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## *Privacy and Markets: A Love Story*

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Ryan Calo | rcalo@uw.edu

University of Washington School of Law

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# PRIVACY AND MARKETS: A LOVE STORY

*Ryan Calo*\*

## INTRODUCTION

In 2014, a former Congressional staffer by the name of Matthew Colbert developed a software application he called “BuyPartisan.”<sup>1</sup> The app invites consumers with smart phones to scan the barcodes of just about any product and learn the political leanings of the company that sells it. The display consists of a meter displaying blue or red, depending on the campaign contributions of the company’s leadership. “Wouldn’t it be great,” Colbert asks, “if you could spend how you believe?”<sup>2</sup>

Occasionally market participants depart from the traditional market criteria of price and quality. A conscientious consumer might strongly prefer her coffee to be “free trade” or a diamond to be “conflict free.” A certain kind of religious flower shop owner might refuse on moral grounds to provide flowers to a wedding with two grooms.<sup>3</sup> Economists would chalk these departures up to “exogenous preference”—attributes that the market can take into account.

But imagine if consumers and businesses knew everything. Not just the circumstances under which a product was made or the politics of its seller, but whether each other market participant supports a rival sports team, believes in God, or bakes erotic cakes on the weekend. In other words, imagine a marketplace without privacy. Would such a marketplace be desirable? Would it be efficient? Would the market mechanism work at all if price and quality took a backseat to salient but arguably extraneous information about market participants?

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\* Assistant Professor of Law and Assistant Professor of Information Science (by courtesy), University of Washington. Affiliate Scholar, Stanford Law School Center for Internet and Society and Yale Law School Information Society Project. This draft benefited from comment at the Privacy Law Scholars Conference at the U.C. Berkeley School of Law and the U.C. Hastings School of Law faculty colloquium. Thank you to Meg Young and the Gallagher Law Library for excellent research assistance.

<sup>1</sup> *Voting with your wallet*, THE ECONOMIST (Sep. 13, 2014).

<sup>2</sup> *Id.*

<sup>3</sup> *E.g.*, State v. Arlene’s Flowers, Inc., No. 13-2-00871-5, 2015 WL 720213 (Wash. Super. Feb. 18, 2015) (finding against flower shop for discriminating against gay couple in contravention of Washington law). What this example shows, of course, is that one person’s ethical consumption can be another’s discrimination. *See also infra* Part IV.B.

This article examines the complex relationship between privacy and markets. In so doing, it rejects both law and economics' skepticism toward privacy and the hostility many privacy law scholars have toward markets. The thesis of this article is that privacy and markets are in important ways sympathetic. To paraphrase contract theorist Charles Fried, it is not that privacy will help markets work better, but that the market mechanism quietly assumes and relies upon privacy to work in the first place.<sup>4</sup> And the reverse is true as well.

Privacy supports the basic market mechanism by hiding enough distracting, value-laden information from market participants. A certain *absence* of knowledge focuses us on market-relevant considerations such as quality and price over salient but distorting information such as personal or political commitments. The beauty of the market mechanism is that you do not need to know that the person you are dealing with voted for a politician you hate or doubts we landed on the moon, or any other basis for distrust or discrimination, only that he is offering the best quality good at the lowest price.

Privacy also enables the longevity of business partnerships through the facilitation of economic intimacy. Market relationships face an ever-present specter of defection—the prospect of a better deal somewhere else—which participants manage in part through the selective disclosure of preferences and expectations without penalty. In business as in life, privacy helps you let the right one in, and in the process engenders the trust necessary for economic stability.<sup>5</sup>

Finally, privacy helps keep a check on information asymmetry between people and firms. While economists agree that information asymmetry is undesirable, the standard remedy is to introduce *additional* information—for instance, through mandatory disclosure laws.<sup>6</sup> But today's firms are increasingly more capable than consumers of processing new information, such that introducing more information only exacerbates asymmetry and its discontents. Privacy can interrupt this dynamic and help save the market from itself.

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<sup>4</sup> Charles Fried, *Privacy*, 77 YALE L.J. 475, 477 (1968) (“My thesis that privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship, and trust.”).

<sup>5</sup> For an argument about the role of contracts generally in moral cooperation, see Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004).

<sup>6</sup> See Ryan Calo, *Against Notice Skepticism in Privacy (And Elsewhere)*, 87 NOTRE DAME L. REV. 1027, 1027 (2012). On the failure of mandated disclosure to accomplish its goals, see Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011).

These arguments build the case for protecting privacy in the market context, including through the force of law. It is important to note, however, that privacy assumes and relies upon markets as well. Privacy is best understood as an instrument of human flourishing.<sup>7</sup> To flourish, people need the separation from others that privacy affords. But they also need access to the material and cultural resources that only other people in society can provide. Self-actualization is the province of the clothed and the fed; regardless, it cannot happen in a vacuum. Markets help us to help one another, a proposition too little remarked in privacy scholarship.

More fundamentally, markets furnish the theoretical means by which to distribute resources in society without having to know everything about everyone. Think just how much a government must know about its citizens truly to enforce the famous socialist maxim “from each according to his ability, to each according to his need.”<sup>8</sup> From this perspective, privacy never had a friend like markets.

The article proceeds as follows. After defining terms, Part I lays out the law and economics case against privacy, including its basis in economic thought more generally. Part II canvasses the literature responding to economic skepticism in the privacy law literature. Some scholars mount an insider critique, accepting the basic tenants of economics but suggesting that privacy actually increases efficiency in some contexts, or else noting that markets themselves will yield privacy under the right conditions. Others critique economic thinking from the outside. Markets “unravel” privacy by penalizing it,<sup>9</sup> degrade privacy by treating it as just another commodity,<sup>10</sup> or otherwise interfere with the values or processes that privacy exists to preserve.<sup>11</sup>

Part III tells the love story from the article’s title. I develop here a novel account of the relationship between privacy and markets, positioning the two concepts as sympathetic instead of antithetical. Neither insider nor outsider, the framework understands privacy as a crucial ingredient of the

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<sup>7</sup> Julie Cohen, *What Privacy is For*, 126 HARV. L. REV. 1904 (2013).

<sup>8</sup> Karl Marx, *Kritik des Gothaer Programms*, in MARX & ENGELS: SELECTED WORKS, Vol. 3, 13-30 (1973).

<sup>9</sup> Scott R. Peppet, *Unraveling Privacy: The Personal Prospectus & The Threat of a Full Disclosure Future*, 105 NORTHWESTERN UNIV. L. REV. 1153 (2011).

<sup>10</sup> Anita Allen, *Coercing Privacy*, 40 WILLIAM & MARY L. REV. 723 (1999). See also Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 988 (1964) (“Use of a photograph for trade purposes turns a man into a commodity and makes him serve the economic needs and interests of others.”).

<sup>11</sup> JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* (2012).

market mechanism, while simultaneously demonstrating how markets enable privacy to achieve its most important functions. It turns out opposites attract, just as Hollywood has been telling us all along.

A final Part discusses what's at stake. First, at the descriptive level, this article helps resolve certain institutional puzzles such as why the Federal Trade Commission—an agency dedicated to free markets and brimming with economists—would arise as the de facto privacy authority for the United States.<sup>12</sup> The article's framework not only explains and perhaps justifies the FTC's role in policing privacy, but predicts other agencies such as the Consumer Financial Protection Bureau will increasingly become involved in privacy enforcement.

Second, at the level of discourse, the article opens up new avenues of analytic inquiry, previously obscured by a mutual skepticism. In particular, the framework helps surface the role of privacy in avoiding market discrimination for the simple reason that it hides many objects of potential bias. And third, normatively, this article argues in support of laws and policies, such as conditioning access to political databases on non-commercial use, that try to keep personal information out of markets.

## I. THE ECONOMIST'S CASE AGAINST PRIVACY

This Part canvases why law and economics tends to be skeptical of privacy, finding privacy overrated, inefficient, and perhaps even immoral. The short answer is that information is the presumed lifeblood of the marketplace, crucial to its proper and efficient functioning. Privacy hides information and in so doing compromises market optimization. We'll complicate the matter in the next two sections, but here I want to explain why the adherents of economic theory—foremost among them, scholars in the tradition of law and economics—look upon privacy with derision, if they do at all.

### A. Terminology

Before laying out the case against privacy, a note about terminology: I am going to be using some terms in this article—privacy, markets, the market mechanism—that do not necessarily have stable or agreed upon definitions.<sup>13</sup> The early literature seems to coalesce around the definition of

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<sup>12</sup> See Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 585-86 (2014) (“FTC privacy jurisprudence has become the broadest and most influential regulating force on information privacy in the United States...”).

<sup>13</sup> See, e.g., Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087 (2002)

privacy as control over personal information.<sup>14</sup> More recently, this conversation has pivoted toward defining privacy in terms of the control that holding information about people affords over them.<sup>15</sup> This article uses the term privacy largely in the negative, as shorthand for the opposite of data promiscuity. Data promiscuity describes a situation, no doubt familiar to citizens of second millennium, in which information about people flows freely between organizations and contexts. Privacy, as this article will use the term, stands in as the force that interrupts the free flow of personal information. Privacy here represents data chastity.

However you define privacy, the concept seems to invite an instrumental justification.<sup>16</sup> We protect privacy, when we do, because its absence would undermine some activity, institution, or value society cares about. Economists care about the efficient operation of markets.<sup>17</sup> And while privacy can be said to support efficiency in narrow circumstances, by and large economic theory sees privacy as an impediment. Perhaps as a consequence, little work to date considers whether markets themselves, as a concept, would survive in a world without privacy.<sup>18</sup> This article takes up this question and answers that the market mechanism assumes and relies upon privacy to accomplish its particular means of value exchange.

It bears mention at the outset that the market mechanism is not the same thing as capitalism. Hard to define in its own right, capitalism can be thought of as political system that commits economic and other elements of society to private, profit-seeking individuals and firms over the state.<sup>19</sup> The

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(discussing the amorphous nature of the term “privacy”).

<sup>14</sup> E.g., Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 223 (1977) (defining privacy in terms of control over information); Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974) (same); Fried, *supra* note 4, at 483 (conceiving of privacy as “control over knowledge about oneself”); ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967) (“Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”).

<sup>15</sup> E.g., Symposium, *Privacy and Technology*, 126 HARV. L. REV. 1880 (2013) (collecting recent scholarship on the interplay between privacy and power).

<sup>16</sup> As Ruth Gavison observes, we tend to think of privacy in terms of what it can do for us as individuals and society. Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 441-42 (1980). Indeed, on my account, privacy and markets each have ends that the other facilitates.

<sup>17</sup> For a discussion of this truism, see, e.g., Friedrich A. Hayek, *The Use of Knowledge in Society*, AM. ECON. REV. 35, no. 4 (1945): 519–530.

<sup>18</sup> As I discuss *infra*, some remark that markets might be *less efficient* without privacy in some contexts.

<sup>19</sup> WILLIAM J. BAUMOL, ROBERT E. LITAN, & CARL J. SCHRAMM, *GOOD CAPITALISM*,

market mechanism is essential to capitalism, of course, but distinct and far simpler. It represents a conceptual means of transferring property, promises, rights and so on between parties whereby individuals or groups openly exchange goods and services for prices set by supply and demand.<sup>20</sup> Communist or socialist societies can and do have markets, if in fewer societal contexts.

With few exceptions, I will refer to markets in this very basic sense. I purposefully select simple examples in order to investigate the interaction of privacy and the market mechanism at a conceptual level. There are, of course, a limitless variety of economic configurations, each of which have subtle dynamics all their own. Still, at their heart, these configurations tend to share a reliance on the market mechanism to facilitate the exchange.

A final definitional problem cannot be entirely resolved here. In the Introduction and throughout this article, I refer to information, like price and quality, that is “traditionally” relevant to the market mechanism, and contrast this to information that is irrelevant, “value-laden,” or “extraneous.”<sup>21</sup> This may strike economists as a false dichotomy, on the theory that all information that informs preferences—literally anything that affects willingness to buy—is relevant to the market by definition.

Thus, my decision to label information other than what is strictly needed to consummate a market transaction—i.e., the qualities of the service or product on offer, the agreed upon price, and perhaps reputational information about the market participant—as extraneous may be sneaking in assumptions and commitments. At the same time, the move makes clear intuitive sense; it should not strike the reader as necessarily controversial that the market represents a particular sphere of life. You see this in the many rules and norms that apply to the market but not elsewhere.<sup>22</sup> Ultimately, my point will be that too severe a departure from classic market

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BAD CAPITALISM, AND THE ECONOMICS OF GROWTH AND PROSPERITY 62 (2007) (canvassing various definitions but noting that “[g]enerally, an economy is said to be capitalistic when most or at least a substantial proportion of its means of production—its farms, its factories, its complex machinery— are in private hands, rather than being owned and operated by the government”). See also Owen M. Fiss, *Capitalism and Democracy*, 13 MICH. J. INT’L L. 908 (1991-1992).

<sup>20</sup> Cf. ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 23-34 (5th ed. 2001) (defining market mechanism).

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

<sup>22</sup> Experiments by Dan Ariely and colleagues are instructive. The researches shift between the social and market context by characterizing tasks as favors versus jobs and observe marked changes in behavior. DAN ARIELY, PREDICTIBLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR BEHAVIORS 75 et seq. (2010) (discussing “why we are happy to do things, but not when we are paid to do them”).

factors such as price and quality in favor of highly salient, value-laden information is problematic.

