CAN I GET YOUR NAME PLEASE? NOT UNLESS YOU WANT TO GO TO JAIL.

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ABSTRACT

Privacy laws protecting citizens from criminal exploitation of their data are receiving significant attention around the United States. While North Dakota has proscribed misuse of its citizens' private information for over twenty years through the criminal code, the current statutory language is overbroad and may criminalize the benign use of ordinary identifying information commonly used in everyday transactions. This article identifies the problems with the statutory language in Section II, provides a framework for interpretation in Section III, and explores the limits of interpretation in Section IV.

Other areas of law appear to be of little help in limiting the overbreadth problem. Section V explores the effect of the First Amendment on the statute, and Sections VI and VII explore other sources of law that may limit the statute's applicability. Section VIII assesses the current offense grading structure, and Section IX suggests legislative corrections to remedy the potentially unjust results identified by the examples in this article. The article concludes with a discussion of how the North Dakota Legislature could resolve these issues by rewriting the statute to prevent potentially unjust prosecution of citizens for ordinary or beneficial uses of one's data.

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I. INTRODUCTION

Privacy protections are creating no shortage of controversy. The European General Data Protection Regulations ("GDPR") has created a worldwide privacy protection regime[1] to the benefit of European Nationals. In the United States, the State of California has enacted the California Consumer Privacy Act ("CCPA"), which has similarly broad coverage implications.[2] The CCPA also has the constitutional benefit of being somewhat enforceable throughout the United States due to the sister states doctrine, born from the Full Faith and Credit Clause in Article IV, Section I of the U.S. Constitution.[3] In both the GDPR and the CCPA, and several other laws,[4] questions about the long-arm applicability of these laws outside of the primary jurisdiction of their enacting bodies abound.[5]

The North Dakota Legislature has, through a series of bills, created privacy protections as part of the North Dakota Criminal Code. These protections are located in chapter 12.1-23 of the North Dakota Century Code ("N.D.C.C."). Unlike the GDPR and the CCPA, which are problematic due to their broad geographic enforcement coverage and their jurisdiction based on the citizenship or domicile of the individual, the principal issue that this article focuses on is the wide range of activities encompassed by North Dakota's privacy laws. North Dakota's laws don't have the geographic problems of the GDPR and the CCPA;[6] instead, the issue with North Dakota's laws is the breadth of activities covered by them.

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1. *See generally* Amber Ausley, *The Prospective Impact of the Global Data Protection Regulation on Entrepreneurship: A Roboadvisor Case Study*, 15 I/S: J. LAW POLICY INF. SOC. 85 (2019).

2. *See generally* Drake Mann, *The California Consumer Privacy Act of 2018: Why it Matters to Clients in Arkansas*, 54 THE ARK. LAW. 50 (2019).

3. U.S. CONST. art IV, § 1 ("Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.").

4. For example, three countries have all created data privacy laws with extrajudicial applications. *See generally* Nigel Cory, *Cross-Border Data Flows: Where Are the Barriers, and What Do They Cost*, ITIF (May 1, 2017), https://itif.org/publications/2017/05/01/cross-border-data-flows-where-are-barriers-and-what-do-they-cost (discussing Brazil); Lothar Determann & Chetan Gupta, *India's Personal Data Protection Act, 2018: Comparison with the General Data Protection Regulation and the California Consumer Privacy Act of 2019*, 37 BERKELEY J. INT'L L. 481 (2019) (discussing India); Lothar Determann, Edward Bekechenko, & Vadim Perevalov, *Residency Requirements for Data in Clouds-What Now?*, 14 PRIV. & SECURITY L. REP. 1 (2015) (discussing Russia).

5. Kurt Wimmer, *The Long Arm of the European Privacy Regulator: Does the New EU GDPR Reach U.S. Media Companies?*, COMMUN. LAWYER 16–21 (2017). *See generally* Lokke Moerel, *The Long Arm of EU Data Protection Law: Does the Data Protection Directive Apply to Processing of Personal Data of EU Citizens by Websites Worldwide?*, 1 INT'L DATA PRIVACY L. 28 (2011).

6. *See* N.D. CENT. CODE § 12.1-23-12 (2019). Long arm provisions do exist, however, unlike with GDPR and CCPA there is a clearer tie to the law's home jurisdiction of North Dakota, making them less objectionable.

The N.D.C.C. provisions that directly relate to privacy include section 12.1-23-11, dealing with the "unauthorized use of personal identifying information," and section 12.1-23-19, dealing with the "use and possession of reencoders and scanning devices."[7] Some privacy violation-related crimes may also be proscribed by sections 12.1-23-02 to 12.1-23-04 (and defined in section 12.1-23-10), if the information is used for theft.[8]

This article focuses on N.D.C.C. section 12.1-23-11 and its overly broad language. Specifically, one example of the problem that the section creates is that the use of an individual's name "to obtain . . . anything . . . of value without the authorization or consent of the . . . individual" is a class B felony, for a first offense, and a class A felony thereafter.[9] While this may have been designed to prevent identity theft and an individual masquerading as someone else, the plain English wording does not meet this goal and instead proscribes an extensive set of behaviors. This article describes the challenges posed by the broad and ambiguous language used in these statutes, discusses defenses to its enforcement, and considers potential legislation to address these issues.

II. THE PROBLEM WITH NORTH DAKOTA CENTURY CODE SECTION 12.1-23-11

This section discusses the problems inherent to the language and plain meaning of N.D.C.C. section 12.1-23-11. First, a number of general problems with the statute are discussed. These problems include its overly broad list of what constitutes personal information, inclusion of things that are not typically defined as protected personal information, similar treatment of information of different levels of confidentiality, and overbroad restrictions on information use. Second, a set of considerations particular to the information of minors are considered.

A. GENERAL PROBLEMS

A reading of the plain English text of N.D.C.C. section 12.1-23-11 quickly illustrates the prospective issues that this section can cause. Section 12.1-23-11(1) identifies nineteen forms of "personal identifying information" these include:

a. An individual's name;

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7. *Id.* §§ 12.1-23-11, 12.1-23-19.

8. *Id.* § 12.1-23-02 (dealing with the "[t]heft of Property"; *Id.* § 12.1-23-03 (dealing with the "[t]heft of services"); *Id.* § 12.1-23-04 (dealing with the "[t]heft of property lost, mislaid, or delivered by mistake"); *Id.* § 12.1-23-10 ("Definitions for theft and related offenses").

9. N.D. CENT. CODE § 12.1-23-11(2) (2019); *Id.* § 12.1-23-11(1)(a) (Individual's names are identified as "personal identifying information.").

b. An individual's address;

c. An individual's telephone number;

d. The operator's license information assigned to an individual by the department of transportation under section 39-06-14;

e. An individual's social security number;

f. An individual's employer or place of employment;

g. An identification number assigned to the individual by the individual's employer;

h. The maiden name of the individual's mother;

i. An individual's financial institution account number, credit card number, or debit card number;

j. An individual's birth, death, or marriage certificate;

k. An individual's health insurance policy number or subscriber identification number or any unique identifier used by a health insurer to identify the individual;

l. The nondriver color photo identification card information assigned to the individual by the department of transportation under section 39-06-03.1;

m. An individual's digitized or other electronic signature;

n. An individual's photograph or computerized image;

o. An individual's electronic mail address;

p. An individual's username and password of any digital service or computer system;

q. An individual's payment card information;

r. An individual's biometric data; or

s. Any other numbers, documents, or information that can be used to access another person's financial records.[10]

The types of information included in this list runs the gamut from clearly confidential information, such as a social security number, to highly public information, such as a "employer or place of employment," or a photograph (presumably including even one taken in a public space).[11] The grouping of all of these types of information raises questions regarding the extent of protection that the N.D. Legislature intended to create for the collection of such divergent types of information. Clearly the protections available for publicly available information would need to be different from truly private

10. *Id.* § 12.1-23-11(1).
11. *Id.* § 12.1-23-11(1)(e)-(f), 12.1-23-11(1)(n).

information. The problem with this indiscriminate list comes in the next sections, where the proscribed conduct is enumerated.[12]

In N.D.C.C. section 12.1-23-11(2), the statute advises:

> An individual is guilty of an offense if the individual obtains or attempts to obtain, transfers, records, or uses or attempts to use any personal identifying information of another individual, living or deceased, to obtain credit, money, goods, services, or anything else of value without the authorization or consent of the other individual . . . .[13]

At first glance, this may seem straightforward. It might seem that this section is designed to prevent the fraudulent use of the aforementioned personal information. Fraudulent use of personal information is clearly proscribed by this language. However, the proscribed activities are far more common than those typically associated with identity theft or stolen-identity fraud. Specifically, the section prohibits: (a) obtaining, (b) attempting to obtain, (c) transferring, (d) recording, (e) using or (f) attempting to use any of the aforementioned information if it (1) belongs to another individual and (2) is used to obtain (i) credit, (ii) money, (iii) goods, (iv) services, or (v) other things of value.[14]

A hypothetical quickly illustrates the problem the section creates.[15] The simple statement, "I am John's friend, would you help me find him?" absent permission to use the individual's name or location data would run afoul of this statute. The request uses the name of the individual and would either be a use to obtain or a use to attempt to attain a service: help locating John.[16] In fact, absent an argument of implicit consent to use John's name to address him, even the mere use of his name appears to be prohibited.

The collection, sale, or use for marketing of individuals' names, addresses, email addresses, and phone numbers is also prohibited.[17] It appears N.D.C.C. section 12.1-23-11 provides perhaps the strongest privacy protections in the world; however, it ostensibly all but ends any direct marketing to consumers.[18] Of course, this has not yet happened, nor is it likely to.

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12. The inclusion of several types of identified "personal identifying information" also raises questions of whether there must be some connection to a particular individual to be implicated. How would "an individual's employer or place of employment" be personal identifying information without some other identifier for the individual? For example, would merely identifying a known workplace qualify, as it would be an (albeit unknown) "individual's employer or place of employment?"

13. N.D. CENT. CODE § 12.1-23-11(2) (2019).

14. *Id.*

15. Subsequent sections in this article will deal with some possible exceptions to these examples including First Amendment protections and Implied Consent doctrine.

16. N.D. CENT. CODE § 12.1-23-11 (2019) (defining "personal identifying information").

17. *Id.* § 12.1-23-11(1)(a)-(c), (o) .

18. The limitation on the use of names, addresses, email addresses and phone numbers would make direct marketing, which requires these details to contact customers, extremely difficult.

