ADMINISTERING PRIVACY CLAIMS

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This Article argues that a transparent claims process for privacy concerns arising from new technologies is essential for gauging privacy social norms and legitimating new technologies. The information accumulated from such a claims system provides the public with the soft power to encourage institutions to incorporate social norms into privacy policy development. The process itself also establishes government and relevant corporations as measured leaders that have some accountability to the public interest. Accessible claims processes that allow individuals to petition institutions empower and make more visible the concerns of individuals who have privacy concerns with a new technology. This gives both private and public actors an incentive to act to assuage individual concerns and build trust with the public. The success of similar systems for patent registration, data breach notification, and legal malpractice discipline, paired with inspiration from information privacy claims system in place in Germany demonstrate the value and feasibility of a claims process for information privacy concerns in the United States. The article explores three possible institutional avenues for claims process in detail, namely (1) state courts, (2) state agencies, and (3) private actors, who would be mandated to disclose the submissions to a government agency.

I. Introduction 3

II.Claim-bringing and institutional incentives..... 5
A. The significance of claims 5
B. Factors that influence the number of claims brought ...7
C. Individual claims and political actors.....9

III. Understanding when claim-bringing helps institutions.....12
A. Characteristics of cases where claim-bringing substantially helps policy-making 13
B. An (imperfect) privacy case study: Google Street View Controversy in Germany 22
C. The centrality of an accessible individual claims process in information privacy

IV. Toward a meaningful pathway for consumer privacy claims in the United States..... 34

A. Why American institutions must be more sensitive to information privacy claims ..... Error! Bookmark not defined.
.....35
B. Three options for reforming American consumer privacy claims 36
1. State Courts 36
2. State Administrative Agencies.....39
3. Mandatory disclosure of consumer claims to federal agencies 42
C. Objections 44
1. Selection Bias.....44
2. Claim Virality 45
V. Conclusion 46

I. Introduction

Progress in the Information Age is premised on the notion that the more information society has, the more we know about how to respond to society's needs and wants.[1] Paradoxically, there is a dearth of data being produced and publicly distributed on the precise socio-technical processes that arose privacy concerns based on the lived experiences of users. While groups at Carnegie Mellon University and Harvard University's Berkman Center have done some important empirical work in the area of privacy and social norms, such as for Internet and Society, these institutions must create their own data to analyze.[2] The process of creating data sets on privacy norms, as in other areas, is prohibitively expensive for most institutions and individuals, including, importantly, those dedicated to journalistic or other public interest pursuits.

Automated, ubiquitous sensors in both real and digital space collect data outside of the consciously lived experiences of

[1] Victor Mayer-Schönberger and Keith Cukier, *Big Data: A revolution that will transform how we live, work, and think* (London: John Murray, 2013)

[2] *E.g.*, Leslie John, Alessandro Acquisti and George Loewenstein, The Best of Strangers: Context Dependent Willingness to Divulge Personal Information (July 6, 2009), http://ssrn.com/abstract=1430482 (finding, based on three experiments, that "that concern about privacy, measured by divulgence of private information, is highly sensitive to contextual factors"); Sandra Cortesi et. al., Youth Perspectives on Tech in Schools: From Mobile Devices to Restrictions and Monitoring (January 15, 2014). Berkman Center Research Publication No. 2014-3, http://ssrn.com/abstract=2378590 (study on youth privacy atttitudes based on a survey of 30 focus group interviews with a total of 203 participants in Boston, Chicago, Greensboro, Los Angeles, and Santa Barbara).

individuals.[3] This gives such data many advantages for some research purposes. However, gauging the effect that technology is having on social norms from the perspective of society requires data that takes into account the subjective impressions of individuals. One need look no further than classic legislative and business debacles such as Prohibition and "New Coke" to understand that social norms play a key role in optimizing government policy making and business practices.

A transparent claims process for privacy concerns arising from new technologies is essential for gauging privacy social norms and legitimating new technologies. The data accumulated from such a claims system provides the requisite information and incentives to encourage government and private actors to incorporate social norms into privacy policy development.

The Article proceeds as follows.

First, the Article describes the meaning of the opportunity to be heard through a claims process to individuals and the advantages to institutions and society of having such a process.

Second, I argue that accessible claims processes allowing individuals to petition institutions tend to empower and make more visible the concerns of individuals who have privacy concerns with a new technology. This tends to give the both private and public actors an incentive to act to assuage individual concerns and build trust with the public. the Article examines a suite of examples showing the power of an accessible claims system for enabling understanding of public concerns and social norm development.

