Privacy and Manipulation in the Digital Age

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The digital age brings with it novel forms of data flow. As a result, individuals are constantly being monitored while consuming products, services and content. These abilities have given rise to a variety of concerns, which are most often framed using "privacy" and "data protection"-related paradigms. An important, oft-noted yet undertheorized concern is that these dynamics might facilitate the manipulation of subjects; a process in which firms strive to motivate and influence individuals to take specific steps and make particular decisions in a manner considered to be socially unacceptable. That it is important and imperative to battle manipulation carries with it a strong intuitive appeal. Intuition, however, does not always indicate the existence of a sound justification or policy option. For that, a deeper analytic and academic discussion is called for.

This Article begins by emphasizing the importance of addressing the manipulation-based argument, which derives from several crucial problems and flaws in the legal and policy setting currently striving to meet the challenges of the digital age. Next, the Article examines whether the manipulation-based concerns are sustainable, or are merely a visceral response to changing technologies which cannot be provided with substantial analytical backing. Here the Article details the reasons for striving to block manipulative conduct and, on the

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other hand, reasons why legal intervention should be, in the best case, limited. The Article concludes with some general implications of this discussion for the broader themes and future directions of privacy law, while trying to ascertain whether the rise of the manipulation-based discourse will lead to information privacy's expansion or perhaps its demise.

Introduction and Motivation

The digital age brings with it novel forms of data flow. As a result, individuals are constantly being monitored while consuming (or even merely contemplating the consumption of) products, services and content. Such surveillance also unfolds when individuals communicate and socially interact. These abilities have given rise to a variety of concerns, which are most often framed using "privacy" and "data protection"-related paradigms. An important, oft-noted yet undertheorized concern is that these dynamics might facilitate the *manipulation* of subjects; a process in which firms strive to motivate and influence individuals to take specific steps and make particular decisions in a manner considered to be socially unacceptable. Such manipulation could be successfully executed by providing or omitting forms of information, at a well-defined time and while using advanced digital technology. This intuitive concern regarding manipulation is now often incorporated into discussions pertaining to information privacy, profiling data protection and lifecycle of personal data.[1] Furthermore, given recent discontent with legal and regulatory steps to rein in privacy-related concerns (and their ultimate failure), calls for analytically and doctrinally relying on manipulation-related arguments have strengthened. That it is important and imperative to battle manipulation carries with it a strong intuitive appeal. Intuition, however, does not always indicate the existence of a sound justification or policy option. For

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1 *See, e.g.*, Natali Helberger, Frederik J. Zuiderveen Borgesius & Agustin Reyna, *The Perfect Match? A Closer Look at the Relationship Between EU Consumer Law and Data Protection Law*, 54 Common Mkt. L. Rev. 1427, 1456 (2017) ("There is some fear that online profiling could be used to manipulate people."). *See also* Ryan Calo, *Digital Market Manipulation*, 27 Geo. Wash. L. Rev. 995 (2013). It is important to note that this manipulation-based concern on the basis of personal data and computerized analysis is far from new and was already noted by Arthur Miller in the early 1970s. *See* Arthur R. Miller, The Assault on Privacy: Computers, Data Banks, and Dossiers 42-43 (1971); Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. Rev. 1814, 1850 (2011).

that, a deeper analytic and academic discussion is called for. To this point, discussions of manipulation in the legal context have been rare (as opposed to other disciplines that do not shy away from this topic) but are now beginning to generate substantial interest and a growing realm of scholarship.[2]

This Article will examine (while contemplating and confronting my earlier work)[3] the role the *manipulation* argument must take in the current data ecosystem. It will do so while attending to several tasks. First, in Part I, the Article emphasizes the importance of addressing the manipulation-based argument, which derives from several crucial problems and flaws in the legal and policy setting currently striving to meet the challenges of the digital age. This latter discussion also further explains why the *manipulation* discussion is already generating growing interest. Next, in Part II, the Article will examine whether the manipulation-based concerns (and hence calls for action) are sustainable, or are merely a visceral response to changing technologies which cannot be provided with substantial analytical backing. Here the Article details the reasons for striving to block manipulative conduct and, on the other hand, reasons why legal intervention should be, in the best case, limited. The Article concludes with some general implications of this discussion for the broader themes and future directions of privacy law, while trying to ascertain whether the rise of the manipulation-based discourse will lead to information privacy's expansion or perhaps its demise.

Before proceeding, consider several comments regarding the somewhat limited scope of this modest project. First, regarding definitions, it is important to distinguish the manipulation here discussed from marketing actions and solicitations premised on fraud, misrepresentation or simple coercion. These latter instances are already prohibited in most cases, and their prohibition is quite easy to justify theoretically. Yet making a similar case to prohibit *manipulation* is far from simple. Even defining the term *manipulation* in this specific context is a complicated (and perhaps futile) task. The fact that *manipulation* has a very different meaning in the context of experimental design further adds to the complication.[4]

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2 Cass Sunstein, *Fifty Shades of Manipulation*, 1 J. Marketing Behav. 213 (2016); Shmuel I. Becher & Yuval Feldman, *Manipulating, Fast and Slow: The Law of Non-Verbal Market Manipulations*, 38 Cardozo L. Rev. 54 (2016).

3 Tal Z. Zarsky, *Mine Your Own Business!: Making the Case for the Implications of the Data Mining of Personal Information in the Forum of Public Opinion*, 5 Yale J.L. & Tech. 1, 5 (2003).

4 Jane R. Bambauer, *All Life is an Experiment*, 47 Loyola U. Chi. L.J. 486, 495 (2015) (discussing the ethical requirements of conducting a proper "manipulation" in the scientific context).

To overcome this foundational definition-based problem, it is helpful to turn to a definition recently set forth by Cass Sunstein. Sunstein defines manipulative actions as intentional measures[5] that do not sufficiently engage or appeal to the individual's capacity for reflection and deliberation.[6] Sunstein notes that this definition relies on similar ones, which find manipulation attempts to be those that strive to bypass rational capacities and subvert decision-making.[7] The Article will return to further sharpen and limit this definition, below.

Second, consider a few words about context. The *manipulation* argument and concern could be voiced in a variety of settings. In the interest of focusing this current analysis, the discussion will be limited to the commercial context and that of consumer relations, as opposed to the political realm,[8] or instances in which it is the state itself that engages in manipulation.[9] These two latter intriguing settings present an additional set of thorny questions which require even further inquiry and debate (which can partially indeed rely on many of the claims and ideas set forth here). In addition, this Article strives to provide universal tools, yet many of its foundational presumptions, as well as the doctrinal examples applied, are U.S-centric.

Within the analysis of manipulation in the commercial context, the current discussion will engage in a somewhat broad inquiry. This is as opposed to a more specific discussion, addressing the ways in which manipulation techniques are used to influence individuals' privacy preferences, or at least the preferences announced and reflected.[10] In this latter context, online interfaces use various techniques, which are partially derived from the personal information they amass, to seduce individuals into providing additional personal information

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5 Sunstein, *supra* note 2, at 218. Some have disagreed with this element of the definition. *See* Eldar Shafir, *Manipulated as a Way of Life***,** 1 J. Marketing Behav. 245, 245 (2015).

6 Sunstein, *supra* note 2, at 216.

7 *Id.* at 220. Sunstein notes that often manipulation, once discovered by the subject, leads to a sense of betrayal. Given the subjectivity of this element, it is perhaps best left outside of this narrow definition.

8 *Id.* at 237-38; Nina Burleigh, *How Big Data Mines Personal Info to Craft Fake News and Manipulate Voters*, Newsweek (June 8, 2017), http://www.newsweek.com/2017/06/16/big-data-mines-personal-info-manipulate-voters-623131.html.

9 This issue has generated a great deal of recent research. *See* Michael Blanding, *Why Government Nudges Motivate Good Citizen Behavior*, Harv. Bus. Sch (July 19, 2017), https://hbswk.hbs.edu/item/why-government-nudges-motivate-good-behavior-by-citizens; Shlomo Benartzi et al., *Should Governments Invest More in Nudging*, 28 Psychol. Sci. 1041 (2017).

10 *See* Paul M. Schwartz, *Privacy and Democracy in Cyberspace,* 52 Vand. L. Rev. 1607, 1661 (1991) (discussing the "autonomy trap").

(Facebook has long mastered this practice[11]) or to neglect to change privacy-related defaults which are corporate-friendly. In doing so, such firms can presumably engage in further manipulations, including the general ones addressed here below. The ability to engage in such manipulations impacts the ways privacy protection measures should be set in place yet requires a separate and nuanced discussion.

