Privacy and Security Through the Lens of the Federal Trade Commission's Bureau of Economics

Chris Jay Hoofnagle[1]

I. Introduction

At the Federal Trade Commission (FTC), all privacy and security matters are assigned to a consumer protection economist from the agency's Bureau of Economics (BE). The BE is an important yet often ignored element of the FTC. Advocates and others operating before the Commission have been inattentive to the BE, choosing to focus instead on persuading Commissioners and staff attorneys to take privacy and security cases. This article describes the BE, discusses the contours of its consumer protection theories, and discusses how these theories apply to privacy and security.[2] I explain why the FTC, despite having powerful monetary remedy tools, almost never uses them: this is because the BE sees privacy and security injuries as too speculative and because the FTC's remedies come too late to deter platform-age services. The BE is also skeptical of information privacy rights because of their potential impact on innovation policy and because privacy may starve the market of information. In this, the BE hews to certain interpretations of information economics, ignoring research in traditional and behavioral economics that sometimes finds benefits from regulation of information.

The article concludes with a roadmap for fostering a BE that sees invasions of privacy and security problems as causing harms worthy of monetary remedy. The roadmap includes the consideration of existing markets for privacy as a proxy for the value of personal information. For example, tens of millions of Americans pay money to keep non-sensitive information, such as their home address, secret. Additionally, the FTC's civil penalty factors, which consider issues such as how to deny a defendant

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[1] Adjunct Professor, University of California, Berkeley, School of Information, School of Law.

[2] I discuss the FTC more generally in my recent book, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY (Cambridge Univ. Press 2016).

the benefits from illegal activity, could justify interventions to protect privacy and security. Finally, the BE could explore how existing information practices have inhibited the kinds of control that could lead to a functioning market for privacy.

II. About the Bureau of Economics

The Bureau of Economics is tasked with helping the FTC evaluate the impact of its actions by providing analysis for competition and consumer protection investigations and rulemakings, and by analyzing the economic impact of government regulations on businesses and consumers. With Commission approval, the BE can exercise spectacular powers. The BE can issue compulsory processes to engage in general and special economic surveys, investigations, and reports. Congress required the BE to perform some of its most interesting recent privacy activities, such as a study of accuracy in consumer reports. The report found that 13 percent of consumers had material errors in their files, meaning that tens of millions of Americans could be affected by inaccuracy in their credit reports.[3]

The BE is divided into three areas focusing on antitrust law, research, and consumer protection. About 80 Ph.D.-level-educated economists work for the BE. Twenty-two economists and 8 research analysts are tasked to the over 300 attorneys focused on the consumer protection mission. The economists help design compulsory process, evaluate evidence collected from process, provide opinions on penalties to be levied in cases, conduct analyses of cases independent of the lawyers, serve as expert witnesses, support litigation, and provide perspective on larger policy issues presented by enforcement. In this last category, the BE has been an important force in eliminating state laws that restrict certain types of price advertising.[4]

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[3] FTC, Section 319 of the Fair and Accurate Credit Transactions Act of 2003: Third Interim Federal Trade Commission Report to Congress Concerning the Accuracy of Information in Credit Reports (Dec. 2008), http://www.ftc.gov/reports/section-319-fair-accurate-credit-transactions-act-2003-third-interim-federal-trade.

[4] For a general discussion of these contributions, *see* Janis K. Pappalardo, *Contributions by Federal Trade Commission Economists to Consumer Protection: Research, Policy, and Law Enforcement,* 33(2) J. OF PUB. POL'Y & MKTG 244 (2014).

The BE has a disciplining effect on the Agency's instinct to intervene to protect consumers. As former Chairman Kovacic and David Hyman explained, the BE "is a voice for the value of competition, for the inclusion of market-oriented strategies in the mix of regulatory tools, and for awareness of costs of specific regulatory choices BE has helped instill within the FTC a culture that encourages ex post evaluation to measure the policy results of specific initiatives."[5] This disciplining effect is a good thing according to Kovacic and Hyman. The duo explains that the BE's tempering role stops the agency from adopting an interventionist posture, warning that sister agencies (such as the Consumer Financial Protection Bureau) may become overzealous without economists acting in an evaluative role.

A. The BE's Conceptions of Consumer Injury

In recommending remedies to the Commission, the BE weighs options that could make the consumer whole, by putting the consumer in the position she occupied before the illegal transaction. BE also considers how a deception shapes demand for a product, thereby inducing individuals to buy who would not make a purchase absent an illegal practice, or whether customers paid more for a product because of a deception. The BE considers whether remedies will deter future unfair or deceptive practices. In its evaluative activities, the BE's lodestar is "consumer welfare" and its economists claim that they have no other social agenda in their activities. The BE's approach "has traditionally focused on fostering 'informed consumer choice' in well-functioning markets.[6]

The special dynamics of personal information transactions makes it difficult for the BE to justify monetary remedies in privacy cases. Consider a fraud where consumers are promised an 18-karat gold trinket but delivered a 10-karat one. The FTC can easily calculate the injury to the consumer based on the price differential between the two products. A market exists that

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[5] David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design, Agency Performance, the CFPB and PPACA*, 82 GEO. WASH. L. REV. 1446 (2014).

