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ESTABLISHING INFORMATION PRIVACY VIOLATIONS: THE NEW YORK EXPERIENCE

Lawrence Friedman*

Threats to information privacy—that is, to the control individuals have over access to, and the dissemination of, information about themselves and their activities—may appear in many forms. Commentators have focused recently, for example, on the threats to information privacy posed by the war on terrorism and, in particular, its invocation to sanction broad new governmental authority to intercept and review otherwise private communications, and to support the creation of a national identification system. And much has been said about the demand for personal information in the commercial market,

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1. See ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967) (defining information privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others"); see also Jeffrey Rosen, Out of Context: The Purposes of Privacy, 68 SOC. RES. 209, 215 (2001) (describing "privacy" as "the ability to exercise control over personal information"); Jerry Kang, Information Privacy in Cyberspace Transactions, 50 STAN. L. REV. 1193, 1203 (1998) (describing information privacy as concerned with "an individual's control over the processing—i.e., the acquisition, disclosure, and use—of personal information"). Information privacy is but one aspect of a larger understanding of privacy; in constitutional matters, for example, courts often distinguish information privacy from an individual's "privacy" interest "in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 598-600 (1977) (footnotes omitted); see also Paul v. Davis, 424 U.S. 693, 713 (1976) (noting recognition of a decisional privacy interest in "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education").


and the privacy violations that may result from the availability and sale of such information.\(^4\)

In this Article, I address another, more subtle threat to information privacy: the failure of courts to recognize certain privacy violations as causing an actionable injury.\(^5\) I examine this threat by discussing the decision of the New York Supreme Court Appellate Division in *Smith v. Chase Manhattan Bank*.\(^6\) In *Smith*, the court upheld the dismissal, for a failure to allege actual harm, of a suit under New York’s consumer protection law in which the plaintiffs argued that a bank’s deceptive practices violated their interest in information privacy.\(^7\) Because many state consumer protection statutes require a plaintiff to allege actual harm in order to proceed to trial, the New York court’s decision in *Smith* establishes a precedent that may reach beyond the state’s borders to affect the judicial construction of consumer protection laws in other jurisdictions and, indeed, the construction of other statutes that concern information privacy.

Part I reviews the factual and legal issues raised in *Smith*. Part II sketches the baseline understandings of information privacy that animate my analysis of the *Smith* decision and its implications. In Part III, I critique *Smith* from both doctrinal and normative perspectives to draw out how the court’s opinion threatens information privacy by undermining potential claims for its violation. Part IV discusses the implications of *Smith* in like cases arising under other states’ consumer protection laws, as well as its potential effect on assessments of information privacy violations outside of the consumer protection context. In conclusion, I suggest that privacy advocates in future cases must be careful to provide for courts both a doctrinal basis for allowing

\(^4\) See Jeff Sovern, *Opting In, Opting Out, or No Options at All: The Fight for Control of Personal Information*, 74 WASH. L. REV. 1033, 1072-73 & n.202 (1999) (discussing individuals’ participation in consumer transactions without knowledge that merchants are acquiring their personal information or transactional data); see also Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1398-1400 (2000) (noting that consumer data can be used for many purposes with which consumers probably would not agree, including employment and health insurance decisions). See generally ERIK LARSON, *THE NAKED CONSUMER: HOW OUR PRIVATE LIVES BECOME PUBLIC COMMODITIES* (1992) (discussing consumer marketing driven by the need for personal information).

\(^5\) I am concerned here with private sector conduct that serves to undermine information privacy, specifically the use of personal identifying information by commercial entities in ways that may violate consumer protection laws or other laws providing some protection for information privacy. While that same information may be acquired by governmental actors in ways that amount to privacy violations under constitutional or statutory norms, such conduct is beyond the scope of this inquiry.


\(^7\) See id. at 102.
lawsuits alleging privacy invasion through deceptive practices to proceed under consumer protection laws, and a supportable normative rationale for recognizing as actionable the harm such invasions cause.

I. **SMITH v. CHASE MANHATTAN BANK**

The plaintiffs in *Smith v. Chase Manhattan Bank* held credit cards and mortgages issued by Chase Manhattan Bank USA, N.A. ("Chase"). They claimed that Chase violated a pledge to protect "privacy and confidentiality and not to share customer information with any unrelated third party," except in conjunction with its business, or to the extent necessary to inform customers about "special offers of products and services." Chase advertised this commitment in a document titled "Customer Information Principles," which it distributed to the plaintiffs.9

In their complaint, the plaintiffs alleged that, unbeknownst to them, Chase, "without their consent and without giving the plaintiffs an opportunity to opt-out . . . sold information to non-affiliated third-party vendors, including the plaintiffs’ names, addresses, telephone numbers, account or loan numbers, credit card usage, and other financial data."10 "The third-party vendors used this information [to create] lists of Chase customers, including the plaintiffs,” that Chase “provided to telemarketing and direct mail representatives to conduct solicitations.”11 The third-party vendors agreed to pay Chase a commission if an individual purchased a product or service offered.12

The plaintiffs brought suit against Chase and its parent, Chase Manhattan Corporation. Among other statutory claims,13 the plaintiffs alleged that Chase violated New York’s General Business Law,14 by

8. *Id.* at 101.
9. *See id.*
10. *Id.*
11. *Id.*
12. *See id.*
13. The plaintiffs alleged violations of New York’s Civil Rights Laws prohibiting the commercial misappropriation of a living person’s name, portrait, or picture. See N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1988). The *Smith* court upheld the dismissal of these claims on the ground that the Civil Rights Laws, “which must be narrowly construed, were never intended to address the wrongs complained of.” *Smith*, 741 N.Y.S.2d at 103. There is ample support for this conclusion in the caselaw. See, e.g., D’Andrea v. Rafia-Demetrious, 972 F. Supp. 154, 156 (E.D.N.Y. 1997) (noting that sections 50 and 51 of the Civil Rights Law reach only the commercial use of a person’s name or likeness “and no more”); Messenger v. Gruner + Jahr Printing & Publ’g, 727 N.E.2d 549, 552 (N.Y. 2000) (same).
engaging in deceptive business practices. In addition, the plaintiffs pursued breach of contract and unjust enrichment causes of action. The defendants moved to dismiss all counts of the complaint and the trial court allowed the motion in its entirety.

On appeal, the Appellate Division first rehearsed the elements of a claim under section 349 of the General Business Laws: the “plaintiff must prove that the challenged act or practice was consumer-oriented, that it was misleading in a material way, and that the plaintiff suffered injury as a result of the deceptive act.” To recover under the statute, the court continued, “a plaintiff must prove actual injury, though not necessarily pecuniary harm.” Assuming the allegations in the complaint to be true, and affording the plaintiffs “the benefit of every favorable inference,” the court concluded that the plaintiffs had alleged “actionable deception.” In other words, the court agreed that, if true, Chase’s decision to sell consumers’ personal information to third parties, contrary to the terms of its pledge to protect that information, constituted an act likely to mislead a consumer acting reasonably under the circumstances.

The court declined, however, to hold that the plaintiffs had alleged an “actual injury” as required under the caselaw construing section 349. The court stated:

The complaint allege[s] that Chase’s “deceptive acts and practices deceived the plaintiffs and other members of the class, and have directly, foreseeably and proximately caused actual damages and injury to the plaintiffs and other members of the class in amounts yet to be determined.” These allegations fail[] to allege any actual harm.