*B. Economists Are Skeptical of Privacy*

*My appreciation of this different view arose when I was in government, discussing privacy with people from many intellectual and political backgrounds. In these conversations, I came to believe that there was one important predictor of people who did not “get” the privacy issues. That predictor was having received graduate training in economics...*<sup>23</sup>

Economists long dream of a market with perfect information.<sup>24</sup> Few think of such a world as literally possible and coterminous market theory addresses itself to the reality of partial, asymmetrically distributed information.<sup>25</sup> Nevertheless, more information is considered better than less. In George Akerlof's famous *Market for Lemons*, the missing information has to do with the quality of a good (used cars).<sup>26</sup> But market participants need many other categories of information as well, from a competitor's price, to a vendor's reputation, to the skills and work habits of a prospective employee. The market works best when everyone acts rationally on the best information. This leads economists working in a number of modes with a distaste for privacy insofar as it reduces information available to market participants.

The best known privacy skeptics write in the tradition of law and economics. Judge Richard Posner in particular argues across various writings that privacy is not the societal value most believe.<sup>27</sup> In a passage

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<sup>23</sup> Peter P. Swire, *Efficient Confidentiality for Privacy, Security, and Confidential Business Information*, 2003 BROOKINGS-WHARTON PAPERS ON FIN. SERVS. 273, 290 (2003).

<sup>24</sup> Kenneth C. Laudon, *Markets and Privacy*, COMMUNICATIONS OF THE ACM, Sept. 1996 (“In a perfect world characterized by perfect information ... shared by all, capital and labor are combined at their most socially efficient levels to produce the wealth of nations. In this most felicitous world of 19th-century economic thought, symmetry of information among market participants—capitalists, laborers, and consumers—is the lubricant of social and economic progress.”)

<sup>25</sup> *Id.*

<sup>26</sup> George A. Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 84 QUARTERLY J. OF ECON. (Aug. 1970), 488-500.

<sup>27</sup> *E.g.*, Richard A. Posner, *The Economics of Privacy*, AM. ECON. R. 71(2) 405-09 (1981); Richard A. Posner, *Privacy, Secrecy, and Reputation*, 28 BUFFALO L. REV. 1



that reads like a paraphrase of Aldus Huxley's *Brave New World*, Judge Posner refers to solitude as economically "selfish" because it only benefits the person experiencing it.<sup>28</sup> But more generally, he positions privacy as a means for market actors to take advantage of others by selecting hiding germane information. Thus, for instance, the convict uses privacy as a way to shield his history from a potential employer. For Judge Posner, the value of privacy, in the sense of "concealment of information about [oneself] that others might use to their advantage," must be weighed against the economic value of "obtaining the right amount of information in a free market system."<sup>29</sup>

Judge Posner is especially visible but hardly alone. Nearly every law and economics scholar to approach privacy has come away skeptical. In 1980, *The Journal of Legal Studies* published by the University of Chicago devoted an entire symposium issue to the law and economics of privacy with a variety of contributors.<sup>30</sup> Privacy did not fare well. "In grossly oversimplified terms," summarizes Richard Murphy, "the consensus of the law and economics literatures is this: more information is better, and restrictions on the flow of information in the name of privacy are generally not social wealth maximizing, because they inhibit decision making, increase transactions costs, and encourage fraud."<sup>31</sup>

Contemporary law and policy debates about privacy also reflect a concern over the economic impact of limits on consumer information flows under the rubric of innovation policy.<sup>32</sup> Privacy regulations could form a

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(1979); Richard A. Posner, *The Right to Privacy*, 12 GA. L. REV. 393 (1978).

<sup>28</sup> Compare Posner, *Privacy, Secrecy, and Reputation*, *supra* note 27, at 8 ("As a detail, it may be noted that if there is a taste for solitude as an end in itself it is a *selfish* emotion in a precise economic sense that can be assigned to the concept of selfishness. Solitary activity (or cessation of activity) benefits only the actor.") (emphasis in original) to ALDUS HUXLEY, *A BRAVE NEW WORLD* 182 (1946) ("I'm not surprised," said Bernard. "It's flatly against all their sleep-teaching. Remember, they've had at least a quarter of a million warnings against solitude.").

<sup>29</sup> Posner, *Privacy, Secrecy, and Reputation*, *supra* note 27, at 9. Judge Posner candidly refers to this activity as "prying." *Id.*

<sup>30</sup> Symposium, *The Law and Economics of Privacy*, 9 J. LEGAL STUD. 620 (1980). Contributors include Richard A. Posner, George J. Stigler, Jack Hirshleifer, Edmund W. Kitch, Anthony T. Kronman, Kenneth E. Scott, Gary S. Becker, and John P. Gould. *Id.*

<sup>31</sup> Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381 (1996).

<sup>32</sup> *E.g.*, Adam Thierer, *Privacy Law's Precautionary Principle Problem*, 66 ME. L. REV. 467, 468 (2014) (placing privacy "on a collision course with the general freedom to innovate that has thus far powered the Internet revolution"); Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 B.U. L. REV.

barrier to market entry or otherwise harm competition.<sup>33</sup> Firms will not be able to generate new, useful content or services without the largely unfettered ability to collect, process, and disseminate information. And while the position begins to weaken in light of consumer and regulatory concerns, references to the economic policy of innovation appear at the top of nearly every government report on privacy and technology I have ever come across.<sup>34</sup>

The views of economically minded law and policy scholars echo those of economists generally. In his essay *Markets and Privacy*, Kenneth Laudon assembles examples of skepticism toward privacy in economic literature spanning decades.<sup>35</sup> For many agency theorists, for instance, i.e., economists interested in the market for managerial labor, “privacy or any restriction on information flow by agents is a costly extravagance raising the costs of management.”<sup>36</sup> If you lack information, you may hire the wrong person, in which case you expend resources hiring the right one.

In the context of insurance markets, privacy can lead to adverse selection, whereby unhealthy people consume health insurance at greater volumes and force insurers to keep raising everyone’s premium.<sup>37</sup> Similarly, unmonitored consumers of car insurance have an incentive to drive more

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1, 14 (1994) (arguing for unrestricted access to genetic databases). *See also* Cohen, *supra* note 13, at 1919 (“In debates about information policy, innovation is increasingly positioned as a justification for withholding data protection, and for looking the other way when privacy breaches appear to violate existing promises to consumers and regulators.”).

<sup>33</sup> *E.g.*, Allen P. Grunes, *Another Look at Privacy*, 20 GEO. MASON L. REV. 1107, 1119 (2013).

<sup>34</sup> *See, e.g.*, FED. TRADE COMM’N, INTERNET OF THINGS: PRIVACY AND SECURITY IN A CONNECTED WORLD 139 (2015) (“[p]rotecting privacy and enabling innovation are not mutually exclusive and must consider principles of accountability and privacy by design”); FED. TRADE COMM’N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY 3 (2014) (“Data brokers provide the information they compile to clients, who can use it to benefit consumers . . . . [C]onsumers may benefit from increased and innovative product offerings fueled by increased competition from small businesses that are able to connect with consumers that they may not have otherwise been able to reach.”); EXEC. OFFICE OF THE PRESIDENT, BIG DATA: SEIZING OPPORTUNITIES AND PRESERVING VALUES 3 (2014) (“Unprecedented computational power and sophistication make possible unexpected discoveries, innovations, and advancements in our quality of life.”); PRESIDENT’S COUNCIL OF ADVISORS ON SCI. AND TECH., BIG DATA AND PRIVACY: A TECHNOLOGICAL PERSPECTIVE x (2014) (“The beneficial uses of near-ubiquitous data collection are large, and they fuel an increasingly important set of economic activities.”).

<sup>35</sup> Laudon, *supra* note 24.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

than they predicted in their application—a so-called moral hazard—leading again to raised rates for all drivers.<sup>38</sup> “Face it,” Laudon remarks, “Privacy is indeed about creating and maintaining asymmetries in the distribution of information.”<sup>39</sup>

These and other arguments lead economists interested in law and policy to counsel against any default toward privacy, if they mention the concept at all. Scholars in this tradition tend to conclude that the ability to hide is bad for market efficiency and hence, ultimately, for consumer. At a minimum, they believe virtually all regulation aimed at enforcing consumer privacy rights will backfire.

## II. RESPONSES FROM PRIVACY LAW

Economists are skeptical about privacy. Responding to this skepticism animates much of the legal scholarship at the intersection of privacy and markets. These responses can be loosely grouped into two categories, “insider” and “outsider.” The insider critique accepts the basic premise that efficiency is the proper lodestar for markets but argues that privacy can also promote greater efficiency in certain settings or, alternatively, that the market could yield privacy under the appropriate circumstances. The outsider critique rejects the market paradigm and observes that it is markets’ very appetite for information that compromises privacy in ways prosaic and profound.

### A. *The Insiders*

Insiders have no basic problem with markets or the market mechanism. Or, at any rate, they begin from an assumption that market efficiency is a valid goal. What they question is whether privacy is *always* inefficient, what I will call the “not always” response, or whether markets could be recalibrated to foster greater privacy. I discuss these approaches in turn.

#### 1. The “not always” response

Several responses to economic skepticism about privacy take the form of point out that privacy sometimes yields *greater* efficiency. In the privacy literature, Richard Murphy, Paul Schwartz, and Peter Swire, among others, pursue this approach.<sup>40</sup> “The economic argument is powerful, and disables

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See Murphy, *supra* note 31 (defending privacy as efficiency promoting in some

much of the loft rhetoric of privacy rights,” concedes Murphy. “But it does not imply that all limits on disclosure of personal information are inefficient.”<sup>41</sup> Sometimes the exogenous preference for privacy outweighs the benefits of disclosure, and disclosing information about people against their will can lead them to distort or withdraw information going forward, erasing the supposed gains to efficiency of lesser privacy.

For Schwartz, “a strong economic argument can be made in favor of privacy” in the context of health law.<sup>42</sup> Schwartz cites to the “positive economic role that data privacy plays in many circumstances,” but his arguments focus instead on the unintended consequences of adding information to a marketplace full of critical imperfections.<sup>43</sup> For example, employers are likely to make mistakes in discriminating against employees on the basis of genetic predispositions that are unlikely ever to materialize. Swire points to the role of trade secrets and confidentiality in promoting efficient transactions.<sup>44</sup>

A small handful of economists have reached similar conclusions about the role of privacy in promoting efficiency. In agency theory, work by economist Jacques Crémer, for instance, suggests that better monitoring removes the ability of the employer to refuse to consider employee excuses, which in turns reduces productivity and the efficiency of agent selection.<sup>45</sup> Benjamin Hermalin and Michael Katz observe that the protection of privacy can lead to ex ante efficiencies even if restrictions on information is inefficient ex post; in insurance markets, for instance, health privacy eliminates socially wasteful costs of testing each participant’s health.<sup>46</sup> And the observation that information is necessary to innovation can be met with the claim that consumers who are too nervous about privacy will not adopt new innovations.

In a magisterial literature review of the economics of privacy, which I cannot recommend enough, Alessandro Acquisti and colleagues review

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contexts); Paul M. Schwartz, *Privacy and the Economics of Personal Health Care Information*, 76 TEX. L. REV. 2 (1997) (same).

<sup>41</sup> Murphy, *supra* note 31.

<sup>42</sup> Schwartz, *supra* note 40.

<sup>43</sup> *Id.*

<sup>44</sup> Swire, *supra* note 23.

<sup>45</sup> Jacques Crémer, *Arms Length Relationships*, 110 QUARTERLY J. OF ECON. (May 1995), 275-95.

<sup>46</sup> Benjamin E. Hermalin & Michael L. Katz, *Privacy, property rights and efficiency: The economics of privacy as secrecy*, QUANTITATIVE MARKETING & ECON. 4(3), 209-239 (2006).

decades of economic analysis that they group into three “waves.”<sup>47</sup> Reviewing this work, the authors find that “it is not possible to conclude unambiguously whether privacy protection entails a net ‘positive’ or ‘negative’ change in purely economic terms: its impact is context specific.”<sup>48</sup>

Privacy can lead to economic inefficiency, but not always.<sup>49</sup> This insight highlights, I think, a limitation with the insider critique: the critique does not tell us much about the deeper relationship between privacy and markets. The insider critique is more caveat than criticism. It is an important caveat, of course, and should give the traditional economist pause. But even in its strongest form, the critique at most reveals privacy to be yet another lever of efficiency that can ratchet either way depending on where and how it is applied.

## 2. Markets for privacy

A variation of the insider critique concedes, again, that market participants need information but points out inefficiencies in its acquisition and use by firms. Laudon notably observes that firms tend to be overzealous in their collection of personal information and “wasteful and inefficient” in its use.<sup>50</sup> Firms thereby impose privacy externalities—in the Pigovian sense—on consumers and society as a whole.<sup>51</sup> Being an insider, Laudon looks to harness the power of the market to improve privacy. Laudon proposes that the law protect privacy with a property rule,<sup>52</sup> meaning that

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<sup>47</sup> Alessandro Acquisti et al., *The Economics of Privacy*, manuscript on file with author.

<sup>48</sup> *See also id.*, at 3 (“Ultimately the economic consequences of information sharing for all parties involved ... can be welfare enhancing or diminishing.”).

<sup>49</sup> A friend once gave me a trick to help manage my lack of knowledge about sports: No matter what anyone in a sports conversation says—for instance, that so-and-so team has bad defense or a particular catcher is a great hitter—just respond “not always.” This will lead the knowledgeable speaker to rack his own memory and, invariably, come up with an exception. “Oh right. There was that series against the White Sox in 1995 when he struck out every at bat.” You somehow get credit for this arcane knowledge and the conversation can move on.

