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# Penny Saved, A Lifestyle Learned - The California and Connecticut Approaches to Supermarket Privacy

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**Recent Development: A Penny Saved, a Lifestyle Learned?  
The California and Connecticut Approaches to Supermarket  
Privacy**

*Allison Kidd*<sup>1</sup>

It is becoming increasingly difficult to find a grocery store where consumers can take advantage of special discounts without first handing over a frequent shopper card for scanning. While many may consider this grocery store technology a new form of coupon clipping, few stop to consider the privacy implications. Grocery store technology, like technology in other areas, allows for the consolidation and dissemination of personal information in ways never before possible. As grocery stores install ever more sophisticated methods to track what we buy, what we are willing to pay, and which grocery aisles are our favorites, additional state privacy protections modeled after the California Supermarket Club Card Disclosure Act of 1999<sup>2</sup> and the Connecticut Consumer Discount Cards law<sup>3</sup> are necessary.

This article investigates privacy implications stemming specifically from the use of discount shopping cards in the supermarket industry. The first part of this article will describe shopper card technology. The second part will investigate consumers' current rights to privacy, both from disclosure to the government and from sale of personal information to private third parties. The third part will explore the privacy protections offered by the California and Connecticut Acts and the implications of those laws for supermarket shoppers across the country. This article will conclude by discussing whether the California and Connecticut Acts could serve as models for protecting consumers' privacy in other states.

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<sup>2</sup> CAL. CIV. CODE §§ 1749.60-1749.65 (West Supp. 2002).

<sup>3</sup> CONN. GEN. STAT. § 42-371 (2002).

## I. Supermarket Tracker Programs

Six out of every ten supermarkets either currently collects or has plans to begin collecting grocery consumer data through discount club cards.<sup>4</sup> Catalina Marketing Corporation, which administers supermarket discount programs for more than 5,000 stores, maintains a database with shopping preferences of thirty million households.<sup>5</sup> In a typical transaction, customers present their cards, rather than coupons, at the register. The cashier swipes the magnetic strip on the card through an electronic reader, awarding customers discounts and building a record of their buying habits.<sup>6</sup> Supermarkets tie a customer's social security number or driver's license number to purchase records of food, personal hygiene and tobacco products, alcohol, over the counter medicines, and, in some cases, prescription drugs.<sup>7</sup> Grocers use the cards to build customer loyalty and make decisions about pricing.<sup>8</sup> Supermarkets often share the information collected with

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<sup>4</sup> Robert O'Harrow, Jr., *Bargains at a Price: Shoppers' Privacy Cards Let Supermarkets Collect Data*, WASH. POST, Dec. 31, 1998, at A1 (exploring whether supermarket shopper cards infringe on privacy rights or merely act as savings programs for customers).

<sup>5</sup> Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1408 (2001) (citing Robert O'Harrow, Jr., *Behind the Instant Coupons, a Data-Crunching Powerhouse*, WASH. POST, Dec. 31, 1998, at A20).

<sup>6</sup> For more in-depth coverage on how shopper card technology works, see Christine Anthony, *Grocery Store Frequent Shopper Club Cards: A Window into Your Home*, 4 B.U. J. SCI. & TECH. L. 7, 220–21 (1998). Author argues that invasion of privacy in the supermarket shopper card context by "market participants," supermarkets, is unlikely since stores will protect the information as trade secrets and that the invasion of privacy by government is more likely because supermarket records are useful to law enforcement. Author also proposes expansion of the Right to Financial Privacy Act to cover supermarket records, which would restrict government access to some financial information, but allow access for legitimate law enforcement purposes.

<sup>7</sup> See SENATE RULES COMM., HEARING BEFORE THE SENATE RULES COMM'N., 1999–2000 Reg. Sess., (Cal. 1999), [http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0901-0950/sb\\_926\\_cfa\\_19990907\\_110548\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0901-0950/sb_926_cfa_19990907_110548_sen_floor.html) (on file with the North Carolina Journal of Law & Technology).

<sup>8</sup> See Jenifer K. Nii, *Albertson's to Join List of Card Stores*, THE DESERET NEWS, (Salt Lake City, Utah), June 25, 2002, at E1. Stores such as Food Lion

marketers and product manufacturers.<sup>9</sup> Some supermarkets sell customer information to marketing agencies that target coupon mailings based on consumer preferences.<sup>10</sup> Customers who prefer not to have a card face higher shelf prices.

## II. Privacy and Supermarket Tracking Programs

The Supreme Court has defined privacy as “the individual’s control of information concerning his or her person.”<sup>11</sup> The privacy concerns raised by supermarket club cards currently in use, as well as those planned for future use, are numerous. The most pressing of these concerns fall into two categories: disclosure of shopping records to government entities and disclosure or sale of shopping information to private third parties.

### A. Disclosure of Shopping Records to Government Entities

Grocery records are a new source of information for government investigations.<sup>12</sup> For example, after receiving subpoenas from the Drug Enforcement Administration (“DEA”),

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also allow customers to link their shopper cards to nonprofit organizations, schools, and churches, passing along a portion of the purchase price as a donation. See Food Lion Shop and Share Program, at [http://www.foodlion.com/shp\\_1ssconsumers.asp](http://www.foodlion.com/shp_1ssconsumers.asp) (copyright 2002) (on file with the North Carolina Journal of Law & Technology).

<sup>9</sup> *Tracking Twinkies*, SALT LAKE TRIBUNE, Aug. 8, 2002, at A14. See also O’Harrow, *supra* note 4, at A1 (asserting that “huge data warehouses have sprung up around the country—places where merchants and marketers can pay for additional information collected elsewhere about each of their customers—such as their homes and cars—and match that with their specific purchase data to create clear profiles of their customers’ lives and preferences”). But see Katie Fairbank, *Grocery Shoppers Sick of Being Carded*, DALLAS MORNING NEWS, Dec. 19, 2001, at 1A (stating that Kroger denies sharing information with third parties).

<sup>10</sup> Tom Maurstad, *Report Foreshadows a World of all-too-Personal Advertising*, DALLAS MORNING NEWS, June 22, 2002, at Entm’t Sec.

<sup>11</sup> *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989).

<sup>12</sup> Stuart Silverstein, *What Price Loyalty?* L. A. TIMES, Feb. 7, 1999, at C1 (describing the information available from supermarket tracker programs).

one supermarket released information on customers' purchases.<sup>13</sup> The DEA was interested in whether a suspected drug dealer purchased a large supply of plastic sandwich bags, which are commonly used to package drugs.<sup>14</sup> While the DEA obtained information on plastic bags pursuant to a subpoena, not every grocer is likely to wait for an official demand for information.

