis of the Privacy Rights for Public Figures*, 49 AM. BUS. L.J. 125, 147 (2012).

<sup>17</sup> *Id.* at 159–98.

<sup>18</sup> *Von Hannover v. Germany*, 294 Eur. Ct. H.R. (2004).

<sup>19</sup> *Id.* at 24–27.

<sup>20</sup> *Von Hannover v. Germany*, App. No. 40660/06, Eur. Ct. H.R. (2012).

contrary to German law.<sup>21</sup> They also held that Germany was not obliged to prevent the publication of such a photograph in an article discussing the health of Princess Caroline's ailing father, Prince Rainier III, and Caroline's decision to go on vacation while his health deteriorated.<sup>22</sup> After *Von Hannover II*, European publishers have a bit of breathing room to publish celebrity photographs taken without the subjects' consent, but they risk liability if the photograph lacks a clear nexus to a story of obvious political concern, such as the declining health of a political figure. Comparable liability is a nonstarter in the United States.<sup>23</sup>

Privacy scholars sometimes bemoan the absence of European-style privacy protections for celebrities, but the California legislature has enacted laws punishing paparazzi who trespass or otherwise gather information in a manner offensive to a reasonable person.<sup>24</sup> California has also enacted a law penalizing the publication of images that the publisher knew were photographed in violation of the state's antipaparazzi law.<sup>25</sup> As a result of these laws, California's legal environment resembles Europe's more closely than any other state's does, though making it unlawful for a tabloid to publish a picture of a celebrity walking down a crowded street remains unthinkable given prevailing interpretations of the First Amendment.

The analysis above raises a number of interesting questions, of which I will focus on two. First, what are the distributive implications of these two divergent approaches to public figure privacy? Second, what might explain why California has followed a more European tack than its sister jurisdictions?

Although the Europeans characterize the *Von Hannover I* decision as a vindication of the basic human dignity and psychological integrity of all citizens,<sup>26</sup> there is a less flattering way to characterize the case. One might understand the ruling as a regressive measure that benefits elites at the expense of the masses.

The public's appetite for celebrity news, videos, photographs, and gossip is insatiable on both sides of the Atlantic. In the United States, where the law's attitude is relatively *laissez faire*, the celebrity gossip market's annual revenues have grown to \$3 billion.<sup>27</sup> Economists regard this spend-

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<sup>21</sup> *Id.* at 4–5.

<sup>22</sup> *Id.* at 36–39.

<sup>23</sup> See, e.g., Paul M. Schwartz & Karl-Nikolaus Peifer, *Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?*, 98 CAL. L. REV. 1925, 1956–63 (2010) (discussing the divergent treatment by American and German privacy law of two factually similar “kiss and tell” cases).

<sup>24</sup> See, e.g., CAL. CIV. CODE § 1708.8(a)-(b), (d) (Deering 2011).

<sup>25</sup> *Id.* at § 1708.8(f).

<sup>26</sup> See *Von Hannover v. Germany*, 294 Eur. Ct. H.R. at 20–21 (2004).

<sup>27</sup> D.L. Stewart, *Celebrity Gossip Taking Over Mainstream News*, DAYTON DAILY NEWS, June 1, 2011, at D14; see also Carina Chocano, *How Tabloid Trainwrecks Are Reinventing Gothic Literature*, N.Y. TIMES, Sep. 4, 2011, at 45 (describing the demand for TMZ's new daily content).



ing as a revealed preference, one that shows consumers really value this commodity, however much some might wish they did not. Other revealed preferences also support the hypothesis that celebrity gossip is greatly valued by consumers. In Los Angeles, the chances of spotting a celebrity drive tourist choices about which hotels to patronize.<sup>28</sup>

The phenomenon is by no means limited to the New World. The British celebrity news industry eclipsed the £1 billion mark in 2007,<sup>29</sup> and Europe's privacy protections have not eliminated the profitability of gossip magazines on the continent.<sup>30</sup> Earlier this year, when TMZ.com and eventually *The Sun* published photographs of a naked Prince Harry partying in Las Vegas, British demand for this content was substantial.<sup>31</sup> So too with the topless Kate Middleton photographs recently published in France and Ireland.<sup>32</sup>

In their canonical 1890 article in this Law Review, Samuel Warren and Louis Brandeis argued passionately that privacy protections would raise the costs of gossip and make hard-hitting news relatively attractive to citizens,<sup>33</sup> but they probably knew then (and we certainly know now) that news and gossip are not close substitutes. If the courts were to shut down TMZ.com, its readers would not suddenly flock to the *Boston Review*.

In Europe, where the courts have made the nonconsensual publication of celebrity information legally risky, two consequences inevitably follow. First, authorized celebrity gossip will form a higher percentage of published celebrity "news." Second, elites will retain privileged access to true information about celebrities via their social networks. This means individuals who travel in the same social circles, and those who live in big cities or resorts, might catch a fleeting glance of the A-listers and B-listers as they make their way through the world.

Those consequences generate testable hypotheses. It seems plausible that in Europe, nonelites will be exposed to air-brushed and authorized accounts of celebrity behavior, while elites are more likely to know something closer to the unvarnished truth. Revelatory disclosures concerning public figures' lives will still exist, but those disclosures will be calculated

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<sup>28</sup> Andy Fixmer, *Marking Time*, L.A. BUSINESS J., December 15, 2003, at 4, available at 2003 WLNR 17612713.

<sup>29</sup> Paul Majendie, *Who Wants to Spend a Trillion? The British Do*, REUTERS, May 16, 2007 available at <http://uk.reuters.com/article/2007/05/16/life-britain-idUKNOA62272420070516>.

<sup>30</sup> See, e.g., *Spanish Media All Set to Dish It out*, NATIONAL POST (Canada), June 19, 2003 (referencing Spain's multi-million dollar gossip industry).

<sup>31</sup> See *Press Ethics: Harry's Place*, THE GUARDIAN, Aug. 25, 2012, at 42, available at [www.guardian.co.uk/commentisfree/2012/aug/24/press-ethics-harry/print](http://www.guardian.co.uk/commentisfree/2012/aug/24/press-ethics-harry/print).

<sup>32</sup> See *Printing Topless Photos of Kate Is 'Win-Win' for Irish Daily Star*, THE TELEGRAPH, Sept. 15, 2012, [www.telegraph.co.uk/news/uknews/kate-middleton/9545300/Printing-topless-photos-of-Kate-is-win-win-for-Irish-Daily-Star.html](http://www.telegraph.co.uk/news/uknews/kate-middleton/9545300/Printing-topless-photos-of-Kate-is-win-win-for-Irish-Daily-Star.html).

<sup>33</sup> See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

to enhance the public figure's stature or marketability.<sup>34</sup> In short, precisely because authorized information about public figures is a poor substitute for unauthorized information about these figures, legal restrictions on access to celebrity information may have a fundamentally regressive distributive impact.<sup>35</sup> Such restrictions can take a sort of knowledge that people value, and makes it less accessible to people who do not reside in the right neighborhoods or belong to the right clubs. At the end of the day the dignitary concerns of celebrities may justify such a regressive effect. Or we might view this regressivity as tolerable if society's privacy rules encourage more talented people to seek public office or pursue acting careers. But the debate in Europe has not confronted this evidently antipopulist aspect of the Continent's privacy laws.

As noted above, California, more than any other American jurisdiction, has attempted to craft privacy laws that resemble Europe's. California's penchant for electing movie stars as governors notwithstanding, there is little reason to believe that the protective content of California privacy laws is the result of systematic preference differences between California's median voter and, say, Oregon's or Arizona's. Admittedly, more Californians than Oregonians likely aspire to become celebrities, though this tendency probably does not drive the content of state law.

The divergent laws are intuitively a function of existing celebrities being overwhelmingly concentrated in California, and those celebrities exerting their political clout in that state via organized interest groups. To be sure, the media organizations that make money off unauthorized celebrity coverage have large California presences, but their coverage is consumed throughout the United States, whereas the costs imposed by that coverage are largely confined within the Golden State's borders. Antipaparazzi rules thus benefit powerful Californians at the expense of Nebraskans. The public choice calculus in Sacramento therefore differs sharply from that in Washington, D.C.

Seen in these terms, we can construct a plausible account for why California has long been the American jurisdiction with the greatest degree of privacy protection. California's large number of politically powerful celebrities recognized that they could not advocate for stronger privacy protections for themselves without simultaneously providing the same privacy protections for every California resident. The state's legislation has there-

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<sup>34</sup> It is helpful to analogize to the content difference between parodic fair use and the authorized derivative works that would be created if parodic uses were not protected by the First Amendment. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590–93 (1994).

