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# Notice and Choice Must Go: The Collective Control Alternative

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Informational privacy is the ability to determine for yourself when others may collect and use information about you and what they can do with it.[1] The dominant legislative and regulatory approach to ensuring adequate informational privacy is Notice and Choice.[2] This approach purports to

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1. The classic source is ALAN WESTIN, PRIVACY AND FREEDOM 7 (1967); *see also* JAMES B. RULE, PRIVACY IN PERIL: HOW WE ARE SACRIFICING A FUNDAMENTAL RIGHT IN EXCHANGE FOR SECURITY AND CONVENIENCE 3 (2007) (defining privacy "as the exercise of an authentic option to withhold information on oneself"); Michael Froomkin, *The Death of Privacy*, 52 STAN. L. REV. 1461, 1464 (2000) ("I will use 'informational privacy' as shorthand for the ability to control the acquisition or release of information about oneself"); U.S. Dep't of Just. v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989) ("both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person").

2. *See* Fred H. Cate, Director, Ctr. for Info. Priv. and Sec. at Ind. Univ. Maurer Sch. of L., Presentation at The University of Hong Kong Privacy & Innovation, In Pursuit of Right Incentives: The Limits of Notice and Choice (June 9, 2015) (on file with author) [hereinafter Cate, The Limits of Notice and Choice]

ensure an adequate degree of control over one's information through the presentation of a Notice (a statement of the terms governing the use of information) and the requirement of a Choice (an action signifying acceptance or rejection of the terms).[3] Recent implementations of Notice and Choice include the European Union's General Data Protection Regulation[4] and California's Consumer Protection Privacy Act.[5] Over twenty years of criticism conclusively confirm that Notice and Choice results in "the worst of all worlds: privacy protection is not enhanced, individuals and businesses pay

(summarizing notice and choice approaches). Notice and Choice has its roots in the formulation of the fair information practices in U.S. DEPT. HEALTH, EDUC. & WELFARE, *Records, Computers, and the Rights of Citizens, Report of the Secretary's Advisory Committee on Automated Personal Data Systems* (1973), https://aspe.hhs.gov/report/records-computers-and-rights-citizens (formulating the fair information principles in Section III). *See also* PRIVACY PROTECTION STUDY COMM'N, PERSONAL PRIVACY IN AN INFORMATION SOCIETY (1977), https://epic.org/privacy/ppsc1977report/; Fred Cate, *The Failure of Fair Information Practice Principles*, *in* CONSUMER PROTECTION IN THE AGE OF THE INFORMATION ECONOMY 342 (Jane Winn ed., 2006) [hereinafter Cate, *The Failure of Fair Information Practice Principles*; Daniel J. Solove & Chris Jay Hoofnagle, *Model Regime of Privacy Protection*, 2006 UNIV. ILL. L. REV. 357, 357 (2006) (outlining history of privacy protection and explaining changes that could be made to the Fair Information Practices); U.S. DEPT. COMM., INTERNET POL'Y TASK FORCE, COMMERCIAL DATA PRIVACY AND INNOVATION IN THE INTERNET ECONOMY: A DYNAMIC POLICY FRAMEWORK (2010), https://www.ntia.doc.gov/report/2010/commercial-data-privacy-and-innovation-internet-economy-dynamic-policy-framework; FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE 2 (Mar. 2012), https:www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf; NAT'L ADVERT. ALL., *Draft Code of Conduct for Public Comment* (2013), https://www.networkadvertising.org/Draft_NAI_Code_For_Public_Comment.pdf.

3. *See* Cate, *The Failure of Fair Information Practice Principles*, *supra* note 2, at 352.

4. *See* European Parliament and Council Regulation 2016/679, art. 7, 2016 O.J. (L 119); European Parliament and Council Regulation 2016/679, ch. 3, 2016 O.J. (L 119). The European Union's General Data Protection Regulation (GDPR) does impose additional requirements beyond the minimal requirements of Notice and Choice. *See* Gabriela Zahfir-Fortuna, *10 Reasons Why the GDPR Is the Opposite of a 'Notice and Consent' Type of Law*, FUTURE OF PRIVACY FORUM, https://fpf.org/2019/09/13/10-reasons-why-the-gdpr-is-the-opposite-of-a-notice-and-consent-type-of-law/ (last updated Dec. 17, 2020). The GDPR nonetheless still requires, and relies heavily on, Notice and Choice. *See id.*

5. *See* S.B. 1121 California Consumer Privacy Act of 2018, 2018 Leg., 2018 Cal. Stat. Ch. 735.

the cost of bureaucratic laws."[6] An apt analogy is the old joke about the drunk and the streetlight:

> A policeman sees a drunk man searching for something under a streetlight and asks what the drunk has lost. He says he lost his keys and they both look under the streetlight. After a few minutes the policeman asks if he is sure he lost them here, and the drunk replies, no, that he lost them in the park. The policeman asks why

6. Cate, *The Failure of Fair Information Practice Principles*, *supra* note 2, at 334. An early and influential critique is Paul Schwartz, *Internet Privacy and the State*, 22 CONN. L. REV. 815, 821–23 (2000) (Notice and Choice does not ensure free choice because of information asymmetries, collective action problems, limited rationality, and a lack of market options). A *short* list of recent critiques includes: Ari Ezra Waldman, *Privacy, Notice, and Design*, 21 STAN. TECH. L. REV. 74, 74 n.4 (2018) (noting that the criticisms of Notice and Choice are too numerous to list); OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2016); Ian Ayres & Alan Schwartz, *The No-Reading Problem In Consumer Contract Law*, 66 STAN. L. REV. 545, 545 (2014) (describing Notice and Choice as Quixotic); MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2012) (outlining that notice and choice as implemented is inconsistent with the requirements of free choice); Ctr. for Digital Democracy & U.S. Pub. Int. Rsch. Grp., Letter on In the Matter of a Preliminary FTC Staff Report on Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework For Businesses and Policymakers 33 (2011), https://www.ftc.gov/sites/default/files/documents/public_comments/preliminary-ftc-staff-report-protecting-consumer-privacy-era-rapid-change-proposed-framework/00338-57839.pdf ("Informed consent in the digital marketing era requires . . . a new commitment to candor and honesty . . . [the online marketing industry] needs to clearly explain to the user how the data are collected and used"); Helen Nissenbaum, *A Contextual Approach to Privacy Online*, 140 DEDALUS 32, 36 (2011) (noting "the transparency paradox. Achieving transparency means conveying information handling practices [however] If notice . . . finely details every [relevant fact] . . . we know that it is unlikely to be understood, let alone read. But summarizing practices in the style of, say, nutrition labels is no more helpful because it drains away important details, ones that are likely to make a difference," and arguing for a much greater reliance on context); Solon Barocas & Helen Nissenbaum, *On Notice: The Trouble with Notice and Consent*, *in* PROCEEDINGS OF THE ENGAGING DATA FORUM: THE FIRST INTERNATIONAL FORUM ON THE APPLICATION AND MANAGEMENT OF PERSONAL ELECTRONIC INFORMATION 36 (2009), https://ssrn.com/abstract=2567409 (consumers "confront . . . full-on barriers to achieving meaningful understanding of the practice and uses to which they are expected to be able to consent."); Paul M. Schwartz & Daniel Solove, *Notice and Choice: Implications for Digital Marketing to Youth*, BERKELEY MEDIA STUD. GRP. 2–3 (2009), http://digitalads.org/documents/Schwartz_Solove_Notice_Choice_NPLAN_BMSG_memo.pdf; RULE, *supra* note 1, at 143–47 (privacy advocates pay insufficient attention to how to balance privacy versus competing concerns).