Some grocers have voluntarily shared consumer information with government agencies. For example, an employee of one grocery chain, in the wake of the September 11, 2001 terrorist attacks, delivered all customer information collected at his store to federal investigators.<sup>15</sup> The agencies had expressed no interest in obtaining the records.<sup>16</sup> Few consumers, however, realize that their grocery purchases could be the subject of a government investigation.

The government has begun to use supermarket records to ensure food stamp and welfare benefits are used properly.<sup>17</sup> In England, "[g]overnment medical and dental programs have already linked to similar shopper monitoring programs . . . ."<sup>18</sup> While the United States does not have a nationalized health care system like England, many Americans do receive assistance for health care through government programs, such as Medicaid or Medicare, raising fears supermarket records could be linked to health records. Often, supermarkets ask customers to make decisions regarding the

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<sup>13</sup> Lisa Jane McGuire, *Banking on Biometrics: Your Bank's New High-Tech Method of Identification May Mean Giving Up Your Privacy*, 33 AKRON L. REV. 441, 442 (citing R.J. Ignelzi, *It's in the Cards; Frequent-shopper Discounts Sometimes Net a Loss of Privacy*, SAN DIEGO UNION-TRIBUNE, Apr. 7, 1998, at E1).

<sup>14</sup> *Id.*

<sup>15</sup> Erik Baard, *Buying Trouble*, VILLAGE VOICE, July 30, 2002, at 34.

<sup>16</sup> *Id.* (stating that the supermarket debated informing customers of the disclosure, but ultimately rejected the idea).

<sup>17</sup> Seventeen million food stamp recipients and welfare recipients in at least three states now receive their benefits through magnetic strip government debit cards subject to supermarket tracking. Cathy Bowen, *Welfare Agencies Seek Aid From Smart Cards*, 3 CARD TECHNOLOGY 74 (Oct. 2002).

<sup>18</sup> Vin Suprynowicz, *After all, It's only Groceries . . . Right?*, LAS VEGAS REVIEW-JOURNAL, June 30, 2002, at 2D (quoting Katherine Albrecht, founder and head of Consumers Against Supermarket Privacy Invasion and Numbering (C.A.S.P.I.A.N.)).

release of shopping information without fully disclosing these possible uses of the information.

### **1. Federal Constitutional Protections Against Disclosure to Government Entities**

The Fourth Amendment protects individuals from unreasonable search and seizure by the government.<sup>19</sup> The Fourth Amendment also prevents government officials from using third parties to obtain information not otherwise available to the government.<sup>20</sup> In such cases, the third party could be acting as the government's agent.<sup>21</sup> Although there has been no litigation about the release of supermarket shopper card information to government agencies to date, existing Fourth Amendment law suggests that shoppers will not find protection in the Constitution.

Fourth Amendment decisions focus on customers' reasonable expectations of privacy.<sup>22</sup> There is no reasonable expectation of privacy when information is voluntarily transmitted to a third party, regardless of customers' assumptions regarding use of that information.<sup>23</sup> The Supreme Court:

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<sup>19</sup> The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

<sup>20</sup> *State v. Watts*, 750 P.2d 1219, 1221 (Utah 1988). The court stated that government officials cannot have "informants do for them what they cannot legally do themselves." The court also explained that two factors are used to determine whether private individuals act as government agents: "(1) the government's knowledge of and acquiescence in the intrusive conduct, and (2) the intent and purpose of the person(s) or body (ies) conducting the search."

<sup>21</sup> *See id.*

<sup>22</sup> The Supreme Court has defined the test for identifying Fourth Amendment violations as follows: "first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *California v. Ciraolo*, 476 U.S. 207, 211(1986).

<sup>23</sup> "What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967).

has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.<sup>24</sup>

For instance, the telephone numbers one dials from a home telephone cannot reasonably be expected to be private since those numbers are revealed to a third party, the telephone company.<sup>25</sup> Similarly, revealing personal and financial information when opening a bank account prevents one from having a reasonable expectation of privacy in her bank records.<sup>26</sup> One also loses her reasonable expectation of privacy when depositing illegal materials in a trashcan.<sup>27</sup> Therefore, revealing one's grocery purchases to a third party cashier arguably removes any reasonable expectation of privacy since cashiers, grocery baggers, and other customers can see all grocery items selected.

Despite the public nature of grocery shopping, however, supermarkets' use of discount club cards can be distinguished from cases involving phone companies and banks. A key distinction exists between what information supermarket customers know they are revealing to stores and what information stores actually collect. Many customers believe that shopper cards do nothing more than trigger coupons and that their purchases are exposed only to the cashier and those people standing around the register.<sup>28</sup> The framers of the Fourth Amendment did not anticipate the potential

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<sup>24</sup> *United States v. Miller*, 425 U.S. 435, 443 (1976).

<sup>25</sup> *Smith v. Maryland*, 442 U.S. 735, 742 (1979).

<sup>26</sup> *Miller*, 425 U.S. at 443.

<sup>27</sup> As the Court explains, the defendant "placed his papers in the bin for the express purpose of conveying them to third parties, the trash collectors, whom he had no reasonable expectation would not cooperate with the police." *California v. Rooney*, 483 U.S. 307, 323 (1987).

<sup>28</sup> Consumer advocacy groups exist to increase customers' knowledge of the nature of supermarket tracker programs. *See generally infra* note 70. No supermarket program identifies itself as a tracker program. Rather, supermarkets use terms such as very important customer, MVP, club, and discount program.

privacy invasions technological advances have created.<sup>29</sup> Yet, until the Supreme Court recognizes a broader expectation of privacy, the distinction will not protect supermarket shoppers.

## 2. State Court Protections Against Disclosure to Government Entities

State courts give consumers more privacy protection than the federal Constitution.<sup>30</sup> However, no state has recognized an interest in the privacy of one's shopping activities, and at least one state has considered the issue and decided that no such reasonable expectation of privacy exists.<sup>31</sup>

Supermarket customers may understand that a supermarket could sell their shopping records,<sup>32</sup> but the fact that a supermarket

<sup>29</sup> The Fourth Amendment provides the level of protection one would expect when in their home at the time the Framers wrote the amendment. *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)).

<sup>30</sup> See, e.g., *Katz v. United States*, 389 U.S. 347, 350–1 (1967) (stating “[b]ut the protection of a person’s general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States”). For example, the Supreme Court of Pennsylvania considers disclosure of financial affairs to a bank to be protected because such disclosure “is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account.” *Commonwealth v. De John*, 403 A.2d 1283, 1289 (Pa. 1979) (quoting *Burrows v. Superior Court of San Bernardino County*, 529 P.2d 590 (Cal. 1974)). Similarly, the Idaho Court of Appeals suggests the state would recognize an interest in the privacy of one’s telephone and bank records because they “provide . . . intimate details of . . . [the defendant’s] life, identify his friends or political and business associates . . . [and may] provide or complete a ‘virtual current biography.’” *State v. Kluss*, 867 P.2d 247, 254 (Idaho Ct. App. 1993).

