Privacy, Rationality, and Temptation: A Theory of Willpower Norms

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Abstract: Social norms that look askance at people when they disclose their own personal information in “inappropriate” situations are puzzling if one believes that the free flow of information promotes better decision-making. This Article proposes a solution to this puzzle that involves the interplay between self-control, temptation, human cognitive limitations, and the theory of social norms. The solution has implications for the legal regulation of information privacy. Along the way, the Article seeks to understand how problems of willpower might come to be reflected in social norms and describes how such “willpower norms” can perform socially beneficial or harmful functions. It contends that personal information norms develop to compensate for human failures of rationality and self-control in processing information. While personal information norms are often efficient at mitigating these failures, under some circumstances pernicious “silencing norms” can develop. These silencing norms are exemplified by the “don’t ask, don’t tell” policy about gays in the military. Finally, the Article explores how legal regulation of information privacy might be necessary to compensate for human information processing weaknesses in situations, such as online commercial transactions, in which social norms fail to develop.

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I. INTRODUCTION

This Article was motivated by a puzzle. Consider the following scenario: A group of business colleagues are at lunch, conversing informally about office politics, movies, sports and so forth. One has recently returned to work after a hospital stay. Inquiries are made about his health. In response, the recently-hospitalized colleague does not stop with the expected brief assurances that he is recovering, but launches into a detailed description of the medical procedures to which he was subjected. He details his symptoms, how frightened he felt before the surgery, how nauseated afterward. His colleagues begin to shift in their seats and eye each other uncomfortably, though one or two are obviously entertained by the descriptions of their colleague’s discomfort. After lunch, the recently hospitalized colleague is embarrassed by what he has shared with the group. Some of his colleagues are distracted during later business interactions with him by their recollections of medical details that were disclosed. The next time some members of the group go out to lunch, their recently hospitalized friend is not invited. Everyone wishes the lunchtime conversation had never taken place.

Now shift the scene. A group of residents of a retirement community are out to lunch, conversing informally about the activities at the recreation hall, movies, sports and so forth. One has recently returned from a hospital stay. Inquiries are made about his health. He launches into a detailed description of his hospital experiences. His luncheon companions listen sympathetically, perhaps encouraging his revelations by recounting similar tales of their own. Everyone goes home completely satisfied with the luncheon experience.
Why the difference? Everyone over the age of four or five knows that certain personal information is appropriately discussed in some social contexts, but not in others. Teenagers have an acronym for inappropriate personal disclosures; "TMI!," they say, "Too much information!" Social norms delineate the types of personal information that are appropriately disclosed in particular circumstances and those who do not follow these personal information norms are looked upon with disfavor. But what is it about personal information disclosures that makes them inappropriate in some circumstances? In the first scenario described above, why did the recently hospitalized colleague disclose all that personal information? And why did other members of the group wish they hadn’t heard it? Information is undeniably important in making decisions and assessing options, in interpersonal as well as commercial contexts. Given how useful information can be, why doesn’t everyone always want to know everything about everyone else? At a minimum, why would anyone object to being handed extra information?

This Article proposes a solution to this puzzle that involves the interplay between self-control, temptation, human cognitive limitations, and the theory of social norms. The solution has implications for the legal regulation of information privacy.

In recent years, legal scholars have focused attention on understanding the role that informal social norms play in regulating behavior, and the relationship between social norms and the law.¹ Social norms are primarily understood as means to coordinate the behavior of individuals in a social group. Thus, norms may help to solve coordination problems -- by determining how pedestrians pass one another on the street -- and collective action problems --

by stigmatizing littering -- when individually rational behavior leads to collectively undesirable results.

This Article suggests that social norms may also play an entirely different role. Rather than serving only to coordinate the behavior of individuals, social norms may arise to deal with individual problems of willpower and self-control. Thus, “willpower norms” may arise to permit a social group that experiences common temptations to assist one another in acting according to long-term preferences rather than giving in to temptation. The possibility for willpower norms may explain some otherwise surprising social norms about seemingly individual behavior without the need to resort to a hypothesis that people have pure “other-regarding preferences” concerning other people’s behavior.2

As a specific example, this Article explores the extent to which social norms about the disclosure of personal information can be explained by the willpower norms theory. Social norms against disclosing certain types of personal information in certain contexts cannot be explained solely by each individual’s desire for privacy. Instead, they likely reflect social attempts to regulate the flow of personal information to promote accurate decision-making in the face of human cognitive limitations, often called “bounded rationality.”3 Problems of self-control and bounded rationality undermine the traditional economic argument against information privacy, suggesting reasons other than misrepresentation and disingenuousness that people seek not to disclose personal information. The personal information norms of particular

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2 See, e.g., McAdams, supra note 1 at 424-30 for a discussion of the role of other-regarding preferences in the development of what he calls “nosy norms.”
social groups can therefore inform the application of the privacy torts of public disclosure of
private facts and intrusion upon seclusion.

The Article also considers some of the negative social effects that can result from
willpower norms and delineates the kinds of circumstances under which negative norms are
likely to arise. Like other social norms, willpower norms can fail to account for minority
preferences. In the personal information context, this failure can lead to pernicious “silencing
norms,” exemplified here by the “don’t ask, don’t tell” policy regarding gays in the military.

Finally, the Article discusses why socially beneficial personal information norms will
probably not develop to deal with widespread computerized data processing. Failures of the
“market” for personal information, which are mitigated by social norms in the interpersonal
context, thus must be addressed by other means. Legal regulation of uses of personal
information in computerized data processing will be necessary. Care must be taken in devising
such regulations, however, in light of the personal autonomy questions that are inevitably raised
by regulations that respond to issues of self-control.

Part II of this Article develops a theory of willpower norms that extends the rational
choice models of social norms. It begins by discussing the phenomenon of temptation, or
“time-inconsistent preferences” and surveying the strategies that individuals use to cope with
their self-control problems. It then briefly reviews the theory of social norms. The bulk of Part
II combines these two threads to devise a theory of willpower norms, explaining how social
norms might develop to supplement individual self-control strategies and exploring the potential
for both beneficial and harmful willpower norms to arise.

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4 See, e.g., McAdams, supra note 1 at 409-24 for a discussion of undesirable effects of social norms.
5 The policy is described and critiqued, with citations to statutory and regulatory authority, in Servicemembers Legal
Defense Network, Conduct Unbecoming: The Tenth Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t
6 See, e.g., references, supra note 1.
Part III of the Article analyzes personal information norms in light of the willpower norm theory. It argues that disclosing one’s own personal information and obtaining personal information about others are both activities characterized by time-inconsistent preferences and self-control issues. It proposes that people prefer not to learn certain personal information about others because of human failures to process information rationally that also underlie the evidentiary rule precluding consideration of evidence that is “more prejudicial than probative.” Personal information norms have evolved, at least in part, as willpower norms to combat these information processing difficulties.

Part IV discusses the implications of the personal information norm analysis for information privacy law. First applying the willpower norm analysis to the primarily interpersonal context of the privacy torts, it proposes that personal information norms be considered by courts in analyzing the reasonable expectations of privacy that accompany limited disclosures of personal information in particular social settings. It then argues that the problems that give rise to personal information norms in social groups persist in situations, such as those involving computerized data processing, in which the social structure undermines the effectiveness of such norms. Where social norms fail to mitigate these problems, appropriate legal regulation of information privacy may be advisable. Part IV gives some brief suggestions as to what form such regulation should take, emphasizing measures that give individuals the tools to pursue recognized self-control strategies. Part V of the Article offers conclusions.
II. WILLPOWER NORMS

A. Willpower and Self-Control Strategies

Humanity has struggled with problems of temptation and willpower since long before Aristotle noted that “the hardest victory is the victory over self.”7 In recent years, an extensive psychological and economic literature seeks to understand the phenomenon.8 The issue has also received attention in the study of consumer marketing.9 Very recently, it has attracted the attention of behavioral economists studying online privacy.10

1. Willpower Problems: Temptation and Time-Inconsistent Preferences

The existence of temptation, willpower, and regret over mistaken choices poses a challenge to the rational choice theory of decision-making. Economists have realized for years that people “discount” the utility of future events when making present decisions and neoclassical economic theory assigns a particular mathematical form (“exponential discounting”) to this phenomenon.11 For present purposes, the important feature of this assumed form is that it preserves an individual’s ordering of preferences over time. Thus, if last night I preferred that I work on this Article today before reading my email and the newspaper, I should maintain that preference ordering this morning. If I read the newspaper before working on the paper and avoid

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7 Aristotle
8 See, generally, George Ainslie, BREAKDOWN OF WILL (2001); TIME AND DECISION (George Loewenstein et al., eds., 2003); Jon Elster, ULYSSES UNBOUND (2000).
10 See, e.g., Curtis R. Taylor, Privacy in competitive markets, Duke Economics Working Papers #02-02 (2002); Alessandro Acquisti and Hal R. Varian, Conditioning prices on purchase history, MARKETING SCIENCE, (forthcoming, 2005); Alessandro Acquisti and Jens Grossklags, Losses, Gains, and Hyperbolic Discounting: An Experimental Approach to Personal Information Security Attitudes and Behavior, in THE ECONOMICS OF INFORMATION SECURITY, (J. Camp and R. Lewis, eds., 2004); and Acquisti, supra note 3.
11 See, e.g., Shane Frederick et al., Time Discounting and Time Preference: A Critical Review in TIME AND DECISION, supra note 8, reviewing time discounting models.
the temptation to read my email only by making a “bargain” with myself setting a specific time to read it, my behavior violates the predictions of exponential discounting.

The phenomenon of temptation, or “time-inconsistent preferences,” has received increasing theoretical attention from psychologists and economists, and various attempts have been made to explain or model it. Self-control issues are not due merely to cognitive difficulties in assessing the trade-offs between certain, immediate gains and speculative, long-term benefits. They arise because decisions made at a temporal distance are changed when temptation looms near, even if the cognitive assessment of the costs and benefits of each option is certain and unchanged.

Studies suggest that time-inconsistent preferences result from a particular mathematical form of “discounting” the value of future choices, known as hyperbolic discounting. The hyperbolic discounting function has the property that graphs of preferences for competing goods as a function of time may cross near the time at which a preference for one of the goods may be gratified, leading to a preference switch -- like my reading the newspaper before working on this Article. The hyperbolic discounting function also predicts that preferences can switch back at a later time -- leading, for example, to my regretting the choice to read the newspaper first.

Other theoretical approaches to the issues of willpower and temptation include modeling individuals as populations of “selves” with differing preferences and goals. Such approaches

12 See, e.g., Ainslie, supra note 8; Elster, supra note 8; George Loewenstein and Drazen Prelec, Anomalies in Intertemporal Choice: Evidence and an Interpretation in CHOICES, VALUES, AND FRAMES (Daniel Kahneman and Amos Tversky, eds., 2000); Richard Thaler and Hersh M. Shefrin, An Economic Theory of Self-Control, 8 J. POLITICAL ECON. 392 (1981).

13 See Ainslie, supra note 8, at 72-77 for an explanation of hyperbolic discounting. See also many of the articles in TIME AND DECISION, supra note 8, for applications of the model; but see Daniel Read, Sub-additive Intertemporal Choice, in TIME AND DECISION, supra note 8, for a challenge to the model of hyperbolic discounting.

14 See Ainslie, supra note 8, at 72-77.

15 The sensation of being “at war with oneself” is not unfamiliar. Models of competing selves vary from those postulating selves associated with particular time frames, to those involving selves of different sorts (“myopic doers” and a planner). See, e.g., Ainslie, supra note 8, at 73-140; Frederick et al., supra note 11, at 43-44.
are particularly illuminating in understanding self control problems that arise when the long term harm occurs only if one too frequently gives in, with each individual indulgence having little effect. In such cases, temptations arise at least in part because of the potential for an individual to “free ride” on his or her own past or future behavior -- the group of past and future “selves” faces a collective action problem. The Tuesday dieting self reasons that future selves will either refrain from dessert, so that Tuesday’s indulgence won’t matter, or eat dessert, so the Tuesday self might as well join them. Whatever the future selves are going to do, the Tuesday self might as well indulge!

For present purposes, we need not adopt a particular theory of time-inconsistent preferences, but merely accept that the phenomenon exists and that many of us struggle to give effect to our long-term preferences in the face of temptation.

2. Self-Control Strategies

The ability to delay the gratification of immediate desires so as to achieve longer-term benefits is one of the hallmarks of human maturity. Indeed, “the design of behavior to handle intertemporal tradeoffs is a universal peculiarity of living systems.” Individuals have developed many strategies for improving their self-control. These strategies inform the present inquiry into the potential for social norms to address the willpower dilemma.

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16 This way of looking at the problem is related to the observation that people do not properly account for “internalities” -- the effects of particular choices on the utility of potential future choices. See Matthew Rabin, *Psychology and Economics*, 36 J. Econ. Lit. 11 (1998). Since the effects of personal information disclosure are cumulative, such disclosures may have significant “internalities.”


18 See, e.g., Elster, * supra* note 8, at 1-17; Ainslie, * supra* note 8, at 73-116.
One of the most important strategies that individuals use to promote self-control is pre-commitment. The canonical example of pre-commitment is Ulysses having his sailors tie him to the mast so that he cannot heed the call of the Sirens. There are many forms of pre-commitment, including avoiding tempting options (not asking to see the dessert menu), and explicitly raising the costs of giving in to temptation by imposing reputational penalties (declaring to co-workers that one has quit smoking), monetary penalties (putting money in a retirement account with early-withdrawal penalties), or, technical restrictions (taking drugs such as Antabuse). Related strategies for dealing with self-control problems raise the benefits of self-control using rewards (an outing to the movies at the completion of an unpleasant task); or substitution (nicotine gum).

There are also various mental strategies for enhancing self control. These strategies include mentally bundling costs and benefits into “mental accounts” (having separate, and limited, budgets for spending on “vices”), imposing personal rules (having a categorical rule against lying or infidelity); and engaging in “self-signaling” behaviors to enforce a “character” or “propensity” for the exercise of willpower. Carrillo and Mariotti, among others, have also argued that people strategically avoid information that they believe will tempt them into undesired behavior.

Many of these mental self-control strategies can be understood in terms of the “hyperbolic discounting” model. In particular, the model explains how mentally categorizing or

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19 See Elster, supra note 8, at 1-87 for an extensive discussion of pre-commitment.
21 See Drazen Prelec and Ronit Bodner, Self-Signaling and Self-Control in TIME AND DECISION, supra note 8, arguing that activities with low marginal efficacy, such as voting, may be explained as signals to the self of future propensity to resist temptation. Such a propensity increases the attractiveness of resisting temptation now.
22 Juan D. Carrillo and Thomas Mariotti, Strategic Ignorance as a Self-Disciplining Device, 57 REV. ECON. STUD. 529, 529 (July 2000) (studying strategies of smokers who are attempting to quit).
bundling choices can provide a “boost” to long-term preferences vis-a-vis immediate gratification.\textsuperscript{23} Models that postulate strategic bargaining games between multiple “selves” with distinct preferences or interests have also been useful in understanding the effectiveness of these self-control strategies.\textsuperscript{24} For example, the personal rule self-control strategy can be seen as an attempt to bundle a series of choices or as a means to coordinate the behavior of past and future “selves” to avoid a “free rider” problem.

Self-control strategies often fail, however. Personal rules are hard to enforce against oneself. Pre-commitment strategies can often be rescinded at the time of temptation. This is why many pre-commitment strategies enlist the aid of others. Attempts to enlist the aid of others are also problematical, however, since these others face a dilemma in judging whether an attempt to rescind the pre-commitment measure reflects a “true” change of heart or a mere “ploy” to avoid the commitment. Ulysses’ crew members had their ears stopped – which protected them not only from the Sirens’ song, but from hearing any commands from Ulysses to release him.

