A New Theory of Privacy

By

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ὅταν μὲν οὖ καταλάμπει ἀλήθειά τε καὶ τὸ ὄν,
εἰς τοῦτο ἀπερείσηται, ἐνόησέν τε καὶ
ἔγνω αὐτὸ καὶ νοῦν ἔχειν φαίνεται

Sub tuum præsidium

A.M.D.G.

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Chapter One

Background

Introduction

A quarter century into the "Internet era," human society is struggling with the terrible beauty of the connected world. Technological advances and social rifts seem to come in tandem, upending expectations at ever faster intervals as we incorporate platforms and systems into our lives at the click of a button. Ironically, we do so even as we know a great deal about how these systems operate and the data-consuming risks they bring. The discourse often centers on privacy, and how we are in the process of losing it and simultaneously, somehow, that we have already lost it.

Privacy itself is a loaded concept. Lawyers and judges have created the structure of legal protections for privacy, but almost none of these laws encompass the full range of human experience that could be qualified as "private." In fact, most would struggle to identify precisely what the contours of "privacy" are, even though the language around the concept often includes terms like "fundamental." The European Declaration on Human Rights holds that all humans are entitled to "the private life," and laws around the world state that privacy is a central aspect of the life of a free society, and the U.S. Constitution has long been believed to be a source of privacy rights. But if you ask what privacy constitutes and protects, it is hard to find a convincing answer.

Protection against intrusive surveillance practices by state actors is typically a facet of whatever privacy is meant to be – reflecting the

idea that the citizenry should not be subject to unreasonable or unwarranted scrutiny by their government. But what about surveillance and data collection by non-state actors? Does privacy encompass a right to be free of undue snooping by enterprises, too? Given that private entities are responsible for vast amounts of data collection about individuals and groups each day, shielding aspects of our lives from government alone seems a hollow victory, especially when private enterprises routinely sell data directly to the governments who might be barred from collecting it themselves.

The rhetoric, then, does not seem to match the reality. As a legal concept, privacy is of relatively recent vintage, but in terms of public discourse and debate, it is a powerful one. Indeed, other than free speech, the right to privacy in the United States has been the most contentious politico-legal matter since the Second World War and has been a centerpiece of the most controversial judicial decisions in that period as well.

But why? What is it about privacy that was so compelling that an apparent global consensus on its importance emerged in the 1960s, spurring legislative and judicial action to protect the private life? There must be an account of why, if those privacy rights were as "fundamental" as they were described, modern reality indicates the contrary. In short, if privacy really matters, why is the world the way it is?

This book aims to tell the story of privacy over a half century, and how that story reflects a kind of stagnation. Privacy, in this story, begins as a concept described as a fundamental, a description that seemed apt, given the growth of the rhetorical and legal power of privacy in the early 1970s, when the German state of Hesse enacted the first data privacy law and when *Roe v. Wade* enshrined privacy as a fundamental right in the United States. Despite auspicious

beginnings, it is a story of how very little happened in the subsequent decades to confirm privacy as fundamental. Indeed, for fifty years, privacy underwent rhetorical peaks and valleys and varying degrees of public attention, but never secured a set definition in the public mind or a legal framework. Even documents like the Convention of Europe's Convention 108 or the European Declaration on Human Rights talk broadly of "the private life" without providing a set definition of what that life constitutes.

That life underwent radical change in the 1990s and 2000s, when data-consumption by private actors far outstripped governmental snooping. As connected devices and online technologies proliferated, so did the scope of intrusive data collection. Human beings today are more monitored and their lives more subject to scrutiny than at any point in history, their decisions and the affordances of daily life increasingly subject to the commercial imperatives of the world's largest enterprises. In many respects, talking about privacy a half century ago was the same as it is today, but today's high-minded language about privacy is, in practical effect, little more than a little-used consumer protest against large corporations using behaviorism, product design, and data science to extract new value from previously non-commercial activity.

This book aims to examine what privacy has meant under the law, whether it was ever truly protected as a fundamental right, and, if not, whether it still can be today.

Research Questions and Research Structure

The law of privacy falls, broadly, into two categories. The first is protection against government surveillance, a subject so well developed and discussed that it can be dispensed with by mere reference to the body of legal and sociological research on the topic. While this work

will refer to that body of research, the gravamen of my argument is that protection against private exploitation of personal data has never taken root, and that our approach to privacy must change if there is ever to be meaningful protection against that exploitation.

