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Managed Sovereigns: How Inconsistent Accounts of the Human Rationalize Platform Advertising

Abstract: Platform business models rest on an uneven foundation. Online behavioral advertising drives revenue for companies like Meta, Google, and Amazon, with privacy self-management governing the flows of personal data that help platforms dominate advertising markets. We argue that this area of platform capitalism is reinforced through a process whereby seemingly incompatible conceptions of human subjects are codified and enacted in law and industrial art. A rational liberal "consumer" agrees to the terms of data extraction and exploitation set by platforms. Inside the platform, however, algorithmic systems act upon a "user," operationalized as fragmentary patterns, propensities, probabilities, and potential profits. Transitioning from consumers into users, individuals pass through a suite of legal and socio-technical regimes that each orient market formations around particular accounts of human rationality. This article shows how these accounts are highly productive for platform businesses, configuring subjects within a legitimizing framework of consumer sovereignty and market efficiency.

Keywords: platform capitalism, behavioral advertising, data protection, consumer protection, consumer sovereignty, rationality, privacy

I. Introduction

As you can tell, reasonable people approach behavioral marketing from very, very disparate perspectives.
—Federal Trade Commissioner Jon Leibowitz (FTC 2007)

Policymakers' beliefs about human cognition and behavior shape how governance structures position people in relation to corporate power (Pappalardo 2012; Hoofnagle 2016). In this paper we ask: Who is the actor presumed and codified in the governance of commercial online platforms? What capacities and subjectivities are imputed onto individuals interacting with these digital surveillance technologies and algorithmic systems of classification and personalization? Focusing on platforms that facilitate online behavioral advertising (OBA), we argue that a contradictory set of rational capacities is assigned

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to individuals as they act, respectively, as "consumers" who choose to engage with a platform and accept its terms of service, and as "users" who then actually engage with the platform service. Radically inconsistent definitions of the subject are tolerated, or potentially encouraged, to secure the ideological and legal integrity of using market mechanisms to govern personal data flows while simultaneously using those data to predict and manage user behavior.

When individuals submit to tracking, profiling, and personalization of their opportunities and environments, such as by agreeing to the privacy policies and binding terms of service offered by social media sites and mobile apps or agreeing to pop-up notifications seeking consent for data processing, the presumption is that those individuals act deliberately to maximize self-interest based on a calculation of their options, benefits, and costs (Solove 2013; Susser 2019; Turow, Hennessy, and Draper 2015). Data privacy law in the US and elsewhere encodes a rational consumer, freely trading personal information for "relevant" advertisements and customized services (Baruh and Popescu 2017; Draper 2017; Hoofnagle and Urban 2014). The bargain is considered legitimate so long as (1) transparent disclosures of corporate data practices equip consumers to make reasoned privacy tradeoffs (White House 2012; FTC 2012), and (2) consumers are capable of giving meaningful consent. Marketing experts and policymakers have regarded personalization and the reigning notice-and-choice regime as exemplars of consumer empowerment and market efficiency (Darmody and Zwick 2020; see Thaler and Tucker 2013). As Robert Gehl (2014, 110–111) explains, the subject personified in digital advertising's policy rhetoric—the "sovereign interactive consumer"—is the "foundational abstraction" of privacy self-management's governance of social media.

Individuals are conceptualized much differently on the other side of the privacy-permissions contract, where the presentation of information and opportunities—including advertisements, product offers, and prices—responds dynamically to inferences and predictions about profiled people and populations (Andrejevic 2020; Barry 2020; Fourcade and Healy 2017; Moor and Lury 2018). In the OBA practices enabled by permissive privacy rules, strategic actors operate from the premises that human decision-making is susceptible to influence and that the reliability of that influence can be increased by discerning users' habits or cognitive patterns (Bartholomew 2017; Calo 2014; Susser et al. 2019). The target of influence is not addressed as a self-determining liberal subject, exercising a stable endowment of preferences and capacities, but rather as a machine-readable collection of variable (sometimes only momentary) properties, correlations, probabilities, and profit opportunities represented by "anonymous" identifiers (Barocas and Nissenbaum 2014; Cheney-Lippold 2017; Fisher and Mehozay 2019). Digital platforms, and the marketers who use them, try to engineer the architectures in which people make choices to systematically increase the likelihood of preferred outcomes, guided by statistical analyses of massive and intimate data (Burrell and Fourcade 2021; Gandy 2021; Nemorin 2018; Yeung 2017). The idea is to steer or nudge individuals toward predicted behaviors through constant tweaking of information environments and opportunities.

By designing those behavioral pathways, platforms produce and sell probabilistic behavioral outcomes that can be differentiated according to their apparent or expected value (Zuboff 2015). Frequently, that value is determined by the data available about the subject whose attention is being monetized, and so access to personal information that ostensibly enables better valuations or strategic decisions becomes a source of power and advantage for platforms (Birch 2020; West 2019). These processes of prediction and influence may not be as effective as proponents suggest, and, in practice, many advertising professionals work with a mix of algorithmic identities and the demographic or lifestyle categories long used to define consumer targets (Beauvisage et al. 2023). Nevertheless, the business of platform-optimized advertising has become astronomically profitable. That profit is premised on a

belief that comprehensive data collection furnishes new abilities to identify and exploit individuals' susceptibilities, vulnerabilities, and, in certain accounts, irrationalities (Calo 2014), all justified by the pretense of giving sovereign consumers what they desire and bargained for.

How can we tolerate such a dramatic discrepancy in the conceptions of human rationality that guide high-level policies about the relationships between people and the platforms they use to participate in social, political, and cultural life? How can data collection be authorized by the presumption that rational consumers freely choose to exchange personal data for improved platform services, when the use of that data within the platform presumes that individual users are not rational and that their choices and behaviors can be managed and "optimized" via algorithmic personalization?

This article contributes to an emergent body of critical scholarship addressing the implications of this inconsistency between the assumptions of liberal subjectivity that frame policy discourse, and the markedly different assumptions about human subjectivity and rationality operative in commercial platforms' modes of computational or algorithmic management (Barry 2020; Benthall and Goldenfein 2021; Cohen 2013; Goldenfein 2019). We demonstrate that a simple question—Who is the platform subject?—provides a lens for examining (1) the political maneuvers that maintain a system and market configuration premised upon incompatible answers, and (2) how, in the name of consumer sovereignty, privacy self-management and norms of market efficiency are installed and defended as the foundation of platform and data governance against other forms of regulatory intervention. Specifically, we argue that this articulation of OBA and privacy self-management is reinforced through an unlikely process whereby seemingly incompatible conceptions of human subjects are codified and enacted in law and industrial art.

