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Abstract
The dialogue between law and Surveillance Studies has been complicated by a mutual misrecognition that is both theoretical and temperamental. Legal scholars are inclined to consider surveillance simply as the (potential) subject of regulation, while scholarship in Surveillance Studies often seems not to grapple with the ways in which legal processes and doctrines are sites of contestation over both the modalities and the limits of surveillance. Put differently, Surveillance Studies takes notice of what law does not—the relationship between surveillance and social shaping—but glosses over what legal scholarship rightly recognizes as essential—the processes of definition and compromise that regulators and other interested parties must navigate, and the ways that legal doctrines and constructs shape those processes. This article explores the fault lines between law and Surveillance Studies and considers the potential for more productive confrontation and dialogue in ways that leverage the strengths of each tradition.

Introduction
Law is intimately intertwined with surveillance, but the dialogue between the two is complicated, for reasons that relate to both the nature of legal scholarship and the nature of Surveillance Studies scholarship. Legal scholars are inclined to consider surveillance simply as the (potential) subject of regulation. Call this the black-boxing of surveillance; within legal scholarship, the ways in which surveillance shapes emergent subjectivity are rarely interrogated, and this is one reason that legal analyses of “privacy” often seem ineffectual.1 Yet scholarship in Surveillance Studies also black-boxes the law, often seeming not to grapple with the ways in which legal processes and doctrines are sites of contestation over both the modalities and the limits of surveillance. Put differently, Surveillance Studies takes notice of what law does not—the relationship between surveillance and the development of situated subjects and communities—but glosses over what legal scholarship rightly recognizes as essential—the processes of definition and compromise that regulators and other interested parties must navigate, and the ways that legal doctrines and constructs shape those processes.

To illustrate these processes of black-boxing, I’ve chosen texts by scholars whose work I consider to be examples of good scholarship in one or the other genre. A preliminary caveat is in order: This essay

1 There is a vast literature dealing with the processes of individuation and social shaping. For my purposes here, it is not necessary to proclaim allegiance to any particular theory or terminology. By “emergent subjectivity” I simply mean to refer generally to models of subjectivity developed within scholarly traditions that reject the notion of autonomous, pre-cultural selfhood and instead understand experienced selfhood as developed through processes that are emergent, relational, and culturally contingent. For further discussion, see Cohen 2012a: 128-35.
focuses primarily on the North American scholarly and policy dialogues around surveillance, and even then does not conduct a comprehensive survey of all of the relevant scholarship. Its focus instead is on tendencies that characterize the mainstream of discussion in law and Surveillance Studies, respectively. Some scholarship runs against the grain of those tendencies, and some of it is cited here as indicative of the direction that the dialogue between law and Surveillance Studies ought to take.

I will argue that the mutual misrecognition between law and Surveillance Studies moves on two levels, one theoretical and one temperamental. Law owes allegiance principally to liberal theory and Surveillance Studies principally to critical theory, and the different approaches to the topics of power and subjectivity within the two traditions complicate efforts at dialogue. In terms of temperament, the law in operation is pragmatic, while Surveillance Studies often seems to value theoretical purity over good-enough results. Yet the theoretical and temperamental misalignments between law and Surveillance Studies also create the potential for productive confrontation and collaboration in ways that leverage the strengths of each tradition.

**Law and Surveillance Studies**

Within democratic legal systems, the relationship between surveillance and the rule of law is a core concern. Even so, regulatory scrutiny of surveillance is complicated by misunderstandings that flow from law’s primary allegiance to liberal political theory. Legal theorists are uncomfortable discussing the social shaping of subjectivity, and this reluctance inclines them to black-box surveillance processes, reducing them to simple (and potentially regulable) observation and overlooking all of the ways in which they are productive. As a result, they tend to resist understanding even very pervasive surveillance as producing any consequence more lasting than a “chilling effect.” And because law’s liberal orientation also inclines legal theorists to deny or underrate the constitutive power of discourses, cultures, and practices, they often neglect to consider the fact that legal doctrines and processes are themselves culturally embedded. In particular, heavy reliance on the public-private distinction makes government surveillance appear both more salient and more troubling than commercial surveillance, and legal theorists tend to forget that that perspective is itself culturally produced. I will consider three topics on which legal scholars have engaged with specific legal and technological developments that also are of concern to scholars of Surveillance Studies, and on which more comprehensive engagement with the methods of Surveillance Studies could yield useful insights.

