

Privacy Law's Indeterminacy

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Fools rush in.¹

She who hesitates is lost.²

American legal realism numbers among the most important theoretical contributions of legal academia to date. Given the movement's influence, as well as the common centrality of certain key figures, it is surprising that privacy scholarship in the United States has paid next to no attention to the movement. This inattention is unfortunate for several reasons, including that privacy law furnishes rich examples of the indeterminacy thesis — a key concept of American legal realism — and because the interdisciplinary efforts of privacy scholars to explore extra-legal influences on privacy law arguably further the plot of legal realism itself.

INTRODUCTION

In the early twentieth century, a group of American scholars and jurists sought to reveal the common law as a contextual, open-ended system owing as much

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1 ALEXANDER POPE, *AN ESSAY ON CRITICISM* (London, 1711). The full quotation is, "For Fools rush in where Angels fear to tread." *Id.* at 66.

2 Adaptation of the line, "The woman that deliberates is lost." JOSEPH ADDISON, *CATO: A TRAGEDY, AND SELECTED ESSAYS* 30 (2004). See also OLIVER WENDALL HOLMES, SR., *THE AUTOCRAT AT THE BREAKFAST TABLE* 29 (1858) ("The woman who 'calculates' is lost.").

to experience and intuition as to rules and logic. The resulting movement — American legal realism — is among the most important theoretical contributions to jurisprudence to date, even as its origins and contours remain contested. Law and economics, empirical legal studies, and critical theory each owe their origins in part to the conversation Oliver Wendell Holmes, Jr., Karl Llewellyn, Roscoe Pound, and others instigated a century ago.

Given the movement's influence — as well as the common centrality of key figures such as Louis Brandeis — it is perhaps surprising that privacy scholarship in the United States has paid scant attention to legal realism to date. Privacy scholars refer to legal realism in passing but have yet to explore its influence in depth.³

This inattention is unfortunate for several reasons. First, privacy law furnishes rich and complex examples for legal realism, particularly with respect to the indeterminacy thesis. Simply stated, the indeterminacy thesis holds that the law as a system is sometimes, often, or always capable of supporting multiple resolutions to a given conflict.⁴ Privacy law, meanwhile, is comprised almost entirely of hard cases.⁵ Privacy shifts with technology — often rapidly. Privacy is seldom a value found in isolation; it must frequently compete with other values such as free speech.⁶ Privacy doctrine is littered with exceptions. And even litigants who succeed in meeting the technical elements of a privacy cause of action face additional, somewhat arbitrary barriers such as prudential standing. These and other facets of privacy law make for an interesting case study in indeterminacy and suggest that critiques of privacy law can be recast in legal realist terms.

Second, contemporary privacy scholarship arguably furthers the plot of legal realism itself by furnishing powerful evidence that the application of social science to doctrine, if anything, compounds indeterminacy. If the common law yields few clear answers to legal questions, as legal realism

3 *See, e.g.*, ANITA L. ALLEN, *PRIVACY AND SOCIETY* 25-26, 39, 585 (2007) (Anita Allen's wonderful "comprehensive introduction to the privacy law of the United States" mentions positivism and "realism" in the abstract but not legal realism); Orin S. Kerr, *Four Models of Fourth Amendment*, 60 *STAN. L. REV.* 503 (2007); Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 *GEO. L.J.* 357 (2003) [hereinafter Kerr, *The Problem of Perspective*] (Orin Kerr has written at least two interesting papers on the indeterminacy of criminal procedure without invoking legal realism).

4 *See infra* Part I.

5 H.L.A. HART, *THE CONCEPT OF LAW* 124 (1961).

6 *See infra* Part II.

posits, then on what basis are judges deciding those cases?⁷ Setting legal process to one side,⁸ contemporary legal theory has a range of candidates at the ready to fill the gaps left by doctrinal indeterminacy. Law and economics posits that doctrine is or should be aiming at efficiency, for instance, whereas critical legal studies, critical race theory, and feminist legal studies envision doctrine as preserving specific dynamics of power. On this account, social science and theory helps explain legal outcomes by getting outside the four corners of law itself.

Privacy scholarship largely cannot imagine a full account of law without social science or theory, to the point that several of privacy law's leading voices possess no formal legal training.⁹ Yet far from helping to explain privacy law and policy outcomes, our best analyses offer rich new sources of what we might call *secondary indeterminacy*. Thus, for example, Alessandro Acquisti and colleagues painstakingly examine the privacy and economics literature, only to conclude that the question of privacy's efficiency is itself subject to manipulation depending on starting assumptions and model selection.¹⁰ Economics cannot explain privacy law decisions because the economics of privacy, too, are indeterminate. Privacy law helps to remind us that indeterminacy is endemic to human pursuits and that privacy survives or flourishes only when it is held as an ascendant value.

This Article proceeds as follows. Part I gives a thumbnail sketch of American legal realism by tracing its origins and describing some of the movement's core commitments, with particular emphasis on the indeterminacy thesis. Part II argues that facets of privacy law, at least in the United States, may render it uniquely indeterminate; at any rate, U.S. privacy law furnishes a number of interesting and powerful examples of legal realism at play in courts and policy debates today. Part III offers some thoughts about what privacy scholarship might contribute to the longstanding legal realist debate. Privacy scholarship is, first, deeply interdisciplinary, and second, long accustomed to

7 *E.g.*, BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 185-86 (2003) ("In many ways, can be seen as the forerunner of . . . law and economics, critical legal studies, critical race theory and feminist legal theory.").

