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# RIGHT TO INFORMATION IDENTITY

ELAD OREG\*

Inspired by the famous Warren and Brandeis conceptualization of the “right to privacy,” this article tries to answer a modern, conceptual lacuna and presents the argument for the need to conceptualize and recognize a new, independent legal principle of a “right to information identity.” This is the right of an individual to the functionality of the information platforms that enable others to identify and know him and to remember who and what he is. Changes in technology and social standards make the very notion of identity increasingly fluid, transforming the way it is treated and opening new and fascinating ways of relating to it. Simultaneously, these changes intensify the dangers threatening identity. The tremendous extent of distortion, impersonation, filtering, deleting and concealing of information-identity demands a legal response grounded in solid conceptual and normative foundations. However, contemporary legal protection for the existence of information identity is partial and insufficient and is provided incidentally by a variety of legal doctrines, lacking any consolidated conceptual and normative foundations.

## INTRODUCTION

In his play, “The Thin Soldier,” legendary Israeli playwright, Hanoch Levin, tells the story of Susia, an emaciated soldier returning from battle only to find a fat soldier in his house, also called Susia, treating his wife and son as husbands and fathers do. Horrified, the emaciated Susia turns to his wife:

My wife, what happened to you? Don't you know me? Yes, it is me.  
You know me so well. Look at my crooked face. Look at the nose. Don't you remember that small wart? – There it is; the crack in the left cheek?  
– There it is. What else can I say – here I am. How did you simply block

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me out? Answer me. How I was erased? It's me [shouting]. . . My wife, either me or you - one of us has gone crazy. Know me! Know me! [He Shakes her] know me! [He lets go, his voice quiet and tired]. . . Is it hunger that makes you think that the fat soldier whose name I don't know is me, Susia, the thin soldier?. . . [Crying]. . . I don't understand. He doesn't look like me. How is the child? How do you. . . hug him? He doesn't even look like me. [Bitterly crying]. This fat slob, this isn't Susia!. . . He is not me!. . . I am scorched, parched and exhausted, I'm thin as a belt, I don't have a belly at all, but I am your Susia!. . . I am your Susia!. . . Where can I go? Where will I hide myself? I'd better hang myself on a tree here in the entry.<sup>1</sup>

Poor Susia. What did he want from his wife and son? It was not his "good name" that he was asking for, nor his honor and admiration. No. He just wanted them to remember his "crooked face," the "small wart," and the "parched," "exhausted" man he was. Nor was it "privacy" – he certainly did not ask to be let alone; on the contrary, he wanted to be redeemed from solitude. Nor was it "property" – he did not seek to be enriched by his character or to put it to commercial use, nor did he request money or compensation from fat Susia for posing as him. He just begged for the restoration of his identity in their consciousness – to be recognized, known and remembered.

Protecting individual personality is deeply rooted in the law. However, the vicissitudes of the times occasionally compel a reformulation of the principles protecting it.<sup>2</sup> This paper presents the argument for the necessity of recognizing a new, independent, and distinct legal principle of a "Right to Information Identity," meaning a person's right to the functionality of information platforms that enable others to recognize him, and to know and remember who and what he is.

The argument is presented against the background of the dramatic changes in technological and social reality over recent decades. This would not be the first occasion in which transformations of this kind have generated new legal conceptions. Twelve decades ago Samuel Warren and Louise Brandeis articulated the (then new) concept of "Right to Privacy" and justified its recognition by the social changes (yellow journalism) and technological innovations (camera).<sup>3</sup> What happened in the late nineteenth century regarding privacy is now happening with respect to identity.

Technological and societal transitions have created a more fluid notion of identity that affects the way in which it is treated and which is opening new and fascinating ways of relating to it. Simultaneously, these

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1. HANOCH LEVINE, *THE THIN SOLDIER AND OTHERS – PLAYS 72-73* (1999) (Hebrew).

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

3. *Id.* at fns. 10-13.

changes amplify the dangers confronting identity. The sheer volume of identity distortions, impersonations, filters, deletions, and other malfunctions necessitate a legal response that is based on solid conceptual and normative foundations.

To date, various branches of law have provided partial and incidental legal protection for the existence of information-identity such as the laws of: privacy, intellectual property, freedom of expression, unjust enrichment, slander and others. This protection is inadequate. The right encompasses too many vast realms, the values it protects are too important, and the dangers confronting it are too great. Therefore, it warrants the protection accorded to an independent, explicit and crystallized principle.

This Article is set out in four parts. Part I briefly presents the general premises that justify the conceptualization of new rights. Generally speaking, new rights warrant recognition to the extent that they are based on a value which is a pivot at which a variety of diverse phenomena converge. Part II lays the conceptual foundations of the new right. It explains the meaning of information-identity and the increased dangers confronting it in the modern information environment. Its increased vulnerability derives from technology developments (primarily the internet) that increase the dependence of identity upon intermediation and simulation, as well as from social changes which view identity as a more flexible concept and divide it into vulnerable pseudonym identities. In addition, the new right is presented and defined, while differentiating it from other kin rights. Part III lays the normative value-related bases of the right. It presents inherent and instrumental justifications for the protection of information-identity, both 'traditional' identities and more flexible 'modern' identities. Part IV emphasizes the principle character of the right. It presents the general outlines of the right and demonstrates its influence on diverse contemporary legal doctrines.

Ultimately, the purpose of this Article is to conceptualize the right, to lay its normative bases and to sketch its outlines. This "opening shot" is limited to a preliminary, skeletal presentation of the right and it is an invitation to further study and to a more concrete and detailed elucidation of this fundamental principle.

## I. CONCEPTUALIZING AND JUSTIFYING A NEW RIGHT

This Article presents the argument for recognizing a new, not-yet-conceptualized right – "The Right to Information Identity." A distinction is generally made between two kinds of theories justifying rights. One includes "inherent" or "natural" theories, which focus on the internal merit of the value protected by the right; the other includes "instrumental" or "consequential" theories, which emphasizes the link between the

value protected by the right and the fulfillment of other values.<sup>4</sup> These two categories of justificatory theories highlight the importance of the values protected by the right. Indeed, this manner of justification is an important component of the argument for recognizing a new right. However, as opposed to justifying an already existing and acknowledged right, it is not sufficient. Arguing for a new right also compels a justification for its mere crystallization as an independent and differentiated concept.

A central component of the justification for recognizing a new right per se is the “regular” justification, based on the importance of the values it protects. The mere act of articulating a concept increases awareness of the protected value, enhances the level of protection afforded to it, and constitutes the first stage in the development of a law to protect it.<sup>5</sup> However, as mentioned, this does not suffice.

Another component in justifying the actual conceptualization of a right is its identification as an axis at which a number of broad phenomena converge. By way of example, this occurs when a number of forms of behavior, each of which occurs in a different context and violates different values, jointly violate the value protected by the right. The context diversity may impede the ability to identify the precise value that has been violated, and the conceptualization of the right is an effective tool for such recognition. This is also the case when the right touches on different legal branches. The conceptualization of the right enables the coherent formulation and implementation of the protected value, despite its scope, which may span a number of distinct legal realms. The same happens when diverse values intersect in a manner justifying the recognition of the right and the value it protects. This diversity in the values founding the right attests to the depth and saliency of the phenomenon to which it relates.<sup>6</sup> This intersection also enables mediation between public, value-based disputes, given the recognition of at least one right,

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4. See, e.g., HOWARD DAVIS & DAVID HOLDCROFT, JURISPRUDENCE 230–32 (1991); *Rights*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, §6 (2011). This is, of course, a very rough depiction of justification theories; however, it is sufficient here. The focus of this paper is the argument for the mere conceptualization of the right. This move does not necessitate binding the right in a single justifying theory. On the contrary, the very diversity of value-based justifications is itself an additional justification for the conceptualization of the right. See *infra* notes 6-7.

5. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming*, 15 LAW & SOC'Y REV. 631, 633 (1980). A good illustration for this is the manner in which legal protection for privacy evolved in the United States only after Warren and Brandeis had formed and named the “right to privacy” in their seminal paper, *supra*, note 2. On the significance of this paper to the evolution of privacy law, see for example, JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 947 (9th ed. 1994).

6. See also AHARON BARAK, THE JUDGE IN A DEMOCRACY 116-17 (2006).

deriving from different values, but which gives expression to one point upon which they are agreed.<sup>7</sup>

The right to information identity, as argued here, satisfies all of these criteria. The values and interests the right to information identity protects are weighty and significant. Furthermore, the right encompasses many broad phenomena: (i) diverse technological and social changes, all of which pose new threats to information identity; (ii) relevance for a variety of legal doctrines; and (iii) the multiplicity of values and interests, originating in different theories, all of which converge in their justification of the right.

Naturally, this kind of panoramic discussion cannot, and makes no pretense to, replace in-depth discussions regarding each and every aspect of this multifaceted right. These discussions must take place at a later stage and are only possible after the establishment of a conceptual and value-based theoretical foundation.

## II. CONCEPTUALIZING THE RIGHT TO INFORMATION IDENTITY

### A. INFORMATION IDENTITY

#### 1. *Information Identity – What is it?*

In legal discourse the term “identity” carries a number of meanings. It has variously been perceived as a concept depicting a person’s national or ethnical affiliation, his knowledge of his immediate family or his sexual orientation.<sup>8</sup> This Article will not discuss those aspects directly, since its focus is on the informational aspect of identity. The full name of the concept is, therefore, “information identity.” However, for convenience, it will also be mentioned here by the shortened phrase: “identity.”

In the current context, a person’s identity is the connection between a person and the information depicting him. The identity of a person (to be named John) is the manner in which he is conceptualized in the mind of another (to be named Paul) as information processed by his brain. Paul cognizes objects in the world using mechanisms that enable him to receive, process and store information concerning those objects. Paul, of course, values those mechanisms deeply. However, when the known object is a human subject, such as John, they may also be appreciated by John. They enable John’s identity to exist in Paul’s mind. Hence, the right to information identity is the right of a person – as the subject of information regarding him – to the functionality of the information platforms which enable this information to exist in the minds of others.

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7. Joseph Raz, *On the Nature of Rights*, 93 MIND 194, 208–09 (1984).

8. See *infra* II.B.2.b.

The mere appearance of one person in the consciousness of another does not, per se mean that his identity exists therein. A woman walking in the street does appear in Paul's mind, assuming he is looking. Paul even has snippets of information about her (her clothing, gender, location etc.). But he does not know her. Intuitively, we would say that she is a stranger to him.

"Information identity" then, is a different kind of knowledge regarding a person. It can be clarified by explaining its components. The first component is the "character," which connotes the "file" of compiled information that describes John in Paul's mind. This "character" has a number of features. First, it expresses the entire complex of knowledge that Paul has of John, not just references to anonymous items of information ("the man who is a British citizen"), but rather comprehensive and synergic knowledge. This includes knowing the name, nickname or any other factor that identifies this person ("John Lennon"), and also knowing a range of other details relating to him ("a British citizen, member of The Beatles, assassinated in NYC" etc.). Second, it is true knowledge. If all that is known about John is false, Paul's mind does not hold a concept depicting John. It only carries a false character bearing no informative connection to John whatsoever – one which actually prevents, or at least complicates his cognition of the true character.<sup>9</sup> Third, it is a dynamic and continuous knowledge – existing over time, and subject to changes and updates, either by direct impression (by direct meetings of John and Paul) or by indirect impression (by Paul's knowledge of John from other sources).

The second component of information identity is the "identification." This is the ability to connect the character to its concrete subject. John enjoys the existence of his identity only if Paul can know that the man who he is now meeting is the subject of the "file" that is stored in his brain under the name of "John Lennon."

## 2. *Dangers to Information Identity*

Identity, as any information, is exposed to many dangers. Managers of data infrastructures ("George") and other external agents ("Ringo") can delete, hide, block, falsify and empty it of content. In truth, these kinds of distortions have always existed, but the modern information environment aggravates the risk that they pose to identity.

### a. *Dangers Posed by the Traditional Information Environment*

As mentioned, an identity may also be distorted in a traditional information environment. For example, the face-concealing veil known as

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9. Truth in these matters is, of course, a complicated concept, and will be discussed later on. See *infra* III.B.2.

the Burka, which women in Afghanistan were forced to wear, harms their identity. Their exposed faces possess great informative value. The uniqueness of their physiognomies enables their identification by others. When these identifying factors are concealed, they walk around as anonymous, identity-deprived persons.<sup>10</sup>

The great fire in California provides another example of identity deprivation. The fire destroyed census registrations, meaning that many people lost their identities and for better or for worse, ceased to exist in the “mind” of the state.<sup>11</sup> Distorting or falsifying information may also harm identity. For instance, an operation to change a person’s face rather than hide it (i.e. by way of a Burka) – a method occasionally used in witness protection programs.<sup>12</sup> Indeed, these programs provide security for the intimidated witness, but at the cost of depriving him of his identity.<sup>13</sup> Distortion and falsification also occurs in more mundane contexts. When a newspaper prints false information concerning John, it generates a false perception of John in the minds of its readers and in doing so, threatens the existence of his true character.<sup>14</sup> Impersonation too harms the existence of an identity. When the impersonation is covert, it distorts the character of the impersonated person. Arnaud du Tilh, who impersonated Marteen Guerre falsely, imputed statements and actions to Guerre’s character. Alternatively, when the impersonation is discovered, it may frustrate the identification process due to the erosion of trust in the identification mechanisms.

*b. The Intensified Dangers Posed by the Modern Information Environment*

Indeed, identity has always been exposed to danger. However, the traditional information environment posed a relatively minor danger.

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10. See also, Thomson Fontaine, *My Journey to Kabul Afghanistan*, THE DOMINICAN.NET (Apr. 30, 2002), <http://www.thedominican.net/articles/kabul.htm>.

11. See Kellee Blake, *The Fate of the 1890 Population Census*, 28 PROLOGUE (1996). Nevertheless, their identity continued to exist in their acquaintances’ minds.

12. See Jack A. Finklea, *Leniency in Exchange for Testimony: Bribery or Effective Prosecution?*, 33 IND. L. REV. 957, 960 (2000).

13. Undoubtedly, having consideration for the dangers, a witness would desire to be included in the protection program, even at the price of losing his identity. However, this is not true free choice. These programs place the witness – sometimes an innocent bystander – in the throes of a cruel dilemma of choosing between criminal vengeance (should he testify), contempt of court (if he fails to testify) and identity loss (if he testifies and participates in the protection program). See also Stuart Mass, *The Dilemma of the Intimidated Witness in Federal Organized Crime Prosecutions: Choosing Among the Fear of Reprisals, The Contempt Powers of the Court, and the Witness Protection Program*, 50 FORDHAM L. REV. 582 (1982).

14. On the difference between the right to identity and the right to a good reputation, see *infra* note 55 and accompanying text.

The modern environment, on the other hand, features a number of grave and inbuilt dangers. As a result of technological innovations and societal changes, identity is exposed to a number of substantial, permanent threats. Contemporary legal systems afford a certain level of protection against these threats but the magnitude and imminence of the danger demand the crystallization of comprehensive legal protection and not just ad hoc, incident and partial protection such as the kind provided today.<sup>15</sup>

*i. Intermediation*

One feature which increases the danger to identity is the intermediated character of the modern information environment. When Paul meets John on the street, he receives data issuing from John, processes it in his brain and stores it in his memory. Thus, John's identity exists and is handled in Paul's mind at a relatively low risk. On the other hand, when the information environment depends upon an intermediary, the danger to identity is heightened. For example, if George is a mailman who fails to pass on letters mentioning John or written by him, George effectively "erases" John from the social space which is based on this channel of communication, thus, preventing the existence of John's identity.

The complexity of modern life creates increasing dependence upon intermediaries. The Internet, for example, abounds with them. Some even consider intermediacy to be the defining component of the concept "virtual."<sup>16</sup> Indeed, the Internet protocols were originally content-neutral<sup>17</sup> and the result was that some characterized it as a non-intermediated communication system.<sup>18</sup> However, nowadays this could be regarded as a description of the desirable "ought" as opposed to the factual "is."<sup>19</sup> With the evolution of the Web, the range of intermediaries has become more sophisticated, partisan, and interest motivated to include parties such as: access providers, search and filter services, name managers, content hosts, communities' administrators, database operators and others. They can all determine what information – including

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15. For demonstration of inadequacies of current law see *infra* VI.C.

16. Richard C. MacKinnon, *The Social Construction of Rape in Virtual Reality*, in NETWORK AND NETPLAY: VIRTUAL GROUPS ON THE INTERNET 147 (Fay Sudweeks et al. eds., 1998).

17. LAURENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 26–48 (2002).

18. Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, in LAW, INFORMATION AND INFORMATION TECHNOLOGY 145, 157 (Eli Lederman & Ron Shapira eds., 2001).

