REVIEW ESSAY

Privacy, People, and Markets

Gordon Hull

Privacy as Trust: Information Privacy for an Information Age, Ari Ezra Waldman (Cambridge, U.K.: Cambridge University Press, 2018), 196 pp., $99.99 cloth, $34.99 paper, $28 eBook.

The Right of Publicity: Privacy Reimagined for a Public World, Jennifer E. Rothman (Cambridge, Mass.: Harvard University Press), 256 pp., $39.95 cloth, $39.95 eBook.

No one but the executives at data companies, it seems, is happy with the current state of information privacy. The dominant model—known as "notice and consent" or "privacy as control"—is economic. It takes as its conceptual core the idea that autonomous individuals should choose how much of their personal information they reveal to others. These individuals must then negotiate this disclosure on a contractual basis, trading information in return for some desired service. This sounds good in theory. In practice, it has meant that online access to almost anything requires first accepting the terms of a byzantine and one-sided document that gives the service provider free and unfettered access to a lot of personal information, including (quite often) the right to sell it to others. Even if users understood these terms (they do not), and even if it would not be bad for the entire economy if they tried (it would), there is no opportunity for negotiation or effective control: major sites like Facebook and Google do not have significant market competitors, and foregoing access to social media or Internet searches is impractical.

A number of scholars have worked to understand what is wrong with this model and how to improve it, and the books under consideration here are welcome additions to that growing literature. In *Privacy as Trust*, Ari Ezra Waldman argues for a new model of privacy that starts not with putatively

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autonomous individuals but with an awareness that managing information flows is part of how people create and navigate social boundaries with one another. Jennifer Rothman's *Right of Publicity* confronts the explosive growth of publicity rights—the rights of individuals to control and profit from commercial use of their name and public image—and, in so doing, she exposes the poverty of treating information disclosure merely as a matter of economic calculation. Both books emphasize practical and doctrinal solutions to the problems they identify. In what follows, I take a step back and draw out the extent to which they converge on a fundamentally important, if somewhat implicit, point: the blunt application of market logic with its tools of property and contracts fails to protect the interests that lead us to turn to privacy in the first place; the tendency to economize privacy is a significant part of why we inadequately protect it.

Privacy, Trust, and Social Contexts

In his lucid *Privacy as Trust*, Waldman develops an understanding of privacy grounded in theories of social trust that he claims would do a better job of protecting privacy than do current consent-based models. Waldman argues that we should "leverage law to enforce disclosure's trust norms: one can be held liable for invasion of privacy if he further disseminates information that was originally shared in a context that manifests trust" (p. 50).

Waldman begins with a survey and critique of dominant theories of privacy, concluding that these theories assume "that privacy is an individual right against the world" (p. 33). The problem, as the remainder of the book makes clear, is that this framing is fundamentally flawed. For one thing, we are social creatures, and social existence is actually premised on disclosure. As Waldman puts it:

> [Privacy as control] may sound liberating on its surface, but it's contributing to the death of privacy. When privacy is about separation or choice, disclosure is always anathematic to privacy. And because so much of modern life requires disclosure—from buying goods on Amazon to engaging with others on Facebook to even going outside—such a vision of privacy cannot exist in today's world. No wonder we think privacy is dying. The way we have framed privacy to date is tipping the scales. (p. 33)

That is, we do not exist *against* the world but *in* and *through* it. Without information sharing, social interaction would grind to a halt. Waldman's own approach accordingly begins with Erving Goffman's work on the ways individuals manage their presentation to others. On Goffman's account, as Waldman describes it,

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"image management is about establishing the parameters of social space in ways that make continued interaction possible. This is the social role of privacy" (p. 38). Privacy is a social concern as much as an individual one.

