Regulating at the End of Privacy

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Regulating at the End of Privacy

Bruce E. Boyden†

INTRODUCTION

Web surfers, repent: the end of privacy is nigh. Or at least, so say many reporters, scholars, and commentators; forecasts of the impending death of privacy are legion. The cause of death varies—from government surveillance,1 to corporate data gathering,2 to social media,3 to all three4—but almost no one claims that privacy is in a healthy state.5 Indeed, the consensus appears to be that some sort of privacy catastrophe is upon us. That pervasive sense of impending doom will likely affect legislators, regulators, and judges as well, ultimately provoking a broad regulatory response.6

† Assistant Professor of Law, Marquette University Law School. I wish to thank the University of Chicago Legal Forum for inviting me to present this Article, and Amy Quester for her love, encouragement, and support.


2 See, for example, Brendan Lynch and Danielle Rivard, Google’s Invasion Leaves Privacy as Tiny Casualty, Boston Herald 4 (Sept 20, 2011); The End of Privacy?, Consumer Reports 33 (June 2006).

3 See, for example, Evgeny Morozov, The Dangers of Sharing, NY Times BR18 (Jan 27, 2012); Daniel J. Solove, The End of Privacy?, 299 Scientific American 100 (Sept 2008).


5 See Polly Sprenger, Sun on Privacy: “Get Over It”, Wired (Jan 26, 1999), online at http://www.wired.com/politics/law/news/1999/01/17538 (visited Sept 15, 2013) (quoting Scott McNealy, then-CEO of Sun Microsystems, as saying, “You have zero privacy anyway. Get over it.”). McNealy’s epigram appears in context to have been more of an exasperated response to persistent questioning rather than a considered view of the state of privacy. Nevertheless, it has been widely cited as reflecting a plausible view of reality.

6 American privacy law has largely been jerry-built from the reactions to such crises. See, for example, Rosen, The Unwanted Gaze at 170 (cited in note 4); Daniel J. Solove, Privacy and Power: Computer Databases and Metaphors for Information Privacy,
But the very extent of the alarm over privacy should give us pause. Privacy, as I argue below, has an observer problem.\textsuperscript{7} It is extraordinarily difficult for persons to objectively assess the state of privacy in their own society, because their self-identities are inextricably linked to the privacy norms prevailing at the time those identities were constructed.\textsuperscript{8} As a result, it is ordinarily impossible to view shifts in or challenges to privacy norms with equanimity. The state of alarm over current privacy developments is therefore at best an ambiguous signal. Widespread alarm could, it is true, indicate that it has become easier or perhaps simply more profitable to violate privacy norms, for example due to technological changes. But it can also signify an incipient alteration of privacy norms themselves. Violations should certainly be resisted; for revolutions, however, the proper response is less clear.

That ambiguity might not be a problem if there were ways to determine the state of privacy other than measuring the level of anxiety. But privacy is inherently subjective in a way that the targets of other laws are not.\textsuperscript{9} Other laws have as their object creating, maintaining, or altering a certain tangible state of the world—they regulate the exchange of funds, the dispersion of inventions and works of authorship, the performance of services, or the prevention of physical harm. Privacy protects dignity.\textsuperscript{10} It is a set of social conventions governing the flow of information about individuals; it restricts the dissemination of information about individuals that can harm their social standing and their

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\textsuperscript{7} An observer effect occurs when the act of measuring a system has a significant enough impact on the system that it cannot be ignored. In such a case, "the observer must be considered part of the system being observed." Wikipedia, Observer Effect (Physics), online at http://en.wikipedia.org/wiki/Observer_effect_physics (visited Sept 15, 2013).
\textsuperscript{8} By "privacy" I mean to refer to both a certain condition—the state of being "private"—and the complex of rules and laws necessary to achieve that statute. See text accompanying notes 27–30.
\textsuperscript{9} See, for example, Robert C. Post, The Social Foundations of Privacy: Community and Self in the Common Law Tort, 77 Cal L Rev 957, 964 (1989) ("[T]he tort of invasion of privacy is qualitatively different because the injury at issue is logically entailed by, rather than merely contingently caused by, the improper conduct."); Diane Leenheer Zimmerman, Musings on a Famous Law Review Article: The Shadow of Substance, 41 Case W Res L Rev 823, 826 (1991) ("Like a flag which has not been assigned a country, privacy is rich in symbolic value but has little particularized meaning.").
\textsuperscript{10} See Post, 77 Cal L Rev at 964 (cited in note 9) (classifying privacy tort as redressing "dignitary harms"). Privacy also provides security and seclusion, but these, too, are intangible.
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attempts to determine their own identities. Privacy harms are therefore difficult to measure objectively. They exist to the extent that we collectively believe them to exist, which means that the best evidence of many forms of privacy harm will be the level of alarm violations provoke.

The result is that privacy is subject to a sort of uncertainty principle. In physics, Heisenberg's uncertainty principle states that it is impossible to determine both a subatomic particle's velocity and position with absolute certainty; our knowledge of one recedes as the other increases. Similarly for privacy, we can measure the current state of alarm in our own society, or we can assess privacy norm change in another society, but we can't reliably assess privacy norm change in our own society. The problem is that the observer is part of the system being measured.

And there is the rub, the one that makes calamity of so much commentary. Privacy scholars and policymakers are just as subject to the risks of cognitive bias as anyone else. They are just as liable to mistake deep social change for selfish violations. The "privacy uncertainty principle" makes it difficult to decide whether and how to respond to an apparent privacy crisis.

And yet a decision may be unavoidable. The purpose of privacy laws is to buttress privacy norms where informal sanctions prove inadequate. A sudden increase in violations is

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11 See Daniel J. Solove, Conceptualizing Privacy, 90 Cal L Rev 1087, 1129 (2002) (defining privacy as comprising "various activities, customs, norms, and traditions"); Helen Nissenbaum, Privacy in Context: Technology, Policy and the Integrity of Social Life 140–47 (Stanford 2010); Post, 77 Cal L Rev at 969 (cited in note 9) (privacy "can only be understood by reference to norms of behavior").

12 Some privacy violations lead to tangible harms, such as being arrested by the secret police or having one's financial accounts compromised. These sorts of harms, because of their tangibility, are far less susceptible to the ambiguity problem described in the text. See Part III.B.


14 Unlike Heisenberg's uncertainty principle, the uncertainty described here is due to a measurement problem: the difficulty in objectively weighing the harms and benefits arising from contemporary social practices.

15 The dynamics of the relationship between law and norms are underexplored, but a number of scholars have suggested that law can and does fill the gap when norms weaken in effectiveness. See Robert C. Ellickson, Order Without Law: How Neighbors
a powerful signal that the laws require modification to combat the problem. The danger posed by uncertainty, however, is that laws passed to cure violations may instead lock in a fading and increasingly obsolete regime of privacy norms, making the transition more difficult, expensive, and stressful than it otherwise might have been. That risk counsels caution in crafting any policy response in a crisis atmosphere, given the difficulty of determining what state privacy is currently in, and the relative benefits of any future regime.

The argument below proceeds in three parts. First, in Part I, I identify the two features of privacy that give rise to privacy crises and the uncertainty problem: the basis of privacy in norms and its connection to status. In Part II, I consider a historical example of norm regime change in order to examine the phenomenon in action while maintaining some critical distance. The example I consider is the history of the changes that led to Samuel Warren and Louis Brandeis's famous 1890 article, the article that launched the very concept of privacy law. Part III then draws upon that example to suggest that at least some of the anxieties of our own time are due to another shift in norms. Even if such a shift is occurring, however, there is no good way to determine whether such a shift should be resisted or not. I argue that the incommensurability of competing privacy norm regimes arising from the uncertainty problem hinders an objective evaluation of the relative costs and benefits. Given the privacy uncertainty principle, policymakers should use caution in adopting laws or regulations that are meant to stave off change, except in those instances where privacy harms are manifest. Even then, policymakers should

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Settle Disputes 283–84 (Harvard 1991) (noting that norms are less effective as stakes rise or social distance increases); Robert D. Cooter, Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant, 144 U Pa L Rev 1643, 1674–75 (1996) (citing examples); Laurence H. Tribe, Structural Due Process, 10 Harv CR-CL L Rev 269, 301 (1975) (describing judiciary's most important function as participating in the "evolution . . . of social norms and understandings as they come to find expression in the law"); Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L J 2117, 2178–80 (1996) (describing shifts in law to preserve status regimes); J.M. Balkin, The Constitution of Status, 106 Yale L J 2313, 2334 (1997) ("Both subordinate and superordinate groups may lash out at each other, wielding the weapons of rhetoric, law, or brute force: the former to demand new social prestige, the latter to reinforce and reproduce old hierarchies of respect and social meaning.").

prefer regulatory tools that are easier to adapt to social change, such as administrative regulations or reasonableness standards.

I. THE SOURCES OF A PRIVACY CRISIS

Privacy crises are not new; there have been waves of anxiety over privacy ever since the late nineteenth century. In each, forecasts of the “death of privacy” were common. In the 1870s, the New York Times predicted the “abolition of privacy” resulting from, of all things, the newspaper interview. In the 1890s, Warren and Brandeis echoed a widespread complaint when they claimed that “[t]he press is overstepping in every direction the obvious bounds of propriety and of decency.” The 1960s saw similar fears of an “assault on privacy” arising from use of mechanized data gathering and storage tools. And as noted above, since 1999 fears of the “end of privacy” have been widespread.

Obviously, privacy did not come to an end in any of these episodes, nor is it likely to now. But that does not mean that the apocalyptic rhetoric was or is disingenuous. Such rhetoric is, rather, often a sign of some emerging threat to the social order. In particular, doomsday prophecies are especially likely at times when the existing methods for determining social status are under challenge or in flux.

And that is the likely source of the repeated alarms over privacy. As explained below, privacy is an integral component of the set of norms that determine social status. It is privacy norms

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18 Warren and Brandeis, 4 Harv L Rev at 196 (cited in note 16). See also Condé Benoist Pallen, Newspaperism, Lippincott’s Monthly 470, 475 (Nov 1886) (“Through the newspaper no man’s private life is sacred, and least of all that of a public man.”).

19 Samantha Barbas, Saving Privacy from History, 61 DePaul L Rev 973, 1032 (2012). The surge in concern about privacy in the 1960s has been under-studied. For a good overview, see id at 1031–38.

20 See, for example, Froomkin, 52 Stan L Rev at 1465 (cited in note 1) (expressing concern that given technological developments, “it seems likely that soon all but the most radical privacy freaks may live in the informational equivalent of a goldfish bowl”).

that govern how information about individuals can be acceptably gathered and distributed. Individuals in turn rely on those norms in deciding how to behave and what to say as they try to maximize their standing with various groups. Changes to privacy norms can be incredibly disruptive for individuals, upending settled expectations with potentially embarrassing results for those adhering to the old regime.

Three features of this web of norms, individuals, and social status make alarm a likely response to the prospect of change.\(^2\)

First, status is critically important to individuals, and they invest heavily in attaining it by adapting their behaviors, and even their personalities, to achieving it in particular ways.\(^3\)

That makes it extremely difficult for individuals to alter their behaviors in response to a shift in norms. Second, changes to norm regimes, when they do occur, often come not gradually and predictably but instead suddenly and catastrophically. Adherents to an existing norm regime, and the status determinations that come with it, are thus quite correct to become nervous at even the first signs of pressure for a change. Finally, status is rarely openly acknowledged and may even be invisible to the participants in a battle over norms.\(^4\)

That makes it extraordinarily difficult to debate the merits of a shift in norms, or even to ascertain whether one is in progress.

The dynamics of status regimes in transition have important ramifications for privacy law. The law should step in, where it can be effective, to arrest an increase in privacy norm

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\(^3\) It is possible that not only status attributions but the need for status itself has changed over time or varies between societies. Most examinations of status come from the social sciences, and for the most part social scientists assume the desire for status to be constant. See Bonnie Erickson, *Social Networks*, in Judith R. Blau, ed, Blackwell Companion to Sociology 314, 325 (Blackwell Publishing 2001) ("Simmel's work is unusual in its attention to history; too much of our work is very much limited to the present."). In any event, I have seen no indication that Americans in the late nineteenth century were dramatically more or less independent of their peers than Americans now.

violations. But it is far less clear that the law should step in to prevent a shift in privacy norms from occurring. Distinguishing between the two, to the extent possible, is therefore an important precursor to determining whether new laws or regulations are required. The privacy uncertainty principle makes this difficult, however. It is thus necessary to identify when privacy crises are likely to be related to a shift in norms, in particular a shift in those norms governing how personal information can be gathered and distributed.