19. See also Vincent A. Miller, *Search Engines, Portals and Global Capitalism*, in WEB.STUDIES: REWIRING MEDIA STUDIES FOR THE DIGITAL AGE 113, 119 (David Gauntlett ed., 2000).

identity-related information – will be kept, verified, accessed and disseminated.<sup>20</sup>

The decentralized structure that characterized the early days of the Internet has been substituted by the “hubs and spokes” structure in which the vast majority of the information passes through intermediaries who control the central junctions.<sup>21</sup> This tendency towards centralization also finds expression in the phenomenon of commercial giants absorbing smaller ones by way of cooperation or acquisition.<sup>22</sup> No doubt, in public contexts the current structure of the Internet is still highly decentralized when compared to traditional mass media. On the Internet, John has considerably more avenues at his disposal for expressing himself and placing himself in public awareness.<sup>23</sup> However, many formerly unmediated contexts – interpersonal, social and even commercial – have become intermediated and hence exposed to the attendant dangers of intermediacy. Moreover, intermediaries frequently create social environments in which identity (as other factors) is completely dependent on a singular channel, controlled by a monopolistic body.<sup>24</sup> In addition, the naïve (and usually false) belief in the neutrality of these intermediaries, and the frequently covert nature of their conduct subjects the very existence of identity to grave risks.

For example, the artificial and hidden removal of a person from the

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20. LESSIG, *supra* note 17 at 164-76. More on the change of software and protocols and its role in transforming the internet into an “intermediary” realm see LAWRENCE LESSIG, CODE, VERSION 2.0 38–60 (2006). This can be viewed as part of the huge debate over the neutrality of the internet. However, internet neutrality is usually discussed and evaluated in the context of the intervention with readers’ autonomy and the evolution of the internet rather than the injury to information subjects. See Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141 (2003); Philip J. Weiser, *The Next Frontier for Network Neutrality*, 60 ADMIN. L. REV. 273 (2008); Tim Woo & Christopher S. Yoo, *Debate, Keeping the Internet Neutral?*, 59 FED. COMM. L.J. 575 (2007).

21. See Miller, *supra* note 19, at 115. On search engines, see also Niva Elkin-Koren, *Let the Crawlers Crawl: On Virtual Gatekeepers and the Right to Exclude Indexing*, 26 DAYTON L. REV. 179 (2001); Lucas D. Introna & Helen Nissenbaum, *Shaping the Web: Why the Politics of Search Engine Matters*, 16 INFO. SOC’Y 169 (2000); Frank A. Pasquale & Oren Bracha, *Federal Search Commission? Access, Fairness and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149 (2008); Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 9 YALE J. L. & TECH. 111 (2006); Jennifer A. Chandler, *Reclaiming the First Amendment: Constitutional Theories of Media Reform: A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 HOFSTRA L. REV. 1095 (2007).

22. Miller, *supra* note 19.

23. See YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 237–56 (2006).

24. See *infra* notes 47-48 and accompanying text.

results of a search query, such as the “the Google Death Penalty,”<sup>25</sup> conceals this person from the minds of users. As for Google (which already has been compared to God),<sup>26</sup> this means, for many practical purposes, eliminating him from the information sphere of websites. Similarly, filtering software, which may define a person’s name as one of its filtering standards, eliminates him from the mind of its users. This is precisely what happened to Richard Armev, whose nickname (Dick) caused all major filtering software to mistakenly sieve him out of the search results.<sup>27</sup> This is also the case when a mechanism filters a person’s name out of SMS or Chat messages, as the Chinese government did to the Dalai Lama.<sup>28</sup>

The intermediaries’ threat to identity is relevant in other contexts too. Many mediators, as operators of online communities or social networks, control the databases that constitute the identity platform of their users. The personal reputation system which is used by eBay is a good example of this. The system, which is completely controlled by eBay operators, keeps track of every sale and purchase of each user as well as feedback provided by those trading with him. All users are entirely dependent upon the system and deleting one’s account or reputation is equivalent to the elimination of his eBay identity. This is precisely what happened to Colin Hepburn. After many years of commercial activity on the site, a dispute arose between Hepburn and the site operators. As a result the latter closed his account, erased his character and left him deprived of his long established identity.<sup>29</sup> Moreover, the phenomenon of ongoing and growing reliance on intermediaries operating personal databases is not limited to online communities. Databases also play a massive role in background checks of qualifications and entitlements. Deletions, mistakes and other defects in these databases may have griev-

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25. See Stephen Hutcheon, *Google ‘Death Penalty’ for BMW Site*, SUNDAY MORNING HERALD, Feb. 6, 2006; Janis Mara, *When U Banished By Google, Yahoo!* THE CLICKZ NETWORK (May 14, 2004), <http://www.clickz.com/news/171488/wenu-banished-by-google-yahoo>.

26. Thomas L. Friedman, *Is Google God?* NEW YORK TIMES (June 29, 2003 7:10 AM), <http://www.cnn.com/2003/US/06/29/nyt.friedman>.

27. MARJORIE HEINS ET AL., INTERNET FILTERS: A PUBLIC POLICY REPORT 13–14, 25, 30 (2nd ed. 2006). Filtering software are services offered to users who wish to avoid (themselves or commonly their children) certain harmful content. However, the filtering standards determined by the service operator are concealed, and the service is occasionally flawed either by excessive filtering or lack of filtering. See also *infra* notes 249–250 and accompanying text.

28. Alison Maitland, *Skype Says Texts Censored by China*, FINANCIAL TIMES, Apr. 18, 2006 11:01PM), <http://www.ft.com/intl/cms/s/2/875630d4-cef9-11da-925d-0000779e2340.html#axzz1ojwrH8Fb>.

29. See Beth Simone Noveck, *Trademark Law and the Social Construction of Trust: Creating the Legal Framework for Online Identity*, 83 WASH. U. L. REV. 1733, 1734–36 (2005).

ous consequences for identity.<sup>30</sup>

ii. *Simulation, Impersonation and Identity Theft*

Another feature that amplifies the dangers to identity is the “virtuality” of the information environment. Virtuality means, *inter alia*, that physical presence is substituted by artificial simulation, thus, facilitating the “work” of impersonators, forgers and other scoundrels. It is hard to replicate a physical identification platform. Ringo would find it exceedingly difficult to emulate John’s unique identifying codes (his physiognomy, voiceprint, gait, etc.). It would be even more complicated to imprint them onto his body. On the other hand, in a simulated information environment, the identifying codes are usually easier to copy and do not require any form of embodiment. This has always been the case. It is easier to forge a signature on a letter than to forge a face and voice in a face-to-face conversation.

The modern information environment has witnessed an exponential growth in the importance attaching to simulation. Physical presence is not even possible on the Internet, having necessarily been replaced by imaging. As a result, impersonations on the net have abounded in all of its manifestations since its inception: in virtual communities, websites and others.<sup>31</sup> Sometimes, the impersonation is combined and is multidimensional, as the incident of Amnon Jacont so horrifyingly illustrates. Michael Ha’efrati was married to Jacont’s stepdaughter. The couple went through a messy divorce. After that, Michael married Ruth. But the ex-son-in-law, and especially his new wife, were still bitter and took the road of avenging Jacont by ruining his identity. Ruth (with Michael turning a blind eye) illegally procured his computer and Internet account, and subsequently sent emails and posts on his behalf. In one occasion, she impersonated him and disseminated an email to his peers, supposedly written by him, in which he ostensibly apologized for forging scientific materials. In addition, she impersonated others and posted messages slandering Jacont on their behalf. She also planted lies about him in his Wikipedia entry and even impersonated him by spoofing his IP address, and made it look as if he had tried to falsely embellish his biography. Thus, by exploiting vulnerable simulated environments,

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30. See e.g., *Comments to FTC on Accuracy in Background Checks and Insurance Reports*, PRIVACY RIGHTS CLEARINGHOUSE, (May 29, 2006), available at [www.privacyrights.org/ar/FTC-BGChks.htm](http://www.privacyrights.org/ar/FTC-BGChks.htm). Indeed, some legal protection to the quality of identifiable information is granted. See *infra* notes 74-76, 247-248 and accompanying text. It is claimed here that it should be understood as an expression of the right to identity.

31. See e.g., SHERRY TURKLE, *LIFE ON THE SCREEN: IDENTITY IN THE AGE OF THE INTERNET* 250-54 (1996); PATRICIA WALLACE, *THE PSYCHOLOGY OF THE INTERNET* 230-31 (1999); Stephanie Austria, *Forgery in Cyberspace: The Spoof Could be on You!*, 4 U. PITT. J. TECH. L. & POL’Y 2 (2004).

Ruth ruined the identity of her victim.<sup>32</sup>

The simplicity of impersonation goes beyond Internet websites and email services and also characterizes other modern information environments. Impersonation – or “Identity Theft” as it is labeled now – can serve a variety of purposes: receiving loans, credits or other services in another person’s name while indebting him, avoiding the criminal register by adopting another person’s identity and more.<sup>33</sup> It is done by misappropriating and using another person’s personal profile details (name, address, date of birth, credit card details, etc.) as identifiers. Those details are collected by varied means: exploiting personal acquaintanceship, rummaging in garbage cans in search for discarded telephone or credit bills, peeping over a person’s shoulder when personal details are revealed, stealing wallets, hacking databanks, etc.<sup>34</sup> The extent of identity theft offenses is vast, with the numbers steadily rising, so that it has even been crowned as “the crime of the millennium.”<sup>35</sup> In the United States alone, for example, nearly 300,000 complaints of identity theft were reported to the Federal Trade Commission in 2009,<sup>36</sup> and it is estimated that the real number of the victims is much higher, reaching millions.<sup>37</sup>

### iii. *Furcation - Pseudonymity and Multiple Identities*<sup>38</sup>

Parallel to technological innovations, dramatic social changes further intensify the danger to identity. The most significant social change

32. CC (TA) 1386/06 Jacont v. Ha’efrati, PM (2011) (Isr.) (Hebrew). Some of the acts and words ascribed to Jacont were of a negative nature, thus, also harming his good reputation. On the relation between the right to a good reputation and the right to identity see *intra* note 55 and accompanying text. More on this story, see CrimC (TA) 40061/06 State of Israel v. Ha’efrati, PM (2006) (Isr.) (Hebrew); Gal More, *Amnon Jacont: The Nightmare is Over*, YNET (May 29, 2005), [www.ynet.co.il/articles/0,7340,L-3091782,00.html](http://www.ynet.co.il/articles/0,7340,L-3091782,00.html) (Hebrew).

33. Claudia L. Hayward, *Social Security Identity Theft Fact Sheet*, in IDENTITY THEFT 145, 146 (Claudia L. Hayward ed., 2004).

34. Sean B. Hoar, *Identity Theft: The Crime of the New Millennium*, 80 OR. L. REV. 1423 (2001); ANDREW F. WOOD & MATTHEW J. SMITH, ONLINE COMMUNICATION: LINKING TECHNOLOGY, IDENTITY AND CULTURE 68 (2d ed. 2005).

35. Sean B. Hoar, *Identity Theft: The Crime of the New Millennium*, 80 OR. L. REV. 1423 (2001).

36. FEDERAL TRADE COMMISSION, CONSUMER SEMINAL NETWORK DATA BOOK FOR JANUARY-DECEMBER 2009, 6 (Feb. 2010) available at <http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2009.pdf>.

37. For example, in 2005 the FTC conducted a survey and consequently estimated that there were more than 8 million victims in that year. See SYNOVATE, FEDERAL TRADE COMMISSION – 2006 IDENTITY THEFT SURVEY REPORT (2007) available at <http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf>. For more numbers see Angie A. Welborn, *Remedies Available to Victims of Identity Theft*, in IDENTITY THEFT 73 (Claudia L. Hayward ed., 2004).

38. This part only deals with the danger to pseudonym identity. For the argument that these identities often deserve protection see *infra* III.B.

in this context is the new understanding of an identity as being multifaceted and context-dependent, rather than rigid and uniform. One manifestation of this understanding is the variety of roles in which the modern man functions.<sup>39</sup> The nexus between “role” and “identity”<sup>40</sup> and the plurality of capacities in which John functions effectively means that he has different identities in different contexts. A woman’s identity, for example, which traditionally consisted only of her roles as “mother” and “wife,” now comprise additional roles such as “council member,” “tennis player” and “party enthusiast.”<sup>41</sup>

The Internet reinforces the nexus between identity and the context in which it exists in a manner far exceeding the multiple role existence.<sup>42</sup> A prominent example of this is the ubiquitous use of pseudonym identities. A pseudonym identity is managed under an alternate name (pseudonym), and enables a person to conduct his life under a different information identity. John, who in real life goes by the name of “John Lennon,” can be known in an online forum by the name of “Night Princess.” Indeed, the use of pseudonym is not exclusive to the Internet and has always been common among artists and intellectuals. William Sydney Porter is “O. Henry” and Norma Jeane Mortenson is “Marilyn Monroe.”<sup>43</sup> However, in the Internet the use of pseudonyms has expanded in an unprecedented manner. The net is a highly convenient forum for pseudonymic, multiple identity existence. The procedure of acquiring a new identity happens within seconds – registering, choosing a name and setting a password. Even the metaphoric operation of computers by “windows,” which can be changed at a click, relates to the no-

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39. See also Dan P. McAdams, *The Case for Unity in (Post) Modern Self: A Modest Proposal*, in *SELF AND IDENTITY: FUNDAMENTAL ISSUES* 46, 52–53 (Richard D. Ashmore & Lee Jussim eds., 1997).

40. On the notion of identity as a social role see ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959); Marcel Mauss, *A Category of the Human Mind: The Notion of Person; The Notion of Self*, in *THE CATEGORY OF THE PERSON: ANTHROPOLOGY, PHILOSOPHY, HISTORY* 1 (Michael Carrithers et al. eds., 1985).

41. Jan E. Stets & Peter J. Burke, *A Sociological Approach to Self and Identity*, in *HANDBOOK OF SELF AND IDENTITY* 128, 135–36 (Mark R. Leary & June P. Tangney eds., 2003).

42. See also Sherry Turkle, *Parallel Lives: Working on Identity in Virtual Space*, in *CONSTRUCTING THE SELF IN A MEDIATED WORLD* 156–75 (Debra Grodin & Thomas R. Lindlof eds., 1996); Gaia Bernstein, *Accommodating Technological Innovation: Identity, Genetic Testing and the Internet*, 57 *VAND. L. REV.* 965, 984–87 (2004); JOHN PALFREY & URS GASER, *BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES* 34–35 (2008).

43. See also Tal Zarsky, *Thinking Outside the Box: Considering Transparency, Anonymity, and Pseudonymity as Overall Solutions to the Problems of Information Privacy in the Internet Society*, 58 *U. MIAMI L. REV.* 1301, 1340 (2004).

tion of multiple identities.<sup>44</sup> John is “A – a glamorous woman” in one window, “B – a Macho cowboy” in the second, and “C” – a nervous bunny” in the third.<sup>45</sup> Likewise, the bifurcation between virtual life in the computer “online world” and physical life “out there” is associated with the notion of multiple identities.<sup>46</sup>

This social practice gives expression to a revolutionary attitude to identity. On the one hand, it opens new possibilities for unprecedented modes of existence under multiple alternative identities. On the other hand, these identities are increasingly vulnerable. As opposed to an identity which is rigid, uniform and mediated by numerous information channels, a person’s pseudonym identity is usually highly dependent upon a small number of information channels, and in the majority of cases, even relies upon a single monolithic channel. Peter Ludlow’s story demonstrates this. Ludlow participated in a game community under the pseudonym identity of “Urizenus.” This identity, existing exclusively within the framework of the game, depended entirely upon the game administrators, who were also in control of the name and password mechanism. Therefore, when a conflict erupted between them in the course of which they deleted his account, the only infrastructure under which “Urizenus” had existed was destroyed.<sup>47</sup> Had he conducted himself in the traditional format – under a uniform identity, mediated by several information channels – this dependency would not have existed. Deleting his account would definitely have expelled him from the community, but the infrastructure-platform enabling the existence of his identity would have remained intact. There is a clear distinction between exclusion in the physical world, i.e. by terminating John’s membership in the club, and the deletion of his virtual identity. John’s expulsion from a club is physical only. Informatively, his identity still exists. His face and name, which are the manifestation of his identity, are not limited to, and are not dependent upon the club platform. Paul, one of the members, can meet him outside the club and identify him. However, when the identity is a pseudonym, it is tantamount to throwing John out of the club without his face and name. Paul may pass him on the street, but no informative interaction will occur.<sup>48</sup>

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44. ANNET N. MARKHAM, *LIFE ONLINE: RESEARCHING REAL EXPERIENCE IN VIRTUAL SPACE* 53 (1998).