[6] Paul A. Pautler, *A Brief History of the FTC's Bureau of Economics: Reports, Mergers, and Information Regulation*, 46 REV. IND. ORG. 59 (2015).

clearly differentiates between these products and assigns a higher price to the 18-karat object. The transaction is also a simple, bounded one.

Turning to privacy cases, the calculation is not as simple. Many services provided to a consumer lack a price tag because they are "free." The alleged deception might be unrelated to price, but rather to a subtle feature, such as the degree of publicity given to some fact about the user. Complicating matters is that the boundaries of the transaction are unclear because services change over time, and in the process, shift consumer expectations and desires.[7]

Furthermore, individual privacy preferences vary. Some consumers may have never considered privacy attributes in their service selection or may not care about privacy a great deal. Unlike something as salient as the purity of a gold object, specific information uses may not enter into the consumer's awareness when selecting a service. These uses of information may never come into the consumers' mind until something goes wrong. When things go wrong, users often cannot point to an economic injury from unwanted disclosures. All of these problems are compounded by the fact that many services do not offer a "privacy friendly" feature set or price point. Without a functioning market for privacy that features prices, the BE struggles to assign value to information privacy wrongs.

The above discussion shows that assigning harm from privacy violations is not a simple exercise. But other dynamics cause the BE to be skeptical of information privacy cases more generally.[8] This skepticism is expressed both in methods, and in larger ideological issues. For instance, lawyers may point to surveys as evidence of privacy harm, but the BE systematically dismisses survey research in this field, because decisions about privacy can implicate complex short and long term tradeoffs that are not well

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[7] Jan Whittington and Chris Jay Hoofnagle, *Unpacking Privacy's Price*, 90 N.C. L. REV. 1327 (2011).

[8] Peter P. Swire, *Efficient Confidentiality for Privacy, Security, and Confidential Business Information*, BROOKINGS-WHARTON PAPERS ON FINANCIAL SERVICES (2003)(" … my experience from government service that graduate training in economics is an important predictor that someone will not "get" the issue of privacy protection.").

presented in surveys. Sometimes economists will argue that consumer behavior belies stated preferences for privacy.[9] One oft-stated rationale is that if consumers really cared about privacy, they would read privacy notices.

Ideologically the BE has had a reputation of hewing to the norms of "Chicago School" economics. This is because the BE (and the FTC more generally) was shaped by President Reagan's installment of economist James Miller to Chairmanship of the FTC in 1981. The Miller-era leadership strengthened the FTC in some ways, making it more enforcement-oriented. But Miller also scaled back many consumer protection efforts, and pursued aggressive policies reflecting great faith in contractual freedom.[10]

For instance, Wendy Gramm was a director of the BE during Miller's tenure. She defended debt collection tools such as the "blanket security interest," agreements that empowered creditors to show up at debtors' homes and seize household goods unrelated to the debt. The record showed that some creditors lorded the agreements over debtors, causing debtors psychological terror through the risk of arbitrary seizure of their things, most of which were valueless and would not satisfy the debt obligation. But Gramm reasoned that consumers accepted blanket security agreements in order to send important signals about the commitment to repay. If consumers really wanted to avoid risks of their things being seized, perhaps they would shop elsewhere for credit. If denied the choice to agree to security agreements, perhaps consumers could not get credit at all.

There are three important points about the Miller-era BE ideology. First, institutions are shaped by people. The BE is typically directed by an academic economist with impeccable credentials.[11] But a thesis of my book is that the FTC staff, who often remain at the agency for decades, have a profound role, one perhaps more powerful than even the appointed political leaders of the FTC. The current staff leadership of the BE's consumer

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[9] PRIVACY ONLINE, PERSPECTIVES ON PRIVACY AND SELF-DISCLOSURE IN THE SOCIAL WEB (Trepte, Sabine, Reinecke, Leonard, eds. 2011).
[10] Thomas O. McGarity, FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL (2013).
[11] FTC OFFICE OF THE INSPECTOR GENERAL, EVALUATION OF THE FEDERAL TRADE COMMISSION'S BUREAU OF ECONOMICS, OIG EVALUATION REPORT 15-03, (June 30, 2015).

protection division all joined the FTC in the 1980s. Miller, and his similarly-oriented successor, Daniel Oliver, hired all three of the economists currently responsible for privacy and security cases.

Second, one should not confuse the Miller-era policy instincts with mainstream economics. I will expand on this point in the next part of this article. For now, it is sufficient to observe that support for privacy and security rights and rules can be found outside the sometimes-maligned field of behavioral economics.[12] The BE marches to a different drum, and has not incorporated scholarship from traditional economic fields that finds benefits to social welfare from privacy.