A. Status and Social Norms

There are a few different ways in which one can understand the term "privacy." First, it might refer to a state that a person achieves—an individual's acts, thoughts, words, or attributes are "private" to the extent that information about them is limited in some way. Second, it might refer to the web of informal rules that are in place in a society to allow individuals to achieve that state. Third, it might refer to both of these things at once—the ways in which a society defines not only what states qualify as "private," but also the cluster of social rules and practices that are intended to protect that state. Or fourth, it might refer to the set of formal laws and regulations that restrict behaviors that threaten the ability of individuals to achieve the state designated as "privacy," however defined.

For the most part, this Article has been using the term in the third sense: as the way in which a society first defines what information is justifiably kept within a limited circle of recipients and then imposes obligations on others to maintain that confidentiality. Those rules about what can reasonably be kept private, and what others may do with information about

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25 For a somewhat similar discussion, see Ruth Gavison, Privacy and the Limits of Law, 89 Yale L.J. 421, 424 (1980) ("[p]rivacy a situation, a right, a claim, a form of control, a value?").

26 This way of using the term is not uncontested. Privacy is sometimes described as a universal human need that has the same meaning in every context. However, such a theory has difficulty accounting for the incredible variation in privacy practices that exist even among democratic societies. See James Q. Whitman, Two Western Cultures of Privacy, 113 Yale L.J. 1153, 1153–60 (2004).

27 I will use the term "state of privacy" to refer only to the conditions that a society designates as "private"; "privacy norms" to refer to obligations imposed on others in the collection or distribution of such information; and "privacy law" to refer to the formal rules governing information practices.
others that they receive, consist largely of social norms.\textsuperscript{28} Norms are informal rules,\textsuperscript{29} enforced outside of the state, that are responsible for much of the social order that exists in society.\textsuperscript{30} And privacy norms, like all norms, change over time. What makes changes to privacy norms so disruptive is their connection to status.

Status can be defined as the amount of honor, respect, prestige, or esteem accorded to an individual by others.\textsuperscript{31} Status varies by context;\textsuperscript{32} a single individual may have multiple statuses in the various roles that he or she occupies, accorded by the various groups he or she is a member of.\textsuperscript{33} Norms govern how those status determinations are made. Norms may specify that certain personal qualities and attributes merit according high or low status, or they may designate higher or lower status for membership in certain groups.\textsuperscript{34} An individual’s own compliance with prevailing norms also affects his or her status.\textsuperscript{35} Others will judge a person negatively who fails to behave in the ways deemed appropriate for his or her particular role and position in a group’s status hierarchy. It is in this way that norms and status are effective regulators of behavior. Those who comply with the relevant norms, or enforce them, are rewarded

\textsuperscript{28} See Nissenbaum, \textit{Privacy in Context} at 140, 148 (cited in note 11). Nissenbaum’s influential theory of “contextual integrity” explains privacy violations as, in part, practices that violate “context-relative informational norms,” that is, norms “that are specifically concerned with the flow of personal information—transmission, communication, transfer, distribution, and dissemination—from one party to another . . . .” Id.

\textsuperscript{29} Although the term “norms” is sometimes used to refer to mere regularities, the most common sense in the legal literature is “informal, decentralized obligations.” Richard H. McAdams, \textit{The Origin, Development, and Regulation of Norms}, 96 Mich L Rev 338, 350 (1997).


\textsuperscript{32} See Sunstein, 96 Colum L Rev at 921–22 (cited in note 30) (discussing the importance of social roles).

\textsuperscript{33} To take an obvious but trivial example, a person with a high status as a baseball player arising from his or her skill at that particular sport may have low status on the basketball court.


\textsuperscript{35} Id at 915–16, 963–64 (discussing how norms influence social behavior and status).
through approbation, respect, selection for positions of authority, or other benefits. Those who fail to follow the appropriate norms are likewise punished through actions that signal or contribute to lowered status, such as shaming the target through open displays of disrespect or confrontation, shunning the target, or distributing information about the target's transgressions—that is, gossiping.

These sanctions and rewards work because people highly value status and seek to maximize it whenever possible. Although there is sometimes a tendency to think of status as a vain and shallow concern, status determinations matter greatly to individuals. Status is nothing less than the amount of respect and esteem with which one is held by one's friends, neighbors, co-workers, and community. Aside from whatever psychic benefits it conveys, there are also more material benefits to high status. The higher an individual's status within a particular group, the more power and influence that person has over the group's decisions. Individuals are thus greatly motivated to keep their status as high as possible.

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36 See Ellickson, Order Without Law at 236–37 (cited in note 15) (providing the example of a letter to the editor of a newspaper praising a good Samaritan).


38 Open confrontation or ostentatious signs of disapproval, such as audible sighing or loudly complaining to a companion, are common techniques to discipline strangers, such as persons who cut in line.


41 See McAdams, 96 Mich L Rev at 355–56 (cited in note 29) (reviewing evidence that people seek to increase esteem); Ridgeway, Social Status and Group Structure, in Hogg and Tindale, eds, Social Psychology: Group Processes 352, 352 (cited in note 34) ("It is striking how concerned people are about their status in the eyes of others.")).
That brings us back to privacy. Privacy norms restrict what information about individuals can be gathered and distributed—including information about their compliance with other norms. Any change to privacy norms can be just as destabilizing as changes to behavioral norms themselves. If privacy norms change, information about the extent to which an individual observes the rules of a group could flow in ways it never had before, with deleterious effects on that individual's status. In particular, when privacy norms change, individuals who fail to adapt to the new norms may lose the ability to compartmentalize information about themselves, based on their various social roles. Information about family life may bleed into an employment setting, and vice versa.

Norm change of this sort would not be as problematic if individuals could readily adapt to sudden shifts. But societies sometimes change faster than people, because many individuals are locked in to their existing beliefs and behaviors. As Jon Elster has written, norms "have a grip on the mind." That is because norms are often internalized—embraced by an individual to such a degree that they become part of that person's self-identity. Individuals who follow an internalized norm do so not because they worry about what others may think, but because they believe themselves to be the sort of person who follows the norm. The result is that individuals self-enforce internalized norms and may be unable to stop. They feel pride when they have followed or enforced such a norm and guilt when they have deviated from it or tolerated a deviation.

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42 See Nissenbaum, Privacy in Context at 3, 140 (cited in note 11).
44 A person's identity includes all of the ways in which a person conceives of herself and her relationship to the rest of the world; it includes not merely how an individual defines herself, but what roles she performs and what groups she is a member of. See Timothy J. Owens, Dawn T. Robinson, and Lynn Smith-Lovin, Three Faces of Identity, 36 Ann Rev Soc 477, 479–80 (2010).
45 See id.
Indeed, internalization of a set of norms does more than simply define who an individual is; it helps shape his or her entire world-view. Internalizing a norm means plugging it into a person’s framework of beliefs about how the world works and should work. That framework forms the basis for all of the individual’s perceptions of events, including their meaning.\textsuperscript{47} A challenge to an internalized norm is therefore not likely to be seen as simply a proposal for an alternative organization of society. It is more likely to be seen as a threat to society itself.\textsuperscript{48}

Nor can individuals caught in the midst of a norm transition simply look the other way. Norms are the result of a group effort; there is no such thing as going it alone.\textsuperscript{49} The stability of norm sets and status regimes is thus critically important to those who benefit from them. The more widespread the adherence to a particular norm, the stronger it is, which gives those who prefer the norm a natural incentive to encourage its adoption and maintain compliance. Similarly for status—the more people who accord status in a particular way, the greater (or lesser) the target’s status will be, since status simply reflects the collective judgment of a group or community.\textsuperscript{50} The beginnings of a shift to an alternate set of norms, including privacy norms, is itself a threat to the status of an individual following the existing norms.\textsuperscript{51}


\textsuperscript{48} See Balkin, 106 Yale L J at 2331 (cited in note 15) ("The preservation of the status of one's group is seen as the preservation of morality itself or at the very least of a particularly upright way of life."); Boyden, 62 Ala L Rev at 132-33, 170-71 (cited in note 21).

\textsuperscript{49} See Michael Sauder, Freda Lynn, and Joel M. Podolny, \textit{Status: Insights from Organizational Sociology}, 38 Ann Rev Soc 267, 273 (2012) ("A principle that appears consistent across research areas in sociology is that deference cannot be seized by an actor but rather is something that is awarded by others.").

\textsuperscript{50} See id.

\textsuperscript{51} See Louis A. Zurcher and David A. Snow, \textit{Collective Behavior: Social Movements}, in Morris Rosenberg and Ralph H. Turner, eds, \textit{Social Psychology: Sociological Perspectives} 447, 451 (1990) (citing researchers who “have argued that challenges to the existence and prestige of the life style to which individuals are committed can render those individuals candidates for participation in ‘status politics’ and/or ‘status crusades.’”).
B. Privacy and Norm Cascades

There is another reason why changes in privacy norms can provoke feelings of alarm. As noted above, social norms, including privacy norms, provide both the substance and the method for status determinations, and status is something individuals hold dear. That alone is likely to make any alteration to the existing norm regime fraught with peril. But norm regimes under challenge also become incredibly unstable. This means that, when a change does occur, it often occurs not slowly and gradually, giving individuals some time to prepare, but quickly and catastrophically.

The sudden nature of norm transitions is a result of the fact that norms have both a group component and an individual component. A norm's power depends both on the number of group members that have adopted it, and thus enforce the norm against others, and on the intrinsic benefit the norm provides to the individual—for example, by matching more closely with that individual's self-concept. Each person in deciding whether to continue following an existing norm, or to change and follow a new norm, must therefore weigh these components together. The more people adhering to the norm, the greater the first component is, until it becomes so large that it tips the scale even for individuals who would otherwise prefer a different norm.

This phenomenon is one that has been widely studied in other contexts, from the behavior of crowds, to social decision-making to technology markets. It arises in any iterated decision-making process in which the outcome of previous decisions affects the value of the current decision. In other words, norm adoption belongs to a class of problems involving what is sometimes called “positive feedback.” All of these


See Akerlof, 65 Econometrica at 1006–07 (cited in note 52).


A related phenomenon widely discussed in the legal literature is “network effects.” See, for example, Lemley and McGowan, 86 Cal L Rev at 494–95 (cited in note
phenomena have the same basic structure as the norm transitions described above: an "internal" component, based on the benefits individuals directly experience from choosing a particular option, and an "external" component, based on the benefit experienced from having chosen the same option as others. 58

Two somewhat counter-intuitive results follow from this structure. First, a group can become "locked in" to a particular selection even if many of its members would actually prefer a different option, as long as the benefit received from making the same choice as others is high enough. 59 At that point, the group decision becomes extraordinarily stable; small disturbances will not be able to dislodge the group from its choice because of the large relative value of the "external" component. 60 But the second result is the exact opposite of lock-in. If preferences change for whatever reason, some adopters may, despite the costs of doing so, choose a different option. Each time a switch occurs, it makes the external value of the old option lower and thus less compelling, and the external value of the new option becomes that much more attractive, potentially producing additional switches. Past a certain point, a trickle of such switches can become an avalanche. 61 Thus, although norms and other group decisions are resistant to change, when they do change they change not gradually but in sudden waves. 62

This phenomenon goes by various names, including tipping, cascades, and the bandwagon effect. 63 Whatever it is called, the outcome is basically the same: collective decisions are very stable until there is a large shift of some sort, at which point the

58 See Arthur, Competing Technologies at 21 (cited in note 53).
59 See id.
61 See Picker, 64 U Chi L Rev at 1228 (cited in note 60); Glance and Huberman, The Dynamics of Social Dilemmas, Scientific American at 78–79 (cited in note 60).
situation becomes very unstable. As change courses through the system, the potential exists for a rapid and nearly total shift to a different state. The occurrence of a norm transition depends on the collective result of innumerable individual decisions that are difficult to measure. A widespread shift in internal preferences could easily remain hidden, as individuals have an incentive to hide the extent to which their preferences diverge from the norm. This subsurface pressure makes norm transitions, like avalanches, hard to predict. We can know when the conditions are favorable for such an event, but not precisely when, or even if, it will occur.

Whatever the mechanism, adherents to an existing norm regime are right to be worried about the potential for sudden change as even a subset of community members begins adopting new norms. The combination of heavy investment and unpredictable cascades is not one conducive to calm reflection as a norm regime is under stress. The frequency of privacy alarms may reflect this fact.

C. Uncertainty

A final contributor to the alarm that attends norm transitions, including shifts in privacy norms, is the difficulty of determining when one is underway and what the outcome of such changes might be. There are two related problems. First, norm transitions are only readily identifiable in retrospect; they may be difficult or impossible to identify in the moment. That is because it may be difficult to determine what the source of the threat is. Threats to privacy can come from two different directions: violators could be motivated by purely selfish reasons to obtain or disclose information outside of accepted privacy norms, or by altruistic motives to protect others from harm. Threats can be subtle and difficult to detect, making it hard to predict when a transition might occur.