Thus, an exploration of the risks to privacy today begins with an exploration of how private actors peer into daily life and collect the data that reveals more about us than we might wish to share. Everything that is done online – from accessing WiFi networks to loading webpages to playing a game – falls within the scope of multiple legal obligations. The most obvious obligations are delineated in the terms and conditions, End User License Agreements, and Terms of Service, but mobile phone payment schemes, high-speed network plans, and even the appropriate use policy at a workplace comprise a dense thicket of legal obligations surrounding anything digital that humans do.

Clarity is typically absent in the systems and structures erected to support the Internet (or, more accurately, to enrich the companies that mediate access to the Internet and ICTs). Part of the problem is the sheer complexity of what these companies do. It is not simple to explain what cookies are, how they are used to generate profiles, how those profiles are used for retargeting, and how the live ad auction system integrates into the process.

Irrespective of how these agreements are written, they are typically the one-and-only stage in which a human being is able to agree or disagree with collection of data about them. And, as many others have convincingly argued, this is no real bargain, given that access to the necessities of digital life require submission to the data collection practices of the world's largest companies, even when without directly engaging with them. Indeed, human beings are surveilled, tracked, segmented, and followed whether we are online or not.

These practices are technically legal, and under the law, technicality is all that matters. No serious consumer challenge exists to this contract-based framework or ongoing digital tracking of daily life. The only extant challenge under the law is that a practice violates one's right to privacy, whether under a statutory provision such as a consumer privacy act or a constitutional right. These rights exist both as a matter of positive law and in public conceputalization – people routinely talk and think about privacy rights, and the idea of privacy as a right has widespread purchase and recognition. Privacy and consumer reality exist, then, in tension with one another.

The challenge is discerning whether this tension actually exists, or whether it is merely rhetorical. Do privacy rights actually exist in an enforceable way? If not, who are the agents of its erosion, and what are its effects? This book seeks to explore these tensions and explain how the law in the United States has empowered private firms -- particularly technology and information capital companies -- to create a legal framework that governs the Internet and mediates human activity with it by denuding the concept of privacy into near irrelevance. In addition, this book will attempt to formulate a coherent framework around privacy that is enforceable and would meaningfully alter our approach to privacy as a legal right.

Specifically, it aims to answer two primary research questions:

RQ1: How has the legal conception of privacy changed since the early 1970s and the height of the "privacy as a human right" era?

RQ2: Can a change in our approach to privacy revivify privacy's status as a fundamental right?

Theoretical Background

This study explores themes, and relies on methods used in socio-legal studies (SLS) and the philosophy of law. The central issues in my research are those that have animated legal scholars and sociologists' work for decades: how does law shape society (and vice versa), and how does the work of the law change the world around them? To that end, I suggest that judges, legislators, and their processes have become agents of Weberian-Habermasian rationalization and colonization (Habermas, 1997; Weber, 2019). They have transformed a positivist conception of privacy as a fundamental right to private life into a commercial, consumer right, cabined primarily as the right to potentially sue companies for data overuse.

This shift has removed central themes of privacy – autonomy and identity, both individual and collective -- from legal discourse, replaced with a focus on contracts and control over how data is used. The rigidity of these agreements, paired with the stripping away of the more expansive concepts of autonomy and personhood have created a kind of *stahlhartes Gehäuse* – the "steel-hard casing" that channels human activity into permissible, predictable, monetizable patterns, often explicitly (Weber, 2010). As the digitization of more aspects of human life advances into new markets, both geographic and factual, the rationalized system is ossified, embedded, strengthened, and primed for even more replication. Shoshana Zuboff suggested that a new breed of capitalism was emerging that constituted a "new frontier of power" (Zuboff, 2019). Yet, on closer inspection, we simply see the extension of the same capitalist model to new areas of previously non-commercial activity – much like the colonization Habermas explored in *Between Facts and Norms*.

Importantly, however, I do not consider the legal framework itself to be the final arbiter of what may or may not be done between an ICT

enterprise and an individual human being. Quite the opposite: what governs how we behave is the conception, held by both enterprises and human beings and framed by lawyers, of what the law is, and what privacy is. Legal realists in the United States have long said that "judges, in acting – that is, in deciding cases – 'make law,' and so the *law is what judges do* as well as predictions of what they will do" (Holmes, 1897).