> he is searching here, and the drunk replies, "This is where the light is."[7]

Policy makers search under the streetlight of Notice and Choice even though free and informed consent is not there—even though they *know* it is not there. Why don't they look in the "park"?

The problem is not that the "park" does not exist. There is a well-known alternative to Notice and Choice suggested by reflection on the exchange of information in social interactions.[8] These exchanges typically exhibit the following striking feature: social norms ensure that people trust each other to respect shared expectations about constraints on the information exchange.[9] The nineteenth century sociologist of urbanization Georg Simmel was perhaps the first to single out such shared expectations for systematic study.[10] He emphasized that urbanization made it possible for a person to take on a variety of social roles:

> [W]hereas earlier [in small communities], individuality was determined primarily by belonging to a single group, it is now [in large cities] formed by the *combination* of the diverse groups to which the person belongs . . . Someone could belong to various professional associations, at the same time as he belongs to a scientific society, is a reserve officer, plays a role in a civic association, and in addition has a social life that brings him into contact with diverse social strata.[11]

It impressed Simmel that people conform to social norms that require that information flows only in selective ways.[12] That is why one could "come into contact with diverse social strata" without much worry that information about those activities would find its way back to, for example, the professional associations to which one belonged.[13] Since Simmel, many have developed the point.[14]

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7. Adapted from DAVID H. FREEDMAN, WRONG: WHY EXPERTS KEEP FAILING US 40 (2010).

8. *See* Georg Simmel, *The Sociology of Secrecy and Secret Societies*, 11 AM. J. SOCIO. 441, 441–42 (1906).

9. *See id.* at 452–56.

10. *See id.*

11. JERRY Z. MULLER, THE MIND AND THE MARKET: CAPITALISM IN MODERN EUROPEAN THOUGHT 248–49 (quoting Georg Simmel, *Gesamtausgabe* in translation) (2002).

12. *See* Simmel *supra* note 8, at 466–69.

13. *See id.*

14. A short list includes: CRISTINA BICCHIERI, THE GRAMMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS (2002); CRISTINA BICCHIERI, NORMS IN THE WILD: HOW TO DIAGNOSE, MEASURE, AND CHANGE SOCIAL

Why have twenty years of criticism been so ineffective in turning the tide from Notice and Choice to the collective control alternative? One plausible factor is that the criticisms detail the flaws but do not adequately motivate the turn to collective control.[15] A motivationally compelling critique would show how and why the failure of Notice and Choice, properly understood, reveals the undeniable need for the collective control alternative. That does not yet exist in the Notice and Choice literature. My goal is to remedy that lack.

Section I outlines Notice and Choice and explains its appeal. Section II proposes three criteria of adequacy which an approach to informational privacy should meet. Section III argues that Notice and Choice fails to meet any of the criteria and shows that the failure results from ignoring the role of social norms. Section IV outlines a social norms/collective control alternative, and Section V urges the adoption of that alternative.

## I. INFORMATIONAL PRIVACY AND NOTICE AND CHOICE

The appeal of Notice and Choice is that it appears to solve two fundamental problems about informational privacy with one elegant stroke. I characterize the problems then turn to the details of Notice and Choice.

### A. Two Problems About Informational Privacy

Problems about informational privacy arise because contemporary surveillance greatly reduces the control people have over information about them.[16] "Virtually every aspect of business is now open to data collection and

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NORMS (2016) [hereinafter CRISTINA BICCHIERI, NORMS IN THE WILD]; MODERN DILEMMAS: UNDERSTANDING COLLECTIVE ACTION IN THE 21ST CENTURY (Dylan Kissane & Alexandru Volacu eds., 2015); HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE (2010); Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSPECTIVE 137; ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY (2005); CASS R. SUNSTEIN, HOW CHANGE HAPPENS (2020); Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996); THE COMPLEXITY OF SOCIAL NORMS (Maria Xenitidou & Bruce Edmonds eds., 2014).

15. A typical example is Robert H. Sloan & Richard Warner, *Beyond Notice and Choice: Privacy, Norms, and Consent*, 14 SUFFOLK UNIV. J. HIGH TECH. L. 370, 371 (2014). We critique Notice and Choice and recommend a collective control alternative, but we do not show how the failure of Notice and Choice itself motivates the turn to the collective control alternative. *See id.*

16. A short list of literature examining cotemporary surveillance issues includes SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019); YASHA LEVINE, SURVEILLANCE VALLEY: THE SECRET MILITARY HISTORY OF THE INTERNET (2018); ARI EZRA WALDMAN, PRIVACY AS TRUST: INFORMATION PRIVACY FOR

often even instrumented for data collection: operations, manufacturing, supply-chain management, customer behavior, marketing campaign performance, workflow procedures, and so on."[17] That is both the cause and the effect of the fact that "information—rather than information technology—is the fundamental building material of the modern enterprise."[18] A significant