<sup>35</sup> Privacy rights and the right of publicity both help define the extent to which unauthorized content concerning public figures is published. For a helpful comparison of rights of publicity in the United States and the United Kingdom, see Marshall Leaffer, *The Right of Publicity: A Comparative Perspective*, 70 ALB. L. REV. 1357 (2007). For perceptive analysis of privacy's historically elitist bent, see LAWRENCE M. FRIEDMAN, *GUARDING LIFE'S DARK SECRETS* (2007).

fore closely tracked the trend Jim Whitman described in Europe: given the choice between lowering elites' privacy protections to the level prevalent among non-elites and raising everyone's privacy rights to the level enjoyed by elites, Europe's ruling classes embraced the latter over the former.<sup>36</sup> Its readiness to embrace public-figure privacy notwithstanding, California has so far resisted some measures that would seek to enhance privacy protections for non-elites. For example, ongoing efforts to "ban the box" by prohibiting public employers from asking prospective employees whether they have committed any criminal offenses have not been enacted statewide, though a few northern California municipalities have embraced those restrictions.<sup>37</sup> Indeed, the comparison between the privacy of public figures and ex-offenders is a rich one that deserves sustained attention.

### B. Criminal History Information

If rights against paparazzi are a bread-and-butter concern for society's A-listers, then the privacy of criminal history information is the equivalent for much of the underclass. In previous scholarship, I have explored the distributive dimensions of criminal history disclosures.<sup>38</sup> The available empirical evidence suggests that in this context privacy and antidiscrimination values sometimes come into conflict. Stated briefly the conundrum is as follows: Employers wish to discriminate against those with criminal histories because they view those job applicants as untrustworthy. To that end, they will refuse to hire applicants with criminal records if they can identify them easily. If they cannot discern readily which applicants have criminal records, they will engage in a more obnoxious strategy, using race and gender as proxies for criminal history and then shying away from hiring African American males regardless of their criminal histories.<sup>39</sup> This form of statistical discrimination is unlawful, but it unfortunately remains prevalent. Indeed, the concern over statistical discrimination perhaps explains why in Europe criminal history information is available to employers in limited circumstances, but is not available to the public more generally.<sup>40</sup>

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<sup>36</sup> See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1164–71 (2004).

<sup>37</sup> See Eumi K. Lee, *The Centerpiece to Real Reform? Political, Legal, and Social Barriers to Reentry in California*, 7 HASTINGS RACE & POVERTY L.J. 243, 256 (2010); Carolyn Said, *Clean Slate Day Gives some lawbreakers 2nd chance*, S.F. CHRONICLE, June 18, 2012, at D1.

<sup>38</sup> LIOR JACOB STRAHILEVITZ, INFORMATION AND EXCLUSION 141–46 (2011).

<sup>39</sup> *Id.*; cf. FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 186–87 (2003) (discussing the potential for airline passenger screeners to overweight passenger attributes like Middle Eastern origin in assessing the risk that a passenger is a terrorist, and noting the possibility that weighted algorithms based on data-mining might ameliorate this behavior).

<sup>40</sup> See James B. Jacobs & Dimitra Blitsa, *Sharing Criminal Records: The United States, the European Union and Interpol Compared*, 30 LOY. L.A. INT'L & COMP. L. REV. 125, 142–43 (2008).

In the 1980's and 1990's, criminal history information in the United States became increasingly available to employers and other members of the general public. For reasons I have explored elsewhere, this transition appears to have improved the job prospects of African American men without criminal records, at the expense of Caucasians with criminal records.<sup>41</sup> It is unlikely that legislatures anticipated this distributive effect, and I know of no evidence suggesting that organizations representing African American men without criminal records lobbied fiercely on its behalf,<sup>42</sup> nor of any evidence that interest groups representing Caucasians with criminal records (to the extent that such interest groups exist) lobbied against it. Most likely, this particular result of the legislation was unanticipated.

The extant legal literature has failed to notice a related phenomenon. Once a decision is made to publicize criminal history information, the granularity of those disclosures will determine which groups benefit and which groups suffer. Research suggests public support for increased transparency for some criminal records,<sup>43</sup> likely because voters feel like they "win" when they can evaluate whether a prospective babysitter, date, neighbor, or business partner has had previous run-ins with the law. Less obviously, even convicted criminals and those who have their interests at heart might favor increased granularity.

After a criminal registry is publicized, registrants who have committed the least-serious crimes typically favor more granular disclosure (so as to create a separating equilibrium), and those who have committed the most-serious crimes typically prefer less granularity (fostering a pooling equilibrium).<sup>44</sup> For instance, the nineteen-year-old who has committed statutory rape with a sixteen-year-old would prefer not to have his crime publicized on the Internet at all. But once the decision to publicize the crime has been made, the statutory rape convict will always prefer to have the nature of his crime specified in great detail, so as to avoid being lumped together with an eighteen-year-old who has raped a much younger child. Disclosures by the state will be more credible than the nineteen-year-old's voluntary disclosures of the same information. In essence, then, the state is per-

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<sup>41</sup> See STRAHILEVITZ, *supra* note 38, at 141–46.

<sup>42</sup> The NAACP continues to work against the accessibility of criminal history information. *See, e.g., 'Ban the Box' Bill Signed Into Law in Philadelphia*, NAACP, <http://www.naacp.org/news/entry/ban-the-box-bill-signed-into-law-in-philadelphia> (last visited Nov. 15, 2012).

<sup>43</sup> See Yolanda Nicole Brannon et al., *Attitudes About Community Notification: A Comparison of Sexual Offenders and the Non-offending Public*, 19 *SEX ABUSE* 369, 374–75 (2007) (finding that 91.7% of non-criminal survey participants found community notification laws for sex offenders fair, and 53.4% found such laws to be moderately to very effective at reducing sex offenses).

<sup>44</sup> The classic work on signaling, separating equilibriums, and pooling equilibriums is A. MICHAEL SPENCE, *MARKET SIGNALING* 92–97 (1974). Prominent applications to law include ERIC A. POSNER, *LAW AND SOCIAL NORMS* 18–22 (2000).

forming a certification function through criminal registries. And even the eighteen-year-old who has committed one heinous offense may prefer to be differentiated from a repeat offender child predator in a public database. Only the very worst offenders have nothing to gain from increased granularity, and these individuals are likely to be the least politically powerful members of society. The number of voters opposed to increased granularity should approach zero, even in a jurisdiction that doesn't disenfranchise felons.

If I have described this dynamic correctly, then it generates a testable hypothesis. Over time, we should expect to see disclosures on criminal history becoming increasingly granular in the United States, with more details provided about the nature and context of the crimes committed. To be sure, there is an obvious stopping point: at some point political payoffs for legislators voting in favor of increased granularity dissipate. But the trend should be in one basic direction. To date, this trend towards increased granularity has manifested itself,<sup>45</sup> and we should expect that in the long run states' disclosure efforts, presently focused on sex crimes, will be expanded to include a host of other crimes, like arson and animal abuse.<sup>46</sup>

## II. BIG DATA AND CONSUMER PRIVACY

This same approach to understanding separating and pooling equilibriums can help us ascertain who wins or loses from increased transparency of data about consumers' lives. The combination of extensive databases and cheap microprocessors has spawned an analytics industry that is changing the ways in which consumer products are marketed and priced. As Julie Cohen's contribution to this volume defines it, Big Data "is shorthand for the . . . configuration of information processing hardware capable of sifting, sorting, and interrogating vast quantities of data [and the process of] mining the data for patterns, [and] distilling the patterns into predictive analytics."<sup>47</sup> Big Data represents the key privacy challenge of the twenty-first century. In this Part I will show that the emergence of Big Data creates clear winners and losers, in much the same way that privacy rules governing criminal history and public figures do. I will also show how understanding the identities of those winners and losers will help explain why the United States has taken a rather laissez-faire attitude towards Big Data and why that lack of intervention is likely to continue.

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<sup>45</sup> See generally WAYNE LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA (2009).

<sup>46</sup> California now has a "Sex and Arson Registry." See Cal. Penal Code § 290.09(b)(2) (Deering 2012). Several states are considering legislation to create animal abuse registries. See Richard Simon, *More States Plan to Start Registries in Hope of Curbing Animal Abuse*, BALTIMORE SUN, Jan. 21, 2012, at 11A.

<sup>47</sup> Julie E. Cohen, *What is Privacy For?*, 126 HARV. L. REV. \_\_\_\_, 33 (forthcoming 2013).

Analytics and data mining have produced some striking results. Perhaps most famously, a credit card issuer determined that individuals who have purchased felt pads to be placed on the bottoms of chairs to prevent the scratching of hardwood floors turn out to be excellent credit risks.<sup>48</sup> The same issuer found that patrons who had frequented Sharx, a Quebec bar, were terrible credit risks.<sup>49</sup> More recently Orbitz discovered that customers surfing the web with Apple products are more likely to choose costlier, luxurious hotels, and people using PCs are more likely to opt for no-frills accommodations.<sup>50</sup> It then used this data-mined propensity to prioritize search results for users of these machines.<sup>51</sup> Academic researchers similarly determined that they were shown lower-priced search results when they accessed sites like Google and Cheaptickets.com using computers that had previously accessed price-aggregation web sites than when they accessed the same sites using computers that had previously visited sites selling luxury products.<sup>52</sup> The same study found that Internet retailers were charging higher prices to users surfing the Internet from Massachusetts exurbs and lower prices to those searching from Massachusetts cities,<sup>53</sup> where the concentration of brick-and-mortar competition was presumably greater. Data mining has uncovered similar correlations, some of them potentially more troubling. For example, Katherine Guthrie and Jan Sokolowsky recently determined that obese consumers are approximately 20% more likely to become delinquent on a mortgage than non-obese consumers.<sup>54</sup> Assuming this sort of finding holds up, it suggests that lenders may (or already have) become avid purchasers of “Big Databases” that shed light on individuals’ diet and exercise.