That concept rings less true today, given the rarity of judges rendering final decisions in disputes. The trope of taking a case "all the way to the Supreme Court" has little grounding in reality. Of the millions of civil lawsuits filed in U.S. federal courts each year, judges dismiss more than half before even taking evidence; of those that remain, approximately two-thirds are dismissed in whole or part before trial, and many (if not most) of the rest settle before a verdict (Dodson, 2012; Cecil & Cort, 2008; Eisenberg & Lanvers, 2009). These statistics do not include the many disputes that never reach actual litigation – a reflection of how power, especially the ability to afford a lawsuit, deters rights enforcement.

As such, the real question regarding what the law means is, "What do people who wish to obey the law *think* that it means?" That question, particularly its application to designing interfaces, platforms, and user experiences, animates a great deal of my research and inquiry. Accepting the evidence of a pervasive surveillance society put forth by scholars begs the question: if privacy is a protected right, why is it protected so tepidly? Understanding how the law functions in reality – that is, how people behave either because they believe the law says one thing or because they believe that the risks of behaving any other way are too high – depends a great deal on the framing and structure provided by lawyers on behalf of their clients. In a sense, if designers create affordances for how to use an object, lawyers frame their

clients' offerings in a way that shapes the legal affordances users *think* they have – whether these are accurate or not.

Law as a Reified Object

The law may be a social construction, but it is rarely treated as such. Put another way, the law is reified: treated as if it were a concrete element that exists outside of society when, instead, it is a series of social acts meant to reflect the parameters for other social acts (Latour, 2009; Lukács, 1971).

There is a strong Heideggerian-Baudrillardian theme implicit in this concept: the laws of the world are not social constructions of embedded power, they are inner-worldly objects that arise, highlighted and not subject to ready challenge or change. They exist in the world as real things and are of unknown and presumably ancient provenance. How is this different from the concept of objectification? It may not be at all: "The realm in which property itself is exchanged has also been naturalized. Markets just *are*, and any notion that they need to be set up seems to be largely absent from popular discourse; rather, they merely need to be unleashed" (May, 2006). This notion of the market as the substrate, or presumed background, of all human activity is of critical importance, and I will return to it at length later.

Reification matters because the law, in many ways, is the original reified social construct, the ur-artefact of human social activity that allows for others to follow. The law is the rule by which society makes all the rest of our rules, and it is the social construct that establishes the boundaries of the other social constructs. If our collective Rule about Rules tells us that privacy means X, it is very difficult to argue successfully that privacy means Not X.

Accepting reified concepts and failing to identify the social actors behind them poses a dual risk. First, the reified concepts become apodictic – they prove themselves through self-evidence. Kramer pointedly asserts that "a reified commodity system will have to presuppose itself; it can finally become established only on the condition that it has already become established" (Kramer, 1991). Reification transforms concepts into a self-fulfilling prophecy: they become part of a 'naturalised' structure stripped of its socio-political history. The elision of such history permits systems to continue unchecked and certainly unchallenged. The second risk is that reification minimizes agency (the notion of human actors causing outcomes) and thus the responsibility we bear for the world we create. Berger and Luckmann argue that "even while apprehending the world in reified terms, man continues to produce it. That is, man is capable paradoxically of producing a reality that denies him" (Berger & Luckmann, 1991). Thus, the practices that conform to, and therefore confirm, reified structures are the practices that establish and maintain the very structures seen as 'other.'

A dialectical approach to establishing a discourse of privacy, the law, and, implicitly, the law of privacy would reverse this reification. This process beings by removing the reified concept of the market at the heart of many privacy questions today. Even a technical understanding of the Internet would provide a good starting point: it is not a thing but a buzzing hive of packets traveling over networks and re-establishing themselves as content or substance. The law is not a thing, it is a collective agreement about how we want to treat one another or, more accurately, of how much we're willing to let someone get away with.

However accurate this vision may be, it hardly matters in the real world. The thinking, certainly from a legal perspective, is that because

the Internet exists, for example, it must exist as a thing, because it is things that exist and not merely a collection of connections. Things can be protected, litigated, or sold, while connections are simply midpoints, always en route to something else. For lawyers and judges, no object in the world lacks an identifiable beginning and a recognizable end because the entire ontology and epistemology of legal objects are the existence of a traceable, proximate cause for every action and an equally identifiable consequence of every action, both bound together by a unifying set of rules. To think otherwise would be to engage in a kind of Deleuzean delusion that social activity and interaction are self-generating: the Internet, laws, privacy are obviously all things; otherwise, how are we holding them together with our rules?

