Heine K, 'What Do Privacy Scholars Maximize? – Law as a Practice and Law as a Science' (2025) Special Issue 1 EJPLT.
DOI: https://doi.org/10.57230/EJPLTSI251KH

EJPLT
ISSN 2704-8012



What Do Privacy Scholars Maximize? – Law as a Practice and Law as a Science

Che cosa massimizzano gli studiosi della privacy? – Il diritto come pratica e il diritto come scienza

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Abstract

Ignacio Cofone's book "The Privacy Fallacy" is the starting point for a methodological discussion about how the notion of privacy is approached by law. It is distinguished between law as a practice and law as science. The first is a technique of conflict resolution, while the latter derives empirically testable hypotheses from a theory. In "The Privacy Fallacy" we find both. Epistemological problems arise when the two approaches are not analytically separated.

Il libro di Ignacio Cofone "The Privacy Fallacy" è il punto di partenza per una discussione metodologica sul modo in cui la nozione di privacy viene affrontata dal diritto. Si distingue tra il diritto come pratica e il diritto come scienza. La prima è una tecnica di risoluzione dei conflitti, mentre la seconda deriva ipotesi empiricamente testabili da una teoria. In "The Privacy Fallacy" troviamo entrambe. I problemi epistemologici sorgono quando i due approcci non sono analiticamente separati.

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Keywords: Legal method; privacy; economic analysis of law

Summary: 1. Setting the Stage. – 2. Law as a Practice and Law as a Science. – 3. Problems, Method and Aspirations. – 4. Economic Efficiency and Human Right Values. – 5. Concluding Remarks.

1. Setting the Stage.

Ignacio Cofone's book "The Privacy Fallacy"[1] touches upon a very timely topic: The privacy of humans in a digital world. What makes this book so powerful is not its sometimes activistic stance, but that it asks from an academic point of view with which legal instruments the privacy of individuals can be guaranteed. Following this train of thought the choice of adequate legal instruments shall be in the center of this contribution. Thereby a methodological perspective is taken. To this end, in a first step it will be outlined what "law as a practice" means and what "law as a science" entails. This basic distinction will be used to get to a better understanding of what in "The Privacy Fallacy" shall be maximized and how (with which legal tools) this shall be achieved. It will become clear that the argumentation presented in the book is pushing the boundaries regarding law as a practice. On the scientific level, the book remains within the perimeter of the incumbent economic analysis of tort law.

2. Law as a Practice and Law as a Science.

Law is not a science. This statement sounds rather bold and even if one subscribes to it, it asks for further explanation. The statement becomes clearer, if one asks for the function of law in society. Basically, law shall resolve conflicts, which includes the facilitation of private contracts, and making the exchange of goods and services on markets possible. Hence, rules describe the modalities under which social interaction takes place in society. For historical and educational reasons, it has been practical to distinguish between public, private and criminal law, although the distinction is not as clear as one may assume. For example, competition law is sometimes seen as part of private law and sometimes of public law. And in some countries competition law foresees criminal charges, and in others not.

If a conflict between private and/or public parties arises, the case goes to a court, where it will be adjudicated according to the interpretation of the established legal rules. Hence, the truth of a law is not determined by science, but by its applicability and congruence with a law of higher order.[2] In the end the truth of a legal rule is derived from the constitution or the fundamental rights. Thereby it does not matter for truth finding from where the

[1] I Cofone, *The Privacy Fallacy* (CUP 2024).
[2] H Albert, 'Critical Rationalism: The Problem of Method in Social Science and Law' (1989) 1 (1) Ratio Juris 1-19.

foundational norms come from. It is only necessary that those norms exist at all.[3]

When the rules are felt as not sufficient or even dysfunctional, the legislator issues new rules for conflict resolution which shall better align with the needs of society. This corresponds with what law students are trained for: Classification of cases, norm finding and interpretation. As a result, to keep consistency of the adjudication, legal practice develops doctrines and landmark decisions as guideposts for future interpretation.[4] Those doctrines can become quite complex and their application to a concrete case needs experience and mastership. But applying a law, the classification of a case and norm interpretation is not a science, in which from a theory, empirically testable hypotheses are derived. Law is a practice for conflict resolution.