AN INFORMATION AGE (2018); JULIA ANGWIN, DRAGNET NATION: A QUEST FOR PRIVACY, SECURITY, AND FREEDOM IN A WORLD OF RELENTLESS SURVEILLANCE (2014); BEATRICE EDWARDS, THE RISE OF THE AMERICAN CORPORATE SECURITY STATE: SIX REASONS TO BE AFRAID (2014); GLENN GREENWALD, NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA, AND THE U.S. SURVEILLANCE STATE (2014); LUKE HARDING, THE SNOWDEN FILES: THE INSIDE STORY OF THE WORLD'S MOST WANTED MAN (2014); Joel R. Reidenberg, *The Data Surveillance State in the United States and Europe*, 49 WAKE FOREST L. REV. 583, 605–06 (2014); HEIDI BOGHOSIAN, SPYING ON DEMOCRACY: GOVERNMENT SURVEILLANCE, CORPORATE POWER AND PUBLIC RESISTANCE (2013); SIMON CHESTERMAN, ONE NATION UNDER SURVEILLANCE: A NEW SOCIAL CONTRACT TO DEFEND FREEDOM WITHOUT SACRIFICING LIBERTY (Reprint ed. 2013); Neil Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1956 (2013); ROBERT H. SLOAN & RICHARD WARNER, UNAUTHORIZED ACCESS: THE CRISIS IN ONLINE PRIVACY AND INFORMATION SECURITY (2013); WASH. POST, NSA SECRETS: GOVERNMENT SPYING IN THE INTERNET AGE (2013) (audiobook); RONALD J DEIBERT, BLACK CODE: INSIDE THE BATTLE FOR CYBERSPACE (2011); JOHN GILLIOM & TORIN MONAHAN, SUPERVISION: AN INTRODUCTION TO THE SURVEILLANCE SOCIETY (2012); SUSAN LANDAU, SURVEILLANCE OR SECURITY?: THE RISKS POSED BY NEW WIRETAPPING TECHNOLOGIES (2011); ATHAN THEOHARIS, ABUSE OF POWER: HOW COLD WAR SURVEILLANCE AND SECRECY POLICY SHAPED THE RESPONSE TO 9/11 (2011); JAMES BAMFORD, THE SHADOW FACTORY: THE ULTRA-SECRET NSA FROM 9/11 TO THE EAVESDROPPING ON AMERICA (2008); LUIS ALBERTO FERNANDEZ, POLICING DISSENT: SOCIAL CONTROL AND THE ANTI-GLOBALIZATION MOVEMENT (2008); Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CAL. L. REV. 901, 911 (2008).

17. FOSTER PROVOST & TOM FAWCETT, DATA SCIENCE FOR BUSINESS: WHAT YOU NEED TO KNOW ABOUT DATA MINING AND DATA ANALYTIC THINKING 1 (2013).

18. JAMES W. CORTADA, INFORMATION AND THE MODERN CORPORATION x (2011). Cortada notes that:

> Today less than 20 percent of the workers in a computer plant make anything; the rest are accountants, supply-chain supervisors, quality-control specialists, production supervisors, managers, analysts, computer scientists, and engineers. Banks do not have as much cash in their vaults and branches as they did in earlier years; instead, they have digital files that say they have large amounts of money, and they are managing information about how much a particular person or account has, not physically moving coins and paper from one pile to another. And so it goes in one industry after another: hundreds of millions of people working with information. They can do this reasonably well thanks to the existence of computers.

part of that "building material" is information about consumers. As Harvard Business School professor Soshana Zuboff notes,

> Surveillance capitalism unilaterally claims human experience as free raw material for translation into behavioral data. Although some of these data are applied to product or service improvement, the rest are declared as a proprietary behavioral surplus, fed into advanced manufacturing processes known as "machine intelligence," and fabricated into prediction products that anticipate what you will do now, soon, and later.[19]

This is problematic because an adequate degree of informational privacy is essential to a wide range of important ends.[20] "Theorists have proclaimed the value of privacy to be protecting intimacy, friendship, individuality, human relationships, autonomy, freedom, self-development, creativity, independence, imagination, counterculture, eccentricity, thought, democracy, reputation, and psychological well-being."[21] As the mention of "intimacy, friendship, individuality, human relationships, autonomy, freedom, [and] self-development" indicates, a central theme is a concern with the self and its relation to how others' informational privacy affects those concerns because different requirements on what one is allowed, expected, or required to reveal or not reveal define different relationships with governmental authorities, acquaintances, colleagues, friends, family, employers, and so on.[22] As sociologist Christena Nippert-Eng emphasizes:

> At its core, managing privacy is about managing relationships between the self and others. . . . privacy . . . [is] a "boundary regulatory process by which a person (or group) makes himself more or less accessible and open to others." When we regulate our accessibility to others, though—including the accessibility of information, objects, space, time, or anything else that we deem private—we simultaneously regulate our relationships with them.[23]

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> Most commentators on information focus on the computers rather than on information, facts, and data.

*Id.* at ix.

19. ZUBOFF, *supra* note 16, at 8.

20. *See* DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 98 (2008).

21. *Id.*

22. *See, e.g.*, Robert H. Sloan & Richard Warner, *The Self, the Stasi, the NSA: Privacy, Knowledge, and Complicity in the Surveillance State*, 17 MINN. J. L. SCI. TECH. 347, 370 (2016).

23. CHRISTENA E. NIPPERT-ENG, ISLANDS OF PRIVACY 22 (2010) (quoting IRWIN ALTMAN, THE ENVIRONMENT AND SOCIAL BEHAVIOR: PRIVACY, PERSONAL SPACE, TERRITORY, CROWDING 31 (1975)).

In light of these considerations, I take it for granted that it is essential to restore an adequate degree of informational privacy, and, like Zuboff, he urges that we reassert "the primacy of a flourishing human future as the foundation of our information civilization."[24]

Successful reassertion requires solving two problems. The first is to ensure that individuals have a sufficient range of opportunities to give free and informed consent to what others do with data about them. Informational privacy consists of the ability to control what others do with information, and you lack that control if you cannot, across a suitable wide range of cases, give free and informed consent to how others process your information.

The second problem concerns tradeoffs. To successfully assert the "primacy of a flourishing human future as the foundation of our information civilization" one must balance the value of informational privacy against the benefits of the data processing that defines that civilization. Information processing has already yielded and will continue to yield significant benefits.[25] How much privacy can one afford to sacrifice to secure the benefits? Reaching (or even approximating) societal consensus on an answer is a daunting task. As sociologist James Rule notes, "we cannot hope to answer [complex balancing questions] until we have a way of ascribing weights to the things being balanced. And that is exactly where parties to privacy debates are most dramatically at odds."[26] It is worth noting that disagreement over privacy is just one instance of disagreement over "matters of fundamental significance."[27] As John Rawls emphasizes,

> reasoned and uncoerced agreement are not to be expected . . . Our individual and associative points of view, intellectual affinities and affective attachments, are too diverse . . . to allow of lasting and reasoned agreement. . . . [The appropriate view of social organization] takes deep and unresolvable differences on matters of fundamental significance as a permanent condition of human life.[28]

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24. ZUBOFF, *supra* note 16, at 21.

25. *See, e.g.*, Robert H. Sloan & Richard Warner, *Big Data and the "New" Privacy Tradeoff*, CHI.-KENT COLL. L. RSCH. PAPER NO. 2013-33, at 1–2 (Aug. 5, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2306071.

26. RULE, *supra* note 1, at 183; *cf.* WESTIN, *supra* note 1, at 370 ("If privacy is to receive its proper weight on the scales in any process of balancing competing values, what is needed is a structured and rational weighing process, with definite criteria that public and private authorities can apply in comparing the claims for disclosure or surveillance through new devices with the claims to privacy.").

27. *See* John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHILOSOPHY 515, 542 (1980).

28. *Id.*

## B. The Allure of Notice and Choice

The allure of Notice and Choice is that it appears with one elegant stroke to solve both the problem of ensuring free and informed consent and the problem of implementing an acceptable tradeoff.