The court observed that, even assuming the “class members were merely offered products and services which they were free to decline[,]” they suffered no actual harm. Indeed, because the plaintiffs failed to allege “a single instance where a named plaintiff or any class member

15. The statute declares unlawful “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service.” Id.
17. See id. at 101-02.
18. Id. at 102.
19. Id.
20. Id.
21. See id.
22. Id.
23. Id. The court assumed, as the lower court had, that the Smith plaintiffs had received “junk mail and junk telephone calls.” Smith v. Chase Manhattan Bank, No. 3070/2000, slip op. at 12 (N.Y. Sup. Ct. July 27, 2000).
suffered any actual harm due to the receipt of an unwanted telephone solicitation or a piece of junk mail[,]” the trial court “properly dismissed the plaintiffs’ General Business Law causes of action.”

The court also upheld the dismissal of the plaintiffs’ breach of contract claim. The court concluded that a vague and conclusory allegation of damage could not support a contract action. Even assuming that the plaintiffs had alleged injury from “invasive and unsolicited telephone calls,” moreover, under New York law, damages could not be recovered for any emotional distress the plaintiffs had suffered. Nor could the plaintiffs rely upon profits received by Chase “to satisfy the damage element of their cause of action, since the plaintiffs never had any expectation of monetary compensation.” Accordingly, the trial court properly and correctly dismissed the plaintiffs’ contract claim.

II. THE IMPORTANCE—AND FRAGILITY—OF INFORMATION PRIVACY

Before exploring Smith’s implications for the vindication of privacy interests under consumer protection laws and statutes containing privacy protections, I sketch some baseline assumptions about information privacy from which this discussion proceeds. For purposes of this Article, I accept certain fundamental suppositions. As an initial matter, I accept that information privacy promotes distinct societal values by providing a context that allows, or creating the conditions in which, individuals may pursue their personal development and interact or engage with one another in the pursuit of myriad ends. With respect to personal development, “privacy,” as Joseph Kupfer has observed, “is essential to the . . . maintenance of an autonomous self.” The “autonomous self” refers to “a concept of oneself as a purposeful, self-determining, responsible agent.” The autonomous self is an individual who conceives of himself or herself as a person in control of his or her life by virtue of the liberty, among other things, to “rehearse . . . thinking

25. See id. at 103. In addition, the court affirmed the dismissal of the plaintiffs’ unjust enrichment claim. The court reasoned that those plaintiffs who had purchased goods or services from the third parties to whom Chase had sold their personal information had no claim for unjust enrichment because they had received the benefit of those goods or services. See id. at 102-03.
26. See id. at 103.
27. Id.
28. Id.
30. Id.
and behavior, to try out options without running ‘real life’ risks”—in other words, absent interference and free from observation.\footnote{Id. at 83; see also Jeffrey Rosen, The Purposes of Privacy: A Response, 89 GEO. L.J. 2117, 2124 (2001) (concluding that “uncertainty about pervasive surveillance makes the development of the subjective self impossible”).}

Information privacy also catalyzes interaction and engagement between and among individuals in a variety of ways. Charles Fried has explained that privacy “is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust[,]” because these relations “require a context of privacy or the possibility of privacy for their existence.”\footnote{Charles Fried, Privacy, 77 YALE L.J. 475, 477 (1968); see also James Rachels, Why Privacy Is Important, 4 PHILOS. AND PUB. AFF. 323, 326 (1975) (arguing that privacy is important because it enables individuals to form relationships with others).} Individuals require privacy in commercial relationships as well. Such relationships—as between contracting or negotiating parties, for example—are not likely to form absent some assurance that the parties involved will be able to exercise control over access to, and the dissemination of, information about themselves and the nature of their relationship.\footnote{See Carlos Perez-Albuerne & Lawrence Friedman, Privacy Protection for Electronic Communications and the “Interception-Unauthorized Access” Dilemma, 19 J. MARSHALL J. COMPUTER & INFO. L. 435, 449-50 (2001) (discussing the relationships that privacy enables).} Thus information privacy is an indispensable predicate to a range of personal and commercial pursuits, from the quotidian to the exceptional.\footnote{See id. at 450.}

A breach of information privacy—as represented by, say, the acquisition of otherwise private information by a second or third party—signifies a loss of control over information. Such a loss of control could compromise the context that enables an individual to maintain a sense of autonomy, or the conditions that allow parties to develop a particular personal or commercial relationship. In the former instance, privacy’s failure undermines, if only to a degree, an individual’s ability to contemplate ways of being without fear of interference. In the latter instance, privacy’s failure threatens to undermine the relationship itself—and, in addition, the development of like associations in the future:

[i]f we thought that our every word and deed were public, fear of disapproval or more tangible retaliation might keep us from doing or saying things which we would do or say if we could be sure of keeping them to ourselves or within a circle of those who we know approve or tolerate our tastes.\footnote{Fried, supra note 32, at 483-84 (footnote omitted).}
This potentiality recommends privacy as a value worth protecting. That protection may be accomplished in a variety of ways, such as making available to individuals who have suffered privacy invasions some legal means of redress.36

I also accept that the legal bounds of privacy are, at bottom, socially-constructed, in the very specific sense that the control over personal information that the law allows is often, if not always, influenced by societal expectations. As Shaun Spencer has explained, information privacy in a given instance is typically defined through public regulation.37 Public regulation tends to track societal expectations, which in turn vary with the circumstances in which the issue of privacy is raised.38 Because both the judicial conception of privacy—as reflected in the invasion of privacy torts and interpretations of the Fourth Amendment to the United States Constitution—and the legislative conception of privacy—as embodied in specific statutory protections for privacy in certain situations—are subject to diminishment when they conflict with other societal interests, “[a]ctors and groups powerful enough to influence social behavior can change society’s expectation of privacy, and thereby change what the law will protect as private.”39

Spencer rightly concludes that “[t]he expectation-driven conception of privacy creates a perverse incentive for businesses to diminish, proactively, individuals’ expectations of privacy.”40 Businesses can exploit consumers’ lack of knowledge about information collection practices, and the uses to which personal information can be put, through stated policies and contractual arrangements that promise individuals the privacy protection that a business believes appropriate—or commercially expedient.41 This knowledge imbalance leads to a market failure, for it simply is not possible for individuals who may be affected by the imbalance in particular instances effectively to organize and,

36. See, e.g., Perez-Albuerne & Friedman, supra note 33, at 455 (discussing the importance of a legal basis to challenge unauthorized disclosure of personal information); see also Charles Nesson, Threats to Privacy, 68 SOC. RES. 105, 111-12 (2001) (arguing that privacy must be legally protected); Fried, supra note 32, at 493 (arguing that, absent legal title, a person cannot possess “the full measure of both the sense and the fact of control” over personal information).


38. See id. at 858-59; see also Frederick Schauer, Free Speech and the Social Construction of Privacy, 68 SOC. RES. 221, 228 (2001) (noting that privacy, as a “social construction,” will be “as variable as the forces that create it”).

39. Spencer, supra note 37, at 860.

40. Id. at 870 (footnote omitted).

41. See id. at 892-94.
therefore, counter the information asymmetries created by "unevenly distributed bargaining costs, and disparities in bargaining power." 42

It nonetheless remains that businesses might elect to commit, in some way, to protecting information privacy, perhaps as a policy or as a pledge if not through a formal contractual agreement. Such a commitment could serve as an incentive for consumers to patronize those businesses that appear to respect privacy as opposed to competitors that promise fewer or no privacy protections—or that choose not to take a position on the information privacy of their customers. Given popular concern about abuses of personal consumer information, a business reasonably could deem such a position to be potentially advantageous in a competitive market. Indeed, companies like Earthlink, an Internet Service Provider, have advertised their commitment to protecting the information privacy of their customers. 44

Regardless of the existence of a contractual agreement, at the point where a pledge to protect information privacy is tested through a consumer protection claim alleging deceptive practices, or some other statutory action, privacy is at risk. In such a case, the court is responsible, in the first instance, for determining whether a defendant should be held to honor a commitment to protect information privacy, simply by ruling on the question of whether a cause of action predicated on a privacy violation—as in Smith—may proceed to trial. Notwithstanding the importance of information privacy to so many other aspects of our lives, as reflected in our laws and our beliefs, as well as the studies of numerous commentators, governmental actors have often proved themselves unwilling to protect privacy when faced with countervailing interests, thus threatening to further diminish its scope. 45

As we shall see, Smith demonstrates that one of the challenges for privacy advocates is to persuade judges, no less than legislators, that information privacy is a value of continuing significance, and that the least that can be done to respect its worth is to allow plaintiffs the opportunity to pursue privacy violations that fall within the reach of such statutes as consumer protection laws.