Consider first the use by law enforcement of tools for monitoring mobility. The U.S. Supreme Court’s recent opinion in *United States v. Jones* (2012) considered a constitutional challenge to a narcotics conviction based on evidence obtained from the warrantless installation of a GPS tracking device on the defendant’s car. According to the conceptual framework traditionally used in fourth amendment search and seizure cases, visual observation of behavior in public does not violate a citizen’s reasonable expectation of privacy. The investigating officers could have followed Jones physically as he drove around town, but elected not to do so for a variety of reasons including cost and resource limitations. One question before the Court was whether prolonged, GPS-enhanced tracking of movements through public space should be treated differently because it is so powerful and so comprehensive. Several of the justices appeared receptive to the argument that such tracking could amount to a “search.” Ultimately, however, a majority of the Court decided the case narrowly on trespass-based grounds, reasoning that the agents’ nonconsensual interference with the defendant’s property (the car) implicated the fourth amendment’s protections against “seizure.”

As Justice Sotomayor noted in her concurrence, however, many commonly

\[2\] In full, the fourth amendment reads: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amdt. IV. In contemporary fourth amendment jurisprudence, cases involving interference with tangible property implicate the seizure proscription, while cases involving information-
used methods of geolocation involve data streams generated consensually, via an on-board GPS or mobile phone. Law enforcement access to those data streams is permitted by the “third-party doctrine,” which holds that no reasonable expectation of privacy exists in information voluntarily provided to a third party. The majority’s reliance on a form of property reasoning thus left law enforcement access to the powerful geolocation capabilities afforded by networked digital technologies largely undisturbed.

The dialogue between the majority and concurring opinions in *Jones* over how the law ought to understand real-time, remotely enabled tracking illustrates just how little overlap currently exists between the universe of cutting-edge networked surveillance practices and the universe of investigative actions that are constitutionally suspect. The two concurring opinions expressed a willingness to reconsider the third-party doctrine, and more specifically to evaluate GPS-enhanced surveillance in some future case through the prism of what has become known in national security and law enforcement circles as a “mosaic theory” of information gathering. As the name suggests, the mosaic theory treats each piece of information, however innocuous, as a piece in an overall picture that, when assembled in sufficient detail, may reveal a greater whole. In cases brought under the federal Freedom of Information Act, the risk of mosaic assembly by terrorists is now routinely invoked to justify refusals to disclose information held by the government (for a useful review, see Pozen 2005). In contrast to that hypothetical risk, mosaic assembly is and always has been the point of law enforcement surveillance in criminal investigations, but if law enforcement is limited to conventional physical surveillance techniques the resolution level of the mosaic might be very low. *Jones* posed the question of how a body of law that is supposed to provide meaningful protection against intrusive state surveillance ought to respond to a modality of surveillance that sharply increases the resolution level of the mosaic. But five justices thought that revising search and seizure doctrine to take account of this reality would lead “needlessly” into “thorny problems.”

A similar resistance to grappling with the complexity and pervasiveness of networked surveillance can be seen in recent post-*Jones* articles by two eminent fourth amendment scholars, one suspicious of the mosaic theory as a touchstone for constitutional analysis and one purporting to embrace it. Orin Kerr (2012) objects that adopting a “mosaic theory of the fourth amendment” would turn on its head the sequential analysis traditionally conducted by courts to determine whether a particular activity constitutes a search, and if so, whether it violates reasonable expectations of privacy. The proper question, argues Kerr, is whether particular, discrete law enforcement actions go too far, not whether the other activities of mosaic-assembly ought to be subject to review. The article is a lucid and painstaking exegesis of fourth amendment tradition, and yet it amounts to an argument that judges completely ignore the way that contemporary networked surveillance works. If the fourth amendment is supposed to provide meaningful protection against intrusive state surveillance, then perhaps it is the tradition of particularized fourth amendment analysis that needs to change. Christopher Slobogin (2012) confronts this possibility, offering a model statute that distinguishes between “targeted” and “general” searches, prescribes evidentiary thresholds for targeted searches that would depend on the duration of the search, and commends general searches to oversight by the political process. Recognition that mosaic-assembly implicates privacy interests is an important step, but the proposal assumes a typology of surveillance practices that does not exist in practice. Networked surveillance is nonlinear, probabilistic, and constantly evolving; it isn’t amenable to targeted-general distinctions or to artificial timelines. Law’s categories are inevitably somewhat artificial, but if legal oversight is to be meaningful the categories must also have some basis in reality.