As an individual transitions from the law's "consumer" into the platforms' "user," they pass through a suite of legal and socio-technical regimes—notice and choice, data protection, consumer protection, and computational or algorithmic management—that each orient market formations around particular accounts of human rationality. These inconsistent accounts are highly productive for platform business practices and the regulatory activities that hold their shape. The vast advertising-oriented sector of platform capitalism is stabilized by a set of institutions that operationalize rationality in divergent yet complementary ways. Those institutions, including the advertising industry and consumer protection law, configure subjects within a framework that simultaneously upholds the ideals of consumer sovereignty and market efficiency while also legitimizing data extraction and its derivative behavioral arbitrage. This article does not argue that law should respond to this contradiction through a more empirically coherent or less stylized subject. The goal is to demonstrate how inconsistencies in legal and industrial accounts of human rationality are used to privilege market ordering for coordinating data flows and to shape those markets in ways that suit commercial stakeholders.

At this point, defenders of OBA might demand a caveat. They might disavow any manipulative designs, conceding instead that when individuals act as marketplace choosers—both of privacy preferences and of advertised goods and services—they exercise "bounded rationality." These defenders might insist that the marketplace chooser imagined by designers and practitioners of data-driven, behavioral marketing is a subject who strives for optimal decisions within material constraints, such as limited time, information, and information-processing power. Illegitimate subversion of individuals' rational-aspiring choices, beyond these unavoidable constraints, will be met by the counteracting force of consumer protection law.

Suppose we accept all that and set aside the possibility that marketers exploit the cognitive biases cataloged by behavioral economists. Even so, the governance of commercial platforms still requires us to recognize that personalization and "choice architecting" are techniques for adjusting the boundedness of rationality—for setting or relaxing the material constraints on decision-making. Rationality is not a natural and persistent endowment, but a contextually situated capacity, shaped by the environments that structure decision-making; it is constituted through calculating devices and it is performative of markets and economization (Callon 1998). What we are suggesting, then, and what the defenders' caveat does not resolve, is that digital platforms are designed and operated to cultivate specific and often asymmetrical rational capacities. Even at the terms-of-service threshold, where individuals make ostensibly reasoned choices about becoming users who are subject to the pleasures and perils of platform optimization, companies try to secure the continuous supplies of personal data they need by implementing consent-management interfaces that take advantage of human incapacities (Keller 2022; McNealy 2022). Admitting that consumers are "boundedly" rational, as opposed to predictably irrational, does not address the fact that platforms actively manipulate those boundaries, modulating information and design features that produce and delimit user experiences and market activity.

Further, and crucially for our argument, we suggest that consumer protection law's evolving recognition of bounded rationality is doing important work for this sector of platform capitalism. Consumer protection in platform governance works to recuperate the political function of the liberal decisionmaker as the legal subject necessary to stabilize existing consumer-rationality-market configurations, and justify market mechanisms over stronger regulatory constraints, maintaining platform control over data flows powering the OBA business model. The legal integration of bounded rationality as a remedy to rational choice theory's well-known limits makes space for a range of ready-to-hand regulatory interventions framed through behavioral economics, with minor impact on platform businesses. By deploying a broader theory of behavior, consumer protection law maintains the human subject as a legal technology around which profitable market configurations continue to be instituted, while avoiding real constraints on how platforms and their advertising apparatuses profit from behavioral management. The accommodation of behavioral economics, while tackling a specific set of predatory market practices and contriving new categories of vulnerable subjects, ensures that the idealized conception of individuals as autonomous market actors and the normative goal of market efficiency persist, while enabling platforms to simultaneously undermine both.

The next sections survey how consumer rationality has been defined and constructed in advertising and marketing, on the one hand, and in law and privacy regulation on the other. Moving through these analyses, it is important to note that we are not explaining how exactly these competing accounts of the human were transmitted across commercial, social-scientific, and legal domains. We are not suggesting, for example, that regulators have been duped or are involved in a knowing conspiracy. Rather, we demonstrate how the platform, as a site of collision between these contradictory accounts, leverages legally and technically codified forms of human rationality (from privacy, data protection, consumer protection, and computational management) into specific market institutions and governance regimes that justify platform business models.

II. Advertising's Two-Faced Consumer

Digital advertising, and behavioral marketing more generally, is a primary economic engine for platform companies like Google, Meta, and Amazon. Not incidentally, the advertising industry has

been, and remains, a major institution of everyday life in which subjects are imagined, produced, classified, and narrated by communities of experts and their technoscientific tools, with profound effect on the social and material worlds constructed around those subjects (Rosa-Salas 2019; Turow 2011). While the industry tries to monitor and manage consumers to whatever extent is feasible and economical in given circumstances, it does not perform this work at an objective distance, acting upon independent and already-formed subjects. Rather, its maneuvers and apparatus, including the adtech systems within digital platforms, create those market subjects and configure their conditions of existence. This section looks at some of the ways in which the advertising industry has projected certain cognitive and behavioral characteristics onto consumers and then mobilized around those projections. As with the legal arenas described below, advertising draws legitimacy from contradictory yet coexisting definitions of consuming subjects.

The advertising industry has always balanced a two-faced view of consumers. For advertising professionals, duplicity about their powers of influence, and the people at whom those powers were directed, was a device for mediating between clients and other publics (Meyers 2013). To clients, advertising agents claimed they could steer consumers toward almost any action or idea. To consumers, advertisers and their agencies presented themselves as trusted advisors, reflecting individuals' needs and desires but never manipulating them. A beneficent public face was not only useful for disarming potential customers; it also helped reassure regulators that advertising exerts no undue influence, and therefore need not be scrutinized or restricted by law (Leiss et al. 2018). Advertising professionals claimed to simply equip sovereign consumers with the information they needed to exercise their rational faculties in pursuit of the desires and preferences that exist within each individual, even if those individuals were not conscious of their own desires and preferences prior to advertising exposure. That the permissible information conveyed through advertising could come in many forms, including emotional appeals, and that this information was effectively inseparable from persuasion, were considered by the industry's proponents to align with the usual mechanisms of choice in a "free society." Representing the advertising industry's largest trade organizations before a Federal Trade Commission (FTC) hearing in 1971, a vice president at the J. Walter Thompson agency maintained, "[T]here is no doubt that advertising affects purchase behavior," but he assured the Commission that this was true simply because "consumers know what they want and . . . if you offer and communicate it to them they will act upon it." Clearly, he said, "consumers are not sheep who loyally do as they are told, but rather they are fickle purchasers who change their opinions quite frequently and deliberately and who change their behavior as they see fit" (Achenbaum 1971, 7–8). Describing how the advertising business as a whole defended against accusations that it manipulated people, Leiss et al. (2018, 321) quip, "Seldom does one find an industry so strenuously arguing the ineffectiveness of its product."

Among themselves, though, many advertising professionals circulated theories and assumptions that held individual consumers in condescension, if not contempt (Marchand 1985, 84–85). Indeed, it was useful for admakers to conceptualize consumers as irrational, emotional, and inept. Such a view justified both their paternalistic stance—empowering them to "uplift" the untutored masses who did not know what was really good for them—and their expertise as behavior engineers, since specialist techniques would be required to manage consumers who could not be trusted to react rationally to marketplace information (Marchand 1985, 52–88).