42. Id. at 891 (footnote omitted).
43. Consider, for example, the controversy surrounding the plans of Internet marketer, Doubleclick, to merge previously anonymous online information with personally identifiable data. See id. at 866-67.
44. See Privacy Policy, at http://www.earthlink.net/about/policies/privacy/ (describing Earthlink privacy policy). See also Steven A. Hetcher, Norm Proselytizers Create a Privacy Entitlement in Cyberspace, 16 BERKLEY TECH. L.J. 877, 884 (2001) (discussing privacy guarantees found on financial services firm websites).
45. See Spencer, supra note 2, at 554.
III. THE SMITH COURT’S FAILURES

With this understanding of information privacy in mind, the Smith decision may be critiqued with respect to its doctrinal shortcomings, which reflect a failure to apply established assumptions about allegations of injury to a case arising from a commitment to respect privacy. A discussion of these doctrinal shortcomings leads in turn to an exploration of the Smith court’s failure to acknowledge the normative arguments for recognizing the plaintiffs’ claim under New York’s consumer protection law—a failure of which privacy advocates must take notice if information privacy is to receive the recognition it warrants.\(^4\)

A. Defining Actual Harm

In Smith, the court apparently concluded that the plaintiffs could not claim actual harm because they did not allege that they had suffered any loss of property or money, or had been compelled to do anything—such as spend money on products or services—in response to the uninvited commercial solicitations they received after Chase sold their personal information to third parties.\(^5\) In light of the caselaw discussing the requisites for a claim under the General Business Law, this conclusion is far from inescapable. The New York state courts have construed the law as encompassing “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service” in the State of New York.\(^4\) To state a claim for relief, a plaintiff must allege that the defendant engaged “in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof.”\(^4\)

In defining injury as actual harm under the statute, the courts have rejected a “deception as injury” theory. In Small v. Lorillard Tobacco Co., for example, the plaintiffs argued that the defendants’ deception regarding the addictive properties of cigarettes prevented the plaintiffs from making “free and informed choices as consumers[,]” and that consumers “who buy a product that they would not have purchased,

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absent a manufacturer's deceptive commercial practices, have suffered an injury under [the] General Business Law."

Dismissing this theory, the New York Court of Appeals explained that it failed to present any "manifestation" of harm; had the plaintiffs sought recovery for "the cost of cigarettes" or "injury to their health," they would have satisfied the actual harm requirement. Either factual allegation would have represented an objectively identifiable manifestation of harm caused by the defendants' conduct.

As Small illustrates, a plaintiff must be able to demonstrate the appearance of an injury from deceptive conduct, and not necessarily that the injury was of a particular kind. Pursuant to this reasoning, the plaintiffs in Smith stated a sufficient claim under the consumer protection law. Though the claim was inartfully pled, the court recognized that the plaintiffs could be understood to have alleged that they had received telephone and mail solicitations offering "products and services which they were free to decline." On these allegations, the deceptive conduct—the disclosure and sale of personal information to third parties notwithstanding a promise not to disclose or sell that information—was not synonymous with the plaintiffs' injury. Rather, that deceptive conduct causally led to a discrete injury: an invasion of the plaintiffs' privacy by third parties, who upon acquiring the plaintiffs' personal information used it to target them with commercial solicitations in the form of unwanted telephone calls and junk mail. On the facts of Smith, the receipt of the unwanted solicitations was the manifestation of the harm to the plaintiffs' privacy that they suffered as a result of the disclosure of their personal information.

It is necessary, but not sufficient, that the deceptive conduct be distinct from its injurious effect on the plaintiffs' privacy: the harm also must bear some relation to the consumer transaction at issue. Here again,

50. Small, 720 N.E.2d at 898.
51. See id. at 898.
52. Id.
54. This is not to say that mere disclosure of personal information does not signify a loss of control sufficient to compromise information privacy; the plaintiffs in Smith arguably suffered harm merely by Chase's disclosure of their personal information, even before they received unwanted calls and mail. But that privacy injury would not be cognizable under the General Business Law if the disclosure remained unknown to the individual whose privacy was compromised, as the injury did not (on the facts of Smith) manifest itself in any objectively identifiable way. For purposes of the consumer protection law, the receipt of unwanted solicitations need not represent the extent of the ways in which a dishonored commitment to protect privacy injury could manifest itself. Any public recognition evidencing the acquisition of personal information by a third party likely would suffice.
Small is instructive. In that case, the court reiterated that an alleged harm need not be pecuniary in nature.\(^{55}\) The court had no doubt that an injury to the plaintiffs' health, for example, would have been cognizable under the consumer protection law, and it suggested that an injury that manifested itself in the form of the dollar cost of cigarettes would have qualified as actual harm.\(^{56}\) Both of these harms were connected to an interest underlying the consumer transaction at issue in Small—representations about the quality of the product, cigarettes. Similarly, in Smith, the manifestation of harm—the receipt of the unwanted commercial solicitations—was connected to an interest at stake in the original transaction: representations by Chase about the quality of the information privacy the plaintiffs could expect to enjoy.

Thus, there existed, under settled caselaw in New York, a doctrinal basis for the Smith plaintiffs' claim of actual harm. The Smith court apparently misconstrued precedent in concluding that the plaintiffs could satisfy the harm requirement only if they asserted that they had lost property or money, or been compelled to respond in some way to the commercial solicitations they received from the third parties that had purchased their personal information. But identification of the court's erroneous reasoning is not the end of the inquiry. Courts play a gatekeeping role with respect to the claims that will be recognized under the General Business Law,\(^{57}\) and so it remains to address the larger issue whether, even assuming the correct application of precedent to the facts in Smith, the court should have recognized the plaintiffs' claim under the statute.

B. Normative Arguments for Recognizing Information Privacy Violations as Actionable Under Consumer Protection Laws

There was no dispute in Smith that, assuming the facts were true, Chase's conduct constituted a deceptive practice under New York's consumer protection law. The only question was whether the plaintiffs had alleged, or could allege, actual harm. As discussed above, under consumer protection caselaw in New York, the plaintiffs in Smith had sufficiently alleged an injury.\(^{58}\) In this section, I argue that, in view of the importance and fragility of information privacy, the court should have ruled that the plaintiffs' allegations stated a cause of action under the

\(^{55}\) See Small, 720 N.E.2d at 897.

\(^{56}\) See id. at 898.


\(^{58}\) See supra notes 53-57 and accompanying text.
General Business Law. This conclusion finds support in arguments based upon deterrence, expressive theory and fairness, none of which would offend the principle of legislative supremacy in lawmaking.