Nevertheless, exactly the reverse occurs – the Internet is, basically and fundamentally, a series of uncontrolled, undirected connections – anarchic and social. The decisionmakers in companies at the apex of the so-called "Internet industry" have laboured (or rather, hired labour) to transform this anarchy into rationalised and processable activity: message boards become Facebook, memes become content factories like Giphy, messaging becomes Gmail, and so on. As the anarchy abates and human activity on the Internet becomes regularized and patterned, the commodity exchange of personal data for access and entertainment serves as the rationalizing, reifying agent. But the *mechanism* of that rationalization and reification is the ever-present threat of revoked access, denied entertainment, and socio-economic ostracization: the punishments inflicted for deviating from the legal frameworks governing the Internet.

Why does this matter? Because the process of reification depends on two factors: catalysts and aims. If a concept or string of connected activities can be reified, it can be turned into a product and treated like

property. Fundamental rights ostensibly exist outside of this framework, and so should therefore not be subject to the same process. Consequently, the course that reification takes will depend on what agent or what process catalyses and promotes the objectification and the reasons for doing so.

Rationalization, Juridification, and the Sociology of Law

Describing the law as a mechanism for rationalization is not novel – far from it. The exploration of the law has been a mainstay of sociology since Weber's comprehensive discussion of power networks, rationality, and bureaucratization in *Economy and Society*. Weber would later remark that one of the core principles behind capitalism is "calculable law. The capitalistic form of industrial organization, if it is to operate rationally, must be able to depend upon calculable *adjudication and administration*" (Weber, 2003; emphasis added). Successive generations have latched onto the idea that the most important aspects of the law for capitalism and industry are adjudication and administration (Weber, 2019).

Although Habermas usually receives a great deal of attention when tracing the lineage of the concept of juridification, he had predecessors. As early as the Weimar Republic, theorists and sociologists like Hugo Sinzheimer were discussing the unfolding process of increased legislative activity and control over everyday life, particularly in labor law (Erd, 1981). It is not difficult to locate analogues to this discussion in post-war process-driven approaches to understanding society. Just as in the United States, where a legal realist movement had taken root in the 1910s-1920s, Weimar thinkers recognized the role that legislators and judges played in changing the nature of the lived social experience (Id.).

However, Habermas most prominently carried on Weber's work with an emphasis on juridification, or the expansion of the law into previously unlegislated or unregulated areas (Habermas, 1987, 1997). As Weber saw the law as the method for rationalizing society, Habermas saw the expansion of the law into new arenas as laying the groundwork for colonization by capitalism (Habermas 1987). Drawing on Lukacs and his theory of reification, as well as some of Weber's work, Habermas conceived of juridification as the expansion of rational, law-based regulation to previously unregulated activity (Habermas 1987; 1997i). Legislatures juridify when they impose structures on activities previously considered non-economic or not subject to the law. An archetypical example in modern times that has generated controversy is the licensing of hairstylists. For most of history, barbering was a private activity that did not require oversight except in the most extreme of instances, and even in those instances, the law was responsive and not proactive.[1] By the late 19th and early 20th centuries, however, governments required licensing for more and more activities. Now, most states in the United States require someone to obtain a license before they may work in a salon or barbershop.

Juridification has political and economic undertones that go beyond mere concern over someone's capability to provide a good haircut. Submitting previously unlegislated economic or personal activity to political authority means that those in political power exert control over livelihoods and, increasingly, bodies: juridification and biopower go hand-in-hand. Habermas conceived of juridification as the mechanism of formalizing civil law and as a pathway for democratizing constitutional power (Habermas, 1987, p. 356). Weber's lineage is clear when Habermas presents this formalization as the

[1] This was so even though barbers often provided some low-complexity medical treatment. (McGrew 30-31.)

movement away from the typical bourgeois social network structure in favor of a bureaucratized civil system (Id.). Gunther Tuebner, a leading figure in socio-legal studies, agrees, though he characterizes juridification as a kind of estuary between law, society, and the welfare state (Daintith & Tuebner, 2011; Tuebner, 1987). He contended that,

> Although the large variety of national experiences with juridification cannot be summarized in a unifying formula, it is important to note that juridification is not to be understood primarily as a quantitative phenomenon of the growth of law and regulation. Rather, it has to be seen in its qualitative dimensions, that is, as the emergence of new structures of law to keep pace with the growth of the welfare state. (Teubner 1987)

Though there is some dispute about whether juridification is most meaningfully explained by examining "hard" law such as legislation, judicial decisions, or regulatory rulemaking (*see* Ponnert 2018) or "soft" law such as policies, standards, or regulatory guidance (Zumbansen, 2010), there is general agreement among socio-legal scholars that juridification is an accepted, ongoing phenomenon of modern capitalist societies.