8 Legal process posits that institutional structures, jurisprudential habits, and other safeguards help domesticate the problem of indeterminacy. See *infra* Part I for a longer discussion.

9 Others possess dual training. The leading United States conference on privacy is Privacy Law Scholars Conference, where the predominant mode of analysis is law and policy. Participation is incredibly interdisciplinary, however, and (fascinating) papers with only a tenuous connection to the law are commonplace.

10 Alessandro Acquisti et al., *The Economics of Privacy*, 54 J. ECON. LITERATURE 442 (2016).

contradiction. Thus, as a field, privacy scholarship is well-positioned to shed light on the role of basic values in channeling legal results not adequately explained by law, efficiency, race, or gender.

I. AMERICAN LEGAL REALISM

American legal realism¹¹ refers to a conversation about the nature of legal interpretation that arose in the early twentieth century, intensifying in the 1930s and '40s and continuing to this day.¹² Its chief precursors and adherents include Oliver Wendell Holmes, Benjamin Cardozo, Jr., Roscoe Pound, Karl Llewellyn, Felix Cohen, Robert Hale, and Jerome Frank.¹³

While far from monolithic, legal realism tends to share certain common commitments. First, legal realists generally characterize their project as a reaction to legal formalism, i.e., the idea that law constitutes a “mechanical” exercise and that legal conclusions follow syllogistically from accepted premises.¹⁴ Legal formalism was to be found not only in the thinking of common law judges at the end of the nineteenth century but also in the education of new lawyers under the case method pioneered at Harvard Law School and still around today.¹⁵

Second, legal realists tend to emphasize the centrality of human experience and the importance of drawing from the natural and social sciences to inform legal interpretation and understanding. Thus, legal realists draw inspiration from Holmes’ famous edict that “the life of the law has not been logic; it has been experience”¹⁶ and often take a form of his “predictive stance,” in the sense of characterizing the law in terms of how judges are likely to decide

11 I use “American” legal realism to distinguish a parallel but distinct effort in Northern Europe. See Jes Bjarup, *The Philosophy of Scandinavian Legal Realism*, 18 *RATIO JURIS* 1 (2005).

12 I do not mean this brief summary of legal realism to be comprehensive. For a full discussion, see Joseph William Singer, *Legal Realism Now*, 76 *CALIF. L. REV.* 465 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)).

13 Legal realism permeates the legal academy today, although we might think of Laura Kalman, Hanoch Dagan, Frederick Schauer, Grant Gilmore, Brian Leiter, and others as continuing the specific conversation within jurisprudence.

14 Roscoe Pound, *Mechanical Jurisprudence*, 8 *COLUM. L. REV.* 605 (1908). *But see infra* Part II.

15 BIX, *supra* note 7, at 179-80 (referring to the efforts of Harvard Dean Christopher Columbus Langdell to formalize legal instruction).

16 OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (London, Macmillan 1881).

cases in practice. Some realists understand jurists to owe a duty to consider the societal impact of applying a particular legal principle,¹⁷ while others seek merely to describe judicial behavior. Today's sub-disciplines of law and society and empirical legal studies owe much to legal realism in this respect.

Third, many legal realists are committed, albeit to varying degrees, to the premise that legal doctrine writ large does not dictate specific results in a given case or cabin discretion to the extent that formalist judicial rhetoric implies. The strong form of this idea — sometimes known as the “indeterminacy thesis” — is that judges are free to select from conflicting, but equally applicable, principles or precedents to decide a given matter before the court.

The indeterminacy thesis implies, if not logically entails, that something *other than doctrine* must guide judges in deciding cases, since the answer cannot be found within the four corners of the law itself. Thus, the indeterminacy thesis is sympathetic with the insight that legal decisions cannot be formally derived from rules (anti-formalism), as well as with the legal realist affinity for infusing pragmatic, social scientific reasoning into legal interpretation.¹⁸

Said another way, doctrine purports to cabin discretion but, for a variety of reasons, in fact judges are free to choose among equally applicable legal principles to decide an individual case. Judging is an *ad hoc* enterprise guided by law, perhaps, but not strictly speaking dictated by formal rules. This is so despite pretensions of objectivity and constraint and notwithstanding the fact that court decisions have consequences that materially affect the lives of litigants.¹⁹

17 *E.g.*, John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924) (exposing a pragmatist understanding of the role of legal interpretation). We also see this commitment in the legal realist embrace of the famous Brandeis Brief.

18 *See generally* Hanoach Dagan, *Doctrinal Categories, Legal Realism, and the Rule of Law*, 163 U. PA. L. REV. 1889 (2015). It is important to note that the strong form of indeterminacy is not widely held among legal realists, who acknowledge the existence of a variety of constraints — constraints which the legal process school, associated with Hebert Wechsler, Henry Hart, Lon Fuller, and others, explores in depth. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). But the basic idea that law often contains support for multiple outcomes and thereby enables judicial discretion seems (i) obviously true and (ii) of tremendous, ongoing relevance to contemporary legal discourse.