### 1. Free and Informed Consent

Advocates of Notice and Choice claim that as long as the Notice is sufficiently informative, and the choice is sufficiently free, Notice and Choice ensures that each individual gives or withholds free and informed consent.[29] As law professors Paul Schwartz and Daniel Solove note, "[a]s long as a company provides notice of its privacy practices, and people have some kind of choice about whether to provide the data or not, then privacy is sufficiently protected."[30]

### 2. Acceptable Tradeoffs

Part of the appeal of Notice and Choice is the—apparent—ease with which it implements an acceptable tradeoff in the face of "deep and unresolvable differences on matters of fundamental significance."[31] To see the appeal, note first that the overall pattern of giving or withholding consent draws a line between consented to and unconsented to uses of information. Merely to define that line is not necessarily to define an *acceptable tradeoff*. An acceptable tradeoff adequately balances the benefits and risks to society as a whole. But, at least in sufficiently competitive markets, in which businesses offer a variety of information processing regimes, why shouldn't individual consent decisions sum to that balance (at least approximately)? If so, there is no need to seek political agreement on what counts as an acceptable tradeoff, a daunting task given the widespread disagreement on the issue.

Some may object that proponents of Notice and Choice rarely address the tradeoff problem.[32] So, what ground is there to attribute the above view to

29. Sloan & Warner, *supra* note 15, at 370.

30. *See* Schwartz & Solove, *supra* note 6, at 1.

31. *See* Rawls, *supra* note 27, at 542.

32. *See, e.g.*, Orson Swindle, *Dissenting Statement of Commissioner Orson Swindle in Privacy Online: Fair Information Practices in the Electronic Marketplace A Report to Congress*, FED. TRADE COMM'N 1 (May 2000), https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-fair-information-practices-electronic-marketplace-federal-trade-commission-report/swindledissent.pdf. Commissioner Swindle sharply criticizes the report for its lack of attention to tradeoff questions. *See id.* at 1–2. "The Privacy Report fails to pose and to answer basic questions that all regulators and lawmakers should consider before embarking on extensive regulation that could severely stifle the New Economy. Shockingly, there is absolutely no consideration of the costs and benefits of regulation; nor the effects on competition and consumer choice; nor the experience to date with government regulation of privacy; nor constitu-

them? One reason is that (with one notable exception[33]) the *only* tradeoff mechanism one finds in the Notice and Choice literature is the combined effect of the individual consent decisions. For further confirmation, recall the Schwartz and Solove claim that "As long as a company provides notice of its privacy practices, and people have some kind of choice about whether to provide the data or not, then privacy is *sufficiently protected*."[34] Privacy is not "sufficiently protected" unless Notice and Choice ensures an acceptable tradeoff. Otherwise, privacy is under protected by a tradeoff that sacrifices too much privacy to information processing or over protected by a tradeoff that sacrifices too much information processing to privacy.[35]

## II. THE ALLURE AND THE ILLUSION: CRITERIA OF ADEQUACY

The allure of Notice and Choice is an illusion. Three questions make the inadequacies clear. When is consent informed? When is it free? When is a tradeoff acceptable? The discussion of each question leads to a criterion of adequacy that Notice and Choice fails to meet.

### A. When Is Consent Informed?

The point of ensuring that consent is informed is to provide the information necessary for a person to make a reasonable decision. It follows that consent is informed when a person has enough information to make such a decision. The question is: What type of information? There are two types: information a person acquires through his or her own investigative efforts and the information that a business adheres to relevant social norms.[36]

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tional implications and concerns; nor how this vague and vast mandate will be enforced." *Id.* at 16.

33. *See* WESTIN, *supra* note 1, at 365–70 (proposing ways to implement tradeoffs that go well beyond mere Notice and Choice).

34. Schwartz & Solove, *supra* note 6, at 1 (emphasis added).

35. In his excellent book *Privacy in Peril*, James Rule seems in the end to endorse the claim that the combined effect of informed consent decisions yields an acceptable tradeoff. He recommends that in "the private sector [the following] precept should apply: no use of personal data for institutional surveillance without meaningful informed consent from the individual." RULE, *supra* note 1, at 196. Rule notes that this precept would alter the existing tradeoff between privacy and a variety of competing concerns, and he endorses the change. *See id.*

36. Relevant social norms are generally the merchant norms such as those found in the Uniform Commercial Code's Implied Warranty of Merchantability, U.C.C. § 2-314 (AM. L. INST. & UNIF. L. COMM'N 1977). Information acquired through one's own investigative efforts will vary based upon things such as the relative price of the good purchased and an individual's proclivity to research purchases or not. *See, e.g.*, Howard Marmorstein et al., *The Value of Time*

To illustrate both, suppose Victoria is purchasing an air purifier. For the moment, imagine a Mid-Twentieth Century transaction without significant data collection. There are features of the product she can readily determine through examining the description of the product and the context in which it is offered. These include price, color, size, weight, and whether it has a HEPA filter, the area it covers, and so on. On the basis of her examination, Victoria forms reasonable expectations about which products meet her requirements. There are other features of the product which she cannot readily assess through her individual investigation. For example, will the product work properly? More precisely, will it be fit for the purposes for which an air purifier is ordinarily used?[37] How is she to learn that? She knows very little about the design and manufacture of air purifiers. Even if she had the expertise, she does not have the time to investigate. She is already committed to a variety of goals—raising her daughter, pursuing her career, enjoying her friends, and so on—and the time she is willing to allot to buying an air purifier is short. Instead of investigating, she relies on a social norm. The norm is that manufacturers provide and retailers sell products fit for the purpose for which they are ordinarily used. The practice arose with the rise of market economies in the seventeenth century.[38] In light of the norm and widespread conformity to it, Victoria's expectation that manufacturers and retailers conform to the norm is *empirically* reasonable. Her expectation is also *norma-*

*Spent in Price-Comparison Shopping: Survey and Experimental Evidence*, 19 J. CONSUMER RSCH. 52, 52 (1992).

37. *See* FED. TRADE COMM'N, *supra* note 2, at 79 (noting that "one of the major themes of the roundtables is that consumers lack understanding of various data practices and their privacy implications, and thus lack the ability to make informed decisions about the trade-offs involved"). *See also* Jeff Chester, *Cookie Wars: How New Data Profiling and Targeting Techniques Threaten Citizens and Consumers in the "Big Data" Era*, *in* EUROPEAN DATA PROTECTION: IN GOOD HEALTH? 53–77 (Serge Gutwirth et al. eds., 2012) (analyzing and explaining trends in use of consumer information for individual-level advertising targeting purposes, typically beyond consumer notice).

38. The practice has a long history. As British common law responded to the rise of a market economy in the seventeenth century, it explicitly noted that the commercial custom and practice was to offer fit products. *See* JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 98 (2004). Moreover, such acknowledgments are not confined to modern market economies; ancient Roman law also notes the same custom and practice. *See* Friedrich Kessler, *The Protection of the Consumer Under Modern Sales Law, Part 1*, 74 YALE L.J. 262, 263–64 (1974). *See also* George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1299–1302 (1981) (explaining history of modern warranties and how exploitation theory was popular reasoning for them).