The unpredictability of norm transitions has significant implications for privacy regulations. As systems become more complex and interconnected, the potential for sudden shifts becomes even more pronounced. This makes it crucial for policymakers to be aware of the underlying dynamics and to consider strategies that can help manage and mitigate the risks associated with norm transitions. By understanding the factors that contribute to such changes, regulators can better anticipate and respond to emerging threats to privacy and security.

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67 See Fiske, *Interpersonal Stratification*, in Fiske, Gilbert, and Lindzey, eds, *Handbook of Social Psychology* 941, 941 (cited in note 24) ("When hierarchies remain stable, no one heeds them much. When hierarchies change, people finally notice the stratification that subtly structures their every social interaction.").
norms; or some sort of underlying social change may undermine the norms themselves. Technological developments can spur either one. Technology could make it easier to invade privacy without being detected, thus evading social sanctions that had previously worked to control violations. Changes in technology could also produce broad changes in society—in how individuals communicate and in the information they share—that could destabilize the existing privacy norm regime and lead to a transition point.

However, individuals adhering to the current privacy norm regime are particularly unlikely to recognize a transition in progress; they are likely to see it as simply a series of violations. This poses problems for both the privacy scholar and privacy policymaker in attempting to determine how best to respond to change. Status regimes are typically invisible to their participants; individuals are rarely conscious of their own or even others' status-related motivations. No one thinks to him- or herself, “My status is being threatened; that is why I’m so upset about this.” What they perceive instead are merely bad actors, people who willfully disobey rules or arbitrarily attempt to oppress others. Indeed, since internalized norms form a part of a person’s worldview, challenging those norms may seem more akin to a challenge to reality—that is, the unquestionable social order—that, if successful, could threaten chaos. The response is likely to be, at the least, loud protests that norm challengers are violating some sort of fundamental tenet of society. In the privacy realm, the result is “privacy panics”—forecasts of doom if the norm is not respected.

Second, even if a transition were correctly identified, there would still remain enormous uncertainty about its potential effects. It is impossible to peer through the curtain of the future to determine how new norms will be integrated into the existing set of norms, and whose status will benefit most, or least, from the change. All that can be said with certainty in advance is that the new regime will be different from the current regime, where

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70 See Barbas, *61 DePaul L Rev* at 973 (cited in note 19).
the norm beneficiaries are already doing relatively well. It is little wonder, then, that challenges to a norm regime, and in particular to norms governing status, are typically met with trepidation and alarm. Not only is it typically unclear how individuals will fare on the other side, after the shift is complete, it is often unclear to the beneficiaries of the current norm regime whether there even is another side. It is that sense of impending collapse that drives the "end of" or "death of" rhetoric.

II. 1890 AND THE EMERGENCE OF PRIVACY LAW

As the previous section demonstrated, our view of the present is clouded by our presence in the present. It is difficult, if not impossible, to distinguish external threats to current norm structures—structures that we are all embedded in—from changes to those structures. It is easier to recognize such a distinction in a historical example, where the changes are now complete.

One clear example of a change in privacy law being driven by changing norms lies at the origins of privacy law in 1890 with the publication of Warren and Brandeis's foundational article, The Right to Privacy. Warren and Brandeis understood themselves to be responding to new sources of privacy violations: the sensationalist press known as "yellow journalism," as well as reporters bearing the newfangled invention, the pocket camera. But the historical context reveals something far more profound was underway. American society was undergoing a fundamental transformation from locality-based communities to associational groups as the basic unit of society.

71 See, for example, John G. Turner and Katherine J. Reynolds, The Social Identity Perspective in Intergroup Relations: Theories, Themes, and Controversies, in Rupert Brown and Sam Gaertner, ed, Blackwell Handbook of Social Psychology: Intergroup Processes 133, 140 (Blackwell 2002) ("A high status group with positive social identity which perceives its superiority as legitimate but unstable and under threat may be highly discriminatory.").

72 An uncertain dynamic environment can be perilous for those at the top. See George G. Szpiro, The Emergence of Risk Aversion, 2 Complexity 31, 35–36 (1997) (finding that, in conditions of uncertainty, automata that seek only to maximize fitness are wiped out).

73 See generally Warren and Brandeis, 4 Harv L Rev 193 (cited in note 16).

74 See id at 196.
What emerged was the modern notion of individuals inhabiting separate and distinct roles among multiple groups, each with its attendant status determinations. This in turn created a need to restrict the distribution of information between groups, in order to maintain the boundaries between roles. Far from a new threat to privacy emerging in the late nineteenth century, it was a new need for privacy that arose. The late nineteenth century saw the creation of the norms of privacy that we are familiar with today—norms that are perhaps entering their twilight.

A. The Puzzle of Warren and Brandeis: Why 1890?

In December 1890, Samuel Warren and Louis Brandeis published their famous article calling for the recognition of a common law right of privacy.75 Most histories of privacy law take the publication of The Right to Privacy as their departure point, dating the concept from that moment.76 Warren and Brandeis's article has been enormously influential, spawning recognition of new common law torts in several states, and even a constitutional right of privacy that ultimately has had a much greater practical impact.77 Warren and Brandeis appear to have successfully captured an emerging zeitgeist with their article, tapping into some nascent sense in 1890 that privacy was not only under attack, but also required specific legal protections.78 But the success of the article raises a puzzle: why had it not occurred earlier? Why were conditions ripe for the concept of privacy law only in 1890? Privacy had antecedents that stretched back centuries; even the specific complaints made by Warren and Brandeis had been made by others decades before.79

75 Id.
77 See, for example, Griswold v Connecticut, 381 US 479, 510 n 1 (1965) (Black, J, dissenting) (tracing origin of constitutional right to privacy to Warren and Brandeis article); Leebron, 41 Case W Res L Rev at 802 (cited in note 76) (same).
78 Ken Gormley, One Hundred Years of Privacy, 1992 Wis L Rev 1335, 1353 (1992) ("It seems fair to say that if Warren and Brandeis had not invented a right of privacy in December of 1890, somebody else would have had to invent a similar legal concept, by whatever name, in short order.").
79 See text accompanying notes 86–87; Lawrence M. Friedman, Guarding Life's
Legal scholars have only briefly addressed what changes in the years leading up to 1890 might have suddenly made a specific tort remedy for privacy attractive. For the most part, they have offered relatively simple causal explanations. For example, it has been suggested that population growth, urbanization, industrialization, or technological improvements in communications and transportation may have created the need for legal protection of privacy. The precipitating factor most commonly cited is the emergence of so-called "yellow journalism," with its banner headlines and sensationalism in covering the news.

None of the commonly cited explanations is entirely satisfactory. For one thing, the timing is off. All of the proposed causal factors predate *The Right to Privacy* by half a century or more. The electric telegraph was invented in the 1840s; at around the same time, railroads drastically reduced the time it took to move persons and freight, and canals had done so two decades before. Urbanization had been occurring since at least the middle of the nineteenth century, as had population growth, as young Americans and immigrants sought their fortunes in the growing metropolises. In any event, far from creating a need for privacy, urbanization may have actually increased...

Even the sensationalism of the late-nineteenth-century penny press was far from a novel development. The first penny press upended the newspaper industry in the 1830s; like its later cousin, the 1830s penny press was the result of technological improvements in newspaper publishing that lowered the cost of publishing and led to wide-ranging changes in news coverage, including the first society gossip items.\footnote{See Schudson, \textit{Discovering the News} at 28--29, 49--50 (cited in note 17). Schudson's book is the standard work on the evolution of newspapers in the nineteenth century.} The 1830s elites were no more enamored of press coverage than Warren and Brandeis would be a half-century later. As early as 1838, James Fenimore Cooper was complaining about the intrusiveness of the penny press: "The press tyrannizes over publick men, letters, the arts, the stage, and even over private life. Under the pretence of protecting public morals, it is corrupting them to the core."\footnote{James Fenimore Cooper, \textit{The American Democrat, or Hints on the Social and Civil Relations of the United States of America} 131 (H & E Phinney 1838).} In 1840, an attendee at a society ball noted the presence of a reporter from the \textit{New York Herald} and ruefully remarked that being forced "to submit to this kind of surveillance [was] getting to be intolerable."\footnote{Schudson, \textit{Discovering the News} at 28 (cited in note 17).}

Warren and Brandeis themselves are of limited assistance in identifying what it was that had changed. Like many modern commentators, they identified the source of the problem they were trying to address as "[r]ecent inventions and business methods"—specifically "[i]nstantaneous photographs and [t]he newspaper enterprise"—which "ha[d] invaded the sacred precincts of private and domestic life."\footnote{Warren and Brandeis, 4 Harv L Rev at 195 (cited in note 16). See also Amy Gajda, \textit{What If Samuel D. Warren Hadn't Married a Senator's Daughter?: Uncovering the Press Coverage that Led to "The Right to Privacy"}, 2008 Mich St L Rev 35, 43--44 (2008); Robert E. Mensel, \textit{"Kodakers Lying in Wait"}: Amateur Photography and the Right of Privacy in New York, 1885-1915, 43 Am Q 24, 29 (1991).} "[N]umerous mechanical devices," Warren and Brandeis warned darkly, "threaten to make good the prediction that 'what is whispered in
the closet shall be proclaimed from the house-tops." While Warren's wife's family had been the subject of intrusive press coverage, the descriptions of the press in The Right to Privacy verge on the hyperbolic. And the remedy Warren and Brandeis proposed seems extreme to modern sensibilities: a "far-reaching" protection of "the right to an inviolate personality," entailing not only a person's right "to prevent his public portraiture," but also a "right to protect one's self from pen portraiture, [that is,] from a discussion by the press of one's private affairs." Even a written description of a person would give rise to liability. Indeed, Warren and Brandeis were confident that publication of the contents of a person's jewelry collection could be prohibited. It seems clear that Warren and Brandeis were writing immediately before, or perhaps during, some sort of transition in norms, one that made the idea of privacy in a list of jewels pass from unquestionable to far-fetched.

B. The Anxiety of the Gilded Age

The shift that led to the Warren and Brandeis article began decades before. The mid-nineteenth century was undeniably a time of vast upheaval in American society. The visible signs of

89 Warren and Brandeis, 4 Harv L Rev at 195 (cited in note 16). Aside from the camera, it is not entirely clear what other mechanical devices Warren and Brandeis may have had in mind, but elsewhere they referred to "any other modern device for recording or reproducing scenes or sounds," indicating that they foresaw the telephone and the phonograph becoming problematic as well. Id at 206.

90 The definitive article on the subject is Gajda, 2008 Mich St L Rev 35 (cited in note 88). For decades, the legal literature accepted William Prosser's claim, apparently made without evidence, that Warren was inspired to write the article after intrusive coverage of his daughter's wedding. See James H. Barron, Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890): Demystifying a Landmark Citation, 13 Suffolk U L Rev 875, 891–93 (1979). That account has been decisively rejected, see id at 896–97, but the story continues to be repeated. See Gajda, 2008 Mich St L Rev at 38 n 12 (cited in note 89) (citing various sources repeating this account).

91 See Pember, Privacy and the Press at 39–40 (cited in note 80). For example, Warren and Brandeis claimed that "[t]o satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers," which seems unlikely. Warren and Brandeis, 4 Harv L Rev at 196 (cited in note 16).

92 Warren and Brandeis, 4 Harv L Rev at 211, 213 (cited in note 16). Warren and Brandeis even proposed criminal sanctions for violations of privacy. See id at 219.

93 See id at 214. The one significant exception Warren and Brandeis allowed was for "publication of matter which is of public or general interest" with "public or general interest" defined narrowly as concerning, for example, "fitness for a public office." Id at 216.

94 Id at 203.
change were everywhere. Railroads crisscrossed the country, opening up the ability to trade in distant markets. The ease of communicating and transacting business at a distance slowly transformed American society from one that was dominated by local communities, each with its own social structure and status hierarchy, to one that was dominated instead by groups and hierarchies that transcended localities. Individuals went from having a single defined place in an isolated small town to playing numerous roles in various organizations: business enterprises, professional associations, religious denominations, labor unions, fraternal organizations, educational institutions, families, reform groups, political parties, and more.

The emergence of separately assessed roles required the creation of something new: limits on the appropriateness of sharing of information about individuals across group boundaries. Without such rules, it might become impossible to keep roles distinct, as information about a person’s activities in one context bled into other contexts. The economic and social transformations of the late nineteenth century, in other words, demanded the creation of our modern notions of privacy. But at the same time, the rise of mass media in its modern form was making cabining information more difficult. It was this

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97 See Halttunen, Confidence Men and Painted Women at 35 (cited in note 83); Howe, What Hath God Wrought at 826 (cited in note 96).
99 This claim is elaborated below in Section II.B.2.
challenge that spurred Warren and Brandeis to write their famous article.