Both advertising agencies and the advertising sales departments at media companies have thus been committed simultaneously to conflicting ideas of the consumer: they insist on a sovereign and rational actor when trying to convince critics or would-be regulators that advertising facilitates the efficient

functioning of markets; and they describe people as malleable bundles of habits when trying to convince clients and customers to invest in the power of professional influencers. Both the legitimacy and the value of advertising depend on this contradiction.

Selective scavenging of scientific research could furnish support for either perspective, although the industry gravitated especially toward evidence of irrationality. Advertising professionals have had a long and mutually opportunistic relationship with the behavioral sciences, and psychology in particular. Psychology found in advertising a vast and sometimes well-financed problem space for conducting and applying research on human cognition and behavior. University researchers began studying the psychology of advertising in the 1890s; across the next decade, psychologist Walter Dill Scott published several books that helped orient the dominant paradigm in advertising around an understanding of consumers as nonrational and "suggestible" (Kuna 1976). This was a felicitous precept. Political economist Zoe Sherman (2020, 125) explains, "Just as [advertising professionals] were reaching the conclusion that the average man was mistaken in his belief that he knew his own mind and could self-consciously exercise his own will, they reached the conclusion that an expert schooled in the newly distinct academic discipline of psychology could know the audience's mind better than audiences knew themselves and deliberately exercise his will over them." This rings familiar today, when advertising platforms claim or imply that their behavioral datasets enable them to predict what people want and need so precisely that they can effectively anticipate and preempt desire (Andrejevic 2020). The advertising industry's affinity for psychological findings that gave a scientific justification for marketplace paternalism echoes in the common refrain that Google, Meta, and Amazon know consumers better than those consumers know themselves.

Applied psychology also lent the advertising business a badge of credibility to show off as it tried to ameliorate public mistrust and to claim the status of a respectable profession. A scientific attitude was part of advertising's performance as a progressive and modernizing force in enterprise and society (Laird 2001; Marchand 1985). The world's largest advertising agency, J. Walter Thompson, made its commitment to scientific rationality into a hallmark of its identity from the 1910s onward (Kreshel 1990). The agency even hired John B. Watson, a former president of the American Psychological Association and the so-called "father" of behaviorism, a school of thought that rejected the interiority of human consciousness and instead defined people through their observable actions. "By removing mind from behavior," James Carey (2009, 112) says of Watson's behaviorism, "the possibility of rational action was removed also, but this was the precise and willing price to be paid for constructing a model of human social action on the postulates of physical science." Watson worked for decades at the agency as an apostle of sorts, spreading throughout the profession (and to advertising clients across industries) the idea that consumer behavior could be scientifically predicted and systematically managed. If nothing else, that evangelism was useful publicity, projecting scientific authority onto businessmen who had long suffered a bad reputation as, alternatively, nefarious manipulators or feckless charlatans. By consorting with a modern science of behavior, the advertising profession could continue claiming exceptional powers of influence, while cloaking those claims in language that defended against both critics and skeptics.

Influence, however, is never a sure thing, and professional trappings did not eradicate crises of confidence. Then, as now, advertisers' deep uncertainty about the effectiveness of their efforts made them receptive to almost any seemingly scientific technique that might help them tame the complexities of consumer behavior. Trends in psychology affected advertising strategies quite dramatically in the 1940s and 1950s, with the somewhat sensational application of motivation research (MR). Drawing on methods like "depth interviews," motivation researchers told advertising

professionals that consumer behavior expressed hidden desires and fears; the key to advertising, they said, was to recognize the unseen and unconscious impulses that drove people to buy and use certain products and brands (Dichter 1947). Unlike behaviorism, MR invited consumers to explain their choices and actions; however, researchers then exercised discretion in defining the boundaries of rationality, judging when the actual motivations for consumer choices exceeded any conscious accounting and intruded instead from outside the realm of self-awareness. MR's most famous avatar, Ernest Dichter (1947, 432), advocated "[c]ooperation between the practical businessman and the psychologist" by appealing to advertisers' insecurities, calling this union "an essential development if we are to progress from a medicine-man stage of selling and advertising to a scientifically controllable one." Motivation research became a sensation, but it also attracted vocal opponents and triggered social anxieties about subliminal manipulation. In some ways, it foreshadowed recent handwringing about platforms as behavioral puppet masters, but it also prefigured increasingly mainstream strategies in machine learning that reject a human's capacity to adequately specify their own preferences (Russell 2021).

As the fashion for MR plateaued, the next fad rushed onto the scene with promises of mathematical optimization that relate directly to today's platform assemblages. Advertising professionals turned to operations research and the broader set of systems and management sciences in the hope of better measuring, predicting, and controlling the effects of advertising. An eclectic cohort drawn from physics, statistics, accounting, and beyond had been channeled into military science during World War II, before redeploying their energies in corporations and business schools in the 1950s (Fourcade and Khurana 2013). In advertising, operations researchers reconfigured calculative and decision-making work around mathematical formalisms and new means of computer processing and simulation (McGuigan 2019). They also advocated for muscular programs of ongoing experimentation, observation, and adaptation of marketing activities (for example, Little 1965; Kotler 1966). In a sense, this project of translating advertising into what Philip Mirowski (2001) calls a "cyborg science" was about extending the scope of management over more of the sphere of consumption—to collect behavioral measures, to classify and evaluate consumer types, and to ultimately format consumers and media audiences as probabilistic and quantitative units of economic value. As Jill Lepore (2020) argues, these behavioral and management scientists invented the future now embodied by advertising platforms like Facebook.

The legacy of operations research in advertising is a profound commitment to socio-technical systems of surveillance, prediction, and optimization (McGuigan 2023). Moreover, this discipline brought an approach to advertising that was often indifferent to the content of commercial messages, preoccupied instead with distributing those messages efficiently to achieve concrete business objectives, like maximizing return on investment.

A cyborg science of advertising was not designed to inform potential buyers about the marketplace or to tell stories about why people use certain products; its purpose was to manage consumers and markets, using whatever models and mathematical techniques seemed to work (or at least satisfy clients). While the databases and mathematical tools in use today have been considerably renovated, the spirit of optimization brought by operations research still animates behavioral advertising on digital platforms (McKelvey and Neves 2021). Platform advertising services pick up on the motivation research project of unearthing hidden desires or habits (behavioral propensities that you weren't even aware of), and convert it into a statistical and correlational register of data mining, which, like operations research and behaviorism, dispenses with the inclination to theorize that desire or attach it to a consistent psychological subject. Today, advertisers and other influencers operate on the

presumption that access to detailed personal data and aggregate patterns of behavior increase their power to profile and manage people—to not just predict behavior, in the sense of describing a potential reality, but to enact a reality that performs or preempts the anticipated desire (Andrejevic 2020; Fourcade and Healy 2017). A welter of big and small intermediaries, and the platforms that link many of them together, promote and exploit the advertising industry's attachment to this logic of "dataism," as José van Dijck (2014) calls it.