Third, the Miller-era emphasis on contractual freedom and consumer savvy frames consumer harm as a foreseeable risk assumed by calculating, even wily consumers. Returning to the example of the blanket security interest, from the Miller lens, consumers in such relationships agreed to be subject to the indignity of having their things taken. The mother who had her baby furniture taken[13] may be harmed, but on the other hand she had the choice to not sign the contract. When public attention turned to the unfairness of blanket security agreements, Gramm commented, "Consumers are not as ignorant as you might suspect."[14] Translated into consumer privacy, this attitude holds that consumers are happy to enjoy the benefits of free services that trade in personal information, and consumers have calculated the risks flowing from these services.

Finally, and unrelated to the Miller-era in particular, the BE's privacy efforts are shaped by concerns about innovation policy. A trade in personal information is necessary and indeed beneficial for enabling modern economic infrastructures, such as consumer reporting. Using the Freedom of Information Act, I obtained training materials for BE and a literature review of privacy papers apparently used by the BE. Some of the microeconomic work

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[12] Alessandro Acquisti, Curtis R. Taylor, and Liad Wagman, *The Economics of Privacy*, JOURNAL OF ECONOMIC LITERATURE (Forthcoming 2016).

[13] FEDERAL TRADE COMMISSION, CREDIT PRACTICES: FINAL REPORT TO THE FEDERAL TRADE COMMISSION AND PROPOSED TRADE REGULATION RULE (16 CFR part 444) (1980).

[14] Michael deCourcy Hinds, *The Rift over Protecting Consumers in Debt*, N.Y. TIMES, May 8, 1983.

showing the costs to consumers from a lack of privacy protection, as well as work in behavioral economics or law regarding consumer challenges in shopping for privacy, make no appearance in the paper list—including articles by some of the most well-known scholars in the field and articles published in journals that are familiar to economists who work on consumer protection.[15] Instead, the BE's literature had a distinctly laissez faire bent, with the first paper listed the product of an industry think tank supported by five- and six-figure donations from telecommunications companies and Silicon Valley firms.

B. The Bureau of Economics Versus the Bureau of Consumer Protection

There is tension between the lawyers of the Bureau of Consumer Protection (BCP) and the economists of the BE over consumer injury, and thus case selection.[16] It is not obvious why lawyers and economists would be at loggerheads over damages in consumer cases. Lawyers are comfortable allowing judges and juries to determine damages for inherently subjective injuries, such as pain and suffering, and the loss of marital consortium. The law also provides remedy for mere fear of harm (such as assault).[17]

Yet, economists may have an even broader view of harm than lawyers. As Romanosky and Acquisti explain, "economic

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[15] Surprising omissions from the list include, James P. Nehf, *Shopping for Privacy on the Internet*, 41 J. OF CONSUMER AFF. 351 (2007); Alessandro Acquisti and Hal R. Varian, *Conditioning Prices on Purchase History*, 24(3) Marketing Science 367 (2005).

[16] Joshua L. Wiener, *Federal Trade Commission: Time of Transition*, 33(2) J. OF PUB. POL'Y & MKTG 217 (2014)("Prior to working at the FTC, I naively thought in terms of FTC versus business. I quickly learned that a more adversarial contest was lawyers versus economists."); Patrick E. Murphy, *Reflections on the Federal Trade Commission*, 33(2) J. OF PUB. POL'Y & MKTG 225 (2014)(the economists had a, "more conservative mindset [than the lawyers]; in general, they were more reluctant to support cases unless some economic harm could be proved. There seemed to be an ongoing battle between these two groups.").

[17] Ryan Calo, *Privacy Harm Exceptionalism*, 12(2) COLO. TECH. L. J. 361 (2014); Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L. J. 1131 (2011).

considerations of privacy costs are more promiscuous [than those of tort law]. From an economic perspective, the costs of privacy invasions can be numerous and diverse. The costs and benefits associated with information protection (and disclosure) are both tangible and intangible, as well as direct and indirect."[18]

Romanosky and Acquisti's observation positions economists as potentially more open to recognizing consumer injury than lawyers. Their point is growing in persuasiveness as legal impediments to consumer lawsuits expand, particularly those requiring more proof of "injury" to gain standing, and thus jurisdiction in court. In a case currently before the Supreme Court, several information-intensive companies have argued that they should not be subject to suit unless the consumer suffers financial injury—even if the company violates a privacy law intentionally.[19] Many consumer lawsuits for security breaches and other privacy problems have been tossed out of court on jurisdictional grounds for lacking "harm"[20]—but economists may view these same cases as meritorious.

The BE sees each case selected as an important policy decision. From the BE's lens, those policy decisions should focus not on rule violations, but on the harm suffered. The BE's approach is thus more evaluative of and more critical of legal rules. The BE wants to see some detriment to consumer welfare as a result of rule breaking.

Lawyers on the other hand are more moralistic, and likely to view a misrepresentation as an inherent wrong. Lawyers are trained and indeed ethically bound to uphold legal processes. In fact, many lawyers see the prosecution of cases as merely being "law enforcement," and are unwilling to acknowledge the policy issues inherent in case selection, as the BE correctly does.

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[18] Sasha Romanosky and Alessandro Acquisti, *Privacy Costs and Personal Data Protection: Economic and Legal Perspectives*, 24(3) Berk. Tech. L. J. 1060 (2009).