1. The Deterrence Rationale

A deterrence rationale supports the adequacy of the Smith plaintiffs' claim under New York's General Business Law. Consumer protection statutes like New York's regulate the commitments made by commercial actors to consumers, to ensure that such actors deal with consumers fairly and without resort to sharp practices. To this end, consumer protection laws function as a commitment-enforcement regime in the context of consumer transactions. Such laws provide a legal means through which individuals injured in some way by a commercial actor's deceptive conduct can seek redress, and the possibility of redress through damages or injunctive relief in the event deception is found serves to deter commercial actors from dishonoring their commitments in the first place.

Consider a hypothetical case involving a consumer's purchase of, say, a kitchen mixer. The seller advertises the mixer as capable of dicing tomatoes. If the seller's claim is deceptive—if the mixer by its design cannot really dice tomatoes—then the seller has dishonored its commitment to the consumer, who may pursue a consumer protection action against the seller under New York law. The availability of an action for damages, as well as possibility of recovering enhanced damages if the deception was willful, in addition to attorney's fees and costs, serves not only to provide full compensation for the consumer, but to present the possibility of a judgment against the seller of greater weight than that resulting from liability under an ordinary contract suit.


60. The legislative history of New York's General Business Law, for example, "makes plain that [it] was intended to 'afford a practical means of halting consumer frauds at their incipiency.'" Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 647 N.E.2d 741, 744 (N.Y. 1995). The statute's broad language "was intended to provide a 'strong deterrent against deceptive business practices.'" Genesco Entm't v. Koch, 593 F. Supp. 743, 751 (S.D.N.Y. 1984) (footnote omitted).

61. There can be little doubt that a consumer would have a claim in this instance. Among the trade practices traditionally considered to be deceptive are false advertising and misrepresentation of the origin, nature, or quality of a particular product. See Teller, 630 N.Y.S.2d at 773. "Generally, claims under the statute are available to an individual consumer who falls victim to misrepresentations made by a seller of consumer goods through false or misleading advertising." Small v. Lorillard Tobacco Co., Inc., 720 N.E.2d 892, 897 (N.Y. 1999).
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with damages likely limited to the cost of the mixer itself. The deterrent effect of the consumer protection action is further enhanced by the possibility of future actions against similarly deceptive sellers.

Not all deceptive acts and practices are necessarily worthy of the deterrent effect the General Business Law ostensibly provides. The courts have reasonably limited the law's reach to those deceptive acts and practices that affect the public interest, which does not include acts or practices occurring in the context of "[p]rivate transactions not of a recurring nature or without ramifications for the public at large." Regarding the deceit associated with a transaction, when the only parties "truly affected" by an alleged misrepresentation are the plaintiff and the defendant, the plaintiff cannot state a claim under New York's General Business Law.

It may be said, then, that a deceptive act or practice merits deterrence if its consequences will be widely felt among consumers and potential consumers. This is true no matter the subject of a commercial actor's commitment to a consumer. A seller's misrepresentation in the kitchen mixer transaction would qualify as an act worthy of deterrence because its effect may extend beyond the parties in a single case; there are many consumers who might be persuaded to purchase the mixer based upon those misrepresentations. This same reasoning applies to the subject of the commitment in Smith—personal information about the plaintiffs. Chase's failure to maintain its commitment to protect its customers' privacy affected not simply those individuals who joined the plaintiffs' class, but any other Chase customer who was also deceived by Chase—and, of course, any individual who might suffer in the wake of a similarly disregarded commitment to privacy.

In addition to the breadth of the potential harm resulting from Chase's actions in Smith, the quality of the harm suggests that the failure to honor commitments to protect privacy is particularly worthy of deterrence. While the public harm caused by a kitchen mixer that does not operate as promised is not insignificant, it is not as potentially damaging as the harm resulting from the privacy violation for which the Smith plaintiffs sought redress. Given the value of information privacy

63. Genesco Entm't, 593 F. Supp. at 752.
64. See id. (concluding that the rental of a baseball stadium "is not an ordinary or recurring consumer transaction").
66. One might argue that the values represented by information privacy and a kitchen mixer, respectively, are incommensurable. See Spencer, supra note 2, at 554. See generally Cass R.
to the development of the self and to the development of personal and commercial relationships, the social costs of further erosion of privacy expectations likely are, in the aggregate, greater than the social costs associated with kitchen mixers that do not dice tomatoes. It follows that, in the interest of deterring commercial actors from reneging on privacy commitments and thereby undermining privacy, a court should allow a consumer protection claim based upon a dishonored privacy commitment to proceed beyond the motion to dismiss stage, just as it would allow the kitchen mixer claim to proceed.

The Smith court’s failure to sanction the plaintiffs’ claim compounds the negative consequences for information privacy created by Chase’s actions. First, the decision itself exacerbates the erosion of information privacy by contributing to the construction of expectations about privacy’s scope. The court acknowledged that Chase’s actions constituted deceptive conduct, yet denied that such conduct warranted redress under the General Business Law; the decision implies that information privacy is not an interest worthy of protection and that dishonored privacy commitments in any event cause no injury of which the law should take notice, thereby undermining efforts to deter actors from dishonoring commitments to respect privacy. The case may well influence the expectations individuals have about the value of information privacy in similar circumstances, and also encourage commercial actors in Chase’s position either to advertise information privacy as limited in precisely the ways the Smith decision suggests, or in the future repudiate similar privacy assurances with impunity.

Second, so far as its impact on future cases is concerned, the Smith court’s failure to recognize the plaintiffs’ claims as actionable under the consumer protection statute undermines any deterrent effect that might be gained from the undisputed conclusion that Chase dishonored its commitment to respect privacy. Which is to say, the fact that the court concluded that the bank’s failure to honor its commitment was deceptive

Sunstein, Incommensurability and Valuation in Law, 92 Mich. L. Rev. 779 (1994). If that were so, then it likely would be because the value of information privacy is incalculable in dollar terms. See James H. Moor, Toward a Theory of Privacy in the Information Age, in Cyberethics: Social & Moral Issues in the Computer Age 200, 205-06 (Robert M. Baird, et al. eds., 2000) (arguing that privacy is a good of both intrinsic and instrumental value). And if that were so, wouldn’t we all agree that the value of information privacy, like the value of, say, breathable air, would be greater than that of the kitchen mixer? See generally Elizabeth Anderson, Value in Ethics and Economics (1995) (discussing the current means for allowing the market to determine value and the need for a consideration of social value).

67. See Deborah G. Johnson, Computer Ethics 127 (3d ed. 2001) (arguing that information privacy is “a social good in its own right and more important than other social goods such as efficiency and better consumer services”).

http://scholarlycommons.law.hofstra.edu/hlr/vol31/iss3/2
under the consumer protection law is well and good but essentially meaningless, because the court declined also to acknowledge that the injury caused by the deception was within the reach of the statute. As a general matter, the respect accorded information privacy will reflect the availability of a remedy for its denigration; absent such a remedy, the value of information privacy can only be diminished.

The deterrence rationale for allowing the *Smith* case to proceed is, in the end, straightforward: when privacy is promised and then compromised in consumer transactions, consumer protection laws, like New York's, provide a viable means through which the deception can be addressed and in the future deterred. Such a ruling does not require that privacy be considered a "right" under ordinary consumer protection laws. A court need only accept the propositions that information privacy is an important societal value, and that consumer protection laws should be available to remedy privacy violations in the context of consumer transactions in the same way that those laws are available to remedy deceptions concerning a wide variety of consumer interests, from kitchen mixers that dice tomatoes to fair debt collection practices and fair insurance practices.

