

PRIVACY'S RIGHTS TRAP

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ABSTRACT—A growing chorus of scholars, privacy professionals, and policymakers think that individual rights of control—rights to access, correct, and delete data, as well as rights to opt out of tracking and to have humans in the loop of automated decision-making—are effective means of regulating the data-extractive economy. Indeed, the argument for individual rights is so pervasive and hegemonic that individual rights form the backbone of every piece of privacy legislation introduced in the United States in the last several years.

This Essay offers a comprehensive critique of that argument. Individual rights fail to address the social harms of the information economy. They shift the burden of privacy regulation to individuals mostly incapable of exercising that responsibility while simultaneously giving technology companies the power to define the practical reach of the law. Individual rights cannot place limits on technology companies when the law has already immunized their business models from accountability. Individual rights also set the wrong norms: they normalize the notion that privacy *should* be an individual responsibility rather than a core obligation of corporate actors. And the history of using individual rights to solve structural problems proves how rights crowd out necessary reform. If individual rights of control are what pass for privacy legislation in the United States, the problems of informational capitalism will get worse, not better.

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INTRODUCTION

Legislators in the United States believe they have found the perfect recipe for privacy law: individual rights of control. In state after state,¹ and in the U.S. Congress,² policymakers are proposing and enacting privacy laws that give us some combination of the right to access the information companies have on us, delete it if we want, correct it if there are mistakes, and move it to another company. This “second wave” of privacy law builds on a “first wave” of long, impossible-to-read privacy policies and insufficient choice.³ And yet, despite repeated criticism of both waves from

¹ See California Consumer Privacy Act of 2018, CAL. CIV. CODE §§ 1798.100–199 (2021); NEV. REV. STAT. §§ 603A.010–360 (2021); H.R. 216, 2021 Leg., Reg. Sess. (Ala. 2021); S. 21-190, 73d Gen. Assemb., 1st Reg. Sess. (Colo. 2021); S. 893, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021); H. 3910, 102d Gen. Assemb., 1st Reg. Sess. (Ill. 2021); S. 46, 192d Gen. Ct., Reg. Sess. (Mass. 2021); S. 6701, 2021 Leg., 244th Reg. Sess. (N.Y. 2021); S. 569, 2021 Gen. Assemb., 2021 Sess. (N.C. 2021); H.R. 1126, 205th Gen. Assemb., 2021 Sess. (Pa. 2021); H.R. 3741, 87th Leg., Reg. Sess. (Tex. 2021); S. 1392, 2021 Gen. Assemb., 1st Spec. Sess. (Va. 2021); S. 5062, 67th Leg., Reg. Sess. (Wash. 2021); S. 1614, 54th Leg., 2d Reg. Sess. (Ariz. 2020); H.R. 963, 2020 Leg., 122d Reg. Sess. (Fla. 2020); H. 1656, 2020 Gen. Assemb., 441st Sess. (Md. 2020); H.R. 3936, 91st Leg., 2d Reg. Sess. (Minn. 2020); L. 746, 106th Leg., 2d Reg. Sess. (Neb. 2020); H.R. 1236, 2020 Gen. Ct., 166th Sess. (N.H. 2020); Gen. Assemb. 3255, 219th Leg., 1st Ann. Sess. (N.J. 2020); S. 418, 30th Leg., Reg. Sess. (Haw. 2019); S. 946, 129th Leg., 1st Reg. Sess. (Me. 2019); H.R. 1253, 2019 Leg., 2019 Reg. Sess. (Miss. 2019); S. 176, 54th Leg., 1st Sess. (N.M. 2019); S. 234, 2019 Gen. Assemb., Jan. Sess. (R.I. 2019).

² See American Data Protection and Privacy Act, H.R. 8152, 117th Cong. (2022) (distributed as discussion draft); Consumer Data Privacy and Security Act of 2021, S. 1494, 117th Cong. (2021); Information Transparency & Personal Data Control Act, H.R. 1816, 117th Cong. (2021); Setting an American Framework to Ensure Data Access, Transparency, and Accountability Act, S. 4626, 116th Cong. (2020); American Data Dissemination Act of 2019, S. 142, 116th Cong. (2019); Consumer Online Privacy Rights Act, S. 2968, 116th Cong. (2019); Mind Your Own Business Act of 2019, S. 2637, 116th Cong. (2019); Online Privacy Act of 2019, H.R. 4978, 116th Cong. (2019); Privacy Bill of Rights Act, S. 1214, 116th Cong. (2019).

³ Ari Ezra Waldman, *The New Privacy Law*, 55 U.C. DAVIS L. REV. ONLINE 19, 21–22 (2021).

a host of scholars,⁴ individual data privacy rights persist as policymakers' go-to.

The debate among scholars and, hopefully soon, among policymakers is not between privacy rights and no privacy rights, or between structural reform and no structural reform. Those who think existing rights are enough seem to be industry mouthpieces, hopelessly naïve, or normatively committed to neoliberal structures of power. They no longer merit our attention. Rather, the modern privacy rights debate pits scholars who support individual rights of control as good first steps against scholars who believe that individual rights will do additional harm to privacy without concurrent structural reform.

Some distinguished privacy scholars fall into in the former camp.⁵ They believe that some individual rights of control are better than nothing. They (rightly) believe that, in general, the perfect should not be the enemy of the good.