B. Social Norm Theory Should Account for Self-Control Issues

Individual self-control strategies are not always terribly effective, primarily because people tend to undermine them at the moment of temptation. Since individuals often enlist the aid of others in their attempts at pre-commitment, it may seem natural that social norms would develop as pre-commitment devices to penalize lapses of will. In fact, many social norms are targeted at tempting behaviors. Yet the issue of self-control has not played a substantial role in social norm theory so far. To see how the theory of social norms might be adapted to account for issues of self-control, it is necessary to review briefly the circumstances under which social norms are generally expected to arise.

\textsuperscript{23} Ainslie, supra note 8, at 78-85, discussing the use of personal rules and explaining their efficacy in terms of hyperbolic discounting. See also Elster, supra note 8, at 84-87, pointing out some difficulties with personal rules.\textsuperscript{24} Ainslie, supra note 8, at 73-117.
1. A Brief Review of Social Norm Theory

Several theoretical explanations have been proposed for the existence and power of social norms. For the most part, these theories have the common feature that they explain social norms primarily as a mechanism for organizing the behavior of a group of individuals so as to produce a collectively beneficial result.

In some cases, social norms serve solely to coordinate group behavior. These “coordination norms” arise when “the utility I receive for performing a type of action depends on others also performing the same action.” An example of a coordination norm is the convention that pedestrians should pass one another on the right. Another example might be a family norm of meeting at a certain place in the shopping mall if family members are separated. Coordination norms are needed in such circumstances because blindly following individual preferences cannot lead to a result that is optimal for anyone. Once a coordination norm is established, it can be maintained without imposing any kind of penalty for violation because individuals have no motivation to deviate (there is no point in going to the fountain if everyone else is meeting at the food court).

“Sanction-driven norms,” on the other hand, are maintained by imposing penalties, often reputational, for non-compliance. Sometimes social penalties are imposed on individual behavior because it has negative side effects (“externalities”) that affect the rest of the

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25 See, e.g., references, supra note 1. There is some dispute as to how the term “social norm” should be defined, with some advocating the use of the term to describe behavioral regularities and others arguing that the term should apply to social prescriptions. See Hetcher, supra note 1, at 17-37 for a discussion of this controversy. For present purposes, I adopt the definition of a social norm as a conforming behavior, thus excluding from the present discussion mere regularities of behavior that result from shared individual preferences.

26 Hetcher, supra note 1, at 17-78, reviews and critiques extant social norm theories and proposes a useful classification of the varieties of social norms. He categorizes rational social norms (those explainable by assuming that individuals act rationally to satisfy their preferences) as “coordination norms,” “sanction-driven norms,” and “epistemic norms.” With the exception of epistemic norms, to which I will return later, these social norms are premised on a need to coordinate group behavior. Such norms can be termed “strategic.”

27 Id. at 47.
community. Neighbors may complain about someone who has loud parties or doesn’t mow his lawn, for example. In such cases, the problem is not one of coordinating behavior, but of forcing the offending neighbor to “internalize” the effects that his behavior has on others.28

Sanction-driven norms may also arise in response to collective action or “free rider” problems (frequently analogized to the “Prisoner’s Dilemma”29). In the canonical Prisoner’s Dilemma, two thieves are placed in separate rooms and each is offered a sentence reduction for ratting the other out. If both keep mum, both will be convicted only of a relatively minor offense with a two-year sentence. If only one confesses, he can go free, while the other will be convicted of a serious crime with a five-year sentence. If both confess, they will each get a four-year sentence. The best outcome for the two thieves is clearly for both to stay mum. However, as long as the thieves are kept from coordinating their actions, they will rationally decide to rat each other out.

The reasons for this suboptimal behavior are illustrated in Figure 1, where the numbers represent the sentences that the thieves receive:

<table>
<thead>
<tr>
<th></th>
<th>Thief B</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Confess</td>
<td>(-4, -4)</td>
<td>Don’t Confess</td>
</tr>
<tr>
<td>Thief A</td>
<td></td>
<td>(-5, 0)</td>
</tr>
<tr>
<td>Don’t Confess</td>
<td>(-2, -2)</td>
<td></td>
</tr>
</tbody>
</table>

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28 There can be issues with coordinating the punishment for such behavior -- each neighbor might prefer to wait for someone else to incur the cost of complaining -- but each neighbor has an incentive to penalize the offender according to the extent he or she is harmed. In principle, the neighbors can act together to inflict penalties equal to the total harm they suffer. Thus, if the social harms of the behavior outweigh its benefit to the offender, it can be deterred. In fact, as explained by McAdams, supra note 1, at 410-18, there is a potential for over-deterrence if the cost of imposing a penalty is less than its impact on the penalized individual. McAdams postulates that esteem penalties are costless to impose, but costly to incur. Hence, there is a potential for “nosy norms” that impose group preferences on weakly disfavored minority behaviors.

29 See, e.g., Hetcher, supra note 1, at 56-57 for a discussion of the Prisoner’s Dilemma and its relationship to sanction-driven norms.
In this example, if Thief B doesn’t confess, Thief A’s best strategy is to confess so that he can get the charges dropped (the “0” payoff). On the other hand, if Thief B confesses, Thief A’s best strategy is still to confess to get the one-year sentence reduction (the “-4” payoff, rather than the “-5” payoff). Thus, thief A will rationally decide to confess. The situation looks the same from Thief B’s perspective and he will also rationally decide to confess. But this strategy clearly leads to a bad result for both thieves! Unless they have some means to enforce an agreement not to confess, their individual preferences will inevitably lead them both to confess. A social norm of “honor among thieves” that imposes penalties on “squealers” can help them to avoid this result.

Generalizing the prisoners’ dilemma to social groups explains what are called “collective action” or “free rider” problems, which make it difficult to provide certain kinds of social goods. These difficulties arise because uncoordinated individually rational choices lead to sub-optimal collective results. A canonical example of such problems is the provision of infrastructure, such as street lighting or public roads. Because each individual can benefit from the lighting or road whether or not he or she contributes funds to provide it, it is individually rational for each not to contribute. Unfortunately, the result is that no one contributes, the lighting or roads are not provided, and everyone is worse off. To solve these problems, there must be a mechanism to prompt individuals to make collectively optimal choices and to deter free riding.

One way to deal with this kind of social problem is to pass laws that penalize people for defecting from the socially optimal course of action. So, for example, taxes are legally mandated as a way of paying for roads, and littering is penalized. However, legal regulation is not always a necessary or effective means for solving this type of societal problem. Social norms often play a more important role than legal regulation. Thus, when prisoners’ dilemma type situations arise

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See, e.g., id. at 59-62, for a discussion of the relation between the Prisoners’ Dilemma and collective action problems.
repeatedly among a close-knit group of individuals, a social norm may arise which penalizes non-conformance and ensures the provision of collective goods.  

For a norm to be enforceable by a community, violations must be observable and the violator identifiable. The community must also be able and willing to impose penalties. Since the penalties are usually reputational in nature, this requirement generally limits the operation of sanction-driven social norms to groups with repeated interactions.

When social norms are feasible they can be quite effective. Though the informal penalties for violating social norms may be less severe than the penalties available under the law, the likelihood of being penalized may be quite high. Since undesirable social behavior is deterred based on the combined effects of the severity and the certainty of punishment, social norms can be very effective at deterring community members from defecting from the socially optimal course. Thus, for example, community disparagement as a “litterbug” may be more effective than the rather unlikely imposition of a legal fine.

While social norm theory for the most part focuses on the need to regulate individual behavior that affects the community at large, Hetcher has suggested that there also may be “epistemic norms” that develop as individuals conform to the behavior of others as a means of

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31 See, e.g., id. at 58-59 for a discussion of social norms as solutions to iterated Prisoner’s Dilemmas. See also Elickson, supra note 1; Robert Axelrod, THE EVOLUTION OF COOPERATION (1984).

32 See, e.g., McAdams, supra note 1, at 351-59. This is the case unless, as has been suggested by Cooter, supra note 1, norms are enforced by internalizing them so that non-compliance produces guilt. Clearly, the instillation of guilt is a time-honored method of dealing with temptation.

33 One of the problems in understanding sanction-driven norms is that imposing penalties, if costly, is itself a public good and people might be expected to attempt to free ride on the imposition of penalties by others with the result that no penalties are provided. McAdams has provided a detailed theory of how the use of esteem sanctions (which he argues are costless to impose) might solve this problem. McAdams, supra note 1, at 355-76. Cooter has also argued that sanctions may be provided through guilt or regret if norms are internalized. Cooter, supra note 1, at 1662.

34 Professor Eric Posner offers a different theory of social norms, arguing that norm compliance serves mainly to signal that an individual will make a good partner for long-term cooperative endeavors. If complying with social norms is costly and does not produce an immediate payoff to the individual, compliance might demonstrate that an individual has the ability to invest in future benefits. Posner, supra note 1, at 18-27. For present purposes I note only that this theory also explains social norms as a means of coordinating group behavior.
economizing on information costs. For example, rather than researching the optimal schedule for brushing one’s teeth, one might adopt a norm of brushing after meals on the rational assumption that this norm reflects the collective wisdom of the community. Like coordination norms, epistemic norms need not be enforced by penalties because conforming to the norm has its own reward. Neither does the community have much incentive to enforce epistemic norms since the costs of not conforming fall, for the most part, on the individual who fails to conform.

2. Social Norms about Tempting Behaviors

While the above theories of social norms go far in explaining observed social norms, there are reasons to believe that they are not exhaustive. Consider, for example, the toothbrushing norm already discussed. Epistemic norm theory explains why an individual would conform to the brush-after-meals norm. Yet, it seems insufficient to explain the social reality, which is that social penalties are often imposed on those who fail to exhibit this and similar behaviors that seem to have little, if any, social impact. People look askance at those who admit to brushing their teeth too infrequently, eat the “wrong” foods, spank (or don’t spank) their children, have messy houses, have unusual sexual proclivities and engage in all kinds of other behaviors that seem rather far removed from any need to coordinate behavior for social benefit. While the epistemic theory can explain why individuals conform to social norms about behavior that does not affect others, the social enforcement of such non-strategic norms requires explanation.

It is possible that sanction-driven norms about such seemingly isolated individual behaviors are motivated by secondary societal effects of the behavior. Those who don’t brush may have bad breath or eventually cause dental insurance rates to rise; those who spank (or don’t spank) their children may eventually produce children who cause social problems of some sort;

35 Hetcher, supra note 1, at 67-70.
and so forth. It is also conceivable that what appear to be direct social penalties for non-conforming behavior are simply part of a process of weeding out unsuitable cooperative partners who have signaled their unsuitability by not investing in conforming behavior.\textsuperscript{36} And of course one may postulate that people simply have preferences about other people’s behavior (“other-regarding preferences”) and that they benefit directly by making other people conform to those preferences.

In this Article, I suggest a different explanation. Social norms may arise as means to deal with common, yet individual, problems with temptation by imposing social penalties to supplement ineffective self-control strategies. Many social norms relate to behavior involving temptation. These include norms about sexual behavior, alcohol consumption, eating, gossip, prying, and disclosure of personal information. While the “willpower norms” theory proposed here does not replace the above explanations of non-strategic norms, it may often be more satisfactory. It also predicts that the combination of effects on the community and internal self-control issues can strengthen the enforcement of social norms. It may thus explain why some social norms are enforced much more strongly than their external impact would seem to justify.

C. A Theory of Willpower Norms

In this section, I analyze how temptation might affect the efficacy and existence of social norms, and the potential that social norms might evolve to reinforce individual self-control strategies.\textsuperscript{37} A social norm might, in principle, aid self control in at least two distinct ways:

\textsuperscript{36} See Posner, supra note 1. It is difficult to understand why anyone would invest in penalizing such individuals above and beyond not forming cooperative partnerships with them, however. Imposing additional sanctions would seemingly dilute the signaling power of norm compliance. Brushing one’s teeth to avoid ridicule is less indicative of ability to delay gratification than brushing one’s teeth to avoid cavities later.

\textsuperscript{37} The possibility that a social norm might act as a self-control measure has yet to be explored by social norm theorists. It has been suggested that adherence to social norms may be a signal of self-control. Schaefer, supra note 17, at 447. Conversely, using pre-commitment devices may signal a lack of self-control. Elster, supra note 1, at 80. Similarly, social norms might mask the extent of an individual’s “true” self-control. Hetcher points out the possibility that social norms might arise as rational responses to irrational or uncontrolled behavior on the part of
First, like some pre-commitment strategies, the social norm might impose a penalty for yielding to temptation, increasing the anticipated cost of yielding enough so that long term preferences prevail. Second, the social norm might reinforce the mental self-control strategies of bundling or categorization of the tempting behavior so that giving in to temptation is less attractive because it is viewed as a violation of a rule rather than as an isolated choice.\textsuperscript{38} The first mechanism is a straightforward penalty, but the second mechanism is specifically tailored to the willpower problem. To explain a social norm that arises to fulfill one of these functions, one needs to understand why a group would maintain such a norm, which solves no obvious collective action or coordination problem.

1. Strategic Characterization of Self-Control Problems

To analyze the possibility of willpower norms, it is helpful to begin by characterizing the kinds of strategic situations in which self-control issues arise. From the outset there is an ambiguity in categorization. To characterize a strategic situation one must lay out the costs and benefits of various courses of action and determine how they depend on the actions of various parties. The perceived costs and benefits of a course of action determine what a rational individual will do. But for temptation-susceptible behavior, the perceived costs and benefits depend upon when they are assessed, since the tempted individual’s preferences change when the tempting option is immediately available. Moreover, the self-control problems of one individual may or may not impose costs on third parties that would give them easily understandable

\textsuperscript{38} This second mechanism is analogous to McAdams’ explanation of the relation between esteem-based and internalization-based mechanisms for social norms. He suggests that “when an [internalized] obligation is vaguely defined, what counts as a violation may depend on what others think is a violation.” McAdams, \textit{supra} note 1, at 385, discussing Cooter, \textit{supra} note 1. Similarly, willpower norms can help to define the scope of a personal rule.
incentives to participate in a punishment strategy aimed at overcoming those willpower deficiencies.

There are thus at least three different kinds of self-control problems that may arise. First, there are self-control problems that affect only the tempted individual, or have very attenuated external impact.\(^\text{39}\) Examples might include temptations to overeat, not to study, to visit a pornographic website, or to spend too much money on a big screen TV.\(^\text{40}\) Second, there are willpower problems that produce negative effects on others. The temptation to drink before driving and the temptation to gossip are of this type. Finally, there are self-control problems that arise in situations requiring coordinated group behavior. Take, for example, the temptation to drink alcohol at a business lunch when there is work to be done later in the afternoon that requires everyone’s participation. If the work is a cooperative project, there is a coordination benefit to be gained if all refrain from drinking too much at lunch. However, there may also be a coordination benefit from drinking if the others do, since the cooperative project will not be accomplished unless all remain sober. Thus, members of this group will have a tendency to “lead each other astray” from the behavior that all would prefer in the long term.

2. Willpower Norms as Solutions to Self-Control Problems

Given the above strategic characterization of the kinds of self-control problems that can arise in a social setting, this section considers the conditions under which effective willpower norms may develop. It also explains how the self-control problems of a powerful social subgroup can lead to social sanctions against the behavior of a distinct subgroup of “tempters,”

\(^\text{39}\) To be more precise, the effects on others that we consider at this point in the analysis are direct effects of the failure to resist temptation. They do not include the effects of any social norms that may arise to govern the activities under consideration. Rather, such social norms are to be explained.

\(^\text{40}\) It is nearly always possible to invent scenarios in which any individual behavior has an impact on others. For example, one person’s choice to overeat may eventually affect the health insurance rates of others and may also, to the extent that “acceptable” weight is socially determined relative to the average, affect the socially acceptable weight for all; one person’s choice not to study may lead to a slightly better job market for everyone else. These second-order effects are ignored here as likely to be too small to affect the behavioral incentives of third parties.
thus permitting the more powerful subgroup to minimize the private costs of its self-control
solution.

a. “Pure” Willpower Norms

It is at first unclear whether a social norm against self-control lapses that do not impose
costs on the larger community is possible. Take, for example, a social norm in favor of working
out at the gym. There are no collective benefits in the long term – the long term health
advantages to me of resisting the temptation to be a couch potato are not affected by whether you
resist. There is also no apparent externality involved – when one person yields to temptation it
has no direct impact on the others.