45. *Id.* at 179-80; see TURKLE, *supra* note 31, at 12.

46. MARKHAM, *supra* note 44, at 181.

47. See Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2075 (2004).

48. See also TURKLE, *supra* note 31, at 12.

## B. RIGHT TO INFORMATION IDENTITY

1. *Right to Information Identity – What is it?*

The right to information identity is a person's right to the existence of his information identity. John has the right to demand that Paul be capable of acquiring comprehensive, true, dynamic and continuous knowledge of John, and be capable of attributing it to him when encountering him.<sup>49</sup> In the context of the aforementioned dangers, this means that John has a right to the functionality of the information platforms, which enable his identity to exist in the minds of others. The right imposes limitations upon various players whose conduct affects these platforms (George and Ringo). It prohibits them from behaving in ways that damage it, such as impersonating, distorting, falsifying, deleting, hiding, filtering, and destroying.<sup>50</sup>

It bears emphasis that this right is anchored in John's will. It would be mistaken to view it as a source from which one can derive a correlative "Duty of Identity." Maintaining John's identity against his will – forced disclosure of information about him, forced identification etc. – does not express the right but rather, collides with his rights of privacy and anonymity, and is justified only under the principles that permit the violation of those rights. The right to information identity is relevant to another category of tensions. It emphasizes the weight that should be given to a person's wish to maintain his identity, when others – public or private – seek to act in ways that damage it.

2. *Right to Information Identity – What it is Not*

The right to information identity does not yet exist as an independent and differentiated legal principle. Verily, there are other closely related legal concepts but they are essentially different and are inadequate substitutes for an explicit stable principle of law. Some of them protect other interests related to information identity but not to its existence per se. Others protect identity, but not in the informational dimension. Others still are broad enough to encompass it, but provide only an abstract framework that requires further concretization.

a. *Other Rights in Relation to Information Identity*

The right to information identity differs from a number of related concepts that also relate to information identity. It differs from property and quasi-property rights in identity. It is not concerned with questions

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49. See II.A.1.

50. For broader exemplification see *infra*, IV.C.

such as who is entitled to profit from the identity,<sup>51</sup> or how to sell it,<sup>52</sup> or how to bequeath it<sup>53</sup> etc. These questions assume the existence of an identity, and only focus on its proprietary implications as an already existing asset. In contrast, the right to information identity is concerned with the very being of the “asset” – the existence of identity as such.

The right to information identity also differs from the right to privacy (in the narrow sense of the individual’s right to restrict others from having access to him).<sup>54</sup> In a certain sense it is precisely the opposite. While the right to privacy recognizes a person’s right to separate himself from his surroundings, the right to information identity means a person’s right to the concrete manifestation of his identity and to maintain the connection between him and the minds of others.

It also differs from the right to good reputation, which emphasizes socially positive aspects of a person’s character, and not its mere existence. In other words a person’s right to a good reputation protects him from negative expressions concerning him.<sup>55</sup> By contrast, the right to identity also protects him from neutral expressions, and also from being deleted, concealed, filtered, and impersonated.

Finally, the right to identity must also be distinguished from the freedom of expression. Indeed, “expression,” as well as “identity,” is based on the connection between John (in terms of his expressive mode, or in terms of his identity) and Paul’s mind. Therefore, the two concepts may occasionally overlap. This however does not render them identical. “Expression” is when John communicates his feelings and thoughts to others.<sup>56</sup> “Identity,” on the other hand, comprises the informative details pertaining to John. These differences create different zones of application for each of the two principles. One difference is that the right to identity also protects aspects of John’s identity other than John’s own

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51. On the commercial exploitation of proprietary rights in identity such as the right of publicity see RESTATEMENT (THIRD) ON UNFAIR COMPETITION, §§46-49. See also J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* (2d ed. 2008); JULIUS C.S. PINCKAERS, *FROM PRIVACY TOWARD A NEW INTELLECTUAL PROPERTY RIGHT IN PERSONA* (1996); Sheldon W. Halpern, *The Right Of Publicity: Commercial Exploitation Of The Associative Value Of Personality*, 39 VAND. L. REV. 1199 (1986).

52. See PINCKAERS, *supra* note 51, at 61-62; see also *Haelan Labs., Inc. v. Topps Chew- ing Gum, Inc.*, 202 F.2d 866 (2d. Cir. 1953).

53. *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 396 N.Y.S.2d 661 (App. Div. 1977); PINCKAERS, *supra* note 51, at 168.

54. For this kind of definition see Warren & Brandeis, *supra* note 2, at 193; see also Ruth Gavison, *Privacy and the Limit of Law*, 89 YALE L.J. 421, 429 (1980). For different meanings of the right to privacy see *infra* notes 71-74.

55. NICK BRAITHWAITE, *THE INTERNATIONAL LIBEL HANDBOOK* 183-85 (1995).

56. Eliot F. Krieger, *Protected Expression: Toward a Speaker-Oriented Theory*, 73 DENV. U. L. REV. 69 (1995); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 5 (1974).

expressions – Paul’s expressions about John, data regarding John, John’s identification platforms etc. Another difference is that freedom of expression also protects the right to identity-less (anonymous) expressions.<sup>57</sup>

*b. Other Rights to Identity*

The right to information identity also differs from other concepts, each recognized in contemporary discourse as “right to identity.” Rights to identity in the sense of right to “group association”<sup>58</sup> or the right to express a key component of personality such as sexual orientation,<sup>59</sup> are totally unrelated to the information aspects of identity. Furthermore, they are limited to a single aspect of a person’s life, and as central and important as they may be, they do not exhaust a person’s identity.<sup>60</sup>

A nuance of the contemporary “right to identity” which is closer to the meaning of the “right to information identity” presented here finds expression in the United Nations Convention of the Rights of the Child.<sup>61</sup> Articles 7-8 of the Convention establish a child’s right to be registered by the state immediately after birth, and his right to a name, nationality and family. However, this formulation mixes different meanings of identity, and omits certain aspects of information identity. First, it relates to the non-informational aspect of identity (right to nationality and family). Second, even where it actually relates to informational aspects of identity, such as the right to a name and the right to be registered by the state, these aspects are very partial expressions of the broad and fundamental right to information identity argued for here, which involves a number of additional players (not only the state), and touches on broader aspects (not only the details usually specified in official ID cards), and is much more varied and personal (going far beyond the “official” name and identity).

*c. Broad Paradigms that Include the Right to Information Identity*

There are legal paradigms whose broader sense could, *inter alia*, include the right to information identity. However, these paradigms are no more than highly abstract frameworks that leave large conceptual vacuums that must be filled with more concrete, derivative principles. As

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57. See *McIntyre v. Ohio Election Comm’n*, 514 U.S. 334 (1995).

58. See e.g., William J. Hapiuk, Jr., *Of Kitsch and Kachinas: A Critical Analysis of the “Indian Arts and Crafts Act of 1990”*, 53 STAN. L. REV. 1009 (2001); see also *Constituição Românei* art. VI (Rom.).

59. See e.g., Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915 (1989).

60. For more see *infra*, note 92 and accompanying text.

61. *United Nations Convention on the Rights of the Child*, Nov. 20, 1989, 1577 U.N.T.S.

such they cannot replace the independent, explicit concept of the right to information identity at a lower level of abstraction. Nevertheless, legal recognition of new concepts often relies on previously established and acknowledged concepts. One could therefore expect these paradigms to play an important role in the adoption of the right into the law, as existing conduits for its absorption.

Human dignity<sup>62</sup> is an example of a meta-principle that spawns many derivative fundamental principles<sup>63</sup> and which can serve as a conceptual compass for the right to identity.<sup>64</sup> As detailed below, lack of identity gives rise to a functional attitude towards a person and a loss of his individual intrinsic value. In addition, the existence of identity is a basic condition for the individual's self-realization. It also fortifies the psychological, interpersonal and social aspects of his life, all of which are also appended to the concept of "human dignity."<sup>65</sup> Nonetheless, the conceptual linkage between dignity and identity does not suffice. The formulation of more concrete principles within the meta-frame of "human dignity," such as a "right to information identity," enables a more focused and concrete analysis, based on its own particular rationale.

This is also the case with the right to personality. The legal concept of "personality rights" was developed in European legal literature in the nineteenth century.<sup>66</sup> It is recognized by international law,<sup>67</sup> and by the constitutions and statutes of many countries.<sup>68</sup> As well as dignity, this concept is extremely broad, consisting of a multitude of sub-principles.<sup>69</sup> As such, it can certainly include the right to information identity. Per-

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62. I mean, of course, the "dignity" of a person as a human being and not his "honor." For different concepts of dignity see Orit Kamir, *Honor and Dignity Cultures: The Case of Kavod and Kvod Ha-Adam in Israeli Society and Law*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 231 (David Kretzmer & Eckart Klein eds., 2002).

63. See Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 *HARV. L. REV.* 16, 44-45 n. 109-10 (2002).

64. *Id.* at n. 45 ("Human dignity is therefore the freedom of the individual to shape an individual identity.").

65. See *infra*, part III.A.1.

66. German and Swiss writers used it already in the nineteenth century. However, some have ascribed its final drafting to an article written by the French scholar E.H Perreau in 1909. See Adrian Popovici, *Personality Rights – A Civil Law Concept*, 50 *LOY. L. REV.* 349 (2004). For detailed historical review see STIG STRÖMHOLM, *RIGHT OF PRIVACY AND RIGHTS OF THE PERSONALITY: A COMPARATIVE SURVEY* 27-31 (1967).

67. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), At 22 (Dec. 10, 1948).

68. See *e.g.*, GRUNDEGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDFESETZ] [GG] [BASIC LAW], May 23, 1949, BFBl. I, art. 2 (Ger.); BUNDESVERFASSUNG [BV] [CONSTITUTION] apr. 18, 1999, SR 101, art. 199-199A (Switz.); CONSTITUCION ESPANOLA [C.E.], Dec. 29, 1978, art. 10(1), 25(2), 27(2) (Spain); and more. In some cases the principle is set by a regular statute. See *e.g.*, Civil Code of Quebec, S.Q. 1991, c. 64, art. 3 (Can.).

69. Such principles are a person's right over his body and life, his right to liberty, honor, social position, freedom of activity, commercial sphere of activity, name and marks

sonality and information identity are tightly connected. Not only does information identity reflect the personality of a person as perceived by others, it also plays a central psychological role in shaping and consolidating a person's inner self.<sup>70</sup> Nonetheless, the right to personality, as the right to dignity, must be filled out with sub-principles, such as the right to information identity.

The right to privacy (in its broader senses, as distinct from the narrow one discussed above)<sup>71</sup> can also serve as a legal paradigm, which includes the right to identity. Some broader meanings of the right to privacy bring it closer to the notions of right to dignity<sup>72</sup> and right to personality<sup>73</sup> that were already discussed above. Under another broad understanding, the right to privacy means a person's right to control his personal life, and especially the information concerning him.<sup>74</sup> This broad construction would also encompass the right to identity. A person's right to control information concerning him can be realized by respecting his desire that other people refrain from damaging his identity – that they will not impersonate him, will not erase or distort information regarding him etc. However, this concept is similarly over-inclusive, expressing the notion of control of information in the general sense. The right to information identity, by contrast, emphasizes the importance of controlling the information in a particular manner – control that is realized in a manner that maintains John's existence as an identified character. This concretization is particularly important in a legal environment of balancing which frequently requires evaluation of the weight and importance of conflicting values. A concrete example of this is the right of correction, i.e. a person's right to correct inaccurate information concerning him in an identifiable database.<sup>75</sup> Naturally, this right infringes on the freedoms and rights of the database administrator, and must be justified having consideration for the competing rights. Conceivably, the infringement of the administrator's freedom can be justified by ascribing greater importance and weight to John's autonomy,<sup>76</sup> but this justifica-

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and intellectual property, the right to privacy, the right to family and others. See STRÖMHOLM, *supra* note 66, at 29, 50-51.

70. See *infra*, III.A.1.

71. See *supra* note 54 and accompanying text.

72. See e.g., Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964).

73. See e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* ch. 15 (2nd ed. 1988).

74. See e.g., ALAN WESTIN, *PRIVACY AND FREEDOM* 7 (1967); CHARLES FRIED, *AN ANATOMY OF VALUES: PROBLEM OF PERSONAL AND SOCIAL CHOICE* 140 (1970).

75. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals With Regard to the Processing of Personal Data and On the Free Movement of Such Data, 1995 O.J (L 281), 12(b).

76. See e.g., LEE A. BYGRAVE, *DATA PROTECTION LAW: APPROACHING ITS RATIONAL, LOGIC AND LIMITS* n.505 (2002).

tion is only valid at a very high level of abstraction. It overlooks the tremendous weight that should be ascribed to the right of correction not just because of the importance of autonomy in general, but also because truthful information depicting a person is an essential part of the existence of his identity.<sup>77</sup>

### III. JUSTIFYING THE RIGHT TO INFORMATION IDENTITY

#### A. THE VALUE OF INFORMATION IDENTITY

##### 1. *Inherent Justifications*

###### a. *Personality – Hegel*

One of the crucial components of Hegel's philosophy of rights is the link between "personality" and "right." This link is twofold. One aspect concerns the existence of personality as a pre-condition for having a right. The second one is that a right is justified if it protects the conditions required for the development of personality.<sup>78</sup> Indeed, there is a tight connection between information identity and personality. The actualization of John's personality is inevitably bound up with the existence of his identified character in the minds of others. This can be illustrated by Hegel's notion that rights are justified *inter alia* because they enable the transfer of the personality from the inner dimension to the outside world.<sup>79</sup> This notion, for example, can justify the right to property. By controlling physical objects the person can realize his personality in the outside world.<sup>80</sup> This notion similarly justifies the right to identity. The existence of John's identity in the mind of others enables the externalization or expression of his personality, indeed, not in a physical, but rather in an abstract sense. However, this abstract dimension, existing in the minds of others, is still external to John. Without information identity, a person cannot externalize his personality beyond his own consciousness. A person whose identity is not conceived by others can only connect with the physical world – he can hold objects, operate them, and walk across the land – but he cannot exteriorize himself in a manner in which minds other than his own give meaning to things. Only his mind conceives himself. Only it gives him meaning and purpose. He is therefore restricted to his inner dimension, which is narrow (in its singular perspective) and of

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77. For further exemplification, see *infra* fn. 247-248 and accompanying text.

78. See G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* §§36, 66 (T.M. Knox trans, Oxford Univ. Press 1952) (1821); JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 353 (1988).

79. HEGEL, *supra* note 78. For the aspect of externality in Hegelian Theory see WALDRON, *supra* note 78.

80. For additional versions of the Hegelian theory of property rights see WALDRON, *supra* note 78. Margaret J. Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982).

limited duration (his lifetime).<sup>81</sup>

In fact, the relation between identity and personality is even closer. In psychology, the absence of identity in the mind of others restricts not only the externalization of the personality, but also limits its inner crystallization. Personality depends, *inter alia*, upon the subject's self-perception, which is based on the totality of the thoughts, feelings and fantasies that a person entertains in relation to himself.<sup>82</sup> Self-perception is also important per se. A person who does not perceive himself as a distinct and continuous entity with his own life story, a past and a future, is a lost person who experiences himself as a momentary, insignificant occurrence.<sup>83</sup> However, from a psychological perspective, in order for John to develop his own self-perception, he is largely reliant upon the ability of others to perceive his identity in their own minds.<sup>84</sup> In fact, the entire discipline of "Social Psychology" is based on the acknowledgment of the immense importance of societal influence on the individual.<sup>85</sup> This influence is equally important when it comes to an individual's self-perception.<sup>86</sup>

This dependency also finds expression in specific psychological mechanisms. Thus, Paul's perception of John's identity constitutes the basis for John's "self-confirmation." This mechanism is activated when a person receives social feedback that conforms to his own self-perception. For Paul to be able to confirm John's self-perception, he must first be able to perceive John's identity in his mind. Self-confirmation is of supreme importance from a psychological perspective. There is scientific evidence that the need to "be confirmed" (which is linked to the protection of information identity) even exceeds the need to be "aggrandized" (which is linked to the protection of good reputation). The explanation for this is that "aggrandizement" satisfies immediate and narrow needs that are the result of the exaggerated positive impression a person may generate. "Confirmation," on the other hand, supplies that deep feeling of

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81. This, of course, raises the question, which will not be discussed here, of whether the right should also be recognized after the person's death. On the general concept see Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763 (2009).

82. Stets & Burke, *supra* note 41, at 130.

83. See CRISPIN THURLOW ET AL., *COMPUTER MEDIATED COMMUNICATION: SOCIAL INTERACTION AND THE INTERNET* 96 (2004) and the references mentioned there. See also NORMAN N. HOLLAND, *THE I* 75 (1985).