I. The Manipulation Argument — Why Now?

A theory, doctrine or regulatory strategy that strives to block, undermine and perhaps even forbid the noted manipulative practices, which rely upon the use of personal information, carries with it several advantages, on both the theoretical and doctrinal levels; advantages that mirror shortcomings and problems with the theories often applied today. This Part will highlight these shortcomings, thus emphasizing the importance of the manipulation-based discussion. The following discussion is therefore normative with respect to its conclusions as to the direction legal scholarship as well as the law itself should take. Yet it is also an attempt to speculate why the manipulation-based argument is already generating substantial attention and interest, despite its substantial flaws.

A. Getting Out of Control

Let us start with theory. Applying the *manipulation* argument allows for overcoming or avoiding substantial theoretical shortcomings and pitfalls, which currently plague central and fundamental privacy theories (and are already impacting the implantation of the law). I will demonstrate this assertion while referring to the salient theoretical justification for information privacy (especially in Europe): the theory of *control*.[12]

The *control*-based theory provides an elegant backing for many of the foundational privacy rights, especially those listed as Fair Information Practice Principles (FIPPs).[13] In particular, it convincingly justifies an individual

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11 *See* Franklin Foer, Opinion, *Facebook's War on Free Will*, The Guardian (Sept. 19, 2017), https://www.theguardian.com/technology/2017/sep/19/facebooks-war-on-free-will.

12 Alan Westin, Privacy and Freedom (1967); Michael Birnhack, *A Quest for A Theory of Privacy: Context and Control*, 51 Jurimetrics 447 (2011).

13 See discussion and sources in Tal Z. Zarsky, *Transparency Predictions*, Ill. L. Rev. 1503, 1541 (2013). *See also* Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126 Harv. L. Rev. 1880, 1882 (2013).

and fundamental right to access and correct personal data pertaining to an individual yet held by others, as well as limiting future uses to only those the data subject initially permitted.

Nonetheless, convincingly arguing today that individuals *must* be provided with a right to *control* their personal data is a complicated exercise.[14] Such difficulty arises both in the court of law and that of public opinion. Recognizing and enforcing the *control* claim calls for creating normative rights in a society in which a broad majority of the population signal their *disinterest* in control. This latter notion is reflected by individuals' constant tendency to waive their data-related rights, for instance by and when constantly opting for terms of use and service which provide said data subjects with limited privacy protection.[15] In doing so (and contrary to several surveys indicating a consumer preference toward privacy),[16] users might be indicating that said *control* is not the essential right policymakers and academics claim it to be, and that the public's preferences and interests lie elsewhere.

This claim regarding the weakness of the control interest is often countered by arguing that control is nonetheless important to establish and protect, while downplaying the relevance of the previously described social dynamics. In fact, one could argue that the instances in which individuals do away with their privacy rights and interests (and thus their need for *control*) do not constitute "informed consent" or any other exercise of autonomous decision-making. These so-called signals should therefore be disregarded.[17] Indeed, the contractual terms involving rights in personal data are rarely read prior to their acceptance. However, users learn (even after the fact) from their

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14 For a similar analytical move, see Zarsky, *supra* note 13, at 1543-44.

15 One might respond to this argument by citing both surveys and statements indicating that individuals hold their privacy in high regard. Yet such indications of interest are clearly inferior to individuals' actions. See discussion in Tal Z. Zarsky, *The Privacy-Innovation Conundrum*, 19 Lewis & Clark L. Rev. 115, 132 (2015). However, and especially in the privacy-related context, one might argue that individuals fail to properly signal their preference regarding this basic and important human right in the market setting, as opposed to the political one, for a set of valid and contextual reasons. Yet only now are we witnessing some (partial) political signaling of privacy preferences. For more on this issue, see Cass Sunstein, Republic.com 2.0 128 (2009); Tal Zarsky, *Social Justice, Social Norms and the Governance of Social Media*, 35 Pace L. Rev. 138, 151 (2014).

16 Mary Madden, Pew Research Ctr., Public Perceptions of Privacy and Security in the Post-Snowden Era 3 (2014), http://assets.pewresearch.org/wp-content/uploads/sites/14/2014/11/PI_PublicPerceptionsofPrivacy_111214.pdf (indicating "widespread concern about surveillance by government and business.").

17 *See* Solove, *supra* note 13, at 1886.

experience, from the press or from word-of-mouth of the minimal and weak privacy norms the firms apply. Nonetheless, they still choose to use the service (or continue such usage). By that they are often indicating their disinterest in controlling their data and weakening the hold of this salient justification for privacy rights.[18]

Thus, erecting a theory of *control* and using it to justify broad regulatory steps is a challenge; it is challenging to justify and balance such an elusive right against other explicit rights, such as those related to speech[19] and occupation. In addition, when relying on a mostly theoretical justification which is not reflected in actual individual preferences but merely in a normative construct, one must fear that behind calls for such *control* are paternalistic[20] governmental sentiments, and even private interests. And while paternalism is not necessarily problematic, it must be justified by an additional set of challenging theoretical claims.[21]

Finally, from the practical, popular and even political perspective, it is also difficult to advocate for control rights (and the extensive measures derived from them) when they lack a concrete basis and a specific form of harm which decisionmakers and voters can clearly grasp.[22] One might speculate that this shortcoming explains the political difficulty in enacting laws and regulations to deal with seemingly nonexistent problems. It is therefore not surprising

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18 This argument clearly does not hold in instances where the privacy harms are hidden and only exposed many years later, or when economic or social forces impeded the individuals' ability to stop using the privacy-intrusive service.

19 *See infra* note 80 and accompanying text, for the discussion regarding relevant speech interests that might be compromised in this context.

20 For a discussion of the meaning of paternalism in the general context, see Doron Teichman & Eyal Zamir, Behavioral Law and Economics, Ch. 8, § G.3 (forthcoming 2018) (on file with author) (mapping out the various forms of paternalism). For arguments for and against the "paternalism" claim at this juncture, see Solove, *supra* note 13, at 1895.

21 Indeed, providing a "control" right might be seen as a form of paternalism, as it strives to enable individuals to achieve objective, or "actual" preferences. Establishing paternalistic rules calls for balancing them against deontological interests — namely the individual's autonomy. For a discussion of these interests and the balances involved, see, generally, Eyal Zamir & Barak Medina, Law, Economics, and Morality 314-48 (2010).

22 For a discussion of "harm" in the privacy context, see Ryan Calo, *The Boundaries of Privacy Harm*, 86 Ind. L.J. 1131 (2011). Using Calo's taxonomy, the simpler and more effective "harms" are the *objective* ones, as opposed to *subjective* harms which are more difficult to apply as a basis for substantial legal responses.

that, at least in the U.S., the enactment of privacy laws followed crises, which brought concrete privacy harms to the headlines and the legislators' desks.[23]

The previous paragraphs might have persuaded a minority of readers that the *control*-based justification is weak and should be set aside. Those committed to the control-based privacy theory will be hardly persuaded by the noted arguments justifying the abandonment of this central privacy justification.[24] However, even devoted proponents of the *control*-based privacy justification could proceed and accept this Article's line of thought. For them, all that is needed is that they concede that the theory of *control* is not without its substantial problems (of both an analytic and political nature), and that there is a strong pull to set forth additional justifications which might supplement (if not supplant) it in the uphill battle to protect individuals in the changing data economy.

Given these noted shortcomings, the benefits of the *manipulation*-based arguments are apparent. Stating that novel data collection, analysis and usage practices enable the actual or even potential manipulation of individuals allows for sidestepping many of the problems detailed above. The manipulation justification provides for promoting an intuitive reason for data protection or other appropriate regulatory steps, given an identifiable and concrete issue. Measures set to battle manipulation are also not seen to be overly paternalistic, but rather set in place to meet a real concern.

Note that while the previous section took aim at the *control* theory, very similar arguments could also be made regarding other dominant yet abstract theories justifying the protection of privacy rights. For instance, consider the influential theory of privacy as (the limitation of) "access."[25] This justification provides analytical responses and even possible practical remedies to an additional set of privacy-related concerns. However, this theory is also highly abstract, as opposed to the intuitiveness of the "manipulation"-based argument. A similar critique could be made regarding theories linking the protection of privacy to the promotion of intimacy,[26]

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23 The most salient example being the enactment of the VPAA after the exposure of viewing records as part of the (ultimately unsuccessful) nomination process of Robert Bork to the U.S. Supreme Court. *See Video Privacy Protection Act*, EPIC, https://www.epic.org/privacy/vppa/ (last visited July 30, 2019).