In particular, privacy protections facilitate social trust because we are apt to disclose information when we believe that we will not be taken advantage of. Trust, Waldman argues, is "a resource of social capital between or among two or more persons concerning the expectations that others will behave according to accepted norms" (p. 51). Trust thus entails a willingness to make oneself vulnerable before an "other," and is something that develops over time in social contexts through interactions and norms of reciprocity. Trust is important in all areas of life, even online: against the conventional wisdom that says people share online information indiscriminately, Waldman draws on original survey research to support the thesis that "proxies for trust—trust that Facebook will protect our privacy, the number of 'Facebook friends' we have, and the number of close friends we have on the platform—are the only statistically significant predictors of a willingness to share, generally" (p. 58).

In short, "trust functions as a counterweight to the vulnerability and loss of power inherent in disclosure. It forms the background social structure that allows sharing to occur in the first place" (p. 62). With that in mind, Waldman proposes several principles to guide policy formation: (1) sharing is both inevitable and necessary; (2) privacy is "an element of social structure that facilitates sharing and social interaction by constraining the power of information holders" (p. 69); and (3) "judges can identify disclosure contexts that are characterized by trust by looking to the experience of the parties, explicit and implicit social cues, reciprocity, and transference from knowns to unknowns" (p. 72).[1] By attending to these issues, the law's expressive power can be harnessed to preserve and build social trust, putting privacy on the same footing as other important social values such as speech and security.

The remainder of the book looks at specific examples of how privacy as trust would perform, and contrasts them with more traditional approaches. Topics include those who collect our data online; protections for previously disclosed information; nonconsensual pornography and cyber harassment; intellectual property (IP); and the potential privacy risks surrounding social robots. For example, Waldman argues that the law should treat online data collectors less as negotiating partners and more as trustees, holding them accountable for deceptive

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practices and requiring them to act in the consuming public's best interest (pp. 88–92).

The chapter on IP is particularly helpful in showing the depth of the problem of using an economic model of privacy. Here, Waldman focuses on one specific aspect of patent law called the "public use bar," which is one part of the law's requirement that patentable inventions be "novel." The public use bar denies patent protection to an invention that is "disclosed" or "in public use" or "otherwise available to the public" for more than a year prior to filing. But what does that mean? After all, invention is a social process, and almost nothing can be invented without several people knowing about it, perhaps for a long time. When has there been enough disclosure that this constitutes "public" availability? Waldman argues that the requirement is currently operationalized by courts with a search for formal nondisclosure agreements (NDAs): if there is an NDA, then the inventor clearly did not intend to disclose or otherwise make public the invention; if not, evidence of disclosure falls afoul of the public use bar.

The problem is that these contractual NDAs are only likely to be pursued by corporations, wealthy individuals, or inventors with the capital and clout to insist on them. In that regard, "public use law's reliance on traditional privacy principles . . . ends up privileging wealthy corporate inventors over entrepreneurs and hobbyists" who lack the resources or sophistication to secure NDAs (p. 123). This is a problem for a few reasons. It increases entry barriers for small-scale inventors and entrenches patterns of power and privilege (women, for example, are underrepresented at the large corporations that tend to get patents, and so are underrepresented in patent filings). Further, it also misunderstands the deeply contextual nature of disclosure in the first place (p. 128). Waldman cites the seemingly absurd case of a designer who lost a patent on a new kaleidoscope because she demonstrated it for party guests and allowed them to handle it without first securing a confidentiality agreement (p. 124).

Privacy as trust would change this contractual focus and let the social context be a guide: "If pre-patenting disclosure happens in relationships characterized by trust and expectations of confidentiality, information disclosed should remain protected and, thus, patentable" (p. 123). Instead of looking for formal agreements, Waldman suggests, courts should assess the totality of the circumstances surrounding the disclosure. In his view, this would have gotten the kaleidoscope case right. Had the court considered social context, it would have discovered that "the invite-only party was at the designer's private home [and she] gathered

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20 to 30 of her friends . . . for the express purpose of soliciting feedback" (p. 130). On the whole, nothing about the party suggests the sort of public disclosure that ought to bar patentability, despite the lack of confidentiality agreements. Who, other than a corporate patent attorney, would think to demand that friends attending a party at their house sign a contract?