<sup>50</sup> Laudon, *supra* note 24.

<sup>51</sup> *Id.* at 98. The reference is to economist Arthur Pigou. *See* ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (1920).

<sup>52</sup> *See* Laudon, *supra* note 24, at 99. As opposed to protecting privacy with a liability rule, whereby firms gain access to data but sometimes pay court-determined compensation, or protecting privacy with no rule at all. *See also* JON L. MILLS, *PRIVACY: THE LOST RIGHT*

firms cannot gain access to an individual's personal information unless the firm meets her price in a national information market.<sup>53</sup> This would force firms to internalize the costs of acquiring personal information and help ensure they only do so where efficient.

Others would police a property rule in personal information with code instead of law.<sup>54</sup> Years ago now computer scientists Joseph Reagle, Lorrie Faith Cranor, and collaborators developed a "platform for privacy preferences" whereby an Internet browser negotiates automatically with websites a user visits and blocks the collection of certain information if the website's stated privacy policies do not meet the consumer's preferences.<sup>55</sup> The idea was the protect consumers while nudging websites toward better practices.

A proposal from 2014 mixes approaches: popular technology critic Jaron Lanier sees us each receiving tiny "micropayments" whenever a company monetizes information about us.<sup>56</sup> There is also an interesting if inchoate argument that the market will deliver privacy without law or code simply because privacy is a selling point. Examples include a mobile phone provider following another's move toward encrypting traffic by default,<sup>57</sup> or a search company offering greater privacy as way to distinguish itself from the dominant player.<sup>58</sup>

While it is theoretically possible for these market approaches to work, they have yet to in practice. No national information market ever arose. Intermediary interests in collecting data from and about consumers are too entrenched.<sup>59</sup> Online firms are attached to current business models whereby

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205-22 (2008) (discussing theories of privacy as property); James B. Rule, *Toward Strong Privacy: Values, Markets, Mechanisms, and Institutions*, 54 U. TORONTO L.J. 183 (2004) (same).

<sup>53</sup> Laudon, *supra* note 24.

<sup>54</sup> E.g., LAWRENCE LESSIG, CODE 2.0 229 (2000) ("And it is my view that, with a technology like [platform for privacy preferences,] we could lower transaction costs enough to make a property rule work").

<sup>55</sup> Joseph Reagle and Lorrie Faith Cranor, The platform for privacy preferences, COMMUNICATIONS OF THE ACM, Feb. 1999. This approach was endorsed by no less a figure than Lawrence Lessig as a positive way in which code is law. Lessig, *supra* note 54, at 229.

<sup>56</sup> JARON LANIER, WHO OWNS THE FUTURE? 9, 226, 317 (2013).

<sup>57</sup> Craig Timber, *Newest Androids will join iPhones in offering default encryption, blocking police*, THE WASH. POST (Sep. 18, 2014).

<sup>58</sup> The Internet search engine Duck Duck Go bills itself as a privacy friendly competitor. See Duck Duck Go Privacy Policy, *online at* <https://duckduckgo.com/privacy>.

<sup>59</sup> Cranor's platform for privacy preferences did not gain traction in part because

consumers tacitly exchange privacy for content or service. Industry, courts, regulators, and consumers themselves seem to place too little a premium on privacy even as they extoll its value. If and when current trends reach a breaking point, protecting privacy with a property rule represents an intriguing option. But it is not an option with a very promising history.<sup>60</sup>

### B. *The Outsiders*

The insiders see privacy as the occasional friend of markets and markets as a potential tool for achieving privacy in some circumstances. Most privacy law scholars, however, are outsiders—displaying, if anything, a greater skepticism toward markets than economists evince toward privacy. For these many scholars, only sampled in the pages that follow, the market mechanism is itself the chief threat to privacy.

There are at least three categories of outsider critiques of markets. The first critique reframes the insight that markets need information as an argument that markets eat privacy. Markets are set up to extract data and thus market processes invariably lead to greater data promiscuity and hence less privacy, an instrumental or intrinsic good. The second critique argues that markets encourage us to think of privacy as a commodity. This is a problem either because consumers are bad at cost-benefits analysis around their data, or because privacy is not the sort of thing that should be traded in the first place. The third claims that markets or market thinking interferes with human subjectivity, in part because the market's emphasis on consumer surveillance restricts self-actualization.

#### 1. Markets eat privacy

When I say that markets “eat” privacy I mean to refer to the incentives markets create for personal information to change hands. These incentives affect firms, which relentlessly collect information as they compete with one another for consumer dollars.<sup>61</sup> They also affect consumers, who

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companies failed to make their privacy policies readable by a machine. Lorrie Faith Cranor, *P3P is dead, long live P3P!*, THIS THING (Dec. 3, 2012), *online at* <http://lorrie.cranor.org/blog/2012/12/03/p3p-is-dead-long-live-p3p/>.

<sup>60</sup> Jessica Litman puts the matter somewhat starkly: “One of the most facile and legalistic approaches to safeguarding privacy that has been offered to date is the notion that personal information is a species of property.” Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1288 (2000). Litman goes on to discuss some of the hurdles the approach has encountered. *Id.* at 1288 et seq.

<sup>61</sup> See Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995 (2014).

increasingly must part with their information in order to gain access to goods and services they desire or need.

Scott Peppet develops the argument, based on the general economic phenomenon of “unraveling,” that contemporary markets are set up to require consumers to divulge personal information or experience worse outcomes by default.<sup>62</sup> Thus, for instance, drivers today face increased pressure to permit their driving habits to be tracked so as to qualify for lower insurance premiums. Firms attempt to reframe the tactic as discounting rates in exchange for personal information, but of course they set the default rate to begin with. The upshot is that consumers who do not give up information pay more.<sup>63</sup> Peppet is an insider, perhaps, to the extent he leverages a phenomenon that comes from economic literature, but his concerns about the loss of privacy by unraveling do not concern market efficiency. They go the other instrumental values of privacy, which the market’s relentless demand for information erodes.

## 2. Privacy is not for sale

Markets also denigrate privacy by encouraging us to think of privacy as a commodity to be traded. In theory, you can make a market for anything.<sup>64</sup> Perhaps some people are fine with companies or the government knowing more about them, and they are happy to “pay” for content, security, or service with their privacy.<sup>65</sup> A considerable literature sees a problem with this privacy market because of how poor we are at managing our privacy;<sup>66</sup> we undervalue it, and we can be nudged by subtle framing or design into disclosing more information than may be good for us.<sup>67</sup> Recent work of

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<sup>62</sup> Peppet, *supra* note 9. The idea of unraveling is that market participants will assume the worse about sellers if they do not volunteer information about their products and services and chose to transact with sellers who are more transparent. Peppet applies this idea to consumers: firms will default to poor terms to consumers who are not willing to reveal why they deserve better ones. *Id.* at 1153.

<sup>63</sup> *Id.*

<sup>64</sup> *Cf.* MICHAEL J. SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS 1-4 (2012) (giving examples of strange or unfortunate things people are willing to trade).

<sup>65</sup> WESTIN, *supra* note 7, at 7.

<sup>66</sup> See Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1883-88 (2013). See also See Alessandro Acquisti et al., *Privacy and human behavior in the age of information*, SCIENCE, Jan. 2015 (reviewing literature around context-dependency of consumer privacy preferences).

<sup>67</sup> Calo, *supra* note 61.



social psychologists is highly instructive in this regard.<sup>68</sup>

But other privacy scholars question whether privacy should be tradable at all. Anita Allen holds a version of this view. She sees privacy as indispensable to society to the degree that coercing a measure of privacy is justified on various instrumental and normative grounds.<sup>69</sup> Allen does not doubt that some consumers would willingly and even rationally trade their privacy for some other resource. Rather, she casts doubt on the idea that society should support mechanisms by which to do so.<sup>70</sup>

### 3. Markets interfere with self-development

Still others—including this author—worry that firms can and do abuse the power they hold over consumers by virtue of know so much about them. Thus, for instance, firms have an incentive to engage in individualized “market manipulation” whereby each consumer is targeted on the basis of his or her specific set of biases or approach at a time when he or she is most vulnerable.<sup>71</sup> Alternatively, firms will use what they know to sort consumers into high priority targets to aggressively cultivate, or lower priority targets to discriminate against or ignore.<sup>72</sup>

Some of the effects of the market are subtler. *The Right to Privacy*, the 1890 article that launched a thousand privacy ships, famously worries about “recent inventions” such as instantaneous photography that made it possible to fix images of people without their cooperation or consent.<sup>73</sup> It is therefore often cast as a work about technology. But equally important to the authors were the then-new “business methods” whereby “gossip... has become a

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<sup>68</sup> E.g., Laura Brandimarte et al., *Misplaced Confidences: Privacy and the Control Paradox*, 4 SOC. PSYCHOLOGY & PERSONALITY SCI. 340 (2013); Leslie K. John et al., *Strangers on a Plane: Context-Dependent Willingness to Divulge Sensitive Information*, 37 J. CONSUMER. RES. 858 (2011);

<sup>69</sup> Allen, *supra* note 10.

<sup>70</sup> *Id.* See also Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 988 (1964) (“Use of a photograph for trade purposes turns a man into a commodity and makes him serve the economic needs and interests of others.”).

<sup>71</sup> Calo, *supra* note 61.

<sup>72</sup> JOSEPH TUROW, *THE DAILY YOU: HOW THE NEW ADVERTISING INDUSTRY IS DEFINING YOUR IDENTITY* 88-110 (2011) (discussing how marketers sort consumers into “wastes” or “targets.”).

<sup>73</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

trade.”<sup>74</sup> A market for gossip does not merely distress those who are its targets; according to the authors, such a market lowers “social standards and morality.”<sup>75</sup> Data promiscuity of this ultimately “belittles and perverts.”<sup>76</sup>

The work of Neil Richards explores how for-profit surveillance of intellectual processes such as reading stifles the human imagination. Richards acknowledges the utility of a “marketplace of ideas” wherein truth (or truths) compete with fiction or bias.<sup>77</sup> But he sees both privacy and First Amendment theory as impoverished to the extent this theory cannot “speak to the process by which those competing ideas of truth are generated in the first place.”<sup>78</sup> In this way, the market’s figurative and literal demand for data, and indeed, government and private surveillance of all kinds, threatens the developing life of the mind.<sup>79</sup> Paul Schwartz analyzes the impact of data promiscuity more specifically on civic participation, concluding that, without privacy, people could not develop the political self.<sup>80</sup>

Recent work by Julie Cohen goes perhaps the furthest to interrogate the role of market forces and market thinking in undermining human subjectivity. Cohen acknowledges the preceding objections but sees them as limited in a sense—scholarship in what Cohen calls “the technocratic market-calibration mode.”<sup>81</sup> The accounts assume a fully formed, autonomous self that is harmfully diminished or discriminated against by stronger market participants.<sup>82</sup> To these objections Cohen adds the “economic justice objection” and the “capabilities objection” that emanate from somewhere other than the liberal tradition of the autonomous

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<sup>74</sup> *Id.* at 195.

<sup>75</sup> *Id.* at 196.

<sup>76</sup> *Id.*

<sup>77</sup> Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 396 (2008). The “marketplace of ideas” is of course a reference to Justice Oliver Wendell Holmes Jr.’s famous dissent in *Abrams v. United States*, 250 U.S. 616 (1919), where the Justice referred to the “free trade in ideas,” *id.* at 630.

<sup>78</sup> *Id.* See also NEIL M. RICHARDS, *INTELLECTUAL PRIVACY* (2014).

<sup>79</sup> See also Neil M. Richards, *The Perils of Social Reading*, 101 GEO. L.J. 689, 701 (2013) (“In our data-driven internet economy, there is economic value in information, which provides incentives to collect, amass, and analyze ever-larger quantities of ever-more granular data.”); NEIL M. RICHARDS, *INTELLECTUAL PRIVACY* (2014).

<sup>80</sup> Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAN. L. REV. 1609 (1999).

<sup>81</sup> Julie E. Cohen, *Irrational Privacy?*, 10 J. TELECOMM. & HIGH TECH. L. 241, 245 (2012).

<sup>82</sup> *Id.* at 246.

subject.<sup>83</sup> The economic justice objection, which I see as having close affinities with Critical Legal Studies, holds that the real object of markets is to aggregate resources to the wealthy.<sup>84</sup> Whatever choices market participants make, the system flows toward inequality.

The capabilities objection “has to do with breathing room for evolving subjectivity.”<sup>85</sup> The objection posits that “all human beings, whatever their resources, require a baseline degree of freedom from categorization in order to flourish as human beings.”<sup>86</sup> Cohen draws a direct link between the institutional investment in categorization and the evolution of capitalism. She invokes the concept of “information capitalism” to describe the practices of firms that “rely on the flows of information to construct pricing and risk management templates that maximize their ability to ... extract surplus from all consumers,” and notes the production of “surveillant assemblage[s]” to mold information flows into “circuits that serve the interests of powerful entities, both public and private.”<sup>87</sup>

In her 2012 tour-de-force *Configuring the Networked Self*, Cohen rejects the “‘science’ of markets” as generally inadequate to the task of explaining culture.<sup>88</sup> She criticizes the role of market thinking in cultivating a view of the subject as a fully formed, autonomous individual who approaches the world with a set of exogenous preferences and beliefs.<sup>89</sup> She catalogues the ways markets and other forces close life’s little gaps, stamping out that “interstitial complexity that leaves room for the play of everyday practice.”<sup>90</sup> To Cohen, the purpose of privacy is to protect subjects from constraints imposed by both public and private power so that people have the capacity to discover who they are and to influence the culture in which they are situated. I will come back to the capabilities objection below; for now, suffice it to say the objection is not friendly toward markets.