I build upon these examples in the context of privacy by outlining the regulatory structure for bringing privacy claims in Germany, in relief of the German response to the roll out of Google Street View. The German case shows the power of an accessible, transparent claims system to capture and respond to the popular discomfort arising from industry violation of existing social norms. But the German case in not perfect, and comparison to the initial suite of examples I argue that system should be modified to get better results in the United States, though the basic idea of a transparent privacy claims system is a strong one.

Then, building on the previous sections, I contend that United States should offer its citizens an accessible, inexpensive and transparent privacy claims process. There are many potential avenues through which individuals could submit their claims, each

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[3] David O'Brien et.al., Integrating Approaches to Privacy Across the Research Lifecycle: When Is Information Purely Public? (March 27, 2015). Berkman Center Research Publication No. 2015-7. 3-4. http://ssrn.com/abstract=2586158 (listing the purview of questions data maintained obtaining data from social networking websites, publicly-placed sensors, government records and other public sources.).

with advantages and disadvantages. This article explores three possible institutional avenues for claims process in detail, namely (1) state courts, (2) state agencies, and (3) private actors, who would be mandated to disclose the submissions to a government agency.

In the final part, the Article concludes.

II. Claim-bringing and institutional incentives

This section will establish what claims mean to individuals, what institutional factors make it easier or more difficult for individuals to bring claims, and the effect that claims have on political actors.

A. The significance of claims

Claims are both of inherent significant to those who make them, and bellwethers of social norms and attitudes for institutions.

The working definition of a claim in this Article is broad: "[t]he assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional."[4] As I use it, the term makes no comment about to where the claim is brought, what type of interest is claimed, or whether it is meritorious or brought in good faith.

The availability and use of a claims process has qualitative (and quantifiable) benefits to individuals, and the to institutions that meet their needs and wants.

A qualitative account of claims shows their benefit to claimants, the fact that not all legitimate claims end up being made, and the central important of intermediaries in the development of dispute. This article draws upon William L.F. Felstiener, Richard L. Abel, and Austin Sarat's influential account of what it means to individuals to claim against others and how many forms of distress remain submerged by individuals in modern society.[5] In a later article, Sarat summarized the group's views in that article as follows:

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[4] *Claim*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[5] *See* William L.F. Felstiner, Richard L. Abel, and Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 LAW & SOC'Y. REV. 631, 631-54 (1980-81).

> "[We] urged scholars to explore the hidden domains of civil justice and to examine processes that we labeled "naming, blaming, and claiming." [M]y co-authors and I argued that "trouble, problems, [and] personal and social dislocation are everyday occurrences. Yet, social scientists have rarely studied the capacity of people to tolerate substantial distress and injustice." We suggested that responses to those events could be understood as occurring in three stages. The first stage, defining a particular experience as injurious, we called naming. The next step in the life cycle of a dispute "is the transformation of a perceived injurious experience into a grievance. This occurs when a person attributes an injury to the fault of another individual or social entity." This stage we called blaming. The third step occurs "when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy." This final stage is called claiming.[6]

Felsteiner, Abel, and Sarat have two contentions that are particularly important to stress at this state of the article. First, they note that it is important to break down each step of the process because it illustrates that not everyone with claims necessarily gets to the claiming stage of dispute formation because of the psychological move to considering oneself a victim of another's wrongful act or the mere cost in terms of time and energy of bringing a claim. Thus, in general, it is safe to assume that there are more legitimately aggrieved people than will be willing to bring claims in any system. Secondly, they discuss the significance of lawyer-intermediaries in the claim bringing process. The job of lawyers is to alert potential clients that they have claims. They can do this indirectly through advertisements, most infamously through seemingly ubiquitous personal injury commercials and billboards. This raises general awareness that being wrongfully injured by a third party is a kind of claim that you can bring to court. Of course, lawyers also more directly push people to recognize specific claims through class actions.[7] Recent organizational psychology work has also suggested emotional relief benefits from bringing claims.[8]

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[6] Austin Sarat, *Exploring the Hidden Domains of Civil Justice: "Naming, Blaming, and Claiming" in Popular Culture*, 50 DEPAUL L. REV. 425, 426-27 (2000)

[7] *See generally* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer As Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 216-17 (1983) (discussing, evaluating and attempting to better reconstruct the idea of the lawyer in the salutary role of private attorney general).