That does not mean that law would not develop, indeed it adapts over time to the needs of society. This happens in a quasi-evolutionary process, when the incumbent rules do not sufficiently resolve actual conflicts. The legislator issues a new law, or the judiciary comes up with a new interpretation, from which it is assumed that the conflict will be better solved. However, this remains an unconscious process. Individuals or groups make ad hoc proposals in the political arena or in the court room for law improvement. As a result, a complex interplay of regulatory competition and legal path dependence emerges from which on the outset it is not clear, whether the socially advantageous rules will prevail or a sticky set of rules, that only serves the interests of a specific group.[5] But we would not know anyway, because there is no theory which would tell us about the effects of legal changes. That does not exclude that all kinds of arguments are put forward to advocate for specific legal changes, but these are rather opinions than arguments derived from a theory. More precisely, in law as a practice it cannot be distinguished between arguments which are mere value judgements and arguments which are derived from a theory, which generates empirically testable hypotheses within a consistent set of social goals. This lack of theory is not a problem for law, because the function of law is conflict resolution in society. And as long law is fulfilling its function it does not need theory.

We already saw that legal change must be somehow motivated with a reason. The reasons put forward can be manifold, it could be, for example, the maximization of paper clips in the universe[6] or the maximization of the gold dollars of the king. However, it is reasonable to assume that a society respecting the value and voice of all its members (citizens) will strive for a social contract that allows the single individual to live in peace and to maximize its happiness. In other words, a normative theory is needed to determine the goal of society. What shall be maximized? That is exactly what social contract theory

[3] H Kelsen, *General Theory of Law and State* (Harvard University Press 1949).
[4] H Albert, 'Critical Rationalism: The Problem of Method in Social Science and Law' (n 2) 1-19.
[5] K Heine, W Kerber, 'European Corporate Laws, Regulatory Competition and Path Dependence' (2002) 13 (1) Eur. J. Law Econ. 47-71.
[6] N Bostrom, *Superintelligence: Paths, Dangers, Strategies* (OUP 2014).

is about and to which scholars like Hume,[7] Kant,[8] Locke,[9] Hobbes,[10] Rousseau,[11] Rawls,[12] Nozick[13] or Buchanan/Tullock[14] have contributed by defining the "constitution" under which society shall work. Hence, truth is derived by a sort of consensus in society. While this social consensus is derived by contractarians by very different means, it is always a sort of mechanism that is proposed, which is then applied to the design of law and norms. That means that the theory is external to the law; it is applied to the law and not inherent to the law.[15]

However, it is not enough to determine what the normative goal is or which the values are, from which out conflicts in society can be deduced. One also needs an explanation of human behavior to get to a scientific explanation of law. A descriptive theory is needed from which empirically testable hypotheses about human action can be derived. More precisely, a theory of human action under constraints is needed.[16] The marginal principle in conjunction with individual rationality provides such a theory of social choice. It says that humans strive for a portfolio of consumption or activities, in which all activities yield the same benefit on the margin, given the constraints (budget and other restrictions) that an individual has. The individual is rational, because it optimizes its portfolio of activities. Uncertainties or behavioral limitation (biases, cognitive limits etc.) play a role, but do not invalidate the rationality of decision-making, but only add complications or refinements to the testable hypotheses, which make them empirically more valid.[17]

Law enters the picture as a constraint for human behavior, by either restricting or enlarging the choice set. For example, certain selling practices are forbidden, and violating the rules will be fined. Or, selling defective products will call under strict liability for compensation. On the other hand, knowing that contracts will be enforced, will make business confident to close deals with even unknown parties. Hence, it is very useful for a lawmaker to know, how a rule affects the behavior of humans, companies and other entities, and if the rule incentivizes choices which lead society closer to the optimum defined in the social contract. Obviously, legal rules are a handy instrument within an empirically valid social theory in conjunction with shared normative values.