Moreover, the section would also seem to end many other types of activities, such as maintaining customer accounts or debt collection.[19] A consumer who did not want to be bothered with paying for a good or service might simply elect to revoke or disavow the authorization. This would prevent the lender's use of the consumer's information to collect the debt.[20] This section would also seem to be an effective way of getting one's credit records removed, as these records typically contain several types of personal information including a name, address, phone number, employer, and account numbers. Readers should now see these examples border on the absurd, yet the statute is clear: those uses are prohibited. Further, N.D.C.C. section 12.1-23-11(3) provides:

> A person is guilty of an offense if the person uses or attempts to use any personal identifying information of an individual, living or deceased, without the authorization or consent of the individual, in order to interfere with or initiate a contract or service for a person other than that individual, to obtain or continue employment, to gain access to personal identifying information of another individual, or to commit an offense in violation of the laws of this state, regardless of whether there is any actual economic loss to the individual . . . .[21]

This section may have unanticipated consequences. While it would certainly prohibit the fraudulent use of personal information to enter into (or breach) a contract, it goes far beyond this.[22] Two simple examples illustrate the difficulties that this presents. First, the use of an individual's name as a reference or alternate contact for a contract, absent explicit or implicit permission, would be proscribed. Second, telling someone that you are friends with (or even know) someone else[23] to get the name of the person you are talking to, or their contact details,[24] would also be proscribed. While this may make verifying employment or other details for a loan potentially illegal and even

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Marketers would have to find an initial way of communicating with a consumer to obtain permission before they could send initial information. Marketers could, perhaps, set-up booths at events to collect information and permissions or obtain details for consenting consumers from another party.

19. Unless a protection for these activities exists. Several potential sources of projection re discussed in this article. These include activities otherwise allowed by statute and those allowed or protected by federal law and the North Dakota and federal constitutions. *See infra* sections V to VII.

20. Debt collection is clearly an attempt to obtain something of value: the money owed, *see* N.D. Cent. Code. § 12.1-23-11(2) (2019) (prohibiting "[The] use [of] any personal identifying information of another . . . to obtain . . . anything else of value . . . .").

21. *Id*. § 12.1-23-11(3).

22. As is typical of some identity theft cases where the perpetrator applies for credit cards or other accounts in a victim's name and then utilizes them for their own benefit.

23. This would inherently use their name, a covered form of personal information.

24. This would "gain access to personal identifying information", which is proscribed. N.D.C.C. section 12.1-23-11(3).

impair personal interactions such as dating,[25] it is just one of many problems created by this section.

This section also becomes a prospective tool for over-charging those who commit other offenses. A group of criminals who talk to each other using their names during a crime would be using personal information to "commit an offense in violation of the laws of this state," which could raise a simple misdemeanor to a felony.[26] The section could also be used to increase the severity of charges for criminals who have not met one or more requisite elements for other offenses, but have used victims or others' information in the commission of a lesser offense.

B. THE SPECIFIC PROBLEM WITH MINORS

Minors present a specific problem relative to N.D.C.C. section 12.1-23-11 for several reasons. First, it is presumed that either a minor, the minor's parent(s), or the minor's guardian can provide the authorization or consent required by N.D.C.C. sections 12.1-23-11(2) or (3).[27] However, this is by no means certain with regards to the parent(s) or guardian.[28] Irrespective of who may provide authorization or consent, the minor has a broad right of disaffirmation that can allow the minor to instantly revoke any consent given.[29] The only requirement imposed by N.D.C.C. section 14-10-11 is that this be done "by the minor personally."[30] Thus, an individual or firm relying on

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25. For example, many personal interactions would require asking for someone's contact details after discussing a mutual acquaintance.

26. N.D. CENT. CODE § 12.1-23-11 (2019). The grading and punishment for offenses under section 12.1-23-11 is discussed subsequently in this article, *see infra* section VIII.

27. N.D. CENT. CODE § 12.1-23-11(2), 12.1-23-11(3) (2019).

28. The North Dakota Century Code fails to define a specific right of a parent or guardian that provides this authority. N.D. CENT. CODE § 14-09-16 (2019). In fact, section 14-09-16 states "the parent, as such, has no control over the property of the child" which might even suggest a lack of ability to provide authorization and consent if this authority was considered to be the exercise of a property right, *see id*. § 14-09-16. Section 14-09-32 outlines "parental rights and responsibilities" without stating any ability to make agreements or otherwise consent, authorize or contract for a child, *see id*. § 14-09-32. Further, section 14-09-00.1(3) states that "'parental rights and responsibilities' means all rights and responsibilities a parent has concerning the parent's child." *Id*. § 14-09-00.1(3). Taken together, these could be taken to limit parental rights and responsibilities to the specifically enumerated. Alternately, section 14-09-22.1 requires a parent to provide "proper parental care or control . . . or other care or control" and requires the parent to prevent association with "vagrants or vicious or immoral persons . . . ." *Id*. § 14-09-22.1. Section 14-09-17 notes that a parent "may relinquish to the child the right of controlling the child" and section 14-09-19 allows a court to cause the child to be "freed from the dominion of the parent" due to parental abuse. *Id*. §§ 14-09-17, 14-09-19.

29. *Disaffirm*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To repudiate; to revoke consent; to disclaim the intent to be bound by an earlier transaction."). Note that per section 14-10-12, a minor is not able to disaffirm contracts "to pay the reasonable value of things necessary for the minor's support or that of the minor's family" if the minor is not otherwise supported by "a parent, guardian, or conservator able to provide for such minor or the minor's family." N.D. CENT. CODE § 14-10-12 (2019).

30. N.D. CENT. CODE § 14-10-11 (2019).

authorization or consent, however that consent was provided, could find this instantaneously gone, potentially without notice. While an argument based on reliance could be raised to defend against directly revoked consent, those receiving a minor's information indirectly, via authorization secured by a third-party collector, for example, would have no expectation of receiving any form of notice whatsoever and could instantaneously have criminal liability for use of information after the removal of consent.

Parents of minor children may also find the requirements of N.D.C.C. section 12.1-23-11 problematic because the child can refuse to authorize and/or may revoke an implicit authorization to use the child's personal information. While there is significant public benefit in not allowing a parent to undertake debts that a child will later either disaffirm or pay back, the section goes far beyond this and may make a number of common activities problematic. For example, a parent may seek to register a child for school to receive a free education (a thing of value), but he or she would be unable to do so if the child's name and other identifiers could not be used because the child refuses to authorize the use of their personal information.[31] Even setting up a prepaid magazine subscription in a child's name or addressing a birthday or holiday card (and prospectively obtaining the value of goodwill) could be taken as being punishable under N.D.C.C. section 12.1-23-11. These examples show how this statute can easily become overly burdensome for parents of minor children.

III. RULES OF CONSTRUCTION AND INTERPRETATION: A POSSIBLE SOLUTION TO N.D.C.C. SECTION 12.1-23-11?

The interpretation of statutes is an area of some contention.[32] Some authorities advocate searching for intended meaning while others propose a literal reading of the law, unless it is manifestly unclear. The interpretation of N.D.C.C. section 12.1-23-11 pits a literal reading against questions of fairness, justice, and legislative intent. The following sections discuss interpretation from three perspectives. First, interpretation based on the instructions from the North Dakota Century Code is discussed. Next, general maxims and principles of interpretation are considered. Finally, precedent is reviewed.

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31. Also, problematically, the child could potentially revoke the authorization later, effectively disenrolling.

32. ANTONIN SCALIA, A MATTER OF INTERPRETATION 14 (2018) ("We American judges have no intelligible theory of what we do most. Even sadder, however, is the fact that the American bar and American legal education, by and large, are unconcerned with the fact that we have no intelligible theory.").

A. INTERPRETATION INSTRUCTIONS FROM THE NORTH DAKOTA CENTURY CODE

The North Dakota Legislature, through chapter 1-02 of the North Dakota Century Code, provides several instructions for statutory interpretation. Most clearly relevant is the instruction that "[w]hen the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."[33] Despite its direct relevance, stopping here does not fully explore the issue. Later in the same chapter, a conflicting instruction is provided:

> In enacting a statute, it is presumed that:
>
> 1. Compliance with the constitutions of the state and of the United States is intended.
>
> 2. The entire statute is intended to be effective.
>
> 3. A just and reasonable result is intended.
>
> 4. A result feasible of execution is intended.
>
> 5. Public interest is favored over any private interest.[34]

Given that a literal reading of N.D.C.C. section 12.1-23-11 is arguably unjust, unreasonable, not feasible due to its vast prohibition of everyday interactions and occurrences, and unconstitutional, simply following the letter of the law is in inherent conflict with these statutory presumptions.[35] Whether this section of the N.D.C.C. runs afoul of the First Amendment is discussed subsequently.[36] A literal reading results in some common activities, such as the use of names for identification purposes without any malicious intent, being criminalized in a manner that could be argued to be unjust and unreasonable. The magnitude of what is prohibited by N.D.C.C. section 12.1-23-11 presents another problem, as the sheer number of things proscribed would be far beyond the capabilities of prosecutors and the courts to process if they were charged as crimes.

The conflict between N.D.C.C. section 12.1-23-11 and N.D.C.C. 1-02-38, dealing with statutory interpretation, arguably creates some ambiguity as to how the statute should be interpreted. However, guidance is provided as to how ambiguity should be handled. N.D.C.C. section 1-02-39 instructs:

> If a statute is ambiguous, the court, in determining the intention of the legislation, may consider among other matters:

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33. N.D. CENT. CODE § 1-02-05 (2019).

34. *Id*. § 1-02-38.

35. *See generally id*. § 1-02-05.

36. *See supra* section V. One could also make an argument that N.D.C.C. section 12.1-23-11 also fails, with regards to point 2, as the Constitutional issues could prevent portions of the statute from being effective or effective in certain circumstances.