Privacy, Publicity, and Property

While Waldman is concerned about the importation of "notice and consent" privacy principles into the realm of intellectual property, Jennifer Rothman makes a strong case that traffic in the other direction—from IP into privacy—has been disastrous for both publicity and privacy rights. In *The Right of Publicity,* Rothman traces the emergence of what she takes to be a dangerous and wrong "simplistic dichotomy" between privacy and publicity, according to which "privacy is about protecting the shrinking violets of the world, while the right of publicity is about protecting those who seek the limelight" (p. 4). This dichotomy, she maintains, has never been true, and writing it into law "does a disservice to both those who wish to avoid publicity and those who seek it out" (p. 4). Since we all live our lives in public to one degree or another, poor management of the publicity-privacy conceptual nexus puts us all at risk; publicity, in particular, needs to be cabined by a return to its origins as an aspect of privacy.

The book presents a fascinating counter-history of the right of publicity, building the case that the historical narrative used to justify current publicity rights and their separation from privacy is wrong on virtually every point. Rothman argues that "the right of privacy was and remains the original right of publicity" (p. 11), best understood as being broadly about managing identity and limiting abuse of information in public, protecting both public and private figures. Rothman's detailed account of the legal disputes surrounding the advent of photography as a publicly consumed medium provides a vivid example of the importance of the sociological theory highlighted by Waldman. Historically, Rothman notes, public figures could and did recover damages from the nonconsensual uses of their images by asserting privacy rights, and private figures could be and were seen to have waived their privacy rights when they were involved in something legally deemed newsworthy or in the public interest.

What happened? In a word, property. Rothman argues that the real reason for the split between public and private rights was that privacy rights were not

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transferable and "companies wanted the power to stop identity-holders from authorizing more than one use of their names and likenesses" (p. 45). For example, some early cases involved litigants who wanted to stop baseball players from licensing their images to appear on more than one company's trading cards. An accretion of case law began the "slow creep" of publicity's transformation into an alienable property right (p. 67). For example, in the mid-1970s, "human cannonball" Hugo Zacchini sued to stop the broadcast of one of his performances on the local news. The case meandered its way to the U.S. Supreme Court, which concluded that the "state's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment," proposing that "the same consideration underlies the patent and copyright laws."[2] On Rothman's analysis, the ruling elevated publicity to a "distinct species of IP," replicating its economic modeling of incentives (p. 78). By 1992, Vanna White (of *Wheel of Fortune* fame) had convinced the ninth circuit court that her publicity rights in California extended to her "identity." She was thereby able to win damages against Samsung for an advertisement that showed a robot gameshow assistant turning letters around, evoking the idea of White, but in no way naming or explicitly representing her (p. 90).

There is already a significant literature that criticizes the reductiveness of this incentive's framework in the context of IP, but Rothman shows that the problem is arguably worse for publicity.[3] Rothman makes a strong case that the economic arguments in particular are a collective failure. The publicity right provides little further incentive for those who are already famous (they can make money from endorsements and other deals without an additional publicity right), and is little help for those who are not (their identity is not worth any money, regardless). There is also no reason to assume that the value of someone's identity should be fully internalized or that doing so is "better overall for society than letting the public freely use the person's identity" (p. 104). In more general terms, there is good evidence that there are social values that are served by refusing to let property owners capture the full value of their assets. The public is served by having access to Dr. Martin Luther King Jr.'s speeches (which his estate has vigorously tried to control), just as I am (more trivially) served by being allowed to freely view my neighbor's flowers.[4] In this way, a fully realized publicity right would come at a cost, by suppressing "commentary, expressive works, merchandise, and advertising about personalities" (p. 102) by those who were not in possession of that right. Again, there is a strong parallel here with IP, in that concerns

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about strong IP rights generally emphasize the value of preserving materials in the public domain or as a commons for further innovation or public use, often with an attention to the problems of internalization.[5]

