

THE DOG THAT DID BARK: FIRST AMENDMENT PROTECTION OF DATA MINING

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INTRODUCTION

In Sir Arthur Conan Doyle’s short story *Silver Blaze*, Sherlock Holmes noticed that the guard dog for a famous racehorse did not bark on the night that the horse disappeared and its trainer was found murdered on the moor.¹ Holmes correctly deduced from this that the dog must have known the killer.² Inspector Gregory of Scotland Yard overlooked the same clue when he earlier accused a stranger of the murder. In modern parlance, reference to “the dog that did not bark” points to a nonevent, the significance of which others have failed to realize.³

Professor Ashutosh Bhagwat provides, in his article for this symposium,⁴ an excellent analysis of the significance of *Sorrell v. IMS Health Inc.*⁵ to attempted government regulation of speech. He focuses on the Court’s comments on that portion of the Vermont law under review that restricted the sale or disclosure of information.⁶ Under Professor Bhagwat’s interpretation, the majority decision does not reach whether the First Amendment requires strict scrutiny of laws restricting disclosure of facts, instead deciding the case on other grounds.⁷ He construes this silence—the “lack of a bark”—as signaling that the Court might afford full First Amendment protection of sales and disclosure of information in future cases.⁸ He then builds a strong argument for treating the sale or disclosure of information as fully protected speech under existing doctrine.⁹ Unhappy with this result, he urges leashing of the dog so that if it should bark, its bite

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1. ARTHUR CONAN DOYLE, *Silver Blaze*, in THE MEMOIRS OF SHERLOCK HOLMES 1, 26 (1922).

2. *Id.*

3. See, e.g., Leslie H. Gelb, *Foreign Affairs; Why the U.N. Dog Didn’t Bark*, N.Y. TIMES, Sept. 25, 1991, at A23 (explaining why world leaders did not applaud President’s Bush’s speech to the United Nations).

4. Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855 (2012).

5. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

6. Bhagwat, *supra* note 4, at 859–61.

7. *Id.* at 860.

8. *Id.* at 861–62.

9. *Id.* at 862–67.

won't reach regulation of speech that is not essential to self-governance or involves matters of purely private concern.¹⁰

Our view is that Professor Bhagwat has this wrong in several ways. *Sorrell* should not be read as a nonevent that simply offers a clue about how the Court will act in the future. This decision is a loudly barking dog, baring its teeth at the red-handed murderer still in Silver Blaze's stable—bald-faced government censorship through suppression of distribution of truthful facts. Second, there is no reason to put this dog on a leash. Government censorship of matters of private concern creates just as many evils for the values enshrined in the Constitution as does government censorship of matters of public concern. As Justice Kennedy recognized in *Sorrell*, a “consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.”¹¹ The First Amendment has a broader role to play in our society than protecting an individual’s ability to participate in self-governance or talk about matters of public concern. It fundamentally safeguards the value of private property and enterprise by ensuring that every Steve Jobs who needs to find and learn the facts needed to make an iPad work, *and* to sell it to millions, can do so. Third, abundant alternatives to government regulation of private information already exist to protect individuals from harmful disclosures of private information as well as from unauthorized exploitation of shared information. *Sorrell* is not just dozing lazily in the corner while the object of its profession is stolen, it is a dog awakened by the stranger it was meant to guard against and its teeth are sunk firmly in the stranger’s ankle.

We first will examine the scene of the crime—the case presented in *Sorrell* and how the Court viewed it. We will then explain why, in this case, the dog did bark—making clear that strict scrutiny is required of all government regulations that restrict the sale or disclosure of information, not just those prohibiting disclosure of information of public concern. Next, we will show why no leash can, or should, be put on this dog. Finally, we will show that the problem that drove Professor Bhagwat to want to leash the dog has a far better solution than adoption of the First Amendment theory he proposes. Professor Moriarty he may not be, but Professor Bhagwat has given us a devious case to be solved. Deerstalker on please.

10. *Id.* at 876–77.

11. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (internal quotation marks omitted)).

I. THE SCENE OF THE CRIME

The Supreme Court describes the challenged law in *Sorrell* as restricting “the sale, disclosure, and use of pharmacy records that reveal . . . practices of individual doctors.”¹² In fact, the law operates in a slightly different way. The first challenged provision states:

A health insurer, a self-insured employer, an electronic transmission intermediary, a pharmacy, or other similar entity shall not sell, license, or exchange for value regulated records containing prescriber-identifiable information, nor permit the use of regulated records containing prescriber-identifiable information for marketing or promoting a prescription drug, unless the prescriber . . .¹³

The Vermont legislature designed this provision with one thing in mind—to cut off the supply of data that IMS Health and other publishers were obtaining from pharmacies and that other entities in the prescribing chain would acquire in the course of filling a prescription. It is analogous to a law that would instruct the owners of land containing coal not to sell their coal to others, or to give it away. It also is analogous to a law that would prohibit sources from conveying information to reporters, and such laws generally are recognized as prior restraints on speech.¹⁴ In essence, the direction given by the law was to keep the coal in the mine and to stop sources from talking to reporters.

Now, notice that the first sentence of this provision of the law imposes both a sale, license, and exchange restriction and a use restriction.¹⁵ The Vermont Attorney General interpreted the law as applying only to data used for either marketing or promotion.¹⁶ The Solicitor General of the United States argued in the Supreme Court, however, that the Court should read the law more broadly as prohibiting *all* sales, licenses, and exchanges for value, rather than only those for marketing and promotion.¹⁷ Vermont conveniently adopted this interpretation of the law in its reply brief and asserted that the law therefore could not be treated as simply a restriction on

12. *Id.* at 2659 (citing VT. STAT. ANN., tit. 18, § 4631 (2010)).

13. *Id.* at 2660 (quoting tit. 18, § 4631(d) (internal quotation marks omitted)).

14. *See, e.g.,* *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (treating a statute prohibiting publication of illegally intercepted electronic communication as a prior restraint as applied to the disclosure of important information to journalists).

15. tit. 18, § 4631(d).