84. See Dianne M. Tice & Harry M. Wallace, *The Reflected Self: Creating Yourself as (You Think) Others See You*, in *HANDBOOK OF SELF AND IDENTITY* 91 (Mark R. Leary & June P. Tangney eds., 2003); see also Stets & Burke, *supra* note 41.

85. Gordon W. Allport, *The Historical Background of Social Psychology*, in 1 *HANDBOOK OF SOCIAL PSYCHOLOGY* 1 (3rd. ed. 1985).

86. Herbert Blumer, *Society as Symbolic Interaction*, in *SYMBOLIC INTERACTION* 78 (Herbert Blumer ed., 1969)

continuity and existence.<sup>87</sup> Another mechanism that reflects the affinity between information identity and self-perception is the “looking-glass self.” A person’s self-perception depends upon his perception of how others see him. Hence, in order for him to perceive himself and crystallize his own self-perception he needs others to be able to perceive his identified character.<sup>88</sup> Information identity also plays a crucial role in the development and changing of a personality. A series of experiments have shown that identified behavior influences personality development far more profoundly than anonymous behavior.<sup>89</sup>

*b. Humanism – Kant*

One of the categorical imperatives of Immanuel Kant’s moral philosophy has, over time, become one of the most pervasive moral principles: “Act in such a way always that you treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.”<sup>90</sup> This moral paradigm is also one of the foundations of legal thinking.<sup>91</sup>

The existence of identity is a crucial factor in the fulfillment of this Kantian principle as can be demonstrated by a comparison between identity and other forms of knowledge regarding people. John can be perceived as “John Lennon – British, adult, male, musician etc.” (Identity), or alternatively, as “someone who is an adult” (Anonymity plus a single piece of data). Obviously, if one’s sole purpose is to ascertain the fact that John is an adult (for instance, when buying alcohol), and then this tiny morsel of information would suffice and would even be preferable from a privacy perspective. However, in many situations this is not sufficient. People do not always want to be viewed merely as being “British” or “an adult.” That kind of attitude toward people would even be considered as rude, and certainly as excessively remote. Neither does it conform to the Kantian imperative. In order to express the human value of a person, there must be synergic knowledge of him. Identity constitutes such knowledge. John is not just “The British” or “The Adult” or a “Rock Star,”

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87. William B. Swann, Jr. et al., *Self-Verification: The Search for Coherence*, in HANDBOOK OF SELF AND IDENTITY 367, 376 (Mark R. Leary & June P. Tangney eds., 2003) compare with Roy F. Baumeister, *The Self*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 680 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 1998).

88. See e.g., Tice & Wallace, *supra* note 84.

89. Dianne M. Tice, *Self-Concept Change and Self-Presentation: The Looking-Glass Self is Also a Magnifying Glass*, 63 J. PERS. & SOC. PSYCHOL. 435 (1992); Barry R. Schlenker, *Self Presentation*, in HANDBOOK OF SELF AND IDENTITY 492, 502 (Mark R. Leary & June P. Tangney eds., 2003).

90. H.J. PATON, THE MORAL LAW: KANT’S GROUNDWORK OF THE METAPHYSIC OF MORALS 91 (H.J. Paton trans., Hutchinson University Library London 1948) (1875).

91. See e.g. United States v. Stevens, 29 F. Supp. 2d 592, 612 (D. Alaska 1998); United States v. Bergman, 416 F. Supp. 496, 499 (S.D.N.Y. 1976).

but rather a character who synergically combines all of these features. People are more complex beings than a single trait or a role which may be attributed to them and their humanity, and cannot be reduced to a single datum. This is what separates human beings from objects. A paper cutter, if to borrow a famous example from Jean Paul Sartre, is an object. Its essence is fully expressed in its functionality. Design it so that the paper will not be cut, it will cease being, well, a “paper cutter.” It has no existence or meaning whatsoever outside its role. People however are different and their existence transcends the specific roles they may fill.<sup>92</sup> Naturally, John has many roles and attributes – he is “male,” “British,” “father” and “rock star.” But he also has additional roles, and he also carries the history and evolution of these roles in his life. Moreover, he has a future potential to transcend these roles, and he is free to embrace new roles for himself. He is all this. He is an identified character. He is “John Lennon.” Whenever John is perceived exclusively in terms of his roles, he is, in Kantian terms, reduced to being a means to an end. He is a “Rock Star” – a superficial figure, made for purposes of entertainment and not “John Lennon” – a complete, integrated and multifaceted human being.

This linkage between identity and humanness is also scientifically supported. People will hurt anonymous victims more cruelly than identified victims.<sup>93</sup> Furthermore, the anonymity of the torturer has a de-individualizing effect on himself which leads to cruel and inhuman conduct.<sup>94</sup>

### c. *Humans as Social Beings*

One of the central criticisms of liberalism relates to the basic notion of the human being an independent, separate entity. Critical literature

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92. Jean-Paul Sartre, *Existentialism Is a Humanism*, in *EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE* 345, 348 (Walter Kaufman ed., 1975).

93. Phillip G. Zimbardo, *The Human Choice: Individuation, Reason and Order Versus Deindividuation, Impulse, and Chaos*, in 17 *NEBRASKA SYMPOSIUM ON MOTIVATION* (William J. Arnold & David Levine eds., 1969).

94. See Steven Prentice-Dunn & Ronald W. Rogers, *Effects of Deindividuation Situational Cues and Aggressive Models on Subjective Deindividuation and Aggression*, 39 *J. PERS. & SOC. PSYCHOL.* 104 (1980); Robert I. Watson Jr., *Investigation into Deindividuation Using a Cross-Cultural Survey Technique*, 25 *J. PERS. & SOC. PSYCHOL.* 342–45 (1973). A similar picture emerges from the studies on anonymous behavior in the internet. See, e.g., Adam Joinsen, *Cause and Implications of Disinhibited Behavior on the Internet*, in *PSYCHOLOGY AND THE INTERNET: INTRAPERSONAL, INTERPERSONAL AND TRANSPERSONAL IMPLICATIONS* 43 (Jayne Gackenbach ed., 1998); see also Lee Sproull & Sara Kiesler, *Computers, Networks, and Work*, in *SOCIAL ISSUES IN COMPUTING: PUTTING COMPUTING IN ITS PLACE* 335, 338–39 (Chuck Huff & Thomas Finholt eds., 1994); see also Thurlow, *supra* note 83, at 62.

stresses precisely the fact that man is essentially a social being.<sup>95</sup> This critique is particularly incisive in the context of Cultural Feminism, which seeks to express gender equality via the reinforcement of feminine values.<sup>96</sup> These values, it is claimed, are grounded in the notion that people are not separate entities, but rather bound to one another and interdependent. These values are defined as “feminine,” *inter alia*, having consideration for the existential condition of women, which is one of “connectedness” (in time of pregnancy, for example), as distinct from the existential condition of the male, which is one of “separateness.”<sup>97</sup> To be precise, it bears mention that liberalism does not reject the notion of the individual’s social nature. The notion of the separateness of the human being and his need for autonomy and self-actualization does not mean ignoring his social needs. Even a declared liberal, who devoutly believes in the individual’s right to the pursuit of happiness and self-fulfillment, would agree that a significant part of this pursuit involves interpersonal and social relationships.

Either way, irrespective of its specific justification, an acknowledgment of the importance of the social and interpersonal dimension of the human condition also compels and justifies recognition of the right to identity. The existence of one’s identity in the mind of the other is significant in the formation of interpersonal and social relationships. The continuous and synergic characteristics of the knowledge comprising identity are necessary (though not sufficient) conditions for a close relationship. A name, for example, is a component of the information identity platform that has significance in establishing relationships. Knowing a person’s name constitutes an anchor for gathering continuous, synergic knowledge regarding that person, thus reflecting the historic depths and future horizons of his character. It thus plays a crucial role in preserving the knowledge and the relationship beyond the limits of a momentary meeting. Ignorance of names usually attests to a non-intimate and functional relationship.<sup>98</sup> In addition, the truthfulness of the knowledge comprising the identity contributes to the depth of the relationship. Honest evaluation and self-confirmation are more important to a relationship than false glorification. This is true both for (long term) romantic rela-

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95. See e.g. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1774 (1976); Anthony Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 1009–10 (1990).

96. On this and other forms of feminism in general see Owen M. Fiss, *What is Feminism?*, 26 ARIZ. ST. L.J. 413 (1994).

97. Robin West, *Jurisprudence and Gender*, 55 UNIV. CHI. L. REV. 1, 14 (1988).

98. See also RAY OLDENBURG, *THE GREAT GOOD PLACE: CAFES, COFFEE, SHOPS, COMMUNITY CENTERS, BEAUTY PARLORS, GENERAL STORES, BARS, HANGOUTS, AND HOW THEY GET YOU THROUGH THE DAY* 10 (1989).

tions<sup>99</sup> and for friendships.<sup>100</sup> Moreover, as would be elaborated below, identity is also a condition for the development of mutual trust.<sup>101</sup> This trust enables new interpersonal and social relationships to evolve, and deepens existing relationships into close or even intimate friendships.<sup>102</sup>

## 2. *Instrumental Justifications*<sup>103</sup>

### a. *Psychological Significance for Others*

The existence of John's identity in Paul's mind is also important for Paul's consolidation of his own self-perception and personality. The psychological mechanism of "social comparison" demonstrates this. Comparison between a person's self-evaluation and his evaluation of his peers is important to his self-perception.<sup>104</sup> Sometimes it is even more important than evaluation according to objective standards,<sup>105</sup> especially when the context in which the person analyzes himself is significant to this person.<sup>106</sup> John's right to identity serves Paul's "social comparison" mechanism. The existence of John's identity in Paul's mind is essential to the operation of the mechanism – indeed, this identity is the subject of the comparison. It should be emphasized that "social comparison" extends beyond statistical comparison (for which Paul can use anonymous data). Its significance in consolidating self-perception increases precisely when the objects of comparison are one's familiar peers, i.e. those who have a

99. See e.g., Peter J. Burke & Jan E. Stets, *Trust and Commitment Through Self-Verification*, 62 *SOC. PSYCHOL. Q.* 347 (1999); William B. Swann, Jr. et al., *Self-Verification: The Search for Coherence*, in *HANDBOOK OF SELF AND IDENTITY* 367, 371 (Mark R. Leary & June P. Tangney eds., 2003).

100. William B. Swann, Jr. et al., *Should We Create a Niche or Fall in Line: Identity Negotiation and Small Group Effectiveness*, 79 *J. PERSONALITY & SOC. PSYCHOL.* 238 (2000).

101. See *infra* III.A.2.d.

102. See Helen Nissenbaum, *Securing Trust Online: Wisdom or Oxymoron?* 81 *B.U. L. REV.* 635, 639–640 (2001); RUSSELL HARDIN, *TRUST AND TRUSTWORTHINESS* 139 (2002).

103. Instrumental justifications can justify also a "duty of identity." This means that if the existence of identity indeed serves interests and values external to John, it could be argued that it should be maintained even against his will. As mentioned above, the current discussion does not address this tension (see *supra* III(a)2). In the present context, then, these justifications should be interpreted as an additional layer of justification that complements the inherent justifications. In other words, if a person wishes to maintain his identity, it should be protected not just because of inherent justifications that focus on him, but also by reason of external considerations.

104. Joanne V. Wood & Anne E. Wilson, *How Important is Social Comparison?* in *HANDBOOK OF SELF AND IDENTITY* 344, 352–57 (Mark R. Leary & June P. Tangney eds., 2003)

105. *Id.* at 346 (Thus, for example, students are more curious about their grade in comparison to other students than in comparison to the maximum possible grade.); but compare Leon Festinger, *A Theory of Social Comparison Processes*, 7 *HUM. REL.* 117 (1954).

106. Richard L. Miller, *Preferences for Social vs. Non-Social Comparison as a Means of Self-Evaluation*, 45 *J. PERSONALITY. & SOC. PSYCHOL.* 343 (1977).

known identity for the person conducting the comparison.<sup>107</sup>

*b. Efficiency*

The right to identity promotes social efficiency. Quite simply, when John actualizes his right to identity, he protects the existence and truthfulness of information regarding him. This true information benefits both those required to make decisions based on it, and society in whole, which benefits from intelligent and informed decisions. In fact, one of the downsides of the right to privacy – which protects the opposite situation, i.e., the secrecy of this information – is the inefficiency that results from lack of knowledge.<sup>108</sup> Besides this self-evident aspect, the right to identity also promotes efficiency in another sense. The nature of the knowledge comprising identity, encompassing the totality of information regarding a person bearing a certain name, creates a cheap and simple mechanism for information management. This aspect was already noted by Russel, who stated that an object's (or a person's) "name" constitutes a shortcut to its (his) description.<sup>109</sup> Linguistic research also proves that short words expressing complex concepts are more efficient. Thus, for example, in Eskimoan there is one word to describe the phenomena of "snow falling." This contrasts with other languages that use two words to describe the same phenomenon. The reason is that to the extent that a phenomenon is more ubiquitous it is more efficient to denote it using a single word.<sup>110</sup> Indeed, instead of saying "The Beatles' member, who was murdered in front of his home in New York etc.," it is more efficient and economic to simply say "John Lennon."<sup>111</sup> Beyond its cheapness, it is also efficient for the dissemination of information. A name serves as an anchor, which enables Paul to collect additional information regarding John even without directly encountering him, by mentioning his name and then supplementing it with further information relating to his character.<sup>112</sup>

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107. Jennifer D. Campbell et al., *Better than Me or Better than Thee? Reactions to Intrapersonal and Interpersonal Performance Feedback*, 54 J. PERSONALITY 479 (1986).

108. See for example RICHARD A. POSNER, *THE ECONOMIC OF JUSTICE* 232–48 (1981).

109. Bertrand Russell, *On Denoting*, 14 MIND 479–93 (1905).

110. See FRANK R. PALMER, *SEMANTICS* 21 (2nd ed. 1981) as quoted by William Landes & Richard Posner, *The Economics of Trademark Law*, 78 TRADEMARK REP. 267, 271–72 (1988); see also Mathias Strasser, *The Rational Basis of Trademark Protection Revisited: Putting the Dilution Doctrine into Context*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 375, 380 n.19 and accompanying text (2000).

111. In the same manner, identity of products (brand) also promotes this kind of efficiency. See Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 818 (1926); see also Strasser, *supra* note 110, at fn. 18 and accompanying text.

112. See Ralph Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1187 (1948); see also Strasser, *supra* note 110, at 382–86.

c. *Incentive and Accountability*

Another justification for the right to identity is that it protects the incentive for positive social conduct. This incentive is the consequence of the fact that identity creates accountability, meaning, that it makes John responsible for his actions and words.

In many cases accountability is the product of a social responsive mechanism. Admittedly, this social aspect is not imperative – for example, a girl who injures herself playing a dangerous game is held responsible “automatically” (by pain) and not by any social mechanism (e.g. her father’s anger triggered by her dangerous behavior). However, the more common case is that society responds to John’s acts, good or bad, with “carrots” and “sticks.” It also bears mention that social accountability may also operate under the veil of anonymity. When John breaks into Paul’s house, wearing a mask on his face, he can still suffer a painful and immediate punch from Paul, one that is loaded with accountability. However, the accountability that is the product of identity goes far deeper. The continuity of the identity in time imposes responsibility in the future upon John for his past and present deeds. This creates a far more significant and lasting incentive.

As such it is no wonder that many have mentioned the lack of accountability of villains as the heaviest price of anonymity – the opposite of identity.<sup>113</sup> Indeed, lawbreakers typically attempt to conceal their identity. They cover their faces with stockings and their hands with gloves. By doing so, they hope to evade responsibility for the crime. It can hardly be disputed that identity and the resultant accountability may prevent crime. However, the right to identity does not serve this purpose directly. The villain does not want his identity to exist in relation to his crime. He does not want to be held responsible for the crime and hence bear its consequences. Activating the accountability mechanism in this context means forcing him to act in an open, identified manner. The right to identity on the other hand is grounded in the will of the right holder,<sup>114</sup> and as such does not serve accountability when based exclusively on negative incentives, such as the punishment of offenders. By contrast, it does promote accountability when based on a positive incentive. John wants to be positively rewarded in the future for his positive

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113. For examples, see Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1645–46 (1995); Michael Froomkin, *Regulation and Computing and Information Technology: Flood Control on the Information Ocean: Living With Anonymity, Digital Cash, and Distributed Database*, 15 J. L. & COM. 395, 402–08 (1996). See also the dissenting opinion of Justice Scalia in the case of McIntyre, *supra* note 57, at 385. Nevertheless, it should be emphasized that anonymity also carries many advantages. See *infra*, notes 153-159 and accompanying text.