[8] Cheryl Wakslak, et. al, *System justification and the alleviation of emotional distress*, PSYCHOLOGICAL SCIENCE, 18, 267-274 (2007).

There are significant quantifiable benefits to a claims process, as well. This explains the prevalence of claims processes in private industry and the administrative state.[9] Colin Rule, the framer and former administrator of the eBay-Paypal Online Dispute Resolution process, ably constructed an economic defense economic benefits that can be gleaned from the deployment of effective redress processes.[10] He found that eBay customers who went through a claims process spent more time browsing and spent more money on eBay in the three months after the month in which they went through a claims process than in the three months before the claims process.[11] This held true regardless of whether the claim was successful or not.

Individual privacy claims regarding a new technology are not merely as claims against others for existing wrongs, but a petition to a powerful body, either private or public, to consider making a change. The mere fact that these claims are heard adds to the sense of legitimacy of these organizations. When a company is a near-monopolist with powerful network effects pushing most to use the product, or when standard industry practices preclude other options, people may rationally choose to use their services. However, these are the cases where legitimacy of an incumbent actor of this type are particularly important. A claims process legitimates the progress of technology in light of individual privacy concerns.

B. Factors that influence the number of claims brought

Several factors influence the number of claims that are brought by individuals.[12] In general, rational individuals will balance the cost in time and money for of bringing the claim against the expected value of the benefit accrued from bringing the claim.

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[9] Although the lack of a literature quantifying the benefits until recently has led to short-sighted cuts in these programs. *E.g.*, Denise Richardson, *Local Dispute Center Loses Funds, Jobs*, THEDAILYSTAR, http://thedailystar.com/localnews/x1678756287/Local-dispute-center-loses-funds/jobs/print.

[10] Colin Rule, *Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost- Benefit Case for Investing in Dispute Resolution*, 34 U. ARK. LITTLE ROCK L. REV. 767 (2012).

[11] *Id.*

[12] *See generally* Tom Tyler, *The quality of dispute resolution processes and outcomes: Measurement problems and possibilities*, DENVER U. L. REV., 66, 419 - 436(1989) (using a psychological framework to examine dispute resolution proceses).

These the relevant factors include (1) the benefit from making the claim itself, (2) the benefit of having their claim meaningfully heard, (3) the speed with which the claim is resolved (regardless of outcome), (4) the likelihood of success and the amount of expected damages, and (5) any limitations on standing. Where there are intermediaries – notably, lawyers – involved in bringing a claim, their incentives can also influence the number of claims observed.[13]

Importantly, the expected value[14] of the benefit gained from making the claim takes into account the guaranteed gain of expressing the perceived harm. So, the expected value that an individual weighs before bringing a claim is not only, or even necessarily primarily, influenced by the likelihood of success on the merits.

As discussed above, most individuals experience psychological and social benefits from airing their claims and having them heard and understood. Completing a claims process tends to increase that claimant's trust in an institution, because it allows the individual to know that that institution will attempt to make things right if something goes amiss.[15] The more the process appears to listen and be responsive to the concerns of the claimant, the more meaningful the opportunity to be heard becomes. If the opportunity to be heard appears meaningful, there may be more perceived benefit to bringing a claim, and more claims will be brought.

Holding all other factors constant, the quicker the claims process is, the more benefit consumers will get from it.[16]

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[13] Intermediary incentives compound some of the factors impacting whether an individual will bring a claim. The psychological benefits of bringing a claim and being heard are personal to the claimant. These only marginally impact intermediaries, and only those intermediaries that are public interest oriented. Assuming intermediaries are paid by the claimants for their services, the latter three factors, that is, speed, likelihood of success and amount of damages, and limitations on standing would all influence the expected amount that a claimant would be willing to pay for intermediary assistance.

[14] SHELDON M. ROSS, INTRODUCTION TO PROBABILITY MODELS 38 (2007)(defining expected value as the value produced when each possible value the variable can assume is multiplied by its probability of occurring, and the resulting products are summed to produce the expected value).

[15] Ethan Katsh, Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace, 10 LEX ELECTRONICA, no.2, Winter 2006, at 1, 6, http://www.lex-electronica.org/articles/v10-3/katsh.htm) (""Dispute resolution processes are generally perceived as having a single function, that of settling problems. What has come to be understood online, perhaps more than it is offline, is that dispute resolution processes have a dual role, that of settling disputes and also of building trust."").