Engagement by legal scholars with literatures exploring the ways that pervasive, networked surveillance of behavior in public spaces affects both behavior and emergent subjectivity would make the mismatch between constitutional jurisprudence and reality more evident. Work in Surveillance Studies documents the ways in which surveillance activity is increasingly “liquid” (Bauman and Lyon 2012) and continuous gathering implicate the search proscription. Whether information-gathering also might constitute a seizure (of the data stream) is an unanswered question.
in ways that ought to prompt a rethinking of the fourth amendment doctrine’s assumptions about the sequential and linear nature of investigative activity. Such work also explores the impetus and justifications for surveillance at structural and cultural levels, which constitutional jurisprudence typically does not do. Courts hearing constitutional challenges are inevitably responding to particularized assertions of need. Rarely do they have occasion to consider the broader institutional logics of surveillance: its relation to the continual pursuit of security and risk minimization (e.g., Lyon 2001; Monahan 2010); its uses within institutional settings as a tool for sorting and managing populations (e.g., Gilliom 2001; Monahan 2010); and the emergence of the “surveillance-industrial complex” (Hayes 2012) as an organizing principle of contemporary political economy. Still more rarely do they consider the ways in which these logics shape the subjectivity of individual citizens. Work in Surveillance Studies identifies a range of behavioral and emotional effects of surveillance (e.g., Koskela 2000; McGrath 2004) that is broader and much more complicated than simple deterrence of undesirable behavior. A body of jurisprudence that addresses the balance of power between the state and its citizens ought to be concerned with these effects, and with their implications for the quality of political and civil culture.

Consider next the debate within legal scholarship about consumer profiling and behavioral advertising. In the U.S., most commercial profiling is regulated only lightly via a “notice and choice” framework that originates in consumer protection law, and that rests on notions of imputed consent to disclosed terms and conditions. The conceptual framework underlying this approach is economic; the idea is that if consumers are adequately informed about product attributes (including the terms and conditions in privacy policies), markets will discipline both product offerings and seller behavior. That hypothesis in turn rests on the presumptive autonomy of the liberal subject, who is capable of making informed decisions about whether and how to participate in marketplace transactions and who suffers no other lasting effects from the activity. Many kinds of transactions strain those assumptions, but commercial profiling stretches them to the breaking point. Empirical work in behavioral economics (e.g., Acquisti and Gross 2006; Acquisti and Grossklags 2007) has demonstrated that consumers understand very little about the way commercial profiling works, and research by communications scholars (e.g., Gandy 1993; Turow 2011) has explored the ways that processes of targeted marketing shape desires and mold opportunities.

Among lawyers and legal scholars, the conversations provoked by work falsifying assumptions about the autonomous behavior of the liberal consumer tend to revolve around strategies for correcting the information asymmetries. This is true to some extent even within the more restrictive European data protection framework, which allows processing of personal information with the subject’s consent. While U.S. regulators tolerate broad, open-ended language in privacy policies, European regulators have moved to impose stricter criteria for verifying agreement to data processing, and to narrow the scope of the consent that can be imputed. As of this writing, the result of those attempts is undetermined. Scholarly debates also have focused on the offsetting social welfare gains (or costs) from data processing. Advocates of behavioral advertising (e.g., Goldman 2006; Strahilevitz 2008) argue that commercial profiling creates important efficiencies that must be weighed in the balance; skeptics (e.g., Peppet 2011; Hoofnagle and Whittington 2013) worry about the longer-term social welfare effects of systemic biases toward overdisclosure.

Underlying these debates about the meaning of consent and the proper metrics for assessing social welfare consequences are deep doubts about the possibility of naming and substantiating a more fundamental species of privacy harm—doubts that are felt by participants on all sides. Where information privacy scholars have sought interdisciplinary insights into privacy and surveillance, they have tended to consult literatures that law’s philosophical commitments find more congenial—economics rather than sociology, liberal political theory rather than political theory more generally, analytical philosophy rather than the sociology of knowledge, and so on. These favored disciplines also privilege liberal consent, and so reliance on them tends to validate the generally prevailing sense that there is nothing more fundamental at stake. Scholars who attempt more sustained theoretical critiques of the consent paradigm (e.g., Solove
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2013) seem adrift, casting about fruitlessly for a framework that might replace (or simulate) the rigorous apparatus of empirical social science. Proponents of increased freedom for technology companies and data brokers mock arguments for enhanced privacy protection precisely for their purported lack of rigor, arguing that privacy advocates are old-fashioned, fearful, and too easily alarmed by novelty (an example of a polemic in this vein is Downes (2013)).