[19] *See* amicus curie brief of eBay, Inc., Facebook, Inc., Google, Inc., and Yahoo! Inc. *in Spokeo v Robins*, No. 13-1339 (SCT 2015).

[20] Lexi Rubow, *Standing in the Way of Privacy Protections: The Argument for a Relaxed Article III Standing Requirement for Constitutional and Statutory Causes of Action* , 29 BERKELEY TECH. L.J. (2014).

The problem with the lawyers' approach is that the law can be applied inefficiently and produce perverse outcomes. The lawyers' approach can be rigid and out of touch with the market. The problem with the economists' approach is that it can supplant democratic processes. Sometimes such processes create ungainly regulatory approaches, but setting these aside is governance by philosopher king rather than rule of law.

The BE has a more academic culture than the BCP as well—the economists are free to express their opinions, and even press them in situations where they are in disagreement with the FTC's actions. This internal questioning can cause attorneys to think that the economists are not fully participating in the consumer protection mission, and instead frustrating it by trying to engage in academic discourse about situations attorneys see as law enforcement matters. Attorneys know that the Agency's hand is weakened in litigation when it is apparent that a matter is controversial within the FTC. Attorneys also see economists as serving in an expert witness role, a service function that should be deferential to the strategic decisions of the litigators. Kenneth Clarkson and former Chairman Timothy Muris explain: "The economists' role is controversial. Many attorneys, sometimes even those the top of the bureau, are dissatisfied with the economists' substantive positions, with their right to comment, and what they perceive as the undue delay that the economists cause."[21]

The lawyers' instinct to intervene also causes tension between the BCP and the BE. Economists are more likely to take a long view of a challenge, allowing the marketplace to work out the problem even where the law prohibits certain practices or gives the Agency tools to redress the problem. The BE may also trust that consumers are more sophisticated in advertising interpretation than the lawyers do.

Beliefs about consumer sophistication and the ability to leave advertising representations to the market can go to extremes, however. Consider John Calfee, a long time expert with the

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[21] Kenneth W. Clarkson& Timothy J. Muris, *Commission Performance, Incentives, and Behavior*, in THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMXIC REGULATION AND BUREAUCRATIC BEHAVIOR (Kenneth W. Clarkson & Timothy J. Muris, eds., 1981)

American Enterprise Institute and former Miller-era BE advisor. Calfee thought that most regulation of advertising was perverse and thus consumer advocates harmed the public interest by attempting to police it. To press the point, he used cigarette advertising—the bête noir of consumer advocates—as a model. He argued that the cigarette industry's own health claims actually undermined tobacco companies. For instance, an advertising claim that there was, "Not a single case of throat irritation due to smoking Camels,"[22] is interpreted differently by consumers and lawyers. Lawyers assume that consumers are more ovine than vulpine. A lawyer views the claim as a simple form of deception that should not appear in advertising. But according to Calfee, consumers may read the same sentence and think that cigarettes are generally dangerous—after all, at least some of them cause throat irritation.

In Calfee's view cigarette advertising that mentioned any health issue taught consumers that all smoking was unhealthful. In fact, no amount of regulation could tell consumers about smoking's danger than the very ads produced by tobacco companies. According to Calfee, FTC regulation caused tobacco companies to stop mentioning health completely, and the industry's advertising became less information rich. In short, Calfee argued that regulation caused smoking to be portrayed in a kinder light.[23] But to the more legalistic culture of the BCP, Calfee's reasoning rejects the FTC's mandate of preventing deceptive practices and false advertising.

Perhaps the different views of consumer sophistication also explain why the FTC has not updated guidelines on various forms of trickery for decades. The guidelines surrounding the use of the word "free" were introduced in 1971 and never updated. The "bait and switch" and "price comparison" ("sales" that misrepresent the regular price of an item) guidance have never been updated since their introduction in 1967. Within the

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[22] R. J. REYNOLDS CORP., NOT ONE SINGLE CASE (1947) in Stanford School of Medicine, Stanford Research into the Impact of Tobacco Advertising.

[23] JOHN H. CALFEE, FEAR OF PERSUASION (1997); Posner too expressed qualified support for this reasoning. *See* ABA, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (Sept. 15, 1969)(Separate Statement of Richard Posner).

Commission, there is fear that updating these different informational remedies would cause them to be watered down by the BE. Yet, any user of the internet can see that free offers, bait and switch marketing, and fake price comparisons are rampant online.

III. The Bureau of Economics' Economics of Privacy and Security

The FTC has revolved over 150 matters involving privacy and security. The BE is involved in every case to a varying degree. Under the Federal Trade Commission Act, "unfair practices" clearly call for cost-benefit analysis. The FTC has to show that a practice causes "substantial injury" and that it is not outweighed by benefits to consumers or competitors. Deceptive trade practices receive less economic scrutiny, but there is a role for economists in deception in well. This is because Congress has considered and rejected policy approaches that would simply ban all falsity in business practices. Instead, Congress recognized that deception was a more nuanced standard. Finding deception requires inquiry into what kinds of representations mislead people. And deception can include truthful representations that are framed such that they lead consumers to error, making deception broader and better tailored to the goal of protecting consumer expectations.[24]

Returning to unfairness, the legal standard requires that the FTC establish "substantial consumer injury." The FTC has alleged such injury in dozens of privacy and security cases. For instance, many FTC security cases involve the exposure of millions of credit card, debit card, and checking account identifiers. Yet, only a handful of security cases have involved monetary remedies of any type.

