

Symposium

Cyberspace and Privacy: A New Legal Paradigm?

***1373 EXAMINED LIVES: INFORMATIONAL PRIVACY AND THE
SUBJECT AS OBJECT**

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III. Choosing

The data privacy debate is also a debate about freedom of choice and its necessary preconditions. The prevailing approach to this question is closely aligned with the position that personally-identified data becomes “property” when, and because, it becomes tradable: A successful data privacy regime is precisely one that guarantees individuals the right to trade their personal information for perceived benefits, and that places the lowest transaction cost barriers in the way of consensual trades. If individuals choose to trade their personal data away without placing restrictions on secondary or tertiary uses, ***1392** surely it is their business. [FN62] On this view, choice rather than ownership is (or should be) the engine of privacy policy. What matters most is that personal data is owned at the end of the day in the manner the parties have agreed.

Theories of privacy-as-choice, however, do not seem to contemplate the exercise of this freedom in nonmarket realms. “Choice” is something that occurs within existing constraints but not about them. This Part considers whether that is necessarily so--whether, in other words, there is something about that sort of choice that makes it the freest.

A. Theories and Technologies of Choice

Adherents of the privacy-as-choice model contemplate that as data privacy becomes more important to consumers, privacy preferences and practices will become specified contractual terms in most ordinary online interactions. [FN63] To make this a concrete possibility, technology companies have invested heavily in the development of technologies for managing data privacy preferences. In theory, these technologies, most notably the World Wide Web Consortium's Platform for Privacy Preferences (“P3P”), will allow individuals to create tailored profiles that specify permitted and prohibited uses of their personal data. [FN64] The profiles will act as digital passports that negotiate privacy terms with vendors' websites. If the vendor offers less privacy protection than the individual wants, the profile will alert the individual and offer the option to transact on the vendor's terms. [FN65]

Like the justifications for property ownership discussed in Part II.B, [FN66] the theoretical antecedents of a data privacy regime based on “freedom of ***1393** choice” mingle strands of Lockean and utilitarian libertarianism. Under utilitarian theory--especially in its economic incarnation--market exchanges reflect the expression and satisfaction of preferences. [FN67] Definitionally, market exchange makes people better off; it follows that the law should seek to maximize opportunities to make data privacy practices the subject of exchange. From

Lockean theory, meanwhile, comes an emphasis on self-determination through freedom from limits on the accumulation and disposition of property. The disposition right is inseparably linked with the accumulation right. [FN68] Conversely, then, interference with exchange reduces the accumulation incentive; it follows that the law should not prevent individuals from managing their own wealth.

The privacy-as-choice model differs in some respects from the property-rights approach explored in Part II.C above. [FN69] The model implicitly concedes initial ownership to individuals. At the same time, however, it presumes both the ability and the desire to alienate personal information (on the right terms), and thus devalues the argument that ownership necessarily includes the right to assert ongoing control. Ongoing control exists only as a matter of contract, and only to the extent that the data processor is willing to agree. Nor is there any serious discussion of digitally self-enforcing access and usage rights, which might create ongoing control on a de facto basis. (One suspects that it is no coincidence that the “transaction cost” objection to data privacy management plays a much less significant role in discussions of privacy-as-choice.) Instead, the contract model relies on self-enforcement of privacy practices by vendors themselves. Dishonest vendors, the reasoning goes, will lose credibility and market share. [FN70]

The theory of privacy-as-choice predicts that, eventually, the technologically-mediated market for a given product or service will reach an equilibrium based on the privacy practices that most consumers prefer. [FN71] If, for *1394 example, most consumers prefer that their credit card companies or magazine publishers make their names and addresses available to “selected” purveyors of other products and services, the status quo will remain the norm. If most consumers prefer no data-sharing, then that practice will prevail. If enough consumers, or enough profitable consumers, prefer something different, a smaller market will evolve to serve them as well.

It seems churlish to contest this rosy vision of a market for privacy, or to argue that we should expect more choice, or different kinds of choice, than the market will provide. Economic and political theorists, however, recognize that choice is both more constrained and more complicated than theories of privacy-as-choice would suggest. Choice occurs within parameters. Some of these parameters, such as the fact that we need gravity to walk and oxygen to breathe, are relatively fixed. Others, such as the design of legal institutions and technological tools, are slightly more malleable; they are, in other words, themselves the subject of choices. [FN72] The debate about privacy and freedom of choice is, in fact, two debates—one about the conditions of choice within a given set of institutions or parameters (here, the evolving, relatively unregulated market for personally-identified data), and one about the parameters themselves. And if “freedom of choice” includes the freedom of self-determination writ large, then it necessarily includes the freedom to use nonmarket means to change the parameters within which markets operate. The question is whether it would be desirable to do so.

