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The Federal Trade Commission's Inner Privacy Struggle

Chris Jay Hoofnagle

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 on policy matters, and staff attorneys, on case selection. This chapter shows how the BE's *evaluative* role is just as important as attorneys' case *selection* role.

This chapter describes the BE, discusses the contours of its consumer protection theories, and discusses how these theories apply to privacy matters. 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, because the FTC's lawyers prefer settlement for a variety of logistical and strategic reasons, 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 the regulation of information. Not surprisingly, calls for the BE to expand its role from case *evaluation* to case *selection* typically come from those wishing to curb the FTC's privacy-expanding enforcement agenda. Those calls may be strategic, but are not without merit.

We should expect President Donald Trump's administration to expand the role of the BE and to make its role more public. With newfound powers, the BE will argue that more cases should be pled under the unfairness theory. This will have the effect of blunting the lawyers' attempts to expand privacy rights through case enforcement.

But the answer is not to avoid the BE's preferred pleading theory. Instead, we need to foster a BE that can contemplate invasions of privacy and security problems as causing injuries worthy of intervention and monetary remedy. This chapter concludes with a roadmap to do so. Among other things, 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 nonsensitive information, such as their home address, secret. Additionally, the FTC's civil penalty factors, which consider issues such as how to deny a defendant 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.

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 study 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.¹

The BE is divided into three areas focusing on antitrust law, research, and consumer protection. About eighty economists educated at the PhD level work for the BE. Twenty-two economists and eight 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.²

By deeply integrating principles of cost-benefit analysis in the FTC's decision-making, the BE has a disciplining effect on the agency's instinct to intervene to protect consumers.³ As former Chairman William E. 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 the 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."⁴ According to Kovacic and Hyman, this disciplining effect is good. 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.

The most comprehensive history of the BE was written in 2015 by Dr. Paul Pautler, longtime FTC employee and deputy director of the BE.⁵

¹ 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).

² 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. PUB. POL'Y & MKTG 244 (2014).

³ Jonathan Baker, *Continuous Regulatory Reform at the Federal Trade Commission*, 49(4) ADMIN. L. REV. 859 (1997).

⁴ 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).

⁵ See Paul A. Pautler, *A History of the FTC's Bureau of Economics*, AAI Working Paper No. 15-03, ICAS Working Paper 2015-3 (Sept. 2015).

The BE's Conceptions of Consumer Injury

If the BE is skeptical of privacy harms, why is it that the FTC brings so many privacy cases without evidence of pure fraud or out-of-pocket monetary loss? The answer is that staff-level FTC lawyers have broad discretion in target *selection*, and the lawyers have focused on expanding pro-privacy norms through enforcement. Privacy enforcement has often focused on large, mainstream, reputable companies such as Google, Facebook, and Microsoft rather than more marginal companies.

While the lawyers select the cases, the economists *evaluate* them and recommend remedies to the Commission. The BE has developed substantial policy thinking surrounding remedies. The BE wishes to achieve deterrence – both specific and general – with an emphasis on avoiding over-deterrence. This is tricky because risk of detection affects deterrence, and the FTC's small staff means that the vast majority of illegal practices will go undetected and unremedied. One thus might conclude that penalties should be massive, but large penalties might cause others to overinvest in compliance, making the entire economy less efficient.⁶

A number of factors are considered in the difficult calculus of balanced remedies. 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.

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."⁷

The special dynamics of personal information transactions make 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 are 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 clearly differentiates between these products and assigns a higher price to the 18-karat object. The transaction is 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."⁸ 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.

Furthermore, individual privacy preferences vary. Some consumers may never have considered privacy attributes in their service selection or may not care a great deal about privacy. 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 consumer's mind until something goes wrong. When that happens, 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 an alternative, "privacy friendly" feature set or comparative price point.

⁶ MALLORY DUNCAN, *FTC CIVIL PENALTIES: POLICY REVIEW SESSION* (1980).