In this Part, I will focus on the secondary effects of privacy protections. I will, for the time being, put to one side privacy law’s primary effects — the harms that people suffer directly from the collection or disclosure of personal information itself — and focus instead on the wider implications

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<sup>48</sup> Charles Duhigg, *What Does Your Credit-Card Company Know about You?*, N.Y. TIMES, May 12, 2009, at MM40.

<sup>49</sup> *Id.*

<sup>50</sup> Dana Mattioli, *On Orbitz, Mac Users Steered to Pricier Hotels*, WALL ST. J., June 26, 2012, at A1, <http://online.wsj.com/article/SB10001424052702304458604577488822667325882.html>.

<sup>51</sup> *See id.*

<sup>52</sup> Jakub Mikians et al., *Detecting Price and Search Discrimination on the Internet 3–5* (October 2012) (Hotnets ‘12 Conference paper), *available at* [http://www.tid.es/es/Lists/Scientific\\_Publications/Attachments/251/hotnets2012\\_pd\\_cr.pdf](http://www.tid.es/es/Lists/Scientific_Publications/Attachments/251/hotnets2012_pd_cr.pdf) (finding a 23% price differential).

<sup>53</sup> *Id.* at 5.

<sup>54</sup> Katherine Guthrie & Jan Sokolowsky, *Obesity and Credit Risk 27* (April 9, 2012) (unpublished manuscript), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1786536](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1786536). *Cf.* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1539–40 (1998) (noting the observed correlation between motorists who do not wear seat belts and those who drive while intoxicated, and positing that both behaviors are common among individuals with high discount rates).

of such collection and disclosure. It should go without saying that even these primary effects have distributive implications as well. For example, the use of Big Data may entail privacy costs for individuals who don't want people or even machines to have access to information that consumers regard as personal. Consumers will be highly heterogeneous in the way they experience these consequences: some will experience significant harm and others will not feel harmed in any way.<sup>55</sup> These harms are not my focus here because they are already well understood.<sup>56</sup> That said, there are sensible reasons to give them a great deal of weight in forming normative judgments about the desirability of privacy protections.

#### A. *Big Data, Big Personality*

Firms regularly use “Big Data” to identify patterns that can help predict future consumption choices. For example, Target famously used data mining to observe that pregnant women were likely to buy calcium, magnesium, and zinc supplements in their first trimester, unscented lotion early in their second trimester, and hand sanitizer close to their due dates. Target used this information to predict delivery dates so that it could target coupon mailers for diapers and baby gear at the optimal times for each of its pregnant customers.<sup>57</sup> Similarly, retailers can data mine for external circumstances that affect purchasing decisions, recognizing that increasing stocks of masking tape in Southeastern stores is a good idea during hurricane season.

In many instances, however, data mining's utility stems from its ability to predict consumer behavior based on cognitive factors rather than biological patterns or external stimuli. Consumption choices like “felt pads or not?” and “Mac or PC?” plausibly predict future consumer decisions *because* the consumption choice reveals something about the consumer's personality. The person who purchases felt pads is likely to be more conscientious and may have a lower discount rate than a non-purchaser. It is not surprising that this set of attributes would correlate well with creditworthiness. Similarly, as Apple's brilliant commercials with John Hodgman and Justin Long reminded us, Apple users are willing to pay a premium for elegance, accessibility, and smart design. Quite apart from the question of disposable income, it is no wonder that Apple users would be more likely to pay a bit more for a higher-quality hotel. If the ads are to be believed, Macs and PCs were for fundamentally different sorts of people.

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<sup>55</sup> See *infra* text accompanying note 128.

<sup>56</sup> See, e.g., M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L.J. 1131, 1151–54 (2011); Matthew Tokson, *Automation and the Fourth Amendment*, 96 IOWA L. REV. 581 (2011).

<sup>57</sup> Charles Duhigg, *Psst, You in Aisle 5*, N.Y. TIMES, Feb. 19, 2012, at MM30.

The genius of Big Data is that by watching individuals' purchasing, reading, and browsing habits, marketers can identify their personality traits.<sup>58</sup> Analytics substitute for subjecting individuals to a battery of psychological tests and plausibly could be a superior alternative because analytics rely on observed behavior rather than cheap talk (self-assessments).

In the last decade, political scientists and computer scientists have begun to mine insights from personality research with regularity. This new research helps explain why American privacy legislators and regulators might resist restrictions on disclosure.

The dominant paradigm among psychologists who study personality is the "Big Five" model.<sup>59</sup> Under the Big Five model, individuals can be categorized on the basis of five essential personality characteristics: Extraversion (assertiveness, gregariousness, energy), Agreeableness (generosity, gentility), Conscientiousness (sense of duty, reliability, orderly), Neuroticism (anxiety, depression, irritability), and Openness (creativity, introspection, receptivity to new experiences).<sup>60</sup>

Psychologists have made concurrent progress teasing out which observable behaviors correlate with Big Five attributes. For example, a fascinating 2008 study revealed that the appearances of individuals' bedrooms correlate with their absent occupants' ideologies. Liberals' bedrooms were significantly more likely to be colorful, distinctive, and filled with books, music, and art supplies. Conservatives' bedrooms were judged to be significantly neater, cleaner, better organized, and better lit, with an abundance of sports paraphernalia, American flags, alcohol bottles and containers, laundry baskets, and ironing boards.<sup>61</sup> The same study, like others before it, found powerful connections between liberalism and the Big Five Openness personality orientation and a significant but less strong correlation between conservatism and the Conscientiousness orientation.<sup>62</sup>

Because consumption choices reveal personality attributes, the collection of Big Data improves firms' abilities to engage in personality discrimination. Setting aside the extreme case of personality disorders (which implicates the Americans with Disabilities Act), personality discrimination is

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<sup>58</sup> Much of the research on Big Data is proprietary. For a recent study of a system for using automated textual analysis of social media postings to predict personality, see Ramya Sharada K et al., *A Text Analysis Based Seamless Framework for Predicting Human Personality Traits from Social Networking Sites*, 10 I.J. INFO. TECH. & COMPUTER SCI. 37 (2012).

<sup>59</sup> See Lewis R. Goldberg, *An Alternative "Description of Personality": The Big-Five Factor Structure*, 59 J. PERSONALITY & SOC. PSYCHOL. 1216, 1216–17 (1990).

<sup>60</sup> David P. Schmitt et al., *The Geographic Distribution of Big Five Personality Traits: Patterns and Profiles of Human Self-Description Across 56 Nations*, 38 J. CROSS-CULTURAL PSYCHOL. 173, 176–77 (2007).

<sup>61</sup> See Dana R. Carney et al., *The Secret Lives of Liberals and Conservatives: Personality Profiles, Interaction Styles, and the Things They Leave Behind*, 29 POL. PSYCHOL. 807, 832–34 (2008).

<sup>62</sup> See *id.* at 824.



widely tolerated and practiced in the American marketplace.<sup>63</sup> As long as it is not a cover for unlawful forms of discrimination (race, gender, age, etc.), a boss's determination that a job applicant "rubs me the wrong way," or "doesn't seem dynamic," or "lacks creativity" is an appropriate basis for decisions not to hire applicants. The same sorts of discrimination that are tolerated in employment law are permitted in the sale of consumer goods and services.<sup>64</sup> Maybe the law's tolerance for personality discrimination ought to be questioned, but those are not questions that American antidiscrimination law presently regards as close ones.

### B. Extraverts Versus Introverts

Extraversion is evidently the key Big Five personality characteristic that differentiates individuals on the basis of privacy preferences. Extraversion scores are a composite of six related attributes: warmth, gregariousness, assertiveness, activity/energy, excitement-seeking, and positive emotions.<sup>65</sup> Individuals who score highly on extraversion are much more likely to use Facebook and to disclose truthful information about themselves on social networks.<sup>66</sup> Extraverted people differ from introverted people in other important respects as well.<sup>67</sup> Critically, extraverted individuals appear significantly more likely to participate in the political process.<sup>68</sup> Extraverts are more likely to feel efficacious in the political process and more likely to try to persuade people they know to vote for

<sup>63</sup> See Deirdre M. Smith, *The Paradox of Personality: Mental Illness, Employment Discrimination, and the Americans with Disability Act*, 17 GEO. MASON U. C.R. L.J. 79, 105–09 (2006); Susan J. Stabile, *The Use of Personality Tests as a Hiring Tool: Is the Benefit Worth the Cost?*, 4 U. PA. J. LAB. & EMP. L. 279, 286–89 (2002).

<sup>64</sup> Cf. Stabile, *supra* note 63, at 286 ("The law does not prohibit employers from using personality tests as part of the hiring process . . .").