However, after accepting this, a cleft opens, dividing those who consider Habermas to have spoken definitively on the nature of juridification and the requirement for morality in an open legal system from those, like Luhmann, who see the law as a self-sustaining, closed system that needs no justification for its decisions outside of itself (Luhmann, 1986). For the latter group, laws permit or forbid but never carry moral weight. The divergence has played itself out over and over again, first between Habermas and others in the Frankfurt

School, then between Habermas and critical legal studies scholars, and finally, in disputes among the groups themselves.

What the Law Says and What the Law Does

The staleness and repetitiveness of these debates indicate that something has gone wrong. Perhaps describing a "cleft" is not quite right – the image is more like two gears spinning in opposite directions, failing to connect and generate further movement. Socio-legal scholars, locked in these same arguments four decades after *A Theory of Communicative Action* and three decades after *Between Facts and Norms*, have not reached a consensus about what law and juridification are: morally justified processes for ordering society or merely functional components of a socio-economic system.

The more fundamental problem is that understanding how the law affects society actually depends very little on describing what the law *is* but rather should focus on the altogether different question of what it *actually does*. The functioning of the law and legal structures – at least in the United States – exists between facts (codified law) and norms (expectations of how other people will behave when facing the threat of legal action).

Tying these elements together, the theoretical framework for my book is using SLS and the philosophy of law to explain how the law affects society and our lives. SLS scholars, in particular, have explored how the law solidifies power structures and transforms concepts into reified objects. However, they have not meaningfully explained the law as human beings *actually experience* it, especially not how they experience the law's application today. My research questions aim to investigate the unexplored questions of privacy law and why that meaning has changed over the past five decades.

Critically, for our purposes, that lived experience sets the parameters for how an individual person or a group can use the law to protect their "right to privacy." There is an old axiom in the law: *ubi jus, ibi remedium*, where there is a right, there is a remedy. But in actual practice, the reverse is more accurate, in that if a right has no remedy, it is no right. In essence, that if a harm cannot be corrected, then there must not be an actual right against that harm, even if there is a written guarantee. A pointed example of a right without a remedy: the constitution for Cambodia under the Khmer Rouge guaranteed freedom of religion.

Privacy, then, can only be a right if it can be enforced when infringed. Defining infringement is much the same exercise as defining the right itself – in order to set out the parameters for how to redress a violation of privacy, we would need first to explain what is being violated. Simply saying "the right to privacy" is not enough, because that is conceptually so vague as to be without meaning.

Structure, Scope, and Limitations

Outline

This book aims at answering RQ1 and RQ2 through a combination of qualitative and quantitative means. The goal is to identify and explain the pathways that legal (and popular) conceptions of privacy have taken in the past half-century, and also to attempt to lay out an approach to a new idea of privacy to bring us through the coming fifty years. To do this, in Part II, I will explore the origins and nature of federal privacy law in the United States in that period. Through this period, the caselaw will demonstrate a gradual withering away of privacy rights from broad but ill-defined (in the early 1970s) to cabined almost entirely to the realm of criminal procedure (today).

In Part III, I turn to U.S. state law and examine how and why privacy's conceptualization under the law changed since 1973. In particular, I look to the traditional view of invasion of privacy as a tort (a non-criminal wrong), and subsequently how privacy rights are far more oriented towards customer-service level protections today. To try to explain this shift, I conduct a quantitative analysis of caselaw in one jurisdiction (California) for a deeper understanding of the issues. I chose California because it is the only U.S. state whose constitutional protections for privacy are enforceable against private entities, as opposed to the government alone. I also conduct an analysis of the expansion of environmental law in the same time period in an effort to show that not all rights underwent an identical process of commercialization as privacy law.

In Part IV, I offer a proposal for a new approach to privacy, what I call the "Tripartite Approach," which identifies and connects three distinct "spheres" where privacy rights are at issue: the personal sphere, the social sphere, and the environmental sphere. The personal sphere covers traditional privacy rights like bodily autonomy, the right to personal space, the right to intellectual freedom of expression, and the like. The social sphere encompasses concepts like group privacy, contextual privacy, the privacy that arises in different kind of interpersonal relationships, and the right to be free of undue intrusion into relationships. Finally, the environmental sphere recharacterizes privacy as, in part, a public good, and encompasses rights to a safe, secure, and honest information environment, rights against mass surveillance and snooping, and protection of communities based on their context.