*tively* reasonable in the sense that consumers, manufacturers, and retailers share values in light of which they endorse and conform to the norm.[39]

To summarize, she has two sources of empirically and normatively reasonable expectations. Those expectations ensure that her consent is informed. Consent is informed when a person has enough information to make a reasonable decision, and the information relevant to her decision is that the product will conform to her reasonable expectations.[40]

Some may object that standard form contracts governing the purchase of products routinely disclaim liability from the failure of the products to be fit for the purpose for which they are ordinarily used. Doesn't that show that Victoria cannot reasonably expect the air purifier to be fit for the purpose for which an air purifier is ordinarily used? The answer is that the penalty for not offering such products is a *market*, not a legal, penalty. In a sufficiently competitive market, the penalty for producing more than the occasional unfit product is lost sales (over time as buyers become aware of the practice), so profit-motive driven sellers will offer fit products—for the most part.[41] When contracts shift the *legal* risk of selling an unfit product onto the buyer, that does not eliminate the *market* penalty.[42] What the shift does is fine-tune the fitness norm's risk allocation in ways that benefit both businesses and consumers. Businesses benefit because no production process is perfect. There will be some unfit products on the market, but these will be relatively rare.[43] The effect is to reduce a business's legal liability and make it more predict-

39. Shared values do not always generate reasonable expectations. They do not do so when the values are open to decisive criticism. Consider, for example, a society in which widely shared values support expectations that women are inferior to men. The expectations the values that generate them are empirically and morally indefensible. In such cases, the expectations are not reasonable. In the text, for simplicity, I assume that values are empirically and morally defensible. Avoiding the assumption would require a more complicated formulation of the claims in the text.

40. *See* Richard Warner, *Turned On Its Head?: Norms, Freedom, and Acceptable Terms in Internet Contracting*, 11 TUL. J. TECH. & INTELL. PROP. 1, 3–4 (2008).

41. *Id.*; *see* Alan Schwartz & Louis L. Wilde, *Imperfect Information In Markets For Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1389 (1983).

42. In other words, the market penalty is the difference in profits from selling an undesirable product as opposed to a legal penalty, which would be one imposed by law. *See* Schwartz & Wilde, *supra* note 41, at 1392–93.

43. *See id.* at 1407 (assuming that in a model chance of breaking is known).

able.[44] The benefit to consumers is that, in a sufficiently competitive market, the resulting savings will to some extent be passed on to consumers.[45]

There are many similar examples.[46] People routinely form reasonable expectations based on social norms. Social norms explain why you trust the quality of the car mechanic's work, the accuracy of the pharmacist filling of prescriptions, the edibility of the food in restaurants, and so on. In general, there are

> social norms about nearly every aspect of human behavior. There are norms about littering, dating, smoking, singing, when to stand, when to sit, when to show anger, when, how, and with whom to express affection, when to talk, when to listen, when to discuss personal matters, when to use contractions, when (and with respect to what) to purchase insurance.[47]

Now set Victoria's transaction in the Twenty-First Century. The difference is that businesses collect, analyze, and distribute information about her. Can Victoria's consent be informed by forming reasonable expectations about those information processing activities? She cannot form them through her own investigation. She does not have access to the information processing practices of businesses. She does have access to privacy policies, terms of use agreements, and terms of sale agreements, but those will not generate the necessary expectations. There are three problems.

First, the documents are too long and too numerous to read. "When PayPal's privacy notice is added to its other terms of use disclosed to consumers, the total word count is 36,275 words, longer than *Hamlet* (at 30,066 words), and iTunes' comes to 19,972 words, longer than *Macbeth* (at 18,110 words)."[48] The number of documents compounds the problem. A 2008 study that considered only privacy policies (not terms of use or terms of sale) notes that "[w]e estimate that reading privacy policies carries costs in time of ap-

44. *See id.* at 1408.

45. This may seem bad for risk-averse buyers and buyers facing unusually high risks who want more protection, but they can easily protect themselves by purchasing insurance or extended warranties, both of which are typically readily available at reasonable prices. On the other hand, consider what happens when sellers do promise that a product is fit in the contract. Sellers will most likely raise prices to cover the additional legal liability. This is bad for low-risk buyers who have little or no need for the additional protection. Those buyers pay for the protection they do not need, thereby subsidizing protection for risk-averse and high-risk buyers. Disclaiming the fitness warranty avoids the subsidy. *See* Warner, *supra* note 40, at 16–17.

46. *See, e.g.*, Richard Warner & Robert H. Sloan, *Vulnerable Software: Product-Risk Norms and the Problem of Unauthorized Access*, 2012 U. ILL. J. TECH. L. POL'Y 45, 64 (2012) (analyzing norms governing the sale of products).

47. Sunstein, *supra* note 14, at 914.

48. Cate, *The Limits of Notice and Choice*, *supra* note 2, at 6.

proximately 201 hours a year, worth about $3,534 annually per American Internet user."[49] Nationally, if Americans were to read online privacy policies word-for-word, we estimate the value of time lost as about $781 billion annually."[50] In 2020, the number of documents a consumer encounters is far greater than it was in 2008.[51] Some have suggested shorter, easy to read Notices,[52] but, as Fred Cate notes,

> Experiments with ways of making notices more accessible, including shortened notices, layered notices, standardized notices, and machine readable notices, have tended to fail in practice, in large part because they ignore the fundamental complexity of the myriad uses of data that notices are trying to describe and the legal liability that can result from inadequate or inaccurate descriptions.[53]

Second, Notices do not contain all the information Victoria needs. If she is, through her individual investigation, to form expectations to guide her choice, she needs to know what information businesses collect, how they use it, and where they distribute it. However, as Helen Nissenbaum notes,

> consider what might need to be conveyed to users to provide notice of what information is captured, where it is sent, and how it is used. The technical and institutional story is so complicated that probably only a handful of deep experts would be able to piece together a full account . . . Even if, for a given moment, a snapshot of the information flows could be grasped, the realm is in constant flux, with new firms entering the picture, new analytics, and new back-end contracts forged: in other words, we are dealing with a recursive capacity that is indefinitely extensible.[54]

Nissenbaum concludes that "the complexity makes it not only difficult to convey what practices are followed and what constraints respected, but practically impossible."[55]

Third, even if she could form expectations, they would not qualify as reasonable. In the sense of "reasonable" as relevant here, reasonable expecta-

49. Aleecia M. Macdonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S J. L. & Pol'y Info. Soc'y 543, 565 (2009).

50. *Id.*

51. Sarah Shyy, *The GDPR's Lose-Lose Dilemma: Minimal Benefits to Data Privacy & Significant Burdens on Business*, 20 U.C. Davis Bus. L.J. 137, 145 (2020).