16. Brief for Petitioners at 10–11, *Sorrell*, 131 S. Ct. 2653 (No. 10-779).

17. Brief for the United States as Amicus Curiae Supporting Petitioners at 12, *Sorrell*, 131 S. Ct. 2653 (No. 10-779).

pharmaceutical manufacturers.¹⁸ Its law, Vermont suddenly claimed, could be read as simply stating that no pharmacy could sell prescriber data, for any purpose, unless the sale fell within an explicit statutory exception. Although the Supreme Court criticized Vermont for changing its interpretation of the law, the Court concluded that the law “cannot be sustained even under the interpretation the State now adopts,”¹⁹ pointing out that exceptions to the law would allow “the information to be studied and used by all but a narrow class of disfavored speakers.”²⁰

This aspect of the law alone likely would have been effective, even though it allowed sales for purposes *other* than marketing, because it directed companies selling data for such other purposes to restrain buyers from using it for marketing purposes without prescriber consent.²¹ Under this part of the law, for example, a pharmacy could sell the information to a manufacturer for non-marketing uses, such as locating doctors who might be interested in conducting clinical trials. But the law also would require the pharmacy to impose a restriction on the buyer not to use it for marketing or promoting a product. A small flaw in this set up was that it provided the state no direct enforcement mechanism against manufacturers if data sellers failed to impose restrictions on data use or failed to enforce restrictions they did impose. So Vermont elected to take a belts-and-suspenders approach, including this second provision to the law: “[P]harmaceutical marketers shall not use prescriber-identifiable information for marketing or promoting a prescription drug unless the prescriber consents”²² This clarified that, even if a pharmacy or intermediary sold data, the state could bring an action against both the seller and the buyer of the data.

The lawsuit filed by IMS Health challenged both aspects of the law because both directly interfered with its acquisition and publication of information. The first part stopped IMS Health from obtaining information from its sources. The second prevented it from selling information to its subscribers for the purposes they chose.

We did not regard it essential to prove that the legislature intended to suppress a particular message due to its disagreement with the message (although abundant evidence of this was available) or to prove that the law singled out pharmaceutical manufacturers in a way that could be used to

18. Reply Brief for Petitioners at 15, *Sorrell*, 131 S. Ct. 2653 (No. 10-779).

19. *Sorrell*, 131 S. Ct. at 2662.

20. *Id.* at 2668.

21. The Second Circuit interpreted the Vermont law to apply both to the initial entities that receive prescriptions from patients, the pharmacies, and companies that might acquire the information from them, such as IMS Health. See *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 273 (2d Cir. 2010), *aff'd*, 131 S. Ct. 2653 (2011).

22. *Sorrell*, 131 S. Ct. at 2660 (quoting VT. STAT. ANN., tit. 18, § 4631 (2010)).

editorial detailers' messages to doctors (although this also seemed clear). To us, the central and most obvious First Amendment violation was that the state silenced a source from conveying information to IMS Health and its co-plaintiffs and prohibited their subscribers from using information provided to them. This made further publishing commercially impossible in two ways.

Suppose that Vermont had elected to prohibit anyone from telling reporters for the *Burlington Free Press* who their doctors were and which drugs they had prescribed for them. Suppose also that Vermont had prohibited subscribers to the *Free Press* from using any information in the newspaper about doctors to conduct a pharmaceutical marketing program. The courts would have immediately recognized this obvious imposition of a content-based prior restraint on press sources and subscribers as patently unconstitutional. The facts that IMS Health did not publish its reports in the form of a newspaper, that it used extremely sophisticated computer techniques to gather and publish information, and that not many people knew how IMS Health, Verispan, or Source Healthcare Analytics conducted their publishing businesses, made this First Amendment violation slightly less obvious. But, it is still apparent.

In the section of his article entitled "The Dog that Did Not Bark," Professor Bhagwat correctly points out that the Supreme Court avoided deciding the central question presented by IMS Health by focusing on the fact that the law "enacts content- and speaker-based restrictions."²³ The Court emphasized repeatedly that the law on its face "disfavors specific speakers"²⁴ and that the legislative record betrayed a legislative objective of hobbling only one class of speakers.²⁵ The Court held that the "First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'"²⁶ In other words, even if Vermont had enacted a law that did not directly suppress any speech at all, such as a law prohibiting detailers from using cars to conduct their work, or restricting the number of visits they could make, or the time of day when visits could be made, the law would be

23. *Id.* at 2663; *see also* Bhagwat, *supra* note 4, at 859 (discussing the Court's characterization of Vermont's restriction on use of data for marketing as a content- and speaker-based restriction).

24. *Sorrell*, 131 S. Ct. at 2663.

25. *Id.* Under the statute, insurers who pay for prescriptions could use the data to urge doctors to prescribe less expensive generic or lower-priced branded drugs.

26. *Id.* at 2664 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

subject to heightened scrutiny as long as the purpose of the law was to suppress the message the detailers were delivering.²⁷

That the Court would view the law in this fashion was not easily predicted. “The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”²⁸ An example of a content-based law would be a prohibition on sleeping overnight in public parks adopted to prevent campers from conveying a message that protests homelessness.²⁹ The same law would be regarded as content-neutral if its justification were maintenance of the aesthetics of the parks.³⁰ The “speech” that is the target of the law is sleeping overnight and the simple question is whether the law was adopted to suppress that speech or for some other purpose unrelated to suppression of the speech. A similar example can be drawn from laws prohibiting adult entertainment that are justified, or not, by reference to the supposed secondary effects of such entertainment.³¹

If one sees the Vermont law as suppressing pharmacy speech to IMS Health, it is difficult to say that the state adopted the law due to disagreement with *that* message because the message is simply which doctor prescribed which drugs. On the other hand, if one starts with the proposition that the legislature adopted the law to suppress the speech of detailers, it is not obvious that the law suppresses *that* speech. It is not even obvious that the state disagreed with the message that speech conveys—details regarding such things as Food and Drug Administration mandated indications and usage, dosage and administration, contraindications, warnings and precautions, adverse reactions, and drug interactions. Vermont’s real disagreement was with doctors’ prescribing decisions. The Court might have viewed that as a justification unrelated to the content of the regulated speech. In order to classify the Vermont law as unconstitutional due to an improper purpose, the Court would have to cut through the complexities of the law and treat it simply as silencing speakers who were trying to persuade doctors to prescribe drugs the state did not want them to prescribe. Ultimately, this is precisely what the Court did before stating that “heightened judicial scrutiny is warranted” from these features of the law alone.³²

27. See generally Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784 (2008) (tracing the history of how courts have determined legislative purpose and its relevance to the constitutionality of legislation).