Economic and political markets offer different constraints. Adherents of market choice argue that nonmarket choices constrain nonsubscribers, while market choices do not. One may be bound by a choice inconsistent with one's own vote and, presumably, with one's own preferences or views about self-determination. In markets, by contrast, one may trade or not trade as one pleases. Thus, some argue that substantive regulation of transaction terms is inherently freedom-destroying. [FN73] But of course third-party constraints do obtain in markets—if one has unusual tastes or belongs to a customer group perceived as fickle or unprofitable, one may be limited to product offerings designed for others' preferences. [FN74] One constraint is no more neutral than the other; they are simply different. Social policy generally reflects some combination of the

two. In our culture, for example, it is usually unacceptable to impose nonmarket constraints on speech--but that decision was and is a political one.

*1395 Economic and political markets also offer different freedoms. Economic markets are, generally speaking, a good forum for the expression and satisfaction of purely consumption-related preferences. They are, however, a much poorer forum for expression and satisfaction of second-order preferences about the sorts of behavior the law should encourage or discourage. [FN75] They are also a poor forum for the resolution of issues that we as a society believe, either for reasons of market failure or for normative reasons, should be decided based on votes rather than dollars. [FN76] Political markets perform precisely this function.

Finally, economic and political markets suffer from different dysfunctions. Market failure may arise from disparities of power, from high or unevenly distributed bargaining costs, from failure to absorb negative externalities (or to reproduce positive ones), or from information asymmetries that preclude the exercise of informed choice. [FN77] The mechanisms for exercising freedom of choice in political markets, in turn, are subject to collective action problems and interest group corruption. [FN78] Public choice theory tells us that there will be substantial overlap between economic and political outcomes, and plainly this is correct. Plainly too, though, there are occasions when the different bases for decisionmaking in economic and political markets may translate into different results. [FN79]

Inescapably, then, selection of the forum for choice about data privacy depends (at least in part) on the nature of the policy sought to be implemented. A substantive preference for trade in personally-identified information*1396 is more easily implemented in economic markets. A substantive preference for durable privacy, or for privacy as to certain items of information, may be more easily or effectively implemented in political ones. Before we can decide (or even decide how to decide), we must assess whether privacy-as-choice will guarantee durable privacy for those who prefer it.

B. Choice, Parameters, and Tradeoffs

The privacy-as-choice model is conceived as empowering individuals. [FN80] Whether that is true, however, depends on the baseline for comparison. Plainly, the model would give individuals more power over uses of their personal data than they currently enjoy. At the very least, P3P and similar technologies might supply a reliable, automatic means of communicating privacy preferences to vendors, where none now exists. It seems difficult to dispute that a system based on accurate information and routinized use of P3P-type profiles would offer some advantages compared with current commercial practice, which affords individuals no enforceable data privacy protection. If we are serious about choice, though, we also must consider the structural choices that privacy-as-choice forecloses. In addition, we must consider the economic and political consequences of a choice to restrict choice about data privacy to the marketplace.

Freedom of choice in markets requires accurate information about choices and their consequences, and enough power--in terms of wealth, numbers, or control over resources--to have choices. [FN81] The privacy-as-choice model reinforces persistent inequalities on both counts.

First, to assess the benefits and costs of a trade accurately, individuals must understand the uses contemplated for the information they are asked to disclose. [FN82] Proponents of "choice" as the basis for privacy policy differ on exactly how this is best accomplished. Some advocate greater regulation of privacy disclosures; others argue that the same market principles that produce privacy also will foster disclosure. [FN83] All agree, though, that digital network technologies

enable easy disclosure of privacy policies and practices at a far greater level of detail than feasible in off-line transactions.

*1397 In reality, individuals face enormous difficulty assessing how their personal information will be used. [FN84] The decision about how much information a privacy policy should provide is hotly contested. The problem is especially acute for secondary and tertiary uses of personally-identified information. Routine practice is to specify these classes of recipients only in the most general terms. [FN85] Yet without information about the nature and identity of secondary and tertiary users, individuals cannot easily determine what information to provide or withhold.