52. *See, e.g.*, M. Ryan Calo, *Against Notice Skepticism in Privacy (and Elsewhere)*, 87 Notre Dame L. Rev. 1027, 1032–33 (2012).

53. Cate, *The Limits of Notice and Choice*, *supra* note 2, at 6.

54. Nissenbaum, *supra* note 6, at 35–36.

55. *Id.* at 36.

tions are those endorsed by the shared values of consumers and businesses. The problem is that the relevant shared values do not exist (at least not in sufficient numbers). Consider the media conglomerate Viacom. It builds "audience segmentation models based on viewing data, demographic and psychographic profiles, purchasing behavior data and more. [This allows it to] mine Nielsen's all-minute respondents to identify audience segments, then design and implement strategies to target them."[56] Do the data subjects share values with Viacom in light of which the subjects and Viacom agree on what counts as reasonable expectations for the data subjects in regard to Viacom's information processing? That is unlikely. Only some will know what Viacom is, and even fewer will be aware of its information processing. But even if they were aware, the intense privacy debates over the use of predictive analytics would be sufficient to show that there is no agreement on relevant shared values.

These same considerations show that Victoria cannot rely on a social norm to create reasonable expectations. The relevant social norm would be defined in terms of reasonable expectations. The "fit for ordinary use" norm illustrates this point.[57] The norm is that consumers *reasonably expect* and businesses provide products fit for ordinary use.[58] The analogous norm for information processing would be that consumers *reasonably expect* a certain type of information processing, and businesses conform to that expectation.

Therefore, the first criterion of adequacy: ensure that social norms generating relevant reasonable expectations exist, and that businesses conform to the norms.

### B. When Is Consent Free?

Law professor Margaret Jane Radin offers a useful characterization of when consent is free.[59] Free consent "requires [1] a knowing understanding of what one is doing [2] in a context in which it is actually possible for one to do otherwise, and [3] an affirmative action in doing something, rather than a merely passive acquiescence in accepting something."[60] An example is helpful. Suppose a thief puts a gun to your head and demands, "Your money or your life!" When you hand over your money, you have a knowing understanding of what you are doing. It is also possible for you to do otherwise—keep your money and be shot. But, if anything is a case of passive acquiescence, handing over the money is. To what extent are online interactions like

56. *Use Audience Analytics to Predict and Identify Patterns in Audience Behavior*, SAS (2015), https://www.sas.com/content/dam/SAS/en_us/doc/solutionbrief/audience-analytics-107006.pdf (last visited Apr. 15, 2021).

57. *See* Warner & Sloan, *supra* note 46, at 60–62.

58. *See id.*

59. *See* Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125, 1126 (1999).

60. *Id.*

the gun to the head example? The answer leads to the second criterion of adequacy.

To begin, imagine Roger visits Amazon.com to buy a book. He has a knowing understanding of what he is doing, and "it is actually possible [for him] . . . to do otherwise."[61] He could buy books from Barnes & Noble's website or not buy books online at all. The critical question concerns the final condition: Is his visit to Amazon's website "an affirmative action in doing something, rather than a merely passive acquiescence in accepting something"?[62] It may look like an affirmative action. After all, Roger would not engage in this exchange if he did not judge that the service was worth more to him than withholding his data, and if he chooses because he finds the service worth more to him than not disclosing his data, how can the action be mere passive acquiescence?

The problem is that the same remarks are true for the gun to the head example. You would not hand over your money if you did not think the money was worth more to you than losing your life. Defenders of Notice and Choice might reply that there is nonetheless a significant difference between the gun to the head and Roger's visit to Amazon.com. In the gun to the head case, you have only one meaningful option: hand over your money. Roger, however, appears to have several options. He does not have to shop on Amazon. The problem is that a variety of retailers does not translate into a variety of relevant options.[63] The relevant options are just two: (1) engaging in transactions subject to information processing; or (2) not engaging in such transactions at all.[64] As Schwartz and Solove contend,

> the "choice" presented is more of a Hobson's choice than a real one. Many companies present consumers with a take-it-or-leave-it choice that provides hardly any ability for consumers to bargain about their privacy preferences. If a consumer wants to buy a product, read a website, subscribe to a magazine, use a service, and so on, the consumer can be forced either to surrender privacy or to go elsewhere. But when nearly all companies offer the same take-it-or-leave-it approach, consumers desiring to protect their privacy have nowhere to turn.[65]

61. *See id.*

62. *See id.*

63. *See* Schwartz & Solove, *supra* note 6, at 3.

64. *Id.*

65. Compare *id.*, *with* Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1229 (1983) ("The consumer's experience of modern commercial life is one not of freedom in the full sense posited by traditional contract law, but rather one of submission to organizational domination, leavened by the ability to choose the organization by which he will be dominated."). *Id.*

Roger's choice is a highly constrained choice—a choice limited to a choice among various information processing regimes.

Does it follow that his choice is mere passive acquiescence? No. Even highly constrained choices can in some cases still be free. This point plays a key role later in the critique of Notice and Choice. To illustrate the idea, imagine your dream vacation is to go to the Cayman Islands. Your budget makes the trip impossible unless you opt for an "all inclusive" vacation package offering airfare, hotel, and food at a price you can afford. When you sit down to eat the food, your choice is highly constrained (your options being going hungry or spending money you cannot afford). However, eating the food is also consistent with your reasonable expectations about the all-inclusive package. Contrast the gun to the head example. The thief's interference is not consistent with the reasonable expectations you had about the pursuit of your plans and projects. This difference explains why you eat the food freely—the sense that doing so is a justified component of a freely chosen overall plan. This is a common pattern. You may, to take another example, have no practical option other than driving your children to daycare. You have to work—there is no one to care for them at home—and so on. But driving them to daycare is part of the pursuit of the freely adopted project of raising your children and as such it is not passive acquiescence but an affirmative action. In general, a constrained choice can be free when the control one surrenders to others will be used in ways consistent with one's reasonable expectations.

Thus, *the second criterion of adequacy*: ensure free choice by ensuring that constrained choices about information processing are consistent with reasonable expectations.

### C. When Are Tradeoffs Acceptable?

Zuboff rightly insists on the assertion of the "primacy of a flourishing human future as the foundation of our information civilization."[66] An "information civilization" is characterized by significant degree of information processing for a variety of purposes.[67] However, realizing "a flourishing human future" means securing a significant degree of informational privacy for individuals.[68] Thus, asserting the "primacy of a flourishing human future as the foundation of our information civilization" means balancing the value of informational privacy against the benefits of the data processing that defines that civilization. When is a tradeoff acceptable? I take it for granted that social and political processes settle that normative question by generating shared values about what counts as an acceptable tradeoff. As variations across cultures and throughout history show, different groups find different

66. ZUBOFF, *supra* note 16, at 21.

67. *See id.*

68. *See id.*

tradeoffs acceptable.[69] The determination of what counts as an acceptable tradeoff provides part of the background against which one assesses the reasonability of consumer expectations. Expectations are not reasonable if they conflict with the tradeoffs defined through appropriate and legitimate social and political processes.