The two-faced subject of behavioral advertising described above permeates platforms' public relations discourse, but the contradictions are never far from the surface. The argument given for why individuals should agree to behavioral tracking and targeting is that they will be compensated for giving platforms control over data flows by receiving content, advertisements, deals, or discounts that are relevant to their interests. This sounds reasonable until we wonder what "interest" means. On its face, it conjures the self-ascribed priorities and preferences of a rational consumer. It suits marketers and platforms to invoke a model of rational choice in debates about whether and how to permit data collection and use. But when platforms leverage their data resources to predict and influence user behaviors, "interests" are operationalized in ways that may diverge dramatically from both what an individual would recognize as part of their identity, and the stability and coherence ascribed to that individual by a privacy self-management regime. Such forms of dynamic personalization remake notions of personhood, complicating consumer protections that presume a stable individual, rather than a multiple and modular "dividual" (Moor and Lury 2018).

A platform's advertising system might define "you" and your "interests" in ways totally inscrutable to your own conceptions of self (Cheney-Lippold 2017), because the identity of the platform "user" is not meant to be processed by or intelligible to humans. Users' "interests" are in many cases not consciously expressed preferences or tastes, but inferred proclivities, fabricated from behavioral observation and statistical modeling, and formatted to be interpreted and acted upon by machine intelligence (Cotter et al. 2021). Like behaviorists and motivation researchers, platforms do not trust individuals to truly recognize and disclose their interests; instead, those interests are extracted from measures of behavior, including sometimes even the behavior of other people who seem to resemble or differ from an individual in ways that are informative for prediction or evaluation. A user might be mis-aged or mis-gendered by a platform decision system, according to how that person (or others) would narrate their identity; but that data-driven classification might reflect something, as the platform sees it, that is useful for adapting environments, recommendations, and advertisements to a statistical view of the user. Laurence Barry (2020, 8) points out that with predictive analytics, "what is being modeled today is not the rational individual of liberalism," but instead the conditioned or impulsive responses to stimulus understood by behaviorism as the basis of decision-making and subjectivity. Advertising platforms treat subjects as a collection of patterns, propensities, and the moments when they are expressed (Baruh and Popescu 2017), and they work to "architect" those moments to their advantage, not by telling you a coherent story about who you are, but by making a bet on a probable impulse or response (Brodmerkel and Carah 2016).

This practical disposition discredits privacy policies that hinge on whether or not data is "personally identifiable," since identification in platform advertising is not about recognizing one's given or chosen name, but about appending some unique badge to make one bundle of behaviors distinguishable from another for the purpose of making better guesses and attributions of success (Borgesius 2016). Furthermore, the identities assigned to users are constantly evolving as observed behaviors "reveal" new interests or alter the confidence of algorithmic guesses about traits like age, gender, and other social and demographic statuses. The notion of interest-based advertising suggests at the same time

that "you are who you say you are" and that you are what a software system processes as your past, expected future, and apparent similarities to, or differences from, other known users (Kant 2021). The "algorithmic episteme" (Fisher and Mehozay 2019), which is prominent in platform advertising, "sees" individuals "in terms of patterns of behavior, or data patterns," and it assembles "audiences" not based on essential identities or solidarities, but by observed and never-final similarities in those patterns across individuals (ibid., 1187).

Mark Andrejevic (2020, 97) neatly captures the "familiar Janus-faced rhetoric propounded by the marketing industry: the consumer-facing side treats people as autonomous individuals—classical liberal Lockean subjects with pre-formed, internally generated desires, preferences, and needs; whereas the client-facing side portrays them as the product of social structures—discursively defined, shaped, and influenced." Data-driven marketing depends on this construction of the consumer as simultaneously sovereign and manageable (Darmody and Zwick 2020).

III. Law's Humans in the Digital Economy

Advertising has long been a trading zone for divergent ideas about consumers' subjectivities and capacities (Curti 1967; Miller and Rose 1997). These ideas do not reflect unambiguous facts of consumer behavior, but rather enact particular subjects and realities, especially insofar as they are embedded in institutions and law. "In large part," Mark Bartholomew (2017, 14) writes, "the law of advertising is governed by legal hypotheses about the cognitive abilities and habits of consumers."

Consider two examples. In the late nineteenth century, US courts issued rulings about consumers' susceptibility to deceptive trademarks. Established manufacturers wanted to prevent competitors from using labels or packaging that could cause shoppers to mistake one product or brand for another. The law settled on the view that consumers should not be expected to exercise a "high degree of care" in making these sorts of choices. The notion of the "unwary purchaser" was enshrined to facilitate trademark protections and to restrict certain competitive practices. Michael J. Pettit (2007, 381) argues that this definition of consumer decision-making occupied "a node in the network through which the economy was constituted." Whether or not it was an accurate characterization of consumer behavior, "the unwary purchaser was a legal technology" that helped define and adjudicate permissible marketing practices. Expanding the power of intangible trademarks to constrain the conduct of others, as Pettit says, "shaped the contours of the legitimate market" (381). By contrast, a very different subject is enacted in laws that prohibit false advertising. There, the presumption of a discerning consumer, who can capably separate useful information from sophistry, generally weighs against intervention by regulators over commercial representations. Similar views of consumer psychology inform regulatory understandings of subjects navigating online architectures (Bartholomew 2017).

In the world of OBA, law institutionalizes multiple constructions of the human in order to establish market-oriented governance over data flows between individuals and platforms and to define forms of individualized harm that delimit market practices. Different legal regimes govern the flow of data between individuals and platforms in different ways. Each relies on its own model of human behavior, capacity, and decision-making, which structure how platforms and individuals are able to legally interact. These legal regimes typically govern the agreements made between platforms and individuals as consumers, while also providing, in the case of data protection, some rights to the "data subject" as platform user. The diversity of these plural legal subjects, each with different models of behavior,

is not the object of our critique. Rather, we describe how each legal subject relates to the subject of online advertising in ways useful for platform businesses.

In the sections below, we describe three different human legal subjects: the rational subject of notice and choice that is presumed to pursue satisfaction of their own preferences through contractual relations; the self-sovereign subject of data protection that defines itself through conditioning an outward digital identity; and the boundedly rational subject of consumer protection whose limited cognitive capacities require protection from abusive practices. We highlight the ideological and economic environments in which those humans are embedded as well as the stakes of their deployment in the governance of platform advertising and personalization. As these accounts progress toward the more nuanced account of behavior becoming codified in consumer protection law, we do not mean to suggest that law's recognition of bounded rationality reflects the legal subject's convergence with ontological reality. Instead, we mean to outline a novel iteration of legal subjectivity whose hybridization of liberal-rational-consumer and behaviorist-computational-user according to the postulates of behavioral economics is put into productive relation with regulatory and market apparatuses that preserve the status quo.