24 For a sharp critique of the "paternalism" argument noted, see, for example, Chris Jay Hoofnagle et al., *Behavioral Advertising: The Offer You Cannot Refuse*, 6 Harv. L. & Pol'y Rev. 273 (2012).

25 Daniel J. Solove, *Conceptualizing Privacy*, 90 Calif. L. Rev. 1087, 1102 (2002); Ruth Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421, 438 (1980).

26 Solove, *supra* note 13, at 1121; Julie. C. Iness, Privacy, Intimacy, and Isolation (1992).

as well as autonomy.[27] All these theories suffer from the disadvantage of referring to abstract harms, which are difficult to conceptualize — thus opening the door to the manipulation-based justification with its relative advantages.

B. Sidestepping Doctrinal Pitfalls

Reliance on the *manipulation* claim also allows for sidestepping several practical and doctrinal pitfalls that privacy law currently comes up against. Consider two central examples of such pitfalls, which are deemed to deepen given the rise of big data analytics that subject these doctrinal elements to an additional set of challenges.[28] Let us start with that of "consent."

1. Consent

Consent is one of the central elements of contemporary information privacy and protection practices. It is the key to enabling legitimate forms of personal data processing. Given informed consent, these can proceed after the relevant individuals have understood their future effects and ramifications. However, providing meaningful and informed consent to subsequent data practices is almost impossible. Indeed, endless debates feature scholars and policymakers lamenting the futility of meaningfully achieving "consent" in today's information society.[29] To achieve meaningful consent, the data subjects must receive vast amounts of information regarding current and future analysis of their personal data which they most likely cannot grasp. Furthermore, for meaningful consent to follow, all such information must be fully comprehended by individuals who are not really interested in doing so. And all this knowledge often must be delivered on small screens (in the mobile context, or no screens in the IoT context). Indeed, in the EU, the recently enacted General Data Protection Regulation (GDPR) has somewhat moved beyond consent. While indeed addressing it at length and expanding on the conditions for meeting it,[30] the GDPR offers several additional options to achieve lawful forms of processing.[31]

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27 Solove, *supra* note 13*,* at 1116.

28 Ira S. Rubinstein, *Big Data: The End of Privacy or a New Beginning?*, 3 Int'l Data Privacy L. 74 (2013).

29 *See* Solove, *supra* note 13, at 1894.

30 Council Regulation 2016/679, art. 7, 2016 O.J. (L 119) 1, 37 (EU) [hereinafter GDPR].

31 *Id.* at arts. 6.1(b-f) (including when necessary to comply with a legal obligation and when necessary for the purposes of a legitimate interest).

Consent, however, is still the cornerstone of information privacy law in many contexts and jurisdictions.[32]

The *manipulation*-based justification for privacy protection need not focus on consent at the time of data collection, thus sidestepping many of the noted concerns. When regulation will in fact strive to protect individuals from such manipulations, the fact that the personal data facilitating the process was collected willfully does not necessarily matter. The manipulative actions are still normatively wrong and therefore should be positively prohibited. On the other hand, the information might be collected and used without proper consent, but the lack of manipulation and other harmful outcomes might render such uses acceptable (at least insofar as the manipulation-based concern is considered). This latter point requires an additional and dramatic step of doing away with (or at least limiting) privacy rights and replacing them with *manipulation* and other harm-based causes of action. I return to this provocative notion in the Conclusion.

A possible caveat to this argument might be that data collectors-turned-potential-manipulators might nonetheless work around any form of manipulation-based regulation by asking individuals to concede and consent to various subsequent forms of data usage pertaining to them, including those constituting manipulation. These, of course, might not be framed as a consent to *manipulation* per se, but to a broad array of communications which will include the actions defined below as unacceptable forms of manipulation. If this is possible, it's "Deja vu all over again;"[33] the same problems plaguing privacy today will impact manipulation-based regulation tomorrow — and the same work-arounds will leave regulators and judges scratching their heads.

The "consent-circumventing manipulation" rebuttal is of limited bite, for several reasons. First, at times the "manipulating" advertiser or entity would not be part of a contractual relationship with the relevant manipulation/subject prior to the manipulative interaction. This would occur when the data used in tailoring the manipulative communication was collected from third parties, or inferred from other, similar, individuals.[34] In such a case, there is no opportunity to obtain prior user consent which would permit the

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32 For the general and U.S. context, see Solove, *supra* note 13, at 1880. *See, e.g.*, Protection of Privacy Act, 5741-1981, SH No. 1011 p. 128 (Isr.) (noting, in art. 1, that obtaining consent is the *only* legitimate process for enabling legal processing of personal information).

33 Thank you, Yogi Berra.

34 This point was made in a somewhat different context by Jack Balkin, noting that these forms of actions constitute algorithmic nuisances. Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, U.C. Davis L. Rev. 1151, 1164-65 (2018).

subsequent manipulation to unfold. Second, manipulation is most likely still normatively unacceptable (and could therefore be doctrinally prohibited) even when followed by consent. Consensual manipulation still brings with it the usual harms and problems (to be discussed below).[35] Therefore, the introduction of manipulation-based regulation substantially resolves many of the tensions the notion of consent currently brings about.

2. The PII Problem

When considering the *manipulation*-based harms and relevant remedies to mitigate them, information and cyber-law is liberated from a tedious challenge; the need to decide whether the process that generated the manipulation relied on personally identified/identifiable information ("PII") or on merely anonymous data, while applying various complicated definitions. Today, finding the data used in the relevant analytical process to meet the definition of PII is the gateway to applying the rules and doctrines of privacy law to a given situation.[36] Indeed, many entities engaging in alleged manipulative practices have strived to shield themselves from the burden of privacy law by stating that the data used is not (or is no longer) personal. For instance, consider firms engaging in behavioral targeting of advertisements online, using cookies and similar techniques and measures. Such firms often argue that their actions do not compromise privacy interests, as they do not know, nor care, who the targeted individual really is (i.e., what their name is, or their specific address).[37] All they have is a unique communication channel which allows them to correspond with the individual directly. Similarly, in the context of tracking video consumption, similar claims noting that a "mere" unique ID is being tracked has led some U.S. courts to find that laws protecting privacy did not apply to this scenario.[38] Shifting the focus towards the manipulative aspects of the firms' actions will potentially enable effective regulation of these targeting entities and practices regardless of their anonymization attempts.

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35 See discussion in Sunstein, *supra* note 2, at 230-31 (making this point while noting several exceptions).

36 *See* Schwartz & Solove, *supra* note 1, at 1816 (explaining that PII is "one of the most central concepts in privacy regulation"). Note, however, that EU law might provide an exception to this rule. See discussion *infra* note 119, and the accompanying text.

37 *See* Schwartz & Solove, *supra* note 1, at 1854-55.

38 Gregory M. Huffman, Note, *Video-streaming Records and the Video Privacy Protection Act: Broadening the Scope of Personally Identifiable Information to Include Unique Device Identifiers Disclosed with Video Titles*, 91 Chi.-Kent. L. Rev. 737, 750 (2016).

Refocusing the discussion on manipulation will promote efficiency as well, since it will also allow for sidestepping a very difficult regulatory conundrum. A substantial amount of both regulatory and academic attention has recently been devoted to establishing whether various forms of data are either "identified" or "identifiable." In the context of online behavioral targeting (and the use of cookies), there is an ongoing debate as to whether mere IP addresses or the cookies' ID numbers enable identification.[39] This difficult question has led to extensive legal exchanges. It has also ignited a technological arms race in an attempt to circumvent the definitions of identifiable data, while at the same time enabling targeting. If manipulation-based regulation is broadly applied, these debates will be somewhat unnecessary, as their utility (in circumventing legal protection) would be limited.

Yet this noted advantage illuminates a possible shortcoming of shifting the emphasis to *manipulation*-based claims. When we rely directly on *manipulation*, and without PII to guide us and set relevant boundaries, what will stop information privacy laws, doctrines and concepts from mushrooming uncontrollably?[40] This expansive dynamic might lead information privacy law to eventually merge with other fields of law such as consumer protection or broader notions of protecting individual autonomy — or perhaps collapse into these broader and more established fields of law. I will return to this issue in this Article's final segment.