[16] *See* Colin Rule, *Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost- Benefit Case for Investing in Dispute Resolution*,

The amount of expected damages can influence the number of claims brought.[17] If there is a high chance of low damages, as in worker's compensation or no-fault insurance regimes, or a low chance of very high damages, as in medical malpractice tort action, individuals will bring a substantial number of claims. However, while the likelihood of success on the merits obviously is a factor in the decision to make an individual happy with a claims process, it is not the only factor, or even necessarily the most important.[18]

If courts are the receiving body for claims, standing rules can make it easier or harder to have the claim heard on the merits. For example, the Federal Rules of Civil Procedure were originally designed to it easier to for individuals bring claims into federal court.[19] Standing rules raise the cost of bringing a claim by making it more uncertain that the claim will have a hearing at all, and, by extension, less likely that the claim will be successful on the merits. This would reduce the likelihood that a rational actor would bring claims in the first place.

C. Individual claims and political actors

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34 U. ARK. LITTLE ROCK L. REV. 767 (2012)("The only group of buyers who filed a dispute and decreased their activity on the site in the three months after the active month were buyers for whom the resolution process took a very long time (identified as "Claim in Progress" in Figure A). These buyers filed a dispute and, for one reason or another, had the resolution of that dispute take longer than six weeks. If the dispute was resolved within six weeks, then the Activity Ratio was higher than the non-dispute-filing accounts, but if the resolution process stretched beyond six weeks, then the Activity Ratio fell lower than the non-filing accounts. That was the only outcome in which the Activity Ratio was lower than the non-filing buyers.").

[17] Colin Rule, *Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost- Benefit Case for Investing in Dispute Resolution*, 34 U. ARK. LITTLE ROCK L. REV. 767, 769 (2012); see also About Net Promotoer, Net Promoter, http://www.netpromoter.com/why-net-promoter/about-net-promoter (popular e-commerce company that uses consumer satisfaction metrics to help clients increase sales; "worldwide standard for organizations to measure, understand, and improve their customer experience").

[18] Joel Brockner, et. al., *When trust matters: The moderating effect of outcome favorability*, ADMINISTRATIVE SCIENCE QUARTERLY, 42, 558-583 (1997).

[19] Paul Frymer, *Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions*, 1935-85, 97 AM. POL. SCI. REV. 483, 486 (2003); Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?,* 137 U. PA. L. REV. 1901, 1906 (1989) ("Few disagree that the Federal Rules were intended by their drafters to open wide the courthouse doors.").

The idea that agencies are merely executors of legislative policy has long been abandoned in considering the modern administrative state.[20] A critical question becomes what influences agencies to create the policies as they do. In particular, what type of political pressure do agencies respond to?

Individuals are not thought to be among the actors that influence federal administrative agencies.[21] Rather, most scholars maintain that federal administrative agencies are influenced by some combination of the three federal branches of government and interest groups. This is precisely the reason for the anxiety of some about the vast power of a body that is not directly accountable to the American public.[22] It is another question, however, whether that anxiety is warranted.[23] Regardless, the American public, for its part, is largely indifferent to and rarely feels represented by the

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[20] *E.g.*, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1711-12 (1975) ("With the breakdown of both the "transmission belt" and "expertise" conceptualizations of the administrative process, administrative law theories that treat agencies as mere executors of legislative directives are no longer convincing. More recent attempts to impose limits on administrative policy choice through rulemaking or economic theory have accepted as inevitable a large degree of agency discretion arising from the inability of Congress (and, perhaps, of any rule-giver) to fashion precise directives or posit unambiguous goals that will effectively determine concrete cases. These attempts have, however, failed to provide an alternative, generally applicable framework for the control of administrative discretion. Faced with the seemingly intractable problem of agency discretion, courts have changed the focus of judicial review (in the process expanding and transforming traditional procedural devices) so that its dominant purpose is no longer the prevention of unauthorized intrusions on private autonomy, but the assurance of fair representation for all affected interests in the exercise of the legislative power delegated to agencies.").

[21] *E.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) ("The history of the American administrative state is the history of competition among different entities for control of its policies. All three branches of government--the President, Congress, and Judiciary--have participated in this competition; so too have the external constituencies and internal staff of the agencies.").