In Part V, I explore how the Tripartite Approach can be implemented, how it can make improvements to current privacy protections, and explore some of its limitations. I conclude by contending that the

Tripartite Approach could be applied within the context of the laws as they currently exist, and that it offers a substantial, novel improvement over existing frameworks both in terms of protecting privacy and promoting personal rights.

Scope and Limitations

The work is limited to the United States, for several reasons. First, privacy law in the United States occupies a unique place in the global economy, insofar as the regulation of American platforms has a global effect – although companies like Alphabet or Meta are subject to GDPR and similar laws, the obligations they face in their home country, in large part, governs how they behave around the world. As such, a deep enquiry into the character of privacy law in the United States necessarily offers insights into what may happen around the world.

Second, a truly global examination of privacy law in the context of my proposed analytic and in the light of my critique of the consumer-protection model is a worthwhile endeavour, and one which I intend to undertake – but not here. Without a doubt, a comparative element, especially with respect to laws like GDPR and its analogues around the world (LGPD, APPI, etc) would enrich and deepen the value of the analysis here. However, such a project is beyond the scope of what I hope to accomplish in this book, which is an explanation of why privacy law has a minimal effect on rights in the United States, and how that might be changed.

The United States is, too, a rich source of comparative caselaw, given that both federal and state courts maintain robust records of all cases, and they mutually inform one another. This means that – at least theoretically – there should be a strong, traceable line of caselaw showing the development of privacy law in a purely adversarial way.

This is useful, in that it helps demonstrate what would presumably be the strongest arguments from advocates at a given time. To incorporate a comparative European element, again, would be quite useful and is my planned next stage, but is simply beyond the scope of my work for now.

My scoped examination of Californian caselaw for the quantitative analysis is also a considered choice, but one which would be improved by a comparative element. That is, showing the evolution of California caselaw with respect to privacy rights since 1971 (when the California Constitution was amended to include privacy guarantees) in the light of similar legal developments (perhaps in Hesse, Germany) is of obvious benefit. Although my book would benefit from such an analysis, I do believe that the exploration of the law in California below is sufficiently illuminating on its own, and for the purposes of this work.

A word on limitations, too. As I will explain below the quantitative analysis of cases in California, semantic network analysis and linguistic networks *can* be quite useful. They help demonstrate relationships that might otherwise be lost in the noise of dicta or thematic trends that are harder to identify simply on a readthrough. But there are limitations, as shown below. Such network analyses are poor at identifying nuance and, when there have been no changes in the law in a material way, they end up proving that water is wet; if the caselaw doesn't change, the results tend to cluster and show flat relationships.

As becomes clear below, exactly such a situation occurred here. The relative stasis of privacy law in California means that the network analysis did not demonstrate nearly the level of interesting outcomes or provide the kind of insights I had intended. I do believe that, if such changes had been present in the body of law, my methodology

would have been useful in identifying trends. Further research on this point will be useful, I believe, and I intend to undertake it over the course of the coming year.

Ultimately, however, law remains a realm of very specific language where purely data-driven approaches to analysis do not necessarily yield the kind of results one would hope to see. For now, close reading and subject matter expertise is still essential to formulating answers and identifying trends. And so, while I hope that future efforts will show the power of data analytics to supplement and enhance such qualitative methods, they do not offer the kind of insights necessary to present any real alternative to focus, attention, and thoughtful scholarship.

Literature Review

Origins of Information Capitalism

Although it was published relatively recently, Shoshana Zuboff's *The Age of Surveillance Capitalism* has become a grounding text in the study of the commodification and monetization of human behavior. Zuboff's thesis is essentially that the creation of monitoring systems for the intake of data on human activity has fuelled a successor to capitalism. These systems monetize otherwise non-economic activity and combine with nudging tools to force or subtly suggest that individuals engage in commercial activities. She bases a great deal of her work on Karl Polyani's thesis on the appropriate use of capitalism in society, providing a compelling account of the development of surveillance as a mode of capitalism (*Id.* 140). Absent from her line of inquiry, however, is a detailed explanation or even an attempt to differentiate surveillance capitalism from any of its predecessor forms of capitalism (*Id.* at 133-35). The exploitation of human activity has been the hallmark of capitalism from the outset. The commodification

of human labor value, for instance, was as radical when it occurred in the early stages of capitalism as it is in Zuboff's account of how sensory systems and monitoring platforms commoditize human activity now – whether it is the commodification of primary activity or the commodification of the data resulting from human activity, the outcomes are much the same.