<sup>31</sup> In Massachusetts, a person may relinquish privacy rights when “shopping in a store” since the act “involves exposure of the person and the items they purchase.” *Ball v. Wal-Mart*, 102 F. Supp. 2d 44, 50 (D. Mass. 2000). See also *T.K.’s Video v. State*, 891 S.W.2d 287 (Tex. App. 1994) (holding consumers of pornographic videos are not protected by a right to privacy at the time of purchase).

<sup>32</sup> Supermarket customers must take affirmative steps, such as completing application forms, to join club card programs. Many supermarket discount card applications have privacy statements revealing to whom and for what reasons



can tie shopping records to other customer information does seem to separate the case of shopper cards from other forms of retail transactions. The information supermarkets keep on file from shopper cards provides more intimate details of customers' lives than do telephone records. While telephone records could indicate whether someone is planning a trip, looking for a job in another city, or comparing prices for an upcoming purchase, the groceries one purchases can reveal one's health, bad habits, and even life expectancy. In fact, federal agents were able to use shopper card transactions of the September 11 hijackers to piece together a profile of "ethnic tastes and terrorist supermarket-shopping preferences."<sup>33</sup> Existing state privacy law suggests that state courts would recognize privacy protection for supermarket tracker program information when those records are tied to other, more personal forms of information, but likely would not protect individuals' shopping lists.

### 3. Statutory Protections Against Disclosure to Government Entities

State legislatures can protect a reasonable expectation of privacy where courts have found no such expectation. At least eight states guarantee some degree of personal privacy in their constitutions, protecting consumers against invasion of privacy by governmental actors.<sup>34</sup> These guarantees often merely mirror

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the supermarket might sell or share information. For example, the Food Lion MVP card application states that "[a]t Food Lion, the protection of your privacy is important to us. We will not sell or give your name, address, email or personal information to any outside company. We evaluate what is purchased on the MVP Card so we can be sure that we have the products you want on shelf when you visit our stores. Purchase information also allows us to send you coupons and offers on items that you use—saving you even more at Food Lion."

FOOD LION, MVP CARD APPLICATION, *at*

[http://www.foodlion.com/mvp\\_application.asp?option=N&mvp=](http://www.foodlion.com/mvp_application.asp?option=N&mvp=) (copyright 2002) (on file with the North Carolina Journal of Law & Technology).

<sup>33</sup> Baard, *supra* note 15.

<sup>34</sup> These states include: Minnesota, incorporating the Fourth Amendment to the federal Constitution in its state constitution; Hawaii, stating in its constitution, "the right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest;" Louisiana, including a

federal protections or have yielded, in practice, very little protection of information privacy.<sup>35</sup>

While federal law regulates the government's use of information collected on individuals,<sup>36</sup> consumer protections against the release of information by a third party to the government tend to regulate only a particular industry or protect only a particular type of customer.<sup>37</sup> For example, action has been initiated to restrict government access to the records of corporations tracking individuals' online activities.<sup>38</sup> The greatest protections of personal privacy against government interference

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provision similar to the Fourth Amendment; Arizona, stating that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law;" Florida, "provid[ing] that 'every natural person had the right to be let alone and free from government intrusion into his private life except as otherwise provided herein;'" Alaska, stating that "the right of the people to privacy is recognized and shall not be infringed;" California, stating that privacy is an inalienable right and applying that right to private and governmental actions; and Illinois, providing that "the people shall have the right to be secure . . . against . . . invasions of privacy." FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* 66-7 (Brookings Institution Press 1997) (quoting and citing: MINN. CONST., art. I, § 10 (2001); HAW. CONST., art. I, § 6 (2002); LA. CONST., art. I, § 5 (2002); ARIZ. CONST., art. I, § 8 (2002); FLA. CONST., art. I, § 23 (2002); ALASKA CONST. art. 2, § 8 (2002); CAL. CONST., art. I, § 1 (2001); ILL. CONST., art. I, § 6 (2002)).

<sup>35</sup> *Id.* at 67-8 (discussing the weaknesses of state constitutional privacy provisions).

<sup>36</sup> For example, the Freedom of Information Act regulates federal agencies' ability to collect and use personal information. 5 U.S.C. § 552 (2002). The Electronic Communications Privacy Act of 1986 regulates government access to certain types of electronic data. 18 U.S.C. §§ 2510-2522 (2002). The federal Privacy Act restricts the type of personal information the government may collect, store, or disclose. 5 U.S.C. § 552a (2002). The Computer Matching and Privacy Protection Act establishes guidelines for government agencies to follow when using electronic records information. Cate, *supra* note 34, at 165.

<sup>37</sup> For example, the Drivers' Privacy Protection Act of 1996 restricts government disclosure of personal information in state motor vehicle records. 18 U.S.C. § 2721 (2002).

<sup>38</sup> The Electronic Privacy Information Center filed a Freedom of Information Action in federal district court to challenge government access to data companies' records of online consumer information. John B. Kennedy and Mary Wong, *Recent Developments in U.S. Privacy Law, Including Post-September 11, 2001*, in *THIRD ANNUAL INSTITUTE ON PRIVACY LAW* 26 (Practising Law Institute, ed., Apr. 5, 2002).

apply when consumer credit is involved.<sup>39</sup> However, there are no federal laws specifically limiting supermarkets' disclosure of customer information to government entities. Most state legislatures will have to pass new privacy laws to protect supermarket customers.

### **B. Disclosure or Sale of Shopping Records to Private Third Parties**

Just as few laws regulate the disclosure of supermarket shopper records to the government, there are few protections against the release of such information to private third parties. Grocers sell and share their customer records with marketing agencies and have begun to release case-related information to private attorneys for lawsuits. For example, an Orange County, California resident brought an abuse of privacy claim against Vons, a division of Safeway, Inc.<sup>40</sup> The plaintiff claimed he slipped on spilled yogurt at a Vons supermarket and shattered his kneecap, preventing him from working.<sup>41</sup> During settlement negotiations, a mediator revealed that Vons reviewed the plaintiff's shopping records, from which it determined that he bought a significant amount of alcohol, and was prepared to use this evidence against Rivera in court.<sup>42</sup> The revelation forced the plaintiff to settle.<sup>43</sup> In another example of a private party's realizing the potential value of supermarket shopping records for civil litigation, Shaw's supermarket has recognized that their "data might some day be sought by an outsider like a health-insurance company."<sup>44</sup> In another case, one partner in a divorce dispute used

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<sup>39</sup> For example, unless the request is made as part of a specific investigation, federal laws restrict the personally identifiable information the government can demand from credit card companies. Jeffrey Rosen, *Silicon Valley's Spy Game*, N. Y. TIMES, Apr. 14, 2002, § 6 (Magazine), at 46.