19 Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

Legal realists have identified a number of mechanisms behind indeterminacy. The simplest may be the coexistence of two or more distinct lines of reasoning within the same jurisdiction regarding the same issue.²⁰

For example, Llewellyn identifies a deep instability in the very nature of common law precedent and, famously, in popular canons of statutory interpretation. He dramatizes the former by, for instance, noting the leeway judges have in parsing the holding of a case from mere dicta.²¹ Llewellyn dramatizes the latter by laying side by side various “dueling canons” of statutory interpretation, i.e., by showing that important principles of statutory interpretation conflict with one another, leaving the judge free to decide among them.²² For example, courts should simultaneously defer to clear statements of legislative intent *but also* inquire into the legislature’s “real” motivations.²³

Felix Cohen identifies malleability in the habitual use of ungrounded concepts. “Our legal system is filled with supernatural concepts,” Cohen writes, “. . . which cannot be defined in terms of experience, and from which all sorts of empirical decisions are supposed to flow.”²⁴ Such “conceptual essentialism” invites judges to imbue abstract ideas such as “property,” “contract,” or the “corporation” with whatever qualities support the conclusion that judge wishes to reach. The upshot of these and other features of the law is that, for legal realists in this mode, “[g]enerally stated rules of law do not so much explain as conceal the bases of judicial decision.”²⁵

Several caveats are in order. First, as Brian Tamanaha convincingly argues, formalism has always been a bit of a straw man. Legal realists and their progeny tend to overstate the sway formalism held over law and legal education up

20 KARL N. LLEWELLYN, *Some Realism About Realism, in* JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 42 (2008) (1962). *See also* Dagan, *supra* note 18, at 1891-92.

21 KARL N. LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* (1951).

22 Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

23 *Id.* at 402. For a recent critique of Llewellyn for failing adequately to support the dueling canons thesis, see MICHAEL SINCLAIR, *KARL LLEWELLYN’S DUELING CANONS IN PERSPECTIVE* (2014).

24 Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 34 COLUM. L. REV. 809 (1935).

25 Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037-38 (1961). Gilmore admits this “overstate[s] the legal realists’ position, as the realists overstated the position of their predecessors” (the formalists); *Id.*

to and through the turn of the twentieth century.²⁶ Tamanaha traces extensive evidence that jurists and academics during the supposed heyday of legal formalism — roughly 1870 to 1920 — actually recognized law's pragmatism and pliability to a significant degree. Judges do not, and never did, understand themselves as applying the law without any discretion, but rather have long embraced a balance between discretion and restraint.

Second, not all realists adhere to the indeterminacy thesis in its strongest state.²⁷ Jerome Frank — often associated with the strong form of the indeterminacy thesis that imagines unfettered judicial discretion — may be something of an outlier.²⁸ The commitment to indeterminism among “mainstream” legal realists is often misunderstood and overstated. “The realist claim of radical doctrinal indeterminacy implies a wide breadth of *potential* judicial choice,” Hanoch Dagan argues, “but does not mean that judges use, should use, or should even consider using this menu of options in every case.”²⁹ Although judges face individual choices, just as realists argue, they tend to experience law overall as stable and predictable, and understand the distinction between interpretations that comport with expectation and those that do not.³⁰

Whatever the specific characterization, it seems hard to deny legal realism generally, the indeterminacy thesis in particular, as deeply instructive and highly influential. At a minimum, the realists laid bare a longstanding tension in the law between constraint and discretion and elevated the importance of natural and social science to legal interpretation and understanding. Even critics of legal realism acknowledge its influence on subsequent legal theory. To whatever extent that doctrine *is* indeterminate, its students must look beyond the rules themselves at the individuals, institutions, and sociocultural forces at play in legal interpretation. Thus, any area of study that either aims to bring social scientific methods to bear on legal questions or otherwise purports to explain how extralegal forces shape judicial outcomes owes a modest debt to legal realism.

26 BRIAN Z. TAMAHANA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010).

27 ERVIN HAROLD POLLACK, *JURISPRUDENCE: PRINCIPLES AND APPLICATIONS* 813 (1979) (“There were almost as many strands in realist thinking as there were realists.”).

28 Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 *TEX. L. REV.* 267 (1997).

29 Dagan, *supra* note 18, at 1902.

30 I owe this refinement to Hanoch Dagan. On my understanding, Dagan's analysis also implies that the distinction between legal realists such as Llewellyn and Cohen and legal process theorists such as Wechsler and Fuller is somewhat artificial. Both the latter and the former acknowledge that the law, as a system, channels participants by its very structure and thereby acts to constrain discretion.

II. LEGAL REALISM IN PRIVACY

We are all legal realists now, as the saying goes.³¹ Few areas of law or legal scholarship entirely ignore the natural and social sciences. Few observers would deny that judges at times craft law and policy rather than follow specific doctrine.

Privacy law is no exception. From its very beginnings in nineteenth-century tort, privacy law has been awash in legal realism. What is *The Right to Privacy*, after all, but an attempt to break from the formal strictures of tort in light of human experience? “Political, social, and economic changes entail the recognition of new rights,” its authors argue, “and the common law, in its eternal youth, grows to meet the demands of society.”³² One went on to coauthor the Brandeis Brief — an emblem of legal realism that helped inspire a turn toward the social sciences in adjudication.³³ Today, privacy law as a discipline is steeped in social science, inviting investigations from fields as diverse as economics, computer science, anthropology, sociology, and science and technology studies in order to understand privacy’s place in society.