Engagement with literatures that explore the logics and effects of commercial surveillance could help both legal scholars and regulators in their search for a framework that moves beyond notice and choice. Here the important questions concern how the law should understand the power of the commercial actors that mediate our relationships with providers of goods and services. Work in Surveillance Studies offers powerful frameworks for probing those relationships. Examples include Mark Andrejevic’s (2007) theory of the “digital enclosure,” which simultaneously empowers and constrains self-development by rewarding predictable choices and disfavoring unpredictable ones; Greg Elmer’s (2004) account of surveillance as a process of modulation within which consumers are defined and located in space by means of their digital profiles; and Kevin Haggerty and Richard Ericson’s (2000) theory of the “surveillant assemblage,” within which networked flows of information structure power relationships. In addition, some Surveillance Studies scholarship is ethnographic in nature, illuminating the processes by which surveillance shapes the opportunities available to minority and subordinated populations (Gandy 2006) or nudges surveilled subjects to remake themselves in ways that align with the goals of market providers of goods, services, and opinions (Andrejevic 2007; Turow 2011). These works offer starting points for an inquiry that looks beyond rote incantations about the public-private distinction and the primacy of consent to consider more carefully the patterns and practices of commercial surveillance that are reshaping everyday life.

As a final example, consider the privacy and data protection implications of social media. Social media involve widespread popular and arguably consensual data exchange. Even the most comprehensive effort at data protection regulation, the European Data Protection Directive, breaks down hopelessly when confronted with a modality of communication whose raison d’etre is data-sharing. Hoping to inculcate different online habits and norms, Sweden prosecuted a church volunteer named Bodil Lindqvist (European Court of Justice 2003) who posted information about congregants on her blog, but it seems that individuals who use social media resist understanding themselves through the prism of the Directive as “data controllers” who engage in “data processing” that entails fair information practice obligations. Additionally, the data flows generated within social media platforms extend beyond them, into a variety of secondary uses that are less consensual, including commercial profiling, background checking, criminal investigation and threat monitoring, trolling, and identity theft. There is persistent and mostly nontransparent slippage between the different kinds of uses, a state of affairs to which the vague, general privacy policies typically utilized by U.S. information businesses contribute.

As the European example illustrates, there are enormous feasibility problems that surround the potential data protection regulation of social media. David Lyon (2001) characterizes the failure of European-style data protection regulation as a breakdown of the modern when confronted with the postmodern. It’s unclear whether that observation is intended more generally as a prediction about the likely failure of any legal intervention, but legal scholarship in the Anglo-American tradition never really grapples with the feasibility problems, because once again it runs aground on the problem of social shaping and constructed subjectivities.

Among most perceptive legal critics of social media are Neil Richards, who has written eloquently about “the perils of social reading” (2013b), and James Grimmelmann, who has explored the tensions between Facebook’s choice of architectures, which create an impression of context-dependent sharing, and its privacy default settings, which routinely transfer information across contexts (2009, 2010). Even as they perceptively trace the social dynamics of online environments, however, these scholars have resisted exploring the more lasting intersections between surveillance, subjectivity, and culture. Richards’ theory
of intellectual privacy (2008, 2013a), which in its most recent incarnation purports to embrace Surveillance Studies, still posits a world deeply structured by the public-private distinction and populated by disembodied, autonomous subjects. He concludes that information about “intellectual activity” should be privileged in legal analyses of the harms of surveillance, and that the principal harms with which law should concern itself are the chilling effect and the risk of blackmail or coercion (i.e., harms to liberty of thought and action of the sorts very traditionally recognized by law). Scholars like Richards and Grimmelmann take their cues from important general works on privacy theory, like Helen Nissenbaum’s (2010) path breaking work on privacy as contextual integrity and Daniel Solove’s (2008) on a “family resemblances” theory of privacy. Both of these works seek to confront the highly variable and context-dependent nature of privacy expectations, but both attempt to evaluate the effects of social and contextual change while holding the subjectivity of the individual privacy claimant constant and unexamined.