I am in the latter camp, and this Essay explains why. Rights, like visibility, are traps.⁶ Individual rights of control require an infrastructure to

⁴ See, e.g., Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 573, 597–603 (2021) (reviewing literature critiquing individualist approaches to privacy); Julie E. Cohen, *What Privacy is For*, 126 HARV. L. REV. 1904, 1930 (2013) [hereinafter Cohen, *What Privacy is For*] (critiquing traditional privacy law's focus on regulating information flow through notice and choice); Julie E. Cohen, *How (Not) to Write a Privacy Law*, KNIGHT FIRST AMEND. INST. (Mar. 23, 2021) [hereinafter Cohen, *How (Not) to Write a Privacy Law*], <https://knightcolumbia.org/content/how-not-to-write-a-privacy-law> [<https://perma.cc/Z7ZN-F5P9>] (arguing that legal proposals oriented toward individual rights of control will be ineffective); Daniel J. Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1882–93 (2013) (highlighting both cognitive and structural limitations of self-managing privacy); Ari Ezra Waldman, *Privacy, Practice, and Performance*, 110 CALIF. L. REV. 1221, 1221, 1226–227 (2022) (characterizing most state law privacy proposals as focusing on individual rights and critiquing that focus); Waldman, *supra* note 3, at 38 (similar).

⁵ See, e.g., Margot E. Kaminski, *The Case for Data Privacy Rights (or, Please, a Little Optimism)*, 97 NOTRE DAME L. REV. REFLECTION 385, 386 (2022) (arguing that despite the flaws of “[g]rounding data privacy law in individual rights,” individual rights nonetheless serve various purposes including reflecting common understandings of privacy and defense against First Amendment challenges, among other goals); Mike Hintze, *In Defense of the Long Privacy Statement*, 76 MD. L. REV. 1044, 1045 (2017) (suggesting the value of privacy statements is in informing consumers of their rights and choices).

⁶ MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 200 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977). The famous sentence—“[v]isibility is a trap”—comes from Foucault's discussion of the panoptic prison, which replaced the traditional dungeon's darkness with full light so prison guards can maintain watch over prisoners at all times. The legibility of the prisoner at all times reduced the prisoner's freedom even more. *Id.* Critical scholars and, in particular, those writing from the perspective of queer and critical race theory, have made a similar argument—namely, that greater legibility of populations at risk of discrimination, stigma, and harm is actually more dangerous than the obscurity and invisibility of marginalization. See, e.g., Khiara M. Bridges, *Towards a Theory of State Visibility: Race, Poverty, and Equal Protection*, 19 COLUM. J. GENDER & L. 965, 982–83 (2010) (discussing Foucault's visibility concept in relation to women in poverty receiving state-subsidized prenatal care); Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643, 687–88 (2001) (discussing Foucault's visibility concept in relation to LGBTQ individuals).

make them meaningful, and that infrastructure does not exist in the law of informational capitalism.⁷ Nor does any piece of privacy legislation currently under consideration create that infrastructure.⁸ After a brief overview of where privacy law currently stands, this Essay offers five critiques of the primacy of individual rights in privacy laws. First, the *social* critique focuses on the mismatch between individual rights and the social nature of data in informational capitalism. When rights go first in a regulatory model for data-extractive capitalism, our coordinated subordination is ignored. Second, a *behavioral* critique argues that people are, for the most part, incapable of exercising their individual rights. When rights go first, little will change on the ground because few of us will be able to exercise those rights. Third, a *practical* critique demonstrates how even those who support individual rights of control implicitly recognize that rights only have real power with structural reform. When rights go first, they cannot overcome preexisting legal and technical barriers to effective enforcement. Fourth, an *expressive* critique challenges the message of individual responsibility sent by rights-based laws. When rights go first, law perpetuates the idea that privacy is our problem alone to manage. Finally, a fifth *structural* critique argues that individual rights have always been a convenient yet ineffective quarter-baked solution to throw at a structural problem. When rights go first, they almost always crowd out rather than pave the way for real reform.

I am not prepared to give the information industry the gift of weak regulation. Nor am I prepared to let policymakers legitimize a subordinating, data-extractive business model simply because they have no better ideas than individual rights. In fact, rights-based laws will make the problem worse.

I. WHERE PRIVACY LAW STANDS

Privacy law has developed in two waves. In the first wave, often described as “notice and choice,” companies that extract information from us are required to post privacy policies on their websites.⁹ We are supposed to read those policies, decide if our privacy preferences align, and then choose some other website if not. In practice, notice and choice provides

⁷ Informational capitalism describes a political and economic system in which the means of production are oriented toward the extraction of value from data and information. JULIE E. COHEN, *BETWEEN TRUTH AND POWER* 5–6 (2019).

⁸ To be frank, I am not even sure individual rights have any benefits whatsoever, but I am willing to assume they do for the purposes of this Essay and to engage in constructive debate with my colleagues. See *infra* Sections II.D–II.E.

⁹ See Waldman, *supra* note 3, at 24, 27–28; Joel R. Reidenberg, N. Cameron Russell, Alexander J. Callen, Sophia Qasir & Thomas B. Norton, *Privacy Harms and the Effectiveness of the Notice and Choice Framework*, 11 I/S: J.L. & POL'Y FOR INFO. SOC'Y 485, 490 (2015).

neither notice nor choice.¹⁰ Privacy policies are long, written in legalese, and impossible for even experts to process accurately.¹¹ Choice is also nonexistent when only a few companies dominate a digital space, when merely using a website is considered consent, and when the Federal Trade Commission (FTC) has historically been more focused on helping the information industry rather than regulating it.¹²

The first wave grew out of the Fair Information Practice Principles, or FIPPs. The FIPPs are best practices developed by the U.S. Department of Health & Human Services in 1973 for those who collect and hold user data.¹³ They include the principles that individuals should know what information will be collected, that they should be able to access their data, that they should be able to make corrections and have their data deleted, and that they should be able to opt out of certain types of data collection.¹⁴ Regarding data collectors, the FIPPs suggest transparency about their data collection and data use practices, minimization of their collection of information where possible, use of effective security when storing data, and general data accuracy.¹⁵ And yet, the first wave was strictly about providing individuals with notice of data use practices and the opportunity to consent. The other FIPPs were deprioritized.