A. The Rational Legal Subject of Notice and Choice

The system of consumer data governance in the US, premised on privacy policies, consent, and consumer law, is known as "notice and choice." Transparency and consent have been fundamental legal concepts governing data flows for at least half a century. Most consent-based information privacy regimes can be traced back to the Fair Information Practice Principles (FIPPs) adopted by the OECD in the 1970s. These regimes were deeply influenced by Alan Westin's (1968) canonical argument that privacy is best expressed as individual control over information flow, and coincided with the general uptake of "rational choice liberalism" as a regulatory theory in the Cold War period (Amadae 2003). The FIPPs specified general principles for data collection, processing, and use, and reified the fundamental role consent would play in data governance frameworks for years to come. This enabled, in the US at least, online consumer privacy to become a system of "quasi-self-regulation," in which online service providers would offer terms of service and a privacy policy to which a consumer could consent. That consent typically afforded consumers access to the service, and the service provider access to user data (subject to the privacy policy). If the service provider breached the agreement, the consumer did not, however, have to rely on private common law contractual remedies. Breaches of privacy policies were instead regulated by the FTC.

The primacy of notice and choice as a system of data governance is best interpreted as a product of rational choice theory (RTC)—the beating heart of "Law and Economics"—in privacy law policy-making (Hoofnagle 2016, 148–151). RTC prescribes certain characteristics to individuals as decisionmakers. The most fundamental are that the rational chooser autonomously determines their own goals, making choices that are reasonably well-suited to attaining those goals; that the rational chooser is able to rank preferences, the ranking of which will not be subject to wild or inexplicable shifts, i.e., those preferences are consistent and formally "transitive";[1] and that there is almost no irrational consumer behavior because preferences are the product of self-determination and autonomy, meaning almost all behavior is assumed to be directed at utility maximization (Ulen 1999).

[1] "Transitive" meaning that if a bundle of goods *A* is preferred to bundle of goods *B*, and bundle of goods *B* is preferred to bundle of goods *C*, then bundle of goods *A* will also be preferred to bundle of goods *C*.

Utility maximization is only definable and measurable, however, if based on the assumption that consumer decision-making is autonomous and premised on transitive preferences. Only under such assumptions will any price paid reflect the true value of the product to the consumer (White 2010). As soon as the ranking of preference or assessment of value originates exogenously to the consumer, this measure of welfare or utility becomes incoherent. Liberal market economies thus require individual rational action for their value-creating and moral justifications. The disembodied rationalism articulated in RTC is an expression of that need, and supports the account of the liberal, rational, rights-bearing subject capable of engaging in market transactions through contracts. The rational consumer, as legal subject, is the free contracting legal subject of the idealized marketplace.

RTC-informed platform data governance is also subject to protective regulation on the basis of market failure in antitrust and competition law regimes. Investigations into platforms' monopolistic control over data and the functioning of online advertising systems have demonstrated how control over data flows translates into domination over ad markets and the permissible range of consumer behaviors (Srinivasan 2020).[2] But the Law and Economics approach, which informs the consumer welfare basis of antitrust, enables protective regulation only in cases of market failure, and only where the benefit of addressing that market failure outweighs the cost of regulation. As such, those additional interventions work to defend the RTC-informed subject of notice and choice, and the use of market mechanisms to coordinate platforms' intermediation of social and political life. Those regulatory interventions do not challenge advertising-informed platform business models, personalization and targeting, or the computational management of consumer behavior. Rather, the normative goal of market efficiency justifies behavioral advertising on the basis that "firms reduce the costs of ads wasted on consumers unlikely to be receptive to them" (Acquisti 2010, 8). So long as advertising does not manipulate a consumer towards a non-preferred product, it is understood to benefit both consumers and producers.

B. The Sovereign Data Subject

The US notice and choice regime is frequently described in terms of liberal "freedom," as opposed to the more "dignitarian" orientation of European data protection (for example, see Whitman 2004). Data protection also descended from the FIPPs. In the context of OBA, like notice and choice, data protection deploys consent as a primary tool for managing information flows (Veale and Borgesius 2022). But data protection also supplements individual control with alternative bases for lawful data processing, such as if processing is in the legitimate interests of the data controller, authorized by law, or necessary for the protection of the vital interests of a person (for example, see the EU General Data Protection Regulation (GDPR) and the California Consumer Privacy Act). Further, data protection laws typically prescribe general principles for the collection and processing of data, as well as obligations on organizations involved in data processing. These include purpose binding, data minimization, data protection by design, and various compliance obligations.

Unlike notice and choice regimes, which effectively only govern the moment when an individual agrees to a platform's terms of service (i.e., the moment when the consumer agrees to become a "user"), data

[2] See, for example, ongoing litigation around Google's "Jedi Blue" program, alleging Google's abuse of dominance in ad markets, *In Re: Google Digital Advertising Antitrust Litigation Case*, No. 21-3010 (S.D.N.Y.), as well as reforms associated with the EU Digital Markets Act, intended to redistribute rents from major platforms to third party complementors by prohibiting a range of practices associated with self-preferencing and implementing fairness and non-discrimination rules.

protection also goes beyond policing compliance with privacy policies or the conditions of consent.[3] Once a service relationship between an individual and a platform is established, data protection renders the parties respectively "data subjects" and "data controllers," granting data subjects rights that enable individuals to obtain access to the data held about them, seek rectification of that data if incorrect, or have that data deleted in certain situations. Data subjects are also entitled to object to or restrict data processing in certain situations (for instance, if the data's accuracy is contested), enjoy the right to have their data provided to them in machine-readable format for the sake of data portability, and have the right not to be subject to fully automated decisions that produce legal or similarly significant effects. In other words, they enjoy several rights that pertain to their status as platform "user." The extent and utility of these rights is a matter of ongoing debate, but our specific concern is with the imputed cognitive and economic capacities of the legal subject that they constitute.

The contours of legal subjectivity embedded in data protection are best described in the case law expounding the concept of "informational self-determination." This personality-based account emerged from the German Constitutional Court's decision in the *Census Act Case* (1983)[4] and became the legal anchor for, at least, German data protection (Hornung and Schnable 2009), but it is generally accepted as fundamental to data subject rights. The *Census Act Case* considered the constitutionality of a proposed digital population census, and was the crescendo of a line of jurisprudence establishing that an individual should have the freedom to decide for themself how they wished to be portrayed to third parties or the public. Informational self-determination meant "the content of the general right to personality is largely determined by the self-image of its bearer" (Kommers and Miller 2012, 322). Informational self-determination thus became the legal concept by which an individual is entitled to control the representation of themself circulating in the outside world. The individual was defined as narrator of their own identity, and data subject rights became tools for reconciling a digital identity controlled by others with an individual's understanding of themselves. In the computational context, this dimension of data protection works to return "control" over a digital identity to the non-digital human, tasked with exercising autonomous and self-determining decision-making over how they are represented in data.