<sup>40</sup> Silverstein, *supra* note 12.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *See id.*

<sup>44</sup> Ross Kerber, *The Privacy Tradeoff*, THE BOSTON GLOBE, Jan. 8, 2001, at C1.

the other's supermarket records to argue that expensive wine purchases showed the ex-spouse could afford more alimony.<sup>45</sup>

Because the Fourth Amendment does not limit the actions of private individuals,<sup>46</sup> a grocer sharing a customer's information without her consent does not violate the Fourth Amendment. While the Supreme Court has acknowledged that a right to privacy of information could exist, it has not held that such a right does exist.<sup>47</sup>

The primary consumer protections regarding sale of information to private third parties are statutory. As with protections against government access to personal information, many privacy protections against private third party access to personal information regulate only certain industries, or apply only to certain types of customers. For example, statutes protect against the disclosure of personally identifiable information by videotape rental and sale companies<sup>48</sup> and by interactive computer services.<sup>49</sup> If released, video rental records might embarrass customers, but those records are unlikely to contain indicators of one's health, familial status, or personal hygiene, as grocery records may reveal. Protecting grocery records should be a more important state goal.

The greatest amount of privacy regulation for consumer information exists when consumers' credit is involved in transactions. For example, Subtitle A of Title V of the Gramm-Leach-Bliley Act ("GLB Act") protects consumers' privacy during financial transactions, but specifically exempts supermarkets.<sup>50</sup>

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<sup>45</sup> Stephanie Dunnewind, *The Two Faces of the Cards: Loyalty, Privacy*, SEATTLE TIMES, May 15, 2002, at C1.

<sup>46</sup> *State v. Watts*, 750 P.2d 1219, 1220 (Utah 1988).

<sup>47</sup> See *Whalen v. Roe*, 429 U.S. 589, 605 (1977) (observing that "[w]e are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files").

<sup>48</sup> Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(b)(1) (2000).

<sup>49</sup> Consumer Internet Privacy Protection Act of 1997, H.R. 98, 105th Cong., 1st Sess. (1997).

<sup>50</sup> DIVISION OF FINANCIAL PRACTICES, FEDERAL TRADE COMM'N, THE GRAMM-LEACH-BLILEY ACT, PRIVACY OF CONSUMER FINANCIAL INFORMATION (2002), <http://www.ftc.gov/privacy/glbact/glboutline.pdf> (stating that "[e]xamples of businesses that are not 'significantly engaged' [in financial activities] for purposes of the GLB Act . . . [include] [g]rocery store[s] that allows consumers

The Fair Credit Reporting Act, moreover, prohibits financial institutions from revealing any consumer credit information unless the situation falls under an exclusion.<sup>51</sup> Unlike other retail establishments, grocery stores do not extend customers credit; therefore, laws governing retailers who extend credit do not protect grocery customers' information. However, the groceries one purchases reveal more personal information than the cars, furniture, stereo equipment, or clothing which many people purchase with credit. Thus, supermarket records deserve protection similar to that afforded records of retailers that extend credit.

### **III. The California and Connecticut Approaches to Supermarket Privacy**

#### **A. The California Supermarket Club Card Disclosure Act of 1999**

The California Supermarket Club Card Disclosure Act of 1999 ("California Act"), enacted on October 2, 1999,<sup>52</sup> was the first piece of legislation to specifically protect consumer information in the supermarket context.<sup>53</sup> When the California Act was proposed, three out of every four southern California shoppers belonged to supermarket discount clubs, and a merger between the Lucky and Ralphs supermarket chains was pending.<sup>54</sup> The growing popularity of supermarket club card programs indicated that the time was right to address the issue.<sup>55</sup>

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to get cash back by writing a check in an amount higher than the actual purchase price") (on file with the North Carolina Journal of Law & Technology).

<sup>51</sup> 15 U.S.C. §§ 1681-1681v (2002).

<sup>52</sup> 1999 Bill Tracking CA S.B. 926 (Cal. 1999).

<sup>53</sup> A 1999 bill that failed to pass in Wisconsin would have made supermarkets disclose the types of information they planned to share, to whom they would release the data, and the purpose of such disclosure. The Wisconsin bill would have given consumers broader protections than do the laws passed in California and Massachusetts. S.B. 207, 94th Leg. Reg. Sess. (Wis. 1999).

<sup>54</sup> Silverstein, *supra* note 12.

<sup>55</sup> *See id.*

The goal of the California Act was to eliminate the quid pro quo exchange of consumer privacy for financial savings.<sup>56</sup> While some grocers stated that they were already taking steps to protect customers' privacy,<sup>57</sup> customers had no protection other than industry self-regulation.

The California Act restricts the use of "marketing information," which includes any personally identifiable information "based on a cardholder's shopping patterns, spending history, or behavioral characteristics."<sup>58</sup> Under the California Act, no supermarket may require a discount card applicant to reveal her driver's license or social security number,<sup>59</sup> and no supermarket may sell or share personally identifiable information.<sup>60</sup> Violations of the Supermarket Act are treated as unfair trade practices<sup>61</sup> and are punishable by fine,<sup>62</sup> prosecution by the California Attorney General,<sup>63</sup> or injunction.<sup>64</sup> The California Act's protections were

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<sup>56</sup> E-mail from Jennie Bretschneider, Consultant to California State Senator Debra Bowen, to Allison Kidd, University of North Carolina law student (Oct. 1, 2002) (on file with North Carolina Journal of Law & Technology).

<sup>57</sup> SENATE RULES COMM., S. FLOOR ANALYSIS OF S.B. 926, 1999-2000 Reg. Sess., (Cal. May 12, 1999), [http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0901-0950/sb\\_926\\_cfa\\_19990512\\_174523\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0901-0950/sb_926_cfa_19990512_174523_sen_floor.html) (on file with the North Carolina Journal of Law & Technology).

<sup>58</sup> CAL. CIV. CODE § 1749.61(e) (West Supp. 2002).

<sup>59</sup> It is illegal for grocers to ask for such information, unless the discount card will be used for identification when the customer cashes a check or uses a debit card. However, even when grocers use such information for some customers, they cannot require all customers to apply for the check cashing kind of card, as opposed to ones with stricter privacy protections. CAL. CIV. CODE § 1749.64 (West Supp. 2002). The current, nationally available version of discount card applications for Dick's Supermarket requests a social security number, and Harris Teeter requests a driver's license number. *See* DICK'S SUPERMARKET SAVINGS CLUB CARD APPLICATION, <http://www.dickssupermarkets.com/SavingsClubCard/SavingsClub.html> (last visited October 31, 2002) (on file with the North Carolina Journal of Law & Technology). *See also* HARRIS TEETER VIC CARD APPLICATION, [http://www.harristeeter.com/vic\\_card/vic\\_application.php](http://www.harristeeter.com/vic_card/vic_application.php) (last visited Nov. 18, 2002) (on file with the North Carolina Journal of Law & Technology).