Privacy, no less than other areas of law, incorporates legal realism. Privacy law also furnishes plenty of standard examples of indeterminacy. The indeterminacy thesis holds, again, that judges commonly have access to multiple, conflicting principles when deciding specific cases.³⁴ Imagine that a judge must decide whether an unflattering recording taken during a fraternity pledge event by a student journalist posing as a pledge constitutes an intrusion upon seclusion. An unsympathetic judge could note that fraternity pledges are open to all members of the student body and that participants assume the risk that someone will repeat what is said. Whereas a sympathetic judge (once a frat brother himself) could characterize the event as semi-private or emphasize the invasiveness of a hidden recording. Each of these currents runs through privacy law, sometimes in the same jurisdiction.³⁵

31 Singer, *supra* note 12, at 467, 532.

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

33 MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 209 (1977) (“[T]he Brandeis brief, by highlighting social and economic reality, suggested that the trouble with existing law was that it was out of touch with that reality.”). See also BIX, *supra* note 7, at 184-85.

34 See *supra* Part I.

35 Compare *Sanders v. American Broadcasting Companies, Inc.*, 20 Cal.4th 907 (Cal. 1999) (upholding a privacy claim because “employees may enjoy a limited, but legitimate expectation that their conversations and other interactions will not be secretly videotaped . . . even though those conversation may not have

Here I want to concentrate specifically on what may be unique about privacy law, namely, the specific dynamics that contribute to a high prevalence of indeterminacy within the doctrine and policy. In addition to shifting technical affordances, which provide a challenging environment for the study and adjudication of privacy concerns, I identify three sources of indeterminacy that are, while not always unique to privacy law, interesting and revealing for their specific dynamics. These are a predilection for balancing, a prevalence of “hungry” expectations, and an oddly narrow conception of harm.

A. Technical Affordances

As an initial matter, privacy as a collective state is correlated with often rapid technological and scientific change.³⁶ Warren and Brandeis premise the right to privacy on changes in technology (and accompanying business practices).³⁷ Justice Douglas invokes technological change in his famous dissent from *United States v. White*, where he refers to the development of electronic surveillance as “the greatest leveler of human privacy ever known.”³⁸ In general, the preservation of privacy relies not only upon legal rights but also upon architectural or structural safeguards, which technology can cause to shift in either direction.³⁹ Thus, as Harry Surden notes, the placement of mortgage information online in a searchable format, which once required a physical trip to the courthouse to discover, diminishes privacy even though there has been no change to the legal protections afforded to homeowners.⁴⁰

been completely private”), and *Gill v. Hearst Pub. Co.*, 40 Cal.2d 224 (1953) (dismissing a privacy claim because defendant’s photograph merely “extended knowledge of the particular incident to a somewhat larger public that actually witnessed it at the time of occurrence”). See also Woodrow Hartzog, *The Public Information Fallacy*, 98 B.U. L. REV. 1, 6 (forthcoming 2018) (“The main thesis of this article is that because there are so many different possible interpretations of ‘public information,’ the concept cannot be used to justify data practices and surveillance without first articulating a more precise meaning that recognizes the values affected.”).

36 I owe this excellent insight to Helen Nissenbaum and to the editorial board.

37 See Warren & Brandeis, *supra* note 32.

38 *United States v. White*, 401 U.S. 745, 765 (1971) (Douglas, J., dissenting).

39 See generally Harry Surden, *Structural Rights in Privacy*, 60 S.M.U. L. REV. 1605 (2007).

40 See *id.*, at 1613-14.

B. Competing Values

Balancing is a systemic source of indeterminacy in privacy law. Privacy is a value that courts seldom confront in isolation. Balancing occurs throughout law, but privacy is *nearly always* balanced or defined against an important competing value such as free speech or physical security. The need to consider other values, justified or not, gives pause to virtually any court confronted with a claim by an individual or group that information about them should be limited.

1. Free Speech

The most visible counter-value to privacy is free speech.⁴¹ In *The Right to Privacy* itself, the authors were careful to acknowledge free speech in certain respects by modeling the elements of the privacy torts they proposed in part on defamation. From the bench, Brandeis ultimately displayed a deep solicitude toward speech, positioning it above privacy in many contexts.⁴² This conflict between privacy and speech makes intuitive sense, at least at first blush, given the apparent tension between exerting control over personal information and allowing a range of commentary about people and their activities.

Privacy and speech are thought to conflict in at least three ways.⁴³ First, privacy may impermissibly limit the *disclosure* of information — especially by the press. If you know a secret about me and you wish to share it, then privacy stands in the way of your communication preferences.⁴⁴ This is the classic tension one encounters with privacy torts such as publication of private fact and false light, each of which are today limited by a newsworthiness exception. A court interested in diminishing the scope of privacy protections

41 Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1296 n.7 (2010) (listing dozens of articles and books exploring this tension).

42 *Id.*

43 Much work in privacy is devoted to debunking this apparent tension and showing how, in some ways and contexts, privacy is critical to free expression. *See, e.g.*, Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996); NEIL M. RICHARDS, *INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE* (2015). The reverse may also be true. *Cf.* Daniel Solove, *First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112 (2007).