II. The Manipulative Argument

A. General Definitions and Foundations

Having established the benefits of reliance on manipulation-based arguments, it is time we turned to their nuts and bolts, as well as their strengths and shortcomings. The intuitive *manipulation*-based argument, on a colloquial level, states that entities collecting vast personal information about individuals will

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39 *Id.* In the EU context, see Case C-582/14, Patrick Breyer v. Bundesrepublik Deutschland, EU:C:2016:779 (Oct. 19. 2016). See discussion in Fredrik Zuiderveen Borgesuis, Case Note, *Breyer Case of the Court of Justice of the European Union: IP Addresses and the Personal Data Definition*, 3 Eur. Data Protection L. Rev 130 (2017).

40 Schwartz & Solove, for instance, find that issues which do not involve PII cannot be considered to be part of privacy law. Schwartz & Solove, *supra* note 1, at 1868.

use insights they have learned to influence individuals in ways we consider to be unfair and thus unacceptable, and therefore must be stopped.[41]

Suffice it to say that precisely drawing the boundaries of such unacceptable actions is a challenge and will be left for another time (and paper). Yet to further focus this Article's discussion, as well as sharpen the definition of manipulation offered above, let us return to the specific technological setting which motivates the current interest in "manipulation." This current analysis is anchored in a data-rich society, in which specific entities have the ability to collect and utilize an immense amount of data about a single individual (thus launching the privacy-related discussion).[42] This setting allows for carving out *four* key elements, which will supplement the noted broad definition (stated in the "Introduction") as the foundations of the unacceptable manipulations here discussed: (1) manipulation will involve the ability to tailor unique responses to every individual on the basis of previously-collected data,[43] and (2) the ability to adapt and change the tailored response in view of ongoing feedback from the user and other peers, thus rendering manipulation an ongoing process, as opposed to a one-time action;[44] (3) manipulation will often occur while the individual is oblivious to the noted processes (or, in other words, in a nontransparent environment);[45] and (4) the manipulation will be facilitated by the availability of advanced data analytics tools (including those that apply data mining), which allow the system designer to acquire deep insights as to what forms of persuasion are proving effective over time.

While the emphasis of this discussion thus far has been technological, it is closely related to psychology as well. Studies in cognitive and behavioral psychology indicate predictable instances in which individuals systematically act irrationally — indications that later can be abused by the manipulating entities. Yet it is perhaps best not to link the definition of manipulation to a specific psychological school, theory or dynamic. Manipulation could take many forms — some of them unpredictable at this time. To demonstrate,

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41 For the foundational analysis of this issue in the legal context, see Jon D. Hanson & Douglas A. Kyser, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. Rev. 630, 722 (1999). For a recent example of this argument in the advertising context, see Mark Bartholomew, Adcreep: The Case Against Modern Marketing 6 (2017).

42 See discussion in Zarsky, *supra* note 3.

43 Calo, *supra* note 1, at 1004 (noting that the manipulation is enabled by the digital system's design and timing).

44 Karen Yeung, *'Hypernudge': Big Data as a Mode of Regulation by Design*, 20 Info. Commun. & Soc'y 118 (2017).

45 Becher & Feldman, *supra* note 2 (seeing this as an important component of manipulation). *See also* Sunstein, *supra* note 2, at 232.

consider the various fields from which manipulation-based insights could be drawn. Some forms of manipulation rely on and aim to utilize cognitive theories, such as the work of Daniel Kahneman[46] (broadly discussed by Sunstein), in that they assume the existence of two mental systems of decision making ("System I" and "System II"). The noted manipulative schemes strive to influence "System I" while circumventing "System II."[47] Other models and methods, such as those noted by Ian Kerr,[48] rely on findings from social psychology, such as proven methods to generate trust and the way they might be both invoked and abused by marketers to achieve their objective.[49] Other models focus on identifying and even generating specific emotional responses and sensations which are known to impact rational conduct.[50] Yet others focus on behavioral psychology to "hook" users on a specific behavior.[51] It is interesting to note, however, that given the breadth of information available, manipulation schemes could be launched on the basis of mere experimentation and feedback assessment, rather than a sound psychological theory. Large firms can tweak their interfaces, seeking the most effective means of influential communication, and select the one indicated as most effective, without necessarily understanding why.[52]

Striving to manipulate and exert influence is, of course, not new. Quite to the contrary, almost every form of human communication tries to do so.[53] This Article is no exception (as the author is trying to influence the reader

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46 Daniel Kahneman, Thinking, Fast and Slow (2011).

47 Sunstein, *supra* note 2, at 222.

48 Ian Kerr, *Bots, Babes, and the Californication of Commerce*, 1 U. Ottawa L. & Tech. J. 284, 288-89 (2004).

49 For other examples of the use of manipulative methods and their link to psychological theory, see James Grimmelmann, *Saving Facebook*, 94 Iowa L. Rev. 1137 (2009); Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 mich. Telecomm. & Tech. L. Rev. 303 (2008).

50 Damian Clifford, *Citizen-Consumers in a Personalised Galaxy: Emotion Influenced Decision-Making, a True Path to the Dark Side*? 7 (CiTiP Working Paper Series 31/2017). *See also* Calo, *supra* note 1.

51 Ted Greenwald, *Compulsive Behavior Sells*, MIT Tech. Rev. (Mar 23, 2015), https://www.technologyreview.com/s/535906/compulsive-behavior-sells/ (discussing the work of Nir Eyal, who applies insights from behavioral psychology to online marketing).

52 Calo, *supra* note 1, at 1010.

53 Sunstein, *supra* note 2, at 239 ("manipulation is a pervasive feature of human life."). *See* Calo, *supra* note 1, at 997; Shafir, *supra* note 5, at 245 (noting that manipulation is inherent to the human condition).

to accept his ideas, while applying some limited yet subtle manipulations).[54] Specifically, advertising has always relied on various forms of manipulation.[55] And yet, television and radio advertising has been accepted as not only a reasonable nuisance, but the economic driver of commercial media. Why, then, does the issue at hand merit an extensive discussion at this specific juncture and perhaps even justify substantial remedies in response?

The four noted elements of this novel form of manipulation provide an initial response to this foundational query. This Article's underlying presumption is that digital data-driven practices must be considered to be substantially different from all previous forms of manipulation — among other things, because of their hidden mechanics[56] as well as their ability to personalize, which enables greater manipulation.[57] Even given these attributes, television nonetheless is still considered to be a powerful and immersive medium, with the ability to captivate attention far beyond that of other digital interfaces. Therefore, the manipulative nature of these newer forms of advertising (which are quickly replacing TV advertising to a great extent) must be closely scrutinized as to whether they indeed generate a manipulative imbalance which requires recalibration, through regulatory intervention or other means.[58]

Much of the following discussion is intuitive; it assumes (like many others writing in this area) that indeed the noted manipulations are effective. However, it is of great importance that this issue be empirically tested.[59] Entrepreneurs are quick to flaunt their ability to manipulate and influence so to attract funding and advertising collaboration. But very often the so-called manipulation attempts mostly analyze noise and are generally ineffective.[60] And while merely attempting to unfairly manipulate is normatively problematic, the regulatory

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54 The readers will have to figure this part out on their own.

55 For a popular discussion of the power of advertising in post WWII America, see Malcolm Gladwell, What the Dog Saw and Other Adventures 76-101 (2009).

56 Micah Berman, *Manipulative Marketing and the First Amendment*, 103 Geo. L.J. 497, 523 (2015).

57 Calo, *supra* note 1, at 1021. See also the discussion in Bartholomew, *supra* note 41, at 2.

58 Sam Thielman, *Digital Media Is Now Bigger Than National TV Advertising, Will Surpass Total TV by 2018*, adweek (June 16, 2014), http://www.adweek.com/tv-video/digital-media-now-bigger-national-tv-advertising-will-surpass-total-tv-2018-158360/ (claiming that digital media will surpass TV by 2018).

59 Sunstein, *supra* note 2, at 235; Becher & Feldman, *supra* note 2, at 497.

60 Antonio Facia Martinez, *The Noisy Fallacies of Psychographic Targeting*, WIRED (Mar. 19, 2018), https://www.wired.com/story/the-noisy-fallacies-of-psychographic-targeting/.

costs involved in regulating manipulative practices would probably only be justified in the face of a substantial risk. Nonetheless, the following analysis will assume the existence of substantial impact by manipulating entities that are successful in persuading and exerting influence, in the hope that substantial and relevant empirical findings will be presented by others in the near future.