<sup>60</sup> CAL. CIV. CODE § 1749.65 (West Supp. 2002).

<sup>61</sup> CAL. CIV. CODE § 1749.63 (West Supp. 2002).

<sup>62</sup> CAL. BUS. & PROF. CODE §§ 17206-07 (West Supp. 2002).

<sup>63</sup> CAL. BUS. & PROF. CODE § 17204 (West Supp. 2002).

<sup>64</sup> CAL. BUS. & PROF. CODE § 17203 (West Supp. 2002).

strengthened on September 23, 2002, when the state's governor signed a bill making grocers' attempts to influence customers to waive their protections under the Act "contrary to public policy, void, and unenforceable."<sup>65</sup>

The supermarket industry and retailers such as Costco opposed the California Act, arguing that consumers liked the savings they received from discount programs and that the stores only used information on an aggregate and not a personally identifiable basis.<sup>66</sup> Supermarket retailers feared that "S.B. 926 would interfere with the operation of the programs, making it difficult or impossible for retailers to reward customers and track the popularity of products."<sup>67</sup> They believed the California Act was unnecessary because "[t]hose consumers have choices in whether they participate and where they shop."<sup>68</sup> Additionally, the supermarket retailers made broader arguments about their duty to inform consumers of privacy policies and about the government's role in regulating marketing products.<sup>69</sup>

Proponents of the California Act included groups of concerned citizens who formed an anti-card movement<sup>70</sup> and nonprofit privacy and consumer rights organizations.<sup>71</sup> This

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<sup>65</sup> A.B. 2331, 2001–2002 Reg. Sess. (Cal. 2001).

<sup>66</sup> E-mail from Jennie Bretschneider, Consultant to California State Senator Debra Bowen, to Allison Kidd, University of North Carolina law student (Oct. 1, 2002) (on file with North Carolina Journal of Law & Technology).

<sup>67</sup> SENATE RULES COMM., S. FLOOR ANALYSIS OF S.B. 926, 1999–2000 Reg. Sess., (Cal. May 12, 1999), [http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0901-0950/sb\\_926\\_cfa\\_19990512\\_174523\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0901-0950/sb_926_cfa_19990512_174523_sen_floor.html) (on file with the North Carolina Journal of Law & Technology).

<sup>68</sup> *Id.*

<sup>69</sup> Bretschneider, *supra* note 66.

<sup>70</sup> Consumers can join Consumers Against Supermarket Privacy Invasion and Numbering (C.A.S.P.I.A.N.). CONSUMERS AGAINST SUPERMARKET PRIVACY INVASION AND NUMBERING, *at* <http://www.nocards.org> (last visited Nov. 18, 2002) (on file with the North Carolina Journal of Law & Technology). Shoppers can share their stories with other consumers at the Club Card Complaints discussion board. CLUB CARD COMPLAINTS, *at* <http://www.geocities.com/WallStreet/5395/clubcard.html> (last visited Nov. 16, 2002) (on file with the North Carolina Journal of Law & Technology).

<sup>71</sup> SENATE JUDICIARY COMM., S. COMM. ANALYSIS OF S.B. 926, 1999–2000 Reg. Sess., (Cal. April 28, 1999), <http://www.leginfo.ca.gov/pub/99->

coalition worried about their privacy rights and about the amount of information supermarkets collected.<sup>72</sup> Some saw cards as financial penalties for those who choose not to enroll rather than as discount programs.<sup>73</sup> While it is true that consumers voluntarily enroll in supermarket tracker programs, proponents argued “most consumers do not see the problem until they are harmed. . . . [but] by then it is too late.”<sup>74</sup> California State Senator Bowen, the sponsor of a similar bill, explained that “[w]e need to have a discussion about what expectations California citizens have for privacy . . . I feel it's my responsibility to raise issues that people are not necessarily thinking about yet but that could have significant consequences in their lives.”<sup>75</sup> Concerns also were expressed regarding use of the shopper card information by private third parties and the government.<sup>76</sup> The bill's “author believe[d] that this kind of activity creates tremendous Big Brother concerns.”<sup>77</sup> Proponents argue that the California Act attempts to alleviate these concerns.

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00/bill/sen/sb\_09010950/sb\_926\_cfa\_19990428\_100407\_sen\_comm.html (on file with the North Carolina Journal of Law & Technology).

<sup>72</sup> SENATE RULES COMM., S. FLOOR ANALYSIS OF S.B. 926, 1999–2000 Reg. Sess., (Cal. May 12, 1999), [http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0901-0950/sb\\_926\\_cfa\\_19990512\\_174523\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0901-0950/sb_926_cfa_19990512_174523_sen_floor.html) (on file with the North Carolina Journal of Law & Technology).

<sup>73</sup> Silverstein, *supra* note 12.

<sup>74</sup> SENATE RULES COMM., S. FLOOR ANALYSIS OF S.B. 926, 1999–2000 Reg. Sess., (Cal. May 12, 1999), [http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0901-0950/sb\\_926\\_cfa\\_19990512\\_174523\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0901-0950/sb_926_cfa_19990512_174523_sen_floor.html) (on file with the North Carolina Journal of Law & Technology). *See also* Silverstein, *supra* note 12. (quoting Jane Perrin, ACNielsen vice president for global market research as stating that, “[f]or most supermarket customers, it's a natural part of how they shop now”).

<sup>75</sup> *The Tech Coast 10: Our Picks for the People and Companies to Watch as They Secure Southern California's Place on the High-Tech Map*, L. A. TIMES, Apr. 12, 1999, at C1.

<sup>76</sup> *See* SENATE RULES COMM., S. FLOOR ANALYSIS OF S.B. 926, 1999–2000 Reg. Sess., (Cal. May 12, 1999), [http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0901-0950/sb\\_926\\_cfa\\_19990512\\_174523\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0901-0950/sb_926_cfa_19990512_174523_sen_floor.html) (on file with the North Carolina Journal of Law & Technology).

<sup>77</sup> SENATE RULES COMM., HEARING BEFORE THE SENATE RULES COMM'N., 1999–2000 Reg. Sess., (Cal. 1999), <http://www.leginfo.ca.gov/pub/99->



## B. The Connecticut Consumer Discount Cards Law

Just over one year after the California Act's passage, Connecticut passed the Consumer Discount Cards Law ("Connecticut Act").<sup>78</sup> The Connecticut Act's simple title indicates its purpose, "An Act Concerning A Consumer's Right To Privacy."<sup>79</sup> As in California, supermarket customers in Connecticut had no previous privacy protections other than industry self-regulation.