Even assuming perfect information about all contemplated reuses of data, however, consumer freedom is relative. Individual consumers are free to accept or reject the terms offered, but it is the vendor who is free to decide what terms to offer in the first place. [FN86] Thus, consumers may discover that the surrender of personal information is nonnegotiable or prohibitively priced. At this point, the P3P model simply assumes the transaction will fail. But to the extent that individuals need or want the goods or services and cannot obtain them elsewhere--to the extent, that is, that all vendors serving a given market believe collecting consumer data is a competitive necessity--one suspects that individuals may simply concede, and convince themselves that the loss of privacy associated with this particular transaction is not too great.

The present valuation placed on any given surrender of personally-identified information is, of course, also a matter of personal choice. Yet it is difficult to assess the future significance of a loss of privacy, much less to compare that future harm with a currently offered benefit. In part, this is due to the information problems discussed above. In part, though, the disability is cognitive. Estimating probability-weighted future value and discounting for present value are hard, and people are demonstrably bad at it. [FN87] The *1398 valuation problem is compounded by the fact that the trivial and incremental character of each loss--information about a grocery purchase here, a magazine subscription there--tends to minimize its ultimate effect. [FN88] A comprehensive collection of data about an individual is vastly more than the sum of its parts.

More fundamentally, the privacy-as-choice model assumes that data privacy can be valued using market measures. But monetary measures of value do not capture the very real incommensurabilities that the choice presents. Privacy, like other dignity-related goods, has inherently nonmonetizable dimensions. [FN89] These dimensions may be lost or distorted beyond recognition in the translation to dollars and cents.

A final set of objections to the privacy-as-choice model is based on distributive justice concerns. Self-evidently, an important determinant of choice within markets is wealth. If data privacy costs money--or, conversely, if surrendering privacy saves money--access to privacy will be more unequal than if it did not. Under a regime of tradable privacy rights, "privacy" simply will become a status that can be chosen (and paid for) the way one might choose a neighborhood, a health club, or a brand of automobile.

Of course, it isn't quite that simple--marketers would rather have your data if you're rich than if you're poor. Thus, marketers are likely to spend extra money to identify wealthier customers and recruit them to loyalty programs that offer incentives for repeat shoppers. [FN90] A perverse consequence of a purely market-based approach to data privacy rights, then, may be more discounts for the rich. If so, then the poor will lose twice over. They will have less privacy, and they will also pay more for goods and services than more desirable customers. Privacy in markets, then, is more than a luxury. Personally-identified data is the wedge that enables "scientific," market-driven, and increasingly precise separation of "haves" from "have-nots." [FN91]

Relatedly, the privacy-as-choice model ignores that some (perhaps most) uses of personally-identified data do not involve offers of discounts. Consumer data can be used for many purposes to which consumers might not so ***1399** blithely agree: employment decisions and classifications by health insurance providers that exclude or disadvantage genetic or medical “have-nots”; employment or housing decisions based on perceived personality risks; employment or housing decisions based on sexual or religious preferences; and so on. [\[FN92\]](#) Data processors have no particular interest in disclosing these uses, precisely because individuals are likely to find them so objectionable. And even many privileged individuals might not wish to trade their own privacy for the supposed advantages that privilege would confer; who knows, after all, to what uses seemingly innocuous information might be put in the future?

To a substantial degree, then, the rhetoric of “choice” obfuscates the political choice that current data privacy policy represents. The data privacy debate is not merely, or even mostly, about the satisfaction of consumer preferences as expressed in the direct market for goods and services. Like the rhetoric of “transaction costs,” the emphasis on “choice” conceals the degree to which the model predetermines who chooses. [\[FN93\]](#) In particular, with respect to secondary uses of personally-identified data, the “choice” that the model protects is not choice by individuals. It is the choice of data processors about how to classify individuals, and for what purposes.

To object that these structural inequalities--the reactive nature of consumer freedom, income disparities, and the like--are beyond the scope of the problem is to miss the point. In any serious discussion of what constitutes choice about privacy, perceived failures of markets are precisely the issue. The design of markets, and whether to delegate resolution of particular questions to them, are themselves choices. [\[FN94\]](#)

The elusiveness of this point within the mainstream data privacy debate suggests that, like “property,” “choice” has become a category with a specific, culturally determined meaning. “Freedom of choice” means “choice in markets,” and means only that. In a provocative essay on the evolution of governance structures, Larry Lessig observes that we have lost faith in other, more traditional institutions of governance. [\[FN95\]](#) But it seems to me that the phenomenon is cognitive as much as existential: We conceive of “freedom” in literal, almost physical terms, as a function of direct or subjective constraints ***1400** on behavior. [\[FN96\]](#) Law, of course, does not directly constrain in most instances; nor, I would argue, does it constrain more directly than price in many cases. Yet law operates in terms of prohibition, while markets operate in terms of possibility. And so liberty has come to mean freedom from laws (other than economic ones) rather than freedom that laws might guarantee.