28. *Ward*, 491 U.S. at 791.

29. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984).

30. *Id.*

31. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986).

32. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011).

II. THE BARK

When the Court then turned to the State's argument, from *Los Angeles Police Department v. United Reporting Publishing Corp.*, that heightened scrutiny should not apply because its law should be treated as a restriction on access to information rather than a restraint on speech, the Court paused to bark.³³ In *United Reporting*, the Court considered "a governmental denial of access to information in its possession."³⁴ The state allowed access to the information—arrest records—to any requester as long as the requester signed a declaration under penalty of perjury that the information would not be used directly or indirectly to sell a product or service to any individual or group of individuals.³⁵ Vermont asserted that even though its law extended to privately owned entities (such as pharmacies), they operated only by virtue of holding a government license and so could be treated as the equivalent of governmental entities. The Court rejected this argument, holding that the "difference" between a government and a private entity licensed by the government "is significant."³⁶ "An individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated."³⁷ Maybe not a bark then, perhaps just a low growl, but certainly fodder for the next case arising from a simple government regulation prohibiting a private person or entity's disclosure of information.

Next, the Court surprisingly indulged Vermont's argument further and assumed, for argument, that if pharmacies were treated as government, the plaintiffs still could challenge Vermont's law on First Amendment grounds. "Here," the Court held, "the respondents claim—with good reason—that § 4631(d) burdens their own speech."³⁸ Now, we must regard this as something of a full-scale bark. Although the First Amendment has been treated as assuring access to criminal and civil judicial proceedings,³⁹ it generally has not been viewed as imposing limits on the discretion of the

33. *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999).

34. *Id.* at 40.

35. *Id.* at 35.

36. *Sorrell*, 131 S. Ct. at 2665.

37. *Id.* (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984)).

38. *Id.* at 2666.

39. *See, e.g.*, *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 7–13 (1986) (holding that the First Amendment right of access to criminal trials applies to preliminary hearings); *Press-Enter. Co. v. Superior Court*, 464 U.S. 501 (1984) (considering whether First Amendment protection extends to access to *voir dire* proceedings in criminal trials); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (holding that a trial judge's exclusion of media from a criminal trial was subject to strict scrutiny); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (holding that criminal trials must be open to the public unless there is an overriding interest).

government to decide what to do with its own information.⁴⁰ But, the language in the *Sorrell* majority opinion would provide a means of challenging *any* government regulation that imposed limits on how the information might be used. Of course, this is not to say that all such challenges would succeed. But, this part of *Sorrell* certainly has opened the door to challenging many regulatory regimes that make data selectively available.

This barking at disclosure restrictions turned into wholesale yapping, yipping, and yelping as the Court encountered Vermont's request that it treat state restraints on disclosure of information as conduct rather than speech. New Hampshire and Maine had advanced the same argument when IMS Health challenged their similar laws. They also sought to escape First Amendment scrutiny under a maze of alternative theories, including that targeted marketing has such little social value that disclosure of information needed to carry it out should be categorically excluded from First Amendment protection in the same way that obscenity and certain other forms of speech are placed outside the First Amendment. The First Circuit embraced every idea that New Hampshire and Maine could come up with in crafting two lengthy opinions upholding those states' laws.⁴¹ Senior First Circuit Judge Bruce M. Selya authored the first of these opinions.⁴² Judge Selya is renowned in the northeast and beyond for his commitment to using uncommon words in his opinions.⁴³ But when it came time to rule on the constitutionality of the New Hampshire prescription restraint law, Judge Selya apparently felt such revulsion at the idea that "data miners" could be compared to journalists that he decided to come up with an analogy of his own that required no thesaurus or dictionary for the ordinary lawyer to understand. Choosing his words carefully, as always, he wrote:

40. See, e.g., *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978) (holding that courts must exercise discretion in releasing tape recordings obtained by subpoena).

41. See *IMS Health Inc. v. Mills*, 616 F.3d 7 (1st Cir. 2010) (upholding a Maine law that allowed drug prescribers licensed by the State of Maine to protect confidentiality of prescribing information used by pharmaceutical manufacturers for marketing of prescription drugs to prescribers); *IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008) (upholding a New Hampshire law that prohibited certain transfers of physicians' prescribing histories for certain commercial purposes).

42. *Ayotte*, 550 F.3d at 42.

43. He has managed to work "defenestrating," "philotheoparoptesism," "thaumaturginal," "resupination," and many other challenging words into his opinions. See *Tasker v. DHL Ret. Sav. Plan*, 621 F.3d 34, 42 (1st Cir. 2010) ("defenestrating"); *United States v. Sepulveda*, 15 F.3d 1161, 1185 (1st Cir. 1993) ("philotheoparoptesism"); *Ne. Fed. Credit Union v. Neves*, 837 F.2d 531, 534 (1st Cir. 1988) ("thaumaturginal" and "resupination").

[T]his is a situation in which information itself has become a commodity. The plaintiffs, who are in the business of harvesting, refining, and selling this commodity, ask us in essence to rule that because their product is information instead of, say, beef jerky, any regulation constitutes a restriction of speech. We think that such an interpretation stretches the fabric of the First Amendment beyond any rational measure.⁴⁴

In hindsight, Judge Selya might agree that throwing beef jerky at the nation's guardian for the First Amendment probably was not the best strategy if he really hoped to provide the Supreme Court a way to uphold statutes of this type. But before looking at the Supreme Court's reaction, let's pause to consider seriously the notion that information can sometimes be a commodity that is bought and sold and regulated by government just like any other product or service, as long as the government has a rational basis for doing so. The fundamental concern created by government regulation of information is that government will decide which ideas are best and manage both politics and the economy through censorship. But when companies like IMS Health are simply engaged in the buying, aggregation, analysis, and selling of information to large manufacturers for marketing, is there really a danger that regulation will become censorship?