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<sup>83</sup> *Id.* For an overview of Critical Legal Studies, see BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT (2012).

<sup>84</sup> Cohen, *supra* note 81, at 246.

<sup>85</sup> *Id.*

<sup>86</sup> Cohen, What Privacy is For, *supra* note 7, at 1915-16.

<sup>87</sup> *Id.*

<sup>88</sup> JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 5 (2012).

<sup>89</sup> *See id.* at 9, 32.

<sup>90</sup> *Id.* at 224.

## III. PRIVACY AND MARKETS AS INTERDEPENDENT

To sum up the argument so far: economists and adherents tend to be skeptical of privacy because, on the prevailing view, privacy hides information from the market that the market needs to function efficiently. Much other scholarship at the intersection of privacy and markets can be characterized as a response of some kind to economic skepticism. The insiders accept market efficiency as a guidance mechanism but offer that, under certain conditions, privacy can correct inefficiencies. The outsiders reject or criticize markets on various grounds.

This Part develops a novel account of privacy and markets that positions the two concepts as fundamentally sympathetic. To the privacy skeptics, I argue that markets assume and rely upon privacy. Although the market mechanism may continue to operate in a world without privacy (or with much less of it), the market itself would be unrecognizable. In this way, privacy plays a similarly contingent but fundamental role to the market mechanism as, for instance, money.

To the market skeptics, I argue that privacy scholarship has failed to engage seriously enough with markets as a positive force in its own right. I begin with the observation that privacy is best understood as an instrument of human flourishing, i.e., that a central role of privacy is provide the space and distance subjects need to figure out who they are.<sup>91</sup> But the developing self needs more than a degree of remove. People also need *access* to physical and other resources, which markets are seemingly well positioned to provide. More fundamentally, the alternatives ways societies could distribute resources seem vastly more privacy invasive than markets, at least in theory.

The resulting narrative, while perhaps not a “love story” for the ages, positions privacy and markets as interdependent and sympathetic. This new framework permits us to ask new questions, justify and predict institutional arrangements, and argue normatively for a great separation between markets and other spheres of life—the subject of this article’s next and final Part.

*A. Markets Without Privacy*

In Part II, I catalogued the responses that law and economics has occasioned among students of privacy. One response involved the claim that there exist circumstances in which a market with too little privacy is less efficient than one with more. To these insiders, law and economics could reply in a way similar to how rational choice theorists have responded

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<sup>91</sup> See *supra* notes 73-90 and accompanying text.

to behavior economics who claim that people are not always rational.<sup>92</sup> The privacy skeptics could concede that, under very specific circumstances, privacy can be more efficient. But the *gist* of their claim—that privacy is bad for markets *in general*—remains in almost full force.

My aim here is to make a deeper claim that goes to the heart of the skepticism rather than its margins. I do not argue that privacy simply makes markets more efficient or that markets eat privacy. Rather, the arguments that follow go to the feasibility of the market mechanism itself in a world without privacy. To paraphrase Charles Fried, my thesis is not that privacy will help markets work better, but that the market mechanism quietly assumes and relies upon privacy to work in the first place.<sup>93</sup>

This is true in several ways. First, the market mechanism relies upon privacy to screen out extraneous but distracting information. Second, no less than in the social sphere, privacy furnishes the means by which long term business partners can develop intimacy and guard against the ever present specter of defection. And third, privacy helps save the market from its own ironic tendency to spiral into information asymmetry.

### 1. The market veil

Imagine a farmers' market somewhere in the United States. Alice is buying vegetables and Bob is selling them. Alice goes from booth to booth trying to find vegetables that meet her standards of quality but also her budget. The vegetables are all laid out next to their prices and descriptions. Alice decides that Bob's vegetables strike the right balance. She asks Bob a few questions about his farm; Bob makes a remark about the weather. Then Alice pays Bob's asking price and takes the vegetables home.

It is easy to see the market mechanism at work in this simple example. Bob and others offer their goods openly to Alice and others, who decide based on quality and price what, if anything, to buy. In other words, they form a market.

The role of privacy is not so obvious. In order to see privacy's role, we need to remove a number of constraints that promote data chastity over data promiscuity. Each of these constraints is important; collectively, they yield the privacy we are to enjoy in any given situation. These are: (1) contextual

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<sup>92</sup> See, e.g., Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1554 (1997-98) ("the fact that people are not always rational, even that some people are irrational most of all of the time, is not in itself a challenge to rational-choice economics").

<sup>93</sup> Fried, *supra* note 4, at 477 ("My thesis that privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship, and trust.").

norms against collecting or sharing information;<sup>94</sup> (2) laws that penalize intrusions;<sup>95</sup> and (3) architectural or structural features of the physical or digital world that pose barriers to discovering personal information.<sup>96</sup> Let us take those constraints away and look at the farmers market again.

Imagine everyone in our farmers market were wearing special glasses that recognize a buyer or seller's face and create an bubble above their head containing more or less everything about them that appears in a database. Some of this information would be quite useful to market participants.<sup>97</sup> Thus, Alice could more easily comparison shop and could verify that Bob has a license to grow and sell food. But in a world without privacy, Alice would find out much more than that. She would see, for instance, that Bob voted for a politician Alice's hates, that he doubts we landed on the moon, or that on the weekend he enters (and wins!) erotic cake competitions.

Alice does not need to know these things about Bob to transact with him, or to accomplish her goal of the best vegetables at the lowest price. And yet, the information is likely to affect her decision to purchase vegetables from Bob. What Bob finds out about Alice could in turn affect his willingness to sell to her. A defining, or at any rate, central feature of the market mechanism is that it matches participants based on quality and price.<sup>98</sup> Were all participants transparent to one another in all aspects of life—in other words, were there no normative, legal, or architectural constraints in place to promote privacy—information extraneous to the market could distort it. Alice would not necessarily stop looking when she found the farmer with the best goods at the right price; she would look for who in the farmers market aligned enough with her worldview.

I'll pause for an obvious objection. Consumers can and do make decisions based on ideology. Some will avoid diamonds unless they are

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<sup>94</sup> See HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* (2009).

<sup>95</sup> There are many dozens of federal and state statutes and regulations that protect privacy in some way, as well as the common law torts famously codified by William Prosser. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

<sup>96</sup> Lawrence Lessig identifies four “modalities of regulation,” that include laws, norms, markets, and architecture. Lawrence Lessig, *The New Chicago School*, 27 J. LEG. STUD. 661 (1998). An architectural or “structural” protection refers to physical or other barriers that make it harder to gather, process, or disseminate information. See Harry Surden, *Structural Rights in Privacy*, 60 SMU L. REV. 1605 (2007).

<sup>97</sup> See Scott R. Peppet, *Freedom of Contract in an Augmented Reality: The Case of Consumer Contracts*, 59 UCLA L. REV. 676 (2012) (noting how “augmented reality” can help consumers compare prices and terms as well as assess the reputation of vendors).

<sup>98</sup> See *supra* note 20 and accompanying text (defining market mechanism).

“conflict free,”<sup>99</sup> for instance, or only buy coffee that is “fair trade.”<sup>100</sup> Some will even avoid patronizing particular businesses due to their political or religious inclinations, or, conversely refuse to serve certain populations due to bias (more on discrimination in Part IV). In some contexts, such as the decision to hire someone we will then work alongside, we would want to know more than attributes such as productivity. Even the “simple” example of a farmers’ market embeds a set of social or political commitments.<sup>101</sup> In cities, at least, shoppers and vendors at a farmers’ market have made a choice to frequent that market over, say, a grocery store. There is the relative quality of farmers’ markets, perhaps, but that is probably not the entire story.

The market tolerates a measure of this behavior, treating ideological commitments as exogenous preferences like the sweetness of an apple. Writ large, however, the unfettered personalization of transactions will balkanize markets, splintering each market into smaller markets of the like-minded. Confronted with highly salient but market-irrelevant information, many consumers may skew purchases toward the people they can stomach dealing with given what they know about them. The marketplace would shift from a place where we set aside value judgments for a bit in the common pursuit of obtaining goods and services, to an ideological and socially fraught environment where we quality and price take a second stage.

Writ very large—that is, following the insight to its logical conclusion—the market becomes unrecognizable. The challenge would be to find a pair of one real farmer and one real shopper in that market that, knowing everything about the other, would still be comfortable transacting about anything. Paul Ohm argues that every one of us has a “database of ruin”—a piece of information somewhere that, were it connected to us and broadly circulated, the results would be devastating.<sup>102</sup> If so, *every deal* has a database of ruin as well, in the sense that you would not buy vegetables or

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<sup>99</sup> See, e.g., Le Billon, P. (2006). *Fatal transactions: Conflict diamonds and the (anti) terrorist consumer*. ANTIPODE, 38(4), 778-801.

<sup>100</sup> See, e.g., De Pelsmacker, P., Driesen, L., & Rayp, G. (2005). *Do consumers care about ethics? Willingness to pay for fair-trade coffee*. J. OF CONS. AFFAIRS, 39(2), 363-385.

<sup>101</sup> I owe this observation to Elizabeth Porter.

<sup>102</sup> Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1748 (2010) (“Almost every person in the developed world can be linked to at least one fact in a computer database that an adversary could use for blackmail, discrimination, harassment, or financial or identity theft. I mean more than mere embarrassment or inconvenience....”).

anything else from a person if you knew this one particular thing about them.

Though invisible itself, the primary force that stands in the way of a market distorted and balkanized by extraneous information is privacy.<sup>103</sup> In a way, this is not surprising. Markets are made of goods and money but also of people.

Anthropologist Robert Murphy, in a 1964 paper, discusses the societal role of “distance techniques,” generally—that is, the set of practices individuals invoke to maintain adequate social distance and hence, the social order.<sup>104</sup> He notes that “[w]here knowledge of the other is minimal, the actor need know only that he is dealing with the butcher, the baker, or some *other social thing*.”<sup>105</sup> But where “the sphere of knowledge increases, the defenses about certain residual private spheres must be correspondingly strengthened.”<sup>106</sup>

Murphy uses the example of the veil worn by men of the Taureg people, which, according to Murphy, helps the Taureg occupy multiple roles in society (e.g., kin and judge) simultaneously without conflict.<sup>107</sup> Contemporary American society certainly has means of generating social distance. Think, for instance, of the Catholic confessional that literally screens the priest from the penitent. Or think of professional norms in the workplace.<sup>108</sup> People discuss politics around the water cooler up to a point. But for myriad roles—managers, professors, students, nurses—norms against over-disclosure and other safeguards operate to promote focus on institutional tasks.

My argument here is that the market mechanism itself can be seen as a

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<sup>103</sup> We can and do use other techniques as well—for instance, we have agents who buy and sell on our behalf. Examining all the myriad ways we maintain distance in the market setting is beyond the scope of this article. Dennis Hirsch made this point.

<sup>104</sup> Robert F. Murphy, *Social Distance and the Veil*, AMER. ANTHROPOLOGIST 66:6(1) (Dec. 1964), 1257-74, at 1272. Privacy scholars cite Murphy from time to time but seldom for this proposition. E.g., Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1212 (1998) (citing Murphy for the proposition that privacy is not culturally contingent); Victoria Schwartz, *Disclosing Corporate Disclosure Policies*, 40 FLA. ST. U. L. REV. 487, 498 n.36 (2013) (same). Schwartz recognizes in passing that privacy is “essential to the maintenance of both social relationships and the sense of self.” *Id.*

<sup>105</sup> Murphy, *supra* note 104, at 1259.

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

<sup>107</sup> *Id.* at 1269-71.

<sup>108</sup> Cf. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 252-55 (1959) (observing that people have different roles in society that are sometimes at tension).



distance technique—a veil that permits us to focus on the exchange of goods and services at a price, though we are simultaneously real people living in a complex world. Without it, market participants would constantly confront that familiarity that famously breeds contempt. We see the market veil in norms against asking or offering personal information in a market context and, as discussed in detail below, laws that separate the market decisions from political affiliations. Or, rather, we do not see, but it is still very much there.

## 2. Economic intimacy

The relatively simple example of the farmers' market exemplifies an interaction between two parties who have no deep relationship, what the contract theorist Ian Macneil would call *discrete transactions*.<sup>109</sup> Many market interactions take place between repeat players who develop relationships over time—so-called *relational transactions*.<sup>110</sup> Here the impulse may be that privacy is less important because the parties get to know each other and, in the process, naturally discover market irrelevant information such as where a business partner grew up or how she takes her coffee. Not so. The mechanism underpinning relational transactions also assumes and relies upon privacy, if for different reasons: Privacy is necessary to develop the economic intimacy between parties to relational transactions that permitted them to become more deeply involved.

Imagine two small business owners sitting across a table for the first time. Acme needs a custom-made part for a unique new product. Smith Manufacturing is in a position to create the part but not without significant up front investment. Each have information that, were it known to the other, would enhance the other's bargaining position. For instance, knowing the exact cost of starting a new manufacturing process would put Acme in a better position to evaluate business Smith's initial offer. Knowing whether Acme had any competitors would put Smith in a better negotiating posture. Each business takes on a measure of risk: either business might defect by failing to renew a contract or breaching if a better deal comes along.<sup>111</sup> But

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<sup>109</sup> Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CALIF. LAW REV. 691 (1974). I owe this reference to Woodrow Hartzog.