Despite the fact that yielding to temptation does not produce social consequences in
this kind of “pure” self-control situation, the internal conflict that characterizes temptation
gives rise to a new type of public good. Recall the individual strategies for solving self-
control problems discussed in Part II.A.2. Most of these strategies are flawed because it is
easy for the tempted individual to unravel them at the moment of temptation. A tempted
individual can often undo pre-commitment strategies or can unbundle a particular temptation
by mentally re-categorizing it (the familiar process of “rationalization”). He or she can try to
“free ride” on expectations of the behavior of future “selves.” A social norm enforced by
penalties might effectively reinforce the effectiveness of personal self-control strategies. It
could deter individuals from yielding to temptation and help them to avoid rationalization,
for example by clarifying how much time at the gym is required for a “workout.”

Thus, for pure self-control problems, willpower norms themselves are collective goods,
even though they are not needed to coordinate group behavior or to address negative externalities

41 If anything, if being more fit than others has social status benefits, others might benefit in some attenuated way by
encouraging others to slack off.
of private behavior. Except at the moment of temptation, the members of a community might agree that it would be helpful to maintain a practice of penalizing anyone who yields to temptation. Providing penalties poses a prisoners’ dilemma, however, because, as long as sanctioning is costly, each tempted individual benefits most in the long term if others impose the penalty on her but she shirks from sanctioning others.

Within a close-knit community, where individuals have repeated opportunities to punish one another’s lapses of willpower, a norm of imposing penalties for willpower lapses might evolve, just as a norm against littering can develop. There are limits to the power of willpower norms to solve “pure” self-control problems, however. For a sanction-driven norm against a purely individual lapse of willpower to be maintained, the temptation must be widely shared in the community. There is no incentive to penalize others for their lapses unless one anticipates a need to be penalized in the future. Groups such as Alcoholics Anonymous and Weight Watchers may be formed to create intentionally repeated sanctioning opportunities of this type. It is also important that community members be able to impose penalties at moments when they themselves are not tempted.\(^{42}\) Unless community members foresee a future need to be restrained at the time when they need to impose a penalty, they will have no incentive to enforce the norm.\(^ {43}\)

\(^{42}\) Possibly this issue of simultaneous temptation explains why people sometimes turn to groups like Weight Watchers for willpower enforcement, rather than relying on friends and family -- who are far more likely to experience temptation simultaneously and thus “let each other off the hook.” It also explains how willpower norms can fail when a group of individuals is tempted simultaneously to lead each other astray.

\(^{43}\) Pure willpower norms of this type might also arise under the esteem theory of norm formation proposed by McAdams. Under this theory, the penalty -- a loss of esteem -- is deemed to be costless to impose, McAdams, supra note 1, at 342. If this is truly the case, there is no collective action problem in imposing sanctions, but in the case of pure self-control problems there must still be a motivation for imposing them. McAdams’s theory requires a consensus that a particular behavior has “negative esteem worthiness.” Whether there would be such a consensus about individual willpower lapses is an open question. Pure willpower norms might also be possible under the scenario proposed by Robert Cooter, in which internalization of a norm produces penalties because non-compliance results in feelings of guilt. Cooter, supra note 1, at 1643. In Cooter’s theory, norm formation occurs when a public consensus against certain conduct convinces some to internalize the norm and pass it on to younger members of the community. Ordinarily, the guilt feelings serve to internalize the harms that non-compliance imposes on society. In
For a sanction-driven norm to be viable, norm violations must be detectable. What, then, of a self-control problem for which lapses are not detectable? The interplay between the mental self-control strategy of “bundling” and the epistemic theory of social norms provides an additional, and novel, mechanism for pure willpower norms. If, as discussed above and theorized by Ainslie, one solution to a willpower problem is to bundle several decisions together into a rule, one function of a social norm might be to categorize behavior so as to reinforce the efficacy of personal rules and make rationalization more difficult. In particular, a social norm could serve to bundle undetectable behavior with behavior that could be detected and punished, by defining the scope of violations of the norm. Under a self-signaling theory, in which self-controlled behavior is valued not only for its present value but also as a “signal” to oneself of propensity to maintain self-control in the future (which increases the value of self-control now), such categorization might permit sanctions against detectable behavior to have some impact on undetectable failures of will. So, for example, if an individual believes that giving in to a temptation in private suggests that she will be more likely to give in to temptation in public (and hence be punished), she may have greater incentive for private self-control.

b. Norms against Yielding to Temptations that Affect Others

Pure self-control problems may be relatively rare. Many failures of will have negative effects on both the long-term interests of the tempted and the interests of third parties. For example, drunk driving is a problem both for the driver and for society at large. In this situation, the long-term payoffs do not suggest a problem. Everyone may prefer that people not drive

the willpower case, the costs of yielding to temptation are already internalized, however. The problem is that anticipating the costs of yielding to temptation (which will include feelings of regret) is not sufficient to overcome the temptation. Conceivably, feelings of guilt could add to the anticipated penalty and deter a self-control failure. The question remains whether there will be any public consensus about self-control problems that do not impose negative externalities.

44 Ainslie, supra note 1, at 90-104.
45 See Prelec and Bodner, supra note 21.
when they are drunk. At the moment of temptation, however, the tempted individual sees it differently. With a sanctioning norm in place, it is possible that social penalties against driving while drunk might be enough to avert temptation. When others are negatively affected by a tempted individual’s failures of will, they are motivated to penalize self-control failings just as they would any behavior with negative externalities. Assisting the tempted individual with his or her self-control is a side effect of the effort to deter behavior that is socially harmful.

In some cases, a temptation may be stronger than the collective harm that is imposed on others when the tempted individual gives in. Then, others may not be willing to produce a sanction that is strong enough to deter the failure of will. Outside of a self-control context, such a situation is no cause for concern, at least from a utilitarian perspective. If the benefit that an individual receives from an annoying behavior is greater than the sum of his neighbors’ annoyance, then he should not be deterred from the behavior.

Self-control problems, however, are different from other annoying or harmful behaviors. In cases involving temptation, everyone’s long term interests – including those of the tempted individual -- would be served by enforcement of the norm, yet if the community is not sufficiently affected by the tempted individual’s self-control lapses, it will not punish them. This situation is then analogous to the pure willpower problem. If there is a close-knit community of similarly tempted individuals, a norm might develop because each individual would be willing to penalize others above and beyond the costs that others’ lack of self-control imposes on her, in exchange for herself being penalized at a moment of temptation. Even if an effective sanction-driven norm does not arise in such a case, a willpower norm might reinforce the mental self-control strategies of tempted individuals by bundling the behavior with other unacceptable behavior and increasing the efficacy of a private rule. Because of these possibilities, social
norms against tempting behaviors may be stronger than one might expect if one looked only at the negative social impact of those behaviors.

c. The Failure of Norms to Solve the Problem of Leading One Another Astray

Consider the business lunch problem discussed above. The day before the lunch, all workers may agree that it would be better not to drink at lunch so that they can work on a collaborative project in the afternoon. While they would also enjoy drinking together, there is a clear preference for abstaining and getting the work done. This situation thus appears like a straightforward coordination problem. All parties prefer to coordinate on abstaining. One would thus anticipate that a coordination norm of abstaining from alcohol at lunch would be maintained.

Temptation changes the situation, however. If the co-workers are subject to temptation, then, at the moment of decision, each may prefer that they all drink. In this situation, the co-workers will “lead each other astray” unless sanctions from outside the group or individual self-control measures are sufficient to overcome the temptation. In such cases, social norms might be less effective at coordinating behavior than one might otherwise expect.

To summarize, sanction-driven willpower norms might, under some circumstances, arise to regulate self-control problems, whether or not those problems produce negative effects on others. Willpower norms can also operate through a novel, non-sanctioning mechanism related to certain mental self-control strategies. A social norm can bundle together or categorize behaviors so as to strengthen the efficacy of personal rules. Like an epistemic norm, this mechanism is costless to third parties, requiring only a consensus about how behavior should be

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46 This problem is similar to the breakdown of pure willpower norms that can arise when there is simultaneous temptation, but worse. In the pure willpower norm case, the only incentive to yield simultaneously to temptation is the advantage of avoiding being punished for yielding. In the coordination case, there is an additional benefit if all members of the group yield simultaneously.
categorized. This mental self-control strategy also provides a means by which social norms might effectively regulate behavior that is not detectable by the community by bundling it with detectable behavior that will be punished.

However, effective norms will not always arise. As noted above, if a tempting behavior does not produce substantial enough externalities, then a pre-commitment sanctioning norm will arise only in a sufficiently close-knit community so that individuals can mutually provide the collective good of reciprocal penalties. And if temptations are simultaneous, even a close-knit community may be unable to provide the necessary reciprocal sanctions, particularly if there are immediate coordination benefits to be gained by succumbing.

d. Norms against Tempters as Solutions to Willpower Problems

The discussion so far has focused on norms that support self-control measures by penalizing individuals when they succumb to temptation. Another possibility, related to the pre-commitment strategy of removing tempting options, is to punish those who offer temptations. Sometimes laws reflect this strategy, such as, for example, those restricting the locations and hours of bars, prohibiting sales of addictive drugs, or prohibiting prostitution or gambling casinos.

Social norms can similarly serve a self-control purpose by affording social disapproval to “tempters” so that temptation will be less easily at hand. The mechanisms for these kinds of social norms are more or less the same as for the norms that operate against those who give in to temptation. Both those who expect to be tempted and those who suffer negative externalities when others yield to temptation will be willing to punish individuals who provide tempting options. From a social perspective, and especially from the perspective of the tempted, it may
well be more effective and less costly to remove a temptation by penalizing the “tempter” than to impose sufficiently severe sanctions to stave off lapses of willpower.

D. The Potential for Pernicious Effects of Willpower Norms

Willpower norms, like other types of social norms, may sometimes create undesirable effects. For example, they may override the private preferences of minority groups that do not share the long-term preference structure of the majority. In particular, willpower norms could penalize behaviors that are tempting for most, but strictly preferred for some. Because willpower norms can develop to address purely individual self-control problems, they are more likely than other social norms to over-ride minority preferences, even when the tempting behaviors have no or minimal negative externalities.

Willpower norms that are based on categorizing or bundling behavior might also lead to problems similar to those that have been associated with personal rule approaches to individual self-control. Ainslie and Monterosso have noted that personal rules can overshadow consideration of the particular choice at hand; magnify the importance of minor lapses; motivate intentional misperceptions as ways to avoid complying; or lead to over-compliance or compulsion. Professor Bailey Kuklin also points out some disadvantages of what he terms “self-paternalism,” in which legal rules are framed to protect consumers from their own purchasing mistakes. These disadvantages include loss of autonomy and of the intrinsic value of spontaneity and pleasure in exercising choice, regret due to changes of long-term preferences

47 See, e.g., McAdams, supra note 1, at 409-24 for a discussion of undesirable effects of social norms.
49 Id.
after the rules are in place, and possible undermining of self-discipline and of opportunities to learn from experimentation and mistakes.\textsuperscript{50} Willpower norms may have similar flaws.

When willpower norms that evolve within one social group have external effects on other groups, and especially when they take the form of sanctions against “tempters,” there are additional dangers. Clearly, sanctioning “tempters” as a self-control measure imposes significant external costs on the tempters, who may be forced to give up both personally preferred and, in some cases, socially valuable behaviors. Socially sanctioned “tempters” may range from purveyors of vice to those who prefer “overly revealing” styles of dress. Even mothers who breastfeed in public may be subject to this type of social norm if, as has been suggested, social norms against breastfeeding arise from issues of male sexual self-control.\textsuperscript{51}

If the groups of “tempters” and “tempted” are distinct, and if the tempted are more numerous or more powerful than the tempters, a norm against tempters may persist despite significant social costs associated with punishing the “tempters.” Attempts to deal with limited willpower are thus an additional source of “nosy norms” involving preferences about other people’s behavior.\textsuperscript{52} McAdams argues that “nosy norms” can arise from the costless imposition of esteem sanctions that are costly to those who are punished.\textsuperscript{53} Because esteem penalties are cheap to impose, they may make it privately worthwhile to enforce rather weak “other-regarding” preferences. The result may be to deter socially valuable behavior. Similarly, the private preference of those with willpower problems may be to punish tempters, while the social optimum might be to penalize those who give in to temptation. This can happen when the

\textsuperscript{51} See, e.g., Sherry F. Colby, \textit{Public Breastfeeding: When Legal Protection Isn't Enough}, FINDLAW WRIT at http://writ.corporate.findlaw.com/colby/20040714.html, discussing social norms and public breastfeeding. Norms against “tempters” raise other difficult issues as well, which are beyond the scope of this Article, involving the extent to which and reasons why minority group “tempters” might enforce the social norms of the majority against one another.
\textsuperscript{52} McAdams, \textit{supra} note 1, at 410-424.
\textsuperscript{53} \textit{Id.}
private cost to the tempted of removing the temptation by punishing “tempters” is less than the private cost of deterring temptation by penalizing failures of will. If the difference in costs is less than the social value of the tempting behavior (including the private value to the “tempters”), then the norm will be inefficient.

The next Part applies the theory of willpower norms to social norms governing the disclosure and dissemination of personal information. This analysis of personal information norms provides insight into the kinds of social problems that may have given rise to the norms, which in turn can be used to evaluate the social need to support or replace these norms when cultural or technological developments erode them.

III. PERSONAL INFORMATION NORMS AS WILLPOWER NORMS

The disclosure and dissemination of personal information about individuals within a community has traditionally been regulated by a nuanced system of social norms. Social norms regulate prying and gossip and also the “inappropriate” disclosure of certain kinds of personal information in certain contexts. By and large the function of these personal information norms has yet to be analyzed in depth from a social norms theory perspective. Yet the question is important for at least two reasons. First, since, as discussed in Part II, social norms often arise out of underlying conflicts between individual preferences and collective benefits, they provide clues to those underlying conflicts. Studying them may bring to light social issues that need to be addressed in contexts in which norms are ineffective. Second, many have mourned a

54 McAdams, supra note 1, at 424-33, has analyzed the effects that restricting the dissemination of personal information through privacy might have on the evolution of social norms. Schwartz, supra note 3, at 838-43, has discussed the ways in which information privacy might mitigate some of the harmful effects of overly zealous enforcement of social norms. Hetcher has devoted considerable attention to the emergence and function of social norms about the treatment of personal information that govern the behavior of online website owners, but has not applied the analysis to interpersonal dissemination and disclosure of personal information. Hetcher, supra note 1, at 243-305.
perceived decline in social norms about personal information disclosure and predicted that modern data processing and other technological means for obtaining personal information will lead to major and undesirable social changes. To understand whether these social forces will result in a breakdown of personal information norms -- and to determine whether such a breakdown is a problem that should be addressed by legal regulation -- it is important to try to understand these norms and to see what underlying social purposes they have served.

In this Part, I argue that many personal information norms are best understood as willpower norms, which can improve the quality of decision-making within a social group by curtailing systematic human tendencies to process personal information inaccurately. Willpower norms arise in the personal information context because both disclosing information and obtaining information are subject to time-inconsistent preferences and temptation. Individuals regularly both disclose information they wish they had not disclosed and obtain information they are unable to process rationally, with resulting social disutility. Personal information norms can curb these tendencies by reinforcing the willpower of both disclosers and recipients of the information. Unfortunately, personal information norms can also serve as socially pernicious and inefficient “silencing norms” against tempters, as exemplified by the “don’t ask, don’t tell” policy against gays in the military.

A. Nuanced Social Attitudes Toward Personal Information Flow: A Puzzle

Social norms governing the obtaining, disclosure, and dissemination of personal information are ubiquitous and nuanced. Norms discouraging prying, gossip, and “tattling” have


been in force, in varied forms, for centuries. Though a large fraction of social discourse consists of discussion of the activities -- including the follies and foibles -- of friends, colleagues, and acquaintances, there are well-recognized boundaries to the types of personal information that can be discussed. The boundaries depend on the identities of the participants in the conversation.