2. The Expressive Rationale

Expressive theory also supports the argument that the *Smith* plaintiffs stated a sufficient claim under New York's General Business Law. The expressive rationale is premised on the view that the meaning of action is as important as what the action accomplishes. Actions, in other words, can violate governing public norms not only by creating concrete costs (with which a deterrence rationale is primarily concerned) but by conveying a meaning that "expresses inappropriate respect" for the relevant governing norms. Expressive theories of action "hold people accountable for the public meanings of their actions[,]" by serving as a means by which we may evaluate how well those actions

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68. *Cf.* Joseph William Singer, *Approaches to Teaching Property: Starting Property*, 46 ST. LOUIS U. L.J. 565, 575 (2002) (observing that "rights are defined by the scope of the remedies the law will grant to right-holders").

69. *See supra* Part II.


"express attitudes that we ought to have" with respect to particular substantive values.\(^7\)

An expressive harm occurs when a particular action undermines collective understandings as reflected in governing public norms.\(^7\) A person suffers expressive harm, for instance, when an actor treats her according to principles that "express negative or inappropriate attitudes toward her."\(^7\) The expressive harm results from the meaning an action expresses—that is, from the action itself. The nonexpressive harm, in contrast, is simply a but-for consequence of the action.\(^7\) In determining whether an action’s meaning actually undermines relevant public norms, the action must be assessed within an interpretive context; as the leading expressive theorists Elizabeth Anderson and Richard Pildes have explained, this is because "meanings are a result of the ways in which actions fit with (or fail to fit with) other meaningful norms and practices in [a] community."\(^7\)

To illustrate the concept of expressive harm, consider an example in the context of election law—specifically, the U.S. Supreme Court’s \textit{per curiam} opinion in \textit{Bush v. Gore}.\(^7\) Heather Gerken has proposed that we might look to the expressive rationale in an effort to understand the Court’s determination that the ballot recount violated the Fourteenth Amendment’s guarantee of equal protection of the laws. "It may be," she suggests, "that the arbitrary and capricious treatment of ballots the Justices perceived in Florida convey[ed] an improper message about the value of one’s vote."\(^7\) In light of the democratic norm that "voters have confidence in the sanctity of the ballots they cast, which in turn requires that state officials accord adequate respect to those ballots by treating similarly situated ballots alike[,]" it follows that the differential treatment of the presidential ballots at issue resulted in an expressive harm, because that action expressed the attitude that similarly situated ballots need not be treated alike.\(^7\)

\(^72\) Anderson & Pildes, supra note 71, at 1513. By "attitudes," expressive theorists refer to the "complex set of dispositions to perceive, have emotions, deliberate, and act in ways oriented toward [a] person." Id. at 1509.

\(^73\) See Pildes, supra note 71, at 755.

\(^74\) Anderson & Pildes, supra note 71, at 1527.

\(^75\) See id. at 1530.

\(^76\) Id. at 1525.

\(^77\) 531 U.S. 98 (2000).


\(^79\) Id. Importantly, Gerken is not saying that the ballots in question in \textit{Bush v. Gore} were similarly situated in fact, just that the Court may have perceived them as being so. See id. at n.16.
Consumer protection laws like New York's embody governing public norms regarding the attitudes commercial actors should express toward individuals with respect to consumer transactions. By prohibiting "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service[,]" the General Business Law reflects the principle that commitments made in consumer transactions should be honored. The law accordingly proscribes actions that indicate that a commitment made in the context of a consumer transaction—be it related to a kitchen mixer or to information privacy—need not be respected.

As noted above, expressive harm follows from conduct that expresses an incorrect attitude in the context of governing public norms; it does not lie in the consequences of the action at issue. Accordingly, in *Smith*, the failure of Chase to honor its commitment to privacy by selling personal information to third parties amounted to an expressive harm regardless of the consequences of the sale of that information. The expressive harm derives from the attitude Chase expressed by its actions vis-à-vis the plaintiffs' personal information—from Chase's failure to honor its promise to the plaintiffs to not convey that information to third parties.

By failing to allow the *Smith* plaintiffs an opportunity to proceed to trial on their consumer protection claim, the court caused an additional expressive harm. A judicial proceeding represents an avenue through which expressive interests may be vindicated via public condemnation of those persons who express attitudes that disrespect particular values. Judicial recognition of expressive interests and condemnation of expressive harm serve:

to ensure that political and social relationships remain constituted according to the principles previously thought to govern them. This is why, it seems, even token compensation makes wealthy landowners more accepting of redistribution. Compensation, even if not commensurate with loss, expresses recognition that the State is inflicting serious harm on individuals in the service of justifiable ends.

The availability of "'expressive legal remedies'" is important "because they express recognition of injury and reaffirmation of the

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81. *See supra* notes 73-76 and accompanying text.
82. *Anderson & Pildes, supra* note 71, at 1529 (footnote omitted).
underlying normative principles for how the relevant relationships are to be constituted.”83

Assuming that information privacy is an important societal value—and a scholarly consensus appears to indicate that it is—and that a dishonored commitment to respect privacy is otherwise actionable under the consumer protection law—as shown above—allowing the Smith suit to proceed would create an opportunity for the plaintiffs to vindicate the expressive harm created by Chase’s conduct. That vindication would be accomplished, if the plaintiffs prevailed, through the public condemnation of Chase via a finding by a judge or jury that Chase was liable to the plaintiffs for breaching its privacy commitment.86 Compared to the way in which expressive harms related to other societal interests—such as the constitutional guarantee of equal protection of the laws, for example—are vindicated through judicial pronouncements and dispositions,87 allowing the plaintiff’s claim simply to survive would represent an uncomplicated acknowledgement of the value of information privacy, and of commitments not to forsake it.

3. The Fairness Rationale

In addition, basic fairness concerns support the viability of the Smith plaintiffs’ claim under New York’s General Business Law. I refer here to the relatively simple conception of fairness implicated by the possibility of a windfall—by “[a]n unanticipated benefit, usually in the form of a profit and not caused by the recipient.”88 The windfall problem is addressed in contractual contexts by the law governing unjust enrichment, which holds that restitution is required if a party is “allowed to retain without paying for it some benefit that had been conferred.”89 The problem may also arise at the doctrinal level. Consider, for example, Todd Rakoff’s proposal that contracts of adhesion be presumed

83. Id.
84. See, e.g., Richard C. Turkington & Anita L. Allen, Privacy Law: Cases and Materials 27 (2d ed. 2002) (noting the “pervasive viewpoint is that many forms of privacy merit protection”).
85. See supra notes 47-57 and accompanying text (discussing the definition of actual harm under New York’s General Business Law).
87. See Anderson & Pildes, supra note 71, at 1533-45 (discussing the expressive dimension of equal protection jurisprudence).
89. E. Allan Farnsworth, Contracts 103 (2d ed. 1990).
unenforceable. An objection to that presumption is that it might result in a windfall to the adherent. The objection supposes, in other words, that the potential creation of a windfall, by operation of a legal presumption, presents a problem of fairness when applied in particular cases.

If the bestowal of a windfall achieved through a legal presumption raises a fairness concern, so too should a windfall achieved through a court’s gatekeeping decision, on a motion to dismiss, to decline to recognize an otherwise valid consumer protection claim based upon the defendant’s failure to honor a privacy commitment. Assuming the facts alleged to be true, a court should hesitate to deny a plaintiff who satisfies the technical legal requisites for a consumer protection claim an opportunity to proceed to trial when to do so would in effect bestow a windfall on the defendant. In viewing a consumer protection claim premised on a dishonored privacy commitment in this way, the court may avoid becoming the instrument of unfairness, in the case at hand and in future cases relying on the instant case as precedent.