[22] *E.g.*, Michael P. Vandenbergh, *The Private Life of Public Law,* 105 COLUM. L. REV. 2029, 2035 (2005) ("Agencies are neither mentioned in the Constitution nor directly responsive to the electorate, leaving their democratic legitimacy unclear. Administrative law scholars have sought to ground the legitimacy of agency actions in a variety of theories.").

[23] Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790 (2005) ("Those who appeal to legitimacy frequently fail to explain what they mean or the criteria that they employ."); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 557 (2000) ("The concept of legitimacy has remained usefully vague in administrative law theory, serving as a vessel into which scholars could pour their most pressing concerns about administrative power.").

federal administrative state.[24] This has adverse effects on the perceived legitimacy of the administrative state.[25] In the standard account of the administrative rulemaking process, a primary way in which administrative agencies make law, individual complaints by citizens play no role at all.[26] Instead, business groups and public interest organizations take central stage in negotiating the perspectives of the public relative to government actors, including the executive branch, the legislative branch, and of course, the administrative state itself.[27] Public choice theory tells us that federal administrators bargain with influential interest groups, dispensing benefits expecting political support in return.[28] Often, the real negotiation for the major regulatory action happens before the public is even aware of what is at stake.[29] Even more worryingly, empirical studies suggest that even repeat players who purport to represent the public interest have little to no influence on the actual administrative rulemaking process.[30] There is a growing amount of scholarly examining the factors the influence the "real" negotiation for administrative policy: checks and balances within the executive branch.[31]

However, public attitudes, especially ones that can be quantified over a period of times through a claims process, are not irrelevant to the actions of regulatory actors. There has long been

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[24] *See* JAMES FREEDMAN, CRISIS AND LEGITIMACY 31-57 (1978) (describing the crisis of public ambivalence towards agency action).

[25] *Id.*

[26] *See, e.g.*, CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING 193-268 (2011) (describing business groups and citizen organizations as instrumental to the rulemaking process in federal administrative agencies).

[27] *Id.*

[28] JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE, 13-30 (1997) (describing challenges to positive political theory).

[29] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2360 (2001) (noting that interested groups interact with agencies pre-regulatory rulemaking to set boundaries for the rulemaking without the public knowing about this parameter-setting.).

[30] Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221, 226 nn.16-17 (2012).

[31] *See, e.g.,* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11(2012); Jerry L. Mashaw, *Due Processes of Governance: Terror, the Rule of Law and the Limits of Institutional Design*, 22 GOVERNANCE 353 (2009); Neal Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

empirical evidence of the influence of public opinion even on the political institution most insulated from direct public rebuke: the Supreme Court.[32]

A claims process creates wellbeing for consumers, and leads to more repeated and extensive use of the resources for which the claims process seeks to provide redress for. It also substantially adds to the legitimacy of the institutions as a major policy decision maker for the community. A rational institution, therefore, should seriously consider a claims process for actions that it aims to encourage.[33] Even if a company makes a mistake in policy development, a meaningful response can help build trust between customer and company.[34]

III. Understanding when claim-bringing helps institutional decision making

In this section I will explain the characteristics of the cases where claim-bringing substantially contributes to institutional decision making, namely when a claim is non-tangible and is shaped by social norms. Then, it will describe the case study of German institutional structure for receiving citizen concerns regarding the privacy implications of new consumer technologies. Through describing how German institutions responded to community privacy complaints about Google Street view this section discusses why access to claims process is the critical difference between the German and American institutions. Then, I stress the particular need for such a claims system in the context of

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[32] Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. PUB. L. 279 (1957). *See also* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2006).

[33] Colin Rule, *Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost- Benefit Case for Investing in Dispute Resolution*, 34 U. ARK. LITTLE ROCK L. REV. 767, 77 (2012).

[34] *See generally* TYLER J. HAMILTON: PRIVACY PAYOFF: HOW SUCCESSFUL BUSINESSES BUILD CUSTOMER TRUST (2002). *Cf.* Gene Marks, *Why Did T.J. Maxx's Share Price Surge After A Data Breach That Affected 94 Million Customers?*, FORBES (Jun. 2, 2014 11:09AM), http://www.forbes.com/sites/quickerbettertech/2014/06/02/why-did-t-j-maxxs-share-price-surge-after-a-data-breach-that-affected-94-million-customers/ (describing that the trust factor arising from its response helped TJMaxx actually improve its standing with consumers following a major data security breach). There is also a growing industry dedicated to helping companies that traffic in personal information manage the risk of breach – despite the fact that there is only limited liability against consumers for data breaches. *E.g.*, WHAT WE DO, KROLL, http://www.kroll.com/what-we-do.

information privacy, by both showing the extreme lack of claims process relative to other possible individual concerns, and outlining the exceptional characteristics of the interest of consumer privacy.