1. Precursor to change: the collapse of the island communities.

Until the mid-1870s, as historian Robert Wiebe observed long ago, "small-town life was America's norm." The threads connecting localities to metropoles were for most of that time still too attenuated to bind them together. Instead, the isolated populations formed archipelagoes of what Wiebe called "island communities," towns that, while sometimes associated with a larger regional center, nevertheless "retain[ed] the sense of living largely to themselves." In those towns, social status was determined by stable and tight-knit groups, by members of the community who were able to observe a person's behavior over a long period of time. A single set of norms governed all aspects of life—religious devotion, family life, skill at one's occupation, personal interactions, adherence to social norms, wealth, racial or ethnic heritage. Members of the island communities interacted with each other frequently, no matter what their status, and thus there were regular opportunities for everyone in the town to assess each other's behavior and make status determinations. Even the elites in places such as New York City would engage in ritualized exercises of public display, for example taking regular promenades where they could see and be seen by their neighbors of all social strata.

Throughout the nineteenth century, as technology improved and the pace of industrialization increased, goods moved to more distant markets, and information flowed more easily between communities. But for most of the century these interactions were limited. Few national or even regional institutions, organizations, or social relations intruded upon the island

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101 Id at 2, 44.
102 See id at 133 ("Year after year townspeople watched each other labor and idle, save and spend, help and cheat, attend church and frequent saloons. . . . [T]hey judged their neighbors with a clear conscience, and . . . a single standard had generally sufficed for all."); Thomas Bender, Community and Social Change in America 118 (Rutgers 1978) (stating that different social roles "were once mutually reinforcing and collectively constituted a community").
103 See Beckert, The Monied Metropolis at 2 (cited in note 98).
communities. There was little in the way of government bureaucracy, and there were few regional offices for distant businesses, no professional organizations, and no unions. Few social structures of any kind tied the affairs of an island community to distant city centers or imposed constraints on the status determinations that the members of the community could make. It was not that members of an island community could expect privacy from each other; far from it. It was that they knew what to expect.

All of that began to crumble away, slowly, beginning in the 1870s. Many of the developments identified by legal scholars as producing the Warren and Brandeis article played a role in that shift: business expansion, migration, the new urban middle class, and the rise of mass-market newspapers. Although they did not directly produce the privacy crisis of the 1890s, they contributed to the transformation that did: each of these phenomena gradually undermined the authority of social hierarchies in small towns and villages, creating space for a new form of community, one centered on groups based on social roles.

The expansion of businesses had a profound effect on late-nineteenth-century America. In the early part of the nineteenth century, businesses in the United States were small, family-run affairs. But beginning in about the 1830s, improvements in transportation—roads and canals—and communications—the telegraph—led to an expansion of market connections. Once suppliers no longer needed to be located near where they ultimately sold their goods, a national market emerged, one that transformed not just commercial transactions but society as well. New social links were created between producers and

105 See Wiebe, Search for Order at 2 (cited in note 100).
106 See id at 113, 133; Bender, Community and Social Change at 61 (cited in note 102).
107 For discussion of the causes of the Warren and Brandeis article, see the sources cited above in notes 80–81.
108 See Chandler, The Visible Hand at 40 (cited in note 98) (Until the 1840s, both commerce and production "remained small and personal."). See also Wiebe, Search for Order at 19–21 (cited in note 100).
110 See Howe, What Hath God Wrought at 565 (cited in note 96); Wiebe, Search for Order at 48–49 (cited in note 100).
purchasers dispersed throughout the country, and a common consumer culture began to coalesce. The variations of isolated localities were smoothed out.

In order to govern such far-flung empires, businesses themselves had to change. One such transformation was due to the rise of the corporate form, but the truly revolutionary innovation was the development of tiered organization and the subsequent rise of middle managers. Tiered organization allowed distribution of management decision-making throughout a large company by putting some employees in charge of discrete units, such as regional offices or task-specific departments. This development not only allowed businesses to balloon to gargantuan size, but it also had an important social ramification: it created a new social network, the network of middle managers, clerks, and other office workers necessary to run a large enterprise.

Those middle managers joined entrepreneurs profiting from the growing market economy to form a new urban middle class. The rise of this new middle class had a disruptive effect on the existing social order. They struggled to define their place in existing social hierarchies by asserting the same entitlement to high status as the older mercantile and landed elite, leading to conflicts over measures of distinction. The managers and entrepreneurs were joined in this effort by an emerging group of professionals—doctors, lawyers, teachers, accountants, architects, and others—workers that sought to distinguish the worth of their skills and their services by defining a professional identity and a minimum set of qualifications. Warren and Brandeis, who graduated from Harvard Law School in 1878, were the product of this process, being among the first classes to graduate from Dean Christopher Columbus Langdell’s modern legal school curriculum.

Urbanization also attracted young adults from the hinterlands to try their fortunes in the cities. The prevailing norms in urban environments were quite different than those of

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113 Id at 38.
114 See Beckert, Monied Metropolis at 246–47 (cited in note 98).
115 See id at 253–54; Wiebe, Search for Order at 113 (cited in note 100).
isolated communities. But even more threatening to community norms was the very act of migration itself, which became increasingly common as transportation improved. As individuals continued to migrate into cities and westward, the social hierarchies and status regimes of the rural towns lost their hold on them. Migration effectively cut off an individual's history, making past compliance with a norm regime irrelevant and past deviance untraceable.

Finally, there was the emergence of mass-market newspapers, beginning with the first penny press in the 1830s. Editors in the 1830s were the first to realize that they could boost circulation and make higher profits by dropping the price of their newspapers. The key was including material the new urban middle class would be interested in reading. Not only did the first penny press essentially invent the modern newspaper, it also helped to define a new sort of community. The very act of learning what is happening in a distant location makes the events occurring there seem more relevant to one's life, and as historian Thomas Haskell has argued, can create a sense of empathetic connection. The penny press, merely by reporting on events in other towns and cities, knit those localities together. To the consternation of the existing elite, the penny press's reporting of society gossip had a similar effect.

As a result of these developments, by the 1870s, the locality-based "island communities" were coming apart at the seams. Their elites found their control over norm enforcement and

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116 See generally Halttunen, Confidence Men and Painted Women (cited in note 83).
117 See Friedman, Guarding Life's Dark Secrets at 28–29 (cited in note 79).
118 The old penny press of the 1830s, due to inflation, cost about four to six cents per issue in the 1870s. Revolutions in printing and in the newspaper business allowed some publishers to again drop the price in the 1870s, permitting them to reach a broader audience.
119 As Richard D. Brown has noted, improvements in nineteenth-century communications eliminated the power of local elites to act as "information gatekeepers for their neighbors." Richard D. Brown, Knowledge Is Power: The Diffusion of Information in Early America, 1700-1865 294 (Oxford 1989).
120 See Thomas L. Haskell, Capitalism and the Origins of the Humanitarian Sensibility, Part 2, 90 Am Hist Rev 547, 551 (1985) (noting that the market encourages participants to "attend to the remote consequences of their actions").
121 For the role of newspapers in defining a society, see generally Benedict Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism (Verso rev ed 2006).
122 See Schudson, Discovering the News at 28–30 (cited in note 17).
status determinations steadily slipping away. Traditional norms of deference to family elders weakened and a wave of scandals engulfed prominent figures. Economic activity frequently depended on decisions made elsewhere; specialization required increased reliance on others; social and professional networks for individuals were more and more extending outside of a given town or city. As roles split apart, the sorts of behavior appropriate in each sphere became more difficult to identify. Relations with family and friends became sharply different from other social relations, leading to painful adjustments for adherents of the old order.

2. The rise of the segmented society.

As the isolated communities faded, a new form of community rose to take its place. The new community ties were based on the segmentation of the various spheres of life, such as public and private. As historian Thomas Bender described the shift: "Work, once securely plated in the context of family and locality, became separated from its traditional social context. Whereas work, family, and town once supplied mutually reinforcing personal orientations, they became crosscutting sources of identity in the bifurcated society that emerged in the late nineteenth century." Sociologists and historians have long referred to this transition as the movement from *gemeinschaft* to

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123 See Beckert, *Monied Metropolis* at 325 (cited in note 98).
124 See Halttunen, *Confidence Men and Painted Women* at 13 (cited in note 83) ("As the ties between family generations weakened and as traditional controls over young workingmen declined, older patterns of social deference were giving way to the new significance of relations between peers.").
125 See Friedman, *Guarding Life's Dark Secrets* at 28–29 (cited in note 79).
126 See Wiebe, *Search for Order* at 49 (cited in note 100) ("Neither merchant nor farmer could borrow on an informal basis as he once might have, nor could he expect his reputation or his glib tongue to win a personal extension."); Lears, *No Place of Grace* at 34 (cited in note 111) ("As market relations spread, they undermined individual autonomy and promoted social interdependence."); Bender, *Community and Social Change* at 108 (cited in note 102) ("Growth in the size and complexity of local life combined with important losses in local autonomy encouraged people to identify community with certain of its parts rather than with the whole, and for a few precocious individuals, social networks completely independent of territory defined a new kind of community.").
127 Bender, *Community and Social Change* at 117 (cited in note 102).
128 Id at 108, 114.
gesellschaft, from “community” to “society.” What emerged from the transition were the beginnings of a recognizably modern society.

The key to this new form of community was the emergence of separate roles, each with its own set of statuses and norms that were enforced by different groups. Groups of all sorts separated away from their local communities to form their own ties. Elites began forming social networks that connected with elites in other cities, using institutions that extended nationwide such as corporate boards, fraternal organizations, elite colleges, and boarding schools. Indeed, Americans of all stripes began self-consciously associating with others of their “class”: The middle class joined professional organizations. Laborers joined unions. Each subset of society participated in their own leisure activities, attended their own cultural events, and joined their own organizations. By 1890, the transition was complete, with William James noting that “a man has as many social selves as there are individuals who recognize him and carry an image of him in their mind.”

The new system, however, was prone to a novel threat, one that had not been an issue in the old island communities where everyone knew everything. The waning influence of locality-based communities made control of a person’s outward image both more critical and more difficult, because information about individuals was increasingly in the hands of people beyond a person’s immediate social circle. It required the development of norms that protected one’s ability to maintain separate identities in different contexts: work tasks, family tasks, social

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129 Id at 116–17. The terms were coined by sociologist Ferdinand Tönnies in 1887. See generally Ferdinand Tönnies, *Community and Society* (Harper & Row 1963) (Charles P. Loomis, ed and trans). As Bender has argued, it would be more accurate to describe the shift not as from community to something else, but from one form of community to another. See Bender, *Community and Social Change* at 58 (cited in note 102).

130 See Bender, *Community and Social Change* at 118 (cited in note 102) (explaining the emergence of separately evaluated roles).


132 See Wiebe, *Search for Order* at 111 (cited in note 100). For the battles over social and cultural events, see Levine, *Highbrow/Lowbrow* at 206–08 (cited in note 131); Beckert, *Monied Metropolis* at 2, 146–47 (cited in note 98).

133 William James, *The Principles of Psychology* 294 (Henry Holt 1890). James continued: “Many a youth who is demure enough before his parents and teachers, swears and swaggers like a pirate among his ‘tough’ young friends.”
relations, religious observance, public activities, and particularly the home, which was believed to be a necessary respite from the crushing "overpressure" of modern life. The boundaries between these separate identities could not be maintained if information flowed freely between contexts.

3. The dawn of modern privacy.

Slowly, in the late nineteenth century, a response emerged to the threat posed by information flows to the rising associational communities. The response was the development of modern notions of privacy—our notions of privacy, under which employers are not supposed to know about family life, business dealings are distinct from political discussions, religious activities are not informed by behavior at sporting events and bars, and interactions with government officials are separate from all of these. Such restrictions are a necessary concomitant of the rise of separate social roles produced by the transformation of the 1870s. And privacy law was developed to help enforce this new set of norms when social sanctions proved insufficient.

As Warren and Brandeis themselves made clear, the "modern enterprise and invention" they worried most about was the newspaper industry. The newspaper industry was at that time in the midst of yet another transformation, the rise of the second penny press. The second penny press must have appeared particularly destabilizing to Warren, Brandeis, and their cohorts. It was not merely that some papers had dropped their prices to a penny to boost circulation, or that they covered society gossip. All of that had occurred before, in the 1830s. What was different in the 1890s was the audience that newspapers could now reach, and upon whom they relied for their massive circulations. The old penny press had been revolutionary in its day because the drop in price allowed the

134 See Lears, No Place of Grace at 52 (cited in note 111) (describing the perceived importance of maintaining the separateness of the home); Bender, Community and Social Change at 61 (cited in note 102) ("Modern urban society is a social aggregate in which different activities, ranging from worship and play to work and politics, each generate or occur within different networks of social interaction. Each of these also provides a reference group that forms a portion of modern man's identity.").