*The third criterion of adequacy*: ensure an acceptable tradeoff.

## III. THE FAILURE OF NOTICE AND CHOICE

Notice and choice meets none of the criteria of adequacy. The reasons for its failure reveal the need for the collective control alternative.

### A. The First Criterion: Ensure Reasonable Expectations Exist

Notice and Choice attempts to use Notices to generate reasonable expectations.[70] The attempt fails. To begin, it fails to generate expectations at all—reasonable or not.[71] The simple and obvious problem is that people do not read Notices.[72] Unread Notices cannot create expectations.[73] Some may object that contract law regards people as informed even if they do not read contracts.[74] The doctrine of the duty to read deems a party to know the terms of the agreement even if he or she did not read it—as long as a party has an adequate opportunity to read and understand the agreement.[75] Why not han-

69. *See* Rawls, *supra* note 27, at 542.

70. *See* Nissenbaum, *supra* note 6, at 34.

71. *See* J. Howard Beales, III & Timothy J. Muris, *Choice or Consequences: Protecting Privacy in Commercial Information*, 75 U. CHI. L. REV. 109, 113–14 (2008).

72. *See, e.g.*, *id.* With regard to standard form contracts generally, "[t]he fact that consumers do not read standard form contracts is so well accepted and documented as to be virtually enshrined as dogma within the contracts literature." Wayne Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 237 (2007); *see also* Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 839 (2006).

73. RADIN, *supra* note 6, at 96–98. In her book, *Boilerplate*, Radin argues that only actual knowledge can fulfill the "knowing understanding" requirement. She concludes that visitors' consent is not free on the ground that non-reading visitors have only hypothetical knowledge of the terms in Notices. *Id.*

74. *See* Barnes, *supra* note 72, at 245–46.

75. This is a traditional formulation of the duty to read. "One having the capacity to understand a written document who reads it, or, without reading it or having it read to him, signs it, is bound by his signature." 7 JOSEPH PERILLO, CORBIN ON CONTRACTS § 29.8 (rev. ed. 2002). When one looks at the exceptions to the doctrine, as stated, it is clear that the actual rule is one is bound if one has adequate opportunity to read and understand.

dle the fact that people do not read Notices in the same way? Why not treat consumers as having the expectations they would have if they read Notices? This will not do. The first criterion of adequacy requires that people *actually have* expectations. The reason is that only actual expectations guide choices. Hypothetical expectations only guide hypothetical choices.

Put aside the problem of generating expectations. Grant that Notices do so. Presenting Notices still does not ensure *reasonable* expectations. The only condition that Notice and Choice imposes on Notices is that they contain sufficient information about a business's information processing practices.[76] It does not require that the expectations the Notices create should be reasonable.[77] Defenders of Notice and Choice could reply that one should regard expectations as reasonable if they are consistent with an acceptable tradeoff between privacy and information processing, and thus, the process that ensures acceptable tradeoffs also ensures that Notices create reasonable expectations. Subsection C below critiques and rejects Notice and Choice as a process for reaching acceptable tradeoffs.

### B. The Second Criterion: Ensure That Constrained Choices are Still Free

Notice and Choice does not address this problem at all. It assumes that people have a relatively unconstrained choice in a sufficiently competitive market.[78] As Marc Rotenberg notes, Notice and Choice "imagines the creation of perfect market conditions where consumers are suddenly negotiating over a range of uses for personal information."[79]

### C. The Third Criterion: Ensure an Acceptable Tradeoff

The Notice and Choice tradeoff claim is that if each person gives free and informed consent to the tradeoffs that are acceptable *to that person*, the overall result is a reasonably close approximation to a society-wide acceptable tradeoff.[80] It is unlikely that this is true. Two examples support the claim—one fictional; the other, real. For the fictional example, imagine a community that does not have a telephone book although everyone would like to have one. Everyone wants that even if he or she has to be listed in the book. However, each prefers not to be listed. When asked to consent to being in the book, each person refuses. No one considers the possibility that so many people will refuse to be listed that the book will not see the light of day.

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76. *See* Schwartz & Solove, *supra* note 6, at 1.

77. *See id.*

78. *See* Marc Rotenberg, *Fair Information Practices and the Architecture of Privacy (What Larry Doesn't Get)*, 2001 STAN. TECH. L. REV. 1, 32 (2001).

79. *Id.*

80. *See* Schwartz & Solove, *supra* note 6, at 1.

The "no phone book" result is a negative externality—a cost of a decision that falls on third parties but not directly on the parties making the decision.[81] The telephone book example shows that when significant negative externalities are present, summing individual decisions can lead to unacceptable results. The real life example is the story of railway transportation to and from Ithaca, New York, a story that prompted the economist Alfred E. Kahn to write his famous article, *The Tyranny of Small Decisions: Market Failures, Imperfections, and the Limits of Economics*.[82] The last passenger train left Ithaca, New York in 1961.[83] Faced with the decision to travel by car, bus, air, or train, so many choose car, bus, or air that train service was no longer profitable and the railroad ceased to offer it.[84] Unfortunately, the train was the only reliable form of transportation in snowy winter weather and in summer peak traffic conditions when roads were crowded and airfares expensive.[85]

The shutting down of the train service was a negative externality. As Kahn observes:

> [L]et each traveler or potential traveler have asked himself how much he would have been willing to pledge regularly over some time period, say annually, by purchase of prepaid tickets, to keep rail passenger service in Ithaca. So long as the amount he would have declared (to himself) would have exceeded what he actually paid in the period—and my own introspective experiment shows it would—then to that extent the disappearance of passenger service [ ] was an incident of market failure.[86]

The lack of train service was unacceptable to most of those affected, yet people making their travel decisions ignored the negative externality.[87]

Compare informational privacy. An acceptable tradeoff between privacy and information processing is a negative externality. To see why, consider that an acceptable tradeoff has to balance society-wide long-term effects. Further, consider the information required to adequately balance the benefits and risks in information about complex society-wide consequences unfolding over a long period of time. That information is not available to people mak-

81. For an intuitive discussion of externalities, see CHARLES E. LINDBLOM, THE MARKET SYSTEM: WHAT IT IS, HOW IT WORKS, AND WHAT TO MAKE OF IT 147–65 (2002) (discussing externalities as "spillovers").

82. Alfred E. Kahn, *The Tyranny of Small Decisions: Market Failures, Imperfections, and the Limits of Economics*, 19 KYKLOS 23, 25–29 (1966).

83. *Ithaca (New York)*, WIKITRAVEL, https://wikitravel.org/en/Ithaca_(New_York) (last visited Apr. 15, 2021).