A. Characteristics of cases where claim-bringing substantially helps policy-making

My contention in this article is that a local point of access and lower financial barrier to making claims would lead to more individual claims in response to perceived consumer privacy infringements from new technologies. More claims make responses more likely by political actors, especially state political actors. This principal is at a broad enough level of generality that several different institutional structures could satisfy it. A institutional system of this type is particularly important in the case of claims regarding information privacy, a personal interest that has positive externalities to the community, has contours are at least in part dependent on social norms, and the market fails to distribute the interest in line with said externalities and norms. Even if the claims process has negligible effect on actual policies, the mere fact that individuals had a meaningful opportunity to be heard would legitimate the actions of public and private entities with respect to the privacy implications of new technologies.

Information privacy shares characteristics with other regulatory areas that feature claims systems that serve a similar function of offering the public a regulatory check on corporate behavior. This section will consider: patent registration, data protection disclosure state statutes, and legal malpractice claims.

Patent registrations were originally called petitions,[35] and registering patents through the USPTO is an example of a claims process that provides valuable information to policy-makers about developments in fields where practices and norms are in flux. It is also a process that is readily accessible to members of the public/ There is a relatively low cost to file a patent. An individual or organization that wishes to file a patent can submit an application to the USPTO. This can be done online, and the fee schedule varies based on whether the submitter is a large entity, small entity, or a

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[35] Camilla Hrdy, *State Patent Laws in the Age of Laissez-Faire*, 28 BERKLEY TECH. L. J., 74 (2013) (citing Patent Act of 1793, ch. 11, § 1, 1 Stat. 318, 318 (repealed 1836) (stating that the applicant must submit a petition "setting forth, that he, she, or they, hath or have invented or discovered any useful art, manufacture, engine, machine, or device, or any improvement therein not before known or used.").

"micro-entity" or individual.[36] Perhaps more importantly, average Americans who are not otherwise repeat players in intellectual property or innovation policy perceive a patent as something within reach. The ubiquity of mass advertising for inventions is a testament to the perception that the opportunity to patent is open to all.[37] Perhaps due to this culture, innovation is common among Americans. In a recent study, it is estimated that 25% of Americans will create or modify an object or concept in such a way that it would have been patentable.[38] Furthermore, the existence of patent trolls is a testament to the system's openness to all-comers, even those who are there only to exploit known holes. There are many ongoing debates as to how to reform patent law, mostly to do with the over-broad scope of patents and how patents may interplay with or unduly limit innovation. However, reform of the opportunity to register a patent through a brisk administrative process is generally not considered a possible remedy for the problem. The USPTOs practices are informed by the registration process and the information that incoming claims provide about who is claiming what. An increasing chorus of voices has argued that the USPTO should receive Chevron deference from federal courts,[39] but even without formal Chevron deference, USPTO policy and information has consistently influenced the courts,[40] the major source of policy change in patent policy.[41] In this way, the

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[36] UNITED STATES PATENT AND TRADEMARK OFFICE, USPTO FEE SCHEDULE, July 1, 2015, http://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule#Patent%20Fees

[37] *See, e.g.*, INVENTHELP, inventhelp.com (a company dedicatd to "help[ing] everydayinventors patent and submit their ideas to companies).One of my first memories of the notion of a patent was my father's doodlings of a possible invention, an ingenious design for a fly trapper. Wdhile his days were fully booked with his work in finance, he told me that someday he would patent the trapper and make a business out of it. To date, he hasn't followed through on the business aspect of this ambition, as far as I know, and I'm not sure if he ever got the patent.

[38] Cite- need to find this study – ask Jeanne Fromer

[39] *E.g.*, Melissa F. Wasserman, The Changing Guard of Patent Law: Chevron Deference for the PTO, 54 WM. & MARY L. REV. 1959, 2018 (2013); Stuart Minor Benjamin & Arti K. Rai, Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law, 95 Geo. L.J. 269, 327-28(2007).