Most interesting -- and puzzling -- are social norms opposing disclosure of one's own personal information to others. Even in today's "tell-all" society (or perhaps especially so), there is widespread aversion to and disapproval of the disclosure of personal information at the wrong time and place. It is not simply that individuals do not want to share everything with everyone, but also that individuals do not want to know everything about everyone else. It is improper to tell one's boss about one's sexual activities, whether or not they are remarkable in any respect. One does not want to be regaled with stories about the hospitalizations of the accountant's relatives or their religious conversions. On the other hand, one may sometimes, without social disapproval, disclose quite personal information to a stranger on a bus. Discussion of some subjects, such as politics, religion, or income, is seen as entirely appropriate in some social situations and entirely inappropriate in others.

These social norms against providing information are puzzling when one stops to think about it, especially in light of the high value usually placed by society on the free flow of information. The availability of information is an assumed prerequisite to a well-functioning and

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57 See Daniel J. Solove, The Virtues of Knowing Less: Justifying Privacy Protections against Disclosure, 53 DUKE L. J. 967, 1035-44 (2003), noting that more information can lead to misjudgment because information is taken out of context and because of irrational judgments based on stigmas, and Julie E. Cohen, Examined Lives: Informational Privacy and the Subject as Object, 52 STAN. L. REV. 1373 at 1403-04, arguing against the contention that more information always leads to more knowledge.

58 Richard A. Posner, THE ECONOMICS OF JUSTICE (1983) at 234, points out that people disclose personal information to strangers and are more reticent when "speaking to friends, relatives, acquaintances, or business associates who might use a personal disclosure to gain an advantage . . . in a business or social transaction." He argues that this selective reticence supports a theory of privacy as misrepresentation aimed at misleading others. However, the fact that, even in the view of the recipient, disclosing personal information to strangers may be more acceptable than disclosing it to acquaintances cuts against the misrepresentation theory.
efficient marketplace. In addition, transparency is a widely held democratic value and the ability to obtain and discuss information about others is considered by many to be an important aspect of free speech.59 Thus, while it is relatively easy to understand why individuals sometimes prefer not to disclose personal information, it is puzzling, and worth exploring in some detail here, that anyone might prefer, in the long term, not to have obtained personal information about someone else. But if personal information disclosures are valuable to the recipients of the information, it is difficult to see how social norms against disclosing personal information could have arisen.

In the following sections of this Part, I will attempt to convince the reader that the concept of willpower norms is useful in understanding the norms governing personal information flow, especially norms that punish those who disclose their own personal information. First, I will argue that the disclosure, dissemination, and processing of personal information are rife with time-inconsistent preferences -- and hence with problems of temptation. Second, I discuss how these temptation problems might lead to a system of willpower norms governing personal information flow that includes norms against disclosing one’s own personal information to others. Finally, I consider how these self-control problems can lead to a pernicious kind of willpower norm against self-disclosure, which I term a “silencing norm” and which is exemplified by the “don’t ask, don’t tell” policy.

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59 For example, Eugene Volokh, in an extensive First Amendment analysis, has characterized the right to information privacy as a “right to stop you from speaking about me.” Eugene Volokh, Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You, 52 Stan. L. Rev. 1049, 1117 (2000). Volokh analyzes various rationales for permitting the subject of personal information to control its dissemination and argues all could be expanded easily to justify restricting other types of discourse.
B. Time-Inconsistent Preferences about Personal Information Disclosure and Dissemination

Both disclosing one’s own personal information and obtaining personal information about other people can be tempting. Moreover, there can be social costs when people yield to the temptation to disclose or obtain personal information.

1. Temptations to Disclose Personal Information

People often disclose personal information despite having indicated a long term preference for keeping such information private. This tendency has been documented particularly well in the context of online disclosures. In the past few years, a large number of surveys and a few experimental studies have probed public attitudes about online disclosure of personal information. Respondents generally report a high degree of concern about the privacy of their personal information and strongly believe that they should have control over its use. However, as noted by Stan Karas, “despite warnings against personality-warping self-censorship, there exists little evidence that consumers actually alter their behavior because of ongoing data collection.” And few individuals take affirmative steps to protect their online privacy. In other words, despite having indicated a preference not to disclose personal information online, individuals in fact disclose such information frequently.

One possible conclusion from these studies would be that people are simply not as concerned about revealing their personal information in the course of real transactions as they report themselves to be when considering a disclosure in the abstract. However, a very

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interesting study by Sarah Spiekermann and collaborators suggests another possibility. The study probed the correspondence between subjects’ reported privacy concerns and their behavior during an online shopping trip involving real purchases.64 The shopping trip involved an online “bot” named Luci which asked the shoppers a variety of personal questions to guide their product selection. The subjects’ behavior during the shopping trip seemed inconsistent with reported privacy preferences. All participants, including those who reported strong privacy preferences, answered a high number of personal questions asked by the “bot.”

A closer inspection of the participants’ behavior brought to light correlations between shopping behavior and reported privacy preferences, however.65 Those study participants who had expressed greater privacy concerns delayed answering the bot’s questions, checking frequently to see whether an information search would provide a satisfactory recommendation for their purchase, such that answering the question could be avoided.66 Though many of them eventually revealed nearly as much personal information as those ostensibly less concerned with privacy, they thus appeared to be much more conflicted about providing the personal information that was requested, providing it only after a period of delay.

These experiments suggest that the more privacy-conscious individuals engaged in an internal struggle over whether to reveal the information. If this speculation is correct, the study may provide evidence that the inconsistency between individuals’ stated attitudes about disclosing personal information and their behavior is a result of time-inconsistent preferences between long term desires for privacy and short term temptations to disclose information in exchange for relatively minor, but immediately attractive, savings or conveniences. As

64 Sarah Spiekermann, Jens Grossklags, and Bertina Berendt, E-Privacy in 2nd Generation E-Commerce: Privacy Preferences vs. Actual Behavior, in 3rd ACM CONFERENCE ON ELECTRONIC COMMERCE - EC ’01 (2002).
65 Id.
66 Id.
recognized in a recent economic treatment of information privacy online, “the protection against one’s own future lack of willpower could be a crucial aspect [of] providing a link between information security attitudes and actual behavior.”

Temptations to disclose personal information may arise not only from the opportunity to trade privacy for immediate gain, as in the usual online context, but from a taste for the disclosure itself. Of course, much of the personal information that provokes concern when it is disclosed in commercial transactions seems unlikely to be the subject of such a taste for disclosure. Likely few people get an inherent kick out of disclosing their credit card numbers or social security numbers. However, the issue of personal information disclosure is significant in many arenas other than commercial transactions. Disclosure of personal information is at issue in social, employment, health care and other contexts in which an inherent appetite for expression is much more likely to come into play.

Indeed, away from the online context, impulsive disclosures, later regretted, are familiar and do seem to be motivated by a taste for disclosure. This taste for disclosure is exhibited not only by those who clamor to participate in tell-all talk shows, but by the increasingly numerous ‘bloggers, by those who bore or captivate their airline seat neighbors with tales of their surgeries or love lives, by individuals seated on bar stools or in barber chairs, and, relevant here, by those who impulsively confide in their co-workers personal information that they later wish they had kept to themselves. This apparently widespread appetite for disclosing personal information can compete with longer-term interests.

In summary, individuals demonstrate ambivalent attitudes and behavior with respect to disclosing their own personal information, suggesting that time-inconsistent preferences and self-control may have important ramifications for personal information disclosure.68

67 Acquisti and Grossklags, supra note 10, at 10.
2. Time-Inconsistent Preferences about Obtaining Personal Information about Others

It is relatively easy to understand why people might wish to obtain personal information about others. Such information may be directly useful in evaluating the advisability of transacting with those others, might even provide opportunities to exploit or defraud them, might be indirectly useful as a kind of "morality tale" about the costs and benefits of particular lifestyle choices, and might satisfy a simple curiosity or taste for information about others. Curiosity about other human beings is widespread, as evidenced by numerous television shows, magazines, books, and lunch table conversations. Indeed, it was this very trait that inspired the seminal Warren and Brandeis article that launched the privacy torts.69 This curiosity about other

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68 These issues of temptation and willpower arise in addition to other concerns about whether disclosures of personal information are likely to be socially optimal. Individuals may not make good decisions about whether to disclose personal information for a variety of reasons beyond lack of self-control. See Alessandro Acquisti and Jens Grossklags, Privacy and Rationality: Preliminary Evidence from Pilot Data, 3RD ANNUAL WORKSHOP ON ECONOMICS AND INFORMATION SECURITY at 3 (WEIS 2004); Acquisti and Grossklags, supra note 7; Acquisti, supra note 3, at 3; Schwartz, supra note 3. See also Hetcher, supra note 1, at 244-50 (discussing and citing authorities regarding the "degradation of consumer privacy result[ing] as a third-party externality of free-market data-collection norms of the website industry"). The recipient of the disclosure is likely to have a much more adequate assessment of the expected private value of the information. Because of this asymmetry, the subject of the information may lack the necessary information and the disseminator the appropriate incentive to behave in a socially optimal way. Moreover, the costs of personal information disclosures are low probability and may realistically range from negligible to catastrophic. Individuals are generally not good at processing such low probability risks. Eric J. Johnson et al., Framing, Probability Distortions, and Insurance Decisions, in CHOICES, VALUES, AND FRAMES, supra note 12. See also Daniel Kahneman and Amos Tversky, Conflict Resolution: A Cognitive Perspective, in id. Studies also show that individuals do not simply make global comparisons of costs and benefits. See Richard H. Thaler, Mental Accounting Matters, Framing, Probability Distortions, and Insurance Decisions, in CHOICES, VALUES, AND FRAMES, supra note 12. Instead, they perform "mental accounting" that categorizes costs and benefits. One aspect of mental accounting is a practice of treating certain small levels of cost as negligible "petty cash." Id. Because each disclosure of personal information may be mentally categorized as an isolated and "small" disclosure, individuals may fail to account for them and fail to account for the cumulative risks of a series of disclosures. Further, one of the most well-established cognitive deviations from perfect rationality is loss aversion. See, generally, the articles in Part Three of CHOICES, VALUES, AND FRAMES, id. The account to which an individual mentally "posts" the expected costs of a disclosure of personal information may determine whether a disclosure of personal information is counted as a loss. The framing of a decision may also affect the choice that is made. See, generally, the articles in Part Four of CHOICES, VALUES, AND FRAMES, id. For example, placing items into the "shopping cart" in a typical online transaction may frame a decision to abandon the transaction rather than provide personal information as a "loss" of what was already "in the cart." Framing effects also combine with loss aversion to provide a "status quo bias", see, e.g., Colin F. Camerer, Prospect Theory in the Wild, in CHOICES, VALUES, AND FRAMES, id., that may lead members of the public to take a very different view of the disclosure of personal information when it is viewed as an "opt-out" default, than when it is viewed as a loss relative to an "opt-in" default.

people is not focused solely on those whose activities affect our own lives, suggesting that there is an inherent pleasure in learning about other individuals.\(^{70}\)

Despite the obvious potential to benefit from obtaining personal information about others, it is well known that individuals sometimes obtain information against their better judgment. Many have experienced regret at having yielded to the temptation to read a letter carelessly left out on a desk or an unintentionally forwarded email. As noted by Solove, “Similarly, people may recognize the value of being restrained from learning certain details about others, even if they crave gossip and would gain much pleasure from hearing it.”\(^{71}\) In this section I consider why this might be the case. The analysis has three steps: explaining why people might be better off if they avoid certain information; arguing that people experience time-inconsistent preferences about obtaining and considering such information; and explaining why personal information is particularly likely to be the object of such time-inconsistent preferences.

a. Why Everyone Doesn’t Want to Know Everything about Everyone Else

To understand why individuals might not want to be exposed to others’ personal information, this section considers whether information can have a negative impact on those who learn it. This discussion necessarily moves beyond the neo-classical model of individuals as perfectly rational utility maximizers who can perform cost-free and error-free information processing. I argue here that a long-term preference to avoid “too much information” may arise for three reasons. First, even someone who could process information perfectly, costlessly, and instantaneously might not always make better decisions when given access to additional

\(^{70}\) Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 395-97 (1977-78), hypothesizes that human fascination with the lives of others is based on the value of the information as general input about how to live a successful life. Perhaps this is the case, though many demonstrate curiosity about matters that seem far removed from their immediate life concerns. In any event, for present purposes, the point is merely that a taste for inquiry exists and may sometimes be in competition with the optimal information acquisition strategy for decision-making purposes.

\(^{71}\) Solove, *supra* note 57, at 1050.
information. Even if perfect information is best, more information is not always better. Second, in the real world, information processing is not costless or instantaneous. Real decision-makers must limit the information that they consider. Third, human beings do not always process information accurately. Some information is “more prejudicial than probative.”72 Because of these costs and limitations, people may make better decisions if they avoid certain kinds of information in certain contexts.

i. A Little Knowledge is a Dangerous Thing: Knowing More Is Not Always Better

Even if information processing were perfect and costless, the availability of more information would not always improve the quality of decision-making. Professor Richard Murphy provided useful examples of this possibility in his article arguing that even perfectly rational decision-makers may make sub-optimal decisions about information.73 Murphy argued that personal information disclosure can lead to wasteful defensive expenditures on rehabilitating reputation to make up for the disclosure of true but incomplete information. Murphy gave two examples of this effect, which are useful to illustrate how more information can lead to inferior decisions. The case of Sipple v. Chronicle Publishing Co.74 involved newspaper reports of the gay sexual identity of a man who thwarted an assassination attempt on President Ford. The case of Haynes v. Alfred A. Knopf, Inc.75 involved publication of a book recounting aspects of Mr. Haynes’s early personal life that cast him in a negative light compared to his current exemplary lifestyle. Sipple and Haynes objected to these disclosures on the grounds that the information might lead third parties to become less willing to deal with them. Murphy’s analysis focused on

72 Fed. R. Evid. 403.
74 201 Cal. Rptr. 665 (Ct. App. 1984).
75 8 F.3d 1222 (7th Cir. 1993).
how Sipple and Haynes might respond to this possibility, by engaging in costly measures to repair their reputations or, in Sipple’s case, to educate potential transactors about the significance of his sexual identity. If such repair efforts are successful, all parties might end up engaging in precisely the same transactions that would have occurred without the disclosures, at the additional cost of Haynes’s and Sipple’s efforts.

These examples demonstrate that more information does not inevitably lead to superior decision-making. If complete information would have convinced the parties to transact, the information disclosure in these cases leads to worse decisions. In the economic world of perfect information, these transactions would take place. In the real world of imperfect information, more information (but not enough information) does not lead to an improved result. There is simply no guarantee that decision accuracy is a strictly increasing function of information flow. Even if complete information is best, more information is not always better.

ii. Rational Ignorance and “Rational Information Processing”: The Costs of Thinking About Things

Even if one could be sure that more information would lead to a better result, the costs of obtaining and processing additional information might offset the improvement in accuracy. The idea that rational decision-makers sometimes decide that the expected value of information is not worth the expected cost of acquiring it is termed “rational ignorance” and has been discussed extensively in a number of contexts. But there is more. Not only is acquiring information sometimes costly, but processing information is costly as well -- even if the information is available for free. The costs of analyzing information include both the costs of sorting out and disregarding irrelevant information and the costs of analyzing relevant information.