<sup>65</sup> Nigel Nicholson, *Personality and Entrepreneurial Leadership: A Study of the Heads of the UK's Most Successful Independent Companies*, 16 EUR. MGMT. J. 529, 533 tbl.1 (1998).

<sup>66</sup> Baiyun Chen & Justin Marcus, *Students' Self-Presentation on Facebook: An Examination of Personality and Self-Constraint Factors*, 28 COMPUTERS IN HUM. BEHAV. 2091, 2097 (2012); Tracii Ryan & Sophia Xenos, *Who Uses Facebook? An Investigation into the Relationship Between the Big Five, Shyness, Narcissism, Loneliness, and Facebook Usage*, 27 COMPUTERS IN HUM. BEHAV. 1658, 1662 (2011).

<sup>67</sup> Extraversion itself does not appear to predict the ideological orientation of voters. Obama and McCain voters exhibited no statistically significant differences in extraversion in a recent study, though they did differ significantly with respect to conscientiousness and agreeableness. Ozlem Dirilen-Gumus, *Who Voted for Whom? Comparing Supporters of Obama and McCain on Value Types and Personality Traits*, 42 J. APPLIED SOC. PSYCHOL. 2879, 2889 (2012).

<sup>68</sup> See Matthew Piszczek & Michelle Kaminski, *It Isn't Always Rational: The Psychology of Voting and Lessons for Labor*, 35 LABOR STUD. J. 116, 122 (2010); see also Mikko Mattila et al., *Personality and Turnout: Results from the Finnish Longitudinal Studies*, 34 SCANDINAVIAN POL. STUD. 287, 292, 300–02 (2011) (concluding that the weight of the evidence, along with a new longitudinal study, support the extraversion–political participation link).

political parties or candidates.<sup>69</sup> The effect is particularly pronounced for less-educated voters.<sup>70</sup>

In an important new paper, Alan Gerber and his co-authors estimated that individuals who are very extraverted (two standard deviations above the median) are 7.5% to 9.8% more likely to be high-turnout voters than individuals at the median of extroversion.<sup>71</sup> The magnitude of this extraversion effect on participation is comparable to a two-standard deviation increase in education or income, the two demographic variables long understood to be key drivers of differential voting propensities.<sup>72</sup> The Gerber study finds similarly strong correlations between extraversion and other forms of political participation, such as donating to a candidate, volunteering for a candidate or party, or attending a political rally.<sup>73</sup> This data shows that there are people within the larger universe of American voters who are simultaneously quite willing to share lots of truthful information about themselves online and to become involved in the political process. By contrast, individuals who are less likely to share information about themselves online are less likely to have their interests represented in the political process.<sup>74</sup>

This data means that a political system that relies on voluntary political participation will likely contain a bias against the enactment of strict privacy regulations.<sup>75</sup> Voters and activists are likely to be people who care less about their own privacy and are less favorably disposed to privacy regulations than non-voters and non-activists. American attitudes toward privacy are highly heterogeneous, with approximately 25% of the population valuing privacy a great deal (privacy fundamentalists), 20% of the population not valuing their own privacy and having a difficult time understanding why anyone would care about privacy (privacy unconcerned), and the remaining 55% of the population approaching privacy in a pragmatic way

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<sup>69</sup> Christopher A. Cooper, *The Big Five Personality Factors and Mass Politics*, 43 J. APPLIED SOC. PSYCHOL. 68, 75, 77 (2013).

<sup>70</sup> Mattila et al., *supra* note 68, at 302.

<sup>71</sup> Alan S. Gerber et al., *Personality Traits and Participation in Political Processes*, 73 J. POLITICS 692, 698 (2011).

<sup>72</sup> *See id.* at 701–03.

<sup>73</sup> *Id.* at 701.

<sup>74</sup> The correlation may be intuitive, since political activism generally reveals the activist's otherwise private beliefs about issues of public concern.

<sup>75</sup> I caveat this sentence because it is possible that individuals who are likely to over-share information are self-aware about this attribute and regard it as a problem, prompting them to support privacy regulations as a mechanism of binding themselves to the mast. *Cf.* Jolls et al., *supra* note 54, at 1479 (“[M]any people recognize that they have bounded willpower and take steps to mitigate its effects.”). That said, this hypothesis runs counter to Westin's characterization of the privacy unconcerned (discussed *infra*, TAN 76), so I do not believe it is supported by the available evidence. More study is certainly warranted, since the assumption that Westin is right looms large in my analysis.

that balances competing interests (privacy pragmatists).<sup>76</sup> If the privacy unconcerned are indeed more disposed to participate heavily in the political process, with privacy fundamentalists tending to remain on the sidelines in political debates, the smaller group's voice in policy debates may be just as loud or even louder than the larger cohort's.<sup>77</sup>

This bias in favor of the privacy unconcerned may well be reinforced by a public choice theory dynamic. Victoria Schwartz has argued that elected officials and business leaders are likely to value their own privacy far less than typical voters and consumers do.<sup>78</sup> After all, these individuals are selected from the ranks of those who were willing to surrender their own personal privacy in order to be vetted and selected for leadership positions. Capable people who intensely value their own privacy likely opted for other sorts of careers. Schwartz argues that, as a result, government and business leaders are likely to be privacy unconcerned individuals who are unsympathetic to privacy protections.<sup>79</sup> The available psychological evidence supports Schwartz's hypothesis, with politicians and business leaders both scoring high on extraversion, which is correlated with a lack of concern for personal privacy.<sup>80</sup> The literature also suggests that a relationship exists between CEO personality traits like extraversion and firm performance,<sup>81</sup> so chief executive preferences could well affect their firms' privacy practices.

### C. Rich versus Poor

Big Data poses hard questions for lawyers and policymakers. As with criminal history information, greater transparency has amounted to a shift from pooling equilibriums — in which undifferentiated consumers are offered products and services on the same terms — toward separating equilibriums, where consumers are sliced into smaller and more homogeneous cohorts.

Figuring out whether an individual with a given level of income will benefit from Big Data can be difficult. On the one hand, such precise dis-

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<sup>76</sup> Alan F. Westin, "Whatever Works" *The American Public's Attitudes Toward Regulation and Self-Regulation on Consumer Privacy Issues*, NAT'L TELECOM. & INFO. ADMIN., available at <http://www.ntia.doc.gov/page/chapter-1-theory-markets-and-privacy> (last visited Jan. 14, 2013).

<sup>77</sup> Cf. Gerber et al., *supra* note 71, at 704 ("[P]olitical participation may attract individuals with distinctive political attitudes, creating a politically engaged citizenry whose views are not representative of the broader public.").

<sup>78</sup> Victoria Schwartz, *Disclosing Corporate Disclosure Policies*, 40 FLA. ST. U. L. REV. (forthcoming 2013) (manuscript at 19) (on file with author) [hereinafter, Schwartz, *Corporate Disclosure Policies*]. Schwartz's in-progress paper, *Troubling Leadership Sorting*, develops this idea at great length.

<sup>79</sup> Schwartz, *Corporate Disclosure Policies*, *supra* note 78, at 19.

<sup>80</sup> See, e.g., Nicholson, *supra* note 65, at 536 tbl.3; Steven J. Rubenzer et al., *Assessing the U.S. Presidents Using the Revised NEO Personality Inventory*, 7 ASSESSMENT 403, 407 (2000).

<sup>81</sup> Hao Zhao et al., *The Relationship of Personality to Entrepreneurial Intentions and Performance: A Meta-Analytic Review*, 36 J. MGMT. 381, 392–94 (2010).

crimination may favor the poor because it allows producers to price discriminate, enabling firms to sell to consumers whose willingness to pay exceeds the marginal cost of production but falls below the price that would prevail if all consumers were charged the same amount. Under perfect price discrimination, a producer with market power can charge customers at their precise willingness to pay. Output and producer surplus are both maximized as a result.<sup>82</sup>

Such price discrimination is impossible in a perfectly competitive market, and in those markets where segmenting consumers or limiting arbitrage is very difficult.<sup>83</sup> But because most markets are imperfect in some respects, the potential for firms to price discriminate is significant.<sup>84</sup> Information privacy rules that make it difficult for firms to collect or access consumer information can have regressive distributive effects by preventing consumers whose willingness to pay barely exceeds marginal cost from obtaining goods and services.

In other respects, information privacy protections may have progressive propensities. While economists tend to focus on price discrimination, service discrimination is an important analog. Service discrimination references the quality of treatment a potential buyer gets when patronizing a commercial establishment. Salespeople may treat well-dressed patrons kindly at an expensive boutique, and may ignore those who are wearing shabby garments. Or high-value customers might be routed to a well-trained customer service agent while lower-value customers are immediately transferred to an automated voice recognition system.<sup>85</sup> Companies like Best Buy have invested heavily in trying to target their stores to customers with particular profiles, while trying to repel bargain-hunting shoppers and those who engage in strategic behavior like returning merchandise and then buying back the returned merchandise at a discount.<sup>86</sup> Best Buy's strategy was not to maximize the number of customers coming into its stores or even to maximize sales, but to ensure that it catered to more profitable customers while directing unprofitable customers to its competitors.<sup>87</sup>

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<sup>82</sup> Lars A. Stole, *Price Discrimination and Competition*, in 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 2229 (M. Armstrong & R. Porter eds., 2007).