Here again, engagement with Surveillance Studies could help legal scholars and policymakers understand the ways in which heightened visibility within social media spaces and the affordances of new architectures for interaction shape emergent subjectivity and collective culture. Writings by Surveillance Studies scholars on social media do not simply bemoan the death of privacy, as writings by legal scholars tend to do. They raise profound and provocative questions about how the widespread adoption of social media and the extension of social media surveillance are making us different. Ethnographic research on online communities has explored the social and cultural effects of architectures and norms that foster increased disclosure (e.g., boyd 2008, 2010). In the realm of theory, Kirstie Ball’s (2009) work on the fetishization of exposure calls attention to the viability of “privacy” in an era in which openness seems prized above all, and then probes beyond the rhetoric to interrogate the processes by which openness and publicity have become elevated as virtues. Katarina Nygren and Katarina Gitlund (2012) explore what they call the pastoral power of technology, or the power of digital technologies to shape internalized narratives of the self under economic conditions in which ordinary users of technology are alienated from the processes of shaping. As before, these works and others like them provide starting points for more careful interrogation by legal scholars and policymakers of the cultural effects of social media and the practices of social media providers.

**Surveillance Studies and Law**

Relative to legal scholarship, work in Surveillance Studies is more likely to build from a solid foundation in contemporary social theory. Even so, such work often reflects both an insufficient grasp of the complexity of the legal system in action and lack of interest in the ways that legal and regulatory actors understand, conduct, and contest surveillance. By this I don’t mean to suggest that Surveillance Studies scholars need law degrees, but only to point out what ought to be obvious but often isn’t: legal processes are social processes, too, and in overlooking these processes, Surveillance Studies scholars also engage in a form of black-boxing that treats law as monolithic and surveillance and government as interchangeable. Legal actors engage in a variety of discursive and normative strategies by which institutions and resources are mobilized around surveillance, and understanding those strategies is essential to the development of an archaeology of surveillance practices. Work in Surveillance Studies also favors a type of theoretical jargon that can seem impenetrable and, more importantly, unrewarding to those in law and policy communities. As I’ve written elsewhere (Cohen 2012a: 29), “[t]oo many such works find power everywhere and hope nowhere, and seem to offer well-meaning policy makers little more than a prescription for despair.” Returning to the topics already discussed, let us consider some ways in which Surveillance Studies might benefit from dialogue with law.

Let us return first to the problem of digitally-enhanced surveillance by law enforcement—the problem of the high-resolution mosaic. As discussed in the section above, works by Surveillance Studies scholars exploring issues of mobility and control offer profound insights into the ways in which continual observation shapes spaces and subjectivities—the precise questions about which, as we have already seen,
judges and legal scholars alike are skeptical. Such works reveal the extent to which pervasive surveillance of public spaces is emerging as a new and powerful mode of ordering the public and social life of civil society. They offer rich food for thought—but not for action. Networked surveillance is increasingly a fact of contemporary public life, and totalizing theories about its power don’t take us very far toward gaining regulatory traction on it. That enterprise is, moreover, essential even if it entails an inevitable quantum of self-delusion. Acknowledgment of pervasive social shaping by networked surveillance need not preclude legal protection for socially-shaped subjects, but that project requires attention to detail. To put the point a different way, the networked democratic society and the totalitarian state may be points on a continuum rather than binary opposites, but the fact that the continuum exists is still worth something. If so, one needs tools for assessment and differentiation that Surveillance Studies does not seem to provide.

As an example of this sort of approach within legal scholarship, consider a recent article by legal scholars Danielle Citron and David Gray (2013), which proposes that courts and legislators undertake what they term a technology-centered approach to regulating surveillance. They would have courts and legislators ask whether particular technologies facilitate total surveillance and, if so, act to put in place comprehensive procedures for approving and overseeing their use. From a Surveillance Studies perspective, this approach lacks theoretical purity because its technology-specific focus appears to ignore the fact that total surveillance also can emerge via the fusion of data streams originating from various sources. But the proposal is pragmatic; it does not so much ignore that risk as bracket it while pursuing the narrower goal of gaining a regulatory foothold within the data streams. And because it focuses on the data streams themselves, it is administrable in a way that schemes based on linear timelines and artificial distinctions between different types of surveillance are not. One can envision both courts and legislatures implementing the Citron and Gray proposal in a way that enables far better oversight of what law enforcement is doing.