As a result of this short reflection, law as a science is either concerned with the study of human action under constraints (positive research) or with the consistent definition of social goals (normative research). Law a such is not a science. It is a study object in conjunction with positive or normative theories

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[7] D Hume, *Enquiries Concerning Human Understanding and Concerning the Principles of Morals* (3rd edn, OUP 1975).
[8] I Kant, *Groundwork for the Metaphysics of Morals* (2nd edn, CUP 2012).
[9] J Locke, *Second Treatise of Government and A Letter Concerning Toleration* (OUP 2016).
[10] T Hobbes, *Leviathan* (OUP 2008).
[11] JJ Rousseau, *Discourse on Political Economy and The Social Contract* (OUP 2008).
[12] J Rawls, *A Theory of Justice* (Harvard University Press 1971).
[13] R Nozick, *Anarchy, State, and Utopia* (Basic Books 1974).
[14] JM Buchanan, G Tullock, *The Calculus of Consent* (University of Michigan Press 1962).
[15] The same applies to non-contractarian approaches of society, like Marxist approaches. Again, it is external forces of power which become manifestly in law and norms, which may suppress and exploit the weaker parts of society.
[16] GJ Stigler, GS Becker, 'De Gustibus Non Est Disputandum' (1977) 67 (2) Am. Econ. Rev. 76-90.
[17] GS Becker, 'The Economic Way of Looking at Behavior' (1993) 101 (3) J. Pol. Econ. 385-409; V Vanberg, 'The rationality postulate in economics: its ambiguity, its deficiency and its evolutionary alternative' (2004) 11 (1) J. Econ. Methodol. 1-29.

drawn from scientific fields as economics, sociology, psychology, philosophy, neuroscience etc.

3. Problems, Method and Aspirations.

In "The Privacy Fallacy" we find both, value judgements about what privacy ought to be and the methodological toolkit with which the law shall be designed to achieve the proposed values. The interesting thing in "The Privacy Fallacy" is not that specific values are proposed, it is also not that the economic analysis of law is used to support the argumentation. The interesting thing is, if and how the spheres of positive and normative argumentation are coupled and how this plays out on the level of law as a science and law as a practice.

The book drives its argumentation by blending empirical observations, legal doctrine, economic analysis of law and value judgements. This is done in an artistic way, which keeps the reader on track. Moreover, one gets a lot of facts, anecdotes and food for thought, which makes the book an asset for a broad readership - and hence it stimulates public discourse. However, in this contribution not another interpretation of what privacy is will be presented, but a different route is chosen. It shall be deciphered which general direction is taken in the book and which critical junctions we come across in the argumentation.

Cofone's argumentation starts basically with a market perspective, in which people by help of contracts make deals. They trade goods with each other to get a personal benefit from it. But it is not trading, for example, bread against fish, but individual data against digital services, like giving personal credentials for being on a social media platform or getting a discount in a shop for giving one's data. The exchange of personal data for having access to digital services is not per se a problem. The problem with privacy enters the picture by the introduction of two failures to the parity of contracting. The *first* is doctrinal and is questioning the "meeting of minds",[18] which is the requirement that the parties of a contract realize that they are in a contractual relation. The user of a digital service may not realize that he or she is trading personal data for getting the service. In other words, there would be no awareness of the deal and therefore also no contractual relation. The companies would thus get wrongly the personal data of the customers; this legal misunderstanding of the pseudo-contractual relation might be called a privacy problem. Whether there is indeed no "meeting of minds" is an empirical question. We may suspect that there is no "meeting of minds", but it is not evident that this assumption generally holds. For example, when accessing a digital newspaper, one is usually asked to make a paid subscription or to read it for free and to give one's data. To give one's data instead of paying money is obviously a conscious decision of a legally competent market participant in a contract. Denying this legal competence needs empirically valid assumptions about human behavior in a specific industry structure.

The *second* failure put forward is mostly framed as an economic one. There

[18] Cofone, *The Privacy Fallacy* (n 1) 4.

is a postulated difference in power between the (human) user of digital services and big digital platforms. Hence, there is the looming problem of abuse of monopoly power. While specific services of the platform might be for free, the platforms can use the data for all kinds of marketing tactics and price discrimination on other markets, leading to exploitation of the consumer.[19] Again, privacy might be thwarted, because personal data are used to the detriment of the user without knowing it. This is again an empirical argument, and the challenges for competition policy and consumer protection are huge. But what are exactly the losses for the consumer? Is a consumer damaged, if he or she receives a digital service for the prize of zero? The answer is not so clear and makes a sensible competition policy analysis necessary.[20] Whatever comes out of those analyses in specific cases, it cannot be ruled out that there are problems and often they will have to do with the consumers' data. Insofar there is again a looming privacy problem, because personal data might be abused for business strategies which are opaque for the consumers and which can hardly be avoided by them.