44 A variety of scholars — Daniel Solove, Neil Richards, Woodrow Hartzog, Jack Balkin — seek to rehabilitate confidentiality or invoke agency law (specifically, fiduciary obligations) as a means to manage this apparent tension.

regarding the transmission of information can get far by characterizing the information as a matter concerning the public interest.⁴⁵

Second, in some contexts, free speech principles push back against efforts to limit the *collection* of information. Thus, for instance, several U.S. Courts of Appeals have found a First Amendment interest in recording the activities of public officials such as police officers or the mayor.⁴⁶ Some scholars would expand this insight beyond public accountability into the commercial realm.⁴⁷

Third, free speech principles mean that government cannot restrict the *use* of lawfully obtained information, including in a commercial context. Thus, in *Sorrell v. IMS Health*, the Supreme Court invalidated an attempt by the State of Vermont to limit the use of a database of patient prescriptions to the state's intended goal of promoting less expensive generic versions of drugs.⁴⁸

2. Security

Free speech may be the most obvious value antonym to privacy but it is hardly unique. Worry over criminal activity in general, national security concerns in particular, often provides the basis for limiting or displacing privacy.⁴⁹ Thus, the British government explains the need for ubiquitous closed-circuit television (CCTV) on the basis of terrorism and other crime prevention⁵⁰ and cites terrorism and other serious crime as the basis for calling for a “backdoor” to encrypted communications.⁵¹

3. Efficiency

Balancing is also baked into the way the major U.S. privacy watchdog — the Federal Trade Commission — addresses firm practices. The FTC's statement on unfairness refers to countervailing benefits to consumers and competition. Thus, convenience and competition may limit the capacity of the Federal Trade

45 This affects other information-based torts such as intentional infliction of emotional distress. *E.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011).

46 For a sustained discussion, see Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167 (2017).

47 *E.g.*, Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57 (2014).

48 *Sorrell v. IMS Health*, 564 U.S. 552 (2011).

49 See Ryan Calo, *Can Americans Resist Surveillance?*, 83 CHI. L. REV. 23 (2016).

50 See Daniele Fenwick, *Terrorism, CCTV, and the Freedom Bill of 2011: Achieving Compatibility with Article 8 ECHR?*, 25 INT'L REV. L. COMPUTERS & TECH. 183 (2011).

51 Rebecca Hill, *UK PM Theresa May's Response to Terror Attacks "Shortsighted,"* THE REGISTER (June 5, 2017), https://www.theregister.co.uk/2017/06/05/theresa_may_encryption_plans_slammed/.

Commission to police poor data security as an unfair practice under the FTC Act.⁵² Speaking generally, many economists see privacy as harming markets by removing information. Thus, law and economics sometimes argues that privacy interests must be balanced against efficiency.⁵³

Less obvious, but also interesting, is the tension between privacy and other torts — as recent work by Eugene Volokh explores.⁵⁴ Tort law arguably pressures individuals and institutions to engage in greater surveillance, as when a lawsuit for negligence succeeds in requiring box stores to monitor warehouses or parking lots.⁵⁵ Thus the value of personal security sometimes overbalances privacy even in a civil context with four official privacy torts.

Privacy, then, as much or more than other areas of U.S. law, seems to invite balancing individual and collective privacy interests against serious values such as speech, security, and efficiency.

C. Hungry Exceptions

American privacy law is also riddled with hungry doctrinal exceptions that courts can and do regularly invoke (or selectively ignore). I call these exceptions “hungry” due to their tendency to swallow the rule. The three hungry exceptions I will discuss here sound in criminal procedure: the third-party doctrine, the administrative search expectation, and the contraband rule. But privacy law has many others, including privacy in public⁵⁶ and the carve-outs for speech described above. I do not mean to suggest, of course, that privacy is somehow the only area of law with major exceptions.⁵⁷ Rather, I mean to call explicit attention to the connection between privacy law’s significant and pervasive exceptions, which are much remarked by privacy law scholars, and legal realist intuitions about indeterminacy.

52 Daniel J. Solove, *The FTC and the Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014).

53 See Ryan Calo, *Privacy and Markets: A Love Story*, 91 NOTRE DAME L. REV. 649 (2016).

54 Eugene Volokh, *Tort Law vs. Privacy Law*, 113 COLUM. L. REV. 879 (2014).

55 *Id.*

56 Joel R. Reidenberg, *Privacy in Public*, 69 U. MIAMI L. REV. 141 (2014).

57 Cf. Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 16 (1984) (discussing the role of exceptions and counter-principles in destabilizing law in general).

1. Third-Party Doctrine

The first hungry exception is the *third-party doctrine*. This is the doctrine, originally announced in the 1970s and reaffirmed since, that individuals can have no reasonable expectation of privacy in statements made or materials provided to third parties.⁵⁸ The doctrine holds, for example, that police may search through garbage bags temporarily placed on the curb for collection without implicating the Fourth Amendment.⁵⁹ The exception is “hungry” in the sense that, as our lives increasingly move into the digital realm, the doctrine arguably covers more and more private information. That is, there are accelerating opportunities for law enforcement to secure intimate information about people from digital service providers in whom the information has been entrusted.⁶⁰

The third-party doctrine generates indeterminacy in a few ways. It is not, for instance, always clear where personal information resides; the location of information for Fourth Amendment purposes may depend on the perspective the jurist adopts regarding the digital sphere.⁶¹ For example, as Orin Kerr argues, whether banking records left visible on a computer are within the scope of a warrant to search a house depends on whether the judge adopts an insider or outsider perspective of the internet.⁶² It is not always clear to whom the information belongs.⁶³ And it is not always clear under what circumstances the citizen provided the document to a third party, or what the right analogy might be. A litigant could credibly argue that data files stored with a secure website are best analogized to documents stored in a safety deposit box, which government must secure a warrant to access.