Turning next to the linked practices of commercial profiling and social media surveillance, we have already seen that work in Surveillance Studies again steps in where legal scholarship badly needs supplementation: on the question of how pervasive surveillance by private market actors shapes the production of culture and the patterns of emergent subjectivity. Such work typically does not, however, consider or explore the ways that the legal construct of consent mobilizes legal and policy discourses to sanction ongoing expansions of private-sector surveillance and insulate them from regulatory oversight. Work in Surveillance Studies also has not seemed to pay particularly careful attention to the roles that rhetorics of innovation and competition play in regulatory debates about information privacy. For a discipline that seeks to develop comprehensive and rigorous accounts of surveillance as social ordering and as cultural practice, these are large omissions. As we have seen, the notice-and-choice paradigm has deep roots within liberal theory, and legal and policy discourses about notice and choice reflect legal culture in action. By the same token, understanding surveillance simply as a means to effective administration, or as a means for pursuing and performing security, misses the extent to which a narrative about the inevitable nature of innovation and knowledge production positions surveillance as a modality of technical and social progress (Cohen 2015). The “surveillance-industrial complex” does not simply parallel the military-industrial complex; it is also deeply rooted in Silicon Valley’s technoculture and (albeit paradoxically) in the tropes of romantic individualism and cultural iconoclasm with which its participants self-identify. These themes have been especially salient for privacy regulators.

Engagement with legal scholarship on information privacy would inform the project of understanding surveillance as social ordering and as culture in a number of complementary ways. First and most basically, many legal writings on information privacy are important as primary sources that reveal the notice-and-choice paradigm and the narrative of inevitable innovation at work. But there is also a rich vein of legal scholarship interrogating the assumptions and the politics that underlie privacy and data protection regulation (e.g., Cohen 2012a, 2012c, 2013, 2015; Kerr 2013; Ohm 2010; Solove 2013). In addition, legal scholars have produced richly detailed and revealing investigations of regulatory and compliance
processes; for example, scholars concerned with the operation of “surveillant assemblages” and “digital enclosures” ought to read and consider the important work by Kenneth Bamberger and Deirdre Mulligan on corporate privacy compliance cultures (2011a, 2011b).

If Surveillance Studies is to inform the content of laws and the nature of regulatory practice in the domain of commercial profiling and social media, however, surveillance theorists will need to do more than simply read legal sources. Work in Surveillance Studies so far has not been particularly well-adapted to helping policymakers figure out what, if anything, to do about evolving practices of commercial surveillance. Once again, if it is to be useful to policymakers, the view from Surveillance Studies requires translation into a form that might furnish a framework for action. Here I want to identify three important sets of questions on which Surveillance Studies scholars who want their work to make a difference might take their cues from legal scholarship.

An initial set of questions concerns how to redefine privacy and data protection in functional terms that do not presuppose the stable, liberal self, and that instead offer real benefit to the situated subjects who might claim their protection. David Lyon (2001) has argued that the organizing concepts of “privacy” and “data protection” are inadequate to comprehend surveillance as a mode of social ordering. From a sociological perspective that is undoubtedly right, but privacy and data protection still might be made effective as legal constructs if articulated differently, in ways that correspond more closely to the ways that surveillance shapes experience. That project calls for the sort of theoretical cannibalization that makes Ph.D. committees in Real Disciplines nervous, but at which legal scholars excel. With some trepidation, I offer my own work on privacy as boundary management for the postliberal self (Cohen 2012a, 2013), as well as Valerie Steeves’ (2009) work on relational subjectivity, as examples of the sort of exercise that is necessary to reframe the effects of surveillance as social ordering in ways to which legal systems can respond. For law to develop a sustainable and effective approach to regulating data protection and protecting privacy, the ways of theorizing about the subject represented by these projects must become second nature, not only for scholars but also and more importantly for legislatures, regulators, and courts. That in turn requires second process of translation, from the language of academia into a vernacular that can supply inputs into policy processes.