114. See *supra*, II.B.1.

acts of today. He wants to be held accountable and this dictates his need to maintain his identity.

This phenomenon finds striking, though not exclusive, expression in the commercial arena.<sup>115</sup> In this arena merchants wish to maintain their commercial identities, in order to reap the future rewards resulting from the excellence of their reputations. Only an economy based on long-term foundations such as accountability, and identity – justifies an investment in the quality of the products,<sup>116</sup> and maintaining the durability of those qualities.<sup>117</sup> In the short run, the merchants are concerned only with creating a favorable impression of quality in the superficial sense at the moment of purchase.<sup>118</sup> Indeed, the effectiveness of these incentives is not solely a function of identity. To motivate John into developing a rewarding identity, he should also be protected from defamation (good reputation),<sup>119</sup> and be acknowledged as the owner of the identity in a manner that prohibits any other entity from exploiting its commercial value (property).<sup>120</sup> However, the foundation, which generates this incentive mechanism, is of course, the mere existence of identity.

Indeed, the positive incentive is John's primary motive for accountability and identity. However, having chosen that path, he subjects himself to all the rules of the accountability regime, including all its incentives both positive and negative.<sup>121</sup> This is exemplified by the growing social involvement of commercial entities. This phenomenon is not just the result of the desire for a positive reward, but also – and perhaps primarily, the desire to avoid the negative image that results from grow-

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115. It is worth emphasizing that no argument will be made here for a "right to corporate identity." This question necessitates a detailed discussion, which exceeds the boundaries of the current discussion which focuses on the mere conceptualization of the right. The discussion in the commercial-corporative context is only mentioned here to demonstrate the manner in which voluntary accountability works and its connection to the existence of identity.

116. See also Landes & Posner, *supra* note 110, at 269-270; John F. Coverdale, *Trademarks and Generic Words: An Effect-On-Competition Test*, 51 U. CHI. L. REV. 868, n.11 and accompanying text (1984).

117. Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981); Carl Shapiro, *Premiums for High Quality Products as Return to Reputation*, 98 Q. J. ECON. 659 (1983).

118. Strasser, *supra* note 110, note 21-22 and accompanying text; see also Steve Hilton, *The Social Value of Brands*, in BRANDS AND BRANDING 47, 50–52 (2003).

119. Doctrinally speaking, defamation is not a commercial tort, but its counterpart – commercial disparagement – is. See David A. Anderson, *Symposium: Dan B. Dobbs Conference on Economic Tort Law: Rethinking Defamation*, 48 ARIZ. L. REV. 1047 (2006); Mary-Ann Fenicato, *Two-Year Statute of Limitations Conferred Upon Commercial Disparagement: Commercial Disparagement Separate From General Defamation Genesis*, 2 LAW J. 1 (2000). However, defamation can, of course, injure commercial interests.

120. MCCARTHY, *supra* note 51.

121. See also Rita Clifton, *Introduction*, in BRANDS AND BRANDING 1, 3 (2003).

ing criticism of the exploitative nature of business practices in relation to the manpower and environment.<sup>122</sup>

The linkage between voluntary accountability, identity, and positive social incentives is not limited to the commercial context. In other contexts too – personal, social, professional, and political – the rules of “reward and punishment” shape people’s behavior. Positive reward that may motivate pro-social conduct finds expression not only financially, but also in the form of affection or veneration, as distinct from anger or scorn.

### c. *Trust*

Trust has been defined as the estimation of Paul (the truster) that John (the trusted) will act in accordance with his commitments or in Paul’s best interests.<sup>123</sup> It is hard to overstate the importance of trust. Trust reduces fears, risks and uncertainties, and frees people from the need to constantly calculate all the interests and options of others.<sup>124</sup> It is also an essential factor in establishing personal relationships.<sup>125</sup> Trust also has social merits. It is the basis of the social order.<sup>126</sup> It promotes solidarity and enhances social strength.<sup>127</sup> It increases cooperation and facilitates lively economic life.<sup>128</sup>

The existence of identity increases the level of trust. An anonymous society is a society made up of strangers who find it difficult to develop mutual trust.<sup>129</sup> The linkage between trust and identity has two sides. One, rooted in the past, enables Paul to estimate John’s acts based on his past behavior. Identity provides this historic dimension and reduces the risk of dealing with John.<sup>130</sup> The second side of this linkage is based on incentives – rooted in the future. Identity and accountability encourage

122. See Harold James, *The Ethics of Business Life: Some Historical Reflections*, in *RETHINKING BUSINESS MANAGEMENT* 9, 14-15 (Samuel Gregg & James R. Stoner eds., 2008); see also Hilton, *supra* note 118, at 54.

123. Avner Ben-Ner & Louis Putterman, *Trusting and Trustworthiness*, 81 *B.U. L. REV.* 523, 527 (2001); see also *TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS* 217 (Diego Gambetta ed., 1988).

124. Niklas Luhmann, *Trust: A Mechanism for the Reduction of Social Complexity*, in *TRUST AND POWER: TWO WORKS BY NIKLAS LUHMANN* 1 (1979).

125. See *supra* note 102 and accompanying text.

126. STEVEN L. NOCK, *THE COSTS OF PRIVACY: SURVEILLANCE AND REPUTATION IN AMERICA* 1 (1993).

127. ADAM B. SELIGMAN, *THE PROBLEM OF TRUST* 73 (1997); Philip Pettit, *The Cunning of Trust*, 24 *PHIL. & PUB. AFF.* 202, 225 (1995).

128. Ben-Ner, *supra* note 121, at 545-46; see also *supra* note 110.

129. Froomkin, *supra* note 113, at 405; see also Luhmann, *supra* note 124, at 39.

130. Strasser, *supra* note 110, fn. 18; see also KEVIN LANE KELLER, *STRATEGIC BRAND MANAGEMENT* 9 (1998).

John to act in a trustworthy pro-social manner.<sup>131</sup>

Indeed, there are alternative means of establishing trust that do not necessitate identity, and resorting to them is inevitable in a modern society.<sup>132</sup> As such, the presentation of "Credentials" (education certificates, stamp of approvals etc.) and conduct of "Ordeals" (drug tests, IQ tests etc.) are objective mechanisms that establish trust among strangers. They provide functional relevant data regarding John, i.e., being a licensed driver or drug-free, and do not inevitably dictate knowledge of his identity which consists of a far broader scope of knowledge about John. The importance of having these alternatives is evident, but they do not obviate the need for identity. First, on the technical level, identity frequently serves as a mean of authenticating that data. A driver's license bears the name and face of the driver as a way of authenticating the information included thereon. Second, the alternative trust mechanisms still depend upon knowing (and trusting) the identity of the certifier. For example, an academic diploma ascribed to John is valuable only if Paul knows and trusts the academic institution. Third, the trust established by identity along time is deeper than the one that is afforded by credentials and ordeals. When the knowledge concerning a person is not reduced to a precise objective piece of information, e.g. "he is a certified medical doctor," but comprises a more detailed history, based on personal interaction – the trust it engenders attains different and higher levels. Indeed, consumers prefer identity-based trust means (e.g. brands personally used by them, reputed brands) to non-identified ones (e.g. self-testing the traits of a product, third party seal of approval).<sup>133</sup>

#### d. Community

The existence of a community is of great value either as an end in itself,<sup>134</sup> or as an instrument that serves the members of that community.<sup>135</sup> But not every group of people merges into a community. In order to become a community, a cohesive element is necessary. The nature of this cohesive element is vague,<sup>136</sup> but it seems that the identity existence of its members is one of the preconditions for the crystallization of

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131. Eric Friedman & Paul Resnick, *The Social Cost of Cheap Pseudonyms*, 10 J. ECON. & MGMT. STRATEGY 173, 173-74 (1998).

132. See e.g., Nock, *supra* note 126.

133. Ted Roselius, *Consumer Ranking of Risk Reduction Methods*, 35 J. MARKETING 56 (1971); see also KELLER, *supra* note 130, at 8-9; Hilton, *supra* note 118, at 59.

134. Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6 (1990); AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* (1993).

135. WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* 164 (1989).

136. See George Hillery Jr., *Definitions of Community: Areas of Agreement*, 20 RURAL SOC. 111 (1955).

a community. Howard Rheingold, who coined the phrase “Virtual Communities,” emphasized, *inter alia*, the important role of the members’ continuous identity in the founding of the community.<sup>137</sup> In order to integrate, communities require the constant participation of its members and the maintenance of long-term relationships among them.<sup>138</sup> This kind of permanence and continuity is the result of the existence of members’ identity, enabling each one of them to appear in community life as a continuous character. A community also needs its members to be acquainted with one another and to have relatively broad knowledge of each other. The synergic nature of identity knowledge provides exactly this.<sup>139</sup>

Some theories link community integration with the identity existence of only some of its members. For example, communities can be formed in non-formal places, known as “Third Place” e.g. the local pub, barbershop or sports center.<sup>140</sup> One of the many social features of “Third Place” communities is the existence of regular members. These “regulars” constitute the social core of the community. Without them, the pub will provide its customers the immediate need for sibling and nibbling, but not the community experience.<sup>141</sup> Indeed, research conducted on virtual communities, which many see as new “Third Places,”<sup>142</sup> confirm this role of “the regulars.”<sup>143</sup>

#### e. Democracy

Identity is also relevant for democratic principles. Concededly, anonymity too is linked to democratic principles – voting is anonymous.<sup>144</sup> Moreover, one of the central justifications for the constitutional protection of freedom of anonymous speech is the facilitation of an open democratic public discourse, free from social chilling effects.<sup>145</sup> However, a

137. HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* 25-56 (1992) (MIT Press rev. ed. 2000).

138. Quentin Jones, *Virtual-Communities, Virtual Settlements & Cyber-Archaeology*, 3(3) J. COMP. MED. COMM. 1, sec. 2(4) (1997).

139. See *supra* notes 132-33 and accompanying text; see also Frooking, *supra* note 113, fns. 26-28 and accompanying text; Amitai Etzioni, & Oren Etzioni, *Face-to-Face and Computer-Mediated Communities, A Comparative Analysis*, 15 THE INFO. SOC’Y 241, 243 (1999).

140. See OLDENBURG, *supra* note 98, at 6 (the “First Place” is home; and the “Second Place” is the workplace).

141. *Id.* at 15.

142. See e.g. Howard Rheingold, *A Slice of Life in My Virtual Community* (1992), available at [www.cs.indiana.edu/docproject/bdgtt/bdgtt\\_18.html](http://www.cs.indiana.edu/docproject/bdgtt/bdgtt_18.html); SHERRY TURKLE, *LIFE ON THE SCREEN: IDENTITY IN THE AGE OF THE INTERNET* 233-35 (1996).

143. RHEINGOLD, *supra* note 137, ch. II; see also MARKHAM, *supra* note 44, at 176.

144. See also Jonathan W. Still, *Political Equality and Election Systems*, 91ETHICS 375, 382-83 (1981). Although it is worth mentioning that the content of the voting is anonymous, not the mere act of voting.

145. See also *infra* notes 153-55 and accompanying text.

democratic society cannot survive, much less thrive, on anonymity alone. In many aspects democracy requires the existence of identity.

Anonymity tends to generate extremism while identity has a moderating effect. Research shows that anonymous online activity is an open invitation to radical tendencies.<sup>146</sup> This extremism is harmful to democracy. Democracy is the antithesis of ultraism. Democracy is based upon tolerance and pluralism. It accommodates conflicts among groups and individuals, interests and values. Resolving these tensions necessitates balances, conciliation and mutual consideration.<sup>147</sup> This, of course, does not justify forcing identity on speakers. However, if a person wishes to express himself openly, without the mask of anonymity, an additional advantage of protecting his choice is the democratic-moderating-balancing effect of identity.

Identity also plays a democratic role in the context of elections. Seemingly, it is indeed possible to vote for anonymous candidates, and at first blush this method seems even more democratic. Candidates would be elected for what they stand for and not by reason of their identity. This system of elections might even remedy racism, prejudice and other odious phenomena that may taint the voting procedure.<sup>148</sup> Consequently, an alternative model based on candidate anonymity has been given serious consideration.<sup>149</sup> Nonetheless, the concept of anonymous candidates is highly problematic. People elected to positions of power are public trustees, and voters require extensive information about them. Voting cannot be based upon objective labels attached to the candidates: Brigadier General, PhD in sociology, age sixty, believes in privatization. Voters need to know who the candidate is and to form their opinions relying on their own interpretations of the candidate's statements, deeds, and personality. As such, voting for anonymous candidates is bad and non-democratic.<sup>150</sup>

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146. WALLACE, *supra* note 31, at 75; THURLOW ET AL., *supra* note 83, at 63-64.

147. BARAK, *supra* note 6, at 63-64.

148. See e.g., Richard Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1369-70 (1995).

149. Debra M. Brown, *Calling the Bluff: Exploring Anonymity as a Means to a Color-blind Electoral System*, 66 MISS. L.J. 547, 568 (1997).

150. See JOHN HASKELL, *DIRECT DEMOCRACY OR REPRESENTATIVE GOVERNMENT? DISPELLING THE POPULIST MYTH* (2001). It should be mentioned that candidates' identity is only required in "representative Democracy." "Direct Democracy can, in principle, be maintained by citizens voting directly on myriad issues. There is no need for representatives and no need for their identities. However, despite the luring idea of the direct decisions by the "people, there are many reasons for preferring representatives.

## B. THE VALUE OF MODERN INFORMATION IDENTITY – PSEUDONYMITY

1. *The Dual Nature of Pseudonymity*

Pseudonymity has a dual character. On the one hand, and similar to anonymity, it strips a person of his “real” identity.<sup>151</sup> On the other hand, and in contrast to anonymity, it still enables him to appear in the mind of others as an identified character, i.e., one who has an identity. In fact, it bestows him with multiple identities – his “real” identity in some contexts, and his pseudonym identity in others. This distinction between anonymity and pseudonymity, though not always strictly maintained, is nonetheless important. Many people manage themselves not simply anonymously but rather pseudonymously.<sup>152</sup> In addition to the severance from their “real” identities, they also wish to adopt new ones.

Indeed, a person’s ability to detach himself from a “real” identity is of tremendous value. It promotes free speech. It enables John to express himself without the chilling effect of social accountability.<sup>153</sup> Consequently, anonymous persons are far more willing to express personal distress<sup>154</sup> and unpopular views.<sup>155</sup> It also protects privacy by preventing the gathering of personal data attributable to a single easily searchable identity.<sup>156</sup> It also promotes equality by ensuring objective judgment, free of extraneous considerations that often ensue from the awareness of identity.<sup>157</sup> For example, it immunizes teachers from being prejudicial when grading students and periodical editors when choosing publishing

151. More on the distinction between anonymity and pseudonymity see Noah Levine, *Establishing Legal Accountability for Anonymous Communication in Cyberspace*, 96 COLUM. L. REV. 1526, 1528 fn. 9 (1996); Michael Froomkin, *Anonymity and Its Enmities*, 1995 J. ONLINE L. 4, ¶¶ 31–40.

152. Joseph B. Walter & Malcolm R. Parks, *Cues Filtered Out, Cues Filtered In: Computer-Mediated Communication and Relationships*, in HANDBOOK OF INTERPERSONAL COMMUNICATION 529 (Mark L. Knapp & John A. Daly eds., 2002); Haya Bechar-Israeli, *From <Bonehead> to <cLoNehEAd>: Nicknames, Play, and Identity on Internet Relay Chat*, 1 J. COMP. MED. COMM. (1995).

153. Shaun B. Spencer, *Cyberslapp Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. MARSHALL J. COMPUTER & INFO. L. 493, 497 (2001); *Buckley v. ACLF*, 525 U.S. 182, 221 (1999).

154. See Froomkin, *supra* note 113, at 408-09; George P. Long, *Who Are You? Identity and Anonymity in Cyberspace*, 55 U. PITT. L. REV. 1177, fn. 29–30 and accompanying text.

155. Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 CONN. L. REV. 981 (1996); see Michael Froomkin, *Regulation and Computing and Information Technology: Flood Control on the Information Ocean: Living With Anonymity, Digital Cash, and Distributed Database*, 15 J.L. & COM. 395, 402-408 n 106 (1996).