<sup>110</sup> *Id.*

<sup>111</sup> So-called "efficient breach" refers to limiting recovery for a breach of a contract to expectation damages, i.e., the value not received, as opposed to specific performance, disgorgement, or punitive damages. For a discussion, Robert Cooter & Melvin Aron Eisenberg, *Damages for Breach of Contract*, 73 CALIF. L. REV. 1432 (1985). Of course, the non-breaching business still incurs considerable costs, including litigation (if fees are not paid by the defendant) and especially the costs of find another buyer or seller.

if all goes well, Acme and Smith may renew their contracts and form new ones.

In world without privacy, where businesses Acme and Smith are completely transparent to one another, there would be certain advantages with respect to market efficiency. Neither business would be able to hide any information in order to take advantage of the other. They would know how to set prices. Though Acme and Smith might not transact in the first place if too much extraneous information interferes, assuming they do, perhaps privacy only gets in the way of the smooth and proper function of the market.

Again, the picture is not so straightforward when it comes to real people entering into actual relationships. Charles Fried famously argues that privacy is a necessary condition to intimacy.<sup>112</sup> Fried starts with the well-worn idea that privacy represents the control we have over information about ourselves.<sup>113</sup> We build interpersonal intimacy through the gradual relinquishment of that information with select people and not others. In Fried's words:

*To be friends or lovers persons must be intimate to some degree with each other. But intimacy is the sharing of information about one's actions, beliefs, or emotions which one does not share with all, and which has the right not share with anyone. By conferring this right, privacy creates the moral capital which we spend in friendship and love.*<sup>114</sup>

If true to begin with, Fried's insights should also apply in the market: business partners such as our Acme and Smith must develop trust like everyone else. Note that I mean more than the observation, made and well-defended elsewhere, that mechanisms such as confidentiality lead to greater efficiency in some circumstances.<sup>115</sup> And of course I understand that many business transactions occur impersonally and at scale. My claim is that when people deal with one another in a business context, they are still just people, and they still require a mechanism by which to develop trust.<sup>116</sup>

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<sup>112</sup> Fried, *supra* note 4. See also Robert S. Gerstein, *Intimacy and Privacy*, ETHICS 89:1, 76-81 (1978) (discussing the role of privacy in physical intimacy).

<sup>113</sup> Fried, *supra* note 4, at 482.

<sup>114</sup> *Id.*

<sup>115</sup> Cf. Neil M. Richards and Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L. REV. 123 (2007). For the case that confidentiality increases efficiency in some contexts, see Swire, *supra* note 23.

<sup>116</sup> See also Neil M. Richards and Woodrow Hartzog, *A Theory of Privacy and Trust*.

The currency of economic intimacy may, of course, be different than that of platonic or romantic intimacy. The information firms “do not share with all” may relate to their business plans, capacity to pay, trade secrets, or intellectual property. Under U.S. law, even publicly traded companies, which have to make certain disclosures to investors and regulators, enjoy a set of rights not to share information.<sup>117</sup> But the mechanism is analogous. When prospective businesses come together, it stands to reason that they will play their cards close to the vest so as to secure the best terms.<sup>118</sup> Over time, as ties between them thicken, each party will disclose more and more about their hopes and capacities. Along the way, the partners will also get to know each other as people as well. This process collectively fosters the sort of trust needed for long-term relational transactions with high stakes.<sup>119</sup>

Our skeptical economist has a response here, namely, that privacy is exactly what allows bad actors to get away with defection or other misbehavior firms worry about.<sup>120</sup> With nowhere to hide, market participants would have nothing to hide, because they would not be able to get away with mistreating others. Acme cannot hide the fact that its owner is quietly talking to another manufacture. But this argument is only superficially attractive. Market participants can always pretend to be fair in their dealings until the payoff is large enough. In a world without privacy, market participants are like the “animals and machines” that, as Fried observes, require constant monitoring to ensure compliance.<sup>121</sup> What we want in a business partner is not just someone who happens to have a clean record, but someone we can trust.<sup>122</sup> Privacy makes that trust possible to generate.

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<sup>117</sup> See generally Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MIN. L. REV. 27 (2014). See also Posner, *The Right to Privacy*, *supra* note 27, at 404 (arguing that “the law should in general accord private business information greater protection than it accords personal information”).

<sup>118</sup> I am aware I am making an empirical, if common sense, claim here; my hope is that I and others will be able to test this and other assertions empirically in future work. See *infra* at Conclusion.

<sup>119</sup> More than this, Daniel Markovitz’s theory of contract as collaboration emphasizes the role of contract formation generally in the installation of community moral and political values. See Markovits, *supra* note 5.

<sup>120</sup> See *supra*, notes 27 to 40 and accompanying text.

<sup>121</sup> Fried, *supra* note 4.

<sup>122</sup> [cite]

### 3. The asymmetry spiral

Economists meticulously study information asymmetry and its effect on markets. The classic work *A Market for Lemons*, which I mention above, deals with an asymmetry between what buyers and sellers know about cars and its effect on the market mechanism.<sup>123</sup> Some work suggests that otherwise efficient transactions may not occur at all in the face of too much information asymmetry.<sup>124</sup> The basic idea is straightforward enough: if you suspect the party with whom you are transacting has much more information than you about your position or the market, you may elect to transact with someone with less of an information advantage.<sup>125</sup> But even at a basic level, consumers without adequate information cannot protect themselves and police the market.<sup>126</sup>

The usual remedy for information asymmetry is to give the less sophisticated party more information—for instance, by requiring firms to disclose information to potential consumers,<sup>127</sup> or otherwise by making information available. A growing body of literature suggests this approach does not work.<sup>128</sup> The problem is not just that individuals or smaller firms lack information but that they lack the ability of larger firms to process and contextualize that information. Consumers do not even know the extent of the asymmetry.

Thus, in practice, today more information means *more information asymmetry*. Consider, by way of example, Vermont's efforts to nudge consumers toward generic drugs by forcing doctors to publish their prescription history on an anonymized basis.<sup>129</sup> Maybe some consumers select doctors on the basis of their preference for less expensive versions of drugs. But pharmaceutical companies definitely took notice—they used the

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<sup>123</sup> Akerlof, *supra* note 26.

<sup>124</sup> See, e.g., Hermalin and Katz, *supra* note \_\_, at \_\_ (citing *The Market for Lemons* for the proposition that “privacy can lead to informational asymmetries that destroy markets and prevent efficient exchange”).

<sup>125</sup> The Federal Communications Commission makes a related claim in recent proceedings. In explaining why it will apply privacy rules to Internet service providers, the FCC mentions that people who believe their privacy will not be respected will not adopt or upgrade their service.

<sup>126</sup> See generally Calo, *supra* note 6.

<sup>127</sup> *Id.* See also Ben-Shahar and Schneider, *supra* note 6.

<sup>128</sup> Alessandro Acquisti et al., *supra* note 66 (reviewing literature around context-dependency of consumer privacy preferences); Solove, *supra* note 66, at 1883-88 (same).

<sup>129</sup> This effort is the subject of a Supreme Court case, *Sorrell v. IMS Health*, 564 U.S. \_\_\_, 131 S.Ct. 2653 (2011), discussed *infra* in Part IV.

information to “detail” physicians with the consequence of more successful marketing of proprietary drugs.<sup>130</sup> Privacy, which can check data promiscuity and hence information asymmetry, clearly has a role to play.

This last argument has not gone unremarked. In previous work, I built out a model of “digital market manipulation,” referring to the prospect that firms would use what they know about consumers to disadvantage them.<sup>131</sup> For example, a company might figure out how to market to people when they are tired or vulnerable, or to change prices in order to charge exactly the consumer’s reservation price (i.e., the highest price they are willing to pay), a practice known as dynamic price discrimination. I speculate that regulators—who have mostly looked the other way at firm exploitation of consumer cognitive bias, such as placing sugary cereals at eye level for a child or pricing everything \$9.99—will be forced to act when this exploitation is based on individualized information about each consumer.<sup>132</sup>

Mathematician Andrew Odlyzko takes the line of thought much further, arguing that capitalism cannot sustain its current information intensity.<sup>133</sup> He notes that the rise of “confusology,” i.e., purposefully introducing uncertainty and confusion into consumer transactions, and refers to the “Tom Sawyer economy” wherein firms pawn off labor and other costs onto consumers under the guise creativity and sharing. He also draws on studies showing how consumers react, often very poorly, to the dynamic price discrimination I describe above.

For Odlyzko, public perception could reach a point of no return, such that we may abandon capitalism altogether, or at least witness a sea change in its configuration. He analogizes to the distortions wrought by railroads in the 19<sup>th</sup> Century: “A large industry, sprouting from a seed sown by capitalism, posed a threat to the functioning and the moral legitimacy of that system. Society reacted by imposing limits on it, and thereby preserved capitalism.” Odlyzko wonders: “Will similar measures be taken to cope with the threats posed by the privacy-eroding trends?”<sup>134</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> “Market manipulation,” a term coined by Jon Hanson and Doug Kysar in 1999, refers to the firm leveraging what it knows of consumer bias in order to extract rent from the consumer. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 747 (1999). “Digital market manipulation” refers to the practice, made possibly by data intensive, mediated environments, of alternating consumer interactions to make each consumer vulnerable to his or her individual biases. Calo, *supra* note 61.

<sup>132</sup> *Id.*

<sup>133</sup> Andrew Odlyzko, *The end of privacy and the seeds of capitalism’s destruction* (Jun. 2, 2014), manuscript on file with author.

<sup>134</sup> Danielle Keats Citron makes a related point in her important 2007 work. She

In short, the market mechanism assumes privacy in a few, fundamental ways. As in other social contexts, privacy hides salient but irrelevant information so that economic participants can focus on market essentials such as price, quantity, and quality. Every deal, no less than every person, has a database of ruin. Privacy also creates the conditions for market intimacy that underpin and permit relational transactions between market participants over time. Finally, assuming the market mechanism is worth preserving, it is worth exploring how privacy interacts with information asymmetry that can be fatal in excess.

### *B. Privacy Without Markets*

The preceding section lays out several key ways in which privacy, far from undermining markets, supports the market mechanism itself. In a world without privacy, markets would look and feel very different, and lose many of the affordances and benefits we see today. None of this is to deny that contemporary market forces can be pernicious to privacy and other values, only that markets assume and rely upon privacy even as they sometimes undermine it. If anything, the role of privacy in markets suggests a role for law, explored in greater depth in the next Part, in protecting the market essentially from itself.

It may be tempting to conclude that this article is not a love story at all but a story of misadventures in symbiosis. Markets are parasitic upon privacy, which gains nothing in return. The outside critique, which bemoans the impact of contemporary market forces on privacy and calls for intervention, implicitly paints such a picture. And yet, the notion of a parasitic market misses much. This position fails to acknowledge, let alone account for, the role that markets play in safeguarding privacy or promoting privacy's deepest goals.

I do not mean safeguarding in the sense of delivering greater privacy through competition or information markets, as Laudon and others argue.<sup>135</sup> Again, I point to something more fundamental. I see at least two ways that privacy assumes and relies upon markets to fulfill its important role in society. First, markets help privacy accomplish its deeper goal of supporting human flourishing by helping to meet basic needs and connecting people to

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remarks upon the unsustainability of holding so much sensitive personal information with so little apparent emphasis on security. These “cyber-reservoirs of danger” resemble the dangerous practices and conditions created during the Industrial Revolution such as storing water for mills, which helped provoke the evolution of tort law toward strict liability. Danielle Keats Citron, *Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age*, 80 S. CALIF. L. REV. 241 (2007).

<sup>135</sup> See *supra*.

the material and cultural resources they require to self-determine. Second, and more basically, markets remain the most plausible mechanism by which to distribute resources that does not necessarily depend on highly detailed information about individuals.

### 1. The cooperative market

The deepest accounts of the purposes of privacy—what privacy is “for”<sup>136</sup>—seem to involve human flourishing. Whether the goal is democratic participation,<sup>137</sup> self-actualization,<sup>138</sup> moral autonomy,<sup>139</sup> or something else, the protections privacy affords are, I agree, crucial. But if privacy is a *necessary* condition for human flourishing, it does not follow that it is a *sufficient* condition. A person rich in privacy but poor in all else is unlikely to flourish. This is true for several reasons. People can have few thoughts of flourishing or even democratic participation if they chronically lack for basic necessities. And, in order to self-actualize, a person must not only be protected from culture in certain ways, she must also have a stable means by which to access and influence that culture.

Though very far from ideal, the market mechanism seems like the leading candidate in Western democracies to meet these requirements. It is important to note that markets possess not only a *competitive* function that pits people and groups against each other, but what Jules Coleman calls a *cooperative* function.<sup>140</sup> Properly calibrated, markets help people help one another, a proposition too little remarked in literature. Accordingly, and assuming the end game is truly flourishing of some kind, privacy scholarship should arguably devote as much energy to engineering better markets as it does to critiquing them.

The idea that flourishing requires that basic needs be met probably strikes the contemporary reader as obvious and trivial, but the notion has a long and famous lineage. An interesting building block is Abraham Maslow’s hierarchy of needs.<sup>141</sup> Maslow observes that a person who lacks physiological necessities such as shelter or food will concentrate all of her

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<sup>136</sup> The reference is to *What Privacy is For*, Cohen, *supra* note 7.

<sup>137</sup> *E.g.*, Schwartz, *supra* note 80.

<sup>138</sup> *E.g.*, Gavison, *supra* note 16.

<sup>139</sup> *E.g.*, Cohen, *supra* note 7.

<sup>140</sup> Jules Coleman, *Competition and Cooperation*, 98 *ETHICS* 76 (1987).