Whereas the subject of notice and choice is described according to its capacity to make decisions in its own economic interests, the data subject (i.e., the legal subject of data protection law) is defined by its capacity to understand itself and how it wishes to be represented in the world. Both legal subjects are relevant to the platform context, where the consumer subject makes transactional decisions based on its self-interest, and the data subject controls external data holdings as a way to narrativize their own identity. However, the self-narrativized identity of the sovereign data subject collides awkwardly with the forms of identity at work in online advertising ecosystems described above. Whereas the data subject might impose self-understanding into platform environments by amending data holdings or correcting the semantic labels by which it is indexed, the platform acts on the machine-readable

[3] To that end, one German competition decision, though based on the data protection principles in the GDPR, has prohibited Facebook from making the use of its social network conditional on the collection and combination of user and device-related data from other Facebook owned services Whatsapp, Oculus, Masquerade, and Instagram. That decision determined the combination of those datasets through user consent as an abuse of market power, a violation of the GDPR's goals of countering informational asymmetries, and a violation of informational self-determination under Article 6(1)(a) (*Bundeskartellamt* case summary 15 Feb 2019, B6-22/16). The decision did not address the collection or amalgamation of data after users had signed up for Facebook, but rather focused on the lack of meaningful consent for user and device data associated with those secondary services to be combined with their Facebook user data when initially signing up for the service.

[4] 65 BVerfGE 1.

consumer categories of the "algorithmic episteme" (Fisher and Mehozay 2019), whose semantic labels primarily facilitate communications to potential advertisers. Data subject rights conceptualize data as a "record" of identity—something static and coherent. But data's relation to identity in platform practice is dynamic and subject to adaptive combination and recombination with novel data streams that infer novel relational characteristics and propensities. Control over what data can be stored about an individual in a database thus offers very little control over the inferences drawn or knowledge derived about an individual (Hildebrandt 2008), which is the stuff of value to platforms and other participants in ad markets. Whereas the freedom rationales behind notice and choice ultimately lead to prioritizing market efficiency as the normative goal, the dignitarian dimensions of European data protection become unwittingly enrolled in a similar dynamic. Granting the legal capacity to define how a user will be read or interpreted by a platform enables the user to impose a construct of themselves that is potentially meaningless to the computational systems that animate OBA, or alternatively, act in service of market efficiency goals by giving better shape to themselves not as a human, but as an attention commodity traded in the OBA ecosystem.

C. The Boundedly Rational Subject of Consumer Protection

Recent developments in consumer protection law directly address the limitations of notice and choice's legal rational actor through the recognition of alternative cognitive characteristics, capacities, and interests. The accommodation of a boundedly rational legal subject serves to bolster market rationality against problematic market practices. Consumer protection principles are also being developed to supplement data protection's requirements for meaningful consent with rules for protecting "vulnerable" consumers.

Consumer protection has long held ideas of consumer sovereignty and consumer safety in tension. It mediates between efforts to improve the quality of market-oriented social coordination as well as consumer safety by prohibiting unsafe products or intervening in consumers' capacity to make agreements in particular situations. Here, consumer protection imposes a floor on rationality, often described in terms of "vulnerability" that requires the prohibition of particular contract terms and trade practices premised on community values (Wilhelmsson 1997; Cvjetanovic 2017). Vulnerability in consumer protection law might be associated with age, disability, or socioeconomic disadvantage. For example, consumer protection law frequently constrains advertising of certain products such as food, alcohol, gambling, pharmaceuticals, or financial services.

On the other hand, consumer protection law works to scaffold rationality by imposing market information rules, requiring disclosure of information necessary for an "ordinary" or "reasonable" consumer to make informed market choices. This consumer welfare orientation holds that consumers making ill-informed decisions or being misled, or the existence of unsafe or deceptively low-quality products, undermine the utility and welfare maximization sought through free exchange. Omissions of essential information or other forms of deceptive conduct are prohibited because they cause consumers to engage in transactions they otherwise would not, resulting in non-efficient market allocations. Notice and transparency requirements around information deemed relevant to decision-making are typical methods for augmenting consumer rationality (Paterson et al. 2021). That augmented consumer is then left to fend for themselves in the world of private agreements. But once the agreement is finalized, and in our case the consumer transitions themselves into the platform user, consumer protection has little more to say about decision-making capacities.

Both the consumer welfare and social justice consumer protection orientations work to reproduce market coordination, deploying a range of approaches from information rules through to specific prohibitions. Consumer protection thus establishes a market-participation/market-prohibition axis expressed through constructs of "reasonableness," on the one hand, and "vulnerability," on the other. These accounts of human capacity are then tuned to achieve a particular configuration of permissible market action and business activity. Consumer protection law recognizes that human rationality is limited, intervenes to compensate for those limits, and preserves the coherence of market mechanisms as social ordering systems by defining the capacities of the reasonable consumer. At the same time, through the concept of vulnerability, consumer protection law establishes the consumer's external boundaries by establishing who is capable of inhabiting the role of consumer at all.

In defining the internal and external shape of the human market actor, consumer protection law often deploys an RTC-style account of human decision-making. Recent cases, however, have begun to operationalize concepts like "bounded rationality" from behavioral economics. Challenging RTC as a sufficient description of human decision-making, behavioral science and psychology have presented alternative models of rationality in which individuals are vulnerable to exploitation because of patterned cognitive biases and a reliance on imperfect decision heuristics (Hanson and Kysar 1999; Sent 2004). This decision-making subject subverts, to a degree, the liberal ideal because feelings and actions are understood as responses to exogenous environmental and informational stimulus and conditioning (for example, see Skinner 1971), rather than as expressions of endogenous preferences, autonomy, and moral self-determination.

Although an ongoing topic of debate, there has been a concerted push for the adoption of behavioral economics in consumer protection, competition law, and economically informed lawmaking more generally (for example, see Mathis and Steffen 2015; Korobkin and Ulen 2000). Some, alternatively, reject the adoption of more complex behavioral models of the consumer deployed in Law and Economics thinking—for instance, because acknowledging the diverse and contradictory nature of human behavior makes it more difficult to replicate in economic models used for policy making (Hilman 2000). Nonetheless, behavioral economics and bounded rationality have penetrated the jurisprudence defining consumers' rational capacities.

To bring an action in consumer protection, claimants must first identify specific unlawful conduct or communications, and then demonstrate that they cause or are likely to cause ordinary reasonable consumers to hold false beliefs (i.e., be misled) in ways that materially contribute to a decision regarding a product or service. Consumer rationality is embedded in the model of consumer decision-making, which uses the standard of an ordinary person, reasonably well-informed, observant, and circumspect, who is not overly credulous or skeptical, and acts reasonably in the circumstances.