FTC observers might conclude that the lack of fines can be attributed the agency's limits on civil penalties (for the most part, the FTC cannot levy civil penalties in privacy and security). But the FTC has a broad range of monetary and other remedies in addition to civil penalties. It can seek restitution, redress,

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[24] David M. Boush, Marian Friestad, and Peter Wright, DECEPTION IN THE MARKETPLACE: THE PSYCHOLOGY OF DECEPTIVE PERSUASION AND CONSUMER SELF-PROTECTION (2009).

disgorgement, asset freezes, the appointment of receivers and recession of contracts.

There are several reasons why various monetary and non-monetary remedies go unused. First, the BE does not believe there is a market for privacy. This leads the BE to undervalue privacy wrongs. Without some kind of penalty, companies may find it economically efficient to violate privacy. Second, the BE's focus on providing information to the consumer at service enrollment finds its roots in standard, physical product marketing. Today, the approach is antiquated and deficient because so many transactions are based on personal information, with the ultimate goal of establishing a platform rather than selling a specific product or service. The next sections explain these problems in greater detail.

A. No Monetary Damages in a World with No Privacy Market

The BE's methods of evaluating relief drive monetary penalties to zero in most matters. And even where civil penalties are applied, they tend to be too low to serve retributive or deterrent goals. One illustration comes from the Agency's case against Google. In it, Google was found to have deceived users of the Safari browser by tracking these users despite promising not to. Google was fined $22.5 million, one of the largest privacy-related recoveries by the commission.[25] Google's behavior was intentional, and the company was already under a consent decree for other privacy violations (thus making it possible for the FTC to apply civil penalties, as explained above). Google clearly had the ability to pay a much larger fine. In a way, the fine created incentives for bad behavior by setting such a low penalty for intentional misbehavior.

To a BE analyst the fine could be seen as disproportionately high. Consumers do not pay with money when they use search engines, and there is no option to pay extra to avoid the kind of tracking that Google used. Thus, the market did not set a price to avoid Google's deception. While millions of consumers who use both Safari and Google would have been affected by the practice, perhaps few of them had ever read Google's privacy policy, had

[25] *In the Matter of Google*, FTC File No. 102 3136 (2011).

known of Google's statements on the matter, or even had chosen Safari because of its privacy features. Only a small number were actually deceived by the representation and subsequent tracking. In sum, the practice justified a relatively small fine because any price on the tracking would be speculative, and because many who were tracked probably did not care about it. The absence of any kind of monetary damages in this and other privacy cases, points to a general inability of the BE to consider privacy invasions harms in themselves.

B. Economic Reasoning for Physical-World Products in the Platform Age

The BE's privacy work appears to still operate in a pre-platform-economy era, with a fixation on price and on the information available to the user at enrollment in a service rather than on the complex interdependencies that develop between users and services as time goes on. For instance, a 2014 BE working paper modeled a market in which privacy policies were transparent and well understood by consumers—two key assumptions refuted by a wealth of research in consumer privacy.[26] The authors concluded that that under the two assumptions, a competitive marketplace would provide consumers privacy options.[27]

But the 2014 study is important for an entirely separate reason. The study reveals the shading of the BE's privacy lens. Recall from section 2 that the BE's economics is not necessarily

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[26] Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126 Harv. L. Rev. 1880 (2013); Aleecia M. McDonald and Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S J. L. Pol'y Info. Soc'y 543, 564 (2008); James P. Nehf, *Shopping for Privacy on the Internet*, 41 J. Consumer Aff. 351 (2007); George R. Milne, Mary J. Culnan, & Henry Greene, *A Longitudinal Assessment of Online Privacy Notice Readability*, 25 J. Pub. Pol'y Marketing 238, 243 (2006) (based on the growing length and complexity of privacy policies, a user would have to read eight pages of text per competitor to evaluate their privacy choices). Paul M. Schwartz, Internet Privacy and the State, 32 Conn. L. Rev. 815 (2000).

[27] Daniel P. O'Brien & Doug Smith, *Privacy in Online Markets: A Welfare Analysis of Demand Rotations*, FTC Bureau of Economics Working Paper No. 323 (Jul. 2014).

"traditional," but rather grounded in influences from the Chicago School. This is reflected in the 2014 study's references. Reading over those references, one sees little overlap with the literature discussed in the forthcoming Acquisti et al. *The Economics of Privacy*.[28] Instead, the authors refer to the above-mentioned training materials and the *advertising* literature rather than the privacy literature.