<sup>83</sup> *Id.* at 2226.

<sup>84</sup> *See id.* at 2292.

<sup>85</sup> For an engaging study of the challenges associated with implementing a service discrimination scheme like this in Northern Ireland's banking industry, see Danielle McCartan-Quinn et al., *Exploring the Application of IVR: Lessons from Retail Banking*, 24 SERVICE INDUS. J. 150 (2004). Interestingly, the program was not popular among customers, who felt that all customers should have the ability to speak with a customer service representative. *Id.* at 164.

<sup>86</sup> *See* Gary McWilliams, *Minding the Store: Analyzing Customers, Best Buy Decides Not All Are Welcome*, WALL ST. J., Nov. 8, 2004, at A1.

<sup>87</sup> *Id.*

Efforts to weed out these unprofitable “demon customers”<sup>88</sup> will affect service quality. Many consumers derive utility from the experience of trying on clothing or taking a car for a test drive even if they are quite unlikely to buy. Poor individuals who own one nice suit may experience dignitary benefits if salespeople treat them like good sales prospects. Permitting salespeople to distinguish in a more fine-grained manner among consumers on the basis of ability to pay necessarily cements a greater degree of service discrimination than would obtain in a pooling equilibrium. By thwarting sorting, information privacy can benefit poor consumers, albeit at the expense of salespeople (who may not be well off themselves) and well-off consumers (who will have to invest in costly signals to get the attention of salespeople).<sup>89</sup>

Alas, even this progressive silver lining has its cloud. As with criminal history, there can be perverse consequences of using privacy to diminish service discrimination. Service discrimination is often rational discrimination, and salespeople may feel a strong impulse to engage in statistical discrimination if they cannot assess an unknown customers’ willingness to pay via Big Data tools. Not surprisingly, then, in the pre-Big Data world, salespeople relied heavily on race and gender proxies, giving more attentive service to women and to Caucasians than to men and African Americans.<sup>90</sup> Regulations that enhance consumer privacy will not stop firms from discriminating against (or in favor of) particular customers, but they can change the criteria on which said discrimination is based.

The use of Big Data has allocative efficiency implications too. To the extent that it permits better targeting of advertisements, Big Data can lower the costs of producing goods and services, which can result in lower prices for everyone. I will not belabor the point, since it is familiar. Less obvious is the fact that the affluent are more likely than the poor to own stock, such that they will benefit as shareholders from efficiency gains generated by Big Data.

So far, I have argued that protecting privacy seems to thwart price and service discrimination while fostering statistical discrimination on the basis of race and lowering production costs. Perhaps counterintuitively, the rich-versus-poor dichotomy has ambiguous effects on the politics of privacy

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<sup>88</sup> The term comes from LARRY SELDEN & GEOFFREY COLVIN, *ANGEL CUSTOMERS & DEMON CUSTOMERS* (2003).

<sup>89</sup> Depriving salespeople of information about consumers will cause them to devote more attention to repeat customers, and less attention to new customers, whose ability to pay for products is less certain. For example, all else being equal, rational salespeople will provide higher quality service to locals than tourist shoppers.

<sup>90</sup> See Thomas L. Ainscough & Carol M. Motley, *Will You Help Me Please? The Effects of Race, Gender and Manner of Dress on Retail Service*, 11 *MARKETING LETTERS* 129, 135–36 (2000); see also Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 *HARV. L. REV.* 817, 842–52 (1991) (discussing statistical discrimination on the basis of race in automobile sales).

regulation, whereas the introvert-versus-extravert dichotomy has rather clear implications.

*D. Sophisticated versus Unsophisticated Consumers*

Consumers vary significantly with respect to the sophistication with which they navigate their movements through the world of Big Data. Some consumers act as if they are not being watched at all, revealing information about their attributes in ways that will trigger price and service discrimination on the part of firms.<sup>91</sup> They may be unable to appreciate whether they win or lose as a result of privacy protections.<sup>92</sup> They therefore should not be expected to choose the products and privacy features that best vindicate their interests, nor should we expect them to vote their interests when considering candidates for office. Other consumers are either savvier about the way the world works or care more about maintaining an advantageous consumer profile. These sophisticated consumers will engage in strategic selective disclosures or sham transactions — purchasing more felt pads than they need using credit cards and paying cash if they ever buy a beer at Sharx.<sup>93</sup> Just as authorized celebrity gossip seems to be a largely whitewashed version of all celebrity gossip, voluntarily revealed consumer behavior represents a rosier account of individual choices than would be provided by scrutinizing both public and secret consumer behavior.

The harder a predictive algorithm's content is to discern and game, the more that algorithm will harm unsophisticated consumers. The most sophisticated consumers may even be able to thwart price discrimination on the purchasing side by, for example, using price aggregation websites to find the cheapest deals for commodities — some sellers offer lower prices to customers who reach a product page via a shopbot rather than via the seller's own home page.<sup>94</sup> Recognizing that these consumers are presumably willing to incur branch-search and switching costs, firms trying to sell them products may lower prices, though they might also stop trying to sell

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<sup>91</sup> As Dan Solove notes in this volume, the complexity of privacy policies do not help matters. See Daniel J. Solove, *Privacy Self-Management and the Consent Paradox*, 126 HARV. L. REV. \_\_\_\_ (discussing the “uninformed individual”).

<sup>92</sup> A great deal of excellent research by Alessandro Acquisti and his co-authors has demonstrated how much difficulty consumers encounter when making choices that affect their privacy interests. See, e.g., Leslie K. John et al., *The Best of Strangers: Context-Dependent Willingness to Divulge Personal Information* (Carnegie Mellon Working Paper, July 6, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1430482](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1430482).

<sup>93</sup> See *supra* TAN 49–50.

<sup>94</sup> Mikians, *supra* note 52, at 5–6; see also Michael D. Smith, *The Impact of Shopbots on Electronic Markets*, 30 J. ACAD. MARKETING SCI. 446, 451 (2002). As this example indicates, sophisticated consumers and affluent consumers do not overlap perfectly. In some cases, less affluent consumers may have lower opportunity costs for “coupon clipping” and other price-lowering strategies.

to them altogether.<sup>95</sup> We can conceptualize consumers' use of these sites as a signal that discloses to producers their lack of willingness to surrender consumer surplus.

Thus, sophisticated consumers can take affirmative steps to receive more aggressive discounts in markets characterized by imperfect competition.<sup>96</sup> Voluntary disclosure of information pertinent to Big Data analytics is another such step. If firms are permitted to collect and use consumer information, but only with the consent of individual consumers, then sophisticates with beneficial profiles may voluntarily disclose their information to get good deals. Sophisticates with less beneficial profiles will be more reluctant to disclose. Over time, however, unraveling may ensue, with firms assuming the worst about those consumers who have not disclosed "voluntarily," prompting the individuals with the least discreditable information profiles within the residual group to disclose. The unraveling process comes to an end when the only people who have not disclosed their personal information are the people whose disclosure would merely confirm the "worst case scenario" assumptions already held about them by firms.<sup>97</sup>

Firms possessing private information about individual consumers may prefer this regime of self-disclosure, since the firms with the best information have an advantage when it comes to pricing strategies.<sup>98</sup> That said, firms without comparative information advantages over their competitors will usually prefer compelled, universal disclosure to optional disclosure that induces unraveling. Voluntary disclosure always entails some strategic nondisclosure, especially by sophisticates. Voluntary disclosure regimes might prompt unwarranted discrimination against privacy fundamentalists who cannot be disaggregated easily from those with poor credit profiles. If the law makes the disclosure of personal information compulsory, then firms' algorithms and decision-making will be more precise. Compelled disclosure thus ensures that all firms in an industry will tailor their products as closely as possible to consumer attributes, though it will have the long-run effect of discouraging firms from investing in technologies that might allow them to sort consumers more effectively than their competitors.

Now that we understand the possible distributive implications of consumer privacy protection, we can make progress on the politics of con-

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<sup>95</sup> See *supra* text accompanying notes 85–87.

<sup>96</sup> For the purposes of this paper, I want to stipulate that sophisticates possess several attributes. They are relatively sophisticated about (a) the contents of laws and regulations, (b) the distributive implications of laws and regulations, and (c) the attributes of products.

<sup>97</sup> See generally Scott R. Peppet, *Unraveling Privacy: The Personal Prospectus and the Threat of a Full-Disclosure Future*, 105 NW. U. L. REV. 1161–82 (2011).