One way to think about this is through the work that is being done by the Special Interest Group on Knowledge Discovery and Data Mining (SIG-KDD) of the Association for Computing Machinery (ACM). Never heard of it? Not many lawyers have, but for the last seventeen years this industry organization has conducted an annual conference to discuss the latest developments in this field. Here are just a few of the seminar topics from the group's 2011 meeting:

- Data Mining for Medicine and Healthcare
- Third International Workshop on Large Scale Data Mining: Theory & Application
- Fifth International Workshop on Data Mining & Audience Intelligence for Online Advertising
- Tenth International Workshop on Data Mining in Bioinformatics

44. *Ayotte*, 550 F.3d at 53.

- Fifth International Workshop on Social Network Mining and Analysis
- Social Media Analytics⁴⁵
- Scalable Inference of Dynamic User Interests for Behavioural Targeting
- Click Shaping to Optimize Multiple Objectives
- Response [P]rediction [U]sing [C]ollaborative [F]iltering with [H]ierarchies and [S]ide-information
- On the Semantic Annotation of Places in Location-based Social Networks
- Sparsification of Influence Networks
- User Reputation in a Comment Rating Environment
- Leakage in Data Mining: Formulation, Detection, and Avoidance
- An [I]nformation [T]heoretic [F]ramework for [D]ata [M]ining
- Online Active Inference and Learning
- Unbiased Online Active Learning in Data Streams
- Differentially Private Data Release for Data Mining
- Exploiting Vulnerability to Secure User Privacy on Social Networking Site[s]
- Detecting Adversarial Advertisements in the Wild
- Democrats, Republicans and Starbucks [A]ficionados: User [C]lassification in Twitter
- Analytics for Political Campaigns⁴⁶

45. ACM Special Interest Grp. on Knowledge Discovery and Data Mining, *2011 Conference on Knowledge Discovery and Data Mining Schedule*, SIGKDD.ORG, <http://www.sigkdd.org/kdd2011/schedule.shtml> (last visited Apr. 7, 2012).

These workshops and seminars were conducted by superstars in their fields such as Anushka Anand, Tuan Dang, Sagar Chaki, Arie Gurfinkel, Zhuang Wang, Nemanja Djuric, Koby Crammer, Slobodan Vucentic, Guo-Xun Yuan, Amr Ahmed, and Vanja Josfovski, to name just a few of the hundreds of presenters.⁴⁷ Never heard of them? They comprise a United Nations of brilliant scientists who are creating new ways to study information and to create new knowledge from that study. What they do has transformed the Internet from a mere pipeline capable of transmitting information from point A to point B, into a fire hose gushing the thoughts and ideas of billions of human beings that can be systematically studied and, perhaps, understood.

This is dangerous and exciting stuff. Much of the work seems driven not by any ideology but rather by the thrill of discovery alone. It is the Manhattan Project of our time, and it is creating a power that in many ways is far greater than the energy that holds the atom together because its goal is to provide an answer to every question. You get a small sense of this from typing a question into a Google search box if you have your “Google Instant” predictions setting on. Today, even before you have completed the question, not only does the remainder of the question appear, but so, in many cases, does the answer sought.

Those who assert that the First Amendment imposes no limits on government regulation of this sort of work sense the dangers that it creates. It can produce information and ideas that are highly disruptive to the status quo. In the context of pharmaceutical marketing, the research done by IMS Health and other companies can disclose that many doctors are advising their patients to take two aspirin and call them in the morning, because they are unaware that a new drug has been invented that will cure the patient’s disease. The research also will produce a list of those doctors and their locations. This allows marketers to dispatch their detailers to the doctor’s office to deliver the information needed to improve the doctor’s prescribing practices and, in some cases, save patients’ lives. But the use of the information can also have a serious impact on the cost of health care. In some instances, it drives the costs down because the patient does not suffer a catastrophic development requiring emergency intervention. In other instances, the information will drive the health care costs up, or at least appear to drive the health care costs up, because the new miracle drug is patent-protected and the manufacturer will be able to charge a price that far

46. ACM Special Interest Grp. on Knowledge Discovery and Data Mining, *2011 Conference on Knowledge Discovery and Data Mining Program*, SIGKDD.ORG, <http://www.sigkdd.org/kdd2011/program.shtml> (last visited Apr. 7, 2012).

47. *Id.*

exceeds the cost of two aspirin. In some instances, the new miracle drug may be no better than an old drug that has lost its patent protection and therefore is sold cheaply as a generic drug. But sorting “good” new drugs from “bad” new drugs is a process that no one has yet discovered (maybe more data mining will allow that to happen). For the time being, no governmental entity can show that suppression of information used to increase the effectiveness of marketing drugs will advance any legitimate government interest, let alone an important or compelling interest.

With all this in mind, let’s return to *Sorrell* and its reaction to the beef jerky thrown at it. The Second Circuit did not adopt the analogy in its review of the Vermont law. It held that “[t]he obscure distinction between speech and ‘information asset[s]’” at the heart of the analogy was “an insufficient basis for giving the government leeway to ‘level the playing field’ subject only to rational basis review.”⁴⁸ The Supreme Court stamped down the beef jerky analogy even more roundly, holding that “creation and dissemination of information are speech within the meaning of the First Amendment.”⁴⁹ With a romantic flourish, showing an intuitive appreciation for work such as that of the SIG-KDD if not actual awareness of the group’s functions, the Court stated that “[f]acts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes.”⁵⁰

This is what Professor Bhagwat calls “The Dog That Did Not Bark,” and he does so because in the very next line of the opinion, the Court spells out that it need not invalidate the Vermont law merely because it is a restraint on disclosure of truthful facts.⁵¹ Having reached the zenith of its alarm over the First Circuit’s embrace of government regulation of information, the decision sits itself back down, content perhaps that it has made it clear enough to the murderer and thief in the stall that if Silver Blaze or his trainer is harmed or removed, it will not hesitate to strike at his

48. *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 272 (2d Cir. 2010), *aff’d*, 131 S. Ct. 2653 (2011).

49. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011) (citing *Bartnicki v. Vopper*, 532 U.S. 514, 527 (“[I]f the acts of ‘disclosing’ and ‘publishing’ information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.”) (internal quotation marks omitted)); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995) (recognizing that “information on beer labels” is speech); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (plurality opinion) (recognizing that a credit report is “speech”).