A perfectly rational decision-maker would not process all the information she receives. In analogy to the concept of “rational ignorance,” what one might call “rational information processing” would lead her to stop considering more information once the expected processing costs exceeded the expected benefits. So, rational ignorance might lead a car buyer to stop wasting time and money traveling to dealerships and collecting brochures. “Rational information processing,” on the other hand, would lead her to decide to stop thinking about which car to buy after finding an acceptable solution. The “rational information processor” stops thinking at the point when the estimated improvement in car selection from further thought is outweighed by the anticipated cost of more complete analysis. The decision to stop considering alternatives may be rational even if further information is costlessly acquired (e.g., Car and Driver magazine arrives in the mail the next day or friends and family give “free advice” about the decision).

iii. Bounded Rationality and Information Processing: Information Can Be “More Prejudicial than Probative”

Besides avoiding the costs of acquiring and processing further information, individuals may wish to avoid considering information that is “more prejudicial than probative.” The idea that some information should be excluded from decision-making is not foreign to the legal system. Cognitive limitations are explicitly recognized in the evidentiary rules that are imposed on formal decision-making in the court system. Judge Richard Posner, who is a prominent critic of controls on personal information dissemination in the privacy context, argues that the exclusion of certain evidence under Rule 403 of the Federal Rules of Evidence can be explained

77 Others have noted the connection between these evidentiary rules and information privacy. See, e.g., Jeffrey Rosen, The Unwanted Gaze: The Destruction of Privacy in America (2000) at 156; Solove, supra note 57, at 975; Robert C. Post, Three Concepts of Privacy, 89 Geo. L.J. 2087, 2088-89 (2001).
78 Posner, supra note 58, at 231-309 (1983); Posner, supra note 70 at 401-08.
on the basis of information processing costs and errors. In that context, Posner concludes, “Keeping evidence from the jury is an alternative to what might otherwise be time-consuming and ineffectual efforts at enlarging and debiasing the jury's cognitive capacities.” He identifies “emotionality,” “cognitive overload,” and “waste of time” as reasons for excluding otherwise relevant evidence from a trial. It almost goes without saying that similar reasons underlie the exclusion of irrelevant evidence.

As Posner explains, “Repetition and protraction can make it harder for the trier of fact to reach a correct judgment, as well as increase the direct costs of the trial. As more and more evidence is introduced, additional evidence, even if relevant, is likely both to be wasteful in the sense of yielding diminishing benefits (in terms of accuracy) with no corresponding diminution in cost and confusing in the sense of actually reducing accuracy.” We have already discussed the problem of costly information processing that does not lead to corresponding improvements in decision-making. Posner’s analysis highlights the further possibility that “extra” information not only imposes unnecessary costs but may lead to worse decisions. Of course, fully rational decision-makers do not get confused. But, as already discussed, real human decision-makers tend to display “bounded rationality” in their thinking. For example, they tend to weigh conspicuous, memorable, or vivid evidence disproportionately. Such information is distracting and, particularly when of low relevance to the decision at hand, likely to interfere with rational decision-making.

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80 Id. at 1523.
81 Id. at 1523 -24.
82 Id. at 1524.
83 Rabin, supra note 16, at 30. This type of error also seems to be what Posner intended when referring to the problem of “emotionality” undermining correct decision-making. Posner, supra note 79 at 1524.
b. Information Temptation: The Role of Self-Control in Information Processing

Having established that there are reasons to expect that decision-making might suffer if there is too much information available, we can now consider why obtaining and processing personal information poses a self-control problem. Juries, after all, are not in control of the evidence presented to them and are expected to consider all admissible information that is presented. Thus, as Posner suggests in his article about the evidentiary rules, one way to think about Rule 403 is as “a corrective to the jury's lack of incentive to overcome its cognitive limitations by 'thinking hard' about the issues that it is asked to resolve.”\(^8^4\) Since those involved in voluntary transactions will be directly affected by the quality of their own decision-making, we need to explain why there is a self-control issue here at all. Why wouldn’t an individual’s strong preference to make correct decisions be sufficient to overcome the cognitive limitations that juries do not bother to resolve? Why don’t individuals just engage in “rational information processing” and avoid excess information processing?

To pose these questions is almost to answer them, however. First, bounded rationality problems may not be solvable by “thinking hard” since they represent limitations on human rationality. Second, many of these limitations are bound up with self-control issues. Information may be distracting, for example, because thinking about it satisfies some short term preference while being inconsistent with long term preferences. If there are particular types of information that provoke curiosity and are likely to interact with weaknesses in decision-making capabilities, a self-control dilemma will arise.\(^8^5\) As already discussed, such self-control dilemmas are familiar, as is the sensation of regret that often follows a decision to “pry” into personal information. If an individual learns personal information accidentally, because the information is

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\(^8^4\) Id. at 1523.

\(^8^5\) See, e.g., Carrillo, supra note 22, discussing information acquisition strategies related to attempts to quit smoking.
disclosed by the subject of the information or by someone else, he or she may find that it is difficult to ignore. This difficulty may be experienced as a simple inability not to consider the information or as an internal struggle as he or she attempts to ignore it.86

If a person is aware that she may be unable to stop herself from mulling over “excess” information, she may prefer to remove the temptation by limiting the information to which she is exposed (the self-control strategy of pre-commitment). Thus, in the car purchase example, an individual who suspects she might continue to read and think about more models of cars or about cars outside of her price range even after making a rational decision that any more time spent on the car question would be a waste, might throw out the Car and Driver magazine that arrives the next day or tell her well-meaning friends and relations that she does not want any more information because her mind is made up.

Individuals who expect that certain types of information will be costly to process and likely either not to improve their decisions or to lead them to incorrect decisions, may thus prefer the pre-commitment mechanism of simply not acquiring the information to the costly and potentially ineffective strategy of “thinking hard” or trying to prevent the information from affecting their decisions.

c. Processing Personal Information: Why is it Special?

The discussion of information processing limitations so far has not provided any reason to be especially concerned about personal information. In principle, tradeoffs between the advantages of acquiring information and the potential costs are present for any information, yet for the most part social norms against disclosures are targeted at personal information. To

86 The possibility that hyperbolic discounting can lead either to conscious struggles with temptation or to what are perceived as unavoidable “captures” of attention is explored at length by Ainslie in his discussions of habits and of pain. This discussion seems directly relevant to a perceived “inability” to ignore certain information. Ainslie, supra note 8, at 48-70.
invoke these information processing issues as an explanation of personal information norms, we thus have to explain why personal information is particularly likely to lead to bad decisions. In fact, there are a number of reasons to suspect that this is the case.

Personal information may be particularly likely to impose high processing costs relative to the value of the information. It may often be difficult to understand or to place in context, either because it is a type of information not ordinarily considered in making a particular kind of decision or because understanding personal information in context is likely to require a potentially costly acquisition of further personal information, as in the Haynes and Sipple cases. Such information thus seems likely to produce a kind of decisional noise, which must be filtered out. Posner may be referring to this effect when he notes the role that a constructed public self plays in “eliminat[ing] ‘noise’ or ‘cross-talk’ from our communications, which would retard rather than facilitate comprehension of our intentions and behavior.”

There are also several reasons to expect that the problem of “distracting” information will be particularly acute for personal information. By analogy to the rules of evidence, the goal is to remove information that is “more prejudicial than probative” from consideration. Private information is, almost by definition, especially likely to be lacking in relevance to a “public” type of decision. And personal information also seems particularly (though obviously not

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87 The argument that privacy protects against being “taken out of context”, made, e.g., by Rosen, supra note 77, at 8-9, has been criticized as not specific to personal information. See, e.g., Lawrence Lessig, Privacy and Attention Span, 89 Geo. L.J. 2063, 2065 (2001); Post, supra note 77, at 2087. However, personal information that is disclosed outside of a context in which such disclosures are standard very likely is more difficult to interpret and more likely to be misinterpreted than more public information. See also Paul M. Schwartz, Privacy and the Economics of Personal Health Care Information, 76 Tex. L. Rev. 31 (suggesting excessive costs of explanation and mistaken beliefs about the significance of genetic information as a reason to limit disclosure of such information).


89 In fact, the issue of relevance might almost be taken to define what information is “private” in a particular circumstance. See Solove, supra note 57 at 1052-53, arguing that privacy of information must be defined by the use of the information.
exclusively) likely to be “distracting” in light of the commonly exhibited, if not entirely explained, short-term fascination with it.

The aversion that many people have to disclosing and being exposed to certain kinds of non-negative personal information, such as nude photographs, information about certain health problems, and so on, can be explained if people anticipate that others may have difficulty ignoring highly salient but largely irrelevant personal information. While scholars who presume rational decision-making are forced to treat these common aversions as mere unexplained preferences, a more satisfying explanation may be the reasonable concern that such information, while almost always irrelevant, will not be ignored, but will factor into decision-making because it is extremely difficult to disregard. Because personal information may be difficult to ignore, this expectation of decision-making irrationality may also underlie social norms against disclosing information about religion, political views, income, sexual proclivities and other potentially “distracting” information in certain situations.

The conclusion from this analysis is that we should not be surprised if people have complex preferences about learning personal information about others. Such information is likely to be useful and interesting in some contexts and distracting and confusing in others. Frequently, personal information about others is interesting in the short term but distracting or confusing in the long run, leading to the time-inconsistent preferences about nosing into other people’s affairs that are familiar from daily life. In the next section, I argue that these complicated time-inconsistent preferences about personal information may underlie the complex social regulation of personal information dissemination by personal information norms.

90 See, e.g., Posner, supra note 58, at 234; Volokh, supra note 59, at 1117.
C. Personal Information Norms as Willpower Norms

Because the short-term and long-term costs and benefits of disclosing and obtaining personal information are highly dependent on the context of the disclosure, it is not surprising that many different strategic situations can arise and that personal information norms are highly contextual. While a detailed analysis of such norms is beyond the empirical foundation of this Article, it is possible to make some general arguments about these norms based on the willpower norms analysis in Part II. I also give a more detailed analysis of two contexts in which personal information norms are problematic: the online disclosure of personal information and the “don’t ask, don’t tell” policy.

1. Norms against Disclosing Personal Information

Under the traditional view that more information is better, one would expect self-disclosures to be welcomed and reticence to be suspect. As explained by Professor Richard Murphy: “in grossly oversimplified terms, the consensus of the law and economics literature is this: more information is better, and restrictions on the flow of information in the name of privacy are generally not social wealth maximizing, because they inhibit decision-making, increase transaction costs, and encourage fraud.”91 Those who wish to keep others from obtaining personal information about them are suspected of seeking to exploit third party misapprehensions.92

In principle, the theory of willpower norms provides a mechanism by which norms against disclosing personal information could be sustained even under this “more information is better” assumption. The temptation to make ill-advised disclosures of personal information is widespread. In principle, a pure willpower norm against such privately damaging disclosures

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91 Murphy, supra note 73, at 2382.
92 See Posner, supra note 70 at 399-400.
could arise in a community with repeated interactions. But, under the “more information is better” premise, such pure willpower norms against personally disadvantageous disclosures seem unlikely to arise. Under that premise, the expected harm from self-disclosure would be weighed against the benefits of learning about others in the community. It seems implausible that the attenuated possibility of harm from future personal disclosures would outweigh preferences to obtain personal information about others which, under the “more information is better” assumption, offers both immediate gratification of curiosity and the potential for better decisions. Incentives to penalize disclosers seem likely to be insufficient under this assumption. In fact, one might well anticipate the formation of a norm in favor of disclosing personal information since private decisions to keep secrets would impose negative externalities on the rest of the community, which could make productive use of the information.

If one accepts that both disclosing and receiving personal information are subject to time-inconsistent preferences, however, it is much easier to understand the phenomenon of norms against disclosing information. Individuals’ long-term incentives both as disclosers and recipients of information, would then motivate them to participate in penalizing the disclosure of “inappropriate” personal information. Norms against disclosing certain types of personal information in certain contexts can compensate for common cognitive and self-control problems related to the taste for disclosure and for inquiry, the likely irrelevance of personal information, and the difficulty in properly processing distracting information. Because the extent to which information is “more prejudicial than probative” will vary according to the context, the norms of

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93 The analysis would be different if the non-disclosure norm were directed at disclosing information to outsiders. If the recipients of the information are not members of the group, the social norms of the group will not take their preferences into account. Thus, if disclosing information is detrimental to members of the group, a social norm against disclosure might be sustained, regardless of whether the disclosures are harmful or beneficial to outsiders. The norm against “squealing” among criminals, discussed earlier in the context of the Prisoner’s Dilemma would be such a norm. While beneficial to the group, these norms can obviously be inefficient from a social perspective. 94 Norms in favor of disclosures that a social group deems appropriate and useful do exist, in fact. Consider, for example, the scientific norm of communalism. See Robert K. Merton, THE SOCIOLOGY OF SCIENCE (1973).
disclosure would be expected to vary accordingly. Information that is considered
“inappropriate” in one context might be considered a perfectly acceptable subject of disclosure in
another. For example, norms cordonning off the disclosure and dissemination of certain types of
personal information in environments such as the workplace may be explicable on these grounds.
If personal information is “floating around” the office it may be imposed on those who would
prefer not to have to incur the costs of and possible mistakes induced by considering it.

    Common failings of personal information norms are also explicable using the willpower
analysis. Simultaneous temptation and coordination benefits can undermine the effectiveness of
these norms. For example, a group of friends may all be better off if they decide not to gossip
about someone. However, if one of them is going to gossip they may be better off if they pool
all the information that they have so that their assessments are more accurate. Though the
group’s long-term preference may be not to gossip at all, the fact that all members are tempted at
the same time might undermine the effectiveness of a norm against gossiping in this case. Group
members might “lead each other astray” unless sanctions from outside the group or individual
self-control measures are sufficient to overcome the temptation.

    To summarize, the willpower norms analysis is helpful in understanding why personal
information norms prohibit both disclosing and prying into personal information in some
circumstances and how simultaneous temptation may undermine their operation. When
disclosers and hearers are more or less similarly situated members of a close-knit community,
these personal information norms are reasonably likely to be socially beneficial and efficient. If,
on the other hand, norms of non-disclosure single out a particularly disfavored subgroup of
“tempters” within a community or if disclosers and recipients form separate groups, such norms
are more likely to be inefficient and problematical.
As illustrated in the next two sections, the theory of willpower norms is useful in illuminating why efficient norms may fail to arise in some circumstances and identifying pernicious, inefficient personal information norms.

2. Failure of Personal Information Norms: The Disclosure of Personal Information Online

Consumer disclosure of personal information online can be analyzed as a willpower issue. Individuals may disclose personal information in transactions with websites -- even, for example, when those websites do not have effective privacy controls -- because the temptation of immediate gratification overcomes a longer-term preference not to disclose such information. In this commercial online context, a willpower norm is difficult to establish. One consumer’s disclosure of or failure to disclose personal information in an online transaction is of no direct interest to other consumers since they are not the recipients of the information. Thus, as already mentioned, a norm against disclosing personal information online would have to be a pure willpower norm. I argued above that a pure willpower norm can develop when a repeatedly interacting group assumes reciprocal obligations to punish lapses. Online commercial disclosures cannot support such a norm both because failures of will are not observed by other online consumers and because online consumers do not form a repeatedly interacting group.

While consumers are unable to develop a norm of penalizing one another for excessive online disclosures of personal information, they do have ways to penalize “the tempters” -- in this case websites without protective privacy policies. Is a norm against tempters likely to arise in this context? Hetcher argues that consumers face a collective action problem in attempting to influence website companies to adopt more privacy-protective policies. Consumers as a whole

95 See Acquisti, supra note 3, and Acquisti and Grossklags, supra note 10, for explorations of this possibility from a behavioral economics perspective.

96 This is not strictly true, since consumers share a common interest, as explored by Hetcher, supra note 1, at 258-59, and discussed below, in pressuring websites to change their data collection policies.
might be better off refusing to deal with sites that do not offer a high level of privacy protection, but for each individual consumer it is rational to attempt to free ride on the boycott efforts of others. Consumers are unable to enforce a boycott because they cannot detect and penalize defectors. This analysis suggests that consumers will not be able to sustain a “norm against tempters” that penalizes such websites.