135 Warren and Brandeis, 4 Harv L Rev at 196 (cited in note 16).

136 See Schudson, Discovering the News at 89–90 (cited in note 17).
rising entrepreneurial middle class to purchase the newspaper, and the content of the penny press reflected that class's interest in local and distant news. The new penny press lowered prices to the point where a daily newspaper was affordable even to laborers. By the turn of the century, almost everyone read a newspaper.\footnote{See Richard L. Kaplan, \textit{From Partisanship to Professionalism: The Transformation of the Daily Press}, in 4 Carl F. Kaestle and Janice A. Radway, eds, \textit{Print in Motion: The Expansion of Publishing and Reading in the United States, 1880-1940} at 116, 120 (North Carolina 2009).}

It was not simply the price that induced the working class to begin purchasing newspapers; the content was aimed to draw in a wider audience as well, and with it the advertisers who pay to reach such an audience. The 1890s penny press put in illustrations to appeal to immigrants from southern and Eastern Europe,\footnote{See Schudson, \textit{Discovering the News} at 97 (cited in note 17). By 1890, immigrants comprised 40 percent of New York City's population. See id.} large headlines to appeal to commuters, and advertisements and tips to appeal to consumers, particularly middle-class women.\footnote{See id at 100.} Above all, the penny papers developed content that their immigrant, laborer, harried middle-class commuter, and domestic consumer audience would pay to read—compelling narratives about interesting events, in preference to information-laden reports about important events. It was these techniques that were labeled "sensationalism," meaning the use of attention-getting techniques to draw attention to local crime news, scandal, and high society coverage—news items that appeared in most papers at the time, but were promoted most heavily in the new penny press.\footnote{See id at 95; Kaplan, \textit{From Partisanship to Professionalism} at 124 (cited in note 137).}

The broad distribution of scandal and gossip was threatening to the emerging social order. The new social world of the 1890s depended crucially on the construction of role-specific presentations of one's outward image. That in turn depended on limiting the flow of inappropriate or unexpected information between contexts. The social norms governing such flows were being constructed for the first time in the last quarter of the nineteenth century, just as the new penny papers, with their obtrusive coverage of crime, scandal, and the rich and famous, were achieving success with mass circulation. The result was
that gossip could not be contained within particular peer groups, but, through newspapers, could escape those boundaries—to laborers at a time when class tensions were high, to immigrants at a time when anti-immigrant sentiment was widespread, and to women at a time when middle-class women were increasingly being sequestered to particular domestic roles.\textsuperscript{141} The penny papers were also distributing images of the elite as well, at first in the form of illustrations, but soon after by reproduction of photographs. Prior to the widespread use of illustrations in newspapers, only a close associate would have regular access to one's appearance. And the new penny papers threatened to broadcast this information—gossip and illustrations—not just within a particular city, but outside of it as well; indeed, the major newspapers were expanding their distribution to deliver content on a national scale.\textsuperscript{142} Such widespread dissemination threatened to undermine the fragile norms separating social contexts that were then under construction.\textsuperscript{143}

Warren and Brandeis are sometimes derided for their fear of the spread of gossip.\textsuperscript{144} But in fact gossip is a critically important source of social information that has legitimate as well as illegitimate uses.\textsuperscript{145} The battle that led to the emergence

\textsuperscript{141} For a historiographical overview, see generally Linda K. Kerber, \textit{Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History}, 75 \textit{J Am Hist} 9 (1988).

\textsuperscript{142} This helps to explain why Warren may have been particularly bothered by the reports uncovered by Amy Gajda in newspapers from New York and Washington. See Gajda, 2008 Mich St L Rev at 44–57 (cited in note 88). However, Boston papers were, as Edward Pember concluded, relatively staid. See Pember, \textit{Privacy and the Press} at 40 (cited in note 80).

\textsuperscript{143} It is likely no accident that this turmoil erupted as the United States was dealing with a surge of migrants and immigrants swelling the cities. Increasing ties between networks can actually destabilize those networks, whether social networks, see Ellickson, \textit{Evolution of Social Norms}, in Hechter and Opp, eds, \textit{Social Norms} 35, 37 (cited in note 22), or physical networks, see Marten Scheffer, et al, \textit{Anticipating Critical Transitions}, 338 \textit{Science} 344, 344–45 (Oct 19, 2012); Charles D. Brummitt, Raissa M. D'Souza, and E.A. Leicht, \textit{Suppressing Cascades of Load in Interdependent Networks}, 109 Proc Natl Acad Sci E680, E683–84 (2012) (finding that, past a certain point, interconnectivity between electrical grids makes them subject to larger cascades).

\textsuperscript{144} See, for example, Stewart Baker, \textit{Skating on Stilts: Why We Aren't Stopping Tomorrow's Terrorism} 311 (Hoover Institution 2010) ("What's remarkable about 'The Right to Privacy' is that the article's title still invokes reverence, even though its substance is, well, laughable.").

of privacy law was a battle over the rules of distributing such powerful information.\textsuperscript{146} That battle erupted just as new group boundaries were taking form and solidifying, in particular the boundaries between classes.\textsuperscript{147} Widespread newspaper readership threatened that nascent structure by allowing the lower classes "to be in proximity to the mighty, the famous, the glorious, the authoritative, and to derogate them at the same time."\textsuperscript{148}

The irony of the Warren and Brandeis article is that, while it essentially invented the modern concept of legally protecting separately defined roles, the particular legal remedy it proposed was ultimately little used. By the second decade of the twentieth century the specific privacy crisis that had alarmed Warren and Brandeis eventually began to subside, as the new elites became more familiar with mass media, and more adept at exploiting or avoiding it. Thus, despite an initially warm reception,\textsuperscript{149} the effort to establish a broad privacy right fell short of the mark that Warren and Brandeis, in \textit{The Right to Privacy}, had identified. That is, \textit{The Right to Privacy} did not lead to a legal prohibition against, for example, describing a woman's appearance, or listing the contents of a private collection, nor did it inspire a criminal prohibition on invasions of privacy. The most egregious intrusions—spying on someone in a secluded place, using a person's image in advertising without consent—were ultimately prohibited, but little else.\textsuperscript{150}

\begin{footnotesize}
\textsuperscript{146} See Gajda, 2008 Mich St L Rev at 43 (cited in note 88) (noting that "[t]he word gossip is used no fewer than five times in a single, key paragraph"), citing Warren and Brandeis, 4 Harv L Rev at 214 (cited in note 16); Barron, 13 Suffolk U L Rev at 918 (cited in note 90) ("The patrician view held that news considered worthy of print was made by public figures, not by ordinary people. Newspapers existed to serve the ends of public policy, not to cater to the mass tastes of the general public.").

\textsuperscript{147} See Beckert, \textit{Monied Metropolis} at 273 (cited in note 98).

\textsuperscript{148} Shils, 31 L & Contemp Probs at 293 (cited in note 84). See also Barbas, 61 DePaul L Rev at 981 (cited in note 19) ("Unwanted publicity of private life was thus seen as destructive of the social order because it disturbed the formalized rituals of self-presentation and ruptured the strict boundaries between public and private life."). Although privacy and status thus appear to be related, the idea that privacy is a means to defend elite status was contested even in 1890. See Brook Thomas, \textit{The Construction of Privacy in and Around "The Bostonians"}, 64 Am Lit 719, 723 (1992).

\textsuperscript{149} See Barbas, 61 DePaul L Rev at 985 (cited in note 19); Bratman, 69 Tenn L Rev at 644-47 (cited in note 80).

\textsuperscript{150} Commentators have alternately viewed this result as a victory or a failure. Compare Zimmerman, 68 Cornell L Rev at 365 (cited in note 145), with Neil M. Richards
\end{footnotesize}
In 1890, that outcome was far from apparent. The ground was shifting but it was unclear what the terrain would look like when it stopped. Warren, Brandeis, and their contemporaries were attempting to make the minimal changes possible; they wanted to construct a world in which the new associational communities were permitted to operate much like the isolated communities had, as self-contained social units where the participants in the norm regime were all members of the same community with reciprocal obligations. That turned out not to be possible, and while it was difficult to see why at the time, the popular press appeared to be an exemplar of the problems of replicating isolated communities in social groups. The sense of crisis that produced The Right to Privacy was in part a sense of anxiety brought about by the dark gloom of the future.

It is too easy to conclude that late nineteenth century elites were atypical in their concern for their status or their inability to foresee the course of future events. Their norms are not our norms, and their statuses are not our statuses, and thus they perhaps appear trifling. But it would folly to suppose we do not have our own norms or statuses worth preserving, or that we are better able to determine what will happen to them. Status determinations need not be class-based; one’s status as a nice person, or a respected authority figure, is as much dependent on norms of appropriate behavior as those of late nineteenth century urban elites. And a threat to such statuses arising from a modern privacy shift would be as keenly felt.

III. THE PRESENT SHIFT

The circumstances that give rise to Warren and Brandeis’s concerns—yellow journalism and the industrial revolution—are now a distant memory. Even newspapers appear to be nearing the end of their run. But there is nevertheless some indication that what happened during the 1890s is happening once more. Again, there is a rising privacy panic, brought on by anxieties connected to new communications technologies. Again, the “death of privacy” is being widely forecast. And again, there are calls for changes in the law to meet these problems.

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As argued above, it makes a significant difference what underlies these expressions of alarm. If the rising anxiety is due to an increase in privacy intrusions enabled by new technologies, then it is imperative for the law to step in and improve enforcement of existing norms. But if the fears being expressed are due instead to changes in privacy itself, then it is substantially less clear how or even if the law should respond. Adopting new laws or regulations in order to shore up a weakening privacy regime risks ossification. This can leave the community locked in to a suboptimal set of norms, artificially sustained by the difficulty of switching.

A privacy crisis therefore requires policymakers to determine the source of that crisis before responding. But distinguishing between norm violations and norm shifts is difficult, because the differences are subtle. In both cases, existing norms are violated. In both cases, the violators have likely not internalized those norms. But in the first case, persons violating the norm do not do so out of any sense that a different norm should govern their behavior; they just see an opportunity to easily violate a norm that others adhere to. In the second case, the violators are following a different set of rules, one that has been adopted by a subset of the relevant community. At the beginning of a norm shift, the adherents of a new norm regime may not have any clear sense of what the new norms are or even that they are different than the ones that came before.

Nevertheless, it may be possible to distinguish between seemingly stable norms that are being violated and those whose very legitimacy is being challenged. As detailed below, there is some evidence that the latter is occurring, for at least some privacy norms. But even assuming that we are in the midst of a norm transition, that assumption leads to a second question: what if the new privacy regime is objectively worse than the one we have now? It may be worth the risk of ossification if the existing norm regime promotes social welfare more than its

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151 Ed Baker is one of the few who have addressed this issue in the context of privacy law. See Baker, 21 Soc Phil & Pol at 251–53 (cited in note 145). See also Post, 77 Cal L Rev at 975 (cited in note 9) (arguing that limiting privacy tort actions "preserves the flexibility and vitality of social life, which undoubtedly would be hardened and otherwise altered for the worse if every indiscretion could be transformed into formal legal action").

152 In complexity theory, the phenomenon is known as getting trapped on a local maximum. See, for example, Stuart Kauffman, The Origins of Order: Self-Organization and Selection in Evolution 36–40, 214–15 (Oxford 1993).
proposed replacement. This potential for a retrograde privacy shift would seem to call for a balancing of the costs and benefits of one regime versus another in order to determine which is socially optimal.

Unfortunately, as I argue below, such a balancing is likely impossible by any person currently invested in the existing norm regime. We are by nature bound up in the norms that define us. There is no way to step outside of our own culture and evaluate it from a remote vantage point. In any contest between the current norm regime and an untested replacement judged by someone who has succeeded under the current norms, the current norms will always win. This incommensurability problem again counsels caution on the part of policymakers responding to a crisis arising from a possible norm shift.

A. Modern Privacy Norms in Transition

Although it is too soon to tell for certain if a norm shift is underway, there are signs that that is the case. Four are discussed below. First, the conditions appear to be favorable: the social impact of the revolution in information technologies over the past thirty years is poised to rival that of the Industrial Revolution of the late nineteenth century. Second, there is some indication that one victim of new information technologies may be the separation of roles that was responsible for modern notions of privacy in the first place. Third, much of the alarm relates to potential harms rather than tangible harms resulting from privacy violations, indicating that it is the opacity of a future shift in status regimes that may be driving the concerns. And finally, there is a noticeable theme of declension in recent commentary, one that places a large amount of the blame for the erosion of privacy on the very individuals who are losing it. This sort of rhetoric signals a battle over the content of privacy norms, not over their enforcement. It is the sort of rhetoric one would expect at a time of norm transition, as adherents of the old regime attempt to convince those departing from it of the errors of their ways.

1. Changing conditions.

Technological developments have brought a significant change in privacy norms within the realm of the plausible. The rise of networked computers and portable digital devices
appears to be producing a fundamental shift in society, altering how information is collected, produced, distributed, and stored—in short, how information is assimilated and understood—not just by large organizations and governments, but by everyone. Three significant effects are immediately clear. First, pervasive documentation has become democratized. With digital media, it is simple and inexpensive for individuals, businesses, and governments alike to record the world around them through audio or video, to record individuals’ movements or transactions through receipts or logs, or to record thoughts, ideas, or impressions in documents, messages, posters, presentations, and other media. Whereas in the island communities of 1870, every movement and transaction was likely to be observed by one or more neighbors, now every move, every communication, every interaction, and many thoughts are recorded in one or more devices, by others or by ourselves.