1. The object sought to be attained.
2. The circumstances under which the statute was enacted.
3. The legislative history.
4. The common law or former statutory provisions, including laws upon the same or similar subjects.
5. The consequences of a particular construction.
6. The administrative construction of the statute.
7. The preamble.[37]

However, the foregoing is of minimal use in interpretation. While N.D.C.C. section 1-02-39 suggests some ways of interpretation, it does not constrain consideration to just these types of interpretation. Further, it does not explain how conflicts between the "aids in construction" items should be resolved or any sort of prioritization.[38]

B. MAXIMS AND GENERAL PRINCIPLES OF INTERPRETATION

Because the N.D. Century Code does not resolve the question of the interpretation of N.D.C.C. section 12.1-23-11, a more general analysis is called for. Robert Summers, the McRoberts Research Professor of Law at Cornell University and the co-editor of *Interpreting Statutes*, a treatise on comparative statutory language interpretation worldwide, provides multiple frameworks for the analysis.[39] The first area of consideration are the types of interpretational arguments that would be persuasive, relative to this statute. Summers identifies twenty-two classes of statutory interpretation arguments, five of which are directly relevant to the question at hand.[40]

Several general principles suggest that the N.D.C.C. section 12.1-23-11 should be interpreted quite narrowly with an implicit understanding that the broad statements should only be taken to prohibit activities that are part of some sort of criminal conduct, theft, or–even more specifically–identity theft. First, Summers notes that "coherence with a general legal concept operative within the branch of law concerned" is one basis for interpretation.[41] This axiom of interpretation suggests that a section within a chapter on "theft and related offenses" could be interpreted to implicitly only proscribe and punish theft and theft-like offenses.[42] Second, this interpretation would likely be

37. N.D. CENT CODE § 1-02-39 (2019).
38. Id.
39. D. NEIL MACCORMICK & ROBERT S. SUMMERS, INTERPRETING STATUTES: A COMPARATIVE STUDY *553-555 (Routledge ed., 2016)*.
40. *Id*. at 407–59.
41. *Id*. at 414.
42. N.D. CENT. CODE ch. 12.1-23 (entitled "Theft and Related Offenses").

closer to the "ultimate purpose of the statute,"[43] and thus supported by this second axiom of interpretation. Third, the section title also is suggestive of the section's "legislative intention"[44] and, thus, this interpretation is also supported by a third axiom of interpretation. While the section title is suggestive of both, there are inherent difficulties in precisely determining both the legislature's purpose and intent.[45]

Fourth, Summers notes that "substantive reasons . . . [that] arguments invoke moral, political, economic or other considerations" can also be considered by courts interpreting ambiguous statutes.[46] Again, from this perspective, N.D.C.C. section 12.1-23-11, under the broadest interpretation of what it proscribes, could be taken as proscribing conduct that is not morally reprehensible or even questionable.[47] Further, there could be implications related to the proper functioning of the political process – if, for example one argued the section interfered with campaigning or gathering the support needed for a citizen-initiated ballot referendum. Proscribing the previously described activities could also have a potential economic impact due to curtailing marketing, sales, and other activities required for businesses to function.

Fifth, Summers notes the importance of "'rule of law' values"[48] and contends that "the argument from a credible ordinary meaning is very powerful. Indeed, it is often the most decisive type of argument."[49] This axiom of interpretation results in a quite different interpretation than the previous four. In this case, the ordinary meaning of the statute is quite clear. It states that:

> "[a]n individual is guilty of an offense if the individual obtains or attempts to obtain, transfers, records, or uses or attempts to use any personal identifying information of another individual, living or deceased, to obtain credit, money, goods, services, or anything else of value without the authorization or consent of the other individual."[50]

While the statute's implications may give the reader or enforcer pause as he or she digests the laundry list of ordinary conduct that most would not expect to be so regulated, this does not make the language of the law less clear. However, for society to function, rules need to be enforced. Individuals that

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43. MACCORMICK & SUMMERS, *supra* note 39, at 415.

44. *Id.* at 416.

45. Among other arguments, the placement of the section within the "Theft and Related Offenses" chapter could be used to argue that the legislature was trying to make theft / identity theft regulations, irrespective of any failings that they made in the actual drafting of the section.

46. MACCORMICK & SUMMERS, *supra* note 39, at 417.

47. For example, simply making reference to a friend or acquaintance as part of a transaction to obtain value would be proscribed under a broad interpretation. This is usual behavior and not typically a criminal activity.

48. MACCORMICK & SUMMERS, *supra* note 39, at 418.

49. *Id.* at 436.

50. N.D. CENT. CODE § 12.1-23-11(2) (2019).

comport their activities to the laws, as written, should not be disadvantaged relative to those who violate the law. Thus, it is clear that "in invoking the ordinary meaning of the statutory words, the Court protects the interests of those who relied on such meanings."[51] This is one of the key arguments for interpreting the section as it stands and relying on the legislature to amend the statute, if the current broad language does not convey its legislative intent. Of course, the section is part of the North Dakota criminal law, and, as Summers notes, "in the criminal law, the argument from the ordinary meaning of the statute generally has especially strong overriding force."[52]

Summers provides four maxims of priorities as observed from the decisions made by courts – the United States Supreme Court, in particular – to facilitate interpretation.[53] These are presented in Table 1.

Table 1. Priority Maxims.[54]

Maxim	Meaning
Priority Maxim One	"In criminal cases, when a sufficiently credible argument from a standard ordinary meaning of ordinary words favors a defendant, it will usually override any competing arguments."[55]
Priority Maxim Two	"In civil (non-criminal cases), a credible argument from a standard ordinary meaning of ordinary words generally prevails over all other competing arguments . . . except the argument from very clear indicia or evidence."[56]
Priority Maxim Three	"Very clear indicia or evidence from legislative history, of legislative intent . . . that is contrary to a credible argument from ordinary meaning will sometimes take priority over such ordinary meaning."[57]
Priority Maxim Four	"When a credible argument from ordinary meaning . . . is significantly reinforced by the argument from contextual harmonization . . . these two arguments combined almost always override even very clear evidence of contrary legislative intent."[58]

51. MACCORMICK & SUMMERS, *supra* note 39, at 438.
52. *Id*. at 448.
53. *Id*. at 434.
54. *Id*. at 434-441.
55. *Id*. at 434.
56. *Id*. at 434.
57. *Id*. at 438.
58. *Id*. at 440.

In a criminal prosecution, the first priority maxim would be applicable and, as per the text of the maxims, take precedence over the others. Based on this first priority maxim, the ordinary meaning would be given particular weight in a case where this interpretation would be beneficial to the defendant. While in most cases, it would seem that this would be unlikely, a few scenarios where the defense could prefer a broader interpretation are plausible.[59] One simple example would be a case where an individual conducts a citizen's arrest based on a belief that the statute, as written, had been violated and a crime, in this case a felony, had been committed. If that individual were later charged with unlawful imprisonment, the broad interpretation of N.D.C.C. section 12.1-23-11 could be very beneficial in making the argument as to the lawfulness of the individual's citizen's arrest.[60]

Analysis now moves on to priority maxims two and three. Priority maxim two is not relevant to the interpretation here, as it is stated to only apply to civil, not criminal, statutes.[61]

Priority maxim three tends to suggest that the interpretation of the section should be scoped to proscribe a narrower set of acts than a literal reading would suggest. Legislative intent can be inferred to the extent that it is assumed that the legislature did not intend to create an absurd or unenforceable statute.[62] Also, the section and chapter titles can be taken to be indications of what the legislature intended to regulate.[63]

The application of priority maxim four could be argued to not produce a conclusion, as the immediate context and literal meaning would appear to be at odds. However, this maxim could be used to advance an argument that, since other areas of the Century Code simply proscribe acts, this section could be intended to proscribe acts, as well. The North Dakota Supreme Court noted that the election corrupt practices statute, N.D.C.C. section 16-20-17.2,[64] "contains no requirement as to the degree of culpability. It is a statute which provides for a penalty for the doing of an act, regardless of willfulness."[65] Section 16-20-17.2 and precedent demonstrate that a statute which proscribes conduct can be enforced against that conduct, irrespective

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59. In many cases, the ordinary meaning would proscribe more activities than a judicially narrowed meaning and not require elements that other types of crimes and other types of theft, in particular, require. This, thus, would typically not benefit a defendant who would be more likely to find his or her conduct ensnared or be more likely to be convicted.

60. The individual, in this scenario, could offer his or her broad interpretation of the law as a justification for the arrest and, thus, as a defense to the charge of unlawful imprisonment.

61. MACCORMICK & SUMMERS, *supra* note 39, at 434.

62. *See supra* section III.A; N.D. CENT. CODE § 1-02-38 (2019).

63. *See supra* note 47.

64. N.D. CENT. CODE § 16-20-17.2 (repealed 1981). Despite involving a repealed section, the ruling still shows North Dakota Supreme Court precedent for conviction without the necessity of *mens rea*.

65. State v. N.D. Educ. Ass'n, 262 N.W.2d 731, 734 (N.D. 1978).

of the existence of a criminal *mens rea*. This precedent supports an interpretation that N.D.C.C. section 12.1-23-11's lack of a required nefarious intention does not impair its enforceability.

C. PRECEDENT

North Dakota has its own rules of interpretation in N.D.C.C. 1-02-05[66] and the North Dakota Supreme Court has its own interpretation principles, which favor plain, unambiguous language.[67] "[A] statute is to be read to give effect to each of its provisions, whenever fairly possible."[68] Thus, a court "need not explore legislative history when the [North Dakota] Legislature has clearly and unambiguously spoken."[69] "When interpreting a statute, [the] primary purpose is to ascertain the intent of the legislature . . . when the statutory language is clear and unambiguous it cannot be disregarded under the pretext of pursuing the legislative intent as intent is presumed to be clear from the face of the statute."[70]

It appears clear from N.D. Supreme Court precedent that a court would not interfere with the plain language of the statute at issue here and would hesitate to examine its legislative history.[71] The history of the statute can be traced back to its beginning in 1999, long before most of the citizens of North Dakota had access to the internet.[72] The core text of the statute remains unchanged since then; the additions over the past twenty years have served to address new ways identify fraud can be committed using internet-enabled technology and adjusted the criminal penalties of violation of the statute.[73]

As discussed previously, there are clear problems with the plain meaning of N.D.C.C. section 12.1-23-11.[74] However, a review of North Dakota criminal appeals cases yields only one case citing N.D.C.C. section 12.1-23-11,[75]

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66. N.D. Cent CODE § 1-02-05 (2019) ("When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.").

67. Haggard v. Meier, 368 N.W.2d 539, 541 (N.D. 1985) ("[W]here constitutional and statutory provisions are clear and unambiguous, it is improper for the courts to attempt to construe the provisions so as to legislate additional requirements or proscriptions which the words of the provisions do not themselves provide.")(citing Rheaumee v. State, 339 N.W.2d 90 (N.D. 1983)).

68. County of Stutsman v. State Historical Soc'y, 371 N.W.2d 321, 325 (N.D. 1985).

69. State v. O'Connor, 2016 ND 72, ¶ 13, 877 N.W.2d 312 (citing N.D. CENT. CODE § 1-02-05).

70. Adams Cty. Record v. Greater N.D. Ass'n, 529 N.W.2d 830, 833 (N.D. 1995).

71. N.D. CENT. CODE § 1-02-05 (2019); *see, e.g.*, Farmers Union Mut. Ins. Co. v. Associated Elec. & Gas Ins. Servs. Ltd., 2007 ND 135, ¶ 9, 737 N.W.2d 253.