50. *Sorrell*, 131 S. Ct. at 2667.

51. *Id.*; see Bhagwat, *supra* note 4, at 5 (noting that the Court struck down the Vermont statute because it restricted disclosure of truthful facts for marketing purposes, rather than disclosure of such facts in general).

jugular. But in doing so, the decision lets out one last gnarling warning: “The state asks for an exception to the rule that information is speech, but there is no need to consider that request in this case.”⁵² You read that right—“the rule that information is speech.”⁵³

So why did the Court go out of its way to state there is a “rule that information is speech”? Six Justices obviously thought that was a critical component of the decision. To us, it is clear that the Court, as guardian of the First Amendment, did not wish to leave on the books any opinion that held regulation of information is akin to beef jerky. It wanted to make this very clear and did so. Legislators now must keep this in mind when they consider enacting any regulation of information. Advocates should also keep it in mind when representing clients accused of violating restrictions on disclosure of information, because of the high cost of compliance with many disclosure restrictions, or simply because they do not want to comply with disclosure restrictions.

At bottom, Professor Bhagwat reads the *Sorrell* decision in precisely the same way that we do. It is only his characterization of the opinion as a nonevent, as a dog that did not bark, with which we disagree. Professor Bhagwat goes on to build a very strong case in favor of subjecting regulation of the sale or disclosure of specific, personal information—such as prescriber-identifying information—to strict scrutiny. He agrees with the Court that information disclosure is speech;⁵⁴ that it cannot logically be treated as conduct;⁵⁵ that disclosure such as a pharmacy’s sale of prescribing data to IMS Health is not commercial speech; that regulation of such disclosure is content-based; and that regulation of it violates the First Amendment if it cannot survive strict scrutiny.⁵⁶ Indeed, these are precisely the arguments that we presented to the courts in New Hampshire, Maine, Vermont, and all of the appellate courts along the way to the Supreme Court.

III. THE LEASH

Professor Bhagwat is very unhappy with the results of his own persuasive logic. But he then turns to what he says is “the profound

52. *Sorrell*, 131 S. Ct. at 2667. This was true, the Court explained yet again, because it did not matter that the state had elected to hobble detailing by prohibiting disclosure of information, the central violation of the First Amendment upon which IMS Health brought the case. *Id.* What mattered most was that the law had been enacted to suppress the content of the speech of particular speakers. *Id.*

53. *Id.*

54. Bhagwat, *supra* note 4, at 862.

55. *Id.* at 864–65.

56. *Id.* at 867.

implication of this seemingly straightforward conclusion”—that many different types of government regulation, including restrictions on doctors, banks, and retailers, must be subjected to strict scrutiny, yet the broad concept of “privacy” might not be a compelling justification of needed restrictions while at the same time it could be used to justify excessive governmental regulation of speech.⁵⁷ He is unsettled by a world in which every disclosure restriction must survive strict scrutiny. He does not spell out explicitly why this is so.⁵⁸ He only tells us that “[t]his result is hard to accept as a matter of simple common sense.”⁵⁹ The Supreme Court itself sometimes resorts to “common sense” as a standard,⁶⁰ but “common sense” also has been criticized as code words that mask the author’s actual rationale.⁶¹ What lurks behind Professor Bhagwat’s “common sense” is the same thing that motivated New Hampshire, Maine, and Vermont to enact their laws, the First Circuit to uphold them, and others to now advocate adoption of federal legislation that would restrict companies from using information acquired from Internet transactions for targeted or behavioral marketing. The fear is that when one conducts a search or engages in a transaction (via the internet or otherwise), this will be observed by others and then disclosed to the world or otherwise used in an embarrassing or offensive way.⁶² That fear, combined with the belief that Google, Amazon, and a host of other Internet sites are as essential as basic utility services, leads to a desire for immediate government regulation that can withstand First Amendment scrutiny. But *Sorrell* cautions that “fear” of speech

57. *Id.* at 867–68, 872. Notably, the *Sorrell* majority did not think very much of Vermont’s effort to justify its law on the basis of privacy either because the restricted information could be freely shared with third parties for non-marketing purposes. *Sorrell*, 131 S. Ct. at 2668 (2011). Indeed, the Court seemed to regard the privacy argument as disingenuous, commenting at the end of the opinion that “[p]rivacy is a concept too integral to the person and a right too essential to freedom to allow its manipulation to support just those ideas the government prefers.” *Id.* at 2672.

58. Bhagwat, *supra* note 4, at 873–74. Although he mentions that strict scrutiny jeopardizes existing laws that prohibit health care workers from disclosing personal medical information and banks from disclosing personal financial information, no serious argument has yet to be developed that such laws could not survive a facial attack under strict scrutiny. *See id.* at 871 (“It seems beyond peradventure that individuals’ interests in maintaining the secrecy of their financial transactions, or their personal health history, qualify as compelling whatever the exact meaning of that term.”)

59. *Id.* at 874.

60. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (stating that the determination of whether a complaint meets the plausibility standard requires courts to use “common sense”); *Illinois v. Gates*, 462 U.S. 213, 214 (1983) (noting that whether probable cause for a warrant exists is a “common sense decision”).

61. *Gates*, 462 U.S. at 290 (Brennan, J., dissenting).

62. Thomas R. Julin, *Sorrell v. IMS Health May Doom Federal Do Not Track Acts*, 10 Privacy & Sec. L. Rep. (BNA) No. 35, at 1262–63 (Sept. 5, 2011).