Second, the cost—or “friction”—of transferring all of that information far and wide has vastly decreased. It is now easy for ordinary individuals to transmit information not only worldwide, but to large numbers of people, a feat whose prohibitive expense previously required a large-scale enterprise. The prevalence of information and the ease with which it can be transmitted means that individuals and businesses are easier to find—it is easier to identify someone based on only a few clues, or to find a person or a business to communicate or transact with. The effect is, again, something of a return to the island community of 1870, only now the island community is Earth.

Third, it is a trivial matter to store large amounts of these digital flotsam and jetsam. That means that our devices and communications networks have a memory. The records and messages being created today are more or less permanently archived, enabling them to be recalled and used later, in different contexts, using technologies not available now. The long memory of small towns has been restored.

The consequences of all of this for society are profound, and we have barely begun to plumb their depths. As Google CEO

\[153\] More specifically, the technology exists that permits low-friction sharing. Whether such technologies should be implemented is a different question. See generally William McGeveran, *The Law of Friction*, 2013 U Chi Legal F 15.

Eric Schmidt has observed, "I don't believe society understands what happens when everything is available, knowable and recorded by everyone all the time."155 This is a significant shift from the world in which our system of norms first developed. The result is a large number of areas where existing law and norms appear to be no longer controlling behavior that they used to regulate effectively.

Consider, for example, the issue of privacy in public. It was an unusual circumstance when an ordinary individual in the twentieth century had to worry about maintaining their privacy in public. Only a few entities, such as large-scale enterprises like magazines or news media, could violate an ordinary individual's privacy by broadcasting their actions to a large audience. But the circumstances in which a newspaper or magazine would want to, say, place an average pedestrian on its cover were rare.156 As a result, a limited tort remedy, combined with the ordinary operation of informal norms, was enough to control the spread of information to the degree required by twentieth-century norm regimes and the social roles and status determinations that depended on them.

But widespread dissemination of information about ordinary individuals—through anecdotes, or images, or personal information—is now much more commonplace. And more is on the way. Video capture is now possible by sufficiently small devices and transmission or storage of video is sufficiently easy that wearable cameras constantly in record mode are likely to soon become prevalent. Every significant moment is likely to be captured in digital media by some, and perhaps most, people present. Facial recognition technology is also improving and, if combined with constant video capture, could completely eliminate the ability to anonymously walk down a street, at least if the street is not entirely deserted.157 Smartphones are

155 Holman W. Jenkins Jr, Google and the Search for the Future, Wall St J A9 (Aug 14, 2010). Schmidt then predicted, somewhat fancifully, that as a result "every young person one day will be entitled automatically to change his or her name on reaching adulthood" in order to escape this effect.

156 For a famous example, see Arrington v New York Times, 434 NE2d 1319, 1320 (NY 1982).

157 See John Diaz, An In-Your-Face Technology, SF Chron F2 (June 12, 2011) (quoting a PC World article describing facial recognition technology as "the end of privacy as we know it—imagine a world in which someone can simply take a photo of you on the street, in a crowd, or with a telephoto lens, and discover everything about you on the Internet").
becoming more capable as well, acquiring both video conferencing and voice recognition capabilities, making it easier to connect to anyone or any information accessible on the Internet. Soon it may become common for a person to be accompanied in his or her daily activities by a travelling Greek chorus of friends, sharing and commenting on everything that anyone within their circle sees. In such an environment, the wide distribution of information about individuals will become frequent, not rare, placing it beyond the ability of high-cost civil litigation to effectively police.

The shift now occurring represents something of an unwinding of the transformation that confronted Warren and Brandeis in 1890. Whereas The Right to Privacy was a reaction to the onset of mass communications, a single universe of print and popular culture that connected all social groups and classes alike, the present transformation is witnessing the slow dismantling of mass media and mass communications. Instead, we are transitioning to an informational world that is much more decentralized and much more interconnected. The social ramifications of those changes will have consequences that have only begun to play out, but they may be on a par with those of the late nineteenth century.

2. Collapsing roles.

One casualty of these changes may be the very notion that modern privacy was founded on: the division of an individual’s social existence into separate, and separately evaluated, roles. In other words, we may be about to come full circle, with the dissolution of the role-specific and context-specific status determinations that the economic changes of the late nineteenth century brought into being. The notion of distinct social roles

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158 Caution is warranted here. Forecasts of the death of various widely distributed media—films, books, broadcast television, newspapers—date back decades. Even if one of these transformations eventually comes to pass, it may be despite such forecasts rather than in accordance with them.

159 This is reasonably open to debate, however. In terms of economic output alone, economists disagree whether Internet technologies are likely to lead to the same growth in productivity as previous technological revolutions. See Steve Lohr, Looking to Industry for the Next Digital Disruption NY Times (NY Times Nov 23, 2012), online at http://www.nytimes.com/2012/11/24/technology/internet/ge-looks-to-industry-for-the-next-digital-disruption.html (visited Sept 15, 2013).

160 The concern that new technologies could put pressure on the maintenance of
is a critical component of most contemporary Americans' personalities: the central premise of one of the core theories of modern sociology is that "the individual should be viewed as a collection of social roles." Each role has a set of norms associated with it, assessed by a particular social group. The maintenance of such a system requires distinct status determinations for each role, which in turn requires a consideration of only a subset of information about each individual—information about the person's performance in that role as friend, co-worker, parent, etc.—rather than the broader set of all information about an individual's activities.

The easy collection and distribution of information results in a more densely interwoven web of social connections, meaning that a person's behaviors are more likely to slip the bounds of those physically present at the time, or even their close associates, and spread far beyond that—and, like a wave in a basin, eventually rebound and return to the source. This threatens the current function of privacy norms in keeping personal information within limited social or role-based contexts. Reputational or shaming information—gossip, in other words—may spread well beyond such limits to people the subject does not even know, or does not know currently. Archiving and searchability will undermine the temporal context of personal information as well as its physical context. And our current mix of laws and norms may be powerless to stem the tide. Privacy norms adequate for governing the slow movement


163 See Daniel J. Solove, The Future of Reputation: Gossip, Rumor, and Privacy on the Internet 74 (Yale 2007) ("The Internet is transforming the nature and effects of gossip. It is making gossip more permanent and widespread, but less discriminating in the appropriateness of audience."); Rosen, The Unwanted Gaze at 7 (cited in note 4) ("At the beginning of the twenty-first century, new technologies of communication have increased the danger that intimate personal information originally disclosed to our friends and colleagues may be exposed to—and misinterpreted by—a less understanding audience.").
of information in relatively close-knit associational communities are unlikely to be adequate to police behaviors by distant strangers far removed from one's physical proximity.164

If individuals cannot maintain informational boundaries between their various roles, then the distinct faces they present to the world will collapse into one. Indeed, that is exactly what is forecast by Facebook founder Mark Zuckerberg. "You have one identity," Zuckerberg declared in 2009, perhaps prematurely. "The days of having a different image for your work friends or co-workers and for the other people you know are probably coming to an end pretty quickly."165 If true, this would be a profound shift in modern society. Modern society is based on the transformation that occurred beginning around 1870, a transformation that resulted in a separation of roles into distinct realms where a subset of an individual's behaviors and traits were assessed by separate social groups. Privacy law arose to protect the emergence of that structure. The collapse of that structure would represent a revolutionary change.

Our current laws and norms may be powerless to prevent this. They were designed for a world of large mass and high friction. In other words, our laws and norms have always depended on a background assumption of high costs to information distribution, making violations infrequent.166 The law could thus focus on large-scale operations engaged in resource-intensive activities—businesses, government investigations, news media—leaving informal norms, enforced in face-to-face transactions with peers, to handle the rest. That mass and friction constitute part of what Harry Surden has called

164 Consider the example of “Dog Poop Girl” that opens Daniel Solove’s book, The Future of Reputation. The moniker “Dog Poop Girl” refers to a Korean woman who failed to clean up after her dog on a subway car. See Solove, Future of Reputation at 1–3 (cited in note 163). There are longstanding norms for punishing a violation like that in real space—dirty looks and vocal complaint are appropriate, physical assault and stalking are not. But the norms for what is permitted online are unclear; worldwide, permanent condemnation—the punishment actually inflicted on the woman—seems a bit excessive.

165 Chris Hoofnagle, The Facebook Enigma, Huffington Post (Sept 30, 2010), online at http://www.huffingtonpost.com/chris-jay-hoofnagle/the-facebook-enigma_b_704677.html (visited Sept 15, 2013). See also Jose Antonio Vargas, The Face of Facebook, New Yorker 54 (Sept 20, 2010) (explaining that Zuckerberg’s Facebook page describes his goal as “trying to make the world a more open place”).

166 See Harry Surden, Structural Rights in Privacy, 60 SMU L Rev 1605, 1612 (Fall 2007) (“[M]any privacy interests are protected not by positive legal prohibitions on behavior, but by structural constraints which act as reliable substitutes for legal constraints.”).
privacy's "structure,"167 or what courts have occasionally referred to as "practical obscurity"168—privacy resulting from the fact that it is ordinarily too expensive to identify someone or track someone's behavior based on idle curiosity.169 That structure has changed, and privacy norms adequate for governing the slow movement of information in relatively close-knit associational communities are unlikely to be adequate to police behaviors by distant strangers far removed from one's physical proximity.

3. Fear of the unknown.

A third sign of transition is the high levels of anxiety expressed over actions that are not currently producing tangible harms. Take, for example, the widespread unease over the amount of information about ordinary individuals being collected by businesses, government, and other institutions.170 Sometimes the concern is described as a fear that mistakes will be incorporated into the data that will prove difficult to eradicate,171 or that the information collected will be insecure. Those are both legitimate concerns, but mistakes can just as easily be corrected by more, rather than less, data, and security of information has been an issue for as long as there have been eavesdroppers. A more likely source of the recent surge in concern is that customer information is now distributed among a wide range of information brokers and purchasers who are

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167 See id at 1606. By "structure," Surden means everything apart from law that regulates behavior. Id.


169 The fact that there is far more information to sift through is unlikely to restore practical obscurity; the power of search engines has more than kept pace with the explosion in the amount of available information. See Paul Ohm, The Rise and Fall of Invasive ISP Surveillance, 2009 U Ill L Rev 1417, 1429–30 (2009) (improvements in processing speed have outstripped growth in bandwidth).


completely unknown to the consumer and whose information practices are opaque. There is no way to know of, or even to track, what is done with personal information and how securely it is kept.

Indeed, something like that concern likely explains one of the more common concerns expressed at constant data collection, which is a sense of unease as to what is being done with all of that information. Surveillance is a real privacy harm, one that can chill behavior and speech, and can be harmful to the development of individual autonomy required for a democratic society. But for most collections of personal information, whether by companies or by government, the extent that the information is being used for surveillance is unknown. Put differently, what is unclear about the new world is the frequency with which nefarious or irrational people will exploit their newfound ability to gather personal information in order to subject individuals to tangible harms.

This remains true even after the recent revelations concerning the National Security Agency’s surveillance of electronic communications. It is now clear that the government is collecting and searching the emails, telephone calls, and other communications—perhaps even postal mail—of millions of Americans. But for any particular person, what is

174 See, for example, Clapper v Amnesty Intl USA, 133 S Ct 1138, 1149 (2013) (holding that there was no standing to challenge surveillance due to lack of knowledge of the exact targets).
175 See Benny Evangelista, Phones with “6th Sense” Envisioned for Future, SF Chron at D1 (June 19, 2012) (quoting CEO of start-up: “The reality is there are deviants and weird people all over the world”). Technologies that divulge information in new ways, such as one’s current location, tend to raise concerns that the information will be used for much more nefarious purposes than it was previously. Evan Selinger, Why Do We Love to Call New Technologies “Creepy”? Slate Future Tense (Slate Aug 22, 2012), online at http://www.slate.com/articles/technology/future_tense/2012/08/facial_recognition_software_targeted_advertising_we_love_to_call_new_technologies_creepy_.html (visited Sept 15, 2013) (“Calling something creepy can be a way of saying, ‘There’s no immediate problem, but I can foresee ways in which things might go wrong in the future.’”).
176 See, for example, Charlie Savage, N.S.A. Said to Search Content of Messages to and from U.S., NY Times, A1 (Aug 8, 2013). The details of the NSA surveillance program are still unclear.
unclear, and what will likely remain unclear for some time, is whether any government employee has scrutinized that person's communications and learned sensitive information from it. Only the latter sort of activity constitutes an actual privacy invasion, as opposed to a reasonable fear of one.