This is the essence of the fairness concern raised by the court’s decision in Smith. As discussed above, the plaintiffs alleged both that Chase’s conduct qualified as deceptive and that they suffered actual harm as a result. To deny the plaintiffs an opportunity to prove Chase’s deceptive conduct and the harm caused thereby at trial indisputably results in a benefit to Chase—the freedom to ignore its own commitment to respect the plaintiff’s personal information and, indeed, to profit on information—which, assuming the facts and the reasonable inferences to be drawn therefrom in the plaintiffs’ favor, Chase did not earn. It is one thing to grant Chase this freedom after a trial in which the plaintiffs failed to prove their case, yet another when the benefit is received purely through the grace of a judicial decision whose effect might extend to other entities and institutions similarly situated, to future deals for personal information that contradict commitments to respect privacy.

91. See id. at 1243-44 (acknowledging and refuting the potential fairness problem created by a presumption that would result on a windfall to one party to a contract).
93. See supra Part III.A (discussing understanding of actual harm under New York’s General Business Law as applied to Smith facts).
4. The Majoritarian Concern

In a case like Smith, the majoritarian concern suggests that, even assuming the injury the plaintiffs suffered qualifies as actual harm, the court should decline to recognize the claim because privacy interests are more appropriately protected through legislative rather than judicial action. The underlying assumption is that questions about the regulation of privacy interests—like questions about the regulation of other societal values—ought to be resolved through the political process.\textsuperscript{94} The majoritarian concern rests on the notion of legislative supremacy in lawmaking, itself a reflection of the “preoccupation in American law with constraining judicial discretion because of the fear that judicial lawmaking will compromise democracy and undermine the rule of law.”\textsuperscript{95} This conception of the judicial task embodies a sharp distinction between judicial work and legislative work,\textsuperscript{96} and the respective insights each branch may bring to bear on an issue of public import.\textsuperscript{97}

To the majoritarian concern at least three responses can be made. First, recognition of a consumer protection claim in cases like Smith would not undermine legislative supremacy, as it would represent a rather minor step in the evolutionary process of statutory construction that obtains with respect to innumerable legislative enactments. As a general matter, a court faced for the first time with a statute will, in construing the law, articulate an analytical framework that will govern the statute’s application and provide notice as to how the statute will operate in practice.\textsuperscript{98} And, as new factual scenarios arise, a court may


\textsuperscript{96} See id. at 595.


\textsuperscript{98} This is a descriptive claim. As Guido Calabresi has observed, statutory construction is “an almost unavoidable judicial task. Words do not interpret themselves.” GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31 (1982); see also Richard A. Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, 37 CASE W. RES. L. REV. 179, 187 (1986) (noting that, “[n]o matter how clear [a] text seems, it must be interpreted (or decoded) like any other communication”). The way in which courts should approach the initial attempt to construe a statute and, in the process, articulate an analytical framework that will guide application of the statute, is a source of much debate. See id. at 192-99 (discussing approaches to statutory construction). For purposes of this discussion, we need only assume that a
tinker with the established analytical framework so as to remain faithful to the statute from which it derives—thus, in *Small v. Lorillard Tobacco Co.*, the New York Court of Appeals took the opportunity to clarify the understanding of actual harm that should control under the General Business Law. Absent legislative correction of a court’s analytical framework, that framework is entitled to deference.

On this view, a decision by the *Smith* court, in its role as cause of action gatekeeper, to allow the plaintiffs’ claim to proceed would not threaten legislative supremacy. The plaintiffs’ claim, after all, satisfied the elemental requisites for a consumer protection action under existing caselaw, and several normative rationales would have justified recognizing that claim under New York’s General Business Law. Unlike *Small*, the case presented no novel theory requiring reconsideration of the basic analytical framework for evaluating consumer protection claims; indeed, allowing the plaintiffs to proceed would have represented little more than the application of the established analytical framework, as articulated in *Small*, to an essentially unremarkable factual scenario. This is what courts do all the time in a wide array of cases; the legislature would, as always, be free to respond if there were some reason to believe the court had gone astray.

Second, even if privacy is understood as a value whose particular attributes commend its regulation by legislatures rather than courts, that still is not reason enough for the court to decline to act in the absence of legislative action. To be sure, a legislative response to the problem posed by deceptive conduct like Chase’s in *Smith* might be preferable, and there is some precedent for legislative protection of information privacy. Congress, for example, has passed legislation expressly aimed at protecting the privacy of video tape rental records. It remains, though, that upholding the *Smith* plaintiffs’ claim would serve simply to preserve the legal status quo with respect to an important societal value until the legislature takes action, one way or another; as noted above, any other court has articulated an analytical framework, as the New York Court of Appeals has with respect to the General Business Law.


100. See CALABRESI, supra note 98, at 31-32 (discussing the judicial-legislative dynamic in statutory construction). In the area of consumer protection, there has consistently been a great deal of interplay between courts and legislatures over the reach of the law. See J.R. Franke & D.A. Ballam, New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?, 32 SANTA CLARA L. REV. 347, 424 (1992).

101. See 18 U.S.C. § 2710 (2000); see also Spencer, supra note 37, at 857-58 (discussing origins of Video Protection Privacy Act).
position vis-à-vis information privacy would have the effect of contributing to its erosion by influencing expectations about its scope.\footnote{102}

Third, as a historical matter, the protection of information privacy has never been viewed as beyond the domain of the judiciary. More than a century ago, courts developed the invasion of privacy torts, the origins of which may be traced to the seminal law review article by Warren and Brandeis,\footnote{103} in which the authors argued that the common law should recognize an invasion of privacy tort to “protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds.”\footnote{104} Courts in a majority of states adopted these torts into their common law, providing a means by which individuals could seek redress for incidents involving intrusion or eavesdropping on one’s “seclusion,”\footnote{105} or for disclosure of one’s private information.\footnote{106} Though in some states, like New York, the adoption of privacy torts resulted from legislative rather than judicial action,\footnote{107} still the efforts of courts to recognize the importance of information privacy through the common law evidences their competence to address such matters.

IV. THE IMPLICATIONS OF SMITH

Smith v. Chase Manhattan, though just one decision from a mid-level appeals court, may well have implications in cases involving information privacy both within and without the context of consumer transactions. Whether a court in a given case adheres to what Ronald Dworkin has called the “strict” form of \textit{stare decisis}, which obliges judges to follow the earlier decisions of certain courts, or the “relaxed” form, which “demands only that a judge give some weight to past decisions on the same issue,”\footnote{108} the key is a factual similarity to an earlier case. With respect to Smith, there are at least two similar factual scenarios that may arise: one in which a plaintiff claims a commercial actor violated a commitment to respect privacy; and one in which a

\footnotesize{102. See supra Part III.B.1.}
\footnotesize{104. Warren & Brandeis, supra note 103, at 206.}
\footnotesize{105. See \textbf{Restatement (Second) of Torts} § 652B (1977).}
\footnotesize{106. See \textit{id.} § 652D.}
\footnotesize{107. See Bratman, supra note 103, at 641.}
\footnotesize{108. \textbf{Ronald Dworkin}, \textbf{Law’s Empire} 25 (1986).}
plaintiff alleges an information privacy violation arising under a statute that seeks to establish some protection for information privacy. I address each scenario in turn.

A. Commitments to Respect Privacy Under Consumer Protection Laws

The Smith decision may be particularly significant in factually similar cases arising under other states' consumer protection statutes. New York's General Business Law resembles many other states' consumer protection laws in generally prohibiting unfair or deceptive acts and practices in trade or commerce. These statutes correspond in scope to the Federal Trade Commission Act, and many state statutes mirror the federal law's terms. Indeed, nearly every state has enacted a consumer protection law proscribing, in one form or another, unfair or deceptive conduct in consumer transactions.