For the second wave, policymakers went back to the same menu, but didn't skimp on the sides. Second wave proposals include a right to access, a right to delete, a right to correct, and a right to opt out of tracking or the sale or transfer of data.¹⁶ Some proposals prohibit retaliation for opting out.¹⁷ A few have a right to object to data processing and a right to human review of automated decisions.¹⁸ Of course, a rights-based regime also requires internal structures of compliance to evaluate and process access, deletion,

¹⁰ See Saturday Night Live, *Coffee Talk: Helen Hunt Is a Family Friend*, YOUTUBE, at 02:30 (Sept. 25, 2013), <https://www.youtube.com/watch?v=J1-D8DjGhfw> [<https://perma.cc/KMX7-S5UY>] (discussing how chickpeas are neither chicks nor peas).

¹¹ Reidenberg et al., *supra* note 9, at 491, 494–95 (2015). For a summary of broad critiques of the notice and consent framework, see *id.* at 490–96.

¹² Waldman, *supra* note 4, at 1233, 1258–60.

¹³ SEC'Y'S ADVISORY COMM. ON AUTOMATED PERS. DATA SYS., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS 41–42 (1973).

¹⁴ See *id.* at 40–41.

¹⁵ See *id.* at 41–42.

¹⁶ Waldman, *supra* note 3, at 27–28.

¹⁷ *Id.* at 28.

¹⁸ *Id.* at 28–29.

correction, and opt-out requests.¹⁹ But policymakers clearly prioritize individual rights over all else.

II. A CRITIQUE OF RIGHTS

Why is that so bad? Who could be against rights? Both waves of privacy law revolve around personal responsibility, presumptions of human rationality, and the notion that we could achieve some measure of privacy by relying on individuals on their own clicking this or that button. This is a fantasy. This Part outlines five reasons why using individual rights to regulate data-extractive capitalism is not just insufficient, but also counterproductive.

A. *The Social Critique*

The information economy is a social economy. Decisions to consent to data collection are never purely personal decisions. Instead, one person's decision to consent to sharing their information frequently implicates others sharing some sort of connection with them. The most obvious example of this is when a family member decides to send their saliva to 23andMe to map their DNA. By doing so, they share information about everyone who shares their DNA (parents, sisters, children, and so forth). In a social economy, individual rights do not control what happens with our data. This is the social critique of individual rights.

In fact, the “sociality” of data is the core feature of the information economy.²⁰ That is, information about one person doesn't just affect that person; it affects everyone like them. Producers extract profit from data specifically because data collected about one person helps them make inferences about other people.²¹ If I purchase several books about the history of Paris or buy in-home exercise equipment, retailers and platforms can assess my latent characteristics (age, education, income, location, sexual orientation, relationship status, you name it) and target others with similar characteristics with advertisements for Mary McAuliffe's book, *Paris, City of Dreams*, or a new Peloton bicycle.

¹⁹ As I have described elsewhere, legislation in the second wave follows the rights/compliance model, like the General Data Protection Regulation in the European Union. See Waldman, *supra* note 4, at 1250, 1257 (describing privacy proposals in statutes, such as data deletion and opt-out tracking); Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 1. This Essay is about the impact of individual rights, so it focuses on that aspect of the second wave.

²⁰ Viljoen, *supra* note 4, at 582.

²¹ *Id.* at 610–11.

This puts us all in data relationships with each other that individual rights—which we alone can exercise against data collectors—entirely ignore.²² A person wrongfully arrested because a facial recognition algorithm identified them as a suspect is socially connected with the person whose voluntarily uploaded picture was used to train the facial recognition tool. Critically, although the individual arrested certainly has a privacy interest in the collection, use, and processing of data related to their face, that interest is independent of the interests of the person who uploaded the picture, thereby starting the causal chain of picture, collection, processing, training artificial intelligence, misidentification, and arrest. The victim’s privacy interest—and their interest in not being wrongfully swept up into a biased criminal justice system—is simply not represented in the relationship between the uploader and the host platform. And yet that “vertical” relationship between uploader and platform is the only one even remotely mediated by individual rights.²³

Therefore, a central feature of an individual rights approach to privacy law is its complete disregard for how an inherently social, inference-based economy actually functions.²⁴ It expresses a narrow, radically individuated property interest in data that has limited value and limited reach.

B. The Behavioral Critique

I suppose it is possible that if enough of us exercise our individual rights to delete, port, and opt out of tracking, things might change. We could conceivably starve the information industry of the materials and labor it needs to extract population-level insights from individual users. But much social science evidence suggests that this will never happen. This is the behavioral critique of individual privacy rights.

Individual rights of control presume human rationality. The right to opt out of tracking is contingent on individuals’ ability to understand how they are being tracked and the effects of that tracking. It then requires individuals to process that knowledge, align it with their privacy preferences, and make the choice to opt out or consent. But humans are not perfectly rational beings;

²² Daniel J. Solove, *The Limitations of Privacy Rights*, 98 NOTRE DAME L. REV. (forthcoming 2023) (manuscript at 12–17), <https://papers.ssrn.com/a=4024790> [<https://perma.cc/9AE3-XCTQ>].

²³ See Viljoen, *supra* note 4, at 607–09 (describing data governance’s response to downstream social effects from data collection as “unsatisfying” because of its commitment to individualism despite the known “horizontal,” or population-based, nature of data flows).

²⁴ Alicia Solow-Niederman, *Information Privacy and the Inference Economy*, 117 NW. U. L. REV. 357, 401, 404 (2022).

at best, our rationality is bounded.²⁵ More likely, our rationality is malleable.²⁶ If policymakers expect people to exercise their individual rights in any appreciable numbers, they will likely be disappointed.