<sup>98</sup> For further discussion, see Thomas Gehrig et al., *History-Based Price Discrimination and Entry in Markets with Switching Costs: A Welfare Analysis*, 55 EUROPEAN ECON. REV. 732 (2011).

sumer privacy legislation. Consumer privacy protections limiting the collection or use of personal information have an ambiguous effect on the rich and the poor. But because they tend to thwart price discrimination, such protections can prevent efforts by businesses to grab consumer surplus. Such efforts to shift surplus from well-organized, concentrated interest groups to poorly-organized, dispersed groups (like consumers) rarely succeed in legislatures, particularly if issues are not politically salient.<sup>99</sup>

From a median voter perspective, privacy protections limiting firms' ability to collect or use data probably benefit unsophisticated consumers (who do not engage in strategic disclosure) and consumers who have worrisome profiles. They harm sophisticated consumers and those with less worrisome profiles. This dynamic may in turn help us understand why the United States legal system has been so tolerant of data mining. Suppose that sophisticated consumers are also much more likely to be sophisticated, politically engaged voters — an assumption that seems plausible based on the conclusions drawn in a sparse social science literature.<sup>100</sup> We can surmise more confidently from the available social science research that sophisticated consumers are attentive and responsive to the consequences of the policies put forth by the major parties concerning issues of interest to them and that unsophisticated consumers are inattentive to these policies, but vote on the basis of other considerations.<sup>101</sup> If both these suppositions are right, then we can understand why under a median voter model American law will systematically favor the interests of sophisticated consumers by, say, permitting data mining. In sum, (1) sophisticated people are more likely to benefit from separating equilibria; (2) privacy limits on the collection and use of data promote pooling equilibria; and (3) sophisticated people are more likely to participate politically. We need only accept the existence of substantial overlap between sophisticated voters and sophisticated consumers to develop a plausible explanation for the nature of U.S. law.

Let us summarize our study of Big Data and our canvassing of the most likely explanations for the lack of an aggressive American regulatory

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<sup>99</sup> See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 132–67 (1971).

<sup>100</sup> See Thomas R. Palfrey & Keith T. Poole, *The Relationship between Information, Ideology, and Voting Behavior*, 31 AM. J. POL. SCI. 511, 526–30 (1987) (finding that informed voters are significantly more likely to vote than unsophisticated voters). Consumer research scholars have argued that the same cognitive dynamics play out when individuals are voting and when they are acting as consumers. See Dianne Dean & Robin Croft, *Reason and Choice: A Conceptual Study of Consumer Decision Making and Electoral Behavior*, 8 J. POL. MARKETING 130, 143 (2009). That correlation between voter and consumer sophistication likely exists because sophistication is as much a function of how individuals process information as it is about underlying knowledge of relevant facts. Sophisticated voters tend to process information much more efficiently than their unsophisticated counterparts. See Li-Ning Huang, *Examining Candidate Information Search Processes: The Impact of Processing Goals and Sophistication*, 50 J. COMM. 93, 96–97, 110–11 (2000).

<sup>101</sup> See Brad T. Gomez & J. Matthew Wilson, *Political Sophistication and Economic Voting in the American Electorate: A Theory of Heterogeneous Attribution*, 45 AM. J. POL. SCI. 899, 910–11 (2001).



response. Because highly extraverted individuals and sophisticated consumers are likely to be overrepresented among the ranks of voters and political activists, politicians will give their preferences more weight in the political process. Extraverts are unlikely to see the value in privacy regulations, and sophisticated consumers are likely to benefit economically in regimes where data is transparent and data mining is widespread. Thus, even though it is not obvious that rich voters benefit more from privacy protections than do poor voters — and the reverse is plausible — if we apply a median voter model and assume that the magnitudes of these effects are roughly comparable, we should expect to see policies slanted away from restrictions on data mining. Moreover, from a public choice perspective, we can expect that firms that can realize economic gains from data mining will influence policies in those domains heavily. Finally, politicians' own preferences will likely skew away from privacy protections, precisely because politicians are likely to behave like other extraverted voters. The deck is stacked against restrictions on data mining.

### III. WHY DO EUROPE AND THE UNITED STATES DIFFER?

This article has posited that public choice and median voter analysis can provide a plausible explanation for the reluctance of American regulators and legislators to resist analytics and data mining in the private sector. Having said that, this hypothesis does raise important questions that might be addressed through the study of comparative privacy law. We have already seen that there is a trans-Atlantic divide over public figure privacy and criminal history information,<sup>102</sup> and that America's particularly strong constitutional protections for speech loom large in explaining the divergence. Europe has addressed data mining much more aggressively than the United States too.<sup>103</sup> A fully persuasive positive account of American privacy law would therefore tie the contents of American privacy law to distinct aspects of the American voting population, its unique government structure, or similar variables.

I want to concede at the outset that mine will not be the aforementioned fully persuasive positive account of American privacy law, let alone global privacy law. My goal in this Part is less ambitious. I want to flag a few possibilities and complications, and provide some initial thoughts about which sorts of factors drive the differences between the American and European approaches.

Let us begin with median voter considerations. One possibility is that there may be divergent preferences among the underlying populations,

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<sup>102</sup> See *supra* section I.A.

<sup>103</sup> See, e.g., Paul M. Schwartz, *Regulating Governmental Data Mining in the United States and Germany: Constitutional Courts, the State, and New Technology*, 53 WM. & MARY L. REV. 351, 377 (2011).

with Europeans more alarmed by corporate threats to information privacy interests than Americans. The evidence on that score is mixed. The leading research finds no distinct cultural differences with respect to information privacy interests generally between those countries that have omnibus privacy legislation (mostly European nations) and those that have sectoral privacy regulation (the United States and Japan).<sup>104</sup> Europeans were more concerned about database errors and unauthorized access to data than their American and Japanese counterparts, though.<sup>105</sup> Given the connection between privacy and equality, cross-national differences in egalitarian values might also help explain the divergent approaches of the United States and Europe, with a larger number of sophisticated European voters who object on moral grounds to even those forms of price and service discrimination that benefit them.<sup>106</sup> But attitudes almost certainly differ far less than the laws do.

Nor is there much support for the idea that systematic differences in personality drive the legal differences. In a large-scale cross-national comparison, Western Europeans and North Americans exhibited identical levels of extraversion and very similar scores on four of the “Big Five” metrics.<sup>107</sup> (North Americans were appreciably more Agreeable than Western Europeans.<sup>108</sup>) Interestingly, though, the French were the third most introverted population surveyed in the world,<sup>109</sup> and it is possible that France has influenced European privacy law disproportionately.

Before moving to public choice analysis, one source of complexity is worth underscoring. Many European democracies are multiparty systems. In such systems, the models used to explain how voters select candidates and how governing coalitions are assembled are necessarily more complex. The models that best explain voter behavior in a multiparty democracy like the Netherlands seem to differ from those that best explain a different mul-

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<sup>104</sup> Steven Bellman et al., *International Differences in Information Privacy Concerns: A Global Survey of Consumers*, 20 INFO. SOC'Y 313, 319–20 (2004).

<sup>105</sup> *Id.* at 320 tbl.5. The database errors finding may be surprising at first blush. Data security protections appeal more to the affluent and those with strong credit profiles. Such consumers are more tempting targets for identity thieves because of their higher credit limits, and the same consumers have more to lose as a result of cases of mistaken identity. Consumers with weak credit profiles may, by contrast, benefit from other cases of mistaken identity, at least in the short run. Of course, in light of these considerations, firms should have rather strong competitive incentives to protect the integrity of their customers' data.

<sup>106</sup> Recall that bank customers in Northern Ireland articulated principled opposition to service discrimination against less valuable customers. McCartan-Quinn et al., *supra* note 85, at 156, 162.

<sup>107</sup> Schmitt et al., *supra* note 60, at 185 tbl.2.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 188–89 tbl.5 & 197. In the American context, Californians' penchant for protecting privacy correlates with a relatively introverted orientation as well. See Peter J. Rentfrow et al., *A Theory of the Emergence, Persistence, and Expression of Geographic Variation in Psychological Characteristics*, 3 PERSP. ON PSYCHOL. SCI. 339, 351 tbl.1 (2008) (ranking California thirty-eighth out of fifty-one jurisdictions in Extraversion).

tiparty democracy like the United Kingdom.<sup>110</sup> Of course, European privacy regulation is a process that involves both national governments and the European Union, with national data privacy regulators charged with enforcement of the European Union Data Privacy Directive.<sup>111</sup> This dynamic makes understanding the relationship between these different layers of government more complicated still.

Does public choice analysis permit us to make comparatively more progress on the comparative question? Recall the argument that American politicians may be more extraverted, and therefore less concerned about privacy, than American consumers. The same extraversion divergence has been documented in Italy,<sup>112</sup> so while the bias against privacy may be evident in both the United States and Europe, there seems to be no countervailing force that is present in Europe but absent in America. This may be where interest group analysis helps. The data brokerage industry appears to be larger in the United States than in Europe (in part as a result of the more permissive American legal environment allowing it to engage in various profitable activities),<sup>113</sup> and it seems plausible that the outsized influence of this well-entrenched industry in the United States makes aggressive privacy regulation less likely here.<sup>114</sup>

Section II.C. discussed unraveling and the role it may play in shaping privacy policy and practices. That said, the theoretical possibility of unraveling is no inevitability. If the population contains a sufficiently large number of people who are privacy fundamentalists even though they would benefit from disclosure financially, then a coalition of “privacy fundamentalists” and the portion of the population that is better off in a world of pooling than a world of separation may clamp down on Big Data.<sup>115</sup> If

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<sup>110</sup> Kevin M. Quinn et al., *Voter Choice in Multi-Party Democracies: A Test of Competing Theories and Models*, 43 AM. J. POL. SCI. 1231, 1245–46 (1999).