58 *United States v. Miller*, 425 U.S. 435 (1976); *Smith v. Maryland*, 442 U.S. 735 (1979).

59 *California v. Greenwood*, 486 U.S. 35 (1988).

60 Several caveats are in order. First, statutory law often provides a backdrop for government searches of third-party information. Second, firms have the means and motivation to resist government attempts to secure data about their consumers. See Calo, *supra* note 49 (arguing that corporations may be best positioned to resist government surveillance); Alan Z. Rozenshtein, *Surveillance Intermediaries*, 70 *STAN. L. REV.* 99, 167-70 (2018). And third, there may be limits to the third-party doctrine on the horizon. *E.g.*, *Carpenter v. United States*, 138 S.Ct. 2206 (2018) (requiring a warrant for cellphone consumer location information in part on the basis that the consumer did not voluntarily furnish the service provider with their location).

61 See Kerr, *The Problem of Perspective*, *supra* note 3.

62 *Id.*

63 *Cf. Los Angeles v. Patel*, 135 S.Ct. 2443 (2015) (permitting a facial challenge to a municipal statute requiring hotels to turn over information about their guests).

2. Administrative Searches

Administrative searches constitute a second hungry exception. On paper, warrantless searches and seizures are presumptively invalid — *per se* unreasonable except under very specifically delineated circumstances. But if you think about the actual searches citizens encounter on a daily basis, the vast majority fall under just such an exception. Examples include searches or seizures at borders, airports, schools, government buildings, drug tests, home or business inspections, and presumably many others.⁶⁴ Such “administrative” searches are subject not to a warrant requirement but to an amorphous balancing of government interests against the degree of intrusion.⁶⁵ Thus, outside of the classic government intrusion while investigating a crime, judges have considerable discretion to characterize the most common sorts of contact with government officials as outside the scope of the warrant clause.

3. Contraband Rule

A third hungry exception is the *contraband rule*, i.e., the doctrine that citizens do not enjoy a reasonable expectation of privacy in contraband. We tend to associate this doctrine with the dog-sniffing cases wherein a dog alerts to drugs and the courts hold that, setting aside the prospect of false positives, the defendant had no reasonable expectation in the illegal substances the dog was trained to detect.⁶⁶ But despite the Court’s characterization of dog-sniffing as *sui generis* in 1983,⁶⁷ the Court applied the contraband rule the very next year to absolve (human) officials who come across a powdery substance and subject it to a chemical test for cocaine.⁶⁸

Unlike the third-party doctrine and the administrative search exception, the contraband rule is not often invoked by courts. But imagine, with Larry Lessig and others, the prospect of massive digital searches for unlawful content such as pirated material or even criminal conspiracy as detected by natural language processing.⁶⁹ In theory, if the software only alerted in the presence of a verifiable crime or unlawful material, the defendant would have no reasonable expectation of privacy under the contraband rule. A

64 Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 255-56 (2011).

65 *Id.* at 256.

66 *E.g.*, *Illinois v. Caballes*, 543 U.S. 405 (2005).

67 *United States v. Place*, 462 U.S. 696 (1983).

68 *United States v. Jacobsen*, 466 U.S. 109 (1984).

69 LAWRENCE LESSIG, *CODE 2.0*, 20-23 (2006).

judge could credibly characterize this development as either perfect justice or perfectly Orwellian.⁷⁰

D. Narrow Conception of Harm

Privacy must contend with shifting technical affordances, competing values, and serious exceptions. But even assuming that a litigant succeeds in articulating a *prima facie* case for a privacy violation — for example, by meeting the elements of intrusion upon seclusion or even showing that a given activity violates a state or federal statute — judges who are skeptical of privacy have another lever to pull. They can and do argue that the litigant did not suffer a legally cognizable harm. Privacy harm is largely in the eyes of the juridical beholder, rendering harm a pervasive source of indeterminacy in privacy law.

We see this in a number of different areas. Many, but not all, class actions concerning inadequate security leading to massive data breaches founder on harm. Courts are unable or unwilling to recognize the prospect of future injury or the anxiety that attends exposure as harms in and of themselves.⁷¹ Ironically, perhaps, given the power of the First Amendment to push back against privacy in other contexts, courts are also unwilling to recognize the chilling effects of government surveillance as a harm under principles of free speech and association.⁷² Courts do not even always recognize privacy harm where the legislature *created a specific cause of action* to vindicate such harm. For example, the Supreme Court has repeatedly interpreted the

70 Timothy C. MacDonnell, *Orwellian Ramifications: The Contraband Exception to the Fourth Amendment*, 41 U. MIAMI L. REV. 299 (2012). Unlike the third-party doctrine (or the privacy in public exception), which the Supreme Court has signaled a willingness to revisit, the contraband rule holds strong. The recent (2014) case of *Florida v. Jardines* involved the question whether bringing a trained dog onto the porch to sniff for drugs constitutes a search under the Fourth Amendment. The Supreme Court held for the defendant. Rather than revisit the contraband rule and hold that dog sniffs constitute a search of the home, however, the Court decided the case on the basis of property law: bringing an instrumentality of surveillance onto a homeowner's porch constituted a trespass which triggers the warrant requirement. See *Florida v. Jardines*, 569 U.S. 1 (2013).