<sup>141</sup> A. H. Maslow, *A Theory of Human Motivation*, *PSYCH. R.* 50 (1943), 370-96. *A Theory of Human Motivation* is a classic of psychology, with over twelve thousand citations.

energy on procuring them. Only when these basics are met will she turn her attention to higher order pursuits—safety, love, and esteem, in that order.<sup>142</sup> Self-actualization—which Maslow defines as the “desire to become more and more what one is”—sits at the very top of the pyramid, influencing human affairs only where the lower needs have been met.<sup>143</sup> Says Maslow of the person who lacks food:

*Freedom, love, community feeling, respect, philosophy, may all be waved aside as fripperies which are useless since they fail to feed the stomach. Such a man may be fairly said to live by bread alone.*<sup>144</sup>

On Maslow’s sweeping account, society and culture constitute “an adaptive tool, one of whose main functions is to make the physiological emergencies come less and less often.”<sup>145</sup> The freedoms we experience—to speak, to act, to seek information, to defend ourselves—are in actuality preconditions to satisfying the basic needs. As a consequence, some societies react to actions or policies that compromise these freedoms with a “threat or emergency response” usually reserved for deprivation of psychological needs.<sup>146</sup>

Maslow’s is avowedly a theory of human *motivation*, but it has obvious affinities to flourishing. And the notion that people need the basics to flourish is an old one indeed. In his Eudaimon ethics, Aristotle also observes that virtue is difficult for those who lack certain baseline traits and resources because, he argues, such people will not have access to opportunities to flourish.<sup>147</sup> These accounts take many twists and turns beyond the scope of this article. And likely few would commit to every assumption held or conclusion advanced by Maslow, Aristotle, or other

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<sup>142</sup> *Id.* at 394.

<sup>143</sup> *Id.* at 382. Maslow acknowledges that there are instances where a certain type of person will invert the pyramid, as when a martyr for a belief refuses food or a starving artist creates. *Id.* at 383 n.8.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 374. An interesting thought, suffice it to say does not follow from Maslow’s account that culture is somehow an adaptive tool in furtherance of stability. For a contemporary claim that morality is an adaptive tool in furtherance of cooperation, trust, and fairness, see the work of moral psychologist Joshua Greene. *E.g.*, JOSHUA GREENE, *MORAL TRIBES* (2014).

<sup>146</sup> Maslow, *supra* note 140, at 374.

<sup>147</sup> Richard Kraut, *Aristotle’s Ethics*, *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta, ed.) (Apr. 21, 2014).



proponents. But there is wisdom in requiring of a strategy to promote human flourishing that it includes a plan to meet basic needs, such that people can experience the world and one another in a state other than emergency.

Human flourishing is somewhat a function of meeting basic needs. But it is clearly much more than that. Among the more sophisticated and enduring accounts of human flourishing is the capabilities approach. Most closely associated with the work of Amartya Sen and Martha Nussbaum, capabilities refer to a certain kind of opportunity individuals in a society have “to achieve valuable combinations of human functionings—what a person is able to do or be.”<sup>148</sup> The emphasis is not in possessing technical rights or freedoms on paper, but in the actual capacity of individuals to navigate lived experience. Can a real person situated in a given society, even one with disabilities or who is poor or outside the mainstream, actually move about freely, marry who they love, or experience the power of music?<sup>149</sup>

Nussbaum, if not Sen, enumerates a core set of capabilities.<sup>150</sup> As with Maslow and Aristotle, certain of these involve physical security and health or physical and emotional connection. Others involve imagination, thought, and play, which Julie Cohen elevates in her work on information policy.<sup>151</sup> These are activities directed more at allowing the subject to self-actualize, i.e., become who she really is. Sen declines to enumerate particular examples of capabilities on the theory that societies should continually discuss and assess what they value.<sup>152</sup> No less than Nussbaum, however, Sen is committed to the notion that certain capabilities—such as the ability to meet nutritional needs or participate in the social life of the community—represent usual antecedents to flourishing.<sup>153</sup>

Four observations about this albeit small sampling of influential accounts of flourishing: First, they each proceed from the assumption that

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<sup>148</sup> Amartya Sen, *Human Rights and Capabilities*, 6 J. HUMAN DEV. 151, 153 (2005).

<sup>149</sup> One way to think of capabilities is that they are akin to beneficial societal affordances, i.e., the set of positive opportunities available to humans by virtue of their socio-cultural environment. Cf. James J. Gibson, *The Theory of Affordances*, in PERCEIVING, ACTING, AND KNOWING: TOWARD AN ECOLOGICAL PSYCHOLOGY (R. Shaw & J. Bransford, eds. 1979).

<sup>150</sup> MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000).

<sup>151</sup> See COHEN, *supra* note 88, at 224 et seq.

<sup>152</sup> Sen, *supra* note 147, at 157-58.

<sup>153</sup> *Id.* at 158 (these include nourishment, freedom from disease, the ability to move around, and the ability to participate in the social life of the community).

certain basic needs must be met before a person is in a position to flourish or self-actualize. Second, assuming basic needs are met, it would seem the subject must further come into contact with cultural resources, ideas, and materials, in order to self-constitute. The capabilities around self-actualization are not consistent with complete isolation. People do not become situated subjects within society by walling themselves entirely off.<sup>154</sup>

Third, privacy has a role to play in each of these accounts. If security is a prerequisite, a person who lacks a right to be left alone will not feel secure. If love is needed, privacy makes friendship and love possible by fostering intimacy.<sup>155</sup> Privacy allows for what Westin called our “moments offstage,” as well as room for intellectual development and imagination generally.<sup>156</sup> Privacy helps in the production of what Cohen calls “semantic discontinuity” which in turns makes space for the “play of everyday practice.”<sup>157</sup>

Yet fourth, privacy is obviously only one of many considerations. Only by securing a roof over her head, a door she can lock, and three meals a day can the subject begin to reflect on who she really is.<sup>158</sup> Only by encountering what ideas and artifacts are available in society can the subject determine his affinities. And having developed a distinct if always evolving voice, the individual must have access to a channel by which to reflect back his subjectivity. All of this requires mechanisms beyond information theory let alone privacy. Though data chastity has a role, so does data promiscuity. Not only must people have a means by which to withdraw, they must have a means by which to connect. People must have two-way access to physical, cultural, social and other resources.

Can markets deliver these resources? They can, at least in theory. In his 1987 essay *Competition and Cooperation*, legal theorist Jules Coleman develops a different vision of markets than the one on offer by outsider critics. He argues that markets are ironic vehicles of cooperation.<sup>159</sup> Ironic because, in the market paradigm, “the perfectly competitive market is taken as a logical and normative point of departure for the analysis and

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<sup>154</sup> Cf. IRWIN ALTMAN, *THE ENVIRONMENT AND SOCIAL BEHAVIOR: PRIVACY, PERSONAL SPACE, TERRITORY, AND CROWDING* (1975) (exploring the tension between achieving distance and connection).

<sup>155</sup> Fried, *supra* note 4.

<sup>156</sup> WESTIN, *supra* note 7.

<sup>157</sup> COHEN, *supra* note 88.

<sup>158</sup> Maslow, *supra* note 140.

<sup>159</sup> Coleman, *supra* note 139.

justification of nonmarket, usually legal, political, and moral institutions.”<sup>160</sup> Proponents of the market paradigm justify it on the basis that individual actors acting in their own best interest—competing, as it were—yields the best outcome for the most participants. Society only collects to cooperate legally and politically when markets fail, in the sense that “individually rational action yields collectively irrational or suboptimal outcome[s].”<sup>161</sup> For example, when markets lack information or discriminate on the basis of race, regulators force disclosure and (hopefully) invoke civil rights law. Otherwise, free competition reigns supreme.

Coleman acknowledges the competitive underpinnings of markets but invites us to see markets as essentially cooperative in several ways. Taking them in reverse order, Coleman explores how markets help to foster social stability in the face of difference. He observes that broad consensus across a heterogeneous society is “both rare and fragile,” i.e., both hard to achieve and hard to maintain.<sup>162</sup> “[G]iven that stability depends on mutual agreement,” Coleman observes, it is plausible that “we should prefer institutions that maximize or domain or scope of social interactions for mutual advantage which do not themselves require broad consensus.”<sup>163</sup> In other words, a free and equal society that has to come together and agree upon such delicate topics as who in society should do what task or get what resource would not last long. Markets promote stability insofar as the institution of the market “maximizes the opportunities for interaction without at every turn calling into question the values of others or the legitimacy of the ends they seek.”<sup>164</sup>

Notice the connection between Coleman’s view of the cooperative market and the role of privacy described earlier in the article. Though unrecognized by Coleman, privacy is crucial to the capacity of markets to promote interaction without value-laden conflict. Without sufficient privacy, market participants would come together to transact, only to realize the inevitable social, political, religious, or other irreconcilable differences that separate many in society. Consensus would be all the more rare and fragile.

In addition to helping to provide stability by avoiding the need for constant value judgment, Coleman observes that markets can be said to help people help one another: “[B]y interaction with one another in markets, we

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<sup>160</sup> *Id.* at 76.

<sup>161</sup> *Id.* at 80.

<sup>162</sup> *Id.* at 86.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 84.

provide for one another the opportunity to improve our respective well-being. We ‘take advantage’ of one another for our mutual advantage.”<sup>165</sup> Although each person is pursuing his or her own interest, they are together pursuing a collective interest in exchange for mutual benefit.

Coleman finds this the less interesting of the two ways markets are cooperative; I find it equally so. Many human activities, directed at a variety of important goals, make use of competition as their central mechanism. Sport is a clear example (even to someone who does not know much about them). Technically, sports teams compete with one another, sometimes bitterly, for points and titles. Collectively, sport fosters teambuilding, promotes exercise, and, for the nonparticipant, provides entertainment.<sup>166</sup> Sports can go too far, and so can markets. But the line between cooperation and competition is hardly ever a clear or boring one.

The cooperative function of markets holds lessons for the interrelation of privacy and flourishing. As noted, a key reason that markets permit mutual advantage without recourse to hard questions of valuation, in the ways Coleman describes, is precisely that privacy helps obscure social-political tensions that BuyPartisan (the app in the Introduction) surfaces.<sup>167</sup> Privacy hides all of our value judgment from one another except price.

In addition, an impersonal and yet cooperative market represents a powerful vehicle to connect people to the various resources they need to flourish. Flourishing cannot take place where a person wants for the basics and requires coming into contact with ideas and other cultural and social resources. Ideally, markets result in the most value to the most participants. Yet regardless, markets seem to be the obvious means by which many individuals can generate value and exchange that value for other necessities. Moreover, the market mechanism opens a path by which individuals can gain access to, but also introduce, cultural objects, materials, and ideas into larger society. Thus, a person can buy a book or music that helps them discover who they are. If they then decide to write a book or song, there is a preexisting mechanism in place—and, importantly, a financial incentive—to distribute it.

## 2. Socialist privacy?

Coleman’s vision of the cooperative market raises the further question of whether there are viable alternatives. The market mechanism represents

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<sup>165</sup> *Id.* at 85.

<sup>166</sup> For a stimulating discussion of the value of sports in society, see generally ROBERT L. SIMON, *FAIR PLAY: SPORTS, VALUES, AND SOCIETY* (1993).

<sup>167</sup> *See supra.*

one means, an albeit gravely imperfect one in practice, by which to distribute resources in a society. It requires a certain kind of information to work efficiently, and seems prone to making greater and greater information demands. But interestingly, as Coleman argues, the market mechanism does not necessarily confront market participants with deep questions of values in every transaction.

So how does privacy fare in a non-market world? Imagine for a moment what it would take to distribute societal resources not through the open exchange of currency and labor, but according to the famous socialist maxim “from each according to his ability, to each according to his need.”<sup>168</sup> Absent infinite resources, an official would have to understand what each person is capable of producing and what she is likely to consume. I submit that this is not a privacy friendly mechanism.

For a relatively extreme (but real-life) example, we might look at China—a country that embraces markets in some contexts but rejects it in others, including in its allocation of government resources. Around the same time Matthew Colbert was developing BuyPartisan in D.C., the Chinese government was compiling a detailed dossier on each of its billion and a third population.<sup>169</sup> This program—called the Social Credit System—scrutinizes the social, market, and other behavior of citizens in order to determine their worthiness to receive various sorts of advantages or resources from the government.<sup>170</sup>

Even in our capitalist, democratic society we see great information intensity anywhere where the government gets actively involved in redistribution. Tax privacy is a bomb waiting to go off. The Internal Revenue Service—our anti-market—collects incredibly detailed information about citizens so as to guess what to expect from them.<sup>171</sup> Those who rely upon the government to meet their basic needs of food and shelter must surrender privacy almost entirely; some see privacy as increasingly a luxury good.<sup>172</sup>

We can imagine, with Yochai Benkler, means other than markets to meet basic human needs and to bring us into contact with one another or

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<sup>168</sup> Marx, *supra* note 8.

<sup>169</sup> Sara Hsu, *China's New Social Credit System*, THE DIPLOMAT (May 10, 2015).

<sup>170</sup> *Id.*

<sup>171</sup> Michael Hatfield, *Taxation and Surveillance: An Agenda*, YALE J.L. & TECH. (forthcoming 2015).