The Connecticut Act provides broader protections than the California Act in the types of retailers it covers, but it has narrower provisions regulating the use of information.<sup>80</sup> The Connecticut Act applies to all retailers who use discount cards, not just supermarkets.<sup>81</sup> Under the Connecticut Act, no retailer may sell or share consumer information unless the store gives the customer reasonable written notice and an opportunity to opt out of disclosure.<sup>82</sup> Opt-in provisions require customers to affirmatively agree to the release of their shopping records, while opt-out provisions allow grocers to share information unless the customer specifically prohibits them from doing so. The written notice must describe the potential sale or sharing of information, the purposes for which that information will be used, and must include a form the consumer can use to opt out of disclosure.<sup>83</sup> In contrast, the California Act prohibits any sale or sharing of information protected by the Act without requiring customers to take any action to protect that information.

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00/bill/sen/sb\_0901-0950/sb\_926\_cfa\_19990907\_110548\_sen\_floor.html (on file with the North Carolina Journal of Law & Technology).

<sup>78</sup> Gov. John G. Rowland signed the Connecticut Act on May 26, 2000. Bill Tracking, H.B. 5586, 2000 Leg. Sess. (Conn. 2000) (on file with the North Carolina Journal of Law & Technology).

<sup>79</sup> H.B. 5586, 2000 Leg. Sess. (Conn. 2000).

<sup>80</sup> See CONN. GEN. STAT. § 42-371 (2001) (describing uses of information allowed under the Connecticut Act); CAL. CIV. CODE §§ 1749.64-65 (West Supp. 2002) (describing allowed uses of information under the California Act).

<sup>81</sup> CONN. GEN. STAT. § 42-371(a) (2002).

<sup>82</sup> CONN. GEN. STAT. § 42-371(b) (2002).

<sup>83</sup> CONN. GEN. STAT. § 42-371(c) (2002).

Similar to the California Act's "marketing information" protection, the Connecticut Act protects "consumer information."<sup>84</sup> However, unlike the California Act, the Connecticut Act does not provide examples of restricted information.<sup>85</sup> The Connecticut Act simply defines "consumer information" as that which "identifies a consumer."<sup>86</sup> Similar to the California Act, violations of the Connecticut Act are treated as unfair or deceptive trade practices<sup>87</sup> and are punishable by civil penalties, cease and desist, or restitution orders from the consumer protection commissioner of the state.<sup>88</sup>

Unlike the California Act, the Connecticut Act did not meet substantial opposition. The Connecticut State House approved the bill with a 145-1 vote.<sup>89</sup> Moreover, there was virtually no national media coverage of the bill. Given that the Connecticut Act would affect all retailers in the state, this was surprising. The fact that retailers who handle customers' financial information already were subject to similar provisions might explain the lack of opposition.<sup>90</sup>

#### IV. Model Legislation for Other States?

##### A. Weaknesses of the Two Acts

The California and Connecticut Acts provide supermarket customers significantly stronger protections than those found in other states. Although the protections are unparalleled, efforts have been made to further strengthen each of the Acts. These efforts identify areas in which consumer rights advocates suggest customers still need additional privacy protections. Additions proposed to the Acts highlight ways each could be strengthened.

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<sup>84</sup> CONN. GEN. STAT. § 42-371(a)(4) (2002).

<sup>85</sup> *See id.*

<sup>86</sup> *Id.*

<sup>87</sup> CONN. GEN. STAT. § 42-371(g) (2002).

<sup>88</sup> OFFICE OF FISCAL ANALYSIS, REPORT ON H.B. 5586, 2000 Leg. Sess. (Conn. 2000).

<sup>89</sup> Daniela Altimari, *House Takes on Retailers*, HARTFORD COURANT (Conn.), Apr. 13, 2000, at A6.

<sup>90</sup> GENERAL LAW COMM., REPORTS ON BILLS FAVORABLY REPORTED BY COMMITTEE, 2002 Leg. Sess. (Conn. 2002).

## 1. Weaknesses of the California Act

At the time of the California Act's passage, two competing bills, S.B. 417 and S.B. 926, simultaneously proposed privacy protections for supermarket club card users.<sup>91</sup> S.B. 926 was the bill that California made law.<sup>92</sup> The alternate bill, S.B. 417, would have required disclaimers on discount card applications describing consumers' right to prohibit the store from collecting, aggregating, selling, or transferring information to third parties.<sup>93</sup> In addition, it would have allowed supermarkets to collect information, but would have linked such information to personally identifiable customer information in fewer cases.<sup>94</sup> S.B. 417 also would have required stores to establish methods for customers to opt-out of having their information collected and still receive discounts.<sup>95</sup> Finally, S.B. 417 would have required notice to customers already enrolled in shopper programs at the time of the bill's passage to inform them of their new rights.<sup>96</sup>

The competition between S.B. 417 and S.B. 926, combined with pressure from the supermarket industry, resulted in the passage of a law with significant compromises. While the California Act provides broad protections for supermarket customers, it has notable exceptions. Supermarkets that are open only to their cardholders and require customers to renew shopper cards annually at a fee, such as Costco and Price Club, are governed by slightly different rules.<sup>97</sup> If such retailers require customers to sign releases of information on their initial applications and require third party marketing companies to sign a confidentiality agreement, they are exempt from the California Act.<sup>98</sup> This provision splits the supermarket industry into two

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<sup>91</sup> S.B. 417, 1999–2000 Reg. Sess. (Cal. 1999); S.B. 926, 1999–2000 Reg. Sess. (Cal. 1999).

<sup>92</sup> Bill Tracking, S.B. 926, 1999–2000 Reg. Sess. (Cal. 1999).

<sup>93</sup> S.B. 417, 1999–2000 Reg. Sess. (Cal. 1999).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> CAL. CIV. CODE § 1749.65(c) (West Supp. 2002).

<sup>98</sup> *Id.*

parts: members-only warehouse clubs and traditional supermarkets.

An additional provision allows supermarkets to sell or share information for the purpose of allowing third parties to mail supermarket club card information on behalf of the supermarket.<sup>99</sup> However, the California Act does not define the term "club card information."<sup>100</sup> This is as a serious loophole. To circumvent this provision, grocers need only claim that third party mailings will be sent on their behalf, and then they are free to sell information.

## 2. Weaknesses of the Connecticut Act

The Connecticut Act permits retailers to share information in order to send that retailers' own billing statements or promotional offers to customers.<sup>101</sup> However, it fails to define "promotional offers." While it seems only logical that a retailer should be able to share information with the company it hires to do its billing, in the supermarket context, the promotional offer exception is large. Given that most supermarkets do not produce many products of their own, this exclusion could allow supermarkets to sell information to any number of food companies.