⁷ Paul A. Pautler, *A Brief History of the FTC's Bureau of Economics: Reports, Mergers, and Information Regulation*, 46 *REV. IND. ORG.* 59 (2015).

⁸ John M. Newman, *The Myth of Free*, 86 *Geo. Wash. L. Rev.* ____ (2017).

The above discussion shows that assigning a dollar value to a privacy violation is not a simple exercise. But other dynamics cause the BE to be skeptical of information privacy cases more generally.⁹ 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 trade-offs that are not well presented in surveys. Sometimes economists will argue that consumer behavior belies stated preferences for privacy. 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 conservative economic norms.¹⁰ This may be in part a problem of disciplinarity. Pautler's 2015 history of the BE notes that when it became active in consumer protection in the 1970s, economists had just started considering the topic. Similarly, Ippolito's 1986 survey only cites to three pre-1970 works on consumer protection economics.¹¹ This narrow view is strange, because the consumer protection literature spanned the 20th century, often describing economic problems in the language of psychology or marketing. Popular, pro-advertising works, such as David Ogilvy's *Confessions of an Advertising Man* (1963), provide credible insights about consumer psychology, decision-making, and the effect of FTC regulation. Similarly, Samuel Hopkins Adams's 1905 work explains the economic conflicts that prevented market forces from policing patent medicines.¹² Yet these kinds of works are not defined as being in the discipline.

Aside from a narrow view of disciplinary relevance, the literature has a conservative lens. Scanning BE literature reviews, the notable omissions are liberal and even centrist works on consumer protection – Albert Hirschman, Arthur Leff, Arthur Kallet and F.J. Schlink, Ralph Nader, David A. and George S. Day's multi-edition compilations on “consumerism,” and the “ghetto marketplace” research (some of which was generated by the BE itself) of the 1960s.

President Reagan's appointment of economist James Miller to the chairmanship of the FTC in 1981 also added to the BE's reputation as conservative. 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.¹³ Miller installed economists in consumer protection leadership positions to influence how the agency weighed case policy. Also, relevant to today's debates about case selection, Miller turned away from normative causes that the FTC might have pursued in favor of policing pure fraud cases.

Wendy Gramm was a director of the BE during Miller's tenure. To get a taste of the flavor of Miller-era consumer protection policy, consider Gramm's defense of debt collection tools such as the “blanket security interest.” These were agreements that empowered creditors to show up at debtors' homes and seize household goods unrelated to the debt. The record showed that some

⁹ Peter P. Swire, *Efficient Confidentiality for Privacy, Security, and Confidential Business Information*, BROOKINGS-WHARTON PAPERS ON FINANCIAL SERVICES 306 (2003) (“... based on my experience in government service, graduate training in economics is an important predictor that someone will not ‘get’ the issue of privacy protection.”).

¹⁰ 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.”).

¹¹ Pauline M. Ippolito, *Consumer Protection Economics: A Selective Survey*, in *EMPIRICAL APPROACHES TO CONSUMER PROTECTION ECONOMICS* pp. 1–33 (Pauline M. Ippolito and David T. Scheffman, eds)(1986).

¹² Among other reasons, advertisers banned publishers from running anti-patent-medicine content. See Samuel Hopkins Adams, *The Patent Medicine Conspiracy against the Freedom of the Press*, *COLLIER'S*, in *THE GREAT AMERICAN FRAUD* pp. 147 (American Medical Association) (n.d.).

¹³ THOMAS O. MCCARTHY, *FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL* (2013).

creditors lorded the agreements over debtors, causing debtors psychological terror through the risk of arbitrary seizure of their possessions, 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 the risk 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.¹⁴ But a thesis of my book, *Federal Trade Commission Privacy Law and Policy* is that 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.¹⁵ The current staff leadership of the BE's consumer 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 Miller-era policy instincts with mainstream economics. I expand on this point in the next part of this chapter. 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.¹⁶ 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, through the Gramm/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 taken¹⁷ may be harmed, but on the other hand there is some risk of moral hazard if consumers think the government might intervene in private ordering. When public attention turned to the unfairness of blanket security agreements, Gramm commented, "Consumers are not as ignorant as you might suspect."¹⁸ Translated into consumer privacy, this attitude holds that consumers are happy to enjoy the benefits of free services that trade in personal information and have calculated the risks flowing from these services.

Finally, the Miller era had a partial revival with the election of President George W. Bush, who appointed Timothy Muris, a protégé of James Miller, as chairman in 2001. An eminently qualified Chairman, Muris focused the FTC on a "harms-based" approach. This approach was shaped by concerns about innovation policy, and in part by a kind of naïve belief in the power of information to lead markets to correct decisions.¹⁹ A trade in personal information is necessary and indeed beneficial for enabling modern economic infrastructures, such as consumer reporting. Thus, the harms-based approach allowed information flows presumptively, and

¹⁴ FTC OFFICE OF THE INSPECTOR GENERAL, EVALUATION OF THE FEDERAL TRADE COMMISSION'S BUREAU OF ECONOMICS, OIG EVALUATION REPORT 15-03 (June 30, 2015).

¹⁵ CHRIS JAY HOOFNAGLE, *FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY* p. 82 (Cambridge Univ. Press 2016).

¹⁶ Alessandro Acquisti, Curtis R. Taylor, & Liad Wagman, *The Economics of Privacy*, 54(2) J. ECO. LIT. 442 (Jun. 2016).

¹⁷ FEDERAL TRADE COMMISSION, CREDIT PRACTICES: FINAL REPORT TO THE FEDERAL TRADE COMMISSION AND PROPOSED TRADE REGULATION RULE (16 CFR part 444) (1980).

¹⁸ Michael deCourcy Hinds, *The Rift over Protecting Consumers in Debt*, p. F8, N.Y. TIMES, May 8, 1983.

¹⁹ Muris was part of a chorus of thinkers who downplayed the risks of the housing bubble, arguing that richer information in credit reporting enabled safe lending to "underserved" (i.e. subprime) prospects. See e.g. Fred H. Cate, Robert E. Litan, Michael Staten, & Peter Wallison, *Financial Privacy, Consumer Prosperity, and the Public Good* (AEI-Brookings Joint Center for Regulatory Studies 2003).

intervention was limited to situations where “harm” was present. “Harm,” a thorny concept that seemingly has expanded over time, was never defined in a satisfying way. The Bush FTC found telemarketing to be “harmful” and adopted a dramatic policy intervention for sales calling: the National Do-Not-Call Registry. Yet, when it came to privacy, the Bush FTC’s idea of harm did not justify adoption of a rights-based framework. Pautler marks 2008 as the end of the harms-based era.

Using the Freedom of Information Act, I obtained training materials for the BE and a literature review of privacy papers apparently used by the BE during the harms-based approach era. Some of the microeconomic work 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 best-known scholars in the field and articles published in journals familiar to economists who work on consumer protection.²⁰ Instead, the BE’s literature had a distinctly laissez faire bent, with the first paper listing the product of an industry think tank supported by five- and six-figure donations from telecommunications companies and Silicon Valley firms.

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.²¹ 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).²²

Yet, economists may have an even broader view of harm than do lawyers. As Sasha Romanosky and Alessandro Acquisti explain, “economic 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.”²³

Romanosky and Acquisti’s observation positions economists as potentially more open to recognizing consumer injury than are 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 decided by the Supreme Court in 2016, several information-intensive companies argued that they should not be subject to suit unless the consumer suffers financial injury – even if the company violates a privacy law intentionally.²⁴ Many consumer lawsuits for security breaches and other privacy problems have been tossed out

²⁰ Surprising omissions from the list include, James P. Nohf, *Shopping for Privacy on the Internet*, 41 J. CONSUMER AFF. 351 (2007); Alessandro Acquisti & Hal R. Varian, *Conditioning Prices on Purchase History*, 24(3) MKTG. SCI. 367 (2005).

²¹ Joshua L. Wiener, *Federal Trade Commission: Time of Transition*, 33(2) J. 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.”).

²² 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).

²³ Sasha Romanosky and Alessandro Acquisti, *Privacy Costs and Personal Data Protection: Economic and Legal Perspectives*, 24(3) Berk. Tech. L. J. 1060 (2009).

²⁴ See amicus curie brief of eBay, Inc., Facebook, Inc., Google, Inc., and Yahoo! Inc. in *Spokeo v Robins*, No. 13–1339 (SCT 2015).

of court on jurisdictional grounds for lacking “injury”²⁵ – 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. This reflects a revolution in thinking about business regulation also present in the FTC’s antitrust approaches. With per se antitrust rule violations out of favor, the FTC focuses now on rule-of-reason style approaches with more evaluation of consumer harm. In addition to reflecting policy commitments, adopting a harm approach empowers the economists structurally, because a focus on harm causes economists to be more deeply involved in consumer protection cases.²⁶

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.

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. The word “harm” appears nowhere in Title 15 of the US Code, which governs the FTC, yet the economists have read the term into the fabric of the agency. Sometimes democratic processes create ungainly regulatory approaches, but setting these aside and reading harm into the statute is governance by philosopher king rather than rule of law.

The BE has a more academic culture than the BCP as well. Since at least the 1990s, the economists have been able to obtain leave for academic positions and for academic writing.²⁷ 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.”²⁸ But if they truly are to be independent advisors, the kind accepted by courts as legitimate experts, the economists need to have the very comforts that attorneys find discomfoting.

²⁵ 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. 1007, 1008 (2014).

²⁶ Paul A. Pautler, *A History of the FTC’s Bureau of Economics*, AAI Working Paper No. 15–03, ICAS Working Paper 2015–3 (Sept. 2015).

²⁷ Paul A. Pautler, *A History of the FTC’s Bureau of Economics*, AAI Working Paper No. 15–03, ICAS Working Paper 2015–3 (Sept. 2015).

²⁸ Kenneth W. Clarkson & Timothy J. Muris, *Commission Performance, Incentives, and Behavior* 280–306, in *THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR* (Kenneth W. Clarkson & Timothy J. Muris, eds., 1981).

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 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,"²⁹ 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 more effectively 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.³⁰ But to the more legalistic culture of the BCP, Calfee's reasoning rejects the FTC's statutory 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 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.

Finally, the lawyers too can steer the FTC away from monetary awards and other dramatic remedies. Pursuing such remedies may force the agency into litigation. The FTC is a risk averse litigant because it has more to lose from bad precedent than do other actors, such as class action attorneys. The burdens of litigation can consume precious staff attorney time, slowing down or even stopping the investigation of other cases. In addition, a 1981 study by Sam Peltzman found that FTC actions, even those without civil penalties, have a dramatic, negative effect on

²⁹ R. J. REYNOLDS CORP., NOT ONE SINGLE CASE (1947) in Stanford School of Medicine, Stanford Research into the Impact of Tobacco Advertising, available at http://tobacco.stanford.edu/tobacco_main/images.php?token2=fm_sto69.php&token1=fm_img1636.php&theme_file=fm_mto04.php&theme_name=Scientific%20Authority&subtheme_name=Not%20One%20Single%20Case.

³⁰ JOHN H. CALFEE, FEAR OF PERSUASION (1997); Posner too expressed qualified support for this reasoning, and argued that low-tar, improved filters, and new technology, such as lettuce-based cigarettes, might reduce the harms of smoking. See ABA, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (Sept. 15, 1969)(Separate Statement of Richard Posner).

respondents.³¹ FTC attorneys may thus feel satisfied that respondent companies are punished enough by the bad press and legal bills that invariably come from a settled case.

THE BUREAU OF ECONOMICS' ECONOMICS OF PRIVACY AND SECURITY

The FTC has resolved over 150 matters involving privacy and security, using its authority to bring cases against deceptive and unfair trade practices. 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. This balancing between injury and benefits is nicely suited to economists' strengths.

The FTC's power to police deception is less burdened than the unfairness test. There is essentially no balancing involved, because across ideological lines, deception is believed to harm consumers and the marketplace. Because deception cases are easier to bring—indeed, only consumer "detriment" need be proven instead of injury—it is no surprise that the FTC relies on its deception power when wading into new areas, such as privacy. Doing so has another strategic, internal benefit for the lawyers: framing a wrong as deceptive essentially circumvents the BE. Deception cases receive much less economic attention.

There is growing tension at the FTC surrounding cases where the lawyers clothe unfairness cases in deception garb. Typically, this happens where a company engages in normatively objectionable behavior and some minor deception is present. The FTC enforces against the deception in order to quash the normatively objectionable practice. For instance, consider the 2015 Jerk.com matter, where the FTC brought an administrative action against a company that created a website that allowed users to rate people as "jerks." The FTC's basis for the matter was the false representation that the site was based on organic, user-generated content, when in reality, the profile data were scraped from Facebook. In another case, a company tracked consumers by monitoring unique identifiers emitted from phones. The company, Nomi, violated the law not because it tracked people, but because it failed to live up to promises of providing notices of its activities.

Why would anyone care about whether Jerk.com's data were organically generated user content? Why would anyone care about whether Nomi faithfully posted privacy notices? The real issue underlying these cases is our normative commitment to privacy: Do we really want websites that label people jerks or companies that collect unique identifiers from phones? The unfairness theory better fits the privacy problems presented by Jerk and Nomi. But the BCP lawyers realized that if they styled these practices as unfair, the BE would have to be convinced that overall consumer welfare was harmed by their activities. The easily satisfied deception power gave the FTC a simple path to policing these objectionable practices.

Returning to unfairness, the FTC has alleged such substantial 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 to the agency's limits on civil penalties (for the most part, the FTC cannot levy civil penalties in privacy and security matters). But the FTC has a broad range of monetary and other remedies in addition to civil

³¹ Sam Peltzman, *The Effects of FTC Advertising Regulation*, 24(3) J. L. ECON. 403 (Dec. 1981).

penalties. It can seek restitution, redress, disgorgement, asset freezes, the appointment of receivers, and the recession of contracts.

There are several reasons why various 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, in particular because privacy violations are so difficult to detect. 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.

No Monetary Damages in a World with No Privacy Market

The BE's methods of evaluating relief drive monetary penalties to zero in most privacy 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 Apple 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.³² 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 derived clear benefits from tracking Apple users. Apple is a luxury brand in technology, thus Apple users are attractive to advertisers. In addition, eroding Apple's efforts to shield its users from Google tracking may have been strategically and psychologically valuable. Detection of Google's tracking required forensic analysis on a specific kind of software, and thus there was little risk that regulators would discover the practice. 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, known of Google's statements on the matter, or even 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 invasion a harm in itself.

Economic Reasoning for Physical-World Products in the Platform Age

The BE's privacy work appears still to 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 (this is not

³² *In the Matter of Google*, FTC File No. 102 3136 (2011).

true of the BE's antitrust work).³³ 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.³⁴ The BE authors concluded that that under the two assumptions, a competitive marketplace could provide consumers privacy options.³⁵

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 "traditional," but rather grounded in relatively conservative economic work. This is reflected in the 2014 study's references. Reading over those references, one sees little overlap with the literature discussed in Acquisti et al., *The Economics of Privacy*.³⁶ 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. These platforms are trying to influence how consumers understand and expect rights from technology.

If firms are strategic, they will compete to both capture benefits and deny them to competitors. Through this lens, Google's tracking of Safari users could be motivated by a desire to capture benefits from tracking, but also to deny Apple the ability to compete on privacy. Denying Apple the competitive benefit could also affect the psychology of consumers, leading them to think no company can protect privacy. This is what Joe Farrell has called a dysfunctional equilibrium,³⁷ a situation in which no firm is trusted to deliver on privacy, and therefore no one can compete on it.

Companies that are competing to be the dominant platform are constantly changing the bargain with the consumer through continuous transactions over time. Platforms build huge user bases 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, sometimes adopting the very invasive practices protested against.³⁸

³³ Although according to a critique by Maurice Stucke and Allen Grunes, antitrust authorities have systematically avoided examining the consumer-side of multi-sided transactions in data-driven mergers and acquisitions, leading to a focus on competitive effects on advertisers but not on privacy and quality issues that affect consumers. Maurice E. Stucke & Allen P. Grunes, *BIG DATA AND COMPETITION POLICY* 103–4, 114, 153–154, 224 (Oxford Univ. Press 2016).

³⁴ Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880 (2013); Aleccia M. McDonald & 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).

³⁵ 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).

³⁶ Alessandro Acquisti, Curtis R. Taylor, & Liad Wagman, *The Economics of Privacy*, 54(2) J. ECON. LIT. 442 (Jun. 2016).

³⁷ Joseph Farrell, *Can Privacy Be Just Another Good*, 10 J. TELECOMM. HIGH TECH. L. 251 (2012).

³⁸ Paul Ohm, *Branding Privacy*, 97 MINN. L. REV. 907 (2013) (describing the "privacy lurch").

Network effects, lock-in, and the power of platforms to shift user expectations enable dramatic policy lurches. 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 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 because no competitors are left standing.

HOW ACADEMICS COULD HELP SHAPE THE BE'S PRIVACY EFFORTS

The BE is proud of its engagement with the academic community. Unlike 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 holds an annual conference on microeconomics open to outside academics. The President Trump administration is likely to elevate the role of the BE, making it more central to case selection, but also more public. The BE's posture gives academics opportunities to shape and expand the FTC's privacy outlook.

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."³⁹ 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 (Google's representation concerns the actual scanning of data and not just absence of advertising). Such surveillance must involve human review of e-mail at times in order to train advertising targeting systems. The inferences from automated scanning could contribute to Google's competitive intelligence.⁴⁰ Those who owe confidentiality duties to customers or clients need communications privacy, and so some portion of that \$5 could be interpreted as a valuation of privacy.

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 the illegal sale of driver record information, an economist polled citizens to

³⁹ Google, *Google for Work Help: Privacy* (2016), <https://support.google.com/work/answer/6056650?hl=en>.

⁴⁰ MAURICE E. STUCKE & ALLEN P. GRUNES, *BIG DATA AND COMPETITION POLICY* (Oxford Univ. Press 2016).

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.⁴¹ Meanwhile, the state was selling this same information at \$0.01 per record.

This survey method represented a plausible, real-life, bounded expense concerning information that is not even considered sensitive. Now, one may object to the survey as artificial – consumers, when presented in the moment with a \$50 discount, may behave differently and allow the 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 time, changing the fundamental dynamics of telemarketing. As 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.⁴² One could also account for 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 telemarketing avoidance was \$1.42 billion.⁴³

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 addresses from real estate websites and public records. Similarly, the private mailbox is a significant expense, often used to shield home addresses 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* reported in 2015 that Silicon Valley technology executives – who scoop up information with the most alacrity – use nondisclosure agreements in many contexts where domestic workers are employed.⁴⁴

⁴¹ *Richard Fresco v. Automotive Directions Inc., et al.* 2004 WL 3671355 (S.D.Fla.)(expert affidavit of Henry Fishkind).

⁴² Peter P. Swire, *Efficient Confidentiality for Privacy, Security, and Confidential Business Information*, BROOKINGS-WHARTON PAPERS ON FINANCIAL SERVICES (2003).

⁴³ I.P.L. Png, *On the Value of Privacy from Telemarketing: Evidence from the "Do Not Call" Registry* (white paper) (Sept. 2007).

⁴⁴ Matt Richtel, *For Tech Titans, Sharing Has Its Limits* BU4, N.Y. TIMES, Mar. 14, 2015.

More Emphasis on the FTC's Civil Penalty Factors

A second area ripe for documenting injury in privacy cases comes from the economic dynamics in the FTC's civil penalty factors, which must be considered when the FTC seeks fines.⁴⁵ The factors inherently call for economic perspective and could be used more prominently in case evaluation. This article largely is a critique of the BE's emphasis on the second civil penalty factor: the injury to the public from the illegal practice. Courts consider four other factors, three of which could also benefit from academic analysis.

One factor concerns the "desire to eliminate the benefits derived by a violation." Recall the discussion earlier 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 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 revolutions in both search and advertising. Google even presented its search service as more privacy-protective than those of competitors because it did not take users' browsing history into account when delivering search results.⁴⁶

Consider how different the Google approach is today. It quietly started using behavioral data in search without telling the public.⁴⁷ 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-style commercials on YouTube – but these new commercials 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 part by two BE authors on the Suntasia Marketing case. That 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

⁴⁵ 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.).

⁴⁶ 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), <http://firstmonday.org/article/view/2326/2156>.

⁴⁷ 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*, C1, N. Y. TIMES, Jun. 27, 2008.

Suntasia's consumers into two groups, thereby setting up a natural experiment. Some Suntasia 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 40 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.⁴⁸ These findings speak to the idea that companies in continuous transactions with the consumer (such as platforms or companies that possess personal information) may require dramatic intervention to deny the benefits from deceptive practices.

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 the 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 violations of the law. 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 or actual proof of harm. 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 relief,⁴⁹ 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 meter lapses are not. It would seem that economic actors would make the best case for monetary penalties in order to engender respect for the law.

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 at 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

⁴⁸ Robert Letzler, Ryan Sandler, Ania Jaroszewicz, Issac T. Knowles, and Luke M. Olson, *Knowing when to Quit: Default Choices, Demographics and Fraud*, 127 *ECON. J.* 2617–2640 (2017). doi:10.1111/econj.12377.

⁴⁹ *FTC v. Inc12.com Corp.*, 475 F. App'x 106, 110 (9th Cir. 2012).

undermine alternatives that could result in better incentives and business practices more in line with consumer preferences.

Another area for rethinking BE approaches comes from behavioral economics. As early as 1969, 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 interest."⁵⁰ The BE embraced this recommendation in several areas,⁵¹ 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.⁵²

Today, when analyzing what a person might understand from a marketing representation, the FTC is quite humanistic in its outlook. It does not limit itself to disciplinary borders. 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.

CONCLUSION

This chapter has provided an overview of the Bureau of Economics, explained its case evaluation role in relationship to the lawyers' case selection role, and summarized reasons why BE economists might conclude that there is no harm from many privacy disputes.

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. In the President Trump administration, it is likely to have a more public role, and it will perform cost-benefit analysis in more privacy cases. Helping the BE see economic injury in privacy and security violations could strengthen the agency's agenda and 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 assign a different value to the attention and data they pour into "free" online services.

⁵⁰ Dorothy Cohen, *The Federal Trade Commission and the Regulation of Advertising in the Consumer Interest*, 33(1) J. MKTG 40 (1969).

⁵¹ Consider the multidisciplinary approach taken in the FTC's tome on information remedies. FTC, *CONSUMER INFORMATION REMEDIES: POLICY REVIEW SESSION* (1979).

⁵² William L. Wilkie, *My Memorable Experiences as a Marketing Academic at the Federal Trade Commission*, 33(2) J. Pub. Pol'y & Mktg 194 (2014).