156. See also Ken D. Kumayama, *A Right to Pseudonymity*, 51 ARIZ. L. REV. 427, 464 (2009).

157. See Froomkin, *supra* note 113, fn. 43; see also Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2191, 2201 n.13 (1996); *Abrams v. United States*, 250 U.S. 616, 630 (1919).

content. The severance from the “real” identity (as well as from other pseudonym identities),<sup>158</sup> is thus related to important, weighty interests and values.<sup>159</sup>

Nonetheless, it bears emphasis that this aspect of identity separation is not directly related to the current discussion of the right to identity. Its concern is with the tension between John’s desire to conceal information about himself and Paul’s desire to access this information, rather than the tension between John’s desire to maintain this information and another person’s desire to disrupt it. The law regulates this tension by making use of the concepts of right to privacy and right to anonymity. The right to identity is relevant for a different aspect – that of preserving the other identity. The question in this context is therefore, not whether to protect John from exposure of his “real” identity; but whether to protect his pseudonym identity from deletion, concealment, falsification, impersonation etc.

## 2. *Pseudonymity and Truth*

### a. *Pseudonymity is not necessarily falsity*

One of the major obstacles to recognition of the importance of pseudo-identity is the notion that those aspects which are not related to the “real” life belong to the realms of either fantasy or fraud. However, the complexity of identity precludes any simplistic, binary understanding of the concept in terms of true and false. Identity is a flexible and context based concept, and the pseudo identity is just a natural development of this complexity.

Indeed, the Internet enables a person to present herself in a manner that diverges from “reality.” A male can present himself as female and John, known by the name “John Lennon,” can also act under the pseudonym “night princess.” The first intuition is that this discrepancy between a person’s real, physical identity and his virtual identity means that pseudo identity is no more than a fantasy or a simple lie, not worthy of protection. However, this intuition is based upon a rigid notion of identity, one both simplistic, and obsolete. The relation between truth and identity is far more complex.

In principle, the eternal question of “who and what am I?” does not admit of an absolute answer dictated by conformity to reality. Firstly, insofar as people are constantly changing, identity is dynamic and time

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158. See Zarsky, *supra* note 43.

159. For a judicial approach to anonymity see *e.g.* McIntyre v. Ohio Election Comm’n, 514 U.S. 334 (1995); Buckley v. ACLU, 525 U.S. 182 (1999); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); see also George H. Carr, *Application of U.S. Supreme Court Doctrine to Anonymity in the Network*, 44 CLEV. ST. L. REV. 521 (1996).

dependent. “Reckless John” can grow into “Prudent John.”<sup>160</sup> Identity is also observer-dependent. It is affected not just by who John is, but also by who Paul is. If Paul has a supportive nature he will perceive John as a “generous,” if not, then as a “spendthrift.” Indeed, “[a] man has as many social selves as there are individuals who recognize him and carry an image of him in their mind.”<sup>161</sup> Hence, John’s identity may differ from one person to the next. In Paul’s mind John might be “rigid,” and simultaneously, for Yoko, he might be “soft.” Identity is also context based. A person acts in different manners with his family, friends, clients, etc. In all of these contexts he is authentically himself. This is neither misrepresentation, nor fraud. Erving Goffman famously observed that these discrepancies in self-representation are commonplace.<sup>162</sup> Indeed, to the extent that a person functions in a variety of contexts his acts and identities will change.

Pseudonymity, as mentioned, is no more than a natural evolution of this flexible context-based notion of identity. It simply expresses one more context in which the self is presented in daily life.<sup>163</sup> Different contexts admit of diverse, even contradictory, identities,<sup>164</sup> and the relationship between them should not be based on any natural hierarchy of importance or truthfulness, but on parallel coexistence. The Internet teaches us that identity should not be judged in absolute true-false terms – i.e., physical identity is the truth and all others are false – but rather contextually. For users, everything one experiences is real,<sup>165</sup> and a person is who he pretends to be.<sup>166</sup> When John acts under a pseudonym, no one directs or scripts him. Unlike imagined worlds in literature and cinema, in interactive virtual communication the user actively participates, thus expressing his personality.<sup>167</sup> As felicitously noted by one user: “RL [Real Life – E.O] is just one more window. . . and it’s not usually my best one.”<sup>168</sup>

Pseudonymity also gives John powerful control in the way he presents himself. It releases him from the messages that “real life” compel him to convey, in what Goffman referred to as “given off”

160. See HOLLAND, *supra* note 83, at 78.

161. WILLIAM JAMES, *PSYCHOLOGY* 294 (Fawcett Premier ed. 1963) (1892).

162. GOFFMAN, *supra* note 40.

163. See also Mark Giese, *Self Without Body: Textual Self-Presentation in an Electronic Community*, 3 *FIRST MONDAY* (Apr. 6, 1998), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/587/508>.

164. See also Alessandra Talamo & Beatrice Ligorio, *Strategic Identities in Cyberspace*, 4 *CYBER PSYCHOL. & BEHAV.* 109 (2001).

165. MARKHAM, *supra* note 44, at 120, 211.

166. See TURKLE, *supra* note 31, at 12, 14.

167. See Balkin, *supra* note 47, fn. 22 and accompanying text.

168. TURKLE, *supra* note 31, at 13.

messages,<sup>169</sup> such as gender, age, race, look, etc.,<sup>170</sup> but this control is not necessarily illusory. Controlled self-presentation is common and legitimate in many situations. The writer of an article, who toils for hours on the precise phrasing of his arguments, is expressing himself in a highly controlled manner and not just spontaneously shooting off ideas. Even when John chooses clothes he controls the message conveyed by his garments. Controlled self-presentation is related to autonomy. Time, care and self-control are of crucial importance to both the contents and the form of self-expression. Moreover, controlled acting can be integrated into John's personality, thus becoming his natural, spontaneous behavioral mode.<sup>171</sup> In fact, controlled self-presentation may sometimes be even more authentic. Quite frequently we inadvertently give off messages that are not only false but which obstruct the disclosure of the "truth." Given-off physical ugliness may eclipse a beautiful personality;<sup>172</sup> a feminine body may be a cover up for a male soul;<sup>173</sup> and what exactly is the "truth" behind the color of a person's skin? Indeed, many believe that controlled self-presentation in general and pseudonymity in particular, is more "real."<sup>174</sup> Sometimes it is precisely distance and control that provide the courage to express intimate and sensitive aspects of the self,<sup>175</sup> thus enhancing the authenticity of self-expression.<sup>176</sup>

*b. Lies about Pseudonymity*

It is therefore dangerous to base any attitude to pseudonymity on a rigid metaphysical panache regarding a person's nature or essence. However, the flexibility and context-dependence of identity does not mean altogether waiving the notion of truth. In fact, as mentioned, one of the major applications of the right to identity is the protection of its truthfulness. It is important, then, to clarify which aspects of John's identity can be evaluated in objective terms of true and false.

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169. For the distinction between willingly "given" messages and uncontrollable "given off" messages, see GOFFMAN, *supra* note 40.

170. See WOOD & SMITH, *supra* note 34, at 59; MARKHAM, *supra* note 44, at 120, 124.

171. See Tice, *supra* note 89. Schlenker, *supra* note 89.

172. As one boy clearly put it: "[I]f a girl comes up to you and they think you're ugly, they just carry on walking, so if you speak to them on the internet, they don't know what you look like so they just carry on talking to you which makes it easier." SARAH L. HOLLOWAY & GILL VALENTINE, *CYBERKIDS: CHILDREN IN THE INFORMATION AGE* 11, 133 (2003).

173. Sonja Shield, *The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment*, 31 N.Y.U. REV. L. & SOC. CHANGE 361, 365 (2007).

174. Ronald E. Rice & Gail Love, *Electronic Emotion: Socioemotional Content in a Computer-Mediated Network*, 14 COMM. RES. 85 (1987).

175. John A. Bargh et al., *Can You See the Real Me? Activation and Expression of the "True Self" on the Internet*, 58(1) J. SOC. ISSUES 33 (2002); see also WOOD & SMITH, *supra* note 34, at 60.

176. MARKHAM, *supra* note 44, at 172, 202.

Some theories, which may collectively be referred to as “Information Pyramid” theories, describe the crystallization of meaning in the mind in terms of different levels of information processing. There is an accepted distinction between “data,” “information,” “knowledge,” “understanding” and “wisdom.”<sup>177</sup> Each level builds upon the preceding lower level. At the lowest level, raw “data” is processed – Paul hears noises issuing from John’s throat and sees marks appearing on John’s paper. His mind processes these data, producing, a higher level called “Information” – the noises are the voice of John singing, and the marks on the paper are the words of John’s song. On a higher level, the information becomes “knowledge” – Paul classifies John’s music as rock-folk. Paul then checks this knowledge against the knowledge he has about himself and attains an “Understanding” – they are suited to each other. At the highest level, he evaluates his understanding in terms of his goals and vast knowledge of the music market and then arrives at the stage of “Wisdom” – that he should join the band. This (inaccurate) description of the process of joining the band proves the following point: To the extent that the information is at a lower level in the information pyramid, it is easier to evaluate it in terms of truth and falsity. After all, there must be a minimum objective social consensus on what words mean. Without it communication between human beings would be impossible. If John sung the word “imagine” and Paul absorbed the word “birds,” then even the most devout post-modernist would agree that there had been some kind of mistake or deception. On the other hand, at higher levels, meaning becomes subjective. The interpretation furnished by Paul’s wisdom, that “he should join the band” – does not admit of a truth/false classification. It depends, as mentioned, on context and on the subjective definition of goals, personal tastes, etc.<sup>178</sup>

The question then is what the level of information processing is. At high levels identity is flexible, while in the low ones, it is fixed. Assume, for example, that the physical community knows John by the name “John Lennon” whereas an online community knows him by the pseudonym “Night Princess.” The question “who is John?” can be asked on different levels which dictate the possibility of true/false answer. At higher levels the question is which identity more correctly captures John’s true personality– his identity as “John Lennon” or as “Night Princess.” There is no unequivocal answer to this question for it depends upon context and

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177. See Russell L. Ackoff, *From Data to Wisdom*, 16 J. APPL. SYST. ANALYSIS. 3–9 (1989). There additional verses to this idea. See Harland Cleveland, *Information as Resource*, THE FUTURIST, Dec. 1982, at 34–39; Milan Zeleny, *Management Support Systems: Towards Integrated Knowledge Management*, 7(1) HUM. SYST. MGMT. 59 (1987).

178. In other words, at these high levels the worldview is necessarily “cognitive” and not “objective.” See Leora Bilsky, *Naming and Re-Categorization in the Law: Child Abuse as Slavery*, 5 INT’L J. CHILD. RTS. 147, 152–57 (1997).

subjective criteria. By contrast, if the question is asked within a context, it invites an answer at a lower level of information processing, e.g., if a person looks at a Beatles pictures and asks "Who is John?" This question can, of course, be answered in true/false terms. Likewise, if someone is impersonating "Night Princess" or ascribes to "Night Princess" utterances that John never made, this is a lie that violates the authenticity of John's pseudonym identity.<sup>179</sup>

### 3. *The Importance of Pseudonymity*

#### a. *Personality, Experience and Development*

As mentioned, psychological doctrines acknowledge the different roles of a person, which bestow him with varied, context-based identities.<sup>180</sup> This is usually viewed as a positive phenomenon. It enriches the life of the multirole person with varied meanings and social relationships.<sup>181</sup> It reduces stresses, fortifies mental health and provides tools for adjusting to changing situations.<sup>182</sup> Thus, the woman functioning as a "mother," "wife," "council member" and "amateur tennis player" enjoys her complex personality and flexible identity which enables her to function in a social world that is complex and multifaceted.<sup>183</sup> The multiplicity of roles also promotes her personal development. At the beginning she may have a feeling of pretense in embodying a new role, but with time the role is internalized into her "self."<sup>184</sup>

The multiplicity of pseudonym-identities expresses all this even more than a simple multiplicity of roles. Pseudonymity expresses not just different roles, but different complete and complex characters, such as the characters of "Norma Jean – an innocent young girl looking for warmth and love" and of "Marilyn Monroe – a glamorous Hollywood star." In this way it enriches the self-exploration and the personal development of a deeper and more flexible personality. Indeed, already at the

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179. The fact that lies can happen at the low levels of the "information pyramid" does not only justify preventing others from injuring John's identity, but also can justify preventing him from lying to others about himself. However, it must be emphasized that this normative tension differs from the one addressed by the right to identity. Indeed, in this kind of situation John wants to break away from his information-identity, while others want to become familiar with it. This tension is similar, albeit not identical, to the one addressed by the right to privacy.

180. See *supra* notes 39-41 and accompanying text.

181. See GOFFMAN, *supra* note 40.

182. See Patricia W. Linville, *Self-Complexity as a Cognitive Buffer Against Stress-Related Illness and Depression*, 52 J. PERS. & SOC. PSYCHOL. 663 (1987); Peggy A. Thoits, *Personal Agency in the Accumulation of Multiple Role-Identities*, in *ADVANCES IN IDENTITY THEORY AND RESEARCH* 179 (Peter J. Burke et al. eds., 2003).

183. See also Stets & Burke, *supra* note 41, at 135-36.

184. See Tice, *supra* note 89; Schlenker, *supra* note 98; Tice & Wallace, *supra* note 98, at 100.

onset of the Internet age, pseudonymity was used as an “identity workshop.”<sup>185</sup> Sherry Turkle found that these experiences provide new perspectives of the world. She explains it having resort to the anthropologic concept of “dépaysement,” which means the experience of using foreign eyes to view a familiar phenomenon.<sup>186</sup> Gender-switch provides an example of this: Recent studies indicate that when pseudonymity also involves a gender-switch, the role of the substituted gender is adopted by playing stereotype games taken from physical, “real,” life. For example, a male pseudonym will rush to help a female pseudonym in distress or alternately, will flood her with sexually based proposals, irrespective of each of their specific genders.<sup>187</sup> And this phenomenon is not limited to gender matters. Embodying characters with alternate race, social status, and nationality promotes personal development and empathy for others.<sup>188</sup> “Identity Workshops” are also significant from another perspective. Under his “real” identity, John is freed from accountability for acts performed by his pseudonym. This aspect of pseudonymity, which is similar to anonymity, encourages him to boldly express the aspects of personality that he prefers to hide in his “real-life-identified” state.<sup>189</sup> However, simultaneously, as opposed to anonymity, it retains the existence of a continuous identity. This combination of detachment from the “real” identity on the one hand, and the continuity of the other identity, on the other hand, provides John with a framework that has time depth, in which he can associate with others and experience new identities without the burden of full responsibility. The prominent psychologist, Erik Erikson, pointed out that this sphere of “psychosocial moratorium” during which one can experiment different roles and identities with less accountability plays a decisive role in the development of self-identity in adolescents.<sup>190</sup>

*b. Interpersonal, Social and Communal Relationships*

The Internet abounds with social and interpersonal activity.<sup>191</sup> The dual nature of pseudonymity plays an important part in creating shap-

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185. Amy Bruckman, *Identity Workshops: Emergent Social and Psychological Phenomena in Text-Based Virtual Reality* (Sept. 1991) (S.M. thesis, Massachusetts Institute of Technology Media Laboratory); see also WOOD & SMITH, *supra* note 34, at 58; WALLACE, *supra* note 31 at 47-49, 53-54.

186. TURKLE, *supra* note 31, at 218.

187. See Bruckman, *supra* note 185, 27-32; see also WOOD & SMITH, *supra* note 34, at 61.

188. *Id.*

189. See *supra* notes 153-159 and accompanying text.

190. ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* 262-63 (1950).

191. For a good brief on social activity on the net see Tal Zarsky, *Law and Online Social Networks: Mapping the Challenges and Promises of User-Generated Information Flows*, 18(3) *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 741 (2008); see also WOOD & SMITH, *supra* note 34, at 61.

ing these relationships. Its continuity provides time depth, which is crucial for the formation of meaningful relationships.<sup>192</sup> At the same time, the breakaway from the “real” identity enables a person to dare and express hidden or repressed aspects of his personality. Thus, it enables relationships to be developed by those for whom conventional social activities are problematic, e.g. those who wish to hide their sexual inclination, or minorities.<sup>193</sup>

Liberation from the constraints imposed by the “real” identity also means freedom from the body – the same body that may hinder social and interpersonal communication due to bias grounded in age, race, gender or looks. In their absence, the relationships are freely created and maintained between minds alone— soul to soul – in a more genuine and authentic manner.<sup>194</sup> The very need to formulate thoughts and feelings in writing engenders more detailed and self-aware communication, leading to greater intimacy.<sup>195</sup> These traits of pseudonymity are especially valuable to those who are not comfortable with their bodies.<sup>196</sup> It should also be remembered that relationships forged under pseudonyms do not always remain in the virtual realm, and often spill over into “real” life.<sup>197</sup>

Pseudonymity also plays a role in the consolidation of communities. As mentioned above, the continuity of the community member’s identity, and especially of its permanent founding members, is one of the traits that differentiate a community from a simple group of people.<sup>198</sup> This continuity is, naturally, the result of the existence of “real” identities, but it also can be the consequence of using pseudonymities, that are separate from their correlate “real” identities, but are continuous and constant within a social context.<sup>199</sup>

### c. *Incentives and accountability*

As mentioned, one of the instrumental justifications for the right of identity is the accountability that derives from identity and creates

192. Joseph B. Walther, *Anticipated Ongoing Interaction Versus Channel Effects on Relational Communication in Computer-Mediated Interaction*, 20(4) HUM. COMM. RES. 473 (1994); see also WALLACE, *supra* note 31, at 138.