In the current session of the Connecticut legislature,<sup>102</sup> lawmakers are considering a bill that would expand the protections of the Connecticut Act.<sup>103</sup> Senate Bill 186 seeks to clarify that the Connecticut Act regulates the sale of information collected through the use of a discount card.<sup>104</sup> The proposed bill would require retailers to give customers the opportunity to opt-out of disclosure,

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<sup>99</sup> CAL. CIV. CODE § 1749.65 (West Supp. 2002).

<sup>100</sup> *Id.*

<sup>101</sup> CONN. GEN. STAT. § 42-371(f) (2002).

<sup>102</sup> On May 7, 2002, in the most recent action taken, S.B. 186 was referred to the Joint Committee on Judiciary. CONN. GEN. ASSEMBLY, BILL HISTORY, 2002 Leg. Sess. (Conn. 2002), at <http://159.247.160.79/billstatus/s/SB-0186.htm> (on file with the North Carolina Journal of Law & Technology).

<sup>103</sup> Office of Legislative Research, BILL ANALYSIS, S.B. 186, 2002 Leg. Sess. (Conn. 2002), <http://www.cga.state.ct.us/2002/TOB/s/pdf/2002SB-00186-R00-SB.pdf> (on file with the North Carolina Journal of Law & Technology).

<sup>104</sup> *Id.*

regardless of how that information was obtained, either through the discount card or by some other means.<sup>105</sup> The proposed bill would protect all customer information that retailers collect, not just discount card information.<sup>106</sup> In this regard, the proposed bill would provide unparalleled consumer protection. Customers would have at least sixty days to opt-out of any information exchange.<sup>107</sup> In addition, Senate Bill 186 would regulate not only the sale, lease, or relinquishment of customer information, but would also add general language to cover any additional “exchange of information.”<sup>108</sup>

Although there was little opposition to the Connecticut Act,<sup>109</sup> Senate Bill 186 faces substantial barriers. The Connecticut Retailer Merchants Association (“CRMA”) is the most outspoken opponent of the bill.<sup>110</sup> CRMA argues that the legislation is unnecessary and will impose significant costs on retailers without benefiting consumers.<sup>111</sup> CRMA also asserts that the GLB Act already governs the sharing of financial information by many of the retailers who also would be governed by Senate Bill 186.<sup>112</sup> However, proponents of the bill argue that it subjects retailers to the same rules that apply to other businesses that collect personal financial information.<sup>113</sup> The provisions of competing California bill S.B. 417 and Connecticut bill S.B. 186 suggest issues other

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> S.B. 186(c), 2002 Leg. Sess. (Conn. 2002), <http://www.cga.state.ct.us/2002/TOB/s/pdf/2002SB-00186-R00-SB.pdf> (on file with the North Carolina Journal of Law & Technology).

<sup>108</sup> S.B. 186(b), 2002 Leg. Sess. (Conn. 2002), <http://www.cga.state.ct.us/2002/TOB/s/pdf/2002SB-00186-R00-SB.pdf> (on file with the North Carolina Journal of Law & Technology).

<sup>109</sup> For example, the Connecticut State House approved the bill with a 145–1 vote. Daniela Altamari, *House Takes on Retailers*, THE HARTFORD COURANT (Conn.), April 13, 2000, at A6.

<sup>110</sup> GENERAL LAW COMM., REPORTS ON BILLS FAVORABLY REPORTED BY COMMITTEE, 2002 Leg. Sess. (Conn. 2002), <http://www.cga.state.ct.us/2002/jfr/s/2002SB-00186-R00GL-JFR.htm> (on file with the North Carolina Journal of Law & Technology).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

states should not ignore when attempting to design their own privacy protections for supermarket customers.

### B. Lessons from California and Connecticut

Despite the weaknesses of the California and Connecticut Acts, both give consumers important protections absent in most states. Rather than leaving consumers' privacy rights to industry self-regulation, they take affirmative steps to protect consumers. When writing a supermarket privacy bill, state legislators should consider provisions that were rejected from the California Act or are proposed under the current amendment to the Connecticut Act. Like the California Act, the ideal bill would protect social security numbers and provide a detailed definition of the types of information that could not be shared. Subjecting all retailers who sell groceries with discount cards, like the Connecticut Act, would protect customers equally, regardless of whether they purchase groceries at traditional supermarkets or at larger discount stores. Allowing customers to opt-in to marketing programs, rather than opt-out, would improve upon both the California and Connecticut Acts and ensure that customer information would be shared only if customers allowed it. If shoppers read their club card applications quickly and fail to complete the entire document, an opt-in law protects their information.

The ideal law also would specify what information grocers could and could not share with the government, a statement absent in the California and Connecticut Acts. This is especially important given emerging shopper tracker technology.<sup>114</sup> Some

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<sup>114</sup> Recently, some supermarkets have begun to invest in new tracking technologies that collect even more information about consumers and raise new privacy concerns. Many supermarkets insist the move to technology such as pay by touch systems is for the primary benefit of the consumer. The system "protects you from criminals." L.A. Lorek, *Pay by Fingerprint*, SAN ANTONIO EXPRESS-NEWS (Tex.), Sept. 4, 2002, at A1 (quoting Ron Smith, president and chief executive officer of Biometric Access Corp., which created pay by touch systems for two grocery store chains). In Washington and Texas, Thriftway and Kroger have installed biometric touch screens in select stores to allow shoppers to pay by fingerprint. *Pay by Touch*, KIPLINGER'S PERSONAL FINANCE, Oct. 2002, at 107. Kroger stores using biometric technology keep credit card

stores currently have the technology to link customers' social security numbers and shopping habits with their fingerprints.<sup>115</sup> Should law enforcement officers have only a suspect's fingerprint, they could use supermarket records to obtain access to the suspect's name, address, and other information. If the number of people who now hold supermarket discount cards all had their fingerprints on file at supermarkets, the retail industry could be the

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numbers and bank account information on file to automatically complete transactions. Christine Blank, *At Grocery Checkout, No Wallet Needed*, N.Y. TIMES, July 25, 2002, at G3. The pay by touch system is new but appears as if it will be popular. *Id.* Twenty percent of customers at West Seattle Thriftway locations and 6,000 Kroger customers at three Texas grocery stores now pay by fingerprint. *Id.* Other stores, such as Winn-Dixie, Publix and Fred Meyer, already require customer fingerprints for check cashing. Deena M. Amato-McCoy, *Can Fingerprints Fight Terrorism?*, 68 GROCERY HEADQUARTERS 33 (Aug. 1, 2002). "Within the next five years, biometric checkout lanes could be standard." Lorek, *supra*. This technology currently is being tested in grocery stores but is likely to spread to fast food restaurants, pharmacies, and other stores. For example, in 2000, McDonald's stores in Fresno, California, tested biometric payment systems. *Id.* The technological advancements do not end at biometrics. The "prototype next-generation shopping 'loyalty' card [is] a radio transmission-driven LED (light emitting diodes) shopping card . . . ." Suprynowicz, *supra* note 18 (quoting Katherine Albrecht). These next generation cards would track your every movement around the supermarket. *Id.* The plans and, therefore, the emerging privacy concerns are increasingly complicated.