A second set of questions concerns how to understand what constitutes privacy harm in an era in which some surveillance is a constant. To the Surveillance Studies reader this may seem to be a variation on the first question, but it is different: in law, harm is what makes violation of an interest actionable, and the potential for harm is what creates the predicate for comprehensive regulation of particular domains of activity. Harm need not be individualized or monetizable; environmental regulations and financial market regulations address systemic and often nonmonetizable risk. But it must be reasonably definite; talk of power, power everywhere is plainly insufficient and it should come as no surprise that policymakers find it risible. Work on this problem is still preliminary, but here legal scholarship has a leg up because it deals in practicalities. Surveillance Studies scholars might profitably read works by Danielle Citron (2007) and Paul Ohm (2010) that identify and name the systemic risks associated with leaky and largely unregulated data reservoirs, and that draw on resources ranging from the history of tort law to computational science to craft recommendations for more effective regulatory strategies.

A final set of questions concerns the design of governance mechanisms. As we have already seen, the flows of surveillance within social media create novel institutional design challenges. In the domain of commercial profiling, many activities on the business-facing side of personal information markets, removed from consumer-facing processes that purport to ensure notice and choice, have eluded regulatory scrutiny entirely. Some of the classic works on privacy governance originate within the Surveillance Studies tradition; these include Priscilla Regan’s (1995) study of the way privacy legislation emerges within the U.S. political system and Colin Bennett and Charles Raab’s (2006) work on privacy governance and the emergence of data protection as a regulatory paradigm. But the question of governance badly
needs to be revisited; in particular, Surveillance Studies scholars have not yet engaged with the “new privacy governance” now emerging as official policy in the U.S. (and as de facto policy in the European Union) in a sustained and meaningful way. Works by legal scholars on the political, epistemological, and normative dimensions of the new governance (e.g., Bamberger 2010; Cohen 2012b, 2013; Freeman 2000; Lobel 2004) offer starting points for an inquiry that moves beyond “doing Surveillance Studies” to consider the more pressing challenge of doing surveillance regulation wisely and effectively.

**Conclusion: Doing Law-and-Surveillance-Studies Differently**

The prospects for fruitful interchange and collaboration between legal scholars and Surveillance Studies scholars are likely to remain complicated by pronounced differences in underlying theoretical orientation. But since Surveillance Studies is itself an interdiscipline (Garber 2001), and since legal scholarship has thrived on interdisciplinary exploration, the prospects for effective communication also seem reasonably good. Bridging the gap requires, first and foremost, efforts by emissaries from both traditions to foster a more tolerant and curious dialogue directed toward improved understanding and, ultimately, toward methodological hybridization. Within one’s own academic community, it can become too easy to mistake consensus on methodological conventions for epistemological rigor, and to forget that methodological strength also derives from refusal to be hemmed in by disciplinary boundaries.

From the standpoint of theory, a more sustained dialogue between law and Surveillance Studies would count as a success if it produced a mode of inquiry about surveillance that melded the theoretical sophistication of Surveillance Studies with lawyerly attention to the details, mechanisms, and interests that constitute surveillance practices as legal practices, and to the kinds of framing that mobilize legal and policy communities. To do Surveillance Studies better, legal scholars need to challenge their own preference for putting problems in categories that fit neatly within the liberal model of human nature and behavior, and Surveillance Studies scholars can help by calling attention to the social and cultural processes within which surveillance practices are embedded. Surveillance Studies scholars need to do more to resist their own penchant for totalizing dystopian narratives, and should delve more deeply into the legal and regulatory realpolitik that surrounds the administration of surveillance systems; legal scholars can help by demystifying legal and regulatory processes.

From a legal scholar’s perspective, however, theory achieves its highest value when it becomes a tool for forcing productive confrontations about how to respond to real problems. And so I think it would count as an even bigger success if dialogue between law and Surveillance Studies generated not only a hybridized theoretical discourse of law-and-Surveillance-Studies but also the beginnings of a more accessible policy discourse about surveillance and privacy, along with reform proposals designed to put the animating concepts behind such a discourse into practice. Here the goal would be a hybridization between law’s ingrained pragmatism and Surveillance Studies’ attentiveness to the social and cultural processes through which surveillance is experienced and assimilated. Working together, legal scholars and Surveillance Studies scholars might advance the project of formulating working definitions of privacy interests and harms, and might develop more sophisticated projections of the likely effects of different policy levers that could be brought to bear on systems of surveillance.

**References**