193. Shelley Correll, *The Ethnography of an Electronic Bar: The Lesbian Café*, 24(3) J. CONTEMP. ETHNOGRAPHY 270 (1995); see also SARAH L. HOLLOWAY & GILL VALENTINE, *CYBERKIDS: CHILDREN IN THE INFORMATION AGE* 11, 136 (2003).

194. See *supra* notes 172-176 and accompanying text.

195. MARKHAM, *supra* note 44, at 142.

196. See *supra* note 172; see also HOLLOWAY & VALENTINE, *supra* note 172, at 133.

197. See *infra* III.B.3.e.

198. See *supra* III.A.2.e.

199. See RHEINGOLD, *supra* note 137, ch. II. Rheingold explicitly emphasizes that identity continuity, as a necessary component of a community, can be maintained by using a permanent nickname, i.e. pseudonym, and not necessarily the “real” name.

incentives for pro-social behavior.<sup>200</sup> At first blush this consideration seems not only irrelevant to pseudonymity, but actually justifies its detractors. After all, pseudonymity is often used to detach its users from their “real identity,” thus releasing themselves from accountability for their actions. In the sense of detachment from “real identity” – pseudonymity is indeed at odds with accountability. However, this perspective is narrow and partial. A person wishing to avoid accountability by breaking away from his “real” identity can use anonymity rather than pseudonymity. By choosing pseudonymity he is not simply detaching himself from an existing identity, but is actually creating a new one – one which creates accountability in the context in which it functions. A woman known as “Marilyn Monroe” is accountable for her deeds under this identity, although she is not held accountable for it under her identity of “Norma Jeane.” If this identity – i.e. “Marilyn Monroe” – is important to her then the accountability incentive mechanism retains its effectiveness in that context. In many cases persons highly appreciate their pseudonymities. As discussed at length above, the pseudonym identity is not necessarily a “lie.” In fact it serves as a cornerstone of interpersonal, social and commercial relationships that the individual cares about.

This is also evidenced by the way certain virtual communities establish inter-communal order by operating accountability mechanisms of “sticks and carrots” which relate not to “real” identities, but rather to pseudonymities.<sup>201</sup>

#### d. Democracy

The dual character of pseudonymity also enriches public discourse. The separation from the “real” identity promotes greater freedom to express oneself without fear of social retaliation. In addition, the continuous nature of pseudonymity provides additional depth to expression, infusing it with a deeper perspective of time and breadth of issues. The reader can trace the speaker’s development and compare and contrast his various positions and personal development over a period of time, and across a myriad of subjects. Pseudonym characters played a vital role in framing the American constitution,<sup>202</sup> and made optimal use of the dual nature of pseudonym. On the one hand, the concealing of real identities protected them from the wrath of their opponents, who were not always committed to non-violent criticism. On the other hand, the continuity of the pseudonym provided accumulated credibility, breadth

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200. See *supra* III.A.2.c.

201. See e.g., Elizabeth Kolbert, *Pimps and Dragons: How an Online World Survived a Social Breakdown*, NEW YORKER, May 28, 2001, at 88.

202. See the opinion of Justice Thomas in *McIntyre v. Ohio Election Comm’n*, 514 U.S. 334 (1995); see also *McIntyre*, 514 U.S. at 343, n.6.

of content and quality of development over time, as well as a dramatic personal dimension that triggered additional interest in the discourse. In the Internet many pseudonymities speak about public issues,<sup>203</sup> and their identities also warrant protection for democratic reasons.

*e. From the Virtual Pseudonym to the Physical Identity*

The conclusion is therefore that within their contexts, pseudonymities are important in their own right. Apart from this, they are also important as a virtual corridor leading to the “real” chamber. For example, since its very inception, the Internet has given rise to countless interpersonal relationships between “real” identities which originated in relationships between pseudonym identities.<sup>204</sup> Similarly, pseudonym identities often merge with “real” identities in public contexts, e.g., when a pseudonym political blogger reveals his true identity.<sup>205</sup> By extension, then, injuring a pseudonymity may be tantamount to injuring the identity of a person wooing a potential sweetheart, searching for a pal, or forming a budding public identity. In other words, protecting pseudonymity actually protects the potential “real” identity.

#### IV. DESIGNING AND IMPLEMENTING THE RIGHT TO INFORMATION IDENTITY

The right to information identity, therefore, expresses a broad and important principle that needs to be independently conceptualized. This indeed is the crux of the matter. However, in the concrete formulation and implementing of the new right, caution is necessary. This is especially true in this infant stage of the right’s formulation, and in the environment in which it should be implemented which is characterized by innovation and change on an unprecedented scale. Under these conditions any attempt to formulate the right in a detailed, rigid manner would be hasty and simplistic.<sup>206</sup> However, some general remarks should be made in order to establish at least the basic contours of the right.

##### A. THE RIGHT TO IDENTITY AS A BROAD STANDARD

The right to information identity is a person’s right to the functionality of the platforms that accommodate comprehensive, continuous and

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203. See Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 896 (2000).

204. Malcolm R. Parks & Kory Floyd, *Making Friends in Cyberspace*, 46(1) J. COMM. 80–97 (1996); see also MARKHAM, *supra* note 44, at 144; TURKLE, *supra* note 31, at 190.

205. See e.g., Nate Silver, *No, I’m Not Chuck Todd*, FIVETHIRTYEIGHT.COM (May 30, 2008), 9:48 AM, <http://www.fivethirtyeight.com/2008/05/no-im-not-chuck-todd.html>.

206. See also Warren & Brandeis, *supra* note 2, at 144.

dynamic knowledge about him, and which enable others to ascribe this information to him when meeting him. Under this definition the right expresses a legal norm belonging to the category of a “principle.” It is not a specific “rule,” but rather a broad standard which requires further discretion in implementing it in concrete situations.<sup>207</sup> It does not establish clear boundaries between the permitted and the forbidden. Rather, it expresses an ideal which can be fulfilled in various degrees of intensity. Hohfeldian speaking, it is not a “right” in the strict sense, but a principle that simultaneously gives expression to all legal norms – “freedoms,” “rights,” “immunities,” “powers,” etc. – that are intended to promote the interests protected by the same principle. For example, it can be wielded against the state in the form of an Hohfeldian “freedom,” such as a restriction on the power of the state to enforce anonymity (e.g., the Taliban Burka),<sup>208</sup> or against fellow individuals, in the form of a strict Hohfeldian “right,” such as a prohibition upon harming identity (e.g. criminalization of identity theft).

This broad formulation of the right is significant. It enhances awareness of the importance of the protected value, i.e. a person’s will to have an identity. It also provides a theoretical framework that frames the right in accordance with clear, conscious, and discussable rationales. It also provides a flexibility and breadth that can provide a comprehensive answer to the gallery of dangers, old and new, that threatens identity. Legal principles are applied in all of the law’s avenues.<sup>209</sup> They constitute the basis for new rules, which regulate new social phenomena.<sup>210</sup> They also serve in the criticism and interpretation of existing rules,<sup>211</sup> and for the exercise of judicial discretion.<sup>212</sup> In addition, they contribute to the formation of social and moral values in general in extra judicial realms.<sup>213</sup>

Presumably, at a later stage, the right will be concretized and expressed at lower levels of abstraction. It may find expression in the direct legal prohibition of conduct that harms identities, by categorizing them

207. RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* 23–31 (1977); MICHAEL D. BAYLES, *PRINCIPLES OF LAW* 14 (1987).

208. See *supra* note 10 and accompanying text.

209. Even without direct legislative establishment of the right to identity, it can be absorbed into public law by implementing standards such as reasonability and proportionality, and into private law applying the criterion of the “reasonable person.” For more on legal means of implementing principles in private law see Aharon Barak, *Constitutional Human Rights and Private Law*, 3 *REV. CONST. STUD.* 218 (1996).

210. Joseph Raz, *Legal Principles and the Limits of Law*, 81 *YALE L.J.* 823, 839–42 (1972).

211. *Id.*; see also AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 160-70 (2005).

212. AHARON BARAK, *JUDICIAL DISCRETION* 64-72 (1989).

213. See e.g. Lesley Wexler, *The Non-Legal Role of International Human Rights Law in Addressing Immigration*, 2007 *U. CHI. LEGAL F.* 359 (2007).

as crimes or torts; for example, a prohibition of impersonation or of knowingly or recklessly lying about a person, etc. It could also serve as the basis for more moderate demands such as the duty to inform a person of an injury to his identity; a duty to enable him to report an injury to his identity; raising the degree of consent required in order to permit an injury to identity (e.g. “opt in” rather than “opt out”); and so on. Naturally, these examples are not an exhaustive list, and are cited purely for purposes of illustration.<sup>214</sup> As mentioned, the essential point here is the conceptualization and articulation of the principle.

## B. WEIGHING THE RIGHT

The nature of this right as a principle also dictates its relativity.<sup>215</sup> Realization of the right may conflict with other important values and principles in a manner that necessitates a balance between them. For example, John’s right to identity justifies his demand for the adoption of appropriate measures of identity authentication to hinder impersonators. Exercising this right could however collide with another person’s right to privacy. Similarly, when the right finds expression in the prohibition of publication of lies about John, it conflicts with the freedom of speech of speakers and listeners. Likewise, where the right justifies the imposition of a ban on the arbitrary filtering of John, it collides with the service provider’s right of property and freedom of occupation. And so on. These are just a handful of examples. Indeed, recognition of the right to identity gives rise to many tensions on a normative level that demand a balance, and there will still be a need for extensive and cautious development and calibration of this balance. However, aside from the need to maintain the abstract, open-ended and flexible nature of the right, some consideration factored into the balancing process could be outlined.

### 1. *Severity of the Impairment to the Information Identity*

#### a. *The Information Level*

The severity of harm to identity depends, *inter alia*, on the position of the impaired information in the “information pyramid.”<sup>216</sup> In as much as the level of the impairment is more profound (lower down on the pyramid) the severity of it increases. For example, if Ringo impersonates John and writes a song, he impairs John’s identity more than if he had just claimed that John wrote the song. Verily, in both cases a lie is attributed to John by attributing him authorship of the song, but in the first case the impairment of John’s character is greater because even the ba-

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214. For further illustration see *infra* IV.C.

215. See also DWORKIN, *supra* note 207, at 24.

216. See *supra* notes 177-178.

sic data regarding the origin of the false content is false. In other words, Paul is even deceived in respect of the way in which he learned about John's authorship of the song. In the first case he accords the information a higher degree of credibility, as though it was based on first hand, direct knowledge, whereas in the second case he treats it more suspiciously, only as a fact attested to by another person.

This line of analysis is rooted in legal doctrine. Evidence law distinguishes between the authentication of evidence and the veracity of its contents.<sup>217</sup> The *actus reus* of the forgery offense relates to the "authenticity" of a document and not its content.<sup>218</sup> Indeed, both cases involve false information, but "inauthenticity" is a lie not just about the content of the information, but also about the source of the information itself. Some have referred to it as information that "lies about itself."<sup>219</sup> This, in fact, is a lie in lower levels of the "information pyramid," and the law treats it more gravely.

Similarly, the prevalent distinction in slander law between "fact" and "opinion" expresses the same notion. Freedom of speech is less protected when "fact," as opposed to "opinion," injures John's good reputation.<sup>220</sup> Indeed, "fact" claims to express the reality – raw "data" or "information" located at the low, basic levels of the information pyramid. "Opinion," on the other hand, is presented as a conclusion of the speaker, at a higher level of information processing.

#### b. *Category of Impairment*

The category of impairment – in the sense of lack-of-information as opposed to falsity – is also a factor in determining the severity of it. In most cases, a lie is more injurious, since it also deceives Paul about the mere fact of him knowing John's identity. When John's identity is erased, Paul at least knows he doesn't know. Should he so desire he can make an additional effort to learn about John elsewhere. In contrast, when John's identity is falsified, Paul mistakenly thinks that he already knows John.

Nonetheless, there could be rare situations in which lack of information will be more injurious. In the case of a lie, some form of information identity at least continues to exist. For example, an intimidated witness

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217. On evidence authentication see CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES: TEXT, CASES AND PROBLEMS* 855-80 (6th ed., 2008).

218. 36 Am Jur 2d *Forgery* § 9 (2010); Ron Shpira, *Forgery in Electronic Messages*, in *LAW, INFORMATION AND INFORMATION TECHNOLOGY* 391 (Lederman & Shapira Eds., 2001).

219. *State v. Hamilton*, 634 P.2d 208, 288 (Or. 1981).

220. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir. 1994); Eileen Finan, *The Fact-Opinion Determination in Defamation*, 88 COLUM. L. REV. 809 (1988).

who participates in the Witness Protection Program indeed loses his current identity, but presumably he prefers to live under a new, false identity than to live anonymously or as someone who repeatedly changes his identity. Under this untrue identity he still can make a new start, develop new relationships, get a new job, and in time to fill out the lie with good measure of truth. This cannot be said of the absence of an identity.

*c. Timing of the Impairment*

There is a difference between an act that *a priori* prevents an identity from coming into existence and one that *post factum* distorts an already established identity. Usually, impairing an existing identity is more injurious, since John is already invested in that identity. Under that identity he has made friends and established a reputation. It is the platform for his personality. From an instrumental perspective too, posterior damage to identity is more acute. For example, its effect on trust is more devastating. The nature of trust, as an opinion based on past experience, makes it easier to build trust from scratch, from non-existence (parallel to preventing identity from coming into existence), than to restore it after betrayal – after it has served the actors and then vanished (parallel to a *post factum* distortion of identity).

*d. The Nature of the Information Platform*

The nature of the information platform also affects the gravity of the identity impairment. For example, an environment in which the intermediacy is open and transparent carries less potential for identity impairment than one in which the intermediacy factor is concealed. Failing to mention John in a television news broadcast does not seriously impair his identity. Paul knows that the broadcast is edited and limited in scope, and that there are countless identities that must be searched for in other platforms. John also is aware that he cannot rely on the news broadcast to expose his identity and spread information about him. He knows that he should maintain alternative channels to communicate his identity. In contrast, the aberrant and covert filtering of John from a database or from the results list of a search engine known to be extensive and all-reaching, severely threatens the existence of his identity. Paul believes that if John's identity fails to show up on the results list of his query, then it simply does not exist, and John too is unaware of the obliteration of his identity from this environment.

*e. Dependency upon the Information Platform*

The level of injury to identity is also influenced by the level of John's dependency upon the information platform. Impairing an identity in a monopolist channel is more severe than in a non-exclusive one. If, for

example, one newspaper reported lies about John, he still has the option of repairing the harm to his identity in the reporting of other newspapers. Indeed, this solution does not reverse the damage completely, for Paul does not necessarily read the other newspapers. Moreover, lies ascribed to John in one channel are not easily refuted in another channel. Rumors have a way of sticking. However, in terms of degree, it is clear that the damage wrought to John by the monopolist newspaper is far graver. As specified earlier, this consideration is highly significant in the modern information environment, which is characterized by extensive dependence upon mediators and other infrastructures, especially with regard to pseudonymities.<sup>221</sup>

*f. Quantitative Consideration*

Obviously, the degree of the harm to an identity is influenced by many quantitative factors: the duration of the impairment, the quantity of details that were impaired, the number of contexts in which John's identity was harmed, the amount of minds ("Paul's") in which the identity has been impaired, and the number of identities of the same person that were injured, etc.

*2. The Importance of the Impaired Identity*

The significance of the right to identity is not just a function of the gravity of the harm to the identity, but also of the importance attaching to the impaired identity. However, particular caution is required in determining the degree of importance. There is a temptation to attempt to objectively determine the importance of different aspects of a person's life which constitute his identity. Determinations of this kind characterize traditional concepts of "right to identity" which ascribe greater importance to identity particulars such as: formal name, family affiliation, national-cultural-religion belonging and sexual inclination.<sup>222</sup> But these concepts of identity are actually quite limited. Indeed, many would concede the importance of all or some of those aspects in a person's life, but they probably also list other characteristics which significantly express a person's identity such as pseudonym name, personal trait, disability, friends, occupation, hobby, football team supporting etc. Ultimately, any attempt to grade the aspects of a person's life using categorical classifications will be simplistic and will omit the uniqueness of each individual's life story.<sup>223</sup> At most, these objective criteria can serve as rebuttable assumptions regarding certain determinative aspects of a person's identity.