“provides no lawful basis for quieting it”⁶³ and that fear “cannot justify content-based burdens on speech.”⁶⁴

Professor Bhagwat wants the government to protect him from what he fears others will do with the information he voluntarily surrenders to them. He then not only constructs an unusual First Amendment theory that will allow such regulation to be enacted, but he embraces the very same First Circuit decision upholding the New Hampshire law he so thoroughly and convincingly discredited in the first part of his article. He ruminates that while *Ayotte* is “doctrinally incoherent, [it] seemed to rest upon an underlying, legitimate insight: that disclosures of factual data differ meaningfully from the sorts of political and artistic speech that historically have been the primary recipient of First Amendment protections.”⁶⁵

He suggests that regulations might be upheld as long as their application is restricted to information that relates to matters of private concern.⁶⁶ The scope of the First Amendment has been much discussed.⁶⁷ The broad view of the First Amendment is typified by the dissent of Justice Holmes in *Abrams v. United States*, which states that the First Amendment exists to protect the “marketplace of ideas.”⁶⁸ The narrower view, as expressed in the writing of Alexander Meiklejohn, is that it protects the communicative process necessary to disseminate the information and ideas for citizens to vote in a fully informed and intelligent way.⁶⁹ The ongoing debate regarding whether these theories may co-exist, and how differences between them should be resolved, demonstrates that there is no simple way to decide whether a particular type of speech is protected under either, both, or neither theory.⁷⁰ So, proposing a solution resting on the ability of courts

63. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670 (2011).

64. *Id.* at 2670–71.

65. Bhagwat, *supra* note 4, at 877.

66. *Id.* at 874–75.

67. *E.g.*, Robert Post, *Reconciling Theory & Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353 (2000) (discussing two competing theories of First Amendment doctrine).

68. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The Supreme Court adopted Holmes’s view in 1937. *See Herndon v. Lowry*, 301 U.S. 242, 258–59 (1937); *see also Terminiello v. Chicago*, 337 U.S. 1, 4–5 (1949) (striking down an ordinance forbidding speech that causes a breach of the peace); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (holding that free speech may only be restricted to prevent harm to protected interests); *Bridges v. California*, 314 U.S. 252, 263 (1941) (adopting the “clear and present danger” framework and recognizing the broad scope of First Amendment protection it provides).

69. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 5 (1960).

70. *See, e.g.*, Post, *supra* note 67, at 2368 (noting that “the Meiklejohnian” approach brings with it the necessity of indicating what speech is so essential to self-governance as to require constitutional protection).

to decide whether regulated information is needed for self-governance seems impractical and unwise.

That may be why Professor Bhagwat suggests an alternative basis for leashing the dog—adoption of a First Amendment principle that allows government significant discretion in regulation of speech that does not involve a “matter of public concern.”⁷¹ Where speech involves “a matter of public concern,”⁷² the Supreme Court has held that historically recognized interests that justify controlling or limiting the speech (such as the government’s interests in ensuring that its own employees and contractors are not undermining the government through their speech,⁷³ or in allowing victims of libel,⁷⁴ invasions of privacy,⁷⁵ or intentional infliction of emotional distress⁷⁶ to recover damages) sometimes must yield to the First Amendment interest associated with publication of speech that is a “matter of public concern.” In other words, although restrictions on some specific types of speech are in harmony with the First Amendment due to the interests they protect, the First Amendment trumps those interests when the affected speech involves a “matter of public concern.”

Many others would welcome Professor Bhagwat’s proposed solution because it would provide a doorway for the creation of a vast governmental information bureaucracy. The Federal Trade Commission,⁷⁷ the U.S. Department of Commerce,⁷⁸ and members of Congress from both parties have already proposed this.⁷⁹ Like Professor Bhagwat, they see the classic

71. Bhagwat, *supra* note 4, at 875.

72. *Garcetti v. Ceballos*, 547 U.S. 410, 416 (2006) (quoting *Garcetti v. Ceballos*, 361 F.3d 1168, 1174 (9th Cir. 2004)).

73. *See, e.g., id.* at 418 (considering whether a public employee’s memo challenging the accuracy of a police affidavit warranted First Amendment protection); *Connick v. Myers*, 461 U.S. 138, 142 (1983) (deciding whether a public employee’s distribution of a questionnaire about office policy was constitutionally protected speech); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (considering whether a teacher’s letter published in a newspaper was protected speech). *But see* *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (per curiam) (holding that government interests were undermined even though the speech in question was not on a matter of public concern).

74. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (plurality opinion) (holding that a credit reporting agency can be held liable for defamation if it incorrectly reports bankruptcy); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (considering whether a broadcaster’s defamatory statements about a private individual warranted First Amendment protection).

75. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

76. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

77. *See* FED. TRADE COMM’N, PRELIMINARY STAFF REPORT: PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE, A PROPOSED FRAMEWORK FOR BUSINESSES & POLICYMAKERS (2010) [hereinafter FTC REPORT].

78. INTERNET POLICY TASK FORCE, U.S. DEP’T OF COMMERCE, COMMERCIAL DATA PRIVACY & INNOVATION IN THE INTERNET ECONOMY: A DYNAMIC POLICY FRAMEWORK (2010).

79. *E.g.,* Personal Data Privacy and Security Act of 2011, S. 1151, 112th Cong. (2011) (Sen.

Warren and Brandeis rant against a world in which information is freely shared and in favor of a legal system that glorifies privacy⁸⁰ as supporting their case for adoption of federal laws regulating private speech.⁸¹

However, the Supreme Court has never announced a doctrine holding that the First Amendment allows greater government discretion to regulate speech that is not a “matter of public concern” as long as there is a rational basis to do so. Indeed, the whole concept suggests that a government regulation of pillow talk in the bedroom might stand a better chance of being upheld than a government regulation of campaign contributions. Professor Bhagwat acknowledges that “private speech” has not been entirely outside the realm of First Amendment protection,⁸² but suggests that private speech be given a “lower form of protection” that would permit the type of data restrictions he desires.⁸³

In *Connick v. Myers*, the Supreme Court held that although the government can exert certain controls over its own employees’ speech that does not involve matters of public concern, “[w]e in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction.”⁸⁴ The opinion cites *Chaplinsky v. New Hampshire*,⁸⁵ *Roth v. United States*,⁸⁶ and *New York v. Ferber*,⁸⁷ as examples of cases showing that only certain narrow categories of speech are outside of First

Patrick J. Leahy, D-Vt.); Do-Not-Track Online Act of 2011, S. 913, 112th Cong. (2011) (Sen. John D. Rockefeller, D-W. Va.); Commercial Privacy Bill of Rights Act of 2011, S. 799, 112th Cong. (2011) (Sen. John Kerry, D-Mass.); Do Not Track Kids Act of 2011, H.R. 1895, 112th Cong. (2011) (Rep. Edward J. Markey, D-Mass.); Consumer Privacy Protection Act of 2011, H.R. 1528, 112th Cong. (2011) (Rep. Cliff Stearns, R-Fla.); Global Online Freedom Act of 2011, H.R. 1389, 112th Cong. (2011) (Rep. Christopher H. Smith, R-N.J.); Do Not Track Me Online Act of 2011, H.R. 654, 112th Cong. (2011) (Rep. Jackie Speier, D-Cal.); Building Effective Strategies to Promote Responsibility Accountability Choice Transparency Innovation Consumer Expectations and Safeguards Act, H.R. 5777, 112th Cong. (2010) (Rep. Bobby L. Rush, D-Ill.).

80. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

81. Compare FTC REPORT, *supra* note 77, at i n.1, with Bhagwat, *supra* note 4, at 862. It also should be remembered that Warren and Brandeis were not writing about the First Amendment. See Warren & Brandeis, *supra* note 80, at 193 (discussing the right to privacy as derived from the common law without a single mention of the First Amendment). They were attempting to formulate common law tort rules arising from specific disclosures of private information in certain contexts. See *id.* at 195–97. Their proposals would not welcome extensive government regulation of the same privacy rights that their proposals sought to protect. *Id.*

82. Bhagwat, *supra* note 4, at 875.

83. *Id.* at 877.

84. *Connick v. Myers*, 461 U.S. 138, 147 (1983).

85. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (discussing fighting words).

86. *Roth v. United States*, 354 U.S. 476 (1957) (discussing obscenity).

87. *New York v. Ferber*, 458 U.S. 747 (1982) (discussing child pornography).

Amendment protection, and that “private speech” is not such a category. Professor Bhagwat cites *Brown v. Entertainment Merchants Ass’n*⁸⁸ as an even more recent example of a case in which the Supreme Court afforded full First Amendment protection of speech that did not involve a matter of public concern.⁸⁹ He also appropriately acknowledges that the Supreme Court cautioned in *United States v. Stevens* that it is not inclined to create any new categories of unprotected speech.⁹⁰ Therefore, we do not believe that Professor Bhagwat’s solution to the perceived problem is possible, appropriate, or desirable.

IV. THE SOLUTION

The solution to the perceived problem was provided by the barking dog itself. Addressing Vermont’s contention that doctors objected to being targeted by detailers based on their prescribing histories, the Court acknowledged that there was record evidence that some doctors had experienced an undesired increase in aggressive sales tactics and that some felt coerced.⁹¹ Its initial reaction was that this is simply a “necessary cost of

88. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011) (discussing violent video games); see also *Trans Union Corp. v. Fed. Trade Comm’n*, 245 F.3d 809 (D.C. Cir. 2001), cert. denied, 536 U.S. 915 (2002). In *Trans Union*, the D.C. Circuit held that a ban on the sale of marketing lists of target consumers was not subject to strict scrutiny because they were solely of interest to Trans Union and its business customers and did not relate to matters of public concern. *Trans Union*, 245 F.3d at 818. The court then went on, however, to analyze the constitutionality of the ban under intermediate scrutiny. *Id.* Its conclusion that the information did not relate to matters of public concern did not obviate the need to examine the constitutionality of the statute (albeit the D.C. Circuit lowered its scrutiny to intermediate). In this important passage from his dissent from the denial of certiorari, Justice Kennedy, the future author of the majority opinion in *Sorrell*, questioned the D.C. Circuit’s reliance on the plurality in *Dun & Bradstreet*, 472 U.S. 749 (1985), for lowering the level of scrutiny:

It is questionable . . . whether this precedent has any place in the context of truthful, nondefamatory speech. Indeed, *Dun & Bradstreet* rejected in specific terms the view that its holding ‘leaves all credit reporting subject to reduced First Amendment protection.’ The Court of Appeals, nonetheless, relied on *Dun & Bradstreet* to denigrate the importance of this speech. A grant of certiorari is warranted to weigh the validity of this new principle.

Trans Union, 536 U.S. at 916 (Kennedy, J., dissenting) (citations omitted).

89. Bhagwat, *supra* note 4, at 875. The *Sorrell* case itself can be viewed as one showing that First Amendment protection is not lessened for speech of private concern if one regards prescriber-identifying data as having no public concern. Notably, however, during litigation over the Maine law, the district court concluded that the information is “a matter of public concern.” *IMS Health Inc. v. Rowe*, 532 F. Supp. 2d 153, 167–68 n.14 (D. Me. 2008), *rev’d sub nom.* *IMS Health Inc. v. Mills*, 616 F.3d 7 (1st Cir. 2010), *vacated sub nom.* *IMS Health Inc. v. Schneider*, 131 S. Ct. 3091 (2011) (mem.), *on remand*, No. 1:07-cv-00127-JAW (D. Me. Sept. 15, 2011) (final judgment invalidating Maine law).

90. Bhagwat, *supra* note 4, at 867; *United States v. Stevens*, 130 S. Ct. 1577 (2010).

91. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2669 (2011).

freedom,”⁹² but it also suggested that a solution to this problem was at hand that seemed far preferable to “content-based rules” imposed by a state legislature.⁹³ The Court reasoned that doctors could simply decline to meet with detailers, post “No Solicitation” signs, or give instructions to their receptionists not to make appointments for detailers, noting that it previously held that this same solution is available for private home dwellers who do not wish to be disturbed by solicitors.⁹⁴ In short, the Court told us that the market can find a solution to the problem; if the market wishes to be left alone, it may cease its interaction with the source of irritation.

The same is true outside the context of pharmaceutical marketing. The market forces that inspired politicians and bureaucrats to propose legislative solutions to perceived privacy abuses by Internet companies have also inspired private companies to start aggressive development of innovative techniques to allow consumers to limit how they may be tracked. The World Wide Web Consortium (W3C) is an international community, and some would say trade association, that develops standards to ensure the long-term growth of the Internet. On November 14, 2011, it published its most recent paper that “defines the meaning of a Do Not Track preference and sets out practices for websites to comply with this preference.”⁹⁵ The paper addresses the underlying user concerns that a tracking preference recommendation would address. It defines what “tracking” is, sets out the different types of tracking that can be done, discusses under what circumstances consumer consent to tracking should be sought, proposes disclosures to be made to users, and suggests privacy controls that can be made available. This is a reasonable industry reaction that seeks to make sure that products and services are desirable to the markets that they serve. The Internet Advertising Bureau, another trade association, also has its own Guidelines, Standards, and Best Practices, including a certification program.⁹⁶ Individual companies also have their own proposals for providing the market the sort of privacy they believe that it wants.⁹⁷

92. *Id.*

93. *Id.*

94. *Id.* at 2669–70 (citing *Watchtower Bible & Tract Soc. of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168 (2002)).