Individuals must overcome all sorts of biases that cause them to pump the brakes on acting, let alone acting rationally. We face status quo biases that make us more comfortable with maintaining things as they are.²⁷ We face problems of overchoice, where the sheer number of choices and steps we must take to opt out of cookies creates paralysis.²⁸ We are also prone to hyperbolic discounting, or the tendency to overweigh the immediate consequences of a decision and to underweigh those consequences that may occur in the future.²⁹

Data tracking often carries with it certain immediate benefits—convenience, access, or social engagement, to name just a few. But individuals usually do not immediately feel its costs, whether the intangible costs of risk and anxiety or the delayed costs of identity theft and loss of autonomy.³⁰ Therefore, our tendency to overvalue current rewards while inadequately discounting the cost of future risks makes us much less likely to exercise our right to opt out. Our disclosure decisions are also subject to framing biases, especially when platforms describe opting out of tracking as being harmful:³¹ “If you don’t allow cookies, website functionality will be diminished,” or, “Opting into data collection will enable new and easier functionality.”

At the same time, platforms are free to manipulate these choices however they want. Sure, they can place a hyperlink to “Access My Data”

²⁵ ALESSANDRO ACQUISTI & JENS GROSSKLAGS, *What Can Behavioral Economics Teach Us About Privacy*, in DIGITAL PRIVACY: THEORY, TECHNOLOGIES, AND PRACTICES 363, 369–70 (Alessandro Acquisti et al. eds., 2008).

²⁶ See generally Stephanie Plamondon Bair, *Malleable Rationality*, 79 OHIO ST. L.J. 17 (2018) (arguing that rationality changes due to time, experience, and policy).

²⁷ William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 8 (1988).

²⁸ See Benjamin Scheibehenne, Rainer Greifeneder & Peter M. Todd, *Can There Ever Be Too Many Options? A Meta-Analytic Review of Choice Overload*, 37 J. CONSUMER RSCH. 409, 409 (2010).

²⁹ Ari Ezra Waldman, *Cognitive Biases, Dark Patterns, and the ‘Privacy Paradox’*, 31 CURRENT OP. PSYCH. 105, 106 (2020); see also Solove, *supra* note 22 (manuscript at 10–12) (discussing how privacy rights are not meaningful if individuals do not have the time or knowledge to invoke them with respect to their data).

³⁰ See Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 96 TEX. L. REV. 737, 756–60 (2018) [hereinafter Solove & Citron, *Data Breach Harms*]; Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 830–61 (2022) [hereinafter Citron & Solove, *Privacy Harms*].

³¹ Idris Adjerid, Alessandro Acquisti, Laura Brandimarte & George Loewenstein, *Sleights of Privacy: Framing, Disclosures, and the Limits of Transparency*, SOUPS ‘13: PROC. 9TH SYMP. ON USABLE PRIV. & SEC. 1, 10 (2013).

somewhere on a webpage, but they can use design tricks to obscure it, redirect us, and manipulate behavior.³² As a sociotechnical process, design includes “processes that create consumer technologies and the results of their creative process instantiated in hardware and software.”³³ The field of science and technology studies has long recognized that the design of built environments constrains human behavior.³⁴ The same is true online, and even more so when millions, if not billions, of people with potentially different preferences are using the same service. As Woodrow Hartzog has noted, “[t]he realities of technology at scale mean that the services we use must necessarily be built in a way that constraints our choices.”³⁵ We can only click on the buttons or select the options presented to us; we can only opt out of the options from which a website allows us to opt out.

At a minimum, the power of design means that our choices do not always reflect our real personal preferences. At worst, online platforms manipulate us into keeping the data flowing, fueling an information-hungry business model. That manipulation is often the result of so-called “dark patterns” in platform design. Dark patterns are “interface design choices that benefit an online service by coercing, steering, or deceiving users into making decisions that, if fully informed and capable of selecting alternatives, they might not make.”³⁶ And they are common.³⁷ Designers use dark patterns to hide, deceive, and goad. They confuse by asking questions in ways most people cannot understand, they obfuscate by hiding interface elements that could help protect privacy, they require registration and associated disclosures in order to access functionality, and they hide malicious behavior in the abyss of fine print. Policymakers should not expect us to act rationally when they have left in place a business model that does everything it can to trigger us to act against our own interest.

C. *The Practical Critique*

Cognitive limitations are not the only barriers standing in the way of us exercising our individual rights. Practical barriers also impede our privacy

³² Waldman, *supra* note 29, at 107.

³³ WOODROW HARTZOG, *PRIVACY’S BLUEPRINT* 11 (2018).

³⁴ *See, e.g.*, Steve Woolgar, *Configuring the User: The Case of Usability Trials*, 38 SOCIO. REV. 58, 59–60 (1990) (arguing that “our preconceptions about the nature and capacities of different entities shape what counts as legitimate accounts of action and behaviour” in the context of information technology).

³⁵ Woodrow Hartzog, *The Case Against Idealising Control*, 4 EUR. DATA PROT. L. REV. 423, 426 (2018).

³⁶ Arunesh Mathur, Gunes Acar, Michael J. Friedman, Eli Lucherini, Jonathan Mayer, Marshini Chetty & Arvind Narayanan, *Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites*, 3 PROC. ACM ON HUM.-COMPUT. INTERACTION 1, 2 (2019).

³⁷ *See id.*

rights. Individual rights have no effect when rights holders cannot act on them or when they fail to hold violators accountable for their actions.