In light of the textual similarities between and among the state and federal consumer protection schemes in most states, courts will often look for guidance in construing consumer protection laws to the decisional law of their sibling state courts and federal courts. Consider Chase v. Dorais, in which the New Hampshire Supreme Court, in a case of first impression, sought to determine the scope of "trade and commerce" for purposes of New Hampshire's consumer protection law. The New Hampshire statute prohibits any unfair or deceptive practice in the conduct of any "trade or commerce" within the state. The Chase court without hesitation turned to the "well developed body of law defining trade and commerce in Massachusetts where the consumer protection statute ... contains exactly the same definition of

109. Smith appears to be the first case addressing the issue of a breached commitment to protect information privacy.
110. See, e.g., 815 ILL. COMP. STAT. 610/9 (1993) (prohibiting "[u]nfair or deceptive acts and practices"); MASS. GEN. LAWS ch. 93A, § 2(a) (2003) (declaring unlawful "unfair or deceptive acts or practices in the conduct of any trade or commerce"); N.H. REV. STAT. ANN. § 358-A:2 (1995) (prohibiting "any unfair or deceptive act or practice in the conduct of any trade or commerce").
112. See MICHAEL M. GREENFIELD, CONSUMER TRANSACTIONS 120 (3d ed. 1999).
113. See id. (discussing the varieties of so-called "little FTC acts"). Most state statutes differ from the Federal Trade Commission ("FTC") Act in providing for private remedies. See Franke & Ballam, supra note 100, at 357.
115. 448 A.2d 390 (N.H. 1982).
116. See id. at 391.
trade and commerce." In the end, the Chase court relied exclusively upon Massachusetts caselaw to establish the reach of the New Hampshire consumer protection statute.\textsuperscript{119}

Unsurprisingly, given the correspondence in the language of consumer protection statutes and the tendency of courts to use as guidance the decisional law from other states and the federal courts, consumer protection claims also share common elements across jurisdictional borders. As under New York's General Business Law, for example, consumers raising claims under the Maryland Consumer Protection Act must demonstrate that they suffered "injury or loss" as a result of a defendant's allegedly deceptive conduct.\textsuperscript{120} A similar consumer injury requirement also obtains under federal law.\textsuperscript{121}

It is no great leap to suppose that a court facing, as a matter of first impression, the question whether a commercial actor's alleged violation of a commitment to respect privacy amounts to an actionable consumer protection claim would look with interest to Smith. Though in some states, like Massachusetts, the court could rely upon caselaw holding that an injury need not amount to a specific economic loss to be actionable under the consumer protection statute,\textsuperscript{122} to the extent that question is not settled—or, indeed, to the extent a defendant seeks to revisit the issue—Smith may prove influential. If, moreover, it happens that businesses, spurred by a perceived consumer interest in privacy protection, seek to follow Earthlink's lead\textsuperscript{123} and promote privacy assurances in connection with the receipt of their services, the Smith decision may come to be regarded as a benchmark for determining whether such assurances can be the subject of a consumer protection action should a business renege on its commitment.

\begin{footnotes}
\item[118] Chase, 448 A.2d at 391 (citation omitted).
\item[119] See Chroniak v. Golden Inv. Corp., 983 F.2d 1140, 1146 n.11 (1st Cir. 1993) (noting that "New Hampshire courts have invited interpretive comparisons with the 'well developed' caselaw construing the analogous Massachusetts 'unfair and deceptive practices' act").
\item[121] See Chroniak, 983 F.2d at 1146.
\item[123] See Privacy Policy, supra note 44 and accompanying text (discussing Earthlink's privacy policy). As Steven Hetcher has noted, "websites whose customers are more demanding of privacy will be more likely to provide greater privacy protections." Steven Hetcher, Changing the Social Meaning of Privacy in Cyberspace, 15 HARV. J. L. & TECH. 149, 175 (2001). Nonetheless, he continues, "there is great controversy as to whether there has been an increase in the supply of privacy respect." Id.
\end{footnotes}
B. Privacy Violations Outside the Consumer Protection Context

The Smith decision could also affect the judicial approach to alleged privacy violations that arise in factual circumstances outside of the consumer protection context. A court could rely upon Smith's understanding of the structure of a privacy injury in construing statutes that contain privacy protections and either require, or are construed to require, actual harm as an element of a successful claim. Recall that the Smith court essentially adopted the view that neither disclosure nor the immediate effect of disclosure, though arguably privacy violations, necessarily amounted to actual harm. This was so, apparently, because the plaintiffs' receipt of unwanted solicitations did not cause them to lose any property or money, to spend any money, or alter their lives in any way. Under Smith, then, a privacy injury is narrowly defined: assuming that harm must be shown, a privacy violation will be actionable only if, as a result of the violation, an individual suffers a tangible loss or is compelled to take some responsive action.

As explained above, in reaching this conclusion the Smith court misapplied precedent concerning the requirements of the consumer protection law. New York law requires only that plaintiffs point to some manifestation of harm in order to evidence the consequence of a deceptive act, such as the disclosure of personal information. The court failed to understand that the unwanted solicitations the plaintiffs received evidenced a specific harm caused by a privacy violation—the loss of their personal information—even if the violation did not cost them property or money, or compel them to respond in some way. This failure might have been avoided, of course, had the Smith court appreciated the ways in which such privacy injuries affect the integrity of information privacy and tend to undermine the values that privacy promotes—had the court appreciated that the unwanted solicitations received by the Smith plaintiffs were the manifestation of a loss with real consequences for both the individuals involved and the value of information privacy to others similarly situated.

124. See supra notes 18-24 and accompanying text.
126. See supra notes 110-124 and accompanying text (analyzing alleged consumer protection violation in Smith under standards established in caselaw).
127. Recall that, in Small v. Lorillard Tobacco Co., Inc., 720 N.E.2d 892 (N.Y. 1999), allegations by the plaintiffs that their health had suffered would have sufficed as a manifestation of the consequences of the cigarette manufacturers' deceptive conduct. See id. at 898.
128. See supra notes 29-35 and accompanying text (discussing the potential effects of information privacy violations on personal development and the development of personal and commercial relationships).
Flawed though it may be, the court's reasoning in *Smith* is not without a certain appeal: in many areas of the law, harm has been understood as necessarily connected to some tangible loss, and the receipt of unwanted solicitations, in the court's view, simply did not qualify.\(^{129}\) The *Smith* court endorsed a conception of harm that serves to limit the scope of particular causes of action for damages; the court essentially balanced against the need for deterrence or the expressive vindication of certain values or an appreciation of fairness such concerns as certainty and efficiency—the need to circumscribe the conduct that may be transformed into a source of liability.\(^{130}\) Courts sensitive to such a balance, and lacking any specific guidance from the legislature as to its intent, might well be influenced by the *Smith* court's analysis of privacy injuries in construing statutes that seek to protect privacy to conclude that privacy violations must result in strictly tangible losses or some kind of compelled action to be cognizable.