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221. See *supra* notes 20-22, 47-48 and accompanying text.

222. See *supra* notes 58-61 and accompanying text.

223. See also *supra* note 92.

Determining the importance of identity should therefore be based on the value-based normative foundations of the right. It should be fixed according to the relevance of the justifications in principle (discussed above) to a specific situation. Within this framework, great consideration should be given to the importance that John ascribes subjectively to his identity or to any specific aspect thereof which has been impaired. Many justifications of the right relate to the fulfillment of psychological, interpersonal and social aspects of the self. However, fulfilling these aspects of identity is highly dependent upon the significance that John ascribes to the context in which they occur. As mentioned long ago by a prominent psychologist: "A man has as many social selves as there are distinct groups of persons about *whose opinion he cares*."<sup>224</sup> This subjective gradation can be deduced from a multiplicity of factors, *inter alia*, the extent of John's investment in creating and maintaining the identity, his degree of commitment to it, the degree of respect it evokes in others, and more.<sup>225</sup>

Objective justifications relevant to a specific situation can complement the subjective layer, adding further weight to the right. For example, when John is a candidate running for public office, or a pseudonym blogger, vehemently criticizing the government. The value of the right in this example is greater not just because John subjectively ascribes importance to it, but also – and perhaps primarily – because of the democratic justification of the right. For that reason, impersonating him or deleting his informative existence, should be treated more sternly.

### C. ENFORCEMENT OF THE RIGHT AND THE CURRENT LAW

The ways of impairing identity are varied and extend to numerous social contexts and legal branches. It is not contested here that priority should invariably be given to the right of identity, in all contexts and cases. Naturally, the extent of the right's effect in each particular situation demands a deeper and more detailed analysis than the present context permits. Different normative tensions arise in every context and produce a variety of possible interactions between the legal right and social, economic and technological forces, which also influence the severity of the dangers to identity and the measure of protection afforded to it.<sup>226</sup> However, as exemplified below, the current normative system does

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224. JAMES, *supra* note 161, 169 (emphasis added). Also "Significant others communicate their appraisals of us, and these appraisals influence the way we see ourselves." See Stets & Burke, *supra* note 41, at 161 (emphasis added).

225. Stets & Burke, *supra* note 41.

226. Indeed, it is probable that in some contexts non-legal forces are better suited to determine the degree of protection afforded to a person's wish to maintain his identity. Therefore, in implementing the right in different contexts a detailed analysis of the interaction of these forces is needed. See also LESSIG, *supra* note 20, at 121-25. At all events, this

not recognize any principle expressing the value of identity existence. The recognition of a right to identity answers this lacuna.

### 1. *Impersonation Law*

A good example of the influence of recognizing a right to identity is impersonation law. The right to identity clarifies the status of John, the impersonated person, as the main victim of the offense of impersonation, or at least as one of them (the other victim – Paul, who is defrauded by the deception – is also protected by other more general fraud offenses).<sup>227</sup> However, in certain systems the offense of impersonation is recognized by law only if there is intent to defraud.<sup>228</sup> The conditioning of the offense in this “special intent” makes Paul, not John, the focus of the offense. The protection of John is only a byproduct and not a purpose in its own right, meaning that the protection of John’s identity is not the value protected by the law. This incidentally has practical results. Impersonating John with the intent to hurt him and without the intent to defraud Paul, e.g. the case of Amnon Jacont,<sup>229</sup> is not covered by the offense.

The conceptual need for a right to identity, as a broad normative principle which affects the legal analysis of impersonation, is also evident in contexts in which the law explicitly acknowledges John as the victim of the impersonation. This is the case, for example, with the federal U.S. “Identity Theft” Act.<sup>230</sup> Indeed, the Act establishes “identity theft” as a separate offense against the impersonated person<sup>231</sup> and creates mechanisms for the restoration of his identity.<sup>232</sup> But, at the same time, the Act is limited in scope and protects only “documented” identi-

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does not obviate the need for a principled legal right, which creates awareness of the protected value, lays theoretical and normative foundations, establishes default guidelines which affect the non-legal actors, etc.

227. I refer of course to impersonations of another individual. Another category of impersonation offenses deals not with impersonating another individual *per se*, but with impersonation as having a certain status (e.g., impersonation as a U.S. citizen, impersonation as a state office, etc.). See e.g. 18 U.S.C. § 911–917 (2006). These offenses are only incidentally relevant, of course, to the right of identity.

228. See e.g. *New Jersey v. Thyfault*, 297 A.2d 873 (Essex County Ct. 1971), *aff’d*, 315 A.2d 424 (N.J. super Ct. App. Div. 1974); *Thompson v. State*, 24 S.W. 298 (Tex. Crim. App. 1893). In the UK, impersonation and identity theft is treated within category of general dishonesty and fraud offences. See, e.g., *R v. Seward*, [2005] EWCA Crim 1941 (11 July 2005) (appeal taken from Eng.); *Impersonation of Another Person*, 5737-1977, LSI 441 (1977) (Isr.).

229. See CC (TA) 1386/06 *Jacont v. Ha’efrati*, PM (2011) (Isr.) (Hebrew).

230. Identity Theft and Assumption Deterrence Act (ITADA), 18 U.S.C. § 1028 (2006).

231. Kurt M. Saunders & Bruce Zucker, *Counteracting Identity Fraud in the Information Age: The Identity Theft and Assumption Deterrence Act*, 8 CORNELL J. L. & PUB. POL’Y 661, 671 n. 48 (1999); see also Stana, *supra* note 37, at 17.

232. Identity Theft and Assumption Deterrence Act (ITADA) 18 U.S.C. §1028 (2006).

ties (especially formal identities)<sup>233</sup> or those which have “economical” implications.<sup>234</sup> Other important identities, in many other important contexts – interpersonal, social and political – which express the Hegelian, Kantian, communal and democratic aspects of the right, are not protected by the Act.

Moreover, the criminal offense, which is a central dimension of the Act, still demands “special intent.”<sup>235</sup> This means that the main rationale behind prohibiting identity theft is not the protection of identity per se, but rather the protection of other values harmed by the offenses resulting from identity theft. This is also evidenced by the definition of “aggravated circumstances” in which harsher punishments can be imposed. For example, an aggravated circumstance is when the identity is stolen in order to carry out an act of terrorism,<sup>236</sup> a crime involving violence or drug trafficking.<sup>237</sup> By contrast, an offense reflecting a true commitment to the right of identity would grade the gravity of the offense and its surrounding circumstances in accordance with the importance of the stolen identity and the degree of its distortion, and not just according to the severity of the other offense made possible by the impersonation.

This lack of normative depth is also evident in other contexts of legal analysis of impersonation or identity theft. For example, in the case of *TRW v. Andrews*<sup>238</sup> the impersonated victim delayed taking legal action against a credit data company that provided erroneous reports about him, based on the acts of an impersonator. The U.S. Supreme Court was asked to determine if the limitation period set in the Federal Credit Reporting Act<sup>239</sup> is calculated from the time the offense was committed or from the time it was detected. The court unanimously chose the former, stricter interpretation. This is a highly problematic choice in the context of identity theft. One of the salient characteristics of which is that its victims are not aware of the impersonation at the time of the impersonation but only at a later stage when its consequences come crashing down upon them. Nonetheless, the court only called upon the legislature to amend the problem and chose formal and narrow judicial analysis, instead of (mild) judicial activism to correct the flaw and determine that the calculation of the limitation period starts from the time the offense was detected. The main rationale of the decision was that limitation rules should be interpreted leniently only when there is a “crying out” need for it or when dealing with “humane law,” and credit reporting is

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233. 18 U.S.C. § 1028 (2004).

234. 18 U.S.C. § 1028(c)(3)(A) (2004).

235. 18 U.S.C. § 1028(a)(7) (2004).

236. 18 U.S.C. § 1028(b)(4)(2004)

237. 18 U.S.C. § 1028(b)(3)(2004).

238. *TRW, Inc. v. Andrews*, 534 U.S. 19 (2001).

239. 15 U.S.C. § 1681 (2003).

neither.<sup>240</sup> This ruling exposes the court's narrow conception of identity theft as an "economic," not a "humane," problem. Recognizing principled right to identity would change this. Identity theft would not be perceived as a petty matter of financial bureaucracy. The credit data company not only ruined the plaintiff financially; it negligently undermined the information foundations enabling him to maintain his identity. Thus, it violated his Hegelian right to express his personality and Kantian right to realize his value as a human being. Impersonating John and loaning "x" amount of money on his behalf or buying "x" amount worth of books on his behalf is neither legally nor morally equivalent to stealing the same money from him. In addition to the financial loss it also creates a fictitious history of John, undermining his very feeling of self-continuity.<sup>241</sup>

## 2. *Other Laws*

The conceptual and normative lacuna is felt across a broad spectrum of legal fields. Thorough discussion of each field is not possible in this framework, but some of them bear mention, even if briefly, in order to provide an inkling of the potential scope of the right.

For example, it provides a sounder theoretical base for the tort of false light, which is usually founded upon the right to a good reputation,<sup>242</sup> or the right of privacy.<sup>243</sup> These foundations are wrong or at least weak. Basing the tort on the right to a good reputation misses the difference between a "false light" which is the essence of this tort, and a "negative light" which is the kernel of the tort of defamation.<sup>244</sup> The right of privacy might be more suited to the tort but is rather frail in terms of providing a conceptual basis for the tort. Indeed, publishing information regarding John, even if untrue, points the public attention to him in an intrusive, non-letting-alone manner.<sup>245</sup> It sometimes even forces John to reveal truthful private facts about himself in order to refute the lie. However, this notion of the tort misses the crucial aspect of the real harm caused by a lie about a person. It is not so much the un-

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240. TRW, Inc., 534 U.S. at 27-28, 37-38.

241. See also Jonathan H. Gatsik, *Cybersquatting: Identity Theft in Disguise*, 35 SUFFOLK U. L. REV. 277, n.5 (2001); *The Identity Theft and Assumption Deterrence Act: Hearing on S.J. Res. 512 Before the Senate Comm. on the Judiciary, Subcomm. on Tech., Terrorism and Gov't Info*, 105th Cong. 17, 19 (1998) (statement of David Medine, Associate Director Credit Practice, Bureau of Consumer Protection, Federal Trade Commission).

242. In Israel for example this tort is explicitly not recognized because it is perceived as being absorbed in the tort of defamation. See THE REPORT OF THE COMMITTEE TO THE PROTECTION AGAINST INJURY TO PRIVACY 10 (1976) (Hebrew).

243. See RESTATEMENT (SECOND) ON TORTS, §652 (1977); William. L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

244. For more on the relation between the right to a good reputation name and the right to *identity* see NICK BRAITHWAITE, THE INTERNATIONAL LIBEL HANDBOOK 183-85 (1995).

245. Gavison, *supra* note 54, at 432-33.

sought publicity as it is the frustration of his ability to appear in the mind of others as who he really is. This is precisely the focus of the right to information identity.

Data protection law would also be affected by the new right. The main perspective of these laws is the right of privacy, and even a broadened understanding of it as a person's right to control the handling of information regarding him.<sup>246</sup> Despite this, the individual's right to handle information concerning him in a manner that hinders the existence and distribution of the information (i.e., right of privacy in the strict sense, as limiting access to information) enjoys far more protection than his right to handle it in a way that promotes knowledge about him in the minds of others (i.e., right to identity). For example, the safe haven agreement between the United States and the European Union regarding data protection obliges a data manager to provide all manner of notices to the individual whose information was being processed. However, there is no such demand when a person is being removed from a data bank or process.<sup>247</sup> Similarly, anonymization of an existing data bank altogether removes it from the scope of data protection law which deals with "identifiable information, although the act certainly hinders identity."<sup>248</sup>

The right to information identity also affects the legal rules governing the retrieval and filtering of information. Today the law treats excessive information filtering as an act that conflicts with the readers' freedom of speech and not as an act that conflicts with the interests of the speaker, and certainly not with those of the subject of the speech.<sup>249</sup> In contrast, recognizing the right to identity means that filtering practices which put a person into "information non-existence"<sup>250</sup> would have to be executed in a proportional manner – with transparency, in compliance with due and fair process, etc.

The same applies to rules governing the management of accounts of internet users. Erasing existing accounts destroys identities, and especially when pseudonymity is involved – being completely dependent upon the service provider.<sup>251</sup> Today the law not only restricts account erasing

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246. See BYGRAVE, *supra* note 76.

247. The safe haven agreement was mentioned because it is probably the closest thing to an international standard of data protection. It should also be noted that even the EU directive itself does not explicitly confer any right upon a data subject that has been deleted from a data handling process.

248. See Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, Recital 26, art. 2(a), 1995 O.J. (L281), 12(b).

249. See *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003).

250. See *supra* notes 25-28 and accompanying text.

251. See *supra* notes 29, 47-48 and accompanying text.

but in certain contexts actually encourages it.<sup>252</sup> The right to information identity justifies restricting these erasers, especially in situations in which a meaningful identity – with interpersonal, social, commercial, and democratic connections – is managed under the account. Similarly, the right also justifies moderating the restrictions enforced by service providers on identity portability.<sup>253</sup> These restrictions harm identity by limiting it to a specific service provider. They prevent a person from spreading his identity to other social contexts and deny him the chance of enabling more people to know him.

This is only a partial list, an attempt to present in a nutshell just some of the areas and conducts which would presumably be affected by recognizing the right to identity. It may also be assumed that in an environment in which identity is so vulnerable, additional ways of harming identity will emerge. However, as evidenced by this somewhat simple presentation, the right to identity is desperately needed as a conceptual and normative principle applying in all realms of law.

## CONCLUSION

People value their information identity, and so does society. Indeed, a person's desire for functional information platforms that enable him to appear in the minds of others as a comprehensive, true, dynamic, continuous identifiable character is of intrinsic value. However, changing reality presents a challenge in fulfilling this desire. Technological innovations and social changes stretch the concept of identity and open new and fascinating opportunities for its management. At the same time, however, they dramatically increase its vulnerability. In facing this challenge existing law seems obsolete and conceptually deficient. It protects identity in a partial and incidental way. The right to identity should be acknowledged as an independent, solidified and explicit concept. This legal right expresses a deeper understanding of identity – its complexity, its diverse management possibilities and the dangers it faces. The right marks an ideal which would be considered in concrete situations along with other rights, values and interests. Legislators would consider it when formulating statutes, judges would weigh it when interpreting

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252. See, for example, the Digital Millennium Copyright Act, 17 U.S.C. § 512(i)(1)(A)(1998), which demands service providers to cancel the accounts of repeat infringers of copyrights in order to become immune from liability for their actions. It should be mentioned that the purpose of this law is legitimate, but the lack of any checks and balances in this processes is an unreasonable deprivation of the right to identity.

253. Randal C. Picker, *Competition and Privacy in Web 2.0 and the Cloud*, 103 Nw. U. L. REV. COLLOQUY 1, 6–9 (2008); Kara Swisher, *Free the Scoble 5,000*, THE WALL STREET JOURNAL, ALL THINGS DIGITAL, (Jan. 3, 2008 6:04 AM), <http://allthingsd.com/20080103/free-the-scoble-5000/>.

them and when developing new common law doctrines; individuals would demand it from each other.

Though the exact scope of the right to identity has yet to be determined, it is already clear, as clarified, that it would be expressed in the restriction upon various identity harming actions such as: erasures, concealments and filtration of information regarding a person; information distortions and fallacious publications about a person; destruction of a person's identification platform, and impersonations. However, this Article's primary focus is upon the consolidation of the concept as a legal principle, the argument for its necessity, and the general presentation of its theoretical and practical outlines. By design it does not focus on one justificatory theory or concrete rule, but rather emphasizes the need for a broad, open and flexible principle. A flexible formulation of the right is crucial not only because the right itself is still in diapers, but also because of the rapid and dramatic social and technological changes which dictate flexibility.

Obviously, the open formulation of the right raises more questions than answers and compels further development and research. There is a need to develop additional considerations which could assist in determining the weight to be ascribed to the right. There is also a need to discuss each of the tensions between the right and conflicting values and interests. Creative thinking is needed with regard to the operative aspect of the right and the remedies that can protect it. Finally, there is a need to analyze the interaction between the right to identity as a legal right and the non-legal forces affecting it. Of particular importance in this context are legal and economic studies that pinpoint situations in which the market forces provide more adequate answers. Indeed, there will be great and intrigue challenges in days to come.

However, for now what is needed the most is the conceptual and normative consolidation of the right to information identity and the willingness to fundamentally acknowledge it – a first indispensable step in a road which is always long and winding.