Throwing a few dollars—even a few million dollars—at state attorneys general or administrative agencies will, at most, hold a company or two accountable for the most egregious or most obvious lies and other wrongs. The leading privacy law proposal in the U.S. Congress does not include any money for any enforcement mechanisms at all.³⁸ And even if regulators have enforcement capacity, the laws are still weak. Regulators estimate that compliance with the supposedly “stringent” law out there³⁹—the California Consumer Privacy Act—will only cost \$128 per business.⁴⁰ Although even proponents of individual privacy rights can see the insufficiency of rights without money for enforcement or meaningful regulation, there is a deeper problem. Rights-based privacy laws are tossing individual rights into zones of legal immunity that insulate the information industry from accountability.⁴¹

Rights-based privacy laws include rights to access the information a company has about us.⁴² Some of them also include rights against discrimination.⁴³ That means we can click a button, download pages and pages of data, and scour them for evidence of exclusion or mistreatment. Good luck! There are several reasons why few of us can turn that into a meaningful check on the information industry. Technical experts such as computer scientists, electrical engineers, programmers, and data scientists—and those with means to pay them—are the ones most likely able to understand the data we receive. Few of us have access to either. The algorithms that make decisions about people’s lives are protected by trade secrecy law or immunized from any kind of regulation as creative expression under the First Amendment.⁴⁴ Therefore, even if we *could* understand what the information industry was doing to us, too much of its business behavior is off limits from any sort of accountability.

The Supreme Court exacerbated this problem in *TransUnion LLC v. Ramirez* when it took away Congress’s long-standing power to ensure that violations of acts of Congress automatically confer Article III standing.⁴⁵

³⁸ American Data Protection and Privacy Act, H.R. 8152, 117th Cong. § 401 (2022).

³⁹ Anupam Chander, Margot E. Kaminski & William McGeveran, *Catalyzing Privacy Law*, 105 MINN. L. REV. 1733, 1734 (2021).

⁴⁰ CALIFORNIA PRIVACY PROTECTION AGENCY, CALIFORNIA CONSUMER PRIVACY ACT REGULATIONS: ECONOMIC AND FISCAL IMPACT STATEMENT (2022).

⁴¹ COHEN, *supra* note 7, at 101–07 (2019).

⁴² A comprehensive review of these proposals can be found at Waldman, *supra* note 4, at 1250–51.

⁴³ *See, e.g., id.* at 1277.

⁴⁴ COHEN, *supra* note 7, at 17, 89–91, 261–63.

⁴⁵ 141 S. Ct. 2190, 2205 (2021) (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)).

This means that even if Congress were to give us individual privacy rights, flagrantly denying us those rights would not be ground for a lawsuit.

If individuals want to exercise a private right of action, a much-touted addition to privacy laws that is supposed to give them some real teeth,⁴⁶ litigants need to identify concrete and particularized harm over and above a company's brazen disregard of our statutory rights.⁴⁷ But U.S. courts have been notoriously and consistently unwilling to recognize anything but the most obvious pecuniary harms in privacy cases.⁴⁸ Invasions of privacy can cause myriad harms; Daniel Solove and Danielle Citron have identified fifteen clusters of harms, included among them are physical, economic, reputational, psychological, autonomy-based, discrimination-based, and relational harms.⁴⁹ Courts *could* recognize those harms, but they just don't.⁵⁰ Introducing individual rights of control into a legal system that built a wall around data-extractive conduct and is utterly uninterested in recognizing the gravity of privacy rights is like putting a feather on a weight scale: it won't register.

D. *The Expressive Critique*

Law has expressive value.⁵¹ It sends messages about what is right and wrong.⁵² It sets norms.⁵³ Privacy laws that elevate individual rights of control send two messages: (1) that privacy is an individual right against others and that privacy is the individual's responsibility and (2) that it is up to us to manage what happens to data extracted from our social behaviors. Both are wrong, misguided, and ill-suited to the threats posed by the information economy.

⁴⁶ See Lauren Henry Scholz, *Privacy Rights of Action in Privacy Law*, 63 WM. & MARY L. REV. 1639, 1644–45 (2022) (arguing that private enforcement of privacy regulations can marshal resources not available to the administrative state).

⁴⁷ *Transunion*, 141 S. Ct. at 2205–06, 2206 n.2.

⁴⁸ See Solove & Citron, *Data-Breach Harms*, *supra* note 30, at 747–55 (describing how three common theories of harm advanced by plaintiffs—risk of future injury to plaintiffs, out-of-pocket costs to mitigate the risk of identity theft or fraud, and emotional distress caused by data breaches—have been rejected by courts); Citron & Solove, *Privacy Harms*, *supra* note 30, at 816–19.

⁴⁹ Citron & Solove, *Privacy Harms*, *supra* note 30, at 830.

⁵⁰ *Id.* at 831–61.

⁵¹ See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2031 (1996).

⁵² Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 377 (2009); see also Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 90 (2009) (arguing that civil rights prosecutions for cyber harassment would communicate society's commitment to equality).

⁵³ See Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1904–05 (2000) (discussing how the legal framework surrounding marriage prescribed and reinforced social norms).

Privacy scholarship began with individual rights. To Samuel Warren and Louis Brandeis writing in 1890, privacy was a “right ‘to be let alone.’”⁵⁴ Privacy was “solitude” and a “retreat from the world,” particularly from a press that was increasingly intruding into their lives.⁵⁵ Almost 100 years later, in 1967, the canonical privacy scholar Alan Westin was still conceptualizing privacy as individuals’ right to decide for themselves when, how, and to whom to disclose information.⁵⁶

But in the decades since, privacy scholars have rightly recognized the limitations of the individual model. Privacy is about facilitating social interaction, not stopping it.⁵⁷ It is “shorthand for breathing room to engage in the processes of boundary management that enable and constitute self-development. So understood, privacy is fundamentally dynamic.”⁵⁸ And, importantly, privacy is about power. As Neil Richards notes, “[s]truggles over ‘privacy’ are in reality struggles over the rules that constrain the power that human information confers.”⁵⁹ And that power is an important piece of social structure that determines who has access to the “common relationships in contemporary commercial and civic life.”⁶⁰ Privacy theory, Julie Cohen argues, “should acknowledge that fact.”⁶¹

The law and technology scholar Margot Kaminski argues that because privacy is commonly understood as an individual right against others, grounding privacy law in individual rights makes intuitive sense and would align with individuals’ expectations.⁶² Even assuming this individualized vision is dominant among nonexperts, that mere fact is no reason to codify those conceptions into law. It is instead a powerful reason for law to push back to frame privacy as a collective goal of democratic governance. Law can, and should, set stronger norms.