Consider the Videotape Privacy Protection Act ("VPPA"),\(^{131}\) which contains a requirement that a violation of the act's provisions must have some effect on a plaintiff. The statute establishes that “[a]ny person aggrieved by any act of a person in violation [of the act] may bring a civil action" for damages.\(^{132}\) In one of the few cases addressing the issue of aggrievement under the VPPA, the United States District Court for the District of New Jersey in *Dirkes v. Borough of Runnemede*\(^{133}\) ruled that, once a plaintiff shows a violation of the statute, “[n]o additional proof of harm is required.”\(^{134}\) Finding that the act had been violated through the disclosure of the plaintiff’s video rental information, the court required no additional showing of injury to demonstrate aggrievement under the act.\(^{135}\) The *Dirkes* court relied upon the argument espoused by Warren and Brandeis\(^{136}\) that “a violation of an individual’s privacy constitutes a ‘legal injuria.’”\(^{137}\) The court’s construction of the

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129. On the problem of appreciating intangible versus tangible harms, see generally, Spencer, *supra* note 2.
130. See Richard A. Epstein, Cases and Materials on Torts 153 (2000) (noting that the concept of negligence and its constituent elements serve to “limit[] a defendant’s liability both in theory and in practice”); see also Lawrence M. Friedman, A History of American Law 300-01 (2d ed. 1985) (suggesting that, as a historical matter, tort law is concerned with limiting liability).
132. Id. § 2710(c)(1).
134. See id. at 239 n.4.
135. See id. at 239-40.
136. See *supra* notes 104-05 and accompanying text.
VPPA’s aggrievement thus reflected a tacit recognition that a privacy injury is the actual harm of compromised control over information that follows from the disclosure of video rental information, regardless of whether the plaintiff had suffered a tangible loss of property or money, or been compelled to take some action in response.

Though the Dirkes court construed the law correctly, its view of aggrievement under the VPPA is vulnerable to the Smith court’s reasoning. New York’s consumer protection law, which provides that “any person who has been injured by reason of any violation of this section may bring an action,” has been construed as requiring that a plaintiff demonstrate actual harm in order to recover. The VPPA is susceptible to a similar construction—in other contexts, courts have understood aggrievement as requiring that a plaintiff demonstrate injury. Were a court to so construe the VPPA, it might also be inclined to conclude—following Smith and in the absence of other persuasive guidance—that a violation of the law is actionable only if, in response to the disclosure of video rental information, an individual suffered a tangible harm or was forced to take some action. This construction of the VPPA’s aggrievement requirement would, of course, diminish the impact of the VPPA and limit its efficacy in promoting the specific privacy interest it seeks to protect.

The Smith analysis of privacy harm could also affect the construction of laws like the Driver’s Privacy Protection Act (“DPPA”), which do not contain express provisions that could be construed as requiring proof of harm. The DPPA allows individuals to bring a civil action against anyone who “knowingly obtains, discloses or uses personal information, from a motor vehicle record.” The courts have not held that the statute contains an implicit harm requirement; in Cowan v. Codelia, P.C., for example, the court construed the act as requiring the plaintiffs to establish only “(1) that the defendants caused a DMV search to be made as to each plaintiff and (2) that the search was

not permitted by any exception to the DPPA." The failure to name a harm requirement in Cowan and like cases may reflect little more than an implicit presumption that an injury is synonymous with a statutory violation—that is, synonymous with proof of the defendant’s disclosure of otherwise private information. But the possibility exists that, in the absence of some indication of legislative intent to the contrary, a court could construe the DPPA in a future case as confined to those privacy injuries that, as defined by Smith, involve a tangible loss caused by the disclosure, effectively limiting the statute’s reach.

The privacy provisions of the Gramm-Leach-Bliley Act (“GLBA”) also do not contain a harm requirement. The act provides that “a financial institution may not . . . disclose to a nonaffiliated third party any nonpublic personal information” unless the consumer is notified and given the opportunity to opt out of the institution’s disclosures. In Union Planters Bank, N.A. v. Gavel, the United States District Court for the Eastern District of Louisiana concluded that nonconsensual disclosure of personal information would result in injury—but to the bank, and not necessarily to its customers. Though the court noted the bank’s contention that disclosure “would result in an invasion of privacy of [its] customers[,]” the court did not suggest that as a result of such an invasion, customers would, without more, have an actionable claim under the GLBA. Construction of the GLBA accordingly remains open to the Smith court’s analysis of the structure of privacy injuries, which predicates a cause of action upon a showing that, in response to the disclosure of personal information, individuals suffered a tangible loss, or were compelled to take action or alter their lives in some way. As with the DPPA, adoption of this view likely would reduce the scope of the GLBA’s privacy protections.

V. CONCLUSION

A failure to recognize as actionable the injuries suffered by the plaintiffs in Smith v. Chase Manhattan risks undermining the value of

144. Id. at *8.
148. See id. at *6.
149. Id. at *2.
150. Indeed, the Gramm-Leech-Bliley Act (“GLBA”) in particular may be more vulnerable to a construction so limiting its privacy protections in light of post-September 11 security concerns regarding financial institutions and information related to the financing of terrorism. See Spencer, supra note 2, at 857-58.
information privacy, both as a matter of law and as an individual expectation. For if the law—as it is articulated and enforced by courts construing statutory commands—fails to reflect the ways in which individuals can experience the loss of information privacy as actual harm, a probable effect will be dilution of the value itself. We might not feel such dilution immediately, and we would probably adjust to it eventually, but that does not mean that a diminishment of information privacy is not without cost, at least to the extent we continue to prize the values of autonomy and interpersonal development that information privacy promotes. Absent recourse in law for privacy violations, conduct affecting privacy remains in many respects unregulated, subject to the control of institutional and commercial actors for whom the privacy of individuals may be inconsequential or even problematic.151

Thus, advocacy in future cases is critical.152 Counsel for plaintiffs pressing privacy claims must seek to persuade courts on both doctrinal and normative grounds that dishonored privacy commitments are actionable under consumer protection laws and, more broadly, that the Smith court’s understanding of the structure of privacy injuries was erroneous. As illustrated by the examination of New York law in this Article, established consumer protection doctrine provides a conceptual means of appreciating a loss of information privacy as actual harm, while the normative rationales for information privacy protection present several justifications upon which a court could rely in concluding that privacy injuries like that suffered by the Smith plaintiffs are indeed actionable.153 These normative rationales may also serve to inform the understanding of privacy injuries outside of consumer transactions—

151. See Spencer, supra note 37, at 870 (discussing the incentive for businesses to favor diminishment of privacy); see also Ronald J. Krotoszynski, Jr., Identity, Privacy, and the New Information Scalpers: Recalibrating the Rules of the Road in the Age of the Infobahn: A Response to Fred C. Cate, 33 IND. L. REV. 233, 233-34 (1999) (noting that conduct like Amazon’s “practice of releasing employer-by-employer information about employees’ purchases from the company” and “the practice of telephone companies selling information about their customers to third parties, [create] serious doubts about the wisdom of trusting privacy protection” to individual privacy interests) (footnotes omitted).

152. As an initial matter, of course, counsel must make clear for a court the importance of privacy as a value. There is no dearth of authority for this proposition. In Dirkes v. Borough of Runnemede, 936 F. Supp. 235, 238 (D.N.J. 1996), for example, the court observed that “our society has firmly embraced the concept of privacy, as evidenced by Congressional statutes protecting this right as it exists in various forms.” But this authority must be made relevant—counsel must connect the importance of the value of information privacy to the means by which it may be vindicated through legal action, so that the consequences of a decision either to recognize a privacy claim or to not recognize such a claim may be accurately gauged.

153. See supra Part III.
such concerns as deterrence, the vindication of expressive values and fairness are not necessarily limited to the consumer protection context.

Privacy proponents in recent years have suggested a variety of ways in which information privacy can be protected or enhanced through legislative action.\(^{154}\) Notwithstanding the importance of such efforts, cases like Smith demonstrate that the usefulness of laws specifically enacted to protect privacy, as well as those, like consumer protection laws, which may afford situational protection to information privacy, may depend upon a court's understanding of the structure of privacy injuries. Privacy proponents accordingly should heed the importance of impressing upon judges, as much as legislators and other governmental actors, a sense of the consequences that may flow from a view of privacy injuries that effectively undermines the ability of individuals to challenge the loss of information privacy.

\(^{154}\) See, e.g., Spencer, supra note 37, at 910-11.