Two problems emerge from the BE's view of the literature. First, it ignores the diverse array of traditional and empirical economic work that explores the potential welfare gains from privacy protection. Second, the focus on the economics of advertising is misplaced because privacy policies are not like price or product attribute advertising. Privacy features are much more complex, hidden, and most importantly, changeable. Today's technology market is not so much about an individual, discrete product. Instead, consumers are bargaining with platforms that are attempting to mediate many different aspects of consumer experience. Companies that are competing to be the dominant platform are constantly changing the bargain with the consumer through continuous transactions over time. A huge user base is built with promises of privacy, often ones that distinguish the company from competitors on privacy. Once a large user base is obtained and competitors trumped, the company switches directions, adopting the very invasive practices protested against.[29]

Network effects, lock-in and the power of platforms to shift user expectations enable dramatic policy shifts. But the BE's tools, forged in the era of valuing jewelry, the sizes of television screens, and so on, need adaptation to be applied to the problems posed by internet services. In fact, the BE approach militates against remedy, because of the Bureau's method for analysis of marketplace effects of remedies. Simply put, remedies are unlikely to be effective by the time the FTC gets involved, investigates a case, and litigates it. The delay involved in FTC processes gives respondents time to establish their platform and

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[28] Alessandro Acquisti, Curtis R. Taylor, and Liad Wagman, *The Economics of Privacy*, JOURNAL OF ECONOMIC LITERATURE (Forthcoming 2016).
[29] Paul Ohm, *Branding Privacy*, 97 MINN. L. REV. 907 (2013)(describing the "privacy lurch").

shut out competitors. By the time these steps are achieved, the BE is correct to conclude that remedies are likely to improve privacy options in the marketplace.

IV. How Academics Could Help Shape the BE's Privacy Efforts

The BE is proud of its engagement with the academic community. Unlike the BCP attorneys, BE economists have biographies online that feature academic publications. BE economists also have academic traditions, such as taking leave from the FTC to visit at a college. The BE also holds an annual conference on microeconomics open to outside academics. The BE's posture gives academics opportunities to shape and expand the FTC's privacy outlook.

A. Documenting the Market for Pro-Privacy Practices

There are tremendous opportunities for research that would assist the BE and the American consumer. Inherently, the BE's monetary relief calculations are impaired because it perceives there to be no market for pro-privacy practices. Academics could document the contours of the privacy market where it currently exists, most notably, in the privacy differential between free, consumer-oriented services and for-pay, business-oriented services.

One example comes from Google, which offers a free level of service for consumers and another for businesses that is $5 a month. Google explains, "Google for Work does not scan your data or email…for advertising purposes...The situation is different for our free offerings and the consumer space…"[30] Of course privacy is just one feature that flows from the $5 charge, yet it serves as evidence that the market puts some value on the avoidance of communications surveillance. Such surveillance must involve human review of email at times in order to train advertising targeting systems, and the inferences from automated scanning could contribute to Google's competitive intelligence. Those who owe confidentiality duties to customers or clients need

[30] Google, *Google for Work Help: Privacy* (2016), available at https://support.google.com/work/answer/6056650?hl=en

communications privacy, and so some portion of that $5 could be interpreted as a valuation of privacy, at least for some consumers.

Elucidating areas where some valuation of privacy exists—particularly in business to business scenarios where actors actually read policies and have the resources and time to protect rights—could help establish a value for privacy.

Another source for harm signals comes from the plaintiff bar, which has developed methods for measuring how consumers conceive of the value of personal information. For instance, in one case involving illegal sale of driver record information, an economist polled citizens to explore what kind of discounts they would accept in renewing their driver's license in exchange for this information being sold to marketers. In the state in question, drivers had to pay a $50 fee to renew their license. However, 60 percent of respondents said they would reject an offer of a $50 discount on their license in exchange for allowing the sale of their name and address to marketers.[31] Meanwhile, the state was selling this same information at $0.01 per record.

This survey method represented a plausible, real-life, bounded expense. Now, one may object to the survey as artificial—consumers, when presented in the moment with a $50 discount, may behave differently and allow sale of personal information. But on the other hand, given the prevalence of domestic violence and stalking among other problems, it seems obvious that many drivers would be willing to pay $0.01 to prevent the sale of this information to others. There is thus some value to this information. There is also increased risk of harm to those whose home address is spread to others indiscriminately. The data could be copied endlessly and resold to entities not in privity with the state, making it impossible for people to trace stalkers or swindlers back to the sale of personal information by the state.