<sup>111</sup> Joel R. Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 EMORY L.J. 911, 925 (1996).

<sup>112</sup> Gian Vittorio Caprara et al., *Personalities of Politicians and Voters: Unique and Synergistic Relationships*, 84 J. PERSONALITY & SOC. PSYCH. 849, 850, 854 (2003).

<sup>113</sup> See Maeve Z. Miller, Note, *Why Europe Is Safe from ChoicePoint: Preventing Commercialized Identity Theft Through Strong Data Protection and Privacy Laws*, 39 GEO. WASH. INT’L L. REV. 395, 405–07 (2007). Cf. Sarah Ludington, *Reining in the Data Traders: A Tort for the Misuse of Personal Information*, 66 MD. L. REV. 140, 157 n.109 (2006) (describing successful lobbying efforts by Californian data brokers).

<sup>114</sup> Compare Ugo Mattei, *Efficiency and Equal Protection in the New European Contract Law: Mandatory, Default, and Enforcement Rules*, 39 VA. J. INT’L LAW 537, 558–59 (1999) (using public choice theory to explain Brussels governance), with Viktor Mayer-Schönberger, *No Choice: Trans-Atlantic Information Privacy Legislation and Rational Choice Theory*, 67 GEO. WASH. L. REV. 1309, 1314–21 (1999) (expressing skepticism about applications of public choice theory to European privacy regulators).

<sup>115</sup> My analysis assumes that “principled privacy proponents” outnumber their opposite — we can call this group “principled exhibitionists.” While there are people who believe that information, even highly sensitive information, “wants to be free,” this seems to be a relatively small constituency, at least

these groups can coalesce quickly enough around a privacy intervention, then they might nip unraveling in the bud by restricting the collection or use of personal information.

We can now posit that path dependence dynamics help drive the U.S.-versus-Europe divide on consumer privacy. The United States approach to data privacy is sectoral and reactive. The European approach is comprehensive and proactive. When a new technology or practice emerges to challenge existing assumptions about privacy in the United States, months or years go by before it will be restricted in any way, since the new behavior falls within a gap in our sectoral statutory framework. Tort laws that once permitted common law judges to confront new challenges in a proactive way were gutted by Prosser's reconceptualization of the privacy torts and the Restatement that he engineered.<sup>116</sup> The Federal Trade Commission has a limited mandate, lacks fining authority absent a consent decree, and contains a bipartisan split of commissioners that may dampen its aggressiveness. Hence, a new practice like data mining or predictive analytics may go unregulated for quite some time. In the mean time, economic interest groups grow more powerful and unraveling begins. Of course, firms can speed this process of unraveling along via strategic choices about how consumer consent should be obtained. Defaults are sticky, and overcoming inertia is difficult. So firms can convince many consumers to voluntarily agree that their information should be shared by making non-sharing the option whose selection is more time consuming. Moreover, as disclosure becomes increasingly common, privacy norms are altered, and what may have been considered intrusive eighteen months ago is no longer deemed troubling today.<sup>117</sup>

To summarize, the lack of prophylactic privacy laws in the United States causes unraveling, public choice, and attitudinal dynamics that make subsequent privacy regulation quite unlikely. The presence of prophylactic European privacy laws such as the Data Protection Directive and the Convention on Human Rights means that new threats to privacy are likely to be stifled before they can take root.<sup>118</sup> European privacy regulators can be

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in the developed world. The group of people who find inequality normatively appealing is a larger group, though it too is probably dwarfed in size by the constituency that prefers equality in the abstract.

<sup>116</sup> See Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CAL. L. REV. 2007, 2012–15, 2032–33 (2010).

<sup>117</sup> See e.g., Roger Allan Ford, *Unilateral Invasions of Privacy* 3 n.9 (2012) (unpublished manuscript) (on file with author); Liz Gannes, *The Apologies of Zuckerberg: A Retrospective*, ALLTHINGS (Nov. 29, 2011, 2:29 PM), <http://allthingsd.com/20111129/the-apologies-of-zuckerberg-a-retrospective/> (“At this point, Facebook CEO Mark Zuckerberg’s pattern on privacy is clear. Launch new stuff that pushes the boundaries of what people consider comfortable. Apologize and assure users that they control their information, but rarely pull back entirely, and usually reintroduce similar features at a later date when people seem more ready for it.”).

<sup>118</sup> The American approach does have advantages over the European approach in directing government resources at real privacy threats rather than hypothetical ones. Many of the envelope-pushing technologies that are immediately challenged by European regulators would have been killed off by

accused of preventing innovation by moving too early, but their American counterparts typically seek to regulate too late, if at all. On this account, the major structural difference between the U.S. and Europe could have significant substantive implications as well. A persuasive explanation for American privacy law may therefore require not only an understanding of median voter and public choice dynamics, but also an appreciation for how unanticipated consequences of design choices made long ago affect the preferences of American citizens and the interest group balance of power.

#### IV. BEYOND DATA MINING: DO NOT CALL

The idea that privacy regulations promote cross-subsidies among consumers is not limited to Big Data. The same basic dynamics play out in other aspects of privacy law as well, such as those pockets of privacy law designed to protect consumers' rights to be left alone.

Although the previous Section argued that median voter and public choice dynamics make it likely that if American regulators fail to nip a new privacy challenge in the bud, subsequent regulatory efforts will be thwarted, that is not to say that privacy regulators' games of catch-up will never succeed. The most prominent example of catch-up privacy regulation is the Federal Trade Commission's Do Not Call registry. In many ways, it is the exception that proves the rule. The case for Do Not Call was so strong, and the opinions of median voters so adamantly in favor of regulation, that the initiative overcame dogged opposition from well-funded and organized interest groups. But the battle was difficult and lengthy.

In the early 1990s the FCC began considering the implementation of a Do Not Call registry to deal with telemarketing.<sup>119</sup> Yet it took more than a decade for the regulation to be implemented, with consumer groups overcoming strong opposition from the telemarketing industry only after state Do Not Call registries proved extremely popular and effective.<sup>120</sup>

Prior to the enactment of the Do Not Call rule in 2003, there were a large number of consumers who rarely if ever purchased anything over the phone, but who had to endure frequent interruptions from telemarketers<sup>121</sup> who were searching for that rare individual who might wish to purchase,

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consumers in the marketplace had the regulators done nothing. Moreover, American regulators consider an envelope-pushing technology at a stage where there is more concrete evidence about its benefits and costs.

<sup>119</sup> See Jennifer L. Radner, Comment, *Phone, Fax, and Frustration: Electronic Commercial Speech and Nuisance Law*, 42 EMORY L.J. 359, 415 (1993).

<sup>120</sup> See, e.g., Lance Gay, *National Dinner Hour Sought as Time-Out for Telemarketing*, HOU. CHRON., July 2, 2000, at A10. For a history of the Do Not Call registry, see Jared Strauss, *The Do-Not-Call List's Big Hang-up*, 10 RICH. J.L. & TECH. ¶¶ 3–6 (2004).

<sup>121</sup> See Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4629–30 (Jan. 29, 2003) (codified at 16 CFR Part 310).

say, a time share, over the phone. Prior to the Do Not Call rule, the overwhelming majority of telephone users were essentially forced to state repeatedly, “I am not a person who wishes to buy stuff over the phone” in response to these calls, a highly inefficient process. The 2003 rule is very popular, with more than 217 million American phone numbers actively registered.<sup>122</sup>

The great achievement of the Do Not Call regulation was that it enabled consumers who never purchased products over the telephone to state *ex ante* their lack of interest in receiving such calls once, rather than forcing them to repeat their unwillingness on a nightly basis as the calls from telemarketers arrived. The regulation contains several exceptions, however. Namely, firms that have an existing business relationship with a customer can continue to place unsolicited calls for marketing purposes, and the rule exempts political and charitable fundraisers, as well as pollsters, from its reach.<sup>123</sup>

To say that the rule is almost certainly welfare enhancing is not to deny that it may create some losers. The rule can disadvantage individuals who specify at time 1 that they do not wish to receive calls and change their mind at a later date, but who are prevented from removing their numbers from the registry by inertia. The registry also can disadvantage those with very granular preferences. For example, suppose that an individual is eager to receive telephone calls encouraging him to purchase new products that are rated “Best Buys” by *Consumer Reports* magazine, but resents receiving telemarketing calls concerning products whose value is less clearly established. Under the Do Not Call registry, there is no simple way for the consumer in question to specify *ex ante* which calls are acceptable and which should be unlawful. The consumer will therefore likely opt out of telemarketing solicitations entirely. Assuming the consumer is rational, this step makes him better off than he would be in a world without a Do Not Call registry, but worse off than he would be in a world with a more granular Do Not Call registry.<sup>124</sup>

To further complicate matters, there is a group of people who enjoy receiving telemarketing solicitations. Absent surprising dynamics involving economies of scale, it is not apparent how this group could be harmed by the implementation of the Do Not Call registry, since none of them will sign up for it.