72. S.B. 2225, 56th Legis. Assemb., Reg. Sess. (N.D. 1999); Act of Mar. 29, 1999, ch. 128, 1999 N.D. Laws 17.

73. H.B. 1211, 59th Legis. Assemb., Reg. Sess. (N.D. 2005); Act of Mar. 30, 2005, ch. 105, 2005 N.D. laws 639;H.B. 1197, 63rd Legis. Assemb., Reg. Sess. (N.D. 2013); Act of Apr. 10, 2013, ch. 105, 2013 N.D. Laws 12.

74. *See* discussion *supra* section II.

75. State v. Kurtenbach, 2009 ND 93, ¶ 2,767 N.W.2d 529.

and this case did not raise the problem of overbreadth. It appears that the examples provided in Section II(A) are lying dormant in the statute, awaiting awakening by a zealous prosecutor.

IV. IMPLIED AUTHORIZATION DOCTRINE AND ITS LIMITS

The doctrine of implied authorization or consent may potentially mitigate the aforementioned criminalization of a broad range of standard conduct. While no specific language in N.D.C.C. section 12.1-23-11 describes implied authorization or consent, it is similarly not explicitly disclaimed.[76] Both N.D.C.C. sections 12.1-23-11(2) and 12.1-23-11(3) criminalize only actions where the individual whose information is collected or used does not provide "authorization or consent" to this use.[77]

The particular language used in the statute must be considered with regard to the how "authorization or consent" is given. "Authorize" is defined as "[t]o give legal authority; to empower."[78] "Consent" is defined as "[a] voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose."[79] "Express consent" is defined as "[c]onsent that is clearly and unmistakably stated."[80] "Implied consent" is defined as "[c]onsent inferred from one's conduct rather than from one's direct expression."[81]

No qualifier is given as to what type of consent must be provided. Given the foregoing definitions of "authorization" and "implied consent," the two can be taken to be effectively the same. The result of this analysis is that the requisite "authorization or consent" could prospectively be provided in two ways. First, it could be given in the form of an explicit statement saying that the information can be used generally, or in a particular way. Second, consent could be assumed through actions, inaction, or silence that is taken to indicate that the information can be used generally or in a particular way.

Express authorization through a written or verbal statement would clearly fall under the first manner of authorization described above. Proceeding to provide information or take another action could also provide express authorization if the person requesting the information made a statement to the effect that providing information also provides consent.[82]

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76. N.D. CENT. CODE § 12.1-23-11 (2019).
77. *Id*. § 12.1-23-11(2), 12.1-23-11(3) (or an attempt at collection or use is made).
78. *Authorize*, BLACK'S LAW DICTIONARY (11th ed. 2019).
79. *Consent*, BLACK'S LAW DICTIONARY (11th ed. 2019).
80. *Express Consent*, BLACK'S LAW DICTIONARY (11th ed. 2019).
81. *Implied Consent*, BLACK'S LAW DICTIONARY (11th ed. 2019).
82. This would be well-suited to online information collection where, in many cases, a user must either tick a box agreeing to terms or is told that submission constitutes agreement to terms.

The assumed authorization paradigm could be taken to provide some relief from the notion that every single collection or use of personal information is potentially felonious. However, this type of standard is inherently problematic.[83] It places authorization for use in the potentially subjective hands of the implicit authorizer on a retrospective basis. Thus, there is a significant potential for a misunderstanding about the implicit authorization (or potential lack thereof) to arise later.[84] In addition to legitimate misunderstanding, there

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83. A review of several types of situations where implied consent doctrine is used identifies some of the problems. In medicine, implied consent can be deemed to exist in (among others) emergency situations where the patient is incapable of consenting due to injury or a delay to attain consent risks death. Raul B. Easton et al., *Defining the Scope of Implied Consent in the Emergency Department*, 7 AM. J. BIOETH. 35, 35–38 (2007) (explaining how so-called "therapeutic privilege" allows a physician to not seek consent when it is believed that "discussing the diagnosis with the patient will cause irrevocable psychological harm"). Geoffrey S. Corn, *Campell v. Clinton: The Implied Consent Theory of Presidential War Power is again Validated*, 161 MIL. L. REV. 202, 203-15(1999) (drawing on language from the decision in *Campell v. Clinton*, contends that the courts have recognized the implied consent of congress to certain military activities, justifying them in the absence of a formal congressional resolution and meeting the standards required by Article 1, Section 8 of the United States Constitution, in this regard) . Implied consent doctrine has also been successfully used as a rationale to allow driver sobriety tests, overcoming self-incrimination arguments. Penn Lerblance, *Implied Consent to Intoxication Tests: A Flawed Concept*, 53 ST. JOHNS. L. REV. 39, 46-54 (1989). Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CALIF. L. REV. 539, 540-61 (2014) (proposing the implied consent doctrine as a way to determine the applicability of religious exceptions to complying with laws with religious implications such as the Americans with Disabilities Act and the Affordable Care Act). Debra Lyn Bassett, *Implied Consent to Personal Jurisdiction in Transnational Class Litigation*, 2004 MICH. ST. L. REV. 619, 620-35 (2004) (arguing that class-member plaintiffs in a class action suit have been deemed to be participating through implied consent doctrine, based on the Supreme Court decision in Phillips Petroleum Co. v. Shutts, by not opting out of participation). Verity Winship, *Jurisdiction over Corporate Officers and the Incoherence of Implied Consent*, 2013 U. ILL. L. REV. 1171, 1171-1188 (2013) (arguing that Delaware (and other states) use implied consent (called "Deemed Consent" in Delaware statute) doctrine to allow suits against corporate officers that otherwise would be barred by minimum contact requirements). Martine Dennie & Paul Millar, *Exploring the Subcultural Norms of the Response to Violence in Hockey*, 22 SPORT SOC'Y 1297, 1297–1314 (2019) (discussing the use of implied consent doctrine as a defense against criminal liability for violence in sports such as hockey, noting that rule-allowed and customary violence is not culpable while excessive violence has been found to be). Jennifer S. Hirsch, et. al, *Social Dimensions of Sexual Consent Among Cisgender Heterosexual College Students: Insights From Ethnographic Research*, 64 J. ADOLESC. HEALTH 26, 26–35 (2019) (describing in the context of consent to sexual activity, how differences of opinion on what constitutes consent can result in one party thinking that consent has been provided while another party does not believe that they have consented). In several of these contexts, explicit problems have been identified. Clare A Cole, *Implied Consent and nursing practice: ethical or convenient?*, 19 NURSE ETHICS 550, 550–57 (2012) (arguing that in medicine (and nursing in particular) implied consent doctrine is used as a matter of convenience to avoid getting patient consent in the absence of valid justification). Laurence B McCullough, Amy L. McGuice, & Simon N. Whitney, *Consent: Informed, Simple, Implied and Presumed*, 7 AM. J. BIOETH. 49, 49-50 (2007) (raising concerns about the use of implied consent in medicine noting that it is "open to elastic interpretation by busy clinicians" who, despite the rigors of their job "always have time for simple consent"). Robert B. Voas, Tara Kelley-Baker, & Eduardo Romano, *Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, 40 J. SAFETY RES. 77, 78 (2009) (noting that refusal of breath alcohol testing, despite the authority provided by implied consent, can have beneficial outcomes for those that do, in some jurisdictions).

84. For example, a dispute could arise both as to what the person said or did that was taken as the implicit authorization as well as the meaning of this comment or action.

is also the potential for the person to argue that they did not provide, or did not intend to provide, the authorization, even if they did, in fact, provide it. An authorizer could prospectively assert that they did not provide authorization based on an undesirable outcome occurring, a subsequent disagreement with the other party over other matters, a changing mood, or other factors.

Given the foregoing, implicit consent may be a key argument for a defendant charged under N.D.C.C. section 12.1-23-11 to make, particularly if they have no documentation of express consent. However, the inherent subjectivity of whether consent existed, a potential argument that N.D.C.C. section 12.1-23-11 requires explicit consent and the difficulty proving or disproving implicit consent's existence, makes the doctrine undesirable to rely on.

V. THE FIRST AMENDMENT SHIELD AND ITS LIMITATIONS

The First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech."[85] The First Amendment was applied to the states using the incorporation doctrine born from the Fourteenth Amendment.[86] It has been used to protect numerous expressive activities from pure political speech to nude dancing.[87] Given this, one might expect the First Amendment to provide protection from N.D.C.C. section 12.1-23-11; however, this will not always be the case.

The First Amendment does not protect all activities. For example, the First Amendment does not protect speech when it can be considered "fighting words."[88] In a North Dakota hate speech case, where the defendant raised the

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85. U.S. CONST. amend. I.

86. Cornell Law School, *Incorporation Doctrine*, LEGAL INFORMATION INSTITUTE WEBSITE, https://www.law.cornell.edu/wex/incorporation_doctrine (last visited Oct 1, 2019).

87. McCrothers Corp. v. City of Mandan, 2007 ND 28, ¶ 10, 728 N.W.2d 124 (citing City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (noting "[n]ude or semi-nude dancing is expressive conduct protected by the First Amendment"). The first amendment protects all expression, but to varying degrees. *See generally* William McGinty, *First Amendment Rights to Protected Expression: What are the Traditional Contours of Copyright Law?*, 23 BERKELEY TECHNOL. L. J. 1099 (2008). The least protection is offered to speech incidental to conduct, for this, "[t]o the extent they review them at all, courts review regulations incidentally burdening speech, or burdening 'non-speech' activities, under a highly deferential rational basis standard." *Id*. at 1109. In cases of "content neutral suppressions of speech," intermediate scrutiny applies which "[c]ourts have applied … with varying degrees of rigor and without a clear explanation of what determines the differences." *Id*. at 1110. Finally, "[w]hen the government regulates speech based on its content, courts employ a strict scrutiny review" which "presumes the statute at issue to be invalid and requires the government to prove that the law is necessary to serve a compelling government interest." *Id*. at 1109. Given this, particular mediums or types of expression cannot be taken as protected; instead the views or content being expressed determines the level of protection afforded to it.