[O]nce these stores have built up the kind of individualized data bases that a couple years of scanning our cards will give them, they're already planning to go much further . . . [I]n the not-so-distant future, 'as soon as you walk into the store they'll read the chip in your (next-generation) card, while it's still in your purse or wallet . . . [T]hey know you only buy peanut butter every six months, so . . . [t]he special display on your shopping cart will start flashing when you enter that aisle, telling you there's a \$1.89 special on the peanut butter, but that's for you alone . . . If you buy it, that's the lowest price you'll ever be offered, because they know you'll pay that. The next time they'll try \$2.29, then \$2.59 . . . You'll never get it any lower than what you've paid in the past . . . .'

*Id.*

<sup>115</sup> See *id.*

largest depository of fingerprint information in the nation,<sup>116</sup> yet the industry has few restrictions on its use of the information. Furthermore, criminals would be able to perpetrate identity thefts if they could gain access to customers' credit card and other personal information. Should fingerprints be included in the personal information circulating in the marketplace, one shudders to think of the type of theft possible.

The California and Connecticut Acts may have been easier to pass in California and Connecticut, respectively, than similar bills would be in other states. Before the California Act's passage, California already had significant privacy protections that many other states lack. For example, California already required credit card companies to contact cardholders and give them an opportunity to opt out of disclosure whenever "marketing information" is involved.<sup>117</sup> California law also prohibits video stores from sharing information about what movies a customer

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<sup>116</sup> The Federal Bureau of Investigation (FBI) currently maintains the largest depository of fingerprints in the world. Press Release, West Virginia University, Defense Department Joining WVU's Biometrics Center, (June 27, 2001), <http://www.nis.wvu.edu/releases/CITER.htm>. The FBI has 35 million fingerprints collected from individuals across the globe. Federal Bureau of Investigation, FBI LABORATORY, at <http://www.fbi.gov/hq/lab/org/systems.htm> (information revised Oct. 2000). There are approximately 105.5 million households in America. U.S. CENSUS BUREAU, *2000 Census People Quick Facts*, available at <http://quickfacts.census.gov/qfd/states/00000.html> (last revised Sept. 24, 2002) (on file with the North Carolina Journal of Law & Technology). Two out of every three families in the California owns a supermarket club card. SENATE RULES COMM., S. FLOOR ANALYSIS OF S.B. 926, 1999-2000 Reg. Sess., (Cal. May 12, 1999), [http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0901-0950/sb\\_926\\_cfa\\_19990512\\_174523\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0901-0950/sb_926_cfa_19990512_174523_sen_floor.html) (on file with the North Carolina Journal of Law & Technology). Thus, if two out of every three families in the United States own a supermarket club card, over 70 million American fingerprints would be on file at supermarkets. Of course, some families own more than one supermarket card, driving the numbers even higher.

<sup>117</sup> CAL. CIV. CODE § 1748.12 (West Supp. 2002) (defining "marketing information" as records "based on a cardholder's shopping patterns, spending history, or behavioral characteristics . . ." that personally identify the cardholder).



rents without having that customer's written consent.<sup>118</sup> The state's Public Utilities Code prohibits telephone companies from sharing information revealing whom their customers call.<sup>119</sup>

Likewise, in Connecticut, video rentals are confidential and cannot be sold.<sup>120</sup> Additionally, Connecticut requires financial institution customers to affirmatively opt-in to information sharing programs.<sup>121</sup> This suggests that those states with few current privacy protections will need to protect consumers first in those industries that have access to the most sensitive financial information. In states that have already begun to protect privacy in industries like those recognized in California and Connecticut privacy laws, passage of a supermarket consumer protection law should be pursued immediately.

## V. Conclusion

States should follow the lead of California and Connecticut when addressing issues of supermarket consumer information privacy. Since privacy protection in this context is fairly new, passage of protections on the state level could produce creative policy solutions. Because supermarket customers generally shop in only one state, uniformity of supermarket privacy protections is not necessary at this time. States with supermarkets currently using newer technology, such as fingerprint recognition systems, might pass laws that specifically address use of that information, while states with less technologically advanced supermarkets might benefit from adopting laws nearly identical to the California or Connecticut Acts. Regardless of what type of privacy protections states choose to adopt, effective protections must be adopted to protect customers' privacy.

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<sup>118</sup> CAL. CIV. CODE § 1799.3 (West Supp. 2002) (including exceptions to this law for release of information pursuant to a subpoena, warrant, for purely commercial reasons, etc.).

<sup>119</sup> CAL. PUB. UTIL. CODE § 2891 (West Supp. 2002).

<sup>120</sup> CONN. GEN. STAT. § 53-450 (2002).

<sup>121</sup> See NATIONAL ELECTRONIC COMMERCE COORDINATING COUNCIL, CONSUMER PRIVACY PROTECTIONS ON THE INTERNET, Dec. 2001, at 19, at [http://www.statesnews.org/InternetPrivacy/online\\_resources.htm](http://www.statesnews.org/InternetPrivacy/online_resources.htm) (on file with the North Carolina Journal of Law & Technology).

In 1977, the federal government's Privacy Protection Study Commission concluded that "[c]urrent law is neither strong enough nor specific enough to solve the problems that now exist . . . [C]hanges in record-keeping practice have already made even recent legal protections obsolete . . . The law as it stands simply ignores the strong interest many people have in records about them."<sup>122</sup> Today, the use of supermarket tracker programs raises similar concerns. No existing source of privacy law can assure that all consumers' supermarket shopping records will not be invaded by the government or private third parties. Current national laws, such as the prohibition against unreasonable search and seizure, protect consumers against only limited instances of privacy invasion by the government. Enacting new state statutes based on the California Supermarket Club Card Disclosure Act of 1999 and the Connecticut Consumer Discount Cards law is the only way to ensure that supermarket customers no longer must pay for their privacy.

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<sup>122</sup> David M. O'Brien, Privacy, Law, and Public Policy 203-4 (Prager Publishers 1979) (citing THE PRIVACY PROTECTION STUDY COMM'N, *Report of the Privacy Protection Study Commission*, in PRIVACY IN AN INFORMATION SOCIETY 10-11 (U.S. Government Printing Office 1977)).