Some economists have studied the value of privacy options to individuals. Perhaps the most popular privacy option of all time was the FTC's establishment of the Telemarketing Do-Not-Call Registry. In the 1990s, technological advances in telemarketing made it easier for sales callers to ring many numbers at the same

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[31] *Richard Fresco v. Automotive Directions Inc, et al*. 2004 WL 3671355 (S.D.Fla.)(expert affidavit of Henry Fishkind).

time, changing the fundamental dynamics of telemarketing. As Professor Peter Swire explained, these calls externalized costs to consumers who were displeased with the calling, but also may have reduced the value of having a phone in general, because defensive techniques to avoid unwanted callers, such as call screening and not answering the phone, could get in the way of desirable calls.[32] One could also value the positive value to consumers from avoiding these calls. Professor Ivan Png estimated this value to households as being between $13 and $98. Png's low estimate for the welfare created by the privacy option was $1.42 billion.[33]

Apart from telemarketing, there are many examples where individuals pay money in order to have enhanced information privacy options. For instance, while many people consider address information public, some homeowners take considerable expense to protect this information. "Land trusts" are used extensively by the affluent to shield home address from real estate websites and public records. Similarly, the private mail box is a significant expense, often used to shield home address from marketers and others. One's listing in the phone book has been public for decades, yet about 30 percent of Americans pay $1.25 to $5.50 a month to unlist this information. The expenses from these interventions add up. Consider that paying the minimum unlisting fee for 10 years would be $150. Private mailboxes can cost more than that in a single year. These expenditures demonstrate that for tens of millions of Americans, privacy is worth real money, even for the protection of "public" data.

Finally, sophisticated actors use legal agreements in order to prevent secondary use of personal information. The New York Times recently reported that Silicon Valley technology executives—the ones who scoop up information with the most

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[32] Peter P. Swire, *Efficient Confidentiality for Privacy, Security, and Confidential Business Information*, BROOKINGS-WHARTON PAPERS ON FINANCIAL SERVICES (2003).

[33] I.P.L. Png, *On the Value of Privacy from Telemarketing: Evidence from the "Do Not Call" Registry* (white paper)(Sept. 2007).

alacrity—use non-disclosure agreements in many contexts where domestic workers are employed.[34]

B. Use of the FTC's Civil Penalty Factors in Case Selection

A second area ripe for documenting injury in privacy cases comes from the economic dynamics in the FTC's civil penalty factors. The civil penalty factors must be considered when the FTC seeks fines.[35] The factors inherently call for economic perspective and they could be used more prominently in case selection. This article largely is a critique of the BE's emphasis on the second civil penalty factor for case selection: the injury to the public from the illegal practice. Courts consider four other factors, three of which could also benefit from academic analysis and consideration in case selection.

One factor concerns the "desire to eliminate the benefits derived by a violation." Recall the discussion above concerning the differences between physical-world products and platform-era services. In an era of platforms, denying the benefits of an illegal practice is a much more complex effort than addressing physical-world swindles. A physical-world swindle often can be cured by the reputational effects of a FTC action combined with disgorgement and restitution to victims. However, platform economy actors use a form of bait and switch that allows them to benefit from the momentum gained from a large base of subscribers who took the bait.

Both Facebook and Google are platforms that benefitted from a bait and switch. Facebook attracted a huge user base with promises of exclusivity and control but then relaxed these very features. The company changed its disclosure settings, making user profiles dramatically more public over time, while masking its

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[34] Matt Richtel, *For Tech Titans, Sharing Has its Limits*, NEW YORK TIMES, Mar. 14, 2015.

[35] Several courts have approved a five-factor test for evaluating the reasonableness of FTC penalties: "(1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of the FTC." *United States v. Reader's Digest Ass'n, Inc.* [1981] 662 F.2d 955, 967 (3d Cir.).

own economic motives with claims that users wanted to be "more open." By the time Facebook made its major privacy changes in 2009, it had such a command of the market and such powerful network effects that users could not defect.

Google announced its search engine wearing opposition to advertising and its influence on search on its sleeve. The company's founders promised a revolution in both search and advertising. Google even presented its search service as more privacy-protective than competitors because it did not take users' browsing history into account when delivering search results.[36]

Consider how different the Google approach is today. It quietly started using behavioral data in search without telling the public.[37] It runs paid search ads prominently at the top of organic search results–mimicking the very thing it considered evil in the 1990s. Google even uses television-like commercials on YouTube—but the new ones are worse because they can automatically pause if not kept in focus and because they track you individually.

Academics could provide research on just how much intervention is needed to address these platform-era bait and switches. Some of the tools used to police natural monopoly may be appropriate.

The interventions may need to be severe to undo the momentum gained from platform status. Consider the findings of a study written in party by two BE authors on the Suntasia Marketing case. The company enticed consumers with "free" trial offers to reveal their checking account numbers, but then Suntasia made many small, fraudulent charges on the checking accounts. The court allowed Suntasia to continue business but, in the process, the court segmented Suntasia's consumers into two groups, thereby setting up a natural experiment. Some Suntasia

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[36] Chris Jay Hoofnagle, *Beyond Google and evil: How policy makers, journalists and consumers should talk differently about Google and privacy*, 14(4) FIRST MONDAY (2009).

[37] Recall that Google presented its search services, which did not track users over time, as a privacy-friendly alternative to competitors. When Google changed strategies and used historical search data for targeting results, it did so secretly and the shift was discovered by an outside analyst. Saul Hansell, *Google tries tighter aim for Web ads*, N. Y. TIMES, Jun. 27, 2008.

customers had to opt in to stay subscribed, while others were retained unless the customer opted out. Almost all of the customers who were required to opt in let their subscriptions cancel. But only about forty-percent of those given opt-out notices canceled, and thus the remainder kept on being charged for "essentially worthless" products. Minorities from low-socioeconomic-status (SES) areas were 8 percent less likely to opt out than whites in high-SES areas.[38] These findings speak to the idea that denying a benefit to a company that misleads others may require dramatic intervention.