88. Interest of H.K., 2010 ND 27, ¶ 13, 778 N.W.2d 764 ("[T]he constitutional right to freedom of speech does not protect 'fighting words' that 'tend to incite an immediate breach of the peace.' 'Fighting words' are 'personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.'") (citations omitted). In *R.A.V. v. City of St. Paul* the U.S. Supreme Court found, though, that hate speech which

First Amendment as a defense, the North Dakota Supreme Court noted that "[t]he First Amendment did not prohibit the juvenile court from considering H.K.'s statements, as well as the context in which she made the statements, as evidence of criminal conduct."[89] However, the court cautioned that "[a] statute which makes criminal a form of pure speech 'must be interpreted with the commands of the First Amendment clearly in mind.'"[90] In the case of H.K., the hate speech was the sanctioned conduct,[91] not just a part of a larger action or used to provide insight into the motive for other conduct. In some cases, the tenets of the First Amendment result in laws with good intentions being struck down because "[c]onstitutional imperatives must prevail and our hopes must lie in the good sense and decency of the electorate, or in the passage of a more carefully drawn statute designed to meet the specific evil."[92]

In this analysis, the burden rests on one who seeks to hold a statute unconstitutional as "a statute is conclusively presumed to be constitutional unless it is clearly shown that the statute contravenes the state or federal constitution."[93] The question that arises is two-pronged. The first analysis must be whether the statue seeks to proscribe both speech and conduct or just conduct, which speech may be incidental to.[94] If it sanctions non-expressive conduct, the First Amendment is not implicated. If it is determined that speech is being proscribed by a given statute, the next question that must be answered is whether there is a constitutional basis for proscribing that speech.[95]

In this regard, N.D.C.C. section 12.1-23-11 can fall into both the First Amendment protected and unprotected categories. Some subsections

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is not fighting words is not proscribed, striking down an ordinance that prohibited "the display of a symbol which one knows or has reason to know 'arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.'" 505 U.S. 377, 377 (1992). The Court also held that even fighting words are protected as they cannot be proscribed "based on hostility-or favoritism-towards" a nonproscribable message they contain." *Id*. at 386.

89. *Interest of H.K.*, 2010 ND 27, ¶ 10. In this case, the defendant's conduct was entirely comprised of racially charged hateful speech. *See id*. ¶ 3. The individual accused of the speech conduct argued, on appeal, that the speech was protected by the First Amendment. *Id*. ¶ 5. However, the court found that the First Amendment did not protect the accused of being convicted of disorderly conduct for making this statement. *Id*. ¶ 22.

90. State v. Haugen, 392 N.W.2d 799, 803 (N.D. 1986) (quoting Watts v. United States, 394 U.S. 705, 707 (1969).

91. H.K.'s conduct at issue was comprised of using a highly offensive racial epithet at a teen center towards a teenage girl. *Interest of H.K.*, 2010 ND 27, ¶ 3. However, the case also included the presentation of evidence of H.K. using the same offensive epithet on several additional occasions towards this same individual and "making other disparaging comments" about this same individual. *Id*.

92. State v. N.D. Educ. Ass'n, 262 N.W.2d 731, 736 (N.D. 1978).

93. State v. Marinucci, 321 N.W.23 462, 467 (N.D. 1982) (citing Dorgan v. Kouba, 274 N.W.2d 167 (N.D. 1978).

94. Laurie Magid, *First Amendment Protection of Ambiguous Conduct*, 84 COLUMBIA L. REV. 467, 467(1984)(explaining "ordinary noncommunicative conduct" is not protected by the First Amendment).

95. A higher level of scrutiny exists for restrictions applied to pure speech. *Id*. at 468-69; State v. Haugen, 392 N.W.2d 799, 803 (N.D. 1986).

proscribe conduct such as obtaining, attempting to obtain, transferring, and recording personal information, which would not generally benefit from First Amendment protection.[96] The use of personal information, however, may be a form of speech which receives some protection in some circumstances, depending on exactly how the information is being used.[97]

Presuming that particular uses of personal information constitute speech, the question becomes whether those uses are protected forms of speech or forms of speech that can be regulated.[98] There are several different reasons why speech can be regulated. Commercial speech has been subjected to higher levels of regulation than non-commercial speech.[99] Other types of speech have been regulated as provocative conduct.[100]

The North Dakota Supreme Court noted that while "any system of prior restraint on speech bears a heavy presumption against its constitutional validity[,]" precedent has shown that "[i]t is quite clear that prior restraint on commercial speech is allowed to an extent which would not be allowed toward other forms of protected speech."[101] Many forms of the use of personal information may be for commercial purposes, such as marketing to new customers.[102] While commercial speech receives less protection, that does not mean that it receives none at all.[103]

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96. N.D. CENT. CODE § 12.1-23-11(2) (2019) ("An individual is guilty of an offense if the individual obtains or attempts to obtain, transfers, records, or uses or attempts to use any personal identifying information of another individual"); *see generally* Laurie Magid, *First Amendment Protection of Ambiguous Conduct*, 84 COLUMBIA L. REV. 467 (1984) (finding conduct that is required for a first amendment expressive activity may receive some protection).

97. For example, if personal information was used to "petition the Government for a redress of grievances", to "exercise" religion or for news media purposes, it may enjoy explicit protection under the First Amendment to the United States Constitution. *See* U.S. CONST. amend. I.

98. In *R.A.V. v. City of St. Paul*, the U.S. Supreme Court stated that "[w]e have sometimes said that [] categories of expression are 'not within the area of constitutionally protected speech,' or that the 'protection of the First Amendment does not extend' to them. . . . [W]hat [this] mean[s] is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." R.A.V. v. City of St. Paul, 505 U.S. 377, 383-84 (1992) (citations omitted). When using the terms 'protected' or 'unprotected' speech, this article, similarly, seeks to distinguish between speech that can be constitutionally proscribed based on the characteristic discussed or not. It does not mean to suggest than any speech is wholly outside constitutional protection due to having a given characteristic.

99. *See generally* Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372 (1979).

100. *See generally* Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUMB. L. REV. 1527 (1993); Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159 (1982).

101. Fargo Women's Health Org., Inc v. Larson, 381 N.W.2d 176, 180 (N.D. 1986) (citations ommitted).

102. For example, many businesses purchase lists of prospective customers from companies that collect and sell this information. These lists are used to send unsolicited mailing and emails and to communicate in other ways with these prospective customers.

103. Farber, *supra* note 99, at 379-81.

Prior restraints on commercial speech have included a myriad of restrictions required to ensure the accuracy of marketing messages. For example, "[t]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity or are more likely to deceive the public than to inform it."[104]

Alternately, regulations that dictate the time, place, and/or manner of expression have also been upheld, both in regards to commercial and other types of speech. In one such case, the North Dakota Supreme Court noted that "nude or semi-nude dancing is expressive conduct protected by the First Amendment. Nevertheless, expressive conduct protected by the First Amendment may be regulated."[105] The Court upheld a local ordinance regulating this expressive activity because it did not eliminate the activity.[106] Instead, it just dictated where the activity could be conducted.[107]

Based on this precedent, a law that requires personal data be secured in a particular way during an expressive activity, or limits when and how it is used, might survive a constitutional challenge. Some portions and uses of N.D.C.C. section 12.1-23-11 could be taken to have a similarly narrow scope to time and place restrictions, in that they simply require a prospective information user to obtain permission.[108] However, by doing this, N.D.C.C. section 12.1-23-11 could impair, if not preclude, critical speech.[109] It also would have a chilling effect on political speech if a candidate for office had to obtain the consent of his or her opponent to campaign against him or her. This also implicates a different phrase of the First Amendment in that it would impair citizens' ability to seek redress for their grievances if a grievance involved a particular named government official.[110]

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104. *Larson*, 381 N.W.2d at 182.

105. McCrothers Corp. v. City of Mandan, 2007 ND 28, ¶ 10, 728 N.W.2d 124 (citations omitted).

106. *Id* ¶ 32.

107. *Id*. ¶ 29 (noting "[t]he challenged Mandan ordinances do not completely eliminate adult entertainment . . . McCrothers and Berger argue that the ordinances have effectively eliminated exotic dancing in Mandan . . . .").

108. Under many circumstances this consent could be implicit, as discussed in section IV, or readily obtained from those an information collector is transacting business with.

109. Requiring that an individual that wished to make a statement that is critical of someone else get their permission would be problematic as that permission would likely not be readily given.

110. U.S. CONST. amend. I (providing a "[R]ight to petition the Government for a redress of grievances . . . .").

Two related forms of speech that have been restricted and bear consideration are speech that directly threatens[111] and speech that is likely to incite violence.[112]

Both the "fighting words" and "true threat" doctrines demonstrate the permissibility of restricting speech content in some cases. Notably, neither doctrine says that a regulation must only regulate that type of speech to be acceptable. The U.S. Supreme Court noted that "[t]he protections afforded by the First Amendment … are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution."[113] The "fighting words" and "true threat" doctrines stand apart from many other types of speech regulation doctrines in that they allow the regulation of the content of speech instead of how it is conducted, which would otherwise typically be taken to be a protected characteristic. However, they do not suggest that a statute, such as N.D.C.C. section 12.1-23-11, is constitutional only if it proscribes these types of speech. It is likely that the U.S. Supreme Court will be called upon to set the balance between speech freedom and privacy in several areas in the future.[114] It is possible that

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111. The North Dakota Supreme Court noted that "[o]ne type of speech that is not protected under the First Amendment and may be restricted is speech that is a 'true threat.'"State v. Brossart, 2015 ND 1, ¶ 12, 858 N.W.2d 275 (citing Watts v. United States, 394 U.S. 705, 707 (1969)). A "true threat" is speech "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Virginia v. Black, 538 U.S. 343, 344 (2003). For an extended discussion of what constitutes a 'true threat' see generally Mary Margaret Roark, Elonis v. United States: The Doctrine of True Threats: Protecting Our Ever-Shrinking First Amendment Rights in the New Era of Communication, 15 PITT. J. TECH. L. & POL'Y 197 (2015); Andrew P. Stanner, Toward an Improved True Threat Doctrine for Student Speakers, 81 N.Y.U. L. REV. 385 (2006).

Of course, personal information could be used to threaten. For example, one who is threatening might refer to the recipient of the threat by name or threaten others by identifying them by name. Additional details, such as the individual's address, could be used to intensify the threat by suggesting that the threatening party was prepared and had the requisite knowledge to carry out the threat. Despite the potential for the use of personal information as part of a threat, the justification of privacy statutes under the "true threat" doctrine seems tenuous as the statute principally proscribes non-threatening speech.

112. Some uses of personal identification which are clearly speech, such as use for actual identity theft or fraud, could clearly fall under the "fighting words" doctrine. Under this doctrine, "[a] State may punish those words 'which by their very utterance inflict injury or tend to incite an immediate breach of the peace'" *Black*, 538 U.S. at 359 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). The Supreme Court held that "fighting words —' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction" — are generally proscribable under the First Amendment." *Id*. (quoting Cohen v. California, 403 U.S. 15, 20 (1971). Thus, while a basic verbal insult that is not likely to breach the peace cannot be proscribed due to its insulting content, affrontive content that is likely to incite violence can. The theft of one's identity or money using speech is likely to provoke a response which may "incite an immediate breach of the peace." *See* State v. Simon, 2018 ND 197, ¶ 18, 916 N.W.2d 626 (explaining that the "analysis of fighting words depends on the context in which the words are used") (citing In A.R., 2010 ND 84, ¶ 10, 781 N.W.2d 644).