The “personal rule” bundling mechanism could conceivably provide a willpower norm in this context, however. If consumers were to begin to categorize online disclosures with other kinds of inappropriate disclosures of personal information, their ability to resist the temptation to disclose might increase. In fact, Hetcher’s description of the activities of “norm entrepreneurs” in the context of website privacy policies may be evidence of just such a bundling willpower norm. Hetcher details how norm entrepreneurs created a consumer demand for online information privacy in part by moralizing the meaning of online data collection by re-categorizing data collection as a privacy invasion. Norm entrepreneurs framed the behavior of websites that do not protect privacy as “disrespectful.” But how would that framing help to solve the consumer collective action problem? Consumers can free ride on the efforts of others to boycott “disrespectful” websites just as easily as on efforts to boycott privacy-invasive website. The answer may lie in the strategy of “bundling” described above as a means of sustaining willpower norms against undetectable deviations. The moralizing here has the effect of re-categorizing “dealing with a website that does not provide privacy protection” as “allowing oneself to be treated with disrespect.” Many individuals likely have personal rules that say “I do not allow myself to be treated with disrespect.” Bundling the undetectable online behavior of “dealing with websites that do not protect privacy” with more detectable instances of being

97 Id. at 268-72.
treated with disrespect has the potential to aid the individual in resisting the temptation to deal with those websites.98

3. The Danger of “Silencing Norms”: “Don’t Ask, Don’t Tell”

As McAdams has noted, norms that protect the rights of individuals to choose not to disclose personal information can undermine “nosy” norms that inefficiently and excessively impose other-regarding preferences on members of minority groups.99 McAdams also describes, however, how non-disclosure can inefficiently conceal information about what the community consensus on a particular issue actually is, thus preventing norms from evolving.100 The impact of norms against disclosing personal information can in principle be similarly pernicious, since inefficient “silencing” norms might arise if personal information norms evolve to sanction the “tempters” – i.e. the disclosers of undesired information. McAdams’ analysis of the issue of privacy of sexual preference is a good starting point for understanding this possibility.

As McAdams explains, if social norms against gays and lesbians are inefficiently “nosy,” then a privacy right to choose whether to disclose one’s sexual orientation might be efficient, leaving gay individuals free to weigh the costs and benefits of disclosure. However such a privacy right might also retard the process of norm evolution, preventing the public from detecting a changing consensus about homosexuality by hiding the extent of non-conformity with the anti-gay norm. The controversy over “outing” reflects this difficulty: “Outing and privacy are always two possible alternative strategies for attacking an existing norm. Privacy tries to drive down the risk of detection to the point where the norm is unenforceable. Outing tries to raise the risk of detection to the point where the consensus is revealed to be far weaker

98 Whether such a norm can be effective when websites have deceptive privacy policies is another question, of course.
99 McAdams, supra note 1, at 424-30.
100 Id. at 430-33.
than previously believed.” The effects of outing are unpredictably dependent on the unknown actual strength of anti-gay sentiment.

Accounting for the bounded rationality and willpower of the hearers of personal information exposes further complications and tradeoffs. These complications are illustrated by analyzing the infamous military “don’t ask, don’t tell” policy. The “don’t ask” aspect of this policy provides a right not to disclose sexual orientation, thus apparently protecting gay members of the military against an inefficient “nosy” anti-gay norm. “Don’t ask” makes sense as a means of protecting these individuals against inefficient other-regarding preferences, (though at the cost of hiding information about the extent of norm violation). A “don’t ask” policy makes no sense, however, if one believes that there is actually a detrimental effect of having gays in the military. “Don’t ask” implicitly assumes that an anti-gay norm in the military is inefficient.

Assuming, therefore, that one believes that the anti-gay norm is inefficient, what could be the justification for instructing a gay soldier who wants to waive the right to privacy, “don’t tell”? After all, the soldier who “tells” is performing a social service by helping to expose the extent of non-conformity with a “nosy” norm at the personal risk of incurring social sanctions.

Bounded rationality provides a plausible explanation for the “don’t tell” part of the rule. Suppose that there are many individuals who object to associating with gays only if they have information about their sexual orientation. These individuals may realize that their distaste has an irrational effect on their interactions with known homosexuals. They would thus self-interestedly prefer not to receive information about others’ sexual orientation in light of its

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101 Id. at 431.
102 Id. at 431-32.
103 Theoretically, “don’t tell” might be a pure willpower norm protecting gay members of the military from a temptation to disclose their sexual orientation, thus exposing themselves to discrimination and harassment. This explanation is utterly implausible, however. Pure willpower norms arise in close-knit groups that face shared temptations. They are enforced by members of the tempted group and not by outsiders.
deleterious effect on their own rational behavior. A gay soldier’s self-disclosure imposes “cost” on such individuals, who therefore have an incentive to sanction the self-disclosure through a “don’t’ tell” norm.104

A “silencing” norm can thus arise. In principle, such a silencing norm could be to everyone’s benefit since it would protect gays from discrimination and non-gays from the costs of their biases. However, the “don’t tell” policy poses even more of a problem for the evolution of social norms regarding gays than the “don’t ask” policy. To prevent gays who would like to speak out about their sexual orientation from doing so is to prevent them from acting to undermine a nosy norm which is detrimental to them.105 This kind of “right to stop people from speaking about themselves” is even more normatively troubling than Volokh’s “right to stop people from speaking about you.”106 The “don’t ask, don’t tell” policy is an example of an inefficient “norm against tempters.” Rather than deal with their own irrational response to information about the sexual orientation of gay soldiers, a majority group imposes the costs of its self control issues on a disfavored minority. The social cost of suppressing the self identification of gay soldiers and deterring gays from joining the military is likely to be very high compared to the costs that would be incurred by permitting the norm to evolve.

Note that a silencing norm could arise even when the anti-gay bias is irrational from everyone’s point of view. Just as gays who would prefer a world in which everyone is “outed” might nonetheless choose, in standard free rider fashion, not to incur the personal costs of outing themselves, there might be non-gays who would prefer to get rid of an anti-gay bias, but be

104 “Don’t ask, don’t tell” is a military regulation, rather than a social norm per se. However, the social norm regarding sexual orientation in many communities today is approximately “don’t ask, don’t tell” so the policy is a meaningful example to illustrate the danger of “silencing” norms.
105 See, e.g., Jean L. Cohen, Is Privacy a Legal Duty?, in PUBLIC AND PRIVATE: LEGAL, POLITICAL, PHILOSOPHICAL PERSPECTIVES 122-24 (Maurizio Passerin D’Entreves & Ursula Vogel eds. 2000), describing how privacy may be detrimental if the “closet” becomes a “prison” in which gays “should” hide.
106 Volokh, supra note 59, at 1117.
unwilling to incur the costs of their current irrational reactions to knowing others’ gay sexual preference. If these non-gays are in the majority, they can maintain an inefficient (not to mention unfair) silencing norm. The silencing norm would in turn permit the inefficiently nosy anti-gay norm to persist.

To determine whether a particular social norm of non-disclosure is efficient is thus a complicated matter in which the likelihood that the “silenced” disclosures would permit more efficient norms to emerge must be considered, as well as the question whether there is a mutual long-term preference between the discloser and the hearer to avoid the disclosure or whether the norm unfairly silences the self-expression of a minority for the benefit of a majority that does not want to incur the costs of alternative self-control measures. The willpower analysis thus shows that one should look especially hard at strictures against disclosure of personal information when they target a minority, rather than reflecting widely shared temptations to disclose.

Having analyzed how temptation and willpower might explain some aspects of personal information norms, I now turn in the last Part of this Article to the implications of personal information norms for legal regulation of information privacy.

IV. PERSONAL INFORMATION NORMS AND INFORMATION PRIVACY REGULATION

There has been extensive and nuanced discussion among legal scholars of the meaning and purpose of information privacy. To its advocates, information privacy promotes important individual values such as autonomy and dignity; important democratic values such as pluralism and dissent; and important community values such as intimacy. To skeptics it provides

\[107\] See Daniel J. Solove, Conceptualizing Privacy, 90 CALIF. L. REV. 1087 (2002), for an extensive review of the literature and of the difficulties in providing a theoretical foundation for privacy protection.

\[108\] See, e.g., Cohen, supra note 57; Jerry Kang, Information Privacy in Cyberspace Transactions, 50 STAN. L. REV. 1193 (2000); David C. Post, The Social Foundation of Privacy: Community and Self in the Common Law Tort, 77 Cal. L. Rev. 957 (1989); Karas, supra note 62; Paul M. Schwartz, Privacy and Democracy in Cyberspace, 52 VAND.
opportunities for misrepresentation, fraud, and other socially undesirable behavior and impedes the flow of information necessary both for a free market and for a free society.\textsuperscript{109}

Underlying the debate about the social benefits of information privacy and information flow is the question of the extent to which information privacy is a matter for government regulation rather than individual action and market forces. The fact that privacy has benefits and disclosure has costs to individuals is not in and of itself a justification for government action. Generally, individuals in American society are left to judge for themselves the desirability of engaging in activities that involve tradeoffs of costs and benefits. Government action is justified when pursuit of individual objectives leads to societal difficulties, including market failures of various sorts.

Here, the social norm analysis is instructive. The very existence of social norms governing personal information disclosure and dissemination is a red flag that indicates some underlying difficulty with purely individual decisions about when to disclose and disseminate personal information. Understanding the provenance of personal information norms provides clues as to whether legal regulation or other government intervention is likely to be appropriate. The analysis of personal information norms in this Article thus has implications for the debate about information privacy regulation. I point out three types of implications here.

First, the recognition that disclosing and obtaining personal information are subject to time-consistent preferences undermines the facile assumption that individual decisions to disclose or obtain such information reveal long-term preferences about information privacy. It also supports arguments that information privacy is not a simple tradeoff between privacy’s

benefits to individual subjects of the information and costs to others of being deprived of the information.\textsuperscript{110} Information privacy regulation has the potential for direct benefit both to subjects and to recipients of information. On the other hand, while providing additional justification for privacy regulation, the personal information norms analysis also highlights potential dangers of such regulation. Like other attempts to regulate behavior that is subject to temptation, the prospect of interfering with the liberty of individuals with unusual preferences must be taken seriously, especially if the law seeks to impose privacy to protect people from temptations to disclose.

Second, in many instances the law should respect the social norms about personal information dissemination that have developed in a particular community or group. The fact that additional information can have either negative or positive implications for decision-making implies that the social value of personal information dissemination is highly contextual, as reflected in the complicated structure of norms about disclosing such information. This observation has ramifications for the development of the common law privacy torts in the interpersonal context.

Third, where individual self-control measures fail and social norms are ineffective for some reason (such as where there is no close-knit community to enforce them or where violations are undetectable), legal regulation may be needed to promote the long-term social good. Modern technology, for instance, undermines the effectiveness of personal information norms in many instances. Yet the temptations associated with disclosing and disseminating personal information persist. A market approach to information privacy will not work in these circumstances. Regulation may be desirable to replace the social norms that have historically mitigated market failure in the interpersonal context.

\textsuperscript{110} See references, supra, note 109.
A. The Contribution of Personal Information Norm Analysis to the Debate about Information Privacy Regulation

1. Personal Information Norms and the Social Benefits of Information Privacy

There is an extensive literature about the benefits of information privacy. For the most part, the immediate benefits of information privacy are to individuals. Thus, one benefit of information privacy is to allow people to engage in activities that would be deterred if third parties were privy to them. This aspect of privacy is valued because it facilitates autonomy and the development of individuality, as well as the development of intimate relationships. The ubiquitous surveillance regime of George Orwell’s 1984 is often invoked as a metaphor for what is lost when this aspect of privacy is surrendered. An alternative literary metaphor for information privacy is the arbitrary and impenetrable bureaucracy of Franz Kafka’s The Trial. As discussed by Professor Daniel Solove, The Trial captures the concern that “the current collection and use of personal information are used to make decisions affecting an individual’s life, yet individuals often have no way to participate and no notice about what is happening.” Here again the direct focus is on the detrimental effects that loss of control over personal information has on the subject of the information.

Critics of information privacy, on the other hand, focus for the most part on the social benefits of information availability. As discussed above, economic thinkers emphasis the need

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111 See, e.g., references supra notes 108, 109.
112 George Orwell, 1984 (1949).
115 Of course, it is well recognized by privacy theorists that these and other direct harms to individuals have important indirect social implications. Particularly under democratic governance, society benefits indirectly when its citizens are autonomous and there is a healthy diversity of behavior and ideas. See, e.g., Schwartz, supra note 108 at 1613, pointing out that democracy “depends on group deliberation as well as individuals who are capable of self-determination.”
for information to support efficient transactions, interpersonal and otherwise.\textsuperscript{116} Communitarians, on the other hand, focus on the ways in which information about individuals is useful to protect communities from harmful individual behaviors.\textsuperscript{117} Free speech advocates focus on individual liberty, but also on the important role of the “marketplace of ideas.”\textsuperscript{118} Thus, there is often a sense in the information privacy debate of a tradeoff between “privacy for me” and “information for you.” The tenor of this debate tends to pit complicated and indirect advantages of privacy against the concrete harms that inadequate information can impose.

The analysis of personal information norms adds a different twist to the debate by focusing on ways in which information privacy can sometimes have direct social benefits by promoting rational decision-making. Because of the issues of bounded rationality and temptation discussed above, a personal information “free market” should not be expected to function efficiently from the perspective of either the subjects or the recipients of the information. If we do not account for the weaknesses of the assumption that “more information is better” in our approach to privacy regulation we may end up in a combination of the Orwell and Kafka dystopias, in which sufficient data is collected to inhibit the experimentation and spontaneity necessary for autonomy, while the collected information remains insufficient to forestall inaccurate and biased decision-making.

2. Self Control and the Law

The analysis of personal information norms strongly suggests that individuals, left to their own devices, will behave in ways that are disadvantageous to themselves and to society, because of time-inconsistent preferences. There are serious hazards, however, to employing legal regulation to bolster self-control. Similar problems to those that can arise when personal

\textsuperscript{116} See, e.g., Posner, \textit{supra} notes 58, 70, 88; Murphy, \textit{supra} note 73.
\textsuperscript{117} See Etzioni, \textit{supra} note 109.
\textsuperscript{118} See Volokh, \textit{supra} note 59.
rules and social norms are used as self-control measures may arise when legal regulation is involved. Legal rules, especially if enacted by statute, may be even less flexible than social norms, though they may also have the virtue of being more deliberately chosen, with greater attention to minority interests.

The idea that the law should assist people in controlling their own disclosures of personal information is related to the advocacy of “libertarian paternalism” by Cass Sunstein and Richard Thaler. Sunstein and Thaler argue that, because of bounded rationality, there is no real way to avoid “paternalism” in the law. Any choice of legal rules affects people’s decisions, through framing effects, status quo biases, and so forth. Sunstein and Thaler thus argue that “libertarian paternalism,” in the sense of framing choices to promote welfare-enhancing decisions, is already present in many legal provisions, such as those setting defaults, those setting procedural constraints on decision-making (such as waiting periods), and those which impose substantive constraints (such as unwaivable warranty requirements).

In a similar vein, Prof. Bailey Kuklin has argued that rational consumers in a democratic legal environment, realizing their own rationality constraints, might choose a “self-paternalistic” legal regime to limit their bargaining choices in the marketplace. He points to a legal warranty requirement as a possible example of self-paternalism. Solove has also argued that disclosure protections may be “self-imposed by society through norms of restraint.” Adding concerns about inadequate willpower to concerns about bounded rationality reinforces the arguments in favor of such measures.

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120 See Kuklin, supra note 50 at 661-71.
121 See Solove, supra note 57, at 1049.
122 On the other hand, “bounded rationality” may bear an interesting and complicated relation to common self-control strategies, many of which appear to take strategic advantage of some of the common “failings” of rationality. For example, “mental accounting,” Thaler, supra note 68, does not meet the economic criterion of “rationality”
However, willpower analysis also suggests that the use of the law in a self-paternalistic way to enforce self-control should be approached with care because of the possibility of imposing silencing norms and of other impositions on the liberty of those whose long-term preferences differ from those of the majority. The best approach thus may be to structure the law to support voluntary self-control measures whenever possible.

In this vein, Ainslie and Monterosso argue that “the law may be most effective by supporting a person’s own longest-range interest in its competition with shorter-range interests.” They suggest that if the law provides direct external controls that undermine autonomy, it may undermine incentives for self-discipline since the incentive for maintaining personal rules is the expected improvement in utility that the rules will bring. External rules can lead to the relaxing of internal rules and to an emphasis on not getting caught. There is also evidence that externally imposed pre-commitment strategies are ineffective, at least for more traditional self-control problems, such as addictions.