71 Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data Breach Harms*, 96 TEX. L. REV. 737 (2017). But see Ryan Calo, *A Long-Standing Debate: Reflections on Risk and Anxiety: A Theory of Data Breach Harms by Daniel Solove and Danielle Keats Citron*, 96 TEX. L. REV. 59 (2017) (noting that Congress has sometimes been successful in dispensing with a showing of actual harm, as with the Fair and Accurate Credit Transaction Act).

72 E.g., *Laird v. Tatum*, 408 U.S. 1 (1972).

Privacy Act of 1974 to require a showing of actual pecuniary harm resulting from the government's mishandling of private citizen data, despite the express language of the Act setting minimum damages of \$1000 per violation.⁷³

In short, courts engage in a kind of privacy harm exceptionalism that calls into question the ability of any given litigant to recover under privacy law, even when she has a strong cause of action meeting the technical elements of a tort or statute. Courts dating back to 1881 have permitted recovery for loss of privacy, as when Mr. and Mrs. Roberts recovered from Dr. De May for bringing Mr. Scattergood to assist with the birth of their child.⁷⁴ Recent awards for privacy invasions in the United States have numbered in the tens or even hundreds of millions.⁷⁵ But many judges, and therefore the courts they sit upon, do not understand privacy loss as a cognizable injury, even as they recognize ephemeral harms in other contexts.⁷⁶ The phenomenon threatens to subvert standing itself. Felix Wu shows that privacy case law has instigated a shift in standing doctrine away from deferring to Congress and the common law in defining cognizable harm.⁷⁷ Regardless, harm is a large and pervasive source of indeterminacy in privacy law beyond what you find in most other domains.

III. SOME PRIVACY REALISM ABOUT REALISM

To sum up the argument thus far, privacy law has yet to expressly engage with American legal realism. This is so despite privacy law's realist origins, privacy law scholarship's commitment to social science, and the pervasive relevance of core legal realist insights to privacy such as the indeterminacy thesis. Privacy law owes much to legal realism and ought to acknowledge and explore this debt. This last Part now offers a tentative account of what

73 Privacy Act of 1974, 5 U.S.C. § 552a. See Ryan Calo, *Privacy Harm Exceptionalism*, 12 COLO. TECH. L.J. 361 (2014) (discussing *Doe v. Chao* and *FAA v. Cooper*). Compare copyright law where minimum damages present no such issues.

74 *De May v. Roberts*, 46 Mich. 160 (Mich. 1881).

75 *Gawker Media, LLC v. Bollea*, 170 So.3d 125 (Fla. 2015) (awarding Terry Gene Bollea, aka Hulk Hogan, \$115 million in compensatory damages and \$25 million in punitive damages). See also Daniel Victor, *Erin Andrews Awarded \$55 Million in Lawsuit Over Nude Video at Hotel*, N.Y. TIMES (Mar. 7, 2016), <https://www.nytimes.com/2016/03/08/business/media/erin-andrews-awarded-55-million-in-lawsuit-over-nude-video-at-hotel.html>.

76 See generally, Calo, *Privacy Harm Exceptionalism*, *supra* note 73.

77 Felix T. Wu, *How Privacy Distorted Standing Law*, 66 DEPAUL L. REV. 439, 461 (2017).

legal realism might in turn learn from privacy. Although the field has not consciously invoked realism, scholars have rather meticulously applied social scientific methods to privacy law and policy. And some of its recent conclusions might have been interesting and reaffirming to Llewellyn, Cohen, and their colleagues.

I often explain the indeterminacy thesis to non-lawyers by reference to two opposite adages: “absence makes the heart grow fonder” and “out of sight, out of mind.” Both feel like received wisdom about matters of the heart and yet they point in opposite directions. A person in a position to quash or fan concerns over a relationship becoming long-distance might invoke either, depending on his or her goals. In theory, however, the question is an empirical one. We might look to social science to see whether, in fact, people tend to grow more or less attached to an absent partner. But it turns out that social science provides no such relief. Researchers have studied the question and the results are fundamentally mixed. Some studies find that time away increases fondness and intimacy, whereas others find evidence of increased negativity.⁷⁸

What privacy scholarship shows, I think, is that social scientific models and theories that purport to predict behavior often conflict; accordingly, they may not account for judicial decision-making any more than legal doctrines. Imagine that we are trying to figure out why courts are so unfriendly to privacy claims. We know the law formally recognizes privacy rights in some contexts and that a path toward victim recovery is often possible. But in practice, privacy claims run into conflicting values, expansive exceptions, and skepticism over harm. If the law itself does not dictate a result one way or another, what does?