A somewhat more technical, but more comprehensive, examination of the same phenomenon is Julie Cohen's *Between Truth and Power*. Cohen, a legal scholar, lays out the interaction between legal structures, judicial and regulatory decisions, and what she calls information capitalism: the use of ICTs to transform human activity that would appear to be non-economic, such as scrolling through a web page or engaging in other social activities, into fodder for economic growth (Cohen, 2019). Cohen's account is strongest when it demonstrates how the existing legal structure allows for (and, in some cases, accelerates) the growth of large-scale platforms designed for the consumption of data on human activity and how the legal guardrails placed around those activities do not serve to promote or meaningfully protect the right to privacy. For example, her examination of intellectual property laws, anti-trust postures taken by judicial authorities, and the generally favorable treatment that legislatures in the West have bestowed on large platforms all paint a picture of a supportive, if not supine, legal framework designed to protect the marketplace (Cohen, 2019). Cohen's work does much of the dot-connecting missing in Zuboff's account; namely, the role that lobbying and revolving door networks in Washington and Silicon Valley have in mutually reinforcing the idea of technology firms as the vanguard of civilization rather than simply another industry that requires regulation, oversight, and control.

The focus of Cohen's book, a legal scholar's inquiry into the political system's codification of support for technology industries, is different than mine in that it exclusively considers the law as written. It does not grapple with the transformation of the law as it is applied in the real world – particularly by the entities it is meant to regulate. It is, in other words, a top-down view focusing on upper-tier power players' legislative and regulatory action in promoting information capitalism. Her kind of inquiry is an important interrogation of the relationship between elites in the political and economic spheres, but while it focuses on how the law is made, it did not dive into an experiential and practical discourse on how the law is lived.

Behaviorism, Science and Technology Studies, and Other Analytic Approaches

Oren Bar-Gill provides an interesting review of the intersection between behavioral economics and the law, focusing on the design of consumer contracts and how their complexity deceives consumers and obfuscates costs (Bar-Gill, 2013). In *Seduction by Contract*, Bar-Gill outlines the overly complex structure of contracts for mortgages, credit cards, and cell phones, highlighting how this intentional opacity leads to higher returns for companies but confuses, misleads, and, ultimately, harms consumers. Bar-Gill contends that the hidden complexity in agreements is necessary for the economic viability of many industries because a straightforward statement of costs would deter customers from using products. For example, credit card companies thrive when consumers underestimate the amount of credit they will use, generating revenue from late fees and unanticipated spending habits (Bar-Gill 39-50). Informing potential customers that they will likely spend more than they expect would diminish the number of value-generating users and could destroy the

business, so to survive, credit card companies "must exploit consumers' imperfect rationality" (Bar-Gill, 52).

Bar-Gill proposes stronger disclosures to consumers as a remedy for the contract complexity of each of the products he examines (Bar-Gill, 4, 102-104, 233-240). Yet, he does not contend with whether consumers are likely to read, let alone understand, these additional disclosures – indeed, his strongest defence is that they are "effective to at least some extent" (Bar-Gill, 33). Against Ben-Shabbat and Schneider's arguments, Bar-Gill suggests that the best outcome possible is to arrive at a place of "optimal," but not perfect or complete, disclosure (Id.)

This is problematic. First, it presumes that the very structures and systems of information transmission that created the circumstances Bar-Gill criticizes will somehow be transformed into a meaningful mechanism for informing consumers about their privacy rights without any fundamental changes. That seems unlikely, and Bar-Gill offers no explanation for how the system now used to deliver information to consumers (pre-contractual disclosures) will, on its own, create an adequate disclosure system.

Moreover, Bar-Gill relies on the idea that it is the responsibility of the *consumers* to become better informed before they make their choices, which rapidly devolves into a question-begging exercise: Consumers will make informed choices when they have optimal disclosures, but what is an optimal disclosure? One that allows consumers to make more informed decisions. This circular reasoning is not the way to address the confusion of consumers. Perhaps it is a balm, but it is, ultimately, no cure, especially because it presupposes that privacy rights exist in a consumer-rights framework, rather than that they are a fundamental right. Put another way, Bar-Gill's thesis is that privacy rights should be strengthened so that consumers can wield them

because of a consumer transaction, rather than the notion that privacy rights exist so that individuals can be wield them *despite* the existence of the contract.