It was not always thus. As Eric Foner shows, liberty has meant many things at different times in our history. [\[FN97\]](#) At times, it has meant a simple, literal “libertarianism”; at other times, though, it has meant the freedom to strive toward shared moral or existential ideals. [\[FN98\]](#) As I will argue in Part VI.A, [\[FN99\]](#) data privacy protection furthers still another sort of liberty--that of self-determination, expressed through the power to define oneself to the world in the way one wishes. The conventional wisdom is that such affirmative liberty claims are weaker and less principled than negative liberty claims. [\[FN100\]](#) Yet assuming this is so, the affirmative formulation is easily reframed in the negative: Data privacy ensures liberty to preclude certain types of probabilistic judgments about one’s inclinations, abilities, or shortcomings. And thus reframed, it is difficult to see why this sort of self-interested choice is less deserving of protection.

Here, data privacy opponents object that limiting markets in personally-identified data will affect the range of other choices available to consumers within markets. The “attention economy,” we are told, demands personal profiling as a survival tactic. [\[FN101\]](#) Vendors that are unable to exploit consumer

profiles to target their products and services effectively will be forced, instead, to discontinue narrowly-targeted product offerings and/or charge higher prices for continued offerings. The effects, we are told, will be especially stark where targeted advertising has traditionally supported free or near-free content--e.g., in the news and broadcast industries. [\[FN102\]](#) Yet all other things being equal, a prohibition on individualized profiling (or on nonconsensual profiling) will not change the fact that businesses compete to provide products and services that consumers prefer, and that digital networks and search tools reduce the costs of niche competition.

***1401** The privacy-value tradeoff, moreover, rests on the same spurious technological determinism as the privacy-efficiency tradeoff discussed in Part II.C. [\[FN103\]](#) Currently, technologies designed to measure consumer preferences permit retrieval and matching of data with names and other identifying characteristics. Systems could be designed quite differently. They could, for example, allow aggregate profiling of groups of consumers without generating personally-identified or identifiable data. [\[FN104\]](#) For that matter, the problem of targeting information to consumers need not be solved by giving businesses more information about consumers; it could, instead, be solved by giving consumers more information about businesses. Rather than giving one entity rights to “shoes.com,” for example, we might design the Internet domain name system to include directory pages for common words. [\[FN105\]](#)

To be sure, the argument that limiting personal profiling will force market tradeoffs is not frivolous. At the margin, some businesses will suffer, and some may go under (though others may thrive). The point is that the mere fact of a tradeoff with some (unquantifiable) impact on choice in markets dictates the outcome of the data privacy debate only if there is only one way to provide businesses with marketing information, and only if choice in markets is the touchstone. Neither assumption is warranted. Our options are more numerous, and more complicated, than market-tradeoffs reasoning suggests.

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Like “property,” “freedom of choice” cannot function as a solving idea for the data privacy problem. The rhetoric of choice obscures the reality that we face not one decision (freedom or not), but a bewildering constellation of decisions about which choices to privilege, which to facilitate, and which to restrict. We confront, as well, a bewildering array of legal, informational, and technological tools that might be used to shape choices, or to set parameters for them. [\[FN106\]](#) A neutral conception of “freedom of choice” will not help us; there simply is no neutral way of deciding how to choose.

The easy response to this dilemma is no response. Yet as Larry Lessig so persuasively demonstrates, “doing nothing” and allowing market processes to dictate policy outcomes is itself a collective choice. [\[FN107\]](#) Taking freedom***1402** seriously requires more--or at least more honesty about why a particular context or field of choice is preferred over others. We may decide that market measures of choice are superior to other measures (for example, political ones). [\[FN108\]](#) Or we may decide that decentralized market processes are superior to conscious attempts at social engineering. [\[FN109\]](#) But we--as a society--should decide, and we should acknowledge our reasons. And since choices about parameters are also, inevitably, choices about substance, we also should consider the substantive purposes and values that profiling is said to serve.