Rothman shows that the implications of an untethered publicity right are disturbing. Taken to a logical extreme, one can imagine people being compelled to transfer their publicity rights, and then being unable to regain them. She admits that many of the dystopian implications of this situation have not happened, but cautions both that the law allows the conditions that would contribute to them and that publicity rights are expanding. Rothman cites the litigation between O. J. Simpson and the estate of Ron Goldman (p. 118). In 1994, Simpson was criminally charged with and afterward acquitted of the murders of Goldman and Simpson's wife, Nicole. Three years later, a civil court ordered O. J. Simpson to pay the families of Ron Goldman and Nicole Simpson $33.5 million in damages. When Simpson refused to pay the debt, the court transferred the copyright of Simpson's book, *If I Did It*, to the Goldman estate, which then republished the book with a preface titled "He Did It." Had Goldman's estate been able to win a fully alienable right of publicity to Simpson's persona, it could have first published Simpson's picture with the caption "I did it" and then prevented him from monetizing his identity by making endorsements, being on TV, or even making certain kinds of public appearances. O. J. Simpson is hardly a sympathetic character, but the larger point is that this sort of judgment could be used against any debtor. This is not just a celebrity problem. Aspiring models, student athletes, and even children can today see their rights "voluntarily" signed away, often as a condition of participation in an activity, as, for example, the NCAA requires for participation in college athletics. In the future, publicity could be subject to division in an acrimonious divorce, and the family of a deceased person could lose any control over that person's image. Indeed, if the (potential) commercial value of people's identity is part of their estate, then someone's heirs could be forced to commercialize that person's identity to pay off outstanding debt (p. 123).

What justification might be better? Rothman considers individual dignitary interests, noting that "in the absence of control over our own identities, we are all like puppets that can be used to speak others' words and messages" (p. 111). This privacy-based rationale is largely missing from current publicity doctrine and its conceptualization as alienable property. As I noted above, Waldman offers a sharp critique of privacy as dignity, and some of it would clearly apply to Rothman. For example, when privacy has been treated as the protection of

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intimate information, it has been difficult to operationalize what counts as "intimate." Still, it is interesting to note here that the way Rothman presents the reunification of privacy and publicity actually shares a lot with Waldman's reorientation of privacy around social models of trust. This is not to say they present the same theory but rather that they are moving in some of the same directions. For example, Rothman does not favor an absolute dignity interest. Like Waldman, she thinks the relevant questions are social, and that "we need to balance the harm to the individual against other competing interests, such as the countervailing free speech interest in commentary and information about that person" (p. 112).

The conceptual point is that publicity and identity are co-constituted aspects of how we form and manage our identities in social contexts. Rothman grounds the argument in a theory of property that suggests that allowing full commodification of attributes and other things traditionally associated with personhood risks damaging them. Margaret Jane Radin, for example, argues that introducing a market model for adopting children—as former circuit judge and Chicago School law and economics theorist Richard Posner controversially proposed back in the 1980s—would inexorably tend to lead toward the commodification of everything from intelligence scores to hair color, reducing human worth to the market value of these attributes.[6] Rothman's use of Radin's argument arrives at a similar place as Waldman's point—which itself builds on Goffman and Julie Cohen—that our conception of privacy functions in part to negotiate the boundaries between an individual and his or her social context. As Rothman notes, "a publicity-holder can affect the identity-holder's public and private identity" (p. 127) by controlling what both the identity holder and the larger public can do with the persona in question. One's identity is not an object but an "attribute" of oneself, and as such "is not detachable from the underlying person" (p. 126). Publicity rights should therefore be inalienable, insofar as "the ability to control how one's image is publicly presented plays a fundamental role in how identity is created and develops" (p. 129). But once one starts limiting transferability for publicity rights, the right faces an existential crisis: "Given that transferability is the primary and defining feature of the right, and is at the root of its split from the right of privacy, one can question whether, absent such alienability, it makes sense to have a separate right at all" (p. 137). After gesturing to this theoretical point, Rothman makes the practical observation that since publicity is here to stay, inalienability is a good start to repairing it (p. 137).