Legislation focused on individual privacy rights of control also sends a message about personal responsibility. The privacy scholar Daniel Solove used the phrase “privacy self-management” to describe practices of notice and choice.⁶³ Individual rights-based laws double down on this model. They put the onus on us to monitor and regulate what happens with extracted data. And we are simply not up to that task at scale. There are simply too many

⁵⁴ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

⁵⁵ *Id.* at 196.

⁵⁶ ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967).

⁵⁷ Ari Ezra Waldman, *Privacy As Trust: Information Privacy for an Information Age* 69–71 (2018).

⁵⁸ Cohen, *What Privacy is For*, *supra* note 4, at 1906.

⁵⁹ NEIL RICHARDS, *WHY PRIVACY MATTERS* 39 (2022) (emphasis omitted).

⁶⁰ Julie E. Cohen, *Turning Privacy Inside Out*, 20 THEORETICAL INQUIRIES L. 1, 22 (2019).

⁶¹ *Id.*

⁶² See Kaminski, *supra* note 5, at 2.

⁶³ Solove, *supra* note 4, at 1880–82.

choices, privacy policies, buttons to toggle, and cookies to understand. Plus, even if it were possible for us to manage all that on our own, the information economy is so vast and opaque that individuals will always lack enough information about the downstream effects of data processing to make informed decisions.

Individual responsibility will not solve collective problems. In fact, corporate interests use the discourse of individual responsibility as a shield to deflect accountability. We see it all the time, and nowhere more prominently than in the discourse around climate change.

For decades, polluters—such as large oil companies, plastics producers, and the coal industry—have worked to keep the conversation about climate change and its solutions focused on the consumer.⁶⁴ As Geoffrey Supran and Naomi Oreskes have found, polluters use rhetoric of climate “risk” and consumer energy “demand” to downplay the reality and seriousness of climate change, normalize fossil consumption, and individualize responsibility.⁶⁵ These communications and marketing strategies have allowed polluters to effectively minimize the appearance of their role in climate change and challenge climate litigation, regulation, and activism.⁶⁶ This makes polluters “part of a lineage of industrial producers of harmful commodities that have used personal responsibility framings to disavow themselves.”⁶⁷

Here’s another example: “The container industry spent tens of millions of dollars to defeat key ‘bottle bill’ referendums in California and Colorado, and then vigorously advanced recycling—not reuse—as a more practical alternative.”⁶⁸ The industry did this because recycling “stress[es] the individual’s act of disposal” and shifts responsibility away from the producer that inundates the market with plastic in the first place.⁶⁹ The push for recycling, therefore, is part of a discourse that gives life to a “diagnosis of environmental ills that places human laziness and ignorance centerstage.”⁷⁰ The result is predictable inaction on the things that could actually save our

⁶⁴ See, e.g., Geoffrey Supran & Naomi Oreskes, *Rhetoric and Frame Analysis of ExxonMobil’s Climate Change Communications*, 4 ONE EARTH 696, 706, 710 (2021) (finding that ExxonMobil disproportionately employed rhetoric to present consumers as responsible for the cause of and treatment for global warming); Walter Lamb, *Keep America Beautiful: Grassroots Non-Profit or Tobacco Front Group?*, 8 PR WATCH 1, 1 (2001) (describing the infamous “crying Indian” ad that expressed the idea that cleaning up the environment was an individual’s responsibility, not the tobacco industry’s).

⁶⁵ Supran & Oreskes, *supra* note 64, at 706, 708.

⁶⁶ *Id.* at 708, 710–11.

⁶⁷ *Id.* at 712.

⁶⁸ Michael F. Maniates, *Individualization: Plant a Tree, Buy a Bike, Save the World?*, 1 GLOB. ENV’T POL. 31, 43 (2001) (emphasis omitted).

⁶⁹ *Id.*

⁷⁰ *Id.*

planet: “When responsibility for environmental problems is individualized, there is little room to ponder institutions, the nature and exercise of political power, or ways of collectively changing the distribution of power and influence in society—to, in other words, ‘think institutionally.’”⁷¹ This is why the plastics industry has waged a decades-long, multimillion-dollar campaign to perpetuate the myth of plastic recyclability and to push recycling—a decidedly individual-focused effort—as the ultimate solution to our impending climate catastrophe.⁷²

The information industry is taking its cues from big polluters. Technology companies publish statements about transparency,⁷³ but fire researchers as soon as their scholarship highlights biases and erasure encoded in profitable algorithms.⁷⁴ Industry mouthpieces will focus on consent and access when any issue comes up,⁷⁵ but never speak about industry’s power to control the collection and processing of data without any accountability from independent researchers.⁷⁶ The industry will spend millions of dollars focusing on making data use policies more readable, but then begin to design an entire virtual world that is data extractive at its core.⁷⁷ Information companies protect their bottom line by utilizing these sleight of hand tactics to distract the public with empty gestures while continuing to collect and sell their private data.

That said, is individual responsibility really *that* bad? Following the climate analogy, it makes sense for us to reduce our carbon footprints even if other regulatory responses could have more impact. It’s something, and something is better than nothing. But is it? As the next Section suggests, individual rights often crowd out other regulatory options. By sending a message of individual responsibility, the information industry ensures that collective, corporate responsibility dies.

⁷¹ *Id.* at 33.

⁷² *Frontline: Plastic Wars* (PBS television broadcast Mar. 31, 2020), <https://www.pbs.org/wgbh/frontline/documentary/plastic-wars/> [<https://perma.cc/77Z6-EW68>].

⁷³ ARI EZRA WALDMAN, *INDUSTRY UNBOUND* 67–68 (2021).