The Do Not Call registry’s consumer “losers” appear to be individuals with frequently changing time-inconsistent preferences, and, depending on

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<sup>122</sup> FEDERAL TRADE COMMISSION, NATIONAL DO NOT CALL REGISTRY DATA BOOK FY 2012, at 4 (2012).

<sup>123</sup> *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1234 (10th Cir. 2004).

<sup>124</sup> Do Not Track, which will be implemented through web browsers, makes the satisfaction of granular preferences much easier, at least in theory. See, e.g., *Frequently Asked Questions About DNT+*, ABINE, <http://www.donottrackplus.com/faqs.php#q4> (last visited Nov. 17, 2012).

one's frame of reference, individuals with very granular preferences. This group is almost certainly outnumbered by those consumers who benefit significantly from the opportunity to opt out of all commercial solicitations *ex ante*,<sup>125</sup> and the winners' feelings are probably more intense than the losers'. If we shift from a focus on median voters to a focus on interest groups, however, a new set of winners and losers becomes apparent.

We can understand the Do Not Call registry's exemption for firms that have established business relationships with customers in one of three ways. One sunny justification for this exception is that customers are less likely to be annoyed by solicitations concerning a product that they have purchased in the past. Perhaps this exception for existing business relationships acts as a sort of proxy that helps ameliorate the aforementioned granular preference problem. A second (still sunny) justification for the exception is that firms with existing business relationships have more to lose from annoying customers than do firms that have no existing relationships. If firms make unduly intrusive calls to their customers, they risk losing their customers. Existing business relationship thus functions as a rough proxy for calls whose timing and contents will not annoy customers. A third (bleak) explanation for the existing customers exception is that the Do Not Call registry makes it more difficult for new entrants to provide prospective customers with information that might prompt them to switch firms. The Do Not Call registry thus has the anticompetitive effect of promoting lock-in between firms and their existing customer bases. The third explanation may have the most purchase in helping us understand the interest group dynamics behind the implementation of the Do Not Call registry. Public choice dynamics inevitably favor established incumbents over new entrants.

In short, the Do Not Call registry — one of the most popular federal government programs in existence — took more than a decade to be enacted, and that was despite the likely support for the regulations from some firms that market to consumers. Getting "Do Not Call" through Congress and the FTC took enormous effort and energy. Less popular, less salient consumer privacy issues are unlikely to prompt the same sort of sustained push going forward.

## CONCLUSION

Having too much privacy can be as bad as having too little. Yet privacy scholarship often makes the case for enhanced protections by assuming away real-world costs associated with enhanced privacy, be it statistical discrimination on the basis of observable characteristics, anticompetitive behavior, or the imposition of elite preferences on a populist populace.

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<sup>125</sup> See J. Howard Beales III & Timothy J. Muris, *Choice or Consequences: Protecting Privacy in Commercial Information*, 75 U. CHI. L. REV. 109, 119–20 (2008).

The extant writing casts privacy battles as fights between consumers who uniformly benefit from privacy protections and producers who are uniformly harmed by them. In reality, privacy regulations harm many consumers and firms. They also benefit different consumers and firms. The sorts of proposals for enhanced privacy that loom large in this volume necessarily pick winners and losers from among the citizenry.<sup>126</sup> Protests to the contrary ought not to be taken seriously by those inclined to make decisions on the basis of sound evidence. The politics of privacy are difficult *because* the economics of privacy are difficult.

A positive account of American privacy law requires us to be sensitive to the personalities of Americans consumers. We must not ignore the personalities of American privacy law scholars either. People who care a great deal about their personal privacy, and the privacy rights of others, tend to be drawn toward writing about privacy law.<sup>127</sup> People who have little concern for their own privacy are unlikely to become privacy scholars. Recall that the 20 percent of the population Alan Westin described as “privacy unconcerned” not only do not value their own privacy highly but

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<sup>126</sup> Julie Cohen provocatively argues that privacy allows us to have our cake and eat it too. She writes that “[f]reedom from surveillance . . . is foundational to the capacity for innovation; therefore . . . the perception of privacy as anti-innovation is a non sequitur.” Cohen, *supra* note 47, at \_\_\_. She adds that without privacy, people will lack “essential tools for identifying and pursuing the material and political conditions for self-fulfillment and more broadly for human flourishing.” *Id.* at \_\_\_. If she is right that the viability of democratic self-governance, the capacity of humans to flourish, and the continuation of technological development depend on curtailing Big Data, then enhancing privacy is inevitably worthwhile; the distributive concerns I have identified in this Article would be trumped.

Debates rage over how to measure democracy and human flourishing, but defining innovation may be a more mundane enterprise and hence one where attaining consensus about terms is easier. As it happens, there are vast literatures on the factors that drive innovation. In those literatures market factors, not freedom from surveillance, loom large. See, e.g., Wesley M. Cohen, *Fifty Years of Empirical Studies of Innovative Activity and Performance*, in 1 HANDBOOK OF THE ECONOMICS OF INNOVATION 129 (Bronwyn H. Hall & Nathan Rosenberg eds., 2010); S. Gopalakrishnan & F. Damanpour, *A Review of Innovation Research in Economics, Sociology, and Technology Management*, 25 OMEGA 15 (1997). That said, some new research by Ethan Bernstein suggests that within a Chinese manufacturing firm, heightened management surveillance of employees may stifle innovation and performance. Ethan S. Bernstein, *The Transparency Paradox: A Role for Privacy in Organizational Learning and Operational Control*, 57 ADMIN. SCI. Q. 181 (2012). Bernstein found that when supervisors circulated on the factory floor they caused workers to perform tasks by the book instead of using more efficient techniques. The presence of supervisors also distracted workers from the tasks at hand. *Id.* at 202–05. A field experiment found that when assembly line workers’ privacy was protected by curtains, their productivity increased. *Id.* at 196–99. Bernstein therefore suggests that privacy can facilitate innovation and efficient production. It remains to be seen how well his study of Chinese workers and their fallible supervisors will translate to other contexts. Similarly, it remains to be seen whether Cohen is right to insist that the use of Big Data in developed democracies could stifle the sorts of creativity that matter most in a knowledge economy. If she is right about the centrality of Big Data and surveillance, one should expect to see the pace of French technological innovation far exceed the pace of American innovation during the decades ahead, absent substantial changes in either nation’s laws.

<sup>127</sup> One possible confounding factor is that academics as a group may be more extroverted than the general population, with the effect more pronounced among tenured and accomplished scholars thanks to a survival effect. Cf. Jai Ghorpade et al., *Burnout and Personality: Evidence from Academia*, 15 J. CAREER ASSESSMENT 240, 250 (2007).



also tend to have a very difficult time understanding why *anyone* would value their privacy — they simply do not grasp why privacy might be a big deal to some people.<sup>128</sup>

The danger that selection effects among privacy scholars will render privacy scholarship “out of touch” with realities on the ground is ever-present, though the robust exchange of ideas that exists among scholars, industry lawyers, and regulators in privacy is a welcome and important corrective.<sup>129</sup> This Article has tried to supplement the existing literature by pointing to both the material upsides and downsides of privacy protection in various contexts, so that scholars will have a firmer grasp on the political and path-dependency dynamics that shape privacy law. Along the way, it has emphasized the new challenges presented in an era of Big Data. In particular, it has hypothesized that when industry or government employ Big Data, they are subjecting consumers to refined personality tests. And whereas personality discrimination in employment has long been accepted, its widespread use in the pricing and delivery of mass-market goods and services is an important new issue. Understanding who wins and who loses from this increased reliance on personality discrimination is vital as we seek to predict how the law will react.

The Article also posits that the lack of a “catchall” provision in American privacy law is a structural feature that alters the public opinion and public choice landscape. American privacy regulations arise reactively, to the extent that they arise at all. As a result, regulators are often acting after information markets have begun to unravel via voluntary disclosure, interest groups have formed around privacy-diminishing technologies, and popular attitudes have become more receptive to data practices that might have generated initial opposition from consumers. Individuals who believe that privacy is underprotected in the United States, and European privacy regulators who would like to see harmonization occur, would do well to focus on a straightforward structural fix for America’s perceived privacy ailments, either via reinvigorated privacy tort protections or a muscular Federal Trade Commission that can tackle new privacy threats in a proactive, nonsectoral way.

The shift toward Big Data will harm a great many consumers. It will benefit a great many too. It is by no means clear whether the trend will create net social welfare losses. And at the end of the day, it may not matter. Privacy battles, like most political fights, are wars between interest groups. They are clashes among voting blocs bound together by personalities, worldviews, and other demographic characteristics. When humans go to war, we usually have our reasons.

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<sup>128</sup> Westin, *supra* note 76.

<sup>129</sup> Institutions like the Privacy Law Scholars Conference and the Future of Privacy Forum play a vital role in keeping the various constituencies honest.



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