[40] John M. Golden, The USPTO's Soft Power: Who Needs Chevron Deference?, 66 SMU L. Rev. 541, 546 (2013) ("I doubt that courts will find that Congress has silently endowed the USPTO with a primary interpretive authority that the courts have long understood the USPTO to lack.").

[41] Camilla A. Hrdy, *Dissenting State Patent Regimes*, 3 IP THEORY 2, 78, 78 (2012).

registration avenue for patents provides legitimacy and influence to the USPTO.

State data breach notification legislation is another area where a mandatory disclosure system gives an incentive to powerful interests to pay attention to the interests of under-organized average consumers. These laws require notice to affected consumers of security breaches of personal data.[42] In 2002, California passed the first state data breach notification state law, and over the next decade, most other states followed suit by making their own variation of the California law. Currently, forty-seven states have data-breach notification laws.[43] In this case, the legislature decides, based on current social norms and business practices, what constitutes a "data breach," and when such a data breach happens, a company is required to report it to affected people. The data breach notification provide notice when grounds for consumers to be worried about the safety of their information so the consumers can change who they give their business to, or the businesses can give the consumer reason not to depart. However, the mere fact of notification of a bad data breach or even bad data protection practices doesn't mean aggrieved consumers have a cause of action in court or in a state administrative agency.[44] In fact, most state data breach legislation does not include such an award of individual cause of action, and advocates have called for reform to give individual consumers more agency.[45]

Transparent claims processes providing record of current practices and changing social norms for groups whose interests are not represented by repeat players in the litigation or legislative process can work outside of the substantive field of high technology. Disciplinary conduct review processes processes, which exist in all fifty states, provide an administrative avenue for unprofessional behavior by attorneys to be reported.[46] Like patent

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[42] *See* GINA STEVENS, CONG. RESEARCH SERV., R42475, DATA SECURITY BREACH NOTIFICATION LAWS 4 (2012), *available at* http:// fas.org/sgp/crs/misc/R42475.pdf..

[43] *State Security Breach Notification Laws*, NAT'L CONF. OF ST. LEGISLATURES (Sept. 3, 2014), http://www.ncsl.org/research/telecommunications-and-information-technology/securitybreach-notification-laws.aspx.

[44] Rachael M. Peters, *So You've Been Notified, Now What? The Problem with Current Data-Breach Notification Laws*, 56 ARIZ. L. REV. 1171, 1183-84 (2014); see also .

[45] Peters *supra* at 47, at 1194-1201.

[46] Nicola A. Boothe-Perry, *No Laughing Matter: The Intersection of Legal Malpractice and Professionalism*, 21 AM. U. J. GENDER SOC. POL'Y & L. 1, 9-10 (2012)("Disciplinary conduct," a narrower class than professional conduct, relates to attorney conduct that specifically violates state and national rules of ethics and professional responsibility, subjecting the attorney to disciplinary proceedings.").

registration and data breach mandatory disclosure, the goal of such legal malpractice is to give society a forum for enforcing an acceptable standard of care among the attorneys that serve them.[47] Neil Hamilton and Verna Monson have demonstrated that there is a direct connection between professionalism and the effectiveness of legal practice, so legal malpractice claims serve the interest of the broad, diffuse set of anyone who uses lawyers.[48] Legal malpractice claims can be litigated in court, or submitted to the state bar association.[49] While large monetary damages are only available through the courts, grievances can be filed with local bar associations quickly and inexpensively.[50]

While all three of these claims systems are imperfect, what they all have in common is that there are virtually no detractors of the claims process themselves. They provide information to the public about violations of social norms against diffuse groups of consumers who are unlikely to organize themselves or have their interests represented by established interests groups. They provide legitimacy to government actors as regulators in their policy spaces. Lastly, they force institutional actors to be accountable to the public interest by exerting the soft power of public pressure. The following subsection section will illustrate how such claims process in information privacy could have similar characteristics by discussing the case study of how the information privacy claims process works in Germany.

B. An (imperfect) privacy case study: Google Street View Controversy in Germany

1. German institutional structure

The need to protect a sphere for data privacy has deep foundations in German law. The constitution (or "basic law") of Germany (*Grundgesetz für die Bundesrepublik Deutschland*)

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47 Nicola A. Boothe-Perry, *No Laughing Matter: The Intersection of Legal Malpractice and Professionalism*, 21 AM. U. J. GENDER SOC. POL'Y & L. 1, 7 (2012)

48