⁷⁴ See, e.g., Cade Metz & Daisuke Wakabayashi, *Google Researcher Says She Was Fired Over Paper Highlighting Bias in A.I.*, *N.Y. TIMES* (Dec. 3, 2020), <https://www.nytimes.com/2020/12/03/technology/google-researcher-timnit-gebru.html> [<https://perma.cc/9JMZ-M27V>].

⁷⁵ WALDMAN, *supra* note 73, at 67–70.

⁷⁶ See, e.g., Taylor Hatmaker, *Facebook Cuts off NYU Researcher Access, Prompting Rebuke from Lawmakers*, *TECHCRUNCH* (Aug. 4, 2021, 2:17 PM), <https://techcrunch.com/2021/08/04/facebook-observatory-nyu-researchers/> [<https://perma.cc/AA39-U75V>].

⁷⁷ See, e.g., Kate O’Flaherty, *Why Facebook’s Metaverse Is a Privacy Nightmare*, *FORBES* (Nov. 13, 2021, 6:30 AM), <https://www.forbes.com/sites/kateoflahertyuk/2021/11/13/why-facebooks-metaverse-is-a-privacy-nightmare/?sh=638254fc6db8> [<https://perma.cc/9ZHK-8WPP>].

E. The Structural Critique

Individual rights are classic liberal responses to social problems.⁷⁸ But individual rights, as described by critical legal theorists, can be indeterminate: “[N]othing whatever follows from a court’s adoption of some” new legal right for individuals.⁷⁹ They can also be pyrrhic victories: “[W]inning a legal victory [recognizing an individual right] can actually impede further progressive change.”⁸⁰ This is precisely what is happening with individual privacy rights of control.

Paul Butler illustrates the “critique of rights” in the context of the right to counsel for indigent defendants. Butler argues that *Gideon v. Wainwright*,⁸¹ long regarded as a milestone in criminal justice because it guaranteed poor criminal defendants the right to be represented by an attorney, “obscures” the real problems of the criminal justice system.⁸² The reason “prisons are filled with poor people, and that rich people rarely go to prison” is not that the former have no lawyers and the latter have all the good ones; rather, it is “because prison is for the poor, and not the rich.”⁸³ Butler recognizes that *Gideon* itself did not create a carceral state that imprisons poor people of color at rates far higher than any other group.⁸⁴ Instead, Butler argues that by providing indigent defendants with counsel—that perfect patina of procedural due process, especially from the lawyer’s perspective—*Gideon* legitimized a broken, racist system and diffused political resistance to structural change.⁸⁵ *Gideon* did not ensure that poor Black people would be “stopped less, arrested less, prosecuted less, incarcerated less.”⁸⁶ It gave defendants a fairer process, but also made it harder for social movements to argue that the system was broken. In other words, *Gideon* threw an individual right at a structural problem, promised us that rights would make the structural problem less of a problem, and, ultimately, made the problem

⁷⁸ See JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY 1–4 (2013).

⁷⁹ Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 32 (1993). That said, many scholars have been more charitable about rights, recognizing their discursive and organizing potential. See, e.g., Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 410 (1987) (“[R]ights rhetoric has been and continues to be an effective form of discourse for blacks.”).

⁸⁰ Tushnet, *supra* note 79, at 26; see Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1051–52 (1978) (referring to the legitimizing capacities of legal doctrine).

⁸¹ 372 U.S. 335 (1963).

⁸² Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 2178–79.

⁸⁶ *Id.* at 2191.

worse.⁸⁷ The carceral state grew, and it grew even more skewed against people of color.⁸⁸ But it maintained legitimacy because *Gideon* gave defendants equal process.

By focusing on each individual defendant's right to counsel, *Gideon* cut off collective action. As Wendy Brown noted, rights discourse "convert[ed] social problems into matters of individualized, dehistoricized injury and entitlement."⁸⁹ It diverted scholarly and policymaker attention to the boundaries of the right and away from the pressing need to find actual answers to the problems of mass incarceration of poor people of color.

The discourse of individual responsibility did the same thing in the climate change context. Studies show that merely reminding individuals of their own past efforts and actions to reduce energy consumption decreases support for government action on climate change.⁹⁰ Individual household behavior crowds out public support for government action by creating the perception of sufficient progress.⁹¹

In the privacy space, individual rights look good on paper. Legislators will throw some rights at a political and economic problem, point to the bill they passed, and say, "Look what we did!" When, inevitably, the data-extractive economy makes headlines for its privacy invasions, manipulative tactics, and violations of civil rights—none of which are limited by individual rights—conservative and neoliberal policymakers will claim that too much regulation stifles innovation, insist they addressed the problem, and go home.⁹² Individual rights leave extractive business models wholly intact. As a result, privacy social movements—already hamstrung by the mostly invisible nature of information age harms—and privacy civil society—heavily invested in their seats at the table—will be less able to galvanize interest in structural reform. If we start with individual rights, we will likely end with them, too.

⁸⁷ *Id.* at 2178–79. The rights-only liberal response worked alongside other aspects of the criminal justice system, like the imposition of strict sentencing guidelines that sentenced those convicted of possession of small amounts of drugs to decades in prison, to worsen the problems of the carceral state. See, e.g., Jessica M. Eaglin, *The Perils of "Old" and "New" in Sentencing Reform*, 76 N.Y.U. ANN. SURV. AM. L. 355, 365 (2021).

⁸⁸ See Butler, *supra* note 82, at 2178.

⁸⁹ WENDY BROWN, *STATES OF INJURY* 124 (1995).

⁹⁰ Seth H. Werfel, *Household Behaviour Crowds Out Support for Climate Change Policy When Sufficient Progress Is Perceived*, 7 NATURE CLIMATE CHANGE 512, 512 (2017).

⁹¹ *Id.* at 513.

⁹² See COHEN, *supra* note 7, at 89–91.