In summary, the conceived privacy problem is fueled from two sources: Legal doctrine and economics. More precisely, in "The Privacy Fallacy" the latter is charged by the help of insights from the economic analysis of law.

"The Privacy Fallacy" discusses many aspects of how the privacy of individuals is challenged, and proposals are made how the value of privacy in society can be maintained. Within all those observations and proposals there is one proposal that stands out, gets special attention and can be understood as the original contribution of the book: The imposing of a sort of extracontractual liability on companies dealing with data and creating harm.[21] A company harming the privacy of an individual shall pay compensation. Being aware of the payment, the company would be effectively deterred of doing harm. Thereby an analogy is made to environmental damages, where the harm often is scattered, and the monetary value of damages cannot be easily estimated. However, courts and the legal system have found practices to deal with it and it would work quite well.[22] Surely, there are good reasons not to believe in the practicability of the made suggestion. The metering of harm in privacy cases, the elaboration of suitable standards by courts and the international dimension can create a stretch – maybe an overstretch - for adjudication.

One may discuss at length whether corporate tort liability is an appropriate tool for dealing with privacy harms. The biggest problem, when staying within the economic analysis of tort law, is, however, that issuing a privacy standard will deactivate the companies' optimization of the activity level. That means, when the given care standard is met, the activity can be executed as often as liked.[23] At the same time it is by no means clear whether the (subjectively) aspired privacy level of the affected individuals is attained by the externally

[19] Ibid 34-35.
[20] N Petit, 'Antitrust and Artificial Intelligence: A Research Agenda' (2017) 8 (6) J. Eur. Compet. Law Pract. 361-362.
[21] Cofone, *The Privacy Fallacy* (n 1) 130-137.
[22] Ibid 134-135.
[23] St Shavell, 'Strict Liability Versus Negligence' (1980) 9 (1) J. Legal Stud. 1-25; AM Polinsky, "Strict Liability versus Negligence in a Market Setting" (1980) 70 (2) Am. Econ. Rev. 363-367.

prescribed privacy standard. As a result, the damage of privacy infringements can remain too high, implying that the incentive given by tort law does not reach its goal.

The last argument needs some more qualification. Deterrence by tort law (according to the economic logic) does not aim at abolishing privacy harm. It is about bringing down the harm to an optimal level according to the yardstick of pareto-efficiency.[24] If incentivizing the activity level of a company is no longer an issue, because a privacy standard has been set, then the yardstick of efficiency cannot be reached. That is the reason why strict liability is usually preferred over negligence liability. Under strict liability no definition of standards is needed, and the activity level becomes incentivized towards efficiency. But strict liability does not seem an option for privacy matters, because the harm through privacy violations is barely objectifiable for individuals.

Finally, the optimization towards efficiency takes place according to the pareto-criterion. This is the normative criterion which is usually applied in the economic analysis of tort law. It assumes individuals which behave as rational utility maximisers under constraints, implying that all kinds of behavioral factors can impinge on choices. Hence, assuming humans which may overlook information or might be prone to dark patterns etc. In this framework the design of tort law rules shall safeguard that on the aggregate level of society an optimal number of voluntary contracts and extracontractual "accidents" materialize. But with regard to privacy it is doubtful that the goal of a social optimum can be reached, because either an objective standard cannot be set or the single individual valuations of privacy cannot be retrieved. Therefore, other legal instruments might be better suited to attain pareto-optimality in the case of privacy. It is the merit of "The Privacy Fallacy" to unbox a more fundamental discussion about the scientifically appropriate instruments to deal legally with privacy violations.

4. Economic Efficiency and Human Right Values.

Let us assume that the route to privacy via an extensively worked out economic analysis of tort law in which companies are held liable can be attained. All works smoothly, no frivolous cases, the burden of proof is not a problem, the sharing of cost between the courts, lawyers, victims and tortfeasors is solved, and the privacy standards are set accurate. Because the activity level cannot be controlled, there is an inherent inefficiency, but compared to other institutional alternatives (ex ante sector regulations, regulation by design or counter technologies etc.) the tort law solution has been proven as comparatively advantageous.

