

[Following is the introduction to an in-progress law review article.]

Rationality and Consent in Privacy Law

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Consent has always played a central role in conceptions of privacy. “The root idea . . . of privacy is that of a privileged territory or domain in which an individual person has the exclusive authority of determining whether another may enter, and if so, when and for how long, and under what conditions. Within this area, the individual person is . . . boss, sovereign, owner.”¹ ““The right to be let alone””² has always been limited by the desire of most of us *not* to be left entirely alone. Thus, Robert Post observes, “the norms policed by [privacy law] are different” from non-waivable norms such as those prohibiting murder; privacy norms “mark the boundaries that distinguish respect from intimacy, and their very ability to serve this function depends upon their capacity for being enforced or waived in appropriate circumstances.”³

In light of the central role of consent in defining the right to privacy, it is puzzling to encounter a recurrent contrary resolution of the consent issue in many cases in which

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¹ Joel Feinberg, *Offense to Others* 24 (1985).

² Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 *Harv. L. Rev.* 193, 195 (1890) (quoting Thomas Cooley, *A Treatise on the Law of Torts* 24 (1888)).

³ Robert Post, *Social Foundations of Privacy*, 77 *Calif. L. Rev.* 957, 974 (1989).

written terms purport to authorize privacy-invading practices, such as workplace drug testing or the search of a premises for property held by a consumer in default on a loan.⁴ Courts that eschew reliance on consent in resolving privacy challenges resolve those challenges instead on the basis of substantive determinations of the acceptability of the challenged practices in light of the competing privacy and nonprivacy interests at stake. Thus, for instance, in *Hennessey v. Coastal Eagle Point Co.*,⁵ the employer’s written drug testing policy – announced by memorandum to employees – provided that an employee might “at any time be required to give a urine or blood sample in order to determine compliance with the policy,” but when Hennessey submitted a urine sample for drug testing the following year and brought a privacy challenge to his discharge after he tested positive, the court adjudicating his challenge did not invoke the written term at all. Instead it engaged in a detailed balancing of the employee privacy interests implicated by drug testing and the employer’s business and safety concerns.⁶ If it is tempting to conclude that consent would have played a larger role had Hennessey actually provided his signed agreement to or acknowledgement of the written drug testing policy, consider *Seta v. Reading Rock, Inc.*,⁷ in which an elaborate written drug-testing policy was not only distributed to all employees but also acknowledged and accepted in writing by its recipients. The written agreement nonetheless went unmentioned in the court’s analysis of the plaintiff’s privacy challenge to the administration of a drug test three months later.⁸ A long list of additional privacy cases fitting the same pattern of

⁴ See cases discussed *infra* Part I.C.

⁵ 609 A.2d 11 (N.J.1992).

⁶ *Id.* at 13, 19-24.

⁷ 654 N.E.2d 1061, 1064 (Ohio App. 12 Dist. 1995).

⁸ *Id.* at 1067.

failing to weigh certain written terms, involving both drug testing and other behavior, such as searches of consumers' homes for defaulted-upon property, is offered in Part I.C below. Sometimes the courts in these cases uphold the behavior covered by the written term and other times they strike it down, but in neither circumstance does the written term factor in the court's reasoning.⁹

What can explain the insistent denial of the role of written terms in these cases? This denial requires an explanation given the backdrop presumption of consent's dispositive role in determining privacy rights.¹⁰ William Prosser, the originator of the influential four-part common law test for invasion of privacy, stated unequivocally that "chief among the available defenses is that of the plaintiff's consent to the [privacy] invasion, which will bar his recovery."¹¹ While many privacy commentators have questioned the role of consent on *normative* grounds,¹² the *descriptive* picture of agreement sometimes providing, but other times denying, immunity for privacy-invading behavior has been overlooked by scholars and remains in a puzzlingly muddled state. This Article both surfaces an underlying order in the treatment of written and other express terms in the common law privacy cases and shows how this descriptive theory of

⁹ See Part I.C below for a detailed discussion of the cases.

¹⁰ See *supra* notes 1-3 and accompanying text.

¹¹ William Prosser, *Privacy*, 48 Calif. L. Rev. 383, 419 (1960).

¹² See, e.g., Priscilla Regan, *Legislating Privacy* 221 (arguing that privacy has social as well as individual value) (1995); Julie E. Cohen, *Examined Lives*, 52 Stan. L. Rev. 1373, 1424 (2000) (similar); Paul M. Schwartz, *Beyond Lessig's Code for Internet Privacy: Cyberspace Filters, Privacy Control, and Fair Information Practices*, 2000 Wisc. L. Rev. 743, 781-86 (2000) (arguing in favor of mandatory, nonwaivable rules governing some privacy questions).

privacy and express consent helps to sharpen normative analysis of the role privacy law affords to such consent.¹³