B. Why is Manipulation Wrong?

The question in the subtitle above seems unnecessary, as manipulation is widely and intuitively understood to be a derogative term. Yet such intuitive thinking does not get us very far when regulatory steps are considered, and counter-interests must be balanced. Consider, therefore, the following three arguments striving to articulate the problematic aspects of this form of conduct. Each such argument will be met with some basic musings regarding specific and initial shortcomings it might entail (more substantial analytical shortcomings will be stated in the next subsection — II.C):

1. The "Welfare" Perspective — Market "Manipulation"[61]

From a law-and-economics perspective, manipulation leads to inefficient outcomes. It is duly noted that some readers and commentators might find the usage of a law-and-economics analysis to address notions that closely relate to individual autonomy to be an ill fit.[62] However, applying this perspective allows for pointing out unique aspects of this issue and flaws in the popular arguments often set forth.

According to this economically-driven line of thought, a successful manipulation will generate a suboptimal transaction, in which individuals fail to properly exercise their preferences. To demonstrate, consider a situation in which the manipulation pertains to the sale of products — such as running shoes. If the manipulation proves successful, consumers will transfer a surplus to the marketing firms (the shoe seller/manufacturer or other middlemen). In other words, this welfare-reducing dynamic will lead individuals to obtain products (the specific noted shoes) they don't want (and which are therefore wasted), and firms to obtain funds they should not have (as other entities would make more efficient usage of this resource).[63]

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61 For a similar (yet not identical) analysis of this issue, see Sunstein, *supra* note 2, at 218-19.

62 Indeed, Sunstein notes that "the most strongly felt moral objections to manipulation are deontological rather than utilitarian in character." *Id.* at 217.

63 Calo, *supra* note 1, at 1003 (referring to the concern that manipulation would enable the extraction of rents or promote needless transactions). *See also id.* at

This economics-based argument relies on a non-trivial assertion: that consumers confronted with manipulation eventually do not act in accordance with their preferences, thus leading to the suboptimal outcome.[64] Therefore, the argument assumes that individuals indeed have stable preferences. However, in case the manipulation causes individuals to change their preferences and act in accordance to these new preferences, the subsequent allocation might indeed prove optimal (as it is now in-line with their preferences). Therefore, this argument, while analytically elegant, is not without substantial problems. This problem might be somewhat mitigated by the introduction of a richer and more nuanced understanding of "preferences," as set forth in the next subsection.

Furthermore, even if individuals are eventually unaffected by the manipulative steps given self-protective measures they might take,[65] such measures are often both costly and time-consuming, thus generating waste and decreasing welfare.[66] For instance, ad recipients might opt to devote substantial resources to installing ad blockers so as to avoid these upsetting messages. In addition, the manipulative measures might decrease consumer utility in other ways, such as by undermining market trust. For instance, ad recipients, in response to these manipulations, might become stressed by said ads (for instance, emphasizing their bad health), and might even opt to shun the relevant market altogether due to their loss of trust in the vendor's conduct, while assuming that other vendors will follow suit. Note that this welfare-centric concern has a distributive/fairness variation as well, as those most often and severely affected by these wealth transfers are poor and vulnerable individuals.[67]

2. The "Autonomy"-Based Perspective

From yet a somewhat different perspective, manipulative actions could be considered unacceptable, as they interfere with and even undermine individual

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1025.

64 *See id.* at 1033 (noting that individuals do not necessarily act in their "best interest").

65 See discussion of such forms of responses, *infra* note 100 and accompanying text.

66 *See* Eric Posner, *The Law, Economics, and Psychology of Manipulation* 9 (Coase-Sandor Working Paper Series in Law & Econ. No. 726, 2015), https://chicagounbound.uchicago.edu/law_and_economics/751/. *See also* Calo, *supra* note 1, at 1027 (addressing the notion of "transaction costs" in this context).

67 *See id.*

autonomy.[68] "Autonomy" — as defined by Gerald Dworkin — constitutes the ability to make informed decisions regarding one's life, while choosing between several reasonable options.[69] Autonomy should be considered an important social interest which the law should strive to preserve and even promote. Manipulative practices impair the process of choosing, subjecting it to the preferences and influences of a third party, as opposed to those of the individuals themselves.

A more nuanced way to articulate this point, while partially referring to the previous, economic, set of concerns (and their noted flaws), could be premised on the notion of first- and second-order preferences (known as preferences about preferences — such as losing weight, gaining knowledge, keeping safe).[70] According to this notion, an individual's general aspiration is to live out his or her second-order preferences, and that their first- and second-order preferences be aligned. The manipulative steps here discussed lead individuals to exercise first-order preferences that they might find acceptable at the moment, yet are not in step with their second-order preferences. This analytical paradigm allows us to frame manipulation as a temporary measure which nonetheless undermines autonomy — an outcome closer to the apparent effects of ads and other brief communications produced in the abovementioned process. Briefly returning to the previously noted economic discussion, the fact that even in view of manipulations, the second-order preferences remain stable allows for arguing that the manipulation process decreases welfare, as well.

Yet this argument is not without problems. Autonomy is a vague and broad concept. It is often encumbered, and therefore the protection of autonomy is a matter of degree. Establishing the actual and acceptable extent of autonomy harms in every context is a complicated task and might require additional tools. In addition, this specific claim carries with it a set of nontrivial assumptions regarding the validity of the first/second-order preference taxonomy.

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68 Gerald Dworkin, The Theory and Practice of Autonomy (1988); Michal S. Gal, *Algorithmic Challenges to Autonomous Choice*, Mich. Telcomm. & Tech. L. Rev. 17 (forthcoming 2018).

69 Note that other definitions were used at this juncture, for instance, Calo argues that these forms of manipulation undermine autonomy, while defining this term as the absence of vulnerability or ability to act in self interest. Calo, *supra* note 1, at 1034. The definition used in the text is preferred because of its additional details.

70 Cass R. Sunstein, *Legal Interferences with Private Preferences*, 53 U. Chi. L. Rev. 1129 (1986). *See also* Eyal Zamir, *The Efficiency of Paternalism*, 84 Va. L. Rev. 229, 243 (1998).

3. Of Mice and Men

Yet a third way to articulate the manipulation-based argument is to note that such actions are unacceptable as they amount to human experimentation. Behind this populist statement stands a much deeper argument, that conduct which features individuals treating others as a means to an end, rather than providing them with the proper level of respect,[71] is socially unacceptable. In addition, one might note that this conduct indicates a failure to respect users and treat them with dignity.[72]

This argument's central advantage is its deontological emphasis. For its application, it does not require the manipulation to prove successful and can merely rely on the ill intent of the manipulating parties. However, this argument is not without severe flaws. Individuals have always been subjected to experimentation by both their governments and firms.[73] Disney, for instance, has subjected visitors to different queue formations at distinct times, while measuring their relative discontent.[74] These practices were often opaque, and the individuals subjected to them did not acknowledge their existence (although they were "hidden" in plain sight). Yet these practices have not been linked to privacy or even autonomy-based concerns and were considered annoying, at best. Therefore, the experimentation element might not be the dominant problem at the basis of the manipulation intuition.

However, it is possible that the recent strands of corporate manipulation and experimentation venture beyond annoyance and into the land of the unacceptable. The change was brought about by the precise novel elements listed above which feature the personalization of the process (the ability to both learn about and affect a specific individual). In conclusion, this final explanation can supplement the previous two and strengthen the case against manipulation, when applicable.

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71 This notion is related to the Kantian "Categorical Imperative." However, its relation to the Kantian theory is more complicated than is often noted. On the Humanity Formula, see Robert Johnson & Adam Cureton, *Kant's Moral Philosophy*, *in* Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2018), https://plato.stanford.edu/entries/kant-moral/#HumFor.

72 Sunstein, *supra* note 2, at 239.

73 *See* Bambauer, *supra* note 4, at 494 (providing examples of such experimentation, both on- and off-line).

74 Emily Nelson, *The Art of Queueing Up at Disneyland*, 8 J. Tourism Hist. 47 (2016).

C. Regulating Manipulation: Barriers and Flaws

The manipulation-based argument must confront several substantial barriers. These arguments are usually laid out on two layers — one general-normative, the other doctrinal. The following paragraphs address these obstacles, which explain why law rarely intervenes to protect against mere manipulative practices[75] (as opposed to fraud or deceit) in the general context. This is as opposed to instances involving minors and other weaker populations at time of need, where the law often intervenes yet are beyond the focus of this analysis. Furthermore, they explore whether the specific context here discussed calls for a change in the existing overall policy and a shift to greater regulatory intervention.[76]

1. The Autonomous Individual Presumption

Let us begin with a theoretical concern: For the first two arguments against manipulative conduct to be of merit, the manipulation must be assumed to be effective. Yet accepting this premise is highly problematic. Many of our social constructs are premised on the (often fictitious) existence of autonomous individuals who cannot be easily swayed and influenced. To demonstrate, consider three central examples: Much of the justification for voting in a democratic state is premised on the expectation of autonomous voters. Similarly, much of the theory of contracts and the justification for their enforcement is derived from the notion that they are entered into by autonomous beings. The premise of functioning markets (including capital markets) is also based on the understanding that rational individuals reach autonomous conclusions regarding various market transactions.