We do not have enough experience with the online accessibility of information to assess the probability of intrusion. How many government employees, grudge-holders, or idly curious individuals are likely to use new technologies to learn sensitive facts about a particular person? Perhaps the world has a relatively high percentage of such snoops, and the only thing that has been holding them back has been the high cost of obtaining the necessary information. Or perhaps anyone disposed to be a snoop is willing to bear the paper-world costs to engage in such behavior. An intermediate possibility might be that some forms of malefactors—misogynistic stalkers, perhaps—have been unleashed by the lower costs of modern harassment, but other sorts of persecutors remain deterred. We will not know for certain until we have spent some time in the reduced-transaction-cost world, at which point we will be able to rely on evidence rather than suspicions.

As with all revolutions, what is most unsettling to those heavily invested in the existing structure is that it is impossible to predict where they will wind up in the social order that emerges after the revolution is over. What provokes the extreme levels of anxiety described earlier, manifesting as fears of catastrophic upheaval, is the prospect of changes to an established norm regime. In many ways, it can be the transition itself that proves the most difficult and harmful, rather than the state of society either before or after the transition. When a prospective shift in norm regimes is at hand, it can be deeply unclear which norms and, ultimately, which status determinations ought to be followed. Even worse, the norms of a

179 There is a danger that people may grow comfortable with new practices before their judgments about them coalesce. But given the subjective nature of privacy, it is not clear in that case whether any harm would actually result from the practice, unless one subscribes to a theory of privacy false consciousness.
180 Again, this is not an irrational or shallow fear. We all like to be respected by our peers, and most of us have figured out ways of accomplishing that, even if imperfectly. Suddenly changing the rules is disruptive.
coalescing new regime may only be half-formed, and may be the subject of some debate. No matter what choice a person makes, he or she risks getting caught between worlds—either persisting in following old practices in a world governed by a different set of rules or switching too quickly to new norms that never quite take hold. People who expect information to remain within its traditional confines may be unpleasantly surprised. People who believe that the world has changed may be similarly surprised when they encounter someone in a position of authority with the opposite view. Until the transition is complete, disputes over what rules apply, or should apply, will be common.


A fourth sign of a norm shift in progress is the frequent attempts to criticize the morality of those who forgo their own privacy. As norm regimes begin to shift, norm entrepreneurs often emerge on either side, arguing for holding the line or jettisoning the old. Modern norm entrepreneurs such as Mark Zuckerberg have attempted to convince others that trying to maintain role boundaries, or refusing to widely disclose

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181 See Tom Zeller Jr, Lest We Regret Our Digital Bread Crumbs, NY Times C5 (June 12, 2006) (quoting John Battelle: “We are living online, but have yet to fully realize the implications of doing so.”).

182 See Andrew Couts, Who Killed Privacy? You Did, Digital Trends (Aug 7, 2012), online at http://www.digitaltrends.com/opinion/state-of-the-web-who-killed-privacy/ (visited Sept 15, 2013) (“[N]o one yet knows the long-term consequences of making so much of ourselves known to the world... Perhaps we will all just accept that everyone has dirty laundry, and overlook the salacious details that might pop up about a person from time to time. (Not a chance, I'd say.”). There is nevertheless some evidence that, in fact, once such disclosures become widespread, their salience and stigmatizing effect will decrease. See generally Alon Harel and Alon Klement, The Economics of Stigma: Why More Detection of Crime May Result in Less Stigmatization, 36 J Legal Stud 355 (2007).

183 The companies managing social media sites, for example, change the rules governing disclosures on a regular basis, often retroactively. See, for example, Taek Kwon, Friendster's Sneak Attack on Your Anonymity, bIPlog (Sept 29, 2005), online at http://www.boalt.org/biplog/archive/000631.html (visited Sept 15, 2013).

184 See Rosen, The Unwanted Gaze at 195 (cited in note 4) (“Will we be passive in the face of technological determinism, or do we have the vision to insist on rebuilding the privacy we have lost?”).

185 See Sunstein, 96 Colum L Rev at 929 (cited in 30). Sunstein appears to consider only the proponents of change to be norm entrepreneurs, but given the invisibility of status and norm regimes, see text accompanying notes 67–69, even those opposed to change need to innovate when called upon to defend what never needed explanation before.
information, is worse than old-fashioned: it’s dishonest. Or as Zuckerberg has put it, “Having two identities for yourself is an example of a lack of integrity.” Others insist that an increasing lack of respect for such boundaries is not simply a public policy debate, but evidence of a deep moral decline.

The struggle to define the moral valence of role maintenance is probably what explains much of the expressed concern or disdain at “oversharing”—voluntarily disclosing too much information about oneself online. Criticism of oversharing has reached a fever pitch in recent years. Now, as in the late nineteenth century, the purpose of the criticism appears to be to reinforce existing norms by shaming those who depart from them. In one typical recent salvo, New York Times columnist Roger Cohen denounced the “unctuous ooze of status updates and vacation snaps seeping across Facebook and Twitter and the rest.” To call it “information overload,” Cohen harrumphed, “would be to debase the word ‘information.’” The fear is that if disclosure of information about one’s own life becomes widespread, disclosure of such information by others will not seem so transgressive. The criticism of oversharing is thus one front in a wider war against norm change.

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187 Hoofnagle, Facebook Enigma, Huffington Post (cited in note 165). Others have argued that privacy must be rebalanced against other values, such as security, in light of modern developments. See, for example, the debates discussed in Priscilla M. Regan, Legislating Privacy: Technology, Social Values, and Public Policy 181–90 (UNC 1995).


191 See, for example, Anita L. Allen, Coercing Privacy, 40 Wm & Mary L Rev 723, 730–32 (1999) (expressing concern that increased media exhibitionism indicates long-term decline in the desire for privacy).
Some of the most heated battles involve the behavior of young people. In many cases there is a palpable sense of schadenfreude at the potential negative consequences of overexposure. The aim is often not to instruct the unknowledgeable, but rather to punish the selfish and correct the wayward.192 “All good things must come to an end,” the New York Times editorial board announced in 2006, “including the chance to post lascivious photographs and diary entries on the Internet without repercussions... What [young people] are getting now is an education in the virtues of privacy.”193 The privacy consequences can be seen as just deserts as well as unfortunate accident. Reports of employers searching social media for information about young applicants may have a similar effect.194 While much of the reporting may be a public service for the young, it also serves as norm education. Indeed, it is possible that employers too are engaging in norm maintenance as much as they are reducing risk.195

There is substantial reason to doubt, however, that young social media users are simply unaware of privacy concerns. Users of social media and other electronic communication tools have clearly not abandoned the notion of keeping their information private; studies are clear, in fact, that they take their own privacy seriously and take steps to protect it.196 It is

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193 Online Party Crashers, NY Times C11 (June 18, 2006).


196 See Stefanie Olsen, Study: Majority of Teens Stay Private Online, CNET News (Jan 8, 2007), online at http://news.cnet.com/2100-1038_3-6148192.html (visited Sept 15, 2013); Mary Madden, Privacy Management on Social Media Sites (Pew Research Center
just that those steps are different from the ones that adherents to established privacy norms would take.\textsuperscript{197} They are different because they are based on a different notion of what information should be shared, how it should be shared, and who it should be shared with.\textsuperscript{198}

In part, the norm transition is occurring because of the way that social media is altering remote interactions. While previous technologies have increased the speed and ease of sending individual messages, communications over social media have an ever-present quality that moves them from the atypical to the quotidian. Social media allows “ambient awareness,” an information exchange that resembles the small details one picks up from being in physical proximity to someone.\textsuperscript{199} That sort of connection has a social impact; it allows “individuals to present themselves, articulate their social networks, and establish or maintain connections with others” in new ways, across vast physical and social distances, and forming new sorts of informal groups.\textsuperscript{200} Sharing information that would not otherwise be the subject of written communication is a common way to build social capital in that setting.\textsuperscript{201} But the rules and expectations for information shared in this way are still being worked out.


\textsuperscript{198} See Lewis, Kaufman, and Christakis, \textit{14 J Computer-Mediated Commu} at 96 (cited in note 196) (“When a new technology such as Facebook is released, there is a high degree of ambiguity over appropriate norms of conduct—the very definition of this space as public or private is contested.”).

\textsuperscript{199} See Clive Thompson, \textit{I’m So Totally, Digitally Close to You}, NY Times Mag 42 (Sept 7, 2008).


And it confounds and disturbs those used to interacting remotely in more formal, self-contained communications.

B. The Response of Privacy Law

If the current privacy crisis is in fact generated in part by a norm shift, then what should the legal response be? Obviously, if the new norms represent an improvement over the old, the law should not step in to forestall change. Even so, that does not mean that regulators must stay their hands entirely. For example, no matter what the state of the debate over privacy norms, new laws or regulations are properly invoked to combat actions that cause tangible harm—"dead bodies," as Ann Bartow has put it. Privacy law can alter the balance of power, countering increases in identity theft, fraud, threats to personal safety, and emotional distress. There is also little risk in using the law to protect those norms that are likely to continue to prove stable—norms that have existed relatively unchanged for generations and show no sign of abating, such as the norm that it is a privacy violation to distribute images taken of someone naked without their consent. But at a time of norm transition, policymakers should take care that any new laws that are adopted are flexible enough to account for changing circumstances, such as by incorporating standards for judges or juries to exercise discretion or by assigning key determinations to regulatory agencies. Otherwise, there is the risk that fading norms will be locked in by the force of law well past their expiration date.

All of that assumes that adoption of the new norms would be socially beneficial. But what if that proves not to be the case? In that event, it might seem perfectly appropriate to use new laws or regulations to stave off change. Norms are not just a set of arbitrarily selected coordination rules; they are social obligations with a moral imperative behind them. They are a society's determination of what it is right to do. And sometimes a large portion of society can be egregiously mistaken in those

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202 See Ann Bartow, A Feeling of Unease About Privacy Law, 155 U Pa L Rev PENNumbra 52, 52 (2006). Bartow makes a different point than the one being made here; her argument is that privacy scholars should identify the tangible harms that result from privacy violations in order to convince legislators and others why protecting privacy is important. See id at 53. She does not argue that privacy legislation should be restricted to such cases of tangible harms.
determinations. Nevertheless, it is impossible for someone acting within a norm regime to evaluate it or any other set of norms objectively. There is thus no way to accurately balance the costs and benefits. We can never know if it would be better to switch or to stay with a given set of privacy norms.

Despite this problem, some theorists, most notably Helen Nissenbaum, have attempted to spell out an account of privacy that not only recognizes its basis in norms, but also considers the potential for norm change. Nissenbaum even proposes a mechanism for addressing the challenge posed here: determining whether a proposed shift in norms would on balance be better for society. Nissenbaum’s account is therefore worth considering in detail.

1. Norm change in Nissenbaum’s contextual integrity framework.

Most theories of privacy appear to view privacy as a fundamental and stable human right, a certain fixed set of minimum acceptable practice necessary for human dignity, autonomous thought, democracy, or other important values. Only a few privacy scholars have explored the ramifications of privacy’s reliance on norms, most prominently Daniel Solove and Helen Nissenbaum. Solove, for example, characterizes privacy as a dimension of certain practices, such as “writing letters, talking to one’s psychotherapist, engaging in sexual intercourse, making certain decisions, and so on.” Privacy in Solove’s account is a set of “customs, norms, and traditions” that are a component part of such practices, and thus “protecting ‘privacy’ involves guarding against disruptions to these practices that undermine the privacy norms, customs, and traditions associated with them.” As a result of being defined in terms of “customs, norms, and traditions,” privacy has no

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203 Most of the theories catalogued in Solove, 90 Cal L Rev at 1099–1124 (cited in note 11), appear to adopt this view. See, for example, id at 1111 (describing Charles Fried’s theory as defining “privacy as ‘control over knowledge about oneself’ that is necessary to protect ‘fundamental relations’ of ‘respect, love, friendship and trust’”). The problem with such theories, as James Whitman has noted, is that they fail to account for the starkly different notions of privacy held in otherwise free and democratic societies around the world. See Whitman, 113 Yale L J at 1154 (cited in note 26).

204 Solove, 90 Cal L Rev at 1129 (cited in note 11).

205 Id. Solove somewhat circularly defines privacy practices as including the "activities" that then privacy is a component of. Id.
acontextual core that can be defined and evaluated apart from a particular set of practices occurring at a particular place and time. But Solove stops short of providing a way to determine what privacy requires, or should require, at any given moment, saying only that “[w]e must make such determinations by evaluating practices empirically, historically, and normatively,” while remaining “responsive to social reality” and attuned to “their historical development.” Merely preserving traditional practices is not sufficient, he argues, nor is focusing on current trends. It is not clear how Solove would evaluate a conflict between the two.