113. *Black*, 538 U.S. at 358.

114. Joseph Marks, The Cybersecurity 202: The Next Supreme Court Justice Could Play a Major Role in Cybersecurity and Privacy Decisions, WASH. POST, (Sept. 21, 2020, 6:31 AM),

a privacy exception, similar to the "fighting words" and "true threat" doctrines, may be recognized through this.

Even with speech that is protected, some regulation is permissible. Speech related to elections is one of the most protected types of speech, given its key role in the democratic process.[115] Despite the fact that election-related forms of speech are highly protected by the First Amendment, time, place, and manner restrictions can prospectively be applied to it. A case related to keeping polling places free of electioneering activities is illustrative.[116] In this case, the North Dakota Supreme Court ruled that a regulation was "[n]arrowly tailored to serve the government's compelling interest in protecting the sanctity of the voting process and curbing election fraud, it does not significantly impinge on constitutionally protected rights, and it leaves open ample alternatives for communication."[117] However, in a similar North Dakota case, a federal district court found electioneering restrictions not to be content-neutral because "[t]he North Dakota electioneering law is a content-based restriction on speech, since it singles out election-related expression for prohibition."[118]

The regulations contained in N.D.C.C. section 12.1-23-11 may not trigger First Amendment considerations in many circumstances because the particular regulation proscribes conduct.[119] In other cases, speech may be proscribed and in these cases "[a]s a prior restraint, the law is subject to 'strict scrutiny' . . . ."[120] Under the strict scrutiny doctrine, government restrictions on speech that are not content-neutral must be justified by a demonstration

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https://www.washingtonpost.com/politics/2020/09/21/cybersecurity-202-next-supreme-court-justice-could-play-major-role-cybersecurity-privacy-decisions/.

115. See generally Terry Smith, *Election Law: Election Laws and First Amendment Freedoms—Confusion and Clarification by the Supreme Court*, 1988 ANN. SURV. AM. L. 597 (1988), for a discussion of election-related speech protections.

116. *Definition of 'Electioneering'*, COLLINS ENG. DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/electioneering (last visited Sep 21, 2020)(defining "electioneering" as "the activities that politicians and their supporters carry out in order to persuade people to vote for them or their political party in an election, for example making speeches and visiting voters").

117. State v. Francis, 2016 ND 154, ¶ 15, 882 N.W.2d 270.

118. Emineth v. Jaeger, 901 F. Supp.2d 1138, 1143 (D.N.D. 2013). In *Emineth*, Emineth petitioned the court for an injunction as he was "engaged in constitutionally-protected speech through a display of election yard signs on his private property, and [did] not wish to take those signs down." *Id*. at 1141. He also wished "speak in support of candidates on Election Day by distributing flyers in public places, which state law prohibits." *Id*. He also indicated that he "frequently discusses the upcoming election with friends, family members, associates, and neighbors, and seeks to continue to do so on Election Day, but state law prohibits such actions. *Id*. The court found that prohibiting speech that was simply election-related, even though no attempt was made to support a particular candidate, was proscribed as it prohibited a particular type of content: that related to elections. *Id*. at 1146-47. Limitations on speech must be content neutral in order to not be proscribed by the First Amendment. State v. Francis, 2016 ND 154, ¶ 8, 882 N.W.2d 270.

119. *See* Laurie Magid, *First Amendment Protection of Ambiguous Conduct*, 84 COLUM. L. REV. 467, 480-81(1984). The First Amendment protects expression and conduct necessary for that expression. It typically will not protect actions that are incidental or simply concurrent to speech.

120. *Emineth*, 901 F. Supp.2d at 1143.

that "the regulation is narrowly tailored to advance a compelling governmental interest[,]"[121] though the definition of what represents a compelling interest is a topic of significant debate.[122] Speech may be proscribed in some circumstances, subject to a lower level of scrutiny, as "[c]ommercial speech does not receive the full panoply of protection under the First Amendment as do other forms of protected speech"[123] and other types of speech (such as so-called "fighting words") can be similarly proscribed.[124] However, the line here is an important one as "the United States Supreme Court has recognized that the 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'"[125] Cases where highly protected speech is impaired may benefit from First Amendment protections, though this will not resolve all concerns.

Many cases that could be prosecuted under N.D.C.C. section 12.1-23-11 will have no First Amendment implications. For example, cases which do not involve speech, such as where data is stolen and used, would not have First Amendment protection. Other cases may have First Amendment implications, but no relevant protection.[126] However, there appears to be some conduct, including the everyday use of personal information such as one's name for political or journalistic purposes, that may be protected by a First Amendment shield.[127]

Given the foregoing, protection by the First Amendment cannot be taken to be a general solution to the problems posed by N.D.C.C. section 12.1-23-11. While it may protect some speech in some cases, many other cases, including many normal everyday uses of personal information, remain outside the scope of First Amendment protection.

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121. Matthew D. Bunker, Clay Calvert & William C. Nevin, Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech, 16 COMM. L. & POL'Y 349, 350(2011).

122. *See generally id*.

123. Fargo Women's Health Org., Inc v. Larson, 381 N.W.2d 176, 180 (N.D. 1986) (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

124. Michael J. Mannheimer, The Fighting Words Doctrine, 93 COLUMB. L. REV. 1527, 1527 (1993)(explaining that the fighting words doctrine places so-called fighting words outside of the First Amendment protections of speech); Martin H. Redish, Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger, 70 CALIF. L. REV. 1159, 1187 (1982); Elise G. Sweeney, *Freedom of Speech: Protections and Limitations*, 5 GEO. J. GENDER & L. 77, 88-89 (2004) (discussing that speech inciting violence is not necessarily protected by the First Amendment).

125. Emineth v. Jaeger, 901 F. Supp.2d 1138, 1142 (D.N.D. 2013).

126. Cases may involve speech, implicating the First Amendment, but not qualify for protection. For example, some restrictions on commercial speech are acceptable. *Larson*, 381 N.W.2d at 180.

127. For a discussion of this topic, see generally Robert M. Entman, *Putting the First Amendment in Its Place: Enhancing American Democracy through the Press*, 1993 U. CHI. LEGAL F. 61 (1993); Michael C. Dorf & Sidney G. Tarrow, Stings and Scams: Fake News, the First Amendment, and the New Activist Journalism, 20 U. PENNSYLVANIA J. CONST. L. 1 (2017).

VI. PROTECTION PROVIDED BY THE NORTH DAKOTA CONSTITUTION

The North Dakota Constitution states that "every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege."[128] Considerable overlap exists between interpretations of the North Dakota Constitution language and the First Amendment; however, key differences exist.[129] N.D.C.C. section 12.1-23-11 is consistent with the North Dakota Constitution language, as it simply punishes what has been proscribed by the statute as an abuse of the privilege of speech, namely the use of "personal identifying information" without authorization or consent. Like with the federal Constitution, North Dakota statutes start with a presumption of constitutionality as "a statute is conclusively presumed to be constitutional unless it is clearly shown that the statute contravenes the state or federal constitution."[130]

While the North Dakota Constitution notes that speaking comes along with responsibility for the "abuse of that privilege,"[131] not all abuses (or perceived abuses) of speech are punishable. For example, "speech does not lose its protected character simply because it may embarrass others or coerce them into action;" however, "threats are not constitutionally protected expression if the character, intent, and circumstances of the threat are narrowly circumscribed."[132] Alternatively, the North Dakota Supreme Court noted that "[s]ome types of speech and expressive conduct are not encompassed within the freedom of speech."[133] Specifically, "[i]nsulting or offensive words may lack free speech protection if the words are fighting words that tend to incite an immediate breach of the peace."[134] Even true statements may be punishable "[i]f they use innuendo, insinuation, or sarcasm to convey an untrue and defamatory meaning."[135]

Speech along with action can also be restricted. For example, "[t]he content of a defendant's speech may be protected constitutional activity, but that a defendant's contemporaneous conduct can be the basis for a disorderly

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128. N.D. CONST. art. I, § 4.

129. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."); N.D. CONST. art. § 4 ("Every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege.").

130. State v. Marinucci, 321 N.W.23 462, 467 (N.D. 1982) (citing Dorgan v. Kouba, 274 N.W.2d 167 (N.D. 1978).

131. N.D. CONST. art. I, § 4.

132. State v. Haugen, 392 N.W.2d 799, 803 (N.D. 1986) (citing Wurtz v. Risely, 719 F.2d 1438, 1441 (9th Cir. 1983)).

133. State v. Simon, 2018 ND 197, ¶ 18, 916 N.W.2d 626.

134. *Id.*

135. Schmitt v. MeritCare Health System, 2013 ND 136, ¶ 11, 834 N.W.2d 627.

conduct conviction."[136] Similarly, activities are "[n]ot protected speech merely because it occurs at a protest or is accompanied by carried signs or speaking for a cause."[137]

Thus, while the North Dakota Constitution explicitly recognizes speakers' responsibility for their speech, it does not further refine what types of speech a speaker should be held accountable for.[138] Further, the applicability of the First Amendment to the U.S. Constitution could result in federal preemption of state constitutional protections. Thus, the arguably broader U.S. Constitution First Amendment language could be applicable in most circumstances.[139] Both Constitutions clearly – with the North Dakota Constitution being more explicit in its text – restrict prior restraints on speech.[140] In instances where N.D.C.C. section 12.1-23-11 is in conflict with either the federal or North Dakota Constitution, it will be unenforceable. However, neither Constitution provides complete protection against N.D.C.C. section 12.1-23-11 and the everyday, non-harmful activities that it proscribes.

VII. PERSONAL INFORMATION USE AUTHORIZATION BY OTHER SECTIONS OF THE N.D. CENTURY CODE AND FEDERAL LAW

Activities that are required or authorized by other sections of the N.D. Century Code or by federal law could be interpreted as explicitly authorized uses of personal information for the purposes of N.D.C.C. section 12.1-23.11. This represents a potential limitation of the scope of what is proscribed by and could be prosecuted under N.D.C.C. section 12.1-23-11. For example, N.D.C.C. section 16.1-02-01 authorizes and requires the creation of a "permanent, centralized electronic database of voters, to be known as the central voter file . . . ."[141] Activities authorized by other sections of the Century Code

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136. *Simon*, 2018 ND 197, ¶ 18.