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Friends Don't Let Friends Treat Privacy as Property

Reading Waldman and Rothman together allows one to see that the contractual model of privacy as control fails in part because it encourages us to think of privacy, and thus aspects of our identity, as alienable commodities on the model of intellectual property. This nudging toward commodification serves no one's interest but data collectors.[7] Contracts function to facilitate privatization, and to make it appear fair. Even if you think that dominant models of intellectual property do a good job in their own context, Waldman and Rothman make clear that they fail to successfully protect personal information. The interests of the public and individuals, and the formation of individual identities, are too deeply intertwined to attempt a clean separation. Because it imagines autonomous and fully informed economic actors, the property model fails to adequately conceptualize what is at stake in privacy. A central reason for this, as Rothman makes quite clear, is that the agents in the economic model are understood to be governed solely by economic incentives, which is an impoverished understanding of the totality of experiences and motivations of real people (pp. 100–101). The model also underestimates the extent to which those motivations can be manipulated and the extent to which allowing the transfer of rights to individual personal information creates incentives to use that information in ways that go against individuals' interests.[8]

Perhaps because of this skepticism about the property model, one common thread running through both books is a deep skepticism about legal formalism's ability to protect privacy. When such rules develop—treating privacy as a question of formal contractual arrangement, or treating publicity as a property right that can be formally alienated—they can fail to protect people's actual, substantive interests. Moreover, they all fail in the same way: By ignoring power and information asymmetries, they leave individuals unable to get a fair deal or to bargain for their rights. Instead their only choice is to sign their rights away in a boilerplate contract, the acceptance of which is presented as a necessary condition of participating in activities ranging from online shopping to college sports. Those who accept these contracts are in vulnerable positions: they cannot know their future selves and probably have little idea of the value of their information. This model is designed to look as though it protects autonomy while it actually undermines it. This becomes clear once one is able to see that treating autonomy in abstract and formal terms leads to an impoverished understanding of whether individuals

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actually possess any autonomy beyond the abstract legal right.[9] For both publicity and privacy, the remedy is for the law to focus on more substantive, contextual issues.

Fundamentally, we should be concerned about the tendency to model every aspect of human interaction on idealized market transactions. A certain view of economics—one centered on privatization, consumer welfare, and a view of agency as primarily or even exclusively economic—has been aggressively colonizing nearly all aspects of law and policy for the last forty years or so. The easy trafficking between privacy as control and dominant models of intellectual property shows the extent to which economics has also come to dominate how we understand privacy and publicity. Regardless of its merits in other areas, this colonization is particularly problematic here, because privacy and publicity denote spaces where individuals negotiate the boundaries between themselves and their various social contexts. Privacy thus names a space that is essential to the formation of subjectivity and agency. Imposing a transactional economic model of agency onto privacy occludes this process of identity formation and insists instead on the reduction of personhood to economics. By superimposing its view of subjectivity onto the environment in which people develop their own subjectivity, the economic model increases the odds that people will turn out primarily to be good market subjects. That may be good for data brokers and the NCAA, but less so for the rest of us. The Nobel laureate and economist Gary Becker famously said that "the economic approach provides a valuable unified framework for understanding *all* human behavior, although I recognize, of course, that much behavior is not yet understood."[10] Here, at least, that value has been substantially overstated, and Waldman and Rothman show us some of the real costs of overvaluing the market.

NOTES

[1] Waldman suggests that "case-by-case litigation is uniquely suited to the task" (p. 74). One reservation here is that litigation is often unaffordable for ordinary users, especially given that large data companies have very deep pockets and a strong interest in preventing tougher privacy norms from developing. Litigation will thus tend to be a long-term strategy aimed at changing the behavior of data intermediaries; that strategy will need to be supported not just by successful, high-profile litigation but by things like generous class certification or even statutory reform enabling and incentivizing regulatory agencies to act on the behalf of consumers.

[2] Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 573 (1977).