For all these central social constructs to work, recognition of broad autonomy is essential. Accepting the notion that individuals could be systematically and easily manipulated shakes many of these foundational assumptions; assumptions we might not be willing to set aside yet, as the costs of doing so would be profound. For that reason, social and legal systems must cling to the premise that individuals are generally autonomous, and reject legal protections from manipulative measures.

As a case in point, consider the facts of *Sorrell*. In this seminal case, the U.S. Supreme Court struck down statutes set in place to block the data mining of pharmaceutical prescription data. The proceeds of such analyses were used by the representatives of the pharmaceutical companies to influence

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75 The statement in the text is quite U.S.-centric. European lawmakers are far more liberal in their tendency to enact such laws. See discussion *infra* note 90.

76 *See* Becher & Feldman, *supra* note 2, at 505.

and persuade physicians to prescribe expensive medication (at times in lieu of generic substitutes). As noted, the Court found these statutes to be unconstitutional, given the way they impede the speech of the noted firms. The Court rejected the premise that the persuasion process initiated by the pharmaceutical firms and facilitated by the collection and data mining process was unduly influential, while emphasizing that the audience of such speech were "prescribing physicians" which the Court found to be "sophisticated and experienced" consumers.[77] The Court therefore fully rejected the (probably true) notion that physicians, who make life and death decisions regarding our health, have merely bounded autonomy and might be swayed by "catchy jingles."[78] After all, if physicians cannot be considered autonomous, who could? As noted above, the foundational fictions of society must live on, even at the cost of justifiable protection from manipulation.

At times, the law is willing to accept that the individual's ability to make sound judgements is (partially and temporarily) impaired and takes specific steps to restore autonomy or void decisions made when such impairment is afoot. In these cases, the assumption of autonomy is relaxed. The law, for instances, distances campaigning from polls on election day[79] and voids contracts and wills when coercion and undue influence have been proven. However, these doctrines are usually applied narrowly.[80] The law, as a whole,

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77 Sorrell v. IMS Health Inc., 564 U.S. 552, 574 (2011).

78 *Id.*

79 Burson v. Freeman, 504 U.S. 191 (1992). Yet these laws are closely scrutinized and at times struck down if found to be insufficiently broad, as the Supreme Court recently did in Minnesota Voters Alliance v. Mansky, 585 U.S. ___ (2018). Here, the Court addressed a Minnesota law prohibiting the wearing of a "political badge, political button, or other political insignia" inside a polling place on Election Day. The Court found that Minnesota's political apparel ban violates the First Amendment's Free Speech Clause. The Court recognized the states' rights to regulate polling areas so that they reflect the distinction between voting and campaigning. However, the Court found the statute to be unconstitutional because "the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out," something the noted statutes did not reasonably achieve. *Id.* at 3.

80 One narrow exception pertains to laws regulating advertising. In the U.S., although the Federal Trade Commission has the authority to act on "unfair" advertisements, it rarely does so and focuses on those that are deceptive. John Spanogle et al., Consumer Law 67 (3d ed. 2007). In Europe, existing laws enable taking action against advertisements which might have an "improper influence" over a consumer, yet here too there is a reluctance to take action on the basis of these laws. Iain Ramsay, Consumer Law and Policy 424 (2d ed. 2007).

will not easily part from the notion that individuals are autonomous, even if it is somewhat fictitious, as with that much of the modern state and market will come tumbling down. Thus, even when convincing evidence proves that manipulations are indeed effectively applied, the law would most likely respond by carving out narrow exceptions. Nonetheless, given possible empirical evidence and technological change, brave and substantial changes are inevitable,[81] and rulings such as *Sorrell* must be reconsidered.

2. The Free Speech Interest

Moving from theory to doctrine, perhaps the greatest point of tension the manipulation-based argument sets forth relates to the opposing rights of the suspected "manipulators," especially their rights to engage in "speech." Even when the manipulation unfolds in the commercial context, Sunstein explains that government "would need a powerful justification for imposing regulation."[82]

The fact that speech is effective and convincing is almost never accepted as a proper justification for its prohibition and limitation. In fact, this is precisely the form of speech we, as a society, are interested in. In the words of Justice Kennedy in *Sorrell*, "The State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers."[83]

The free speech counter-argument might be successfully rejected when applied to some of the forms of communication which generate the manipulative processes noted above.[84] For instance, in the advertising context, a popular response to the free speech claim could argue that not all forms of communication involved in the manipulation process are speech and therefore not all of them are protected. For instance, speech would benefit from limited protection

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81 Such changes might already be on their way in the political context. *See* Carole Cadwalladr, *A Withering Verdict: MPs Report on Zuckerberg, Russia and Cambridge Analytica*, The Guardian (July 28, 2018), https://www.theguardian.com/technology/2018/jul/28/dcms-report-fake-news-disinformation-brexit-facebook-russia. This very critical parliamentary committee report regarding the usage of fake news and data in elections set forth extensive recommendations, including substantial auditing of platforms and a ban on political micro-targeted advertising.

82 Sunstein, *supra* note 2, at 238.

83 *Sorrell*, 564 U.S. 552.

84 After all, even Justice Kennedy conceded that this could be done in some circumstances. *Id.* at 573.

when false and misleading.[85] However, the manipulative communications here discussed are not misleading per se. Rather, at least in some cases, they merely strive to "influence consumers on a subconscious or emotional level."[86]

Nonetheless, some scholars argue that even in such latter cases, these forms of manipulative communication should not be considered to constitute speech, as they do not strive to communicate information, but merely to persuade.[87] These arguments might pertain to the abovementioned attempts to circumvent "System II" of the cognitive process and directly impact "System I" (again, returning to the famous cognitive taxonomy set forth by Kahneman)[88] or generate habits using behavioral insights.[89] However, even if we choose to accept this controversial claim, it is of limited scope, as not all forms of manipulation fall into this category of "mere persuasion." For instance, at times, manipulative messages strive to scare and generate fear by describing intimidating scenarios (even in plain text). Or they might use specific language to generate trust, frame a discussion, or create an anchor (which will later serve the vendor's interests during negotiations). In these cases, finding persuasive communications to be excluded from free speech protection would be quite challenging (under existing doctrine and case law) and therefore their direct prohibition or regulation would prove difficult. It is duly noted that outside the U.S., the balance between these rights is different, with far lesser weight given to the "free speech" interest.[90]

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85 Note that, at times, even false speech will receive protection, at least in the U.S. (in other words, such actions are not an unprotected category of speech). However, speech would be unprotected if fraudulent. Nonetheless, false speech would receive a lower level of protection given its limited social value. Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of United States v. Alvarez*, 76 Alb. L. Rev. 499, 504-05 (2012).

86 Berman, *supra* note 56, at 500.

87 *Id.* The author also notes that at times these forms of manipulative communications threaten important interests such as health and public safety. Yet such instances should probably be subjected to balancing tests which are beyond this current inquiry. *See also id.* at 514.

88 *See* Kahneman, *supra* note 46.

89 *See* Greenwald, *supra* note 51.

90 In Europe, for instance, it would be easier to find some of the practices discussed here to be in breach of the *Unfair Commercial Practices Directive*. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and

There are several other doctrinal exceptions which might be applied in this context and show some promise in rebutting the free speech claim. For example, Ryan Calo notes specific instances in which U.S. law allowed for the regulation of persuasive speech when targeted at vulnerable individuals (such as those who themselves or a family member of theirs suffered a personal injury)[91] and carried out via personal solicitation.[92] Calo proceeds to apply this exception to the manipulative dynamics here discussed: processes which personalize their interactions and strive to identify and even create psychological vulnerabilities, and then move to take advantage of them. If and when substantial empirical evidence surfaces regarding the actual influence of manipulation, such doctrinal exceptions should indeed be expanded and considered in this novel and broader context as well. In that way, free speech concerns would fail to block anti-manipulation regulation.