Finally, the theoretical nature of this optimal disclosure framework means that it will run into the real-world problems that lie at the heart of this book. A disclosure that is considered optimal in abstraction will in reality need to be litigated, adjudicated, or otherwise put through a series of legal struggles before being usable. By that point, what will need to be disclosed will most likely have changed, and the whole process will start over again.

Bar-Gill's work is important context for this book, because his conceptual approach – rely on contracting measures and protections for consumers qua consumers – reflects a broader view of all human activity online as commercial. It treats individuals as though they have obligations equal to their commercial counterparts, and that they have the time, ability, inclination, and wherewithal to do so. This is an assumption without basis and, like Jack Balkin's notion of data fiduciaries, places too much of the burden on consumers to redress wrongs rather than on enterprises to prevent harms. It also overly empowers lawyers and offers opportunities for the technical expertise of contract drafters to shine through in diminishing the ability of a consumer to recover from harms.

Certainly, it would be a mistake to assume that lawyers are the only ones responsible for how the Internet works. They are situated within a variety of interconnected contexts – economic, social, and political – which shape and inform what they do. Furthermore, in an important sense, lawyers never *do* anything unless told to do so. The very nature of the profession makes it reactive (to a client's request), facilitative (of the client's goal), and justificatory (of the basis for the client's activity, and the lawyer's also). As such, the engineers, marketing teams,

CFOs, and consultants who also populate the ecosystem of ICT enterprises share responsibility for outcomes. Science and technology studies alone account for dozens of book-length inquiries into the matter, down to the very neurological processes that manage human reception of information on a screen and the neo-Enlightenment philosophy of connected systems (Carr 2013; Stiegler 2013). Behavioral scientists and economists, too, provide substantial explanations for how websites create positive feedback loops for profitable behavior (Richard Abel, 1989; Susskind, 2015, 2017; Kahneman, 2012).

However, unlike lawyers, the work of designers, engineers, and founders has received substantial study and analysis. Indeed, the entire field of human-computer interaction (HCI) revolves around the multiple ways in which humans engage with ICTs, from the purely physical to the sociocultural. Even a small survey of the field shows the degree to which researchers have explored how humans perceive and use ICTs, and scholars continue to plumb the depths of these interactions.

Within the wider HCI space, a number of studies are valuable analogues for my research. Cliff Kuang dives deeply into the work of the design teams who make products "user friendly" (Kuang & Fabricant, 2019), while Jenny Davis deftly explores the nature of affordances as (un)intentional progeny of the artifacts that surround us (Davis, 2020). These studies underscore the crucial role that human decision-making as it related to ICTs plays in creating digital affordances and affecting human behavior. Relatedly, Cass Sunstein and Richard Thaler explore "choice architecture" and how individuals perceive choice, particularly when these have been prepared and presented to them (Thaler, Richard, 2009). It is not necessary to agree with the conclusions they draw (i.e., that "nudges" are appropriate

tools for channelling human behavior) to recognize the accuracy of their analysis that "defaults are ubiquitous and powerful" (Id. at 85.) These defaults did not emerge, fully formed, from the ether: various actors decided what the default would be and then presented it as such.

Thus, although there have been substantial studies on design principles (Norman, 1998) and user interfaces (Davis; Kuang), such as the effects of "dark patterns" and "white hat design" (Gillespie, 2018; Pasquale, 2015), no one has yet examined the role that lawyers play in the design, implementation, and – most importantly – the *purpose* of ICT enterprises for humans, especially the agreements that control the enterprise-user relationship.

Legal Theories at Play

The Contours of Consumer Law

A central component of my research is why privacy law – as written and, more importantly, as experienced – operates, including in customer-facing products and Internet-connected services. Consumer law is a distinct corpus within the American legal tradition, primarily related to false advertisements or unfair business practices (Weber Waller, 2005). This background will be useful when comparing the evolution of privacy law later and when contrasting with the development of environmental law.

As consumer products and agreements became commonplace through the 19th and 20th centuries, legislatures responded by providing remedies for the deceived, swindled, and misled (Fleming, 2014). Initially, it was thought that an informed consumer in an efficient marketplace would make reasoned decisions and, therefore, that deceptive or unfair practices would distort the market in much