Thus, despite the fact that bounded rationality and limited willpower make maximal information flow undesirable, lessons from attempts to deal with other self-control issues suggest that “libertarian paternalism” or “self-paternalism” should be employed cautiously, with an emphasis on supporting the self-control efforts of individuals and due attention to the potential for external controls to backfire. Information privacy regulation must therefore be sensitive to

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123 Ainslie and Monterosso, supra note 48, at 856.
124 Id.
125 Ainslie and Monterosso raise some doubts even about the effectiveness of making commitment devices available for a person’s own use, however. Id. at 858.
the danger that majority preferences will be used to silence disfavored minorities or, more
generally, that norms within one community will be used to impose costs on another community.
Mechanisms for promoting information privacy should be designed as much as possible to
permit individuals to distinguish for themselves between long term preferences and short term
temptations. Usually this will mean enhancing -- and perhaps mandating -- the availability of
self-control measures, while permitting individuals to “opt out” of those measures. Regulations
based on “penalizing the tempters” can be very effective, but such regulations should be
scrutinized especially carefully to ensure that they are not (like the “don’t ask, don’t tell” policy)
inefficiently and unfairly targeted at minority group preferences.

The next two sections briefly discuss how the above principles might apply to legal
treatment of information privacy in two different contexts -- the interpersonal dissemination of
personal information and the use of personal information by commercial entities for
computerized data processing.

B. Personal Information Norms and the Legal Regulation of Interpersonal
Disclosures

As emphasized in this Article, when personal information is disclosed within a
community with repeated interactions, there is a likelihood that personal information norms will
develop to regulate the disclosure of “too much information.” However, people in industrialized
societies often do not belong to all-encompassing local communities that are close-knit on every
level. Those communities have to a large degree been replaced by networks of specialized social
groups characterized by repeated, but specialized, interactions involving distinct aspects of life
(workplace, PTA, house of worship, athletic club, and so forth). These networks are likely to develop limited personal information norms that are specialized to their needs.126

1. Regulating Disclosure of One’s Own Personal Information

In the interpersonal context, legal strictures against disclosing one’s own personal information to other individuals are likely to be unnecessary, intrusive, and insufficiently in tune with particular webs of interpersonal relationships. There may be some situations involving interpersonal communication, however, in which there are insufficient opportunities for informal norms to develop. One might think this would be the case in online communities, since participants are often identified only be screen names. However, online communities often do develop informal norms about disclosure of personal information.127 Moreover, if norms fail to develop, such communities often promulgate rules of behavior, enforced by a central authority, to regulate personal information disclosure, among other things. Such codes of “netiquette” are increasingly common.128

Even if netiquettes develop, however, two factors make such online communities more problematic than real world communities. First, if online conversations are maintained in a searchable archive (as they may be either intentionally or unintentionally by the website owner), personal information may “escape” from the community in which it was disclosed to contexts in which it will not be correctly understood. The community’s norms may not account for this possibility. Second, such online communities may have corporate sponsors, who are silent

126 See Lior Strahilevitz, A Social Networks Theory of Privacy (December 2004), available at http://ssrn.com/abstract=629283; Randall P. Bezanson, The Right to Privacy Revisited: Privacy, News, and Social Change 1890-1990, 80 CAL. L. REV. 1133, 1145-50 (1992) (arguing that in modern society sources of private information are likely to be “discrete, varied, and diffuse,” discussing a shift from “global” associations to “specialized” associations and arguing that smaller associational groups should provide norms of behavior and values). See also Post, supra note 108, at 976, arguing that the privacy torts are intended to enforce social norms of decency and recognizing the difficulty of doing so in a diverse society.
128 Id.
observers of the interpersonal exchange and may also communicate the information beyond the community. These corporate sponsors may not be constrained by community norms about disclosure. Moreover, they may in some instances have access to information that maps an online identity to a real world identity.

One approach to these possible norm failures in online communities might be to require that websites that provide interpersonal discussion forumsgive clear notice of their policies about archiving the online discussion and about corporate use of information disclosed in the discussions. To be effective, the form and placement of such notices may need to be tightly specified to avoid obfuscation. Because they do have repeated interactions with each other and with the website owners, notice may be enough to permit online communities to subject these owners to community norms about the treatment of personal information.

Another approach would be to subject website owners to tort liability to the extent that their behavior violates the social norms that pertain to other members of the online community. This possibility is explored in more detail in the next section, which discusses how the privacy torts should be adapted to deal with networks of specialized communities.

2. Regulating Disclosure of Information about Others

a. Reasonable Expectations of “Limited Privacy” and Personal Information Norms

The study of personal information norms provides insight into a disagreement between courts about the interpretation of the privacy torts of “public disclosure of private facts” and “intrusion upon seclusion” that regulate how people may disseminate and obtain personal information about others. These torts turn upon whether the plaintiff had a reasonable expectation of privacy.

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129 The two most relevant branches of the privacy torts for present purposes, are the torts of intrusion upon seclusion, RESTATEMENT (SECOND) OF TORTS § 652B (1977) (“One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the...
expectation of privacy in the information involved. Courts have taken two different approaches to determining whether a reasonable person would expect privacy in a given case. Traditionally, there is an assumption of a single “public” and thus rather minimal disclosures destroy any “expectation of privacy.” A growing body of case law, however, recognizes a “limited privacy” expectation in communications within a defined group. The personal information norms analysis supports the limited privacy approach.

The “on/off” definition of privacy may have made sense for traditional communities which were close-knit on all levels. In such a social scenario, a rule that disclosure to a few members of the community should be enough to remove the “private” label from personal information might be sensible since everyone has a similar interest in either obtaining or avoiding information about everyone else.

In modern industrial society, however, individuals belong to various networks dealing with largely separate aspects of life. A more tailored definition of “private affairs” is thus appropriate to supplement social norms that have evolved to control the flow of irrelevant but distracting information. Information may be distributed quite differently in each of the various networks to which individuals belong, some types of information being extensively shared other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person”), and public disclosure of private facts, RESTATEMENT (SECOND) OF TORTS. §652D (“One who gives publicity to a matter concerning the private life of another is subject to liability . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”)

The discussion here is limited to the concept of reasonable expectations of privacy in tort law and does not address the distinct Fourth Amendment analysis.

See Strahilevitz, supra note 126, for an extensive discussion of these two branches of case law. In the parlance of social network theory, such traditional communities are characterized by “strong ties.” Id. Strahilevitz, id., and Solove, supra note 57 at 1053, have come to essentially the same conclusion by focusing on social network theory and information use, respectively. Post, supra note 108, similarly argues that privacy tort liability focuses on the communicative act, rather than only on the content of the communication. The extent to which bounded rationality and limited willpower constrain the ability of individuals to ignore irrelevant or distracting information supports their analyses. See also Randall P. Bezanson, supra note 126 at 1145-50.
within one group, but never shared within another group. Individuals quite reasonably rely on information remaining relatively localized in these networks, such that information disclosed to the entire membership of one group is still unlikely to leak out to another. Moreover, because of the bounded rationality and self-control concerns discussed in this Article, information that is of “legitimate concern” to one group (and has a primarily rational effect on the decision-making of members of that group), may be of no legitimate concern (and highly distracting) to another. Treating information as legally “private” with respect to one group even after it has been disclosed to another group thus may benefit both the subject of the information and potential hearers to whom it would prove distracting and irrelevant.

Of course, determining which information is of legitimate concern to a particular group is potentially difficult. Here the personal information norms of the community can provide guidance. If a specialized community has repeated interactions, it will develop social norms of appropriate inquiry and disclosure that are tailored to the particular types of information that are relevant to the community. A reasonable expectation of privacy should accompany disclosure to members of the community of information recognized as appropriate by those norms. When people can depend on personal information remaining localized within a group because of the social norms of that group, they are also more willing to share it within the group. The possibility of selective disclosure is crucial for the development of intimacy and of broader forms of community. Evidence that personal information originally disclosed in accordance with one

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134 These specialized communities might be described as linked by “weak ties” in a social network theory sense, see Strahilevitz, supra note 126, but perhaps equally important is the specialization of the links between people in modern networks. Individuals may be quite strongly linked on some topics, with extensive and repeated exchange of information on those topics, and almost completely disconnected on topics outside the purview of the specialized community.

135 See id., using social network theory to make this point and arguing that such reasonable expectations of limited privacy should be recognized by the courts in enforcing the privacy torts.

136 See Solove, supra note 57, at 1053, noting that “some information is more distorting and unhelpful in particular contexts” and “has a relevance to certain inquiries but not to others,” and criticizing the treatment of disclosure as “all-or-nothing.”
group’s personal information norms has been disseminated to another group in which such information would not normally be shared should be relevant in determining whether a privacy tort has occurred.

Lior Strahilevitz has recently analyzed a number of privacy tort cases in light of how the predictions of social network theory affect the reasonableness of an expectation of privacy.\textsuperscript{137} The personal information norms perspective can also shed light on these cases. For example, two cases that seem to take very different approaches to the reasonable expectation of privacy for personal information disclosed in the workplace can be reconciled by taking workplace norms into account. The case of \textit{Sanders v. ABC}\textsuperscript{138} involved a conversation with a telephone psychic that was reported to the public by an undercover journalist posing as a fellow employee. The California Supreme Court held that the fact that the conversations could be overheard by other telephone psychics did not render them public for purposes of the intrusion tort.\textsuperscript{139} The \textit{Sanders} case may be contrasted with the case of \textit{Fisher v. Ohio Department of Rehabilitation and Correction}.\textsuperscript{140} In \textit{Fisher}, a conversation with co-workers was deemed unprotected by the privacy torts against dissemination to Fisher’s husband, whom she was in the process of divorcing.\textsuperscript{141}

The different results may stem from the contents of the conversations and the way the information fit into the norms of workplace dialogue. The conversation in \textit{Sanders} seems to have involved ordinary workplace chat (even including a sample psychic reading) of the sort which was appropriate to the context and in which any of the telephone psychics might expect to

\textsuperscript{137} Strahilevitz, \textit{supra} note 126.  
\textsuperscript{138} 20 Cal. 4th 907 (1999).  
\textsuperscript{139} \textit{id.} at 923.  
\textsuperscript{140} 578 N.E.2d 901 (Ohio Ct. Cl. 1988).  
\textsuperscript{141} \textit{id.} at 305-06.
be engaged at some point.\textsuperscript{142} It was thus a socially acceptable discussion within the workplace community of matters that might be expected not to be shared with the world at large. The social norms that might ordinarily restrict disclosure of workplace discussions to outsiders were ineffective against the defendant journalist, however, and the law stepped in.

In \textit{Fisher}, by contrast, the remarks at issue involved Fisher’s interactions with her seven-year-old son, which had “sexual overtones.”\textsuperscript{143} These personal disclosures were not deemed appropriate to workplace discourse – in fact, Fisher was reprimanded for engaging in “unprofessional” conversations in the workplace.\textsuperscript{144} Moreover, because these remarks were not ordinary workplace discourse, those who heard them could not be expected to be constrained by workplace social norms from repeating them to outsiders.

Though the two cases reach different results with respect to the expectation of privacy in a conversation among co-workers, both cases can be seen as reflecting the social norms of workplace discourse. In \textit{Sanders}, the law protects the social norms of workplace discourse from an intruder who is not reachable by those norms. In \textit{Fisher}, the law refused to step in when the operation of workplace social norms punished inappropriate workplace discourse by disclosing it to outsiders.

The extent to which privacy is sacrificed when information is disclosed should depend on the context of the specific disclosure and the social norms of the group with which the information was shared. Courts should recognize that social norms about the appropriate disclosure of information may have evolved to improve discourse and decision-making within a

\textsuperscript{142} 20 Cal. 4th at 912.
\textsuperscript{143} 578 N.E.2d at 305.
\textsuperscript{144} \textit{Id.}
social group and take those norms into account in analyzing reasonable expectations of privacy.145

b. Reasonable Expectations of Privacy in the Online Context

The argument that reasonable expectations of limited privacy should take into account the social norms of the group in which the disclosure occurred may be usefully applied in the context of online social groups. As already discussed, online interpersonal interactions often occur in the context of communities with well-defined social norms or rules about the treatment of personal information. Like the dissemination of information by the investigative reporter in Sanders, the behavior of individuals or corporate entities that “lurk” in the background of these discussions and then disseminate or record information disclosed by individuals might be evaluated in light of the norms of those communities. Such an expansion of the privacy torts also may have potential to address the issue of virtual “individuals” (what have been called “buddy-bots”) which are increasingly capable of engaging in conversations that have the “look and feel” of friendly discourse.146 Such recent advances in computer marketing technology seem likely to tap more and more into the kind of self-disclosure which seems to be inherently pleasurable, and thus potentially tempting. As online experiences begin more and more to resemble conversations with amiable acquaintances (wearing hidden microphones that feed into computer databases), it

145 Of course, because social norms can also evolve to protect one group’s ability to impose costs on another, there is no avoiding a normative analysis. Criminal conspiracies also have norms of non-disclosure to outsiders. Such norms facilitate the group’s imposition of harms on society at large and are not evidence of beneficial regulation of personal information flow. This possibility complicates the analysis of cases like Sanders, in which the journalist’s expose of the telephone psychic industry may protect society from costs imposed by that industry on society at large by means of its norms of non-disclosure. Social norms are thus relevant to the tort analysis, but not necessarily dispositive.

146 See Ian R. Kerr and Marcus Bornfreund, Buddy Bots: How Turing’s Fast Friends Are Under-Mining Consumer Privacy, in PRESENCE: TELEOPERATORS AND VIRTUAL ENVIRONMENTS (2005), arguing that virtual reality can now be used “to facilitate extensive, clandestine consumer profiling under the guise of harmless, friendly conversation between avatars and humans.”
may be more and more reasonable to hold these virtual individuals to the standards set by appropriate social norms.

C. Implications of Personal Information Norms for Computerized Data Processing

1. Information Technology and Norm Failure

Jange and Schwartz define “information privacy” as “the creation and maintenance of rules that structure and limit access to and use of personal data.” They note that the rules are sometimes found in norms, such as those involving gossip, and sometimes in law. Under this definition, an understanding of personal information norms would seem central to an understanding of information privacy. It may thus be a bit surprising that rather minimal attention has been paid to the theory of personal information norms in the information privacy debate. This relative inattention to the norms that govern the interpersonal flow of personal data is not as surprising, however, when one considers that much of the focus of recent discussions of information privacy rightly has been on analyzing the impact of computerized data processing and collection by corporate entities. Social norms of the sort analyzed in this Article do not govern the behavior of these entities directly. But they are relevant to the question of how to regulate the use of personal information by these entities precisely for that reason. The increasing prevalence of information technology as a means to disseminate personal information threatens to undermine the salutary role that personal information norms formerly played in

147 Jange and Schwartz, supra note 3 at 1223.
148 McAdams, supra note 1, among others, has argued that privacy may be important in both the evolution of social norms about other kinds of behavior and in preserving the rights of minorities to escape the strictures of other-regarding “nosy norms.” Schwartz, supra note 3 at 838-43, has similarly relied on social norm theory to argue that privacy may provide relief from social pressures for “preference falsification.” Hetcher, supra note 1 at 243-60, has detailed above, has discussed the norms that affect the incentives of websites to adopt privacy-protective policies. Post, supra note 108, argues that the privacy torts are intended to enforce social norms. But these authors have not used social norm theory to inquire as to what the shape of personal information norms has to tell us about failures of individual preferences for personal information disclosure and dissemination.
supplementing self-control so as to promote rational decision-making and enhance the ability of individuals to make good long-term decisions about disclosing their personal information.