The key to understanding consent's limits in cases such as *Hennessey* and *Seta*, I will be suggesting, lies in the *durational* aspect of the relationships in which the courts eschew reliance on consent. What is special and distinctive about the type of written term at issue in these cases is that it is given in the context of an ongoing relationship in which the promulgation of the term and the occurrence of the behavior covered by the term are often widely separated in time, and in which there is typically uncertainty about if and when the privacy-invading behavior will transpire. By contrast, in the simpler situation of a spot transaction, in which an express agreement is coincident or almost coincident in time with the privacy-invading behavior, courts unhesitatingly rely on consent in resolving privacy claims¹⁴ (a descriptive feature of privacy law that this Article neither supports nor criticizes on normative grounds).¹⁵

In what follows I seek not only to impose some clarity on what otherwise appears to be a vexing jumble of common law privacy decisions sometimes accepting but other times rejecting the role of express consent, but also to use this descriptive insight to clarify and contribute to normative debates over the role of express agreement in privacy law. The full scope of the normatively appropriate limits on express consent to privacy-invading behavior is difficult to settle definitely – and this Article does not attempt such a task. However, the sharp differentiation surfaced below between cases involving express

¹³ For discussion of this Article's focus on the common law right to privacy, see *infra* Part I.A.

¹⁴ See cases cited *infra* Part I.B.

¹⁵ For discussion of the competing normative considerations, see *infra* Part III.E.

in-advance agreement under uncertainty and cases involving other types of express agreement is a place where increased normative clarity *is* possible.

As described in Part II.A below, the differentiation in the case law turns out to map well onto what behavioral economics teaches about the nature of human rationality. A massive body of evidence suggests the prospect of systematic errors in human decision making when there is uncertainty about future circumstances at the time a choice is made.¹⁶ As discussed in Part II.A, people frequently exhibit optimism bias, underestimating the probability that an undesirable event will happen to them down the road. In the workplace drug testing cases discussed above, for instance, employees were asked to agree in advance to testing that might (or might not) occur at some unspecified point in the future. In this sort of context, the discussion in Part II.A suggests that individuals will predictably tend to discount the chances of their actually being drug tested relative to the true probability of being tested. Furthermore, as discussed in Part II.B, a strong focus at any given point of time on present over future consequences may lead individuals to slight the importance of harms that arise outside of the present – though, as I will discuss, the relationship of such “presentist” thinking to “rationality” is more complex than in the case of optimism bias. Part III sets forth and analyzes the mapping of the behavioral economic analysis in Part II onto the doctrinal pattern described in Part I.

The analysis in Parts II and III focuses on aspects of human decision making that relate to responsiveness to uncertain future events, but of course the full relationship between rationality and consent embraces other important questions as well. Even in the

¹⁶ See generally, e.g., *Judgment Under Uncertainty* (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

context of a spot transaction with no uncertainty or delay in the consequences, it is entirely reasonable to question, on grounds of some conceptions of rationality, certain forms of express consent; as Part III.E describes, choice may be severely constrained, or crucial information or perspective needed for appreciating the situation at hand may be lacking. To take a particularly disturbing recent example from outside of the privacy domain, when a 42-year-old German man advertises on an internet cannibalism site for a “well-built man, 18-30 years old, for slaughter” and a fellow German responds affirmatively and, at an arranged meeting with the first man, swallows twenty sleeping pills and then has his body eaten by the first man, was the second man’s “consent” rational?¹⁷ In a similar vein, Amartya Sen asks us to “[c]onsider a person whom we find cutting off all his toes with a blunt knife, who responds when one asks if he has examined “what the consequences of not having any toes would be,” “No, I have not, and I am not going to, because cutting off my toes is definitely what I desire.”¹⁸ Is this individual “rational”?¹⁹ Behavioral economics alone of course cannot answer that question. But behavioral economics *can* tell us whether an agreement to submit to the *possibility* of some invasion of body or personhood at some point in the perhaps-distant future is an agreement that was likely to have been accurately comprehended and assessed at the time it was entered into. This claim, and its match with the actual common law privacy cases, are the focus below. This matching of the behavioral economics analysis and the existing

¹⁷ The example is from Vera Bergelson, “The Right To Be Hurt: Testing the Boundaries of Consent,” 75 *Geo. Wash. L. Rev.* 165, 165-66 (2007).

¹⁸ Amartya Sen, *Rationality and Freedom* (2004).

¹⁹ See *id.*

cases suggests that our common law of privacy – like other areas of common law²⁰ – displays an “implicit behavioral rationality”²¹ in its effort, in evaluating express consent to respond to the types of bounded rationality and bounded will power emphasized by behavioral economics.²²

²⁰ See Jeffrey J. Rachlinski, A Positive Psychological Theory of Judging in Hindsight, 65 U. Chi. L. Rev. 571, 574 (1998).

²¹ Christine Jolls & Cass R. Sunstein, Debiasing Through Law, 35 J. Legal Stud. 199, 235 (2006).

²² See *infra* Part III.A.