The case of *Australian Consumer and Competition Commission v. Google* (2021)[5] offers an example of authorities adopting the fundamentals of behavioral science to determine the rational capacities of the ordinary reasonable consumer as a legal subject. Dealing with the deceptive nature of individual privacy controls on Android devices, the court considered whether Google's privacy self-management interfaces would be misleading to a reasonable member of the relevant class. At issue was the need for users to go beyond a first obvious toggle into a preference sub-list in order to deactivate location tracking. While very careful navigation of the preferences dashboard would allow an individual to disable location tracking, the court had to determine whether the choice architecture of the interface

[5] *ACCC v Google LLC (No. 2)* [2021] FCA 367.

would mislead the reasonable consumer. Critically, the court took into account testimony from experts in behavioral economics, who provided commentary on the impact of behavioral biases and heuristics on users' likely navigation of those privacy settings (Paterson, Bant, and Cooney 2021). The court found the dashboard design would unlawfully influence the decisions of reasonable consumers, and that the relevant class of users navigating those privacy settings would likely be misled about the possibility of disabling location data tracking.

This movement away from the RTC model was significant in its recognition that, beyond information asymmetry, the manner of information presentation also influences consumer behavior, and that the consumer is a boundedly rational individual and legal subject. The case recognized that consumers exercise their will to maximize utility but within architectures of manipulable constraints and affordances. This is a sensible evolution in the context of a growing literature describing how profiling, experimentation, and interface design challenge the assumptions of rational choice, necessitating alterations in how consumer law understands and constructs the capacities of its rational agent (Viljoen, Goldenfein, and McGuigan 2021). But rather than pursue an in-depth empirical analysis of the various models of human decision-making that are embedded in the techniques of platform advertising and recommendation systems, the ordinary or reasonable consumer of consumer protection law was refashioned according to a behavioral economics toolkit that opens space for a series of ready-to-hand interventions targeting specific data market configurations. In the Google case, this meant less treacherous privacy self-management interfaces—but the boundedly rational subject can be contrived with sufficiently open texture to accommodate a wide range of market interventions. The boundedly rational ordinary consumer is not an empirically or doctrinally coherent endowment of capacities, but is differentially defined, in the words of Kysar (2003), as "sovereign," "susceptible," or "situated," according to a contested calculation over the contours of the market. In the context of digital platforms, the accommodation of behavioral economics services global regulatory imperatives around "dark patterns" and "digital manipulation" that require defining consumer rationality as bounded and exploited.

At the same time, the regulatory focus on "dark patterns" and other deceptive mechanisms for securing individuals' permission to collect personal data bolsters the rationality and reasonableness of consumer behavior only in the establishment of privacy preferences, not the broader world of information personalization, rational discrimination, and targeting that defines a user's platform experience and a platform's value proposition to marketers. Behavioral economics works to protect the integrity of the "consumer" contract, but offers little assistance to the "user," who remains constantly bombarded with information, messages, and adaptive choice architectures seeking to exploit those very same heuristics and cognitive biases in line with whatever privacy preferences are established. Behavioral economics ensures that the "consumer" can still make its way into the platform, before helping the platform make its hay out of the "user."

Some scholars suggest extending consumer protection's purview for platform "users" on the basis of vulnerability. As Willis (2020, 157) notes, "algorithmic marketing will aim specific materials at the most vulnerable consumers at their most susceptible moments, not average consumers when they are at their most reasonable." This may limit the advertising of certain classes of product like gambling and tobacco, or to particular classes of users such as children. However, such practices are peripheral to platform business models, affect the industries advertising their products more than the platforms themselves, and raise similar conceptual problems to those identified above regarding the correlative and adaptive constellations of machine-readable data that constitute identity categories in algorithmic marketing networks.

Others propose developing consumer protection's accommodation of behavioral models for regulating practices like dynamic pricing, steering consumer preferences, and personalized exploitation (Graef 2021). But consumer protection's *ordinary* person, even if behaviorally inflected, remains entirely inept in the face of highly personalized and micro-targeted forms of communication that are optimized in real time (Willis 2020). Short of abandoning the possibility for rational action in the platform environment, defining all users as always already "vulnerable" to influence and persuasion and thus eliminating the ideological justification for OBA markets, the behavioral model of the consumer does little to help the "user" as the subject of the platforms' primary functions—maximizing engagement and coordinating the delivery of advertising.

A behavioral economist might resist this diagnosis of consumer protection's limits on the basis that the consumer and user act differently according to the different techno-legal environments they inhabit. They may be a more considerate (system 2 thinking) consumer when choosing to agree to a platform's terms of service, but a more intuitive (system 1 thinking) actor when responding to targeting and personalization as a user (Kahneman 2011). Protecting the gateway to the platform experience is therefore sufficient if consumers adequately consider and understand the manipulations and behavioral management they agree to. But despite regulators' persistent endeavors to improve the quality of consent rendered in consumer-platform exchanges, no extant privacy policy describes the process of translating individuals into predictable bundles of propensities, monetized through nudging, or exploiting affective states and moments of compromised decision-making. No privacy settings dashboard enables users to define the intensity of their behavioral management. But even if consumers did understand and consent to these dynamics, the objective basis of the consumer welfare standard makes it difficult to defend claims that consumers would be better off when exposed to the tuning and optimization prerogatives used to modulate their rationality and preferences, even if they subjectively acquiesce to them.

The boundedly rational human as conceptualized in consumer protection is therefore less a psychologically coherent instrument for augmenting consumer welfare, and more a capacious and versatile construct for conditioning markets in dynamic ways. In that sense, consumer protection's "ordinary" consumer, as inflected by behavioral economics, operates as a legal analogue of the two-faced human subject of advertising. Not so much because it shares any of its cybernetic qualities, but because it functions as a sufficiently malleable legal technology to accommodate an inherently contradictory story about the subject of behavioral advertising. Rather than enacting an explicitly rivalrous account of human capacity, as with regimes of "notice and choice" and "informational self-determination," consumer protection echoes OBA's account of human rationality as an optimizable variable in order to retain the "consumer" as a sovereign subject, while justifying particular market forms and commercial data flows.

IV. The Politico-Legal Ontology of the Consumer and User

The ways in which OBA internalizes and stabilizes these sometimes rivalrous, sometimes complementary legal and industrial human constructs afford a lens into broader pathologies of digital economy regulation. The consumer protection work being done in the platform space, while protecting against some forms of exploitation of consumer vulnerability, is essential to the political concept of "consumer sovereignty" that puts markets in charge of economic production, and consumers in charge of markets.