95. *Tracking Compliance and Scope*, W3C (Nov. 14, 2011), <http://www.w3.org/TR/2011/WD-tracking-compliance-20111114/>.

96. *Guidelines, Standards & Best Practices*, IAB, <http://www.iab.net/guidelines> (last visited Feb. 5, 2012).

97. *See, e.g.*, Chloe Albanesius, *Microsoft ‘Do Not Track’ Plan Accepted by Web Standards Group W3C*, PCMAG.COM (Feb. 24, 2011), <http://www.pcmag.com/article2/0,2817,2380888,00.asp> (discussing Microsoft’s software addition to Internet Explorer 9 that utilizes information from “sites that plant small tracking code on many other Web sites to profile users’ site history and habits”).

All of these private initiatives offer a variety of advantages over legislation. First, they are not mandatory, and therefore companies can continue to offer consumers a choice. Some consumers may prefer Internet services and sites that are not cluttered with confusing privacy settings and control mechanisms. They may find that their interests are served best if they are simply cautious about the information they hand over to third parties and do not attempt to rely on the fine print (or even the bold print) that comes associated with privacy controls. Second, privacy standards developed by industry groups can evolve more easily over time as technology changes and consumer sophistication increases. Third, companies that elect not to comply with industry standards can continue to innovate without concern that they will be subjected to onerous government fines.⁹⁸

The Federal Trade Commission (FTC) has a role to play as well. Under the broad mandate of the FTC Act it has extensive powers to prevent “[u]nfair methods of competition . . . and unfair or deceptive acts or practices.”⁹⁹ If consumers are misled to believe that information they deliver to a third party, through an Internet search or a particular transaction, will not be used for any other purpose, the FTC can seek various remedies to stop the deception. And it already has brought many such enforcement actions.¹⁰⁰ The FTC’s existing powers ensure that consumers fully understand how the Internet operates and what happens to the information they provide to search engines, retailers, and others. The

98. Herbert Hoover, while Secretary of the Department of Commerce in 1922, faced a problem with an evolving industry that was similar to the problem now associated with the data-mining industry. See L.W. SMITH & L.W. WOOD, FOREST PRODS. LAB., U.S. FOREST SERV., HISTORY OF YARD LUMBER SIZE STANDARDS 2, 8 (1964), available at http://www.fpl.fs.fed.us/documnts/misc/miscpub_6409.pdf. No standard sizes existed for cutting lumber. *Id.* at 1–2. This resulted in confusion in a rapidly expanding building industry and led to calls for government regulation. *Id.* at 2. Developing standards posed technical challenges, however, due to changing technologies used in production. *Id.* Hoover advocated that the industry should develop, advertise, and continuously update its own standards. *Id.* at 8. This successful program resulted in formation of the American Standard Lumber Committee and its promulgation in 1924 of what is today the Voluntary Product Standard. *Id.*; see also NAT’L INST. OF STANDARDS & TECH., U.S. DEP’T OF COMMERCE, AMERICAN SOFTWOOD LUMBER STANDARD (2005), available at <http://gsi.nist.gov/global/docs/vps/ps20-05.pdf>.

99. 15 U.S.C. §§ 41–58 (2006).

100. See, e.g., Press Release, Fed. Trade Comm’n, FTC Accepts Final Settlement with Online Advertiser Scan Scout, Which Allegedly Used Flash Cookies to Track Consumers (Dec. 21, 2011), available at <http://www.ftc.gov/opa/2011/12/scanscout.shtm> (explaining that the settlement bars misrepresentations about the company’s data-collection practices and consumers’ ability to control collection of their data); Press Release, Fed. Trade Comm’n, Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises (Nov. 29, 2011), available at http://www.ftc.gov/opa/2011/11/privacy_settlement.shtm (explaining that the settlement requires Facebook to provide notice and obtain consumers’ consent before sharing information beyond the consumers’ privacy settings).

Act does not and cannot constitutionally authorize the FTC to impose restrictions on disclosure of information merely because the FTC or anyone else deems the information to be private. States' unfair-trade-practice laws and contract principles also may offer consumers relief in the event that they are deceived regarding use of their data by an entity that promises confidentiality and fails to provide it.¹⁰¹

Finally, the common law of privacy, as inspired by Warren and Brandeis, has a continuing role to play in addressing Professor Bhagwat's perceived problem. The Restatement (Second) of Torts section 652B provides: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."¹⁰² Section 652D provides a private cause of action for publication of private facts. It defines private facts as a matter that "would be highly offensive to a reasonable person" and "not of legitimate concern to the public."¹⁰³ Numerous state statutes provide remedies where individual names or likenesses are appropriated for commercial purposes.¹⁰⁴ These venerable tort principles and statutory protections have coexisted relatively peacefully with the First Amendment for generations and may be used to reign in particular types of data collection and use, obviating any need for wholesale reworking of First Amendment doctrine to allow a broad wave of government regulation of speech that does not involve a "matter of public concern."

CONCLUSION

When the dog in the original *Silver Blaze's* stable did not bark, Inspector Gregory did not realize its import and arrested the wrong man. Here, when the dog in our *Silver Blaze's* stable did bark, Professor Bhagwat did not think it to be a bark and urged the good dog to let the culprit go. Another case, it seems, for the great Sherlock Holmes.

101. *See, e.g.*, *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151 (1st Cir. 2011) (holding that grocery store customers whose electronic payment data was allegedly stolen by a third-party could maintain a class action for breach of contract); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, No. 09-2046, 2011 WL 6012598 (S.D. Tex. Dec. 1, 2011) (surveying state causes of action arising from breach of data security).

102. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

103. *Id.* § 652D.

104. *E.g.*, FLA. STAT. ANN. § 540.08 (West 2007).