3. The Marketplace (of Ideas) Counter-Argument

Even if we accept the notion that novel practices enable external entities to exert undue influence over a given individual, this still need not mean that legal intervention is due. As in other business-related contexts, the invisible hand (this time of speech — in addition to that of markets) might protect individuals from the concerns of manipulation.[93]

In many contexts, it is fair to assume that some of the problematic aspects of manipulation will be mitigated by countering forms of manipulation set forth by other, interested, parties.[94] In theory, this battle of manipulators

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Regulation (EC) No 2006/2004 of the European Parliament and of the Council, 2005 O.J. (L 149) 22. These laws have been adopted in spite of a possible conflict with free speech interests.

91 Calo, *supra* note 1, at 1038-39. Calo further notes that many of today's practices could also be considered to be "misleading" (and thus outside the First Amendment's protection) because recipients are misled to believe they are receiving ads similar to those others view as well. Over time and as the public understands the inner workings of behavioral marketing, this argument will surely lose its force. Thus, it should not be relied on even at this early juncture.

92 Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

93 Sunstein, *supra* note 2, at 240 (" . . . . the ethical taboo on manipulation is substantially weakened, in part on the theory that competitive markets impose appropriate constraints against undue harm."). Sunstein notes, however, that this assertion is not always accurate.

94 Teichman & Zamir, *supra* note 20, at 26 (stating, yet ultimately rejecting, the notion that "competition crowds out irrational behavior," citing, among others, Richard A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, 73 U. Chi. L. Rev. 111, 118-32 (2006)).

will lead to a standoff, with the competing manipulative forces substantially offsetting each other, thus leaving individuals exactly where they started (but perhaps even more resilient and knowledgeable). Or, to paraphrase the famous Brandeis quote, the answer to manipulation might simply be "more manipulation."[95]

Additional market-like dynamics might unfold as well. Manipulation, once exposed, could be bad for business. Consumers do not appreciate being subjected to manipulation.[96] Therefore, firms might fear engaging in manipulation to begin with, as such actions might be exposed by their competitors, the press or the government — all driven by different yet powerful incentives to disclose.[97] Beyond theory, this counterargument might generate specific yet moderate counter-manipulation remedies; to battle manipulation, regulators might call for enhanced forms of disclosure regarding these practices — thus providing information to fuel the noted dynamics.[98] Disclosure-based responses would most likely survive free speech challenges given their neutral character.

Several layers of responses could be set forth to limit the force of this critique. Generally, manipulation is a substantial concern which requires an immediate and direct response, regardless of the noted market forces.[99] First, while manipulative forces within the marketplace of ideas might sway individuals in various directions, it is probably wrong to assume that these forces will be balanced out and offset each other. Rather, they will be slanted in a specific direction which would prove harmful to the individual consumers. Similarly, the "shaming" dynamic noted might not unfold given the complexity of the individualized and stealthy manipulations currently exercised.[100] These

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95 The original and famous Brandeis quote is: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, concurring).

96 Indeed, Sunstein indicates that one of the key elements to manipulation is the sense of "betrayal" which follows the discovery of being subjected to manipulation. *See* Sunstein, *supra* note 2, at 217.

97 *Id.* at 230.

98 Regarding the benefits and importance of disclosure in this context, see Calo, *supra* note 1, at 1044.

99 For a general discussion as to the problems of applying the "market"-based paradigm to speech-related contexts, see David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colom. L. Rev. 334 (1991).

100 For instance, consider the famous New York Times report regarding manipulations conducted by Target. In this case, Target feared that merely sending advertisements for baby-related products would prove too creepy. It opted for "burying" such ads among clearly irrelevant advertisements. Such sophisticated strategies

might be very difficult to reveal, or be grasped by public opinion, when encountered or exposed.[101] In addition, firms do not often engage in exposing their competitors' shortcomings.[102]

To demonstrate, consider the context of credit card teaser rates. Some credit companies strive to manipulate individuals to spend and enter various credit traps. In theory, conservative lenders should be alerting consumers to the problematic deals they might be entering with other predatory lenders or striving to manipulate them into preferring more conservative lending options. However, for the various reasons noted above, this countering process rarely unfolds.[103]

Second, even if these mitigating forces unfold and lead individuals back to "square one," where they can exercise their autonomy, the entire decision-making process may prove to be a futile, yet costly, endeavor.[104] Thus, on efficiency grounds, manipulative processes (even countering ones) generate waste and thus should be limited.

Third, when information comes at an individual from only one source, the market-like dynamic will not unfold. The digital environment currently features several instances (at times due to network effects) in which such "virtual" monopolies have formed. Consider, for instance, the context of social networks, search engines and even very large online retail.[105] In these cases, the case for anti-manipulation laws is substantially stronger.

To some extent, this point is already recognized in current law, which regulates instances in which individuals might be manipulated yet are unable to engage in comparative research of their options with other vendors. Consider "ambulance chaser" laws and cases, which pertain to lawyers offering

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substantially encumber the shaming dynamic noted. Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. Times (Feb. 16, 2012), https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html.

101 *See* Calo, *supra* note 1, at 1030 (noting that it is unlikely that consumers will "catch up" with the manipulative strategies).

102 Teichman & Zamir, *supra* note 20, at 28.

103 Sunstein, *supra* note 2, at 238; Oren Bar-Gill & Ryan Bubb, *Credit Card Pricing: The Card Act and Beyond*, 97 Cornell L. Rev. 967 (2012).

104 This is a common argument in the "public choice" context to justify anti-lobbying regulation. *See* Dennis C. Mueller, Public Choice 117-19 (1979) (discussing the inefficiencies of lobbying).

105 Richard Posner, *Orwell Versus Huxley: Economics, Technology, Privacy and Satire*, 24 Phil. & Literature 1, 5 (2000) (noting that technology might "invite" monopoly by lowering costs and reducing the costs of control, while also noting that the opposite might also be true in some other instances in which the digital economy will promote decentralization).

their services to individuals who suffered traumatic events. These serve as examples of instances in which the law looks out for individuals when they are psychologically unable to seek out additional offers and opinions (and therefore face what is for them a monopoly-like situation).[106] The ongoing regulation of funeral home pricing by the FTC features similar facts and rationales for consumer protection from manipulative practices.[107] Similarly, laws provide cool-off periods for door-to-door sales.[108] These could also be seen as instances featuring individuals who are pressed for time, refrain from proper comparative shopping research, and are therefore susceptible to making wrong decisions. With some legal imagination, all these doctrines could be stretched to counter online manipulations which transpire in an assumedly competitive environment, when the consumer is virtually locked into one platform.

Fourth and finally, the marketplace argument provides a response to the utilitarian justifications noted yet does not mitigate the deontological concerns that manipulations raise. Even with the market forces in play, the practices noted involve disrespectful conduct which society certainly might be discontent with and opt to regulate when deemed unacceptable.

4. The Static vs. Dynamic Perspective

The presumption that the manipulative practices and dynamics here discussed are effective is mostly based on specific psychological experiments (beyond the fact that firms invest many millions in their implementation,[109] thus indicating that they at least believe such practices will prove effective).[110] Yet it is unclear whether these empirical findings can prove that a one-time manipulation carried out in a lab setting will successfully unfold over time and throughout society. To make a convincing case for anti-manipulation laws and rules, one must make a stronger case which proves long term and sustainable effects.

However, the long-term effects of manipulation schemes could be contested. Individuals might, with time, adapt to these manipulative processes. The

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106 Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). *See also* Berman, *supra* note 56, at 505.

107 *See The FTC Funeral Rule*, Fed. Trade Comm'n, https://www.consumer.ftc.gov/articles/0300-ftc-funeral-rule (last visited July 30, 2018).

108 See sources listed in Becher & Feldman, *supra* note 2, at 468.

109 Calo, *supra* note 1, at 1010 (noting, among others, the considerable size of Microsoft's anthropology department).

110 *See id.* at 1009 (citing a vast number of psychological studies); Teichman & Zamir, *supra* note 20, at 29 n.169 (citing substantial evidence of such manipulation).

adaption might be of several forms. Individuals could develop resilience towards these methods of influence given their experience. Or they might engage in self-correction or even avoidance of the noted problematic practices.[111] Furthermore, educational methods, both formal and informal, might also prove effective in creating such resilience. Thus, it is quite possible that the manipulation concern is overblown.

This response is yet an additional call for long-term empirical testing of manipulations, their effects and outcomes. Nonetheless, regulation might still be called for in the interim,[112] as the public slowly adapts and the relevant firms continue to suck up substantial consumer surpluses. Furthermore, as the public adapts, the firms might be adapting as well, introducing more effective manipulation mechanisms and always remaining a step ahead of the public. This is yet another reason why the development of regulatory measures is essential.