Another civil penalty factor concerns whether the respondent company acted in good or bad faith. This raises the need for research into what kinds of fines are enough to deter bad faith—or whether fines can deter at all. Deterrence may vary based on industry, and on the size and maturity of the respondent company.

The final civil penalty factor concerns, "the necessity of vindicating the authority of the FTC." Inherently, this factor considers respect for law and for the consumer. The law presumes that natural and fictitious people are rational actors and that they respond sensibly to incentives and disincentives. Yet, we impose fines with almost no due process or economic analysis against natural persons for many law violations. The criminal law imposes drastic penalties on individuals even though many criminals lack the capacity to act rationally. Administrative penalties, such as the $50 parking ticket for forgetting to pay a $1 meter fee, are keyed to municipal revenue goals rather than economic loss to society. Oddly, such a disproportionate penalty would never survive constitutional review if applied against a company.

Turning to wrongdoing by companies, an economic analysis of harm and other factors is appropriate. But there is something substantively unfair and strange in how these analyses result in recommendations for no monetary penalties. The FTC need only make a "reasonable approximation" when specifying monetary

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[38] Robert Letzler, Ryan Sandler, Ania Jaroszewicz, Isaac T. Knowles, and Luke Olson, *Knowing When to Quit: Default Choices, Demographics and Fraud* (February 2016), http://ssrn.com/abstract=2512276

relief,[39] and thus need not surmount a particularly high threshold to find that damages are in order. In addition, companies receive ex ante legal advice and engage in serious planning when deciding what to do with data. Many privacy lapses, such as Facebook's settings changes, are deliberate in a way that criminal acts and parking mater lapses are not. It would seem that pure economic actors would make the best case for monetary penalties in order to engender respect for the law.

C. Fostering A Market for Privacy

Finally, the BE could explore ways to foster a market for privacy. Part of that effort should concern the FTC's traditional approach of ensuring effective disclosures to consumers. But the more difficult challenge comes in addressing industry players who do not have incentives to fairly use data. For instance, data brokers engage in practices, such as reverse data appends, that render consumers' attempts of selective revelation ineffective. That is, reverse appends make it impossible to avoid having a retailer learn personal information about a consumer. The BE could use its empirical might to study how these information flows in the data broker market undermine alternatives that could result in better incentives and business practices more in line with consumer preferences.

The BE clearly is capable of serious and valuable empirical work—just consider the study of Suntasia Marketing discussed above. Another example comes from the BE's study of credit reporting errors mentioned above in section two. The FTC's report was a difficult to execute endeavor. Yet it was so authoritative that despite its radical finding that 13 percent of consumer reports have a material error, it was not seriously challenged by industry.

Another area for rethinking BE approaches comes from behavioral economics. As early as 1969, Professor Dorothy Cohen called for the creation of a "Bureau of Behavioral Studies," with the mission of gathering and analyzing data on "consumer buying behavior relevant to the regulation of advertising in the consumer

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[39] *FTC v. Inc12.com Corp*, 475 F. App'x 106, 110 (9th Cir. 2012).

interest."[40] The BE embraced this recommendation in several areas,[41] most visibly in false advertising. In the 1970s, the FTC began a program where marketing professors were embedded in the BCP. This led to greater sophistication in the interpretation of advertising, and, perhaps, the first agency use of copy testing (the evaluation of consumer interpretation of advertising by survey and lab experiments) in a matter.[42]

Today, when analyzing what a person might understand from a marketing representation, the FTC is quite humanistic in its outlook. It eschews rational choice theories and the idea that the consumer reads the small print. The FTC focuses on the overall impression of an advertisement. It acknowledges that consumers are not perfectly informed, and that they have limited resources to investigate advertising claims. However, this expansive view of consumer behavior and the subtleties of information products does not appear to have informed the BE's own privacy work.

V. Conclusion

The BE is key to effective enforcement of consumer privacy. Academics and advocates should pay more attention to this important institution because it shapes how privacy and security is protected. Helping the BE see economic injury in privacy and security violations could introduce disgorgement and restitution in matters currently settled with no monetary damages. The BE could also map an enforcement strategy that stimulates a market for privacy, one that helps consumers a different value to the attention and data they pour into "free" online services.

[40] Dorothy Cohen, The Federal Trade Commission and the Regulation of Advertising in the Consumer Interest, 33(1) J. OF MKTG 40 (1969).

[41] Consider the multidisciplinary approach taken in the FTC's tome on information remedies. FTC, CONSUMER INFORMATION REMEDIES: POLICY REVIEW SESSION (1979).

[42] William L. Wilkie, *My Memorable Experiences as a Marketing Academic at the Federal Trade Commission*, 33(2) J. of Pub. Pol'y & Mktg 194 (2014).