As a result, the proposed solution is pareto-superior and a quasi-optimal amount of privacy damages occurs. That sounds not so bad, if achieved. At least not from an individualistic approach as economics, in which the normative goals are derived from the single individual. Methodologically, the legal practice of

[24] W Landes, RA Posner, *The Economic Structure of Tort Law* (Harvard University Press 1987).

privacy protection gets informed by economic science. But that is not how "The Privacy Fallacy" positions itself. It regards privacy as a Human Right.[25] That means privacy is understood as an absolute right that cannot be balanced with potential (economic) gains from the privacy violating activity.[26] Moreover, the very idea of Human Rights is that they shall not be enjoyed on an efficient aggregate level by a legal ex post mechanism like tort law, but they are guaranteed upfront for everyone.

This positioning of privacy raises the fundamental question whether the tool of economic analysis is a good choice at all, when the protection of privacy is conceived as a Human Right and a balancing with the advantages of potential privacy infringements is not possible. The assumption that liability would simply incentivize companies to invent activities, which yield a profit and do no harm, is a hypothesis which has yet no empirical evidence. One may equally assume that innovativeness of companies slows down, products become more expensive and new products or services (for example, new cancer therapies) become not available. But we would not know anyway, because a balancing of effects is not foreseen.

Within the thinking of law as practice, conflict resolution is the primary goal. The consistency and truth of a legal statement is guaranteed by recourse to a higher norm. This condition is fulfilled in "The Privacy Fallacy", because privacy is presented as a Human Right which claims to be respected and cannot be questioned by competing legal norms. Any privacy conflict can be solved that way in a consistent way. This does not exclude that here and there knowledge from sciences like sociology, economics or psychology is employed for supporting a legal statement. But it is not law as science, in which a theory informs about the normative and descriptive design of law and which allows for empirically testable hypotheses.

The economic analysis of law has been the most prominent approach within law as science in the last decennia, because it has with the pareto-criterion a fixed point for the normative goal and with the rational choice analysis a theory of human behavior from which empirically testable hypotheses can be derived. However, the economic analysis of law is challenged by the digital lifeworld in two dimensions: 1) The strong inward focus on methodological rigor leads to the neglect of attention to societal developments as the call for diversity, ecology, rights of socially underrepresented people, or to redefine what privacy may mean in a digital society.[27] 2) At the same time the economic analysis of law has problems to fully integrate the digital challenges into its theoretical framework. This has to do with the specification of property rights of data, of which privacy is a subcategory, and the missing utility function in case of artificial intelligence, which makes a deterrence like in "human torts" impossible.[28]

[25] Cofone, *The Privacy Fallacy* (n 1) 171.
[26] Ibid 171.
[27] KS Abraham, GE White, 'The Inward Turn and the Future of Tort Theory' (2021) 14 (2) J. Tort L., 245-259.
[28] K Heine, 'Autonomous Decision-making as a Challenge for Legal Research' (2025) J. Inst. & Theoretical Econ. (forthcoming).

5. Concluding Remarks.

"The Privacy Fallacy" is full of ideas, observations and examples, melting together in a unique blend. This makes the book a required reading for anyone who is interested in the ongoing debate about privacy, and how society likes to govern privacy in the future. There is not yet a solution for all the raised questions. But "The Privacy Fallacy" provides ample food for thought to address those questions. The book makes also aware that the discussion about privacy plays on different analytical levels and bears a methodological dimension. The methodological challenge is to differentiate between law as a practice and law as a science. It is important to distinguish these levels; especially in the case of privacy in the digital lifeworld, because privacy might be too easily introduced as a personal value judgement into the discourse. In the shape of a Human Right privacy claims authority over the practice of rulemaking and conflict resolution. But it is also a question how such a normatively charged interpretation of privacy can be combined with a scientific approach to law as, for example, the economic analysis of law, which brings with it its own normative (pareto-) criterion. "The Privacy Fallacy" makes aware of those questions and it demands answers, which we yet not have. But we better work on them!