Helen Nissenbaum provides such an analysis in her book, \textit{Contextual Integrity}. Nissenbaum’s work represents the most substantial and sophisticated effort to define privacy in a way that accounts for privacy’s basis in norms rather than in a fixed set of values. Key to her approach is that Nissenbaum provides only a “framework” for understanding privacy, rather than a theory, which allows her to avoid the difficult question of what, exactly, privacy consists of at any given time by leaving that unspecified. Under Nissenbaum’s framework, privacy is a set of rules for maintaining “contextual integrity,” that is, keeping information flows within certain social contexts defined by informational norms. Informational norms, in turn, are defined as prescribing “for a given context, the types of information, the parties who are the subjects of the information as well as those who are sending and receiving it, and the

\begin{footnotesize}
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\item Id at 1145.
\item Id at 1142.
\item Solove, 90 Cal L Rev at 1142 (cited in note 11).
\item Nissenbaum’s framework has been extraordinarily influential in just the three years since it was published. See, for example, Woodrow Hartzog and Frederic Stutzman, \textit{The Case for Online Obscurity}, 101 Cal L Rev 1, 32–33 (2013); Deidre K. Mulligan and Jennifer King, \textit{Bridging the Gap Between Privacy and Design}, 14 U Pa J Const L 989, 1005–16 (2012); Kenneth A. Bamberger and Deidre K. Mulligan, \textit{Privacy on the Books and on the Ground}, 63 Stan L Rev 247, 298–302 (2011).
\item Nissenbaum consistently refers to her account as a “framework,” not “a full-blown theory of privacy.” Nissenbaum, \textit{Privacy in Context} at 189 (cited in note 11). Explaining and defining the full dimension of the concept of privacy, apparently the task of a theory, is, according to Nissenbaum, likely a “hopeless ambition.” Id at 2. Nissenbaum’s “framework” therefore provides only a descriptive account of the factors that determine “when people will perceive new information technologies and systems as threats to privacy,” which in turn helps in “formulat[ing] an approach to evaluating these systems and prescribing legitimate responses to them.” Id.
\item Id at 140.
\end{enumerate}
\end{footnotesize}
principles under which this information is transmitted." The primary goal of Nissenbaum's framework is descriptive—she attempts to identify the conditions that produce privacy controversies in a given society. According to Nissenbaum, "indignation, protest, discomfit, and resistance to technology-based information systems and practices... invariably can be traced to breaches of context-relative informational norms." In other words, widespread violations of contextual integrity produce alarm, the very sort of alarm described at the beginning of this article.

But Nissenbaum has set her sights higher than merely providing a framework for predicting the rise of privacy controversies. She argues that her framework also has a normative payoff—it can contribute to a determination of when such reactions are not only likely to occur, but also when they are justified. Specifically, if the outcome of a contextual integrity analysis demonstrates that the practice in question violates "entrenched informational norms," then it also is prima facie unjustified. As the term "prima facie" should indicate, Nissenbaum is careful to avoid the obvious objection to this argument—that it simply reifies existing practices. Existing privacy practices, she readily admits, can be suboptimal, even harmful. So Nissenbaum proposes only that existing norms provide a baseline for determining the social value of certain privacy practices; that is, there is only a presumption that the existing norms are socially optimal. That presumption can be overcome, but "the burden of proof falls heavily upon the

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212 Id at 141.
213 Id at 140.
214 Nissenbaum, Privacy in Context at 3 (cited in note 11) ("Information technologies alarm us when they flout these informational norms—when, in the words of the framework, they violate contextual integrity.").
215 Id at 189–90 ("The framework of contextual integrity is intended as a descriptive tool, systematically accounting for people's reactions to the myriad technical systems radically affecting the flows of personal information. But it is also intended as a framework for evaluating these systems from a moral and political point of view."). See also id at 150.
216 Nissenbaum proposes a series of steps—what she terms the Contextual Integrity Decision Heuristic—to determine whether a new system or practice violates contextual integrity. See id at 149–50. The specifics of that analysis are not relevant here.
217 See id at 205.
218 See Nissenbaum, Privacy in Context at 164 (cited in note 11).
shoulders of proponents" of the new practice. Given the disruptions that violations of informational norms cause, proponents of change must demonstrate that "special circumstances are so compelling as to override this prescription."

Nissenbaum's analysis sounds reasonable. The known and the familiar will often seem preferable to the unknown and the speculative. But that is precisely the problem. Indeed, not only are the benefits of future norms difficult to predict, but we have an inherent bias to see any change in norms as immensely harmful, even if the ultimate result is on balance positive. That may be why many scholars view current privacy practices as essential to society even while privacy itself proves impossible to define. And as the Warren and Brandeis episode shows, any disruption to high status is perceived not simply as a threat to individual status, but as a threat to society as a whole. Nissenbaum's descriptive account of contextual integrity is by design an attempt to explain what causes privacy alarms; she correctly attributes this to violations of informational norms. But there may be little reliable connection between the extent of the alarm and the benefit to society, all told, from preserving the norm. Consider, as an example, a recent controversy in which a reader called New York Times reporter Nick Bilton a "sociopath," evidently without intended exaggeration, and the paper's ombudsman printed the letter without comment. Bilton's crime? He believes thank-you emails are unnecessary.

Obviously that is an extreme overreaction, but that is the point. When long-held norms are under challenge due to a change in technology, adherents to the existing norms may lose perspective. Nissenbaum's augmented contextual integrity

219 See id at 191.

220 Id at 164 ("For reasons of expectation, accumulated wisdom, and settled rationale, a presumption in favor of entrenched, context-relative informational norms makes sense.").

221 Id at 191. Daniel Solove has similarly proposed giving existing privacy practices a sort of stare decisis effect. See Solove, 90 Cal L Rev at 1144 (cited in note 11).

framework proposes a procedure for determining if a new practice that violates existing informational norms nevertheless may be justified. That analysis includes consideration of the "moral and political factors affected by the practice in question," and a weighing of "how the system or practices directly impinge on values, goals, and ends of the context." But any estimate of costs and benefits of competing norms by someone invested in the current norm structure—which would likely include scholars, policy makers, judges, and lawyers—is almost guaranteed to come out in favor of existing norms, and against any change to those norms. Indeed, decisionmakers may not be able to step outside of their norm regimes to consider the issue from some sort of omniscient point of view even if they wanted to. In other words, the calculation Nissenbaum proposes may not be possible. The future and the present may be incommensurable.

2. Accounting for the privacy uncertainty principle.

None of the above means that privacy law should be abandoned in the face of the slightest novel pressure. Rather, it counsels in favor of modesty and humility about our ability to forecast the ultimate outcome of changes underway. Other areas of the law have incorporated limiting doctrines precisely to account for such cognitive biases. First Amendment law forsakes an exception based on the falsity of political speech because of the risk that those in power are highly likely to regard dissenting views as false. Copyright law largely removes from judges the ability to restrict copyright's protection based on an assessment of artistic merit. Privacy law may need a similar rule, intended to stay legislators' or common-law judges' hands when an asserted novel privacy threat poses only

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223 Nissenbaum, Privacy in Context at 182 (cited in note 11).
224 See United States v Alvarez, 132 S Ct 2537, 2546-48 (2012); Abrams v United States, 250 US 616, 630 (1919) (Holmes dissenting) (stating that stifling dissent appears to the person in power to be "perfectly logical").
225 See generally Bleistein v Donaldson Lithographing Co, 188 US 239 (1903). Some scholars have argued that, despite the problem identified by Holmes, artistic judgments in copyright law are unavoidable. See, for example, Alfred C. Yen, Copyright Opinions and Aesthetic Theory, 71 S Cal L Rev 247, 249–50 (1997); Rebecca Tushnet, Worth a Thousand Words: The Images of Copyright, 125 Harv L Rev 683, 687 (2012) (describing how courts are unable to avoid drawing lines "between ineffable artistic choice and mere reproduction of reality").
an inchoate threat to dignity or status. As the privacy harms become more speculative, regulation should tread more lightly.

In particular, two sorts of changes should be resisted. First, technological change may simply enable violations of long-established norms without any sign of widespread challenge to the validity of those norms. For example, there appears to be no general challenge to longstanding norms of privacy in the home, in individuals’ naked bodies, or in the bathroom.\textsuperscript{226} There is no substantial resistance to the idea that stalking is morally depraved.\textsuperscript{227} Using the law to bolster these norms against challenge poses no real difficulties of balancing trade-offs between future benefits to other people and present benefits to ourselves.

Second, and more difficult, are cases where norms are in flux, or are not well developed, but where the harm experienced is substantial and is concentrated in a small number of individuals. For example, mobs can coalesce on the Internet to target an individual for verbal abuse and threats that, while perhaps no one of the messages may clearly rise to the level of criminality or tortious behavior, the aggregate of the mob’s behavior takes a significant toll on the target.\textsuperscript{228} For example, women often experience substantially greater privacy harms than men; several have been targeted by online mobs for gender role enforcement.\textsuperscript{229} Relatedly, an individual’s own sensitive information may escape his or her control, with a resulting discontinuity in the harm suffered: from zero to a very large number.\textsuperscript{230} Commercial activities that pose a significant risk of


\textsuperscript{227} See Elizabeth Olson, \textit{Though Many Are Stalked, Few Report It, Study Finds}, NY Times A22 (Feb 15, 2009).


\textsuperscript{230} See, for example, Jan Hoffman, \textit{A Girl’s Nude Photo, and Altered Lives}, NY Times
identity theft or compromise user account security likewise impose significant burdens on the few individuals who suffer those harms. Of course, all collection of consumer data imposes a nonzero risk of security breaches; no information is entirely secure. But where the risks become large enough to become reasonably likely, legal regulation is an obvious solution.

Even in such cases, however, where technological change is behind the circumstance that makes new law desirable, our preference should be for legal regulation that can be altered in light of new information in the future. In particular, during a technological shift new privacy law should tend toward the adoption of administrative regulations or standards subject to judicial interpretation, somewhat like the common law. That may represent the ultimate genius of the solution posed in *The Right to Privacy*. Warren and Brandeis proposed judicial recognition of a common law cause of action to address the harms that they foresaw. While many found their argument to be persuasive, courts were cautious in following their recommendation. The first decisions adopting the new privacy law tort applied it in situations where its merits seemed the most clear: the use of the images of nonconsenting individuals to sell merchandise.231

As a result, the tort narrowed considerably in application from Warren and Brandeis's original vision of it, avoiding the issues that would have arisen from giving the tort its full power to prevent public discussion or representation of individuals. Because of the pliable nature of the common law, the privacy tort was adapted and limited as time passed and the crisis atmosphere of the 1890s faded. It was never given its seemingly intended role as a bulwark against social change arising from mass communications. Prosser's classification of the tort in 1960 as four separate causes of action merely recognized what had already transpired: courts had limited the tort's application to those particular circumstances in which it seemed most justifiable.232 Even so, further limits were imposed, again by the slow accretion of judicial decisions, in order to clear space for the

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231 See, for example, *Pavesich v New Eng Life Insurance Co*, 50 SE 68 (Ga 1905).
rise of free speech doctrine in the 1960s. The privacy torts were in many states modified again to account for these trends.\textsuperscript{233}

IV. CONCLUSION

Our knowledge of the future is limited. It is limited not only by our inability to foresee the course of future events, but also by our own conceptual apparatuses. In other words, the fault is not in our stars, but in ourselves. Our limited foreknowledge makes the future especially murky when the harms we foresee are harms to our dignity, and that dignity is in turn defined by social rules that are themselves in flux. When the gloom becomes thick enough, it can seem as though any downward slope drops away precipitously into a fathomless abyss.

The dread aroused by a norm regime under threat makes it difficult to determine the correct response to a privacy crisis. Regulators and scholars assessing the state of privacy are as bound by limits on human understanding as anyone else. They are unable to distinguish between mere violations of established privacy norms and a fundamental shift in those norms themselves. Both appear to be violations to anyone invested in the current privacy norm regime. And even if an incipient shift in privacy norms could be identified, there is no way for anyone whose interests are affected by that shift to objectively evaluate whether the new norms are better.

But neither can privacy be forsaken. Privacy norms are critical to the operation of society, even during periods of flux. The only solution for regulators is to continue to combat privacy violations where they arise, through new law if necessary, while remaining cognizant of the dangers. A certain epistemic humility is required where there are indications of a privacy norm shift in progress, such as rapid technological changes, heightened levels of alarm, and moralistic rhetoric. This is the troubling consequence of the privacy uncertainty principle. When we are disinterested, we can know what direction privacy is headed; when we are interested, we can take a position on where privacy should wind up. But we cannot do both.

\textsuperscript{233} See Barbas, 61 DePaul L Rev at 1021 (cited in note 19). Barbas dates the "death" of the public disclosure of private facts tort—the one that most directly addressed Warren and Brandeis's concerns—even earlier, to roughly the 1930s. See Samantha Barbas, The Death of the Public Disclosure Tort: A Historical Perspective, 22 Yale J L & Humanities 171, 173 (2010).