84. Kahn, *supra* note 82, at 25.

85. *Id.* at 26.

86. *Id.*

87. *Id.* at 29.

ing decisions about entering transactions, so they could not take the information into account even if they tried.[88] Like the telephone book and Ithaca train cases, Notice and Choice is subject to a negative externality that ensures it will lead to unacceptable tradeoffs.

## IV. BEYOND NOTICE AND CHOICE

Notice and Choice fails because it ignores the role of social norms in creating reasonable expectations. Instead, it envisions people giving or withholding consent independently of knowledge of what others are choosing and without any mechanism of coordination with them. It is time to turn to the collective control alternative. I outline a version of that alternative. My goal is to indicate a direction for development, not to present a fully argued theory.[89]

An example illustrates fundamental themes. Family relations are a convenient illustration even if the ultimate concern is with commercial and governmental relations. Imagine a large congenial extended family where everybody shares the goal of a harmonious holiday dinner. Harmony requires a selective flow of information. Everyone knows, for example, that there are things you can say to Aunt Jane that you cannot say to Uncle John and vice versa. In general, they all know that they all share more or less the same understanding of what the relevant strictures on concealment and disclosure are. No family member can unilaterally realize the goal of harmonious family relations. Members must coordinate their efforts to observe the harmony-creating constraints.

Family members conform to a norm—in the following sense of a norm. A *norm* is a behavioral regularity in a group, where the regularity exists at least in part because almost everyone thinks that he ought to conform to the regularity.[90] The regularity in the family holiday dinner is acting to ensure a

88. *See* Nissenbaum, *supra* note 6, at 35–36.

89. Robert Sloan and I have worked out an approach in SLOAN & WARNER, *supra* note 16, at 59–60, 84–86, 343 and ROBERT H. SLOAN & RICHARD WARNER, THE PRIVACY FIX: HOW TO PRESERVE PRIVACY IN THE ONSLAUGHT OF SURVEILLANCE (forthcoming, 2021).

90. Our notion of a norm is a standard one in recent law and economics literature, with one exception. We explain conformity to the norm by appeal to people's beliefs above what they ought to do. The recent literature in contrast explains conformity as the result of self-interested actors avoiding the costs of nonconformity. "[One] approach typically assumes that people care only about their own (material) well being, and rely on repeated game models to explain how they cooperate or refrain from violating social norms. . . . [A] second approach typically assumes that people care about something else aside from material goods—esteem, or status, or conformity, or some such thing." Eric A. Posner, *Introduction* to SOCIAL NORMS, NONLEGAL SANCTIONS, AND THE LAW xi–xii (Eric A. Posner ed., 2007). Richard McAdams, a proponent of the second approach, notes that "by *norm* I mean a decentralized behavioral standard that

certain selective flow of information. The regularity exists because family members think they ought to conform to realize the goal of family harmony.[91]

Similar social norms govern a wide range of social, commercial, and governmental interactions, as Simmel, Nissenbaum, Nippert-Eng, and others have emphasized.[92] The difficulty is that consumers and businesses do not share values that generate relevant reasonable expectations.[93] A reasonable public policy is to create the complex of shared values and social norms that ensure the existence of reasonable expectations on which free and informed consent depends. To motivate that approach, I conclude this section by out-

individuals feel obligated to follow, and generally do follow . . . [to gain the esteem of others], *or* because the obligation is internalized, or both." Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, *in* SOCIAL NORMS, NONLEGAL SANCTIONS, AND THE LAW, *supra* at 101, 144. The emphasis on "feeling obligated" would appear close to our view that people conform because they think they ought to; however, McAdams explains "feeling obligated" in terms of the costs of non-conformity—thus: "Without internalization, one obeys the norm to avoid external sanctions. . . . After internalization, there is yet another cost to violating a norm: guilt. The individual feels psychological discomfort whether or not others detect her violation." *Id.* McAdams still conceives of people as self-interested agents seeking to avoid costs that they regard as unacceptable. We take it to be clear that people are not merely self-interested agents. The assumption that they are has been extensively and decisively criticized. *See, e.g.*, AMARTYA SEN, THE IDEA OF JUSTICE 32–33 (2009).

91. Family members conform if they think enough others will. That feature makes the family norm a coordination norm. A coordination norm is a behavioral regularity in a group to which people conform because they think they ought to do so *if others do*. BICCHIERI, NORMS IN THE WILD, *supra* note 14, at 11.

92. *See* Simmel, *supra* note 8, at 448, 481, 489; Nissenbaum, *supra* note 6, at 45; NIPPERT-ENG, *supra* note 23, at 22.

93. *See* discussion *supra* Section II.A. There is another problem in addition to lack of norms. Some norms may be inconsistent with shared values. The classic example is the "no helmet" norm among National Hockey League players. *See* T. C. Schelling, *Hockey Helmets, Concealed Weapons, and Daylight Saving: A Study of Binary Choices with Externalities*, 17 J. CONFLICT RESOL. 381, 381 (1973). Before 1969, not wearing a helmet was a behavioral regularity that existed in part because each player thought he ought to conform—*as long as all the others did*. *Id.* Wearing a helmet meant not looking tough and involved a slight loss in peripheral vision. *Id.* However, each player would have happily worn a helmet if he thought almost all the others were going to. *Id.* Because of the value they placed on avoiding head injuries, virtually all the players regarded the alternative in which they all wore helmets as better justified. *Id.* Thus, the no-helmet norm was not value-optimal. But the players remained trapped in it, because no individual player would wear a helmet as long as he expected most others not to. *Id.* For examples involving informational privacy, see SLOAN & WARNER, *supra* note 16, at 61–62.

lining how norms based on shared values ensure informed and free consent as well as an acceptable tradeoff.

*Informed consent*: As long as people know their interactions are governed by relevant social norms, the norms will generate the reasonable expectations on which informed consent depends.

*Free consent*: The constrained choices involved in transactions are still free as long as adherence to social norms creates conditions under which the constraints are consistent with reasonable expectations.

*Acceptable tradeoffs*: Informational norms implement tradeoffs between the value of privacy and the benefits of information processing. They permit some information processing and thus secure some of the benefits, but they protect privacy by allowing only certain processing. Thus, legitimate social and political processes that yield appropriate social norms also implement acceptable tradeoffs.

## V. LOOKING IN THE "PARK"

Social norms are the "park" in which regulators should look for ways to preserve and promote information. As Cass Sunstein notes, "[f]ar too little attention has been played to the place of norms in human behavior and to the control of norms as an instrument of legal policy."[94] The time to remedy that lack of attention is now. The critique of Notice and Choice makes it clear that the right public policy is to create a complex of shared values and social norms that generate reasonable expectations.

94. Cass R. Sunstein, *Social Norms and Social Roles* 4 (Univ. Chi. L. Sch. Working Paper No. 36, 1996), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622525.