Consumer sovereignty emerged as a concept in the twentieth century to prioritize the aggregated market behavior of consumers for coordinating economic production over democratic planning. Hutt (1936, 257) defined the consumer as sovereign "when, in his role of citizen, he has not delegated to political institutions for authoritarian use the power which he can exercise socially through his power to demand (or refrain from demanding)." As consumers spend, entrepreneurs and producers must adapt themselves to remain competitive. As such, "sovereignty" in the form of the power to express political will in any particular domain lies with the consumer rather than government. Consumer sovereignty thus couples (or even collapses (Korthals 2000)) market agency with democratic participation, both politically legitimizing market society and providing the consumer with a politically salient legal identity (Amadae 2003). Indeed, the restating of various political and social domains of life in market terms has been central to late twentieth-century governance ideologies. In other words, the positive (and normative) weakness of the rational choosing consumer is nonetheless necessary to support its political function of authorizing market capitalism as a form of political organization (Schwarzkopf 2011). The additional complexity of the boundedly rational or vulnerable consumer does not alter that arrangement.

Behavioral economics acknowledges, and seeks to remedy, the cognitive limits of the consumer only at the entry point, the contractual gate, of the platform ecosystem, as evidenced by the growing focus of competition regulators on "dark patterns." But it does not address the cognitive limits of the individual once they enter. When inside, consumer law has no tools to intervene on the issue of decision-making competence. Data protection may offer the user something to augment a different type of self-determination—informational self-determination. But these rights reflect, on one hand, a false notion that an individual's ability to govern their self-image will have any impact on how they are treated or exploited by a platform as a user (since their "interests" and identities are inferred and ascribed rather than self-authored), and on the other hand, the false belief that a disappointed user will just take all their valuable data with them to another platform offering them a better deal. The irony of the regulatory formation is that the consumer sells themself into the status of the user. They rationally agree to have themselves embedded as a dynamic, aggregated metric of probabilistic behavior and a target of persuasive communications, amenable to having all their predictable irrationalities, all their inconsistencies, exploited.

The transition of the "consumer" into the "user" speaks to the transition of a human subject through different iterations of capitalist legal and social relations. Not unlike the wage labor contract through which apparently autonomous workers sell themselves into social relations of subordination (Marx [1867] 1990), the adoption of behavioral economics in consumer protection and the proliferation of data protection laws work to produce certain platformed social relations—to hold up the human as a rational seller in a market for data and attention, while at the same time exploiting their data and attention as a predictably irrational user. By stabilizing the rational and irrational human in one entity, behavioral economics-informed consumer protection scaffolds the political project of consumer sovereignty into the context of informational capitalism. On one level, the law interrogates the impacts of, for instance, symbols or disclosures on decision-making. This operates through nuanced investigations of the reasonableness of the individual: Are they reasonably intelligent, reasonably credulous, reasonably careful in the circumstances? But by supporting the individual to better know what they want and act in furtherance of those goals only at the point of agreeing to a platform's terms of service, these rules offer cover for platforms to algorithmically control their domains with limited legal constraint. By taking seriously the shortcomings of RTC, and jettisoning any single coherent theory of behavior, behavioral law and economics preserves the ideal of the individual as the

originating source of preferences, and market efficiency as a normative goal, while enabling platforms to simultaneously undermine both.

V. Conclusion

Law contributes to the construction of informational capitalism in myriad ways (Cohen 2019; Kapczynski 2020; Pistor 2020). Installing individuals as platform "users"—resources to be mined for data and attention—is central to the OBA-funded digital economy. Business models premised on data extraction and personalization require that at least boundedly rational consumers agree to platform terms of service for their legitimacy. Existing legal regimes operationalize, in the case of notice and choice and informational self-determination, conceptions of rational liberal subjectivity and identity. As consumer protection law becomes more central to platform regulation, it mobilizes a spectrum of human capacity, from rationality to vulnerability, to recuperate the ideal of market ordering by prohibiting pernicious practices that might undermine the legitimacy of the user agreement. Inside the platform, however, these illusions dissolve; the modes of knowledge and power that operate in algorithmic advertising dispense altogether with a human theory of the self (Fisher and Mehozay 2019). Once the capacity of the decisionmaker to enter themself into the platform environment is legitimized, platforms obtain the rights to exploit that subject as "user" to whatever degree they are able. The conflicting subjectivities that are codified and assigned to individuals throughout this process preserve at once liberal approaches to market governance and cyborg approaches to managing the behavior of decentralized actors that better define the functioning of the digital economy.

Anchoring politics in consumer choice was a dubious ideal even before its articulation to the computational machinations of platforms. Baudrillard ([1970] 1998) made clear long ago that the notion of consumer choice was a fantasy generated by capitalist culture industries, making serious political and economic debate impossible. With greater attention to the rational capacities of the human, Michel Callon (1998) provocatively argued that *homo economicus* does indeed exist, not as a state of human nature but rather as something configured by market devices that equip economic actors to calculate and to perform rationality. We can say the same for the technology of the legal subject. There is little correspondence between the social realities of human life and the legal construction of social relations as autonomous, consensual, and rational. As Julie Cohen (2013, 1905) puts it, "the liberal self who is the subject of privacy theory and privacy policymaking does not exist." Rationality, in other words, is not a cognitive endowment so much as a variable and institutionally determined construct. Its evident deficiencies in the raw freedom of a liberal chooser, beset by systemic biases and vulnerabilities, call into action the devices of, alternatively, data protection, to enable narrative authorship over one's identity, or consumer protection, to scaffold rationality such that the autonomous and utility-maximizing subject can stand on its own, a monument to the validity of market mechanisms. This rational and calculating consumer is then free to enter into the terms of platform services. Inside the platform, however, a peculiar set of devices scaffolds a radically different subject—the platform "user," not autonomous and self-determined, but fragmentary, correlational, probabilistic, environmentally contingent.

Privacy regulators nonetheless continue advancing notice and choice privacy regimes, framing digital privacy as primarily a solution to market failure, subordinating privacy's normative content to ideals of market efficiency. What then is really achieved through the persistent operationalization of this contradiction? In this article, we suggest that the contradiction is central to the ways platform capitalism relates itself to individuals and embeds itself into the communicative dimensions of

everyday life. To that end, we argue that, even if supplemented with whatever expressions of behavioral economics consumer protection law might construe, notice and consent not only fails to deliver meaningful privacy; its real productive function is to harbor a set of relations that legitimize the strategic overlapping of market mechanisms with market-subverting data-intensive, algorithmic management infrastructures. This is not to say that we need a new legal regime premised on the behaviorist or cyborg subject—one that pays attention exclusively to conditions of stimulus/response rather than facilitating individual choice. Premising the regulation of platforms on harms as defined by these subjectivities would inevitably reproduce new mechanisms for operationalizing flows of data and attention for profit. Meaningful interventions against platform business models and data markets must recognize that these regulatory programs ultimately legitimize personalization and targeted advertising as forms of harm that cannot be measured in terms of consumer welfare or market efficiency, which operate through normative proxies like information asymmetry, manipulation, or informational self-determination. Relying on cognitive or behavioral models of the consumer to define harm instead merely recuperates consumer sovereignty as the organizing logic for platform regulation.

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