137. *Id.* ¶ 19.

138. N.D. CONST. art. I, § 4 ("[E]very man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege.").

139. For a discussion of federal preemption related to speech, see generally Donald W. Garner & Richard J. Whitney, *Protecting Children from Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 EMORY LAW J. 479 (1997); Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 COLUM. J. L. ARTS 165(2009); Michael J. McLane, *The Right of Publicity: Dispelling Survivability, Preemption and First Amendment Myths Threatening to Eviscerate a Recognized State Right*, 20 CALIF. WEST. L. REV. 415(1983); Richard S. Robinson, *Preemption, the Right of Publicity, and a New Federal Statute*, 16 CARDOZO ARTS & ENT. L.J. 183 (1998); J. Eugene Jr. Salomon, *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CALIF. L. REV. 1179 (1986).

140. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."); N.D. CONST. art. § 4 ("Every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege.").

141. N.D. CENT CODE § 16.1-02-01 (2019) ("A permanent, centralized electronic database of voters, to be known as the central voter file, is established with the offices of the secretary of state and county auditors linked together by a centralized statewide system. The county auditor is chief

or federal law could be deemed to be beyond the scope of section 12.1-23-11 enforcement under two different theories. It has been argued that "adults tacitly consent to a state's lawful actions just by living within its borders," thus, actions authorized by other laws could be taken as implicitly consented to, providing the consent required by N.D.C.C. section 12.1-23-11 for the use of personal information.[142] An alternate and perhaps more commonly used theory yielding the same conclusion is that the specific authorization of an action by another section of a similarly situated (or, in the case of a federal law-preempting) law would be superior to and take precedence over the proscription of this act by a less specifically applicable section.[143] In any event, a successful prosecution of an individual for doing something that the law allowed–or required–in one area and proscribed in another would be difficult, if not effectively impossible.[144] Given the foregoing, other sections of the N.D. Century Code and federal laws can be taken to limit whatever scope, if any, N.D.C.C. section 12.1-23-11 may remain after constitutional challenges.

Table 2 lists a number of different sections of the North Dakota Century Code that require the recording of information identified by N.D.C.C. section 12.1-23-11.[145] While the majority of these requirements could be argued to be acceptable based on at least a tacit consent of the individual due to participating in a transaction that requires disclosure or serving in a position where disclosure could be reasonably expected, two exceptions exist. First, N.D.C.C. section 12-44.1-22 requires the collection of information from detained inmates, where consent would typically not exist.[146] Second, N.D.C.C. section 12-68-01 discusses the filing of a missing person's report, where the

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custodian of the central voter file records in each county. The secretary of state shall maintain the central voter file. The central voter file must be accessible by the secretary of state and all county auditors for purposes of preventing and determining voter fraud, making changes and updates, and generating information, including pollbooks, reports, inquiries, forms, and voter lists."). Thus indicating that the requisite information on voters shall be both collected and used for certain purposes.

142. This theory is known as the "Residence Theory," *see generally* Stephen Puryear, *Consent by Residence: A Defense*, 18 EUR. J. POL. THEORY 1 (2019).

143. The *lex specialis* doctrine dictates that a more specific regulation, on a particular subject, takes precedence over a less specific one of similar authority. *See generally* Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORDIC J. INT'L. L. 27 (2005).

144. A number of issues exist to a successful prosecution of an individual for violating one law while performing as required by another. For example, it would be difficult to establish the required *mens rea* for many laws. For a discussion of other relevant issues see generally Robert A. Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 CASE W. RES. L. REV. 44 (1974). For a discussion of *mens rea* issues, see generally James J. Sr. Hippard, *The Unconstitutionality of Criminal Liability without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039 (1972).

145. *See infra* Table 2.

146. The detention of the inmate is clearly something "of value" (as required by N.D.C.C. section 12.1-23-11) as societal resources are devoted to paying for this detention. If this was not of value, why would society devote resources to paying for it?

individual would clearly not be available to consent.[147] These examples further illustrate the problematic nature of N.D.C.C. section 12.1-23-11. If one of the aforementioned theories of explicit authorization or precedence did not apply, a jailer who booked an inmate for a misdemeanor would be him or herself committing a felony.[148]

Table 2. Conflicting Areas of the North Dakota Century Code Requiring Data Collection.

Section	Requirement / Authorized use of information
4.1-57-03	To provide: "6. The name of each partner if the applicant is a partnership; 7. The name of each corporate officer and the state of incorporation if the applicant is a corporation; 8. The name of each manager and the state of organization if the applicant is a limited liability company;"[149]
4.1-83-03 & 4.1-88-03	To provide: "a. The name of each partner if the applicant is a partnership; b. The name of each corporate officer and the state of incorporation if the applicant is a corporation; or c. The name of each manager and the state of organization if the applicant is a limited liability company;"[150]
5-02-07.2	"Whenever a retail alcoholic beverage licensee sells beer in a container with a liquid capacity greater than six gallons [22.71 liters], the licensee shall record the date of sale and the name, address, and driver's license number or number of other official state or military identification card of the person to whom the beer is sold . . . ."[151]
5-03-01	"The state tax commissioner may require the applicant to set forth other information necessary to enable the state tax commissioner to determine if a license should be granted."[152]
6-08.1-04	"No consent or waiver shall be required as a condition of doing business with any financial institution, and any consent or waiver obtained from a customer as a condition of doing business with a financial institution shall not be

147. The "anything . . . of value" standard is very low and could be satisfied by obtaining knowledge about a disappearance to prevent future crimes, for example. *See* N.D. CENT. CODE § 12.1-23-11(2) (2019).

148. *Id.* § 12.1-23-11 (making "unauthorized use of personal information" a class C felony for the first offense and a class A felony for subsequent offenses).

149. N.D. CENT. CODE § 4.1-57-03(6)-(8)(2019).

150. *Id.* § 4.1-83-03(1); *id.* § 4.1-88-03.

151. N.D. CENT. CODE § 5-02-07.2(2) (2019).

152. *Id.* § 5-03-01(2).

	deemed a consent of the customer for the purpose of this chapter."[153]
10-04-06	"The name, address, and telephone number of the person to contact for additional information;"[154]
10-04-08	"b. With respect to every director and officer of the issuer, or person occupying a similar status or performing similar functions: (1) The person's name, address, and principal occupation for the past five years;"[155] "f. With respect to any person on whose behalf any part of the offering is to be made in a nonissuer distribution: (1) The person's name and address;"[156]
10-04-10	"The names and addresses of all persons who have been registered as broker-dealers, agents, investment advisers, or investment adviser representatives, and all orders with respect thereto, and the names and addresses of all federal covered advisers who have made a notice filing must be recorded in a register of broker-dealers, agents, investment advisers, federal covered advisers, and investment adviser representatives in the office of the commissioner."[157]
10-06.1-15	"With respect to each shareholder or member: (1) The name and address of each, including the names and addresses and relationships of trusts and estates that own shares or membership interests;"[158] "c. With respect to management: (1) If a corporation, then the names and addresses of the officers and members of the board of directors; or (2) If a limited liability company, then the names and addresses of the managers and members of the board of governors."[159]
12-44.1-22	"Each administrator is responsible for a correctional facility register in which must be entered such inmate information on such forms as the department of corrections and rehabilitation shall prescribe by rule."[160]

153. N.D. CENT. CODE § 6-08.1-04(1) (2019).
154. N.D. CENT. CODE § 10-04-06(17)(e) (2019).
155. *Id.* § 10-04-08(1)(b)(1).
156. *Id.* § 10-04-08(1)(f)(1).
157. *Id.* § 10-04-10(7) (2019).
158. *Id.* § 10-06.1-15(1)(b)(1).
159. *Id.* § 10-06.1-15(1)(c).
160. N.D. CENT. CODE § 12-44.1-22 (2019).

12-68-01	"A report of a missing person may be made to any law enforcement agency in the state"[161]

While these conflicting sections may prevent the undesirable enforcement of N.D.C.C. section 12.1-23-11, section 12.1-23-11 could also be used as an impediment to enforcement of these other regulations. This could result in records not being kept, reports not being filed, and inmates not being tracked, in addition to other undesirable outcomes. At a minimum, the lack of clarity could cause confusion to those going about their business while attempting to follow the law.

VIII. PUNISHMENT AND REPEAT OFFENDERS

Another particularly problematic aspect of N.D.C.C. section 12.1-23-11 is how the offense is graded. The section provides that "The offense is a class B felony if the credit, money, goods, services, or anything else of value exceeds one thousand dollars in value, otherwise the offense is a class C felony. A second or subsequent offense is a class A felony."[162]

The dramatic difference in how the "unauthorized use of personal information" is handled, compared to other similar offenses, is quickly discernable when comparing the grading of personal information offenses to theft offenses. Table 3 highlights these differences.

Table 3. Comparison of Grading

Value Level	N.D.C.C. § 12.1-23-11 "unauthorized use of personal information" grading		N.D.C.C. § 12.1-23-05 theft offense grading
	First Offense[163]	Subsequent Offenses[164]	First & Subsequent Offenses
$1 - $500	Class C Felony	Class A Felony	Class B Misdemeanor[165]

161. N.D. CENT. CODE § 12-68-01 (2019).

162. N.D. CENT CODE § 12.1-23-11(2) (2019).

163. *Id.* § 12.1-23-11(2).

164. *Id.* Prior offenses include violations of section 12.1-23-11, and laws of other states or federal laws that are "equivalent to this section." *Id.* § 12.1-23-11(4). The prior violation must have been "alleged in the complaint, information, or indictment" and the subsequent offense must have occurred after the "plea or finding of guilt for the prior offense." *Id.*

165. N.D. CENT. CODE § 12.1-23-05(5) (2019) (qualifying for a class B misdemeanor for theft offenses, the value must be under $500, the theft must not have involved a threat, it cannot have been "committed by deception by one who stood in a confidential or fiduciary relationship to the victim of the theft" and the perpetrator cannot be "a public servant or an officer or employee of a financial institution who committed the theft in the course of official duties").

$500.01 - $1,000	Class C Felony	Class A Felony	Class A Misdemeanor[166]
$1,000.01 – $10,000	Class B Felony	Class A Felony	Class C Felony[167]
$10,000.01 – $50,000	Class B Felony	Class A Felony	Class B Felony[168]
$50,000.01+	Class B Felony[169]	Class A Felony	Class A Felony[170]

One of the most extreme examples of a difference between the grading under the two sections is at the lowest end of the spectrum. An individual who made "unauthorized use of personal information" with a value of $100 could be charged under N.D.C.C. section 12.1-23-11 with a Class C felony for the first offense and a Class A felony for subsequent offenses,[171] whereas under N.D.C.C. section 12.1-23-05 (absent certain aggravating factors), the individual would be charged with a class B misdemeanor.[172]

In addition to the above theft offenses, N.D.C.C. section 12.1-23-11 provides penalties for non-theft use of information:

166. *Id.* § 12.1-23-05(4) ("All other theft under this chapter is a class A misdemeanor, unless the requirements of subsection 5 are met.").