[3] For the critique of incentives, see, for example, Rebecca Tushnet, "Economies of Desire: Fair Use and Marketplace Assumptions," *William & Mary Law Review* 51, no. 2 (November 2009); and Roberta Rosenthal Kwall, "Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul," *Notre Dame Law Review* 81 (May 2006). My own contribution to this discussion appears in my book *The Biopolitics of Intellectual Property: Regulating Innovation and Personhood in the Information Age*

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(Cambridge, U.K.: Cambridge University Press, 2020, pp. 64–70), which revises my argument in the book chapter "Copyright between Economic and Cultural Models of Creativity" (in Joseph C. Pitt and Ashley Shew, eds., *Spaces for the Future: A Companion to Philosophy of Technology* [New York: Routledge, 2018]).

[4] That is, entitlements generate positive externalities, a condition that might go away if property owners were allowed to try to internalize the full value of their assets. See Brett M. Frischmann and Mark A. Lemley, "Spillovers," *Columbia Law Review* 100, no. 2 (2006). The flowers example is from Lawrence Lessig, *Code and Other Laws of Cyberspace, Version 2.0* (New York: Basic Books, 2006).

[5] On this, see, for example, Madhavi Sunder, "IP^3," *Stanford Law Review* 59, no. 2 (November 2006), pp. 257–332; Julie E. Cohen, "Creativity and Culture in Copyright Theory," *UC Davis Law Review* 40, no. 3 (March 2007), pp. 1151–1205; John Tehranian, "Towards a Critical IP Theory: Copyright, Consecration & Control," *Brigham Young University Law Review* (2012); and James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven, Conn.: Yale University Press, 2008). The idea that property rights are about internalization is most famously developed by Harold Demsetz. See, for example, Harold Demsetz, "Toward a Theory of Property Rights," *American Economic Review* 57, no. 2 (May 1967), pp. 347–59. The move to internalization in IP is criticized in such texts as Brett M. Frischmann, "Evaluating the Demsetzian Trend in Copyright Law," in *Review of Law & Economics* 3, no. 3 (2007), pp. 649–77; and Frischmann and Lemley, "Spillovers."

[6] Margaret Jane Radin, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts, and Other Things* (Cambridge, Mass.: Harvard University Press, 1996).

[7] Gordon Hull, "Successful Failure: What Foucault Can Teach Us about Privacy Self-Management in a World of Facebook and Big Data," *Ethics and Information Technology* 17, no. 2 (June 2015), pp. 89–101.

[8] There is a robust literature on manipulation of users online by advertisers (quite apart from that on fake news and so forth). See, for example, Karen Yeung, "'Hypernudge': Big Data as a Mode of Regulation by Design," *Information, Communication & Society* 20, no. 1 (2016), pp. 118–36.

[9] Richard H. Fallon Jr., "Two Senses of Autonomy," *Stanford Law Review* 46, no. 4 (April 1994), pp. 875–905.

[10] Gary S. Becker, "The Economic Approach to Human Behavior," in Ramón Febrero and Pedro S. Schwartz, eds., *The Essence of Becker* (Stanford, Calif.: Stanford University Press, 1995), p. 13.

Abstract: Most current work on privacy understands it according to an economic model: individuals trade personal information for access to desired services and websites. This sounds good in theory. In practice, it has meant that online access to almost anything requires handing over vast amounts of personal information to the service provider with little control over what happens to it next. The two books considered in this essay both work against that economic model. In *Privacy as Trust*, Ari Ezra Waldman argues for a new model of privacy that starts not with putatively autonomous individuals but with an awareness that managing information flows is part of how people create and navigate social boundaries with one another. Jennifer Rothman's *Right of Publicity* confronts the explosive growth of publicity rights—the rights of individuals to control and profit from commercial use of their name and public image—and, in so doing, she exposes the poverty of treating information disclosure merely as a matter of economic calculation. Both books emphasize practical and doctrinal solutions to the problems they identify. In this essay, I take a step back and draw out the extent to which they converge on a fundamentally important point: the blunt application of market logic with its tools of property and contracts fails to protect the interests that lead us to turn to privacy in the first place; the tendency to economize privacy is a significant part of why we inadequately protect it.

Keywords: privacy, intellectual property, publicity, trust, Ari Ezra Wadman, Jennifer Rothman

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