Law and economics, an influential child of legal realism, offers a credible candidate: efficiency. Economists in general, law and economics scholars in particular, tend to be heavily skeptical about privacy for its tendency to deny market participants information.⁷⁹ Principals cannot make good decisions about agents without personal information. Producers and consumers cannot make good decisions about what to make or buy without behavioral information. And so on. “Face it,” economist Kenneth Laudon remarks, “[p]rivacy is indeed

78 Compare L. Crystal Jian & Jeffrey T. Hancock, *Absence Makes the Communication Grow Fonder: Geographic Separation, Interpersonal Media, and Intimacy in Dating Relationships*, 63 J. COMM. 556 (2013), with Lisa M. Diamond, Angela M. Hicks, & Kimberly D. Otter-Henderson, *Every Time You Go Away: Changes in Affect, Behavior, and Physiology Associated with Travel-Related Separations from Romantic Partners*, 95 J. PERSONALITY & SOC. PSYCHOL. 385, 385-403 (2008).

79 Calo, *supra* note 53.

about creating and maintaining asymmetries in the distribution of information.”⁸⁰ If, as law and economics predicts, judges decide cases in ways that maximize efficiency and channel goods and services to their highest value use, then one branch of social science at least predicts an overall judicial skepticism toward a force like privacy that stands in the way.

Does efficiency explain judicial skepticism regarding privacy? Recently information scientist Alessandro Acquisti and economists Curtis Taylor and Liad Wagman undertook an exhaustive literature review of the economics of privacy.⁸¹ Reviewing several dozen articles, which the authors sorted into three “waves,” they came to the following conclusion: sometimes privacy undermines efficiency and social welfare, while at other times it promotes it.⁸² Depending on the context, as well as the starting assumptions, models, and data selection of researchers, privacy can be shown to have conflicting effects on efficiency and social welfare.

This insight is hardly limited to economics. Feminist legal theory is famously conflicted about privacy as well, noting its importance in protecting women from intimate partner violence, revenge pornography, and other abuses, while simultaneously recognizing the ways privacy and privacy rhetoric create private spaces where men are free to engage in domination without scrutiny.⁸³ Privacy is critical to self-exploration and expression. Its absence can be nothing short of deadly for LGBTQ youth. But privacy is also the chief rationale cited by proponents of legislation requiring people to use the bathroom corresponding to their birth gender.⁸⁴

While social science and theory are undoubtedly *relevant* to understanding and adjudicating privacy issues, they are in no sense *dispositive*. The notion that we can “look beyond” doctrine to these exterior sources to understand why judges really make the decisions they do is subject to an important qualification. Social scientists and theorists, no less than judges, can have different starting assumptions, leverage different models and methods, and draw differing conclusions from data. For every economic analysis there is a reply. For every plaintiff expert there is a defense expert. There is no single

80 Kenneth C. Laudon, *Markets and Privacy*, 39 COMM. ACM 92, 98 (1996).

81 Acquisti et al., *supra* note 10.

82 *Id.* at 442 (“[T]here are theoretical and empirical situations where the protection of privacy can both enhance, and detract from, individual and societal welfare.”).

83 Reva B. Seigel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

84 Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U.L. REV. 159 (2015).

Brandies Brief but a host of amicus curiae describing society from a variety of perspectives.⁸⁵

Obviously I am not attempting to impugn social science as such. I recognize that close observation and rigorous adherence to sound methodology yield invaluable insights. I also recognize that social science often yields considerable uniformity — around many matters, there is widespread academic consensus. But this is just to say that careful human activities and systems have ways of cabining discretion, and that there exist both easy and hard cases.

Privacy law and scholarship has, as the legal realists suggest, looked to social science in order to inform our understanding. But far from explaining legal results in light of indeterminacy, we have found a deeper, more complex indeterminacy born of the complexity of privacy itself as a societal force. The observation that social science invites secondary indeterminacy crystalizes and empirically corroborates and considerably deepens the intuitions of Cohen, Llewellyn, and other legal realists who stopped short of recommending that social sciences (or “social facts”) displace law.⁸⁶ Further, it calls into question the project of explaining legal decisions entirely on the basis of extralegal understandings. Privacy law has rigorously, if unconsciously, followed this approach and found it lacking.

CONCLUSION

Privacy law's origins are steeped in legal realism, yet privacy law scholarship to date has paid relatively little express attention to the movement. This Article has sought to provide a bridge between legal realism and privacy, first by positing U.S. privacy law as a potentially rich and complex source of legal indeterminacy, and second by exploring the effects of applying social scientific methods to privacy law. Privacy must grapple with technological shifts, competing values, broad exceptions, and deep skepticism regarding harm. Where privacy law offers relief, it does so against a backdrop of affirmative choices by jurists to embrace privacy as an ascendant value.⁸⁷ Privacy law scholarship, meanwhile, demonstrates that social science is unlikely entirely

85 Cf. David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 9, 11 (2011) (noting that Joseph Lochner's own brief in *Lochner v. New York* included a lengthy appendix providing statistics about the health of bakers relative to other professions. *Lochner v. New York*, 198 U.S. 45 (1905)).

86 I owe this point to Hanoch Dagan.

87 They are what Alan Westin might have called “privacy fundamentalists.” Cf. Chris Jay Hoofnagle & Jennifer M. Urban, *Alan Westin's Privacy Homo Economicus*, 49 WAKE FOREST L. REV. 261 (2014) (discussing Westin's categories).

to fill the gaps left by rule indeterminacy, as the legal realists themselves predicted. This is so because economic and other lenses are themselves open and contested, such that starting assumptions and methodological choices by social scientists can and do influence conclusions. Ultimately, indeterminacy is likely a component of any complex human activity, including and beyond the law.