167. *Id.* § 12.1-23-05(3) (This grading has a number of exceptions that would make it unavailable and make certain theft offenses Class C felonies instead. Theft below would be a class C felony if: (a) the value exceeds $1000; (b) is obtained by threat and (1) "acquired or retained by a public servant by a threat to take or withhold official action" or (2) the value exceeds $100; (c) value exceeds one hundred dollars and is "acquired or retained by a public servant in the course of official duties;" (d) the property is a "firearm, ammunition, or an explosive or destructive device;" (e) "government file, record, document, or other government paper stolen from any government office or from any public servant;" (f) if the "defendant is in the business of buying or selling stolen property" and the theft occurs as part of these activities; (g) "implement, paper, or other thing uniquely associated with the preparation of any money, stamp, bond, or other document, instrument, or obligation of this state;" (h) "livestock taken from the premises of the owner;" (i) "key or other implement uniquely suited to provide access to property the theft of which would be a felony and it was stolen to gain such access;" (j) "card, plate, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit, or is a debit card, electronic fund transfer card, code, or other means of access to an account for the purposes of initiating electronic fund transfers;" or (k) "prescription drug as defined in section 43-15.3-01, except when the quantity stolen is five or fewer capsules, pills, or tablets.").

168. *Id.* § 12.1-23-05(2) ("[T]heft . . . is a class B felony if the property or services stolen exceed ten thousand dollars in value but do not exceed fifty thousand dollars or are acquired or retained by a threat to commit a felony.).

169. In most circumstances, so-called "unauthorized use of personal information" would qualify under sections 12.1-23-02, 12.1-23-03, 12.1-23-04 as a theft offense as well and could be charged and graded under these sections to allow grading at the Class A felony level, if desired by the State's attorney. *See* N.D. CENT. CODE §§ 12.1-23-02, 12.1-23-03, 12.1-23-04 (2019).

170. *Id.* § 12.1-23-05(1).

171. *Id.* § 12.1-23-11(2).

172. *Id.* § 12.1-23-05.

> [T]o interfere with or initiate a contract or service for a person other than that individual, to obtain or continue employment, to gain access to personal identifying information of another individual, or to commit an offense in violation of the laws of this state, regardless of whether there is any actual economic loss to the individual.[173]

The first offense of this type is a class A misdemeanor and subsequent offenses are class C felonies.[174]

While it is appropriate to place additional weight on particular types of crimes based on the circumstances under which they occur, the level of disparity between the grading of a "unauthorized use of personal information" offense–which does not necessitate actual harm to anyone,[175] just the defendant somehow obtaining or seeking to obtain value–and an offense requiring harm, threat or similar, seems unjust.[176] In fact, only the more severe "unauthorized use of personal information" offenses, such as where a threat is used to obtain value by depriving others of it, would qualify as theft offenses.[177] If the offender was charged in this way, they would receive, in most cases, a lower grading.[178]

Another key difference between the sections is that the criminal acts defined "in sections 12.1-23-02 to 12.1-23-04 constitute[] a single offense,"[179] while an act that violated one or more of these sections could also be charged under section 12.1-23-11 separately, and in addition to, the charge under sections 12.1-23-02 to 12.1-23-04.[180] It would also seem that a single circumstance might constitute only a single charge of theft under section 12.1-23-01 (for section 12.1-23-02 to 12.1-23-04 offenses), while it could potentially result in charging for every record obtained during one circumstance under N.D.C.C. section 12.1-23-11.[181]

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173. *Id.* § 12.1-23-11(3).

174. *Id.*

175. It is important to note that N.D.C.C. section 12.1-23-11(2) does not require an illicit or even undesirable-to-the-individual use of personal information for punishment, just unauthorized use as discussed in Section II.A.

176. N.D. CENT. CODE §12-1.23.11(2) (2019) (stating that the offense is committed if one "obtains or attempts to obtain, transfers, records, or uses or attempts to use any personal identifying information of another individual, living or deceased, to obtain credit, money, goods, services, or anything else of value without the authorization or consent of the other individual").

177. Theft offenses are defined in N.D. CENT. CODE § 12.1-23-05(3) (2019). A number of other specific criteria for more severe treatment are enumerated in this section.

178. *See* id. § 12.1-23-05.

179. *Id.* § 12.1-23-01.

180. It is not uncommon for prosecutors to charge defendants under multiple sections for a single crime. *See generally* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63 (2011).

181. In fact, the language section 12-1.23.11(6) anticipates just this circumstance. In describing violations that occur under the statute, involving "one or more victims" across a geographically distributed areas within the state, it notes that they are "multiple offenses" and can "be consolidated

Finally, the threshold for committing a crime under N.D.C.C. section 12.1-23-11 is quite low. Sections 12.1-23-02 to 12.1-23-04 require an actual theft, or an attempt to conduct theft, must have occurred.[182] However, under section 12.1-23-11, an individual commits a crime if he or she "obtains or attempts to obtain … any personal identifying information . . . to obtain . . . anything . . . of value without . . . authorization or consent."[183] Given that personal information is understood by many businesses to have inherent value (i.e., it can be bought and sold), the mere collection of data could itself even be argued to meet the requirements for the crime.[184] Even disregarding the inherent value of the data, unless the defendant literally intended to do nothing with the data, it would be difficult to not somehow obtain something "of value" using the data and meet the requisite standard.

While discouraging the "unauthorized use of personal information" is certainly a laudable goal, the punishment here quite literally does not fit the crime. This could be rectified by consolidating the grading with the theft offenses and requiring actual theft or attempted theft to have occurred. Including conduct that constitutes an offense under section 12.1-23-11 within the combination of offenses in section 12.1-23-01 would simplify and increase the fairness and consistency of offenses under chapter 12.1-23.

IX. POTENTIAL LEGISLATIVE SOLUTIONS TO N.D.C.C. SECTION 12.1-23-11

Two potential fixes to the problems posed by the current form of N.D.C.C. section 12.1-23-11 seem reasonable. First, the statute could be rewritten to be more precise as to the specific activity that is proscribed and tie those activities to the conduct of theft or fraud, whether attempted or realized. Second, the activities proscribed in N.D.C.C. section 12.1-23-11 could be integrated into other sections of chapter 12.1-23 or other applicable areas as

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for commencement of prosecution in any county where one of the offenses was committed." N.D. CENT CODE § 12-1.23.11(6) (2019).

182. Under the theft offenses an individual commits the offense if he or she "[k]nowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of." N.D. CENT. CODE § 12.1-23-02(1) (2019). "Knowingly obtains . . . or intentionally deprives another." *Id*. § 12.1-23-02(2) or "[k]nowingly receives, retains, or disposes of." *Id*. § 12.1-23-02(3). Attempts to do the aforementioned also qualify for punishment as the same offense, under the theft sections as "an attempt to commit a theft under this chapter is punishable equally with the completed offense when the actor has completed all of the conduct which the actor believes necessary on the actor's part to complete the theft except receipt of the property." *Id*. § 12.1-23-05(6).

183. N.D. CENT. CODE § 12.1-23-11(2) (2019).

184. Under the "unauthorized use of personal information" offenses, an individual has committed the offense if he or she "obtains or attempts to obtain, transfers, records, or uses or attempts to use any personal identifying information of another individual, living or deceased, to obtain credit, money, goods, services, or anything else of value without the authorization or consent of the other individual." *Id*. Thus, simply obtaining, attempting to obtain, transferring or recording personal information, with an applicable intended use, is a violation.

either additional elements or methods of conducting crimes already existing in these sections.

The first approach requires adding a clear requirement for a specific *mens rea* related to information theft, fraud, and/or other defined criminal activities. Currently, the statute proscribes simply making an attempt (successful or not) to obtain something of value using another individual's information. This could ensnare legitimate conduct. The proposed changes would instead create a proscription of using others' information as part of an attempt at theft or a deception to obtain goods, services, or other value. This would proscribe harmful content without ensnaring common conduct which is not typically or necessarily harmful.

The second approach would assign harsher penalties to crimes involving information misuse. This could be accomplished by adding a harsher grade of crime to information misuse misdemeanors and felonies, potentially both within N.D.C.C. section 12.1-23-05 and in sections locations throughout chapter 12.1. The sections related to theft of property,[185] theft of services,[186] and dealing in stolen property[187] could be expanded to specifically deal with the types of information crimes. Other areas of the N.D. Century Code that focus on electronically or information-relevant crimes, for example N.D.C.C. sections 12.1-23-16, 12.1-23-19, and 12.1-23.1-01, could also be similarly updated to ensure that essential preparatory steps, such as information gathering or theft with an intent to commit these crimes, are also explicitly proscribed. The exact changes that are made – and whether changes are made at all – are, of course, the prerogative of the North Dakota Legislature.

X. CONCLUSION

N.D.C.C. section 12.1-23-11 is enforceable and could be used in criminal prosecutions. As shown in the hypothetical examples in this article, the statute is overbroad and could potentially criminalize benign, everyday use of personally identifying information. The public would benefit from the Legislature rewriting the section to be clearer and more consistent with other parts of the N.D. Century Code. The current statute is overbroad and criminalizes common innocent behavior that is not constitutionally or otherwise protected. While an argument can be made that courts should interpret the law to avoid absurdity and injustice, the law in its current format may cause some citizens to refrain from exercising their legitimate rights. Others may avoid conducting activities that require data collection that are otherwise beneficial to the public in order to avoid possible prosecution under this section.

185. N.D. CENT. CODE § 12.1-23-02 (2019).
186. *Id. §* 12.1-23-03.
187. *Id.* § 12.1-23-08.3.

Laws that criminalize everyday behaviors, but which are not regularly enforced, leave open a significant potential for abuse.[188] In any case, the public benefits from clear and consistent laws that proscribe harmful actions. This law lacks that clarity and suffers from legislative imprecision. It goes beyond prohibiting truly criminal behavior to proscribing many beneficial, or at least benign, everyday activities.

188. Critics of plea bargains, for example, have described how the threat of a lengthy prison sentence combined with a much shorter one under a plea results in innocent people taking a plea bargain instead of risking loosing and its consequences. *See generally* Douglas D. Guidorizzi, *Should we Really Ban Plea Bargaining: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L. J. 753 (1998).