<sup>172</sup> Julia Angwin, Opinion, *Has Privacy Become a Luxury Good?* N.Y. TIMES (Mar. 3, 2014).

distribute work and resources.<sup>173</sup> I do not mean to whitewash or privilege markets, or to suggest that they are somehow the very best or fairest way to organize a society. But again, I question whether these alternative mechanisms will be *privacy* friendly, specifically. I submit they will not be, because they will require knowing quite a bit about everyone else. It is notable that Benkler's *Wealth of Networks* makes literally no mention of privacy,<sup>174</sup> just as Cohen's *Configuring the Networked Self* makes little mention of markets.<sup>175</sup>

As far as I can tell, no one in the literature is explicitly denying that markets can play an important role in supporting human flourishing. Rather, the claims are that market excesses are damaging to privacy and other values and that market thinking itself obscures an important dimension of information policy.

Nevertheless, just as economists' skepticism about privacy obscures privacy's important role in the market mechanism, the skepticism privacy scholars tend to show toward markets obscures the considerable role of the market mechanism in promoting human collaboration and fulfillment. This very basic story of how markets support flourishing is mostly missing from the privacy literature, and perhaps in consequence, also missing from consumer privacy law and policy. Indeed, it could well be that means exist to foster contact and distribute resources that rely neither on markets nor the sorts of privacy-invasive practices I have described above.<sup>176</sup> But that is the whole point: we need an exploration of alternative means of production and distribution as well as their frank comparison to the market mechanism on the dimension of privacy.

#### IV. SO WHAT?

I have argued that law and economics misses the role of privacy in supporting the market mechanism and, further, that privacy scholars have yet fully to explore the role of markets in promoting privacy and its goals. I have also alluded along the way to how a framework that positions privacy and markets as sympathetic might allow us to pose new and important research questions. In this final Part, I expand on the advantages of setting

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<sup>173</sup> YOCHAI BENKLER, *THE WEALTH OF NETWORKS* (2006).

<sup>174</sup> *Id.* Index.

<sup>175</sup> COHEN, *supra* note 88. Index.

<sup>176</sup> See, for instance, the work of Elli Androulaki, Binh Vo, and Steven Bellovin on taxable bank accounts that preserve privacy. Elli Androulak et al., *Privacy-Preserving, Taxable Bank Accounts*, Proc. of the Euro. Symposium on Research in Computer Security (ESORICS), Athens, September 2010.

aside a mutual skepticism about privacy and markets. These advantages are interrelated, even cumulative, and include: explaining or justifying the role of the Federal Trade Commission; predicting the direction of other institutions involved with markets; surfacing the role of privacy in reducing discriminatory market behavior; and building the normative case for greater separation between personal and the market sphere.

### A. *Justifying Our Privacy Watchdog*

We can start with a puzzle. Why is the Federal Trade Commission—an agency devoted to open markets and replete with economists—the de facto privacy authority in the United States?<sup>177</sup>

The answer is not obvious. The role of the FTC is to promote a “vibrant marketplace.”<sup>178</sup> Market theory is, once again, famously skeptical of privacy. Economic orthodoxy holds that market participants need information to make a variety of decisions such as whom they should hire or what they should buy or sell. Privacy hides that information. Privacy is, at best, just another exogenous consumer preference, except one that happens to harm the market when selected.

The FTC often follows conventional market theory, as when it rejects privacy as an independent basis to block a merger between Internet advertising giants<sup>179</sup> or forces a company to keep a privacy promise it already made.<sup>180</sup> The agency in general protects consumers and competition largely by ensuring that the market has access to *enough* accurate information.<sup>181</sup> But in recent years, the Commission has developed a broad regulatory toolkit in a seeming bid to elevate privacy as a substantive value, becoming the de facto data protection authority of the United States and its

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<sup>177</sup> See Solove and Hartzog, *supra* note 12, at 585-86 (“FTC privacy jurisprudence has become the broadest and most influential regulating force on information privacy in the United States...”).

<sup>178</sup> See Federal Trade Commission, What We Do, online at <https://www.ftc.gov/about-ftc/what-we-do>.

<sup>179</sup> See Statement of the Federal Trade Commission concerning Google/DoubleClick, FTC File No. 071-1070, \*3 (Dec. 12, 2007) (“We have therefore concluded that privacy considerations, as such, do not provide a basis to challenge this transaction.”). See also Grunes, *supra* note 33, at 1112 (discussing various “reasons to doubt that privacy will ever reach the status of price, quality, or innovation in an antitrust review”).

<sup>180</sup> Solove and Hartzog, *supra* note 12.

<sup>181</sup> *Id.* See also Federal Trade Commission, About the FTC, online at <https://www.ftc.gov/about-ftc> (referring to its role in promoting “access to accurate information”).

chief privacy ambassador to the outside world.<sup>182</sup> Why would that be?

The Commission draws its authority from the FTC Act, which empowers the agency to pursue “unfair methods of competition” and “unfair or deceptive acts or practices in or affecting commerce.”<sup>183</sup> As the agency’s name, structure, and authority make clear, the FTC is concerned with trade in general, not any one substantive preference or value. For example, although the FTC sanctions purveyors of weight loss drugs for making unsubstantiated claims about their products,<sup>184</sup> the FTC does not engage in anti-obesity campaigns... And yet, the Commission has done more than any other government body to address consumer privacy in the United States and is recognized domestically and abroad as a de facto data protection authority.

Recent or forthcoming work by Daniel Solove and Woodrow Hartzog, Kenneth Bambauer and Deirdre Mulligan, and Chris Hoofnagle reflects a growing interest among privacy scholars in the Commission and its role.<sup>185</sup> Solove and Hartzog trace the FTC’s interest in privacy back to the mid 1990s.<sup>186</sup> These authors describe how the Commission came to address information practices—initially, by enforcing privacy policies required not by federal rules but under California law.<sup>187</sup> They catalog changes to agency personnel, including the establishment of a Division of Privacy and Identity Protection with the Consumer Protection Bureau. This is groundbreaking research, but the authors effectively gloss over why a commission dedicated to free trade would protect against privacy and security violations in the first instance.<sup>188</sup>

The FTC’s charge, according to its animating statute, has to do with ensuring fair competition in commerce. The FTC has the authority to address anti-competitive behavior through its Bureau of Competition, the mission of which is to “enforce[] the nation’s antitrust laws, which form the

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<sup>182</sup> *Id.* at 585-86.

<sup>183</sup> 15 U.S.C. § 45(a)(1).

<sup>184</sup> *E.g.*, *FTC v. Kevin Wright; HCG Platinum, LLC; et al.*, 2:14-cv-00258-CW (Dist. Utah Dec. 11, 2014).

<sup>185</sup> Solove and Hartzog, *supra* note 12; Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy and the Books and on the Ground*, 63 *STAN. L. REV.* 247 (2010).

<sup>186</sup> Solove & Hartzog, *supra* note 12, at 585.

<sup>187</sup> *Id.* at 594.

<sup>188</sup> Solove and Hartzog note only that enforcing promises companies make in a privacy policy could help “ensure that people would view privacy policies as meaningful and trustworthy. *Id.* at 599.



foundation of our free market economy.”<sup>189</sup> The Bureau of Competition takes a macro (broader, systemic) view of the market with a eye toward protecting its overall health. To this end, the FTC employs a substantial number of economists<sup>190</sup>—economists who, again, tend to be deeply skeptical of privacy because of its effect on market efficiency. It should come as no surprise, then, that the Commission has for instance rejected privacy considerations as a basis to block a merger between two online advertising giants that collect data different types of data about consumers.<sup>191</sup>

The FTC has more than antitrust authority: In addition to the Bureau of Competition, the Commission has a Bureau of Consumer Protection.<sup>192</sup> This Bureau takes a micro view, scrutinizing particular economic practices about which consumers or competitors might complain. And yet, the focus remains on the prospect of market failure through inadequate or defective information. The FTC addresses, for example, whether advertising is truthful or marketing fair, and whether certain relationships were adequately disclosed.<sup>193</sup> This is clearly in line with a model whereby more information is better, and where inadequate or false information skews the market away from value maximization. Consumers cannot realize their preferences for privacy or anything else, they cannot protect themselves and police the market, if they cannot believe what companies are telling them. Moreover, truthful firms cannot compete with other firms that tell lies about the quality or price of their goods and services.

Said another way, much of the FTC’s energy and competency goes to making sure there is *enough* information in the market. The Commission interprets its authority to stamp out “deceptive” practices to also encompass false or misleading statements about privacy, privacy being an exogenous

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<sup>189</sup> See Federal Trade Commission, About, Bureau of Competition, *online at* <http://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition>.

<sup>190</sup> The FTC has an entire Bureau of Economics with two units of three devoted to supporting the FTC’s antitrust enforcement. See Federal Trade Commission, About, Bureau of Economics, *online at* <http://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics>.

<sup>191</sup> See Statement of the Federal Trade Commission concerning Google/DoubleClick, FTC File No. 071-1070, \*3 (Dec. 12, 2007) (“We have therefore concluded that privacy considerations, as such, do not provide a basis to challenge this transaction.”). See also Grunes, *supra* note 33, at 1112 (discussing various “reasons to doubt that privacy will ever reach the status of price, quality, or innovation in an antitrust review”).

<sup>192</sup> See Federal Trade Commission, About, Bureau of Consumer Protection, *online at* <http://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection>.

<sup>193</sup> Solove & Hartzog, *supra* note 12.

consumer preference.<sup>194</sup> Yet the agency's role has extended well beyond enforcing the statements companies make in privacy policies. The agency routinely holds workshops and publishes guidance on matters related to privacy and security of emerging technology in general wherein participants and Commission recognize a diverse array of complex privacy values.<sup>195</sup> And in its burgeoning role as a de facto privacy regulator, the Commission has relied more and more on its authority to stamp out not only deception but "unfairness."<sup>196</sup> For instance, the Commission pursues inadequate security around the personal information of consumers even in the absence of a promise to keep it safe,<sup>197</sup> as well as sudden or invasive changes to the use and collection of information that have been technically disclosed to the consumer.<sup>198</sup>

The use of unfairness in the privacy context is particularly interesting: The FTC Act provides that an unfair practice must "cause substantial injury to consumers" and cannot be "outweighed by countervailing benefits to consumers or to competition."<sup>199</sup> Elsewhere federal law has been deeply skeptical of whether the loss of privacy constitutes a compensable injury at all.<sup>200</sup> And, again, economic orthodoxy holds that the free flow of information about consumers and their preferences is a countervailing benefit to some set of consumers as well the market overall.

So the FTC's expansive interest in consumer privacy remains something of a puzzle. One way to explain and perhaps justify this focus is to think of privacy as necessary to the function of the market mechanism. On a theory that sees markets and privacy as sympathetic, more information can be better, but excess data promiscuity undermines the very enterprise of free

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<sup>194</sup> Solove & Hartzog, *supra* note 12, at 628-38 (canvassing privacy complaints brought under the FTC's deception authority).

<sup>195</sup> See *supra* note \_\_ (listing examples). Randall Picker is developing an argument that the FTC's "guidance" is precatory in name only; companies, especially smaller ones, are likely to construe FTC guidance as essentially rules that must be followed. Randal C. Picker, *Unjustified By Design: Unfairness and the FTC's Regulation of Privacy and Data Security* (draft, 2013).

<sup>196</sup> Solove & Hartzog, *supra* note 12, at 638-43 (canvassing privacy complaints brought under the FTC's unfairness authority).

<sup>197</sup> See, e.g., *id.* at 643.

<sup>198</sup> See, e.g., *id.* 634 (discussing *In re Sears Holding Management Corp.*, in which the Sears company allegedly installed tracking software on computers without adequately calling consumers' attention to it).

<sup>199</sup> See *Int'l Harvester Co.*, 104 F.T.C. 949 app. At 1070, 1073 (1984) (FTC Policy Statement on Unfairness).

<sup>200</sup> See Ryan Calo, *The Boundaries of Privacy Harm*, 86 *IND. L.J.* 1131, 1132 (2011).

trade that it is the FTC's stated mission to protect. Thus, the FTC's attempts to domesticate the problem of privacy in the United States can be understood as a kind of immune response to the direction market economics is taking in the digital age. The FTC tries to carve a space for privacy on the tacit assumption that privacy is necessary for markets to work.

Similarly, the fact that the FTC's mandate and history is bound up in commerce and in the smooth functioning of free markets is no impediment to its interest in human flourishing that promoting privacy affords. At its best, the market mechanism helps people help themselves and one another. The market is, among other things, a way to bring the most people into the greatest contact with a diversity of social, cultural, and materials from which to self-actualize. This is why the market, as well as privacy, is worth protecting in the first place.

If the theory holds—the theory being that the proper intellectual underpinning of the FTC's growing interest in information privacy relates to the sympathy between privacy and markets—then at least one testable prediction follows. In the wake of the most recent financial crisis, Congress passed a law requiring, among other things, the establishment of a new agency dedicated to protecting consumers in the specific context of financial products and services<sup>201</sup>—an area from which the federal law arguably withdraws FTC authority.<sup>202</sup> The Consumer Financial Protection Bureau sets and enforces rules around, for instance, truth in lending. Since its establishment in 2011, the CFPB has brought a few dozen enforcement actions related to misleading consumers about a financial product or else permitting kickbacks or referral fees.<sup>203</sup> None relate specifically to privacy. The theory elaborated above would predict that the CFPB will undergo a similar transformation to the FTC and show increasing interest in general consumer privacy over time, as it, too, comes to appreciate the deep role of privacy in the market.

### *B. Markets and Discrimination*

One of the areas the CFPB pursues actively today is discrimination, particularly in lending decisions.<sup>204</sup> Discrimination famously creates its own

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<sup>201</sup> See Consumer Financial Protection Act of 2010, 12 U.S.C. § 5511 (2010).