In today’s society, the flow of personal information is less and less subject to social norm mechanisms of enforcement: disclosures are often made in unobservable online contexts; information is disseminated to and by corporate entities; and information flow is no longer confined to a community of individuals who interact repeatedly. This social norm failure can be beneficial in some instances, by undermining silencing norms and permitting minority group discourse. However, it is also likely that social norms will fail to mitigate the effects of bounded rationality and willpower in cases where disclosure is not optimal. Moreover, where, as is usual in the online context, disclosures are made to corporate entities, there is the danger that those entities will develop their own norms regarding the treatment of personal information that promote their private interests but are socially detrimental. For example, Hetcher has argued that websites are likely to develop a coordination norm of deceptive privacy practices, while individuals will have difficulty developing and enforcing norms of privacy-protective behavior.

Unless other self-control mechanisms are available, one should thus expect individuals to disclose significantly more information in the online context than they would prefer to disclose in the long term. At the same time, computerized data processing permits far more extensive aggregation and dissemination of personal information than is possible in the interpersonal context. Roger Clarke coined the term “dataveillance” to describe the monitoring of individual behavior that is made possible by computerized data collection. Professor Julie Cohen argues that data collection reduces autonomy because it provides a means of informational surveillance which generates “a ‘picture’ that, in some respects, is more detailed and intimate than that

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produced by visual observation.” Data may be aggregated over space and time and may be searched to discern patterns. Data aggregation exacerbates the self-control issues that affect decisions to disclose personal information. Like indulging in Tuesday’s dessert, disclosure of each piece of information is particularly tempting because each disclosure forms an insignificant part of the picture. Personal information may also be disseminated far more rapidly and widely than is likely in the interpersonal context, to parties that have no contextual knowledge of the individual involved. This widespread and rapid dissemination makes it difficult, if not impossible, for individuals to make rational predictions of the costs and benefits of each disclosure. As explained in a recent economic treatment, “[T]he negative utility coming from future potential misuses of somebody’s personal information is a random shock whose probability and scope are extremely variable . . . [the] individual [] is facing risks whose amounts are distributed between zero and possibly large (but mostly uncertain) amounts according to mostly unknown functions.”

One might argue that concern about this increased circulation of personal information should be mitigated by the fact that the human failings of rationality and will that were central to the development of personal information norms are not at issue in computerized data processing -- at least on the recipient’s side. However, there are at least two reasons to reject this hypothesis. First, it may be privately advantageous for online data collectors to use personal information in socially suboptimal ways and the market will fail to correct this tendency. Second, computerized data processing entities are not immune from human failings in interpreting personal information because all of the decisions about what data to collect and how to analyze it are made by human beings.

150 Cohen, supra note 57 at 1425.
151 See discussion supra at Part II.A.2.
152 Acquisti and Grossklags, supra note 10 at 9.
2. Information Externalities and Computerized Information Processing

Commercial entities may prefer to collect more information and to be less careful about its security than is socially optimal for a variety of reasons. Most importantly, the collecting entity does not bear the full cost of privacy losses to the subjects of the information, including any costs that arise from criminal misuse of the information by rogue employees or hackers or from errors in the data. The personal information “market” will not solve this problem because individuals will not force these entities to pay a high enough “price” for personal information because of their own self-control failures and inability to take into account accurately the expected costs of disclosing personal information online. The self-control issues that are the focus of this Article simply add to the force of arguments about market failure based on information asymmetry and bounded rationality. Recent high-profile demonstrations of insufficient information security may well lead to improved legal regulation aimed at curbing the possibility of malicious uses of personal information. Such regulation raises few of the concerns about paternalism discussed above -- few individuals have long-term preferences for insecure or inaccurate data collection!

The self-control analysis raises a further potential for rational uses of data processing by corporate entities to lead to socially harmful results, however. Targeted marketing, based on the

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153 For a more formal economic treatment of the incentives of private firms to obtain inefficient amounts of information, see Curtis R. Taylor, Privacy in competitive markets (Technical report, Department of Economics, Duke University, 2004), available at http://www.econ.duke.edu/Papers/Other/Taylor/privacy.pdf. Taylor states that, “The central theme of this paper is that if information acquisition is not observable, then competitive pressure will lead to a divergence between the marginal private benefit of information acquisition and the marginal social benefit. In such a setting, firms will possess incentives to systematically collect the wrong amount of information about prospective customers and/or employees resulting in too little trade in equilibrium.” Id. at 3.

154 See Jange and Schwartz, supra note 3, at 1241-46, making the point that because of bounded rationality the privacy market between financial institutions and consumers does not function well.

analysis of consumer buying patterns, has the apparent potential for great social benefit. It promises to eliminate social and consumer waste associated with marketing that is aimed at those who have no interest in the services or products being offered. Despite these reasonablesounding justifications for targeted marketing, however, there is widespread uneasiness with the idea that commercial entities might base their marketing on personal profiles that are too detailed or complete. This uneasiness is somewhat mysterious if consumers are rational processors of marketing information. Presumably, everyone could be subjected to less advertising if the advertising could be targeted accurately. If, however, one accounts for the influence of temptation and willpower on consumption decisions, the aversion to overly personalized marketing makes more sense. A more detailed personal profile permits a more targeted satisfaction of consumer preferences, but also a more targeted attack on consumer will. The possibility that targeted advertising can undermine long-term preferences may explain an intuition that such detailed profiling is a threat to personal autonomy. This analysis suggests that consumer antipathy to spam and pop-up ads, for example, may be premised on more than concerns about attention consumption.156

Finding good legal solutions to this kind of problem is complicated, of course, by the issues of personal liberty and autonomy and concerns about minority preferences discussed above, as well as by issues of commercial free speech. The present analysis does not resolve these questions, but does suggest that any attempts at legal regulation might focus on empowering consumers to employ self-control strategies to filter targeted marketing by category, rather than dealing with it on a case-by-case basis.

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156 See Eric Goldman, *Data Mining and Attention Consumption*, in *Privacy and Identity: The Promise and Perils of a Technological Age* (Katherine J. Strandburg and Daniela Raicu, eds., forthcoming 2005) for an analysis of targeted marketing based on its costs in attention consumption.
3. **Rationality, Willpower, and Computerized Data Processing**

This section briefly considers whether computerized data processing should be expected to be immune from the irrationalities that affect human processing and interpretation of personal information. Are individuals correct to fear that computerized processing of personal information will be used to make bad decisions about them? Or are they simply seeking to benefit from hiding negative information about themselves from their employers, insurance companies, and potential dates?

Computers, one may safely say, are not plagued by issues of temptation and self-control. They are neither curious nor confessional. They simply do what they are told. Thus, the relevance of bounded rationality and willpower to computerized data processing stems from three things: human choices affecting the input data; human choices about how to process the data; and human interpretation of the computerized analysis. Computerized uses of personal information can range from the simple collection of a mailing list to sophisticated and innovative techniques for “mining” patterns from large quantities of data. It is beyond the scope of this Article to provide an extensive analysis of the ways in which these various uses of computer analysis might fall prey to bounded rationality, and limited self-control. However, the potential pitfalls may be illustrated by a few specific points.

First, entities may tend to over-collect information if the costs associated with processing excessive information are not imposed on the group within a corporate entity that makes decisions about collection. Because collecting more data may impose very minor immediate costs, failing to collect and store the data may also implicate loss aversion, resulting in a tendency to avoid the greater regret that might accompany an irretrievably lost opportunity to acquire information (particularly because information – especially in digital form – seems very
Moreover, the individuals in charge of data collection may perceive (probably correctly) that they will suffer more dire personal consequences if they fail to collect data than if they collect an excess of data.

Second, where statistically based techniques, such as data mining, are used to categorize individuals based on computerized data, the categorizations may be highly dependent upon the choice of input data and on judgment calls as to when a categorization is “sensible” and when the application of a particular technique (of which there are many) is “successful.” Texts on data mining stress the importance of user input at many stages of the process, including selecting data to be used in the data mining computation and assessing the meaning and “interestingness” of patterns that are discovered by the data mining process. Human cognitive limitations can enter at any of these points. Moreover, as a technical matter, computerized data analysis often depends on numerical optimization techniques that are not guaranteed to reach a global optimum. For such techniques, the inclusion of irrelevant information can lead the computation to become “stuck” in a local optimum. Often there are no objective methods for assessing whether a particular data mining result is even close to a global optimum.

Finally, when human decision-makers assess the output of any computerized data analysis, there are several cognitive biases that may come into play. There is a tendency to treat quantitative output as more certain and more objective than may be justified by its accuracy and the amount of subjective input on which it depends. The specificity of numerical output may also give it a salience that could lead to over-reliance on this information. Moreover, the results of computerized data analysis techniques are frequently statistical, giving probabilities that

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158 See, e.g., Jiawei Han and Micheline Kamber, *DATA MINING: CONCEPTS AND TECHNIQUES* at 1-34 (2001).
certain correlations or patterns of behavior apply to certain individuals. Even setting aside the
normative issue of whether it is fair to make decisions about individuals based on statistical
assessments, the well-established difficulties that people have in accurately reasoning based on
uncertain, probabilistic information are likely to degrade the assessment of the output of
computerized data analysis of personal information.

This subject clearly warrants more extensive treatment. However, the brief discussion
here should serve as a warning against any facile assumption that computerized analysis is
immune to the limitations of human information processing.

4. Legal Approaches in the Context of Computerized Data Processing

Because of the time-inconsistent preferences associated with disclosure of personal
information in contexts involving commercial data processing, the market is unlikely to provide
an optimal distribution of privacy policies and other behavior by data collectors. As discussed in
Part II.C.2, social norms will also likely fail to address the self-control problems associated with
such commercial disclosures. Some of the resulting social problems, such as inadequate
accuracy and security, may be best attacked by regulating data handlers directly. Other issues,
such as targeted marketing, raise more delicate questions of preserving autonomy while avoiding
temptation. To avoid the hazards of imposing majority self-control solutions on individuals who
may have a long term preference to disclose personal information, legal solutions to these kinds
of problems might focus on providing self control options for consumers. The law can also seek
to regulate “the tempters” -- for example by requiring data collectors to provide better notice
about what will happen to the personal information that individuals disclose -- to increase the
likelihood that disclosures of personal information reflect long term preferences.
An example of a possible regulation of this sort in the context of disclosure of personal information might be a statute requiring opt-in policies for websites that collect and disseminate personal information. Such a rule would not prevent anyone from disclosing any personal information, but would assist individuals in resisting the temptation to disclose by aggregating most disclosure decisions under a non-disclosure category and setting that category as the default. Individuals would no doubt still disclose information in many circumstances, but would be required to “justify” each disclosure to themselves as a reasonable “exception” to the default rule of non-disclosure. Perhaps even better would be to mandate that internet service providers provide a choice of “privacy plans” requiring each user to select a customized personal information disclosure “rule” that would apply to online transactions as a default, but could be over-ridden on a case by case basis. Thus, consumers with a long-term preference for disclosure could choose an “opt-in” rule and avoid the transaction costs of opting in in piecemeal fashion. Just as a spam filter takes away the need to consider (and perhaps even be tempted by) unsolicited email advertising, a privacy rule could permit individuals to choose not to be

159 See, however, Jange and Schwartz, supra note 10 at 1245-59, questioning whether opt-in defaults are sufficient in light of consumer bounded rationality and asymmetrical information. Jange and Schwartz do not consider the role that opt-in defaults might play as self-commitment mechanisms, but their concerns are well-taken. The possibility of a voluntary privacy rule that removes commercial entities from consideration if they do not comply with pre-set privacy choices may mitigate these concerns to some extent, though it is tailored to transactions that occur entirely online and would not be directly applicable to interactions with some entities that acquire personal information offline.

160 The Platform for Privacy Preferences (P3P) provides a standard for machine-readable privacy policies that has been implemented on many websites. Lorrie Cranor et al., An Analysis of P3P Deployment on Commercial, Government, and Children’s Web Sites as of May 2003, TECHNICAL REPORT, FEDERAL TRADE COMMISSION WORKSHOP ON TECHNOLOGIES FOR PROTECTING PERSONAL INFORMATION (May 2003). Unfortunately, “P3P user agents available to date have focused on blocking cookies and on providing information about the privacy policy associated with a web page that a user is requesting. Even with these tools, it remains difficult for users to ferret out the web sites that have the best policies.” Simon Byers, Lorrie Cranor, Dave Kormann, and Patrick McDaniel, Searching for Privacy: Design and Implementation of a P3P-Enabled Search Engine, in PROCEEDINGS OF THE 2004 WORKSHOP ON PRIVACY ENHANCING TECHNOLOGIES (PET2004). Given the procrastinations and temptation issues discussed here, automated privacy rules are unlikely to provide significant social value unless they are easy to use. Most recently, a search engine has been developed that displays information about a websites privacy policy next to its entry in the search results. Id. If this feature is widely adopted by well-known search engines, it may dramatically improve the practical effectiveness of the technology. However, making choosing a privacy rule a standard aspect of obtaining internet service should drastically increase the effectiveness of such technologies.
confronted with the possibility of transacting with websites with privacy policies that do not meet pre-selected standards or to choose to have available websites for a particular transaction divided into compliant and non-compliant categories. While it is possible that a market for such privacy plans will develop -- especially as privacy-protective technologies become more user-friendly\textsuperscript{161} -- the possibility for a socially sub-optimal website coordination norm\textsuperscript{162} may counsel in favor of legal intervention.

The law might also increase the salience of the potential costs of disclosing personal information by requiring notice of these potential costs precisely at the point of disclosure (somewhat in the spirit of attaching warning labels to cigarettes). Issues of bounded rationality and self-control highlight the importance of the timing, framing, and placement of information about the potential uses of personal information, suggesting that legal regulation of notice should take these issues into account.\textsuperscript{163}

V. CONCLUSION

Self-control and temptation have played a significant role in human society throughout history. This Article has attempted to set out an analysis of the ways in which individual willpower is sometimes enhanced through social norms that evolve to penalize either those who succumb to temptation or those who are seen as “tempters.” Social norms can also play a role in self-control strategies by categorizing or “bundling” certain behaviors with others, a strategy that social science studies have suggested may be effective for resisting temptation.

\textsuperscript{161} See note 162.
\textsuperscript{162} See Hetcher, supra note 1 at 243-60.
\textsuperscript{163} These concerns also speak to the potential efficacy of the Fair Information Practices standards that have been urged as a basis for privacy of computerized databases since the 1970’s. The standards for notice, consent, and access might need to be modified to reflect the realities of bounded rationality and willpower. For discussion of the Fair Information Practices, see, e.g., Federal Trade Commission, PRIVACY ONLINE: A REPORT TO CONGRESS (1998) at http://www.ftc.gov/reports/privacy3/priv-23a.pdf.
Personal information norms, which frown upon disclosing certain kinds of personal information and prying into personal information in certain contexts, are possibly explained as willpower norms that have arisen to deal with bounded rationality and time-inconsistent preferences in disclosing, disseminating, and processing personal information. Frequently, these norms serve socially beneficent purposes, improving decision-making within a social group. However, where personal information norms are imposed by a majority on a disfavored minority they may function as pernicious “silencing norms” that prevent other social norms from evolving to reflect an evolving social consensus. An example of such a “silencing norm” is the “don’t ask, don’t tell” policy about gays in the military.

Because personal information norms frequently arise to compensate for collective action problems in the dissemination of personal information, they highlight the potential for information market failures that can lead to socially sub-optimal decision-making. Therefore, when situations arise in which personal information norms are expected to be ineffective, such as in the context of computerized data processing, alternative mechanisms, including legal regulation, for addressing these problems must be considered. Potentially useful areas of legal regulation include the adaptation of the reasonable expectation of privacy analysis in the privacy torts to account for the personal information norms of a social group; and measures that increase consumer self-control in the context of online information processing -- such as opt-in defaults, the ability to set across-the-board personal information rules, and increasing the salience of information about the hazards of personal information online. Norm entrepreneurship that categorizes online personal information disclosures with “real-space” behavior that is governed by social norms -- such as the “moralization” of inadequate website privacy policies as...
“disrespectful” described by Hetcher -- may also promote willpower through the bundling mechanism.

Further analysis, and especially further empirical work aimed at elucidating the role that temptation plays in information disclosure and dissemination, will be necessary to understand the interplay between personal information norms and information privacy law more completely. The concept of willpower norms should also find useful application outside of the information privacy context.