5. The "Slippery Slope"/"Difficult to Define"/"What's the Difference" Argument

Arguing that the noted dynamics amount to unacceptable forms of manipulation and taking action to block them calls for properly defining which of such dynamics are problematic. As noted, persuasion attempts and even some forms of manipulation are a part of any form of discourse. Thus, the challenge of mapping out the confines of prohibited manipulation would be a very difficult one,[113] running the risk of prohibiting behaviors and forms of discourse that society will ultimately find valuable. The prohibition on manipulation, if construed too broadly, might also prove to be a limitation on innovation,[114] though I concede that given the severity of the possible manipulation-based actions, this latter claim is relatively weak.

To sum up this section, there are substantial reasons to enhance regulation that strives to block manipulative practices, although such steps will prove complicated and meet both theoretical and doctrinal resistance. In addition, applying these manipulation-based claims to justify concrete remedies is an uphill battle because such remedies are almost nonexistent in the present. Yet

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111 Becher & Feldman, *supra* note 2, at 492; Sunstein, *supra* 2, at 227 (discussing individuals' ability to discount the effects of manipulation).

112 Teichman & Zamir, *supra* note 20, at 27 (stating their belief that the adaption period would be extensive).

113 Clifford, *supra* note 50, at 33.

114 For a similar argument in the privacy-related context, *see* Zarsky, *supra* note 13, at 139 (as well as a discussion of counter-claims). Note that many of the so-called manipulative practices here addressed are the key business models of the internet age.

given the benefits and importance of relying on such arguments in the data protection/privacy context (given the weakness of other analytical arguments), anti-manipulation provisions should certainly be seriously considered. The caveats here noted will provide the outer boundaries of novel anti-manipulation laws and map out the balances required when structuring their scope.

Conclusion: Manipulation and the Future of Privacy

Adding the manipulation-based argument to the analytic and doctrinal arsenal of measures which enable legal intervention in the new digital environment seems to be a helpful notion if and when the analytical barriers noted are overcome. Yet what ought to be the regulatory and jurisprudential response after this looming concern is recognized?

On the doctrinal level, several measures can already be introduced, while applying existing laws, including data protection provisions and consumer protection laws. The General Data Protection Regulation (GDPR)[115] recently applied in the EU will guide nations worldwide in their attempt to overcome the challenges of data protection in the digital age. The justifications for such protection in Europe are well founded in the notion of human rights,[116] as well as the control individuals should have over their personal data. However, a nuanced review of the GDPR reveals additional analytical foundations which justify the steps it takes and are linked to the objectives discussed in this Article. Recital 4, for instance, notes the "freedom of thought" — a notion which could easily be tied into the broader theme of protection from manipulation. Therefore, it is no surprise that some scholars read the GDPR's recitals to indicate that manipulative measures are subject to the Regulation's reach regardless of whether the process entails collecting identifiable information.[117] The analytical discussion here presented will justify, in many cases, a broader

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115 GDPR, *supra* note 30.

116 *See* Charter of Fundamental Rights of the European Union 2012/C 326/02, art. 8, 2012 O.J. (C 326), 391.

117 Frederik J. Zuiderveen Borgesius, *Singling out People without Knowing Their Names — Behavioral Targeting, Pseudonymous Data, and the New Data Protection Regulation*, 32 Computer L. & Security Rev. 256 (2016). *See also* Clifford, *supra* note 50, at 21-23. This conclusion is premised on the analysis of the GDPR's Recital 24, which indicates that tracking and profiling pertains to actions "particularly in order to take decisions concerning her or him." Arguably, the GDPR might be expanding its reach and remedies to all instances in which data enables the singling out of a specific individual. GDPR, *supra* note 30, at recital 24.

interpretation of the GDPR's rules to include instances where manipulation takes place. Thus, manipulating firms will be subjected to, among others, requirements to disclose their data and practices.[118]

In the U.S., Section 5 of the Federal Trade Commission Act[119] could be applied to prohibit "unfair" acts. The FTC rarely takes action against advertising which is not fraudulent or deceitful.[120] Yet the analysis set forth here could justify greater action against manipulators (as here defined) in accordance with this foundational provision.[121] However, other direct and indirect legal measures must be introduced.

In terms of indirect measures, Ryan Calo explains that aggressive regulatory steps to promote privacy protection will limit the concern here discussed; after all, personal data is the fuel of the manipulation process.[122] Thus, limiting the firm's collection of such data will directly lead to limited manipulation concerns. However, as detailed in Part I, the enforcement of privacy rights is meeting substantial challenges on both a theoretical and a doctrinal level. Therefore, quite to the contrary, it might be up to novel regulatory steps to overcome the manipulative challenges, with privacy tools being set aside.

This brings us to this Article's final provocative query; given the fact that manipulation-based rules provide substantial advantages and strive to promote the same underlying interests as privacy laws (autonomy, dignity and democracy), once introduced, should they (as well as other harm-related remedies) perhaps supplant information privacy laws and regulations as the central right to enforce and protect in the digital age? The discussion noted above might be hinting at the "death of privacy." Yet this co-called "death" is different than the one noted in other contexts.[123] Privacy is not "dead" because the right is unenforceable or because data subjects sheepishly concede it and

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118 This statement faces some difficulty, as art. 2(1) of the GDPR sets its "Material Scope" to include "the processing of personal data." GDPR, *supra* note 30, at art. 2(1).

119 15 U.S.C. § 45(a)(1) (1938).

120 *See* Calo, *supra* note 1, at 1043.

121 See suggestions set forth by Hartzog along these lines. Woodrow Hartzog, *Unfair and Deceptive Robots*, 74 Md. L. Rev. 785 (2015). Note that given expansive regulatory measures taken in the 1980s, Congress has substantially limited the FTC's jurisdiction to act solely under this prong. Spanogle et al., *supra* note 80, at 67-68.

122 Calo, s*upra* note 1, at 1042.

123 *See, e.g.*, A. Michael Froomkin, *Death of Privacy?*, 52 Stan. L. Rev. 1461 (2000).

sell it off without a second thought. Rather, it is "dead" because it has lost its significance and has merged into other doctrines.[124]

To a certain extent, the process here discussed might be a reversal of the one launched by Samuel Warren and Louis Brandeis in their seminal article "The Right to Privacy."[125] In that article, the authors assembled the right to privacy from several other doctrines, while noting the importance of setting a central notion and right in place. It is possible that the day to deconstruct privacy has arrived.[126] Therefore, rather than chase down firms collecting and analyzing information without proper consent, society's shift should be towards regulating their subsequent manipulative (and other abusive) uses. And while maintaining overlapping laws to address similar negative dynamics is possible, it might lead to a non-elegant, confusing and at times contradictory legal regime.

Even according to this narrative, privacy theory and doctrine will have a crucial role in society. There are still situations in which the core values of individual autonomy and protection from scrutinizing gazes and data collection are highly significant. These will pertain, for instance, to surveillance of private communications, or to the prohibitions on the collection of health information. However, the strict enforcement of privacy in this sense might be reduced to its limited yet essential core. For other issues — such as those related to commercial entities and marketing settings — perhaps manipulation-based rules and regulations should (at least) lead the way. This radical notion should be borne in mind as empirical evidence regarding the significance of today's manipulation's effects begins to accumulate.

There is an alternative narrative to privacy theory, doctrine and practice in the age of anti-manipulation enforcement: Privacy is not dead. It has merely mutated. The concepts of manipulation here described all fit within the confines of a broader and somewhat different notion of data protection — one that might strive to counter asymmetries brought about by technology

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124 One might argue that maintaining the overarching framework of "privacy law" will add coherence and elegance when dealing with varied legal issues all coming under the umbrella of "privacy." However, Daniel Solove has famously pointed out that the concept of "privacy" is splintered into a variety of subtopics. Therefore, coherence need not follow by retaining this over-arching theme. Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. Pa. L. Rev. 477 (2006).

125 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

126 This is not the first time that this notion has been set forth. Richard A. Epstein, *Deconstructing Privacy: And Putting It Back Together Again* (John M. Olin Program in Law & Econ. Working Paper No. 75, 1999).

in an effort to promote human autonomy.[127] It is now the duty of privacy theorists to establish whether this ever-changing term is sufficiently broad both theoretically and practically to include this transformation and bring anti-manipulation measures under its wing.

In conclusion, the precise impact manipulation regulation will have on the overall ecosystem of data-related laws and regulation is still unclear. But it will no doubt be substantial. This Article's analysis will hopefully contribute to clarifying this important role.

127 *See* Clifford, *supra* note 50, at 16. *See also* Calo, *supra* note 1, at 1028.