<sup>202</sup> 12 U.S.C. § 5514 (granting the CFPB exclusive authority). See also 15 U.S.C. § 45(a)(2) (exempting banks, savings and loan institutions, and Federal credit unions from FTC authority).

<sup>203</sup> See Consumer Financial Protection Bureau, Enforcement, *online at* <http://www.consumerfinance.gov/blog/category/enforcement/>.

<sup>204</sup> *Id.*

“puzzle” for economists because, some assume, discrimination should not survive in the face of robust competition.<sup>205</sup> And yet, discrimination in the market persists (likely in proportion to societal bias). Presumably students of markets find this not only puzzling but also disturbing. A framework that recognizes an important role for privacy in markets also offers privacy as a lever for combatting existing discrimination. Privacy can stem the prospect of more categories of discrimination as access to granular information about market participants triggers idiosyncratic bias that law or policy has yet to address.

Sometimes more information can mean less bias. Lior Strahilevitz notably argues that additional information, even if privacy-invasive, can help combat negative stereotypes.<sup>206</sup> Thus, for example, revealing the criminal background of every job applicant helps conviction-free black men seeking employment by overriding a biased heuristic.<sup>207</sup>

But very often more information simply means more bias. Being a black man is not something an applicant can generally hide, at least at the interview stage. Thus, introducing additional information here represents an imperfect means by which to try to combat the bias that can unfortunately attach to this applicant profile. Where, as often, the subject of bias could or would be hidden from the decision-maker with sufficient privacy, privacy becomes a way to help keep bias out of the marketplace.

One example is genetics. Some genetic traits are visible, but very many are not. Yet invisible traits such as a propensity for mental health problems could lead to discrimination in insurance, employment, and other settings. Privacy removes information, including some bases for discrimination, and so operates as a lever in discrimination policy generally. Because genetic information has become more commonplace, Radhika Roa argues in favor of a “veil of genetic ignorance” to support equality in several settings.<sup>208</sup>

There may be ways to hide information long enough to overcome bias, especially where the bias is not conscious and overtly intended. Some orchestras helped to combat a pattern of sexism in hiring by conducting auditions behind a screen. This has reportedly led to many more women orchestral musicians and, importantly, to a more competitive market for musicians overall. Such techniques should be extended. To combat apparent bias against African American names on resumes, for instance, we could

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<sup>205</sup> See Peter Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 *TEX. L. REV.* 787 (1995).

<sup>206</sup> Lior Strahilevitz, *Privacy versus Antidiscrimination*, 75 *U. CHI. L. REV.* 363 (2008).

<sup>207</sup> *Id.*

<sup>208</sup> Radhika Rao, *A Veil of Genetic Ignorance? Protecting Genetic Privacy to Ensure Equality*, 51 *VILLANOVA L. REV.* 827 (2006).

adopt blind screening of online applicants.<sup>209</sup>

Race, gender, sexual orientation, genetics. These are qualities about which there is general consensus not to discriminate. We have equal protection laws, as well as a specific federal law prohibiting discrimination against employees or applicants on the basis of their genetics. Presumably, however, people have idiosyncratic biases as well. Some of these might not end up affecting market choices, let alone necessitating legislation, because privacy hides the relevant traits.<sup>210</sup>

### C. Enforcing the Veil

In Part III, I argue that, as a descriptive matter, privacy hides information from the market that would distort and undermine the market mechanism. In this section, I push the insight further: I argue that, normatively speaking, the law can and should address take opportunities to limit how much personal, social, and political information enters the marketplace. The benefit accrues to privacy and markets both.

All fifty states explicitly permit public access to voter registration databases in some form.<sup>211</sup> Of these, at least twenty-eight states prohibit the use of information contained within these databases for any commercial purpose.<sup>212</sup> Federal election rules around access to disclosures by individual or political committee contributors also prohibit using or sharing this information for commercial purposes.<sup>213</sup>

As with the FTC's interest in privacy, it is a little hard to point to a particular reason why state and federal law sometimes disallows commercial uses of political information. Databases of voters, and particularly of donations, seem important for democratic transparency. But there is little by way of legislative or regulatory record discussing what lawmakers or regulators were thinking when they included the rule against

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<sup>209</sup> For a well-known study on the effect of names on labor discrimination, see Marianne Bertrand and Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, NBER Working Paper No. 9873 (Jul. 2003). Of course, nameless job applications at most get the applicant to an interview stage with greater frequency.

<sup>210</sup> This observation sets aside, perhaps problematically, whether it is always better to name and confront discrimination instead of hiding it. The argument is limited to the role of discrimination in the marketplace, which is, and could be further, diminished by privacy.

<sup>211</sup> Ira S. Rubenstein, *Voter Privacy in the Age of Big Data*, 2014 WIS. L. REV. 861, 868 (2014).

<sup>212</sup> *Id.*

<sup>213</sup> 2 U.S.C. § 438(a)(4). *See also* 11 CFR 104.15.

commercial use. State voter database statutes date back to a time before states routinely archived legislative sessions.<sup>214</sup> The Federal Register makes no mention of why the Federal Election Commission adopted a rule against commercial use, and the rules did not appear to go through a proposed regulation stage.<sup>215</sup> And law review articles—even those concerning the consumer privacy implications political data—do not necessarily identify the motivations of the states that restrict political data to noncommercial use.<sup>216</sup>

We can imagine a number of reasons why decades-old state and federal rules would prohibit the use of political information to solicit voters commercially. In particular, regulators could fear diminished participation in politics if voters were to grow concerned about receiving direct mail to the address they list on the voter rolls. Yet there exist, and have long existed, numerous sources of home address and other information that do not condition access on non-commercial purposes.<sup>217</sup> As several scholars observe, the foundation for the data broker industry is public information of various kinds.<sup>218</sup> Data brokers start with citizens and end up with consumers. Alternatively, there may be something specifically unsavory about mixing politics and consumption. Other scholars catalog the disturbing consequences of, and prohibitions around, thinking of politics like a marketplace.<sup>219</sup>

A theory that sees privacy and markets as sympathetic not only explains these laws, it helps to justify and recommend them: making political information too easily accessible to the marketplace may undermine the market mechanism itself. A highly motivated individual could use political

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<sup>214</sup> A research librarian at the University of Washington Gallagher library went so far as to contact the state legislature in Olympia only to be told that the state archives do not contain legislative history for the time when the state voter data base laws were enacted.

<sup>215</sup> See 45 Fed. Reg. 15080.

<sup>216</sup> E.g., Rubenstein, *supra*, note 210, at 868; Rebecca Green, *Petitions, Privacy, and Political Obscurity*, 85 TEMP. L. REV. 367, 384 n.120 (2013) (noting that 29 states ban commercial use, but not why); Deborah G. Johnson et al., *Campaign Disclosure, Privacy and Transparency*, 19 WM. & MARY BILL RTS. J. 959, 965 (2011) (same).

<sup>217</sup> For example, I have yet to come across restrictions around information on who owns a house or what they paid for it; arrest records (unless sealed); marriage licenses; hunting licenses; business licenses; or death records.

<sup>218</sup> Jack Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1 (2008); Jon D. Michaels, *All the President's Spies*, 96 CALIF. L. REV. 901 (2008).

<sup>219</sup> Rubenstein sees market principles as ill-suited to politics and notes the illegality of purchasing or selling votes. See also Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004); Richard L. Hansen, *Vote Buying*, 88 CALIF. L. REV. 1323 (2000).

data today to screen out potential buyers or sellers based on their political beliefs by, for instance, only offering goods and services to registered Republicans. In a privacy-free world where all known information appears in a bubble over your head, it would be trivially easy, perhaps unavoidable, to do so. But today a number of legal, normative, and structural impediments stand in the way.

Depending on how one interprets the language of the statute, screening out buyers or sellers on the basis of political affiliation—even BuyPartisan itself—could be seen as a commercial use and hence violate particular laws. Regardless, these laws possess a signaling function, helping to reinforce a norm against making market decisions with political data.<sup>220</sup> Structurally speaking, the absence of an economic motivation (because commercial use is prohibited) means fewer individuals and firms will bother to access the data or make it available to others.<sup>221</sup> Maintaining a conceptual and practical separation between the civic and commercial sphere represents an important and ultimately market-preserving function where government can help play a role.

We can imagine and encourage further efforts at separation. For example, municipal and other governments are opening up more and more of their data to the public.<sup>222</sup> Concerned with present trends, these cities can and should consider conditioning access to more categories of citizen information, beyond political activity of allegiance, on non-commercial use only.<sup>223</sup> Governments release data for good reasons, accountability foremost among them. That “We, The People” cede daily governance to officials does not mean we give up the power to know how we are being governed.<sup>224</sup> But by making the government more transparent, we make ourselves more transparent as well. Taken to the extreme, and assuming widespread commercial access, this transparency could distort the market

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<sup>220</sup> See Danielle Keats Citron, *Laws Expressive Value in Combating Cyber Gender Harassment*, MICH. L. REV. 373, 377 (2009) (“Because law is expressive, it constructs our understanding of harms that are not trivial.”).

<sup>221</sup> See *supra*.

<sup>222</sup> See Jan Whittington et al., *Push, Pull, and Spill: A Transdisciplinary Case Study in Open Municipal Government*, BERK. TECH. L.J. (forthcoming 2015).

<sup>223</sup> *Id.*

<sup>224</sup> The preamble of Washington’s public records act is particularly poignant: “The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.” RCW 42.17.251 (Wash. 2007).

mechanism itself and hamper its role in distributing the resources of human flourishing.

Readers familiar with recent First Amendment jurisprudence may wonder whether a strategy that restricts use to non-commercial purposes will pass constitutional muster. Above I discuss the case of Vermont trying to incentivize doctors to prescribe generics by forcing transparency. The move backfired as pharmaceutical companies used the same information to better target proprietary drugs. Vermont then sought to ban the use of prescription history for marketing, and ran right into a First Amendment challenge.

In *Sorrell v. IMS Health*, the Supreme Court invalidated an attempt by the state of Vermont—the birthplace of the commercial speech doctrine—to restrict how pharmaceutical companies use the prescription history the state requires doctors to make publicly available.<sup>225</sup> The state hoped doctors under the watchful eye of the public would prescribe more generic drugs and fewer expensive brand names. Instead, the pharmaceutical companies used the information to target doctors for marketing—a process called “detailing.”<sup>226</sup> The Court found an attempt by the state to pursue this targeting to be an unconstitutional restrict on the speech rights of the companies.

We might worry that other efforts to keep salient, value-laden information out of the marketplace would meet a similar fate. The key difference is that Vermont did not merely condition release of prescription information on using it for a noncommercial purpose. The state singled out particular speakers to silence. According to the Court, “Vermont’s law enacts content- and speaker-based restrictions on the sale disclosure, and use of prescriber information.”<sup>227</sup> Specifically, “the statute disfavors specific speakers, namely pharmaceutical manufacturers.”<sup>228</sup> Thus, the law runs afoul of constitutional prescriptions of discriminating against viewpoints. Had the state instead kept the data itself and released it only on the condition that it is not used for commercial purposes, the Court might not have taken issue.

Starving the market of all information would be deeply unwise. The economists are certainly correct to suggest that market participants need information to make rational and efficient choices. But placing limits on the kinds of information to which market participants have access may be a

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<sup>225</sup> 564 U.S. \_\_\_, 131 S.Ct. 2653 (2011).

<sup>226</sup> *Id.* at \*2.

<sup>227</sup> *Id.* at \*8.

<sup>228</sup> *Id.*



necessary condition to supporting a market-based sphere at all. Which, from the perspective of privacy, may be the best way to distribute physical and cultural resources in society.

#### CONCLUSION

In romantic comedies, two people with nothing in common wind up falling deeply in love. We should not hold our breath waiting on this fate for law and economists and privacy law scholars. Nevertheless, a sustained examination of privacy and markets reveals the important ways in which the two concepts are sympathetic. Markets assume and rely upon privacy to prevent a deluge of extraneous information, to encourage deeper economic partnerships, and to keep information asymmetry in check. A world without markets, meanwhile, is not a privacy-friendly one. The market mechanism represents a relatively anonymous means by which to distribute resources in society. And markets, no less than privacy, have a role in human flourishing. Hollywood had it right: these opposites do attract.

This article operates mostly at the level of theory. Several of the claims can and should be subject to empirical assessment.<sup>229</sup> We might test, for instance, whether market participants tend to balkanize in the face of salient but market-irrelevant traits and beliefs. We can also model whether parties entering into relational transactions with *ex ante* complete information behavior defect more often than those who come to better information in time. My hypothesis would be that where all information were disclosed up front in a prospectus to subjects in game, we would see higher rates of defection than in a condition where the participants revealed their capabilities and preferences to select partners over time. This process may—or may not—generate an economic intimacy that reduces defection. Either way, it would be very interesting to know.

Ultimately my hope for this article is to clear the way for these and similar questions at the intersection of privacy and markets. Although there is an existing literature burgeoning around the “economics of privacy,” the domain of inquiry remains somewhat limited. Deep questions as to the complex relationship between these two important societal forces remain unasked, let alone answered. This article has tried to pose some of the questions here. I suspect that if economists and privacy scholars could set aside their common skepticism they might find love, or at the very least knowledge.

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<sup>229</sup> A worthwhile project would test canonical pronouncements about the instrumental value of privacy empirically, as other disciplines have done. It is all well and good for Fried to say, in the nineteen seventies, that love and friendship require privacy. We now enjoy a more mature discipline with access to qualitative and quantitative methods.