III. PRIVACY LAW BEYOND RIGHTS

This Essay is a critique of individual privacy rights as a primary weapon against data-extractive capitalism. It has demonstrated the shaky ground on which rights-based privacy laws stand and their inability to constrain manipulative, invasive, and harmful corporate behavior. But the critique of rights is an easy target without an alternative. Privacy scholars and policymakers need a robust toolkit to regulate informational capitalism. Individual rights will not work. Nor will other current models work, such as the rights-and-compliance models embraced by the General Data Protection Regulation in the European Union.⁹³

A moderate approach might try to strike an acceptable balance between privacy and the monetization of data. A more radical approach might begin from the premise that the data-extractive, behavioral advertising-based business model of informational capitalism is structurally invasive, abusive, and subordinating, and therefore requires wholesale regulation and change. This Part briefly outlines what either approach might look like, leaving to forthcoming work the task of laying out new proposals in detail. That the political environment today may not be ripe for more radical proposals is no reason to give up; it is instead the strongest rationale possible for framing a more robust alternative right now. We need to move the politically acceptable range of policies before it's too late.

A moderate approach could significantly boost funding for the FTC to create and enforce regulations.⁹⁴ The FTC and the Department of Justice could become more aggressive at enforcing anticompetition law so that individuals obtain real power to choose between companies depending on their privacy practices. The FTC could require regular audits to ensure database accuracy, with annual reporting requirements and substantial punishments for failure. To regulate algorithmic decision-making systems that use vast amounts of data to make predictive, probabilistic decisions about people, the FTC could write a rule mandating a “minimum level of quality” in algorithmic decisions.⁹⁵ Some scholars have proposed a right to restitution from the ill-gotten gains from data collected by manipulative or misleading practices.⁹⁶ Data minimization—the notion that companies should only be allowed to collect and retain data that is absolutely necessary to achieve a previously defined and disclosed purpose—should be aggressively enforced.

⁹³ Waldman, *supra* note 4, at 1223–24.

⁹⁴ The FTC is trying to do just that. *See* Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (Aug. 22, 2022) (to be codified at 16 C.F.R. ch. I).

⁹⁵ Solove, *supra* note 22 (manuscript at 34).

⁹⁶ *Id.* (manuscript at 36).

These are just a few examples of a moderate approach to regulating data use in the information economy. They are, however, reformist.⁹⁷ They leave intact an underlying labor- and data-extractive business model that subordinates every participant in the digital economy. A more radical approach—what André Gorz called “non-reformist reforms”—might target that business model directly.⁹⁸ A radical response to the harms of informational capitalism might prohibit companies from using data for behavioral targeting and ban location tracking. It would subsidize open-access, not-for-profit Internet intermediaries that would become a counterweight to the extractive information industry. It could ensure transparency and public interrogation of algorithmic decision-making processes by removing corporate trade secrecy protections for automated systems they sell to the state.

Importantly, structural changes in how the law is implemented in practice are also necessary. As Julie Cohen has described, the law of informational capitalism is managerial; it reflects values of efficiency and productivity, relies on informal processes such as audits and consent decrees, and depends on public–private partnerships in which regulated entities are responsible for policing themselves.⁹⁹ The managerial information economy reflects the will and the interests of managers and leaders of government, those with strong interests in the status quo and the revolving door of industry and government.¹⁰⁰ We need the rule of law to shrink the power of corporate compliance departments that weaponize processes of legal managerialism, such as privacy impact assessments, record keeping, and audits. There are several ways to do this. Law can circumvent compliance departments; giving up trade secrecy protections and bans on behavioral advertising do not require procedure-oriented compliance. Law can also force compliance departments to take privacy seriously, particularly by providing a robust “public” option in which privacy and public interest are core pieces of the mission. In the end, the law needs to assert authority over powerful information economy actors and relieve individuals of an

⁹⁷ Reformist reforms tweak institutions while maintaining capitalistic structures of power. Non-reformist reforms require a “modification of the relations of power,” in particular “the creation of new centers of democratic power.” ANDRÉ GORZ, *STRATEGY FOR LABOR* 8, 8 n.3 (Martin A. Nicolaus & Victoria Ortiz trans., 1967); see also Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 *HARV. L. REV. F.* 90, 100–01 (2020).

⁹⁸ Akbar, *supra* note 97, at 100–01 (noting that organizers are increasingly invoking non-reformist reforms particularly against the prison industrial complex).

⁹⁹ COHEN, *supra* note 7, at 186–87.

¹⁰⁰ See WILLARD F. ENTEMAN, *MANAGERIALISM: THE EMERGENCE OF A NEW IDEOLOGY* 154 (1993) (identifying managers of organizations and negotiations among managers as the key instruments of authority in managerialist societies).

impossible task—securing illusory control over their privacy one website at a time.

CONCLUSION

This Essay warns against relying on individual rights to protect privacy. The rights model is a gift to the information industry. Individuals can exercise their rights to delete their data and to transfer it if they wish, but policymakers' focus on individual responsibility entirely ignores those who are primarily responsible for the manipulation, subordination, and commodification at the heart of informational capitalism. Nor is it enough to say that individual rights should be one piece in a larger regulatory regime. When legislators begin with individual responsibility, they rarely, if ever, follow through with the kind of structural regulation that could make individual rights meaningful. Therefore, the individual rights model is a trap, laid for us by corporate actors and captured lawmakers content with symbolic performances of regulation.

In the end, scholars on both sides of the individual privacy rights debate agree that policymakers are not doing enough. Where we depart is on the value of individual rights. Some see them as a critical piece of a larger regulatory structure. Others fear they will crowd out more robust options of accountability. And some feel that individual rights-based laws are the best we can expect in the current political environment. I think they're worse than nothing, for the reasons I describe above. Although we need both voices in the privacy debate, I fear that we skeptics will be right. If we are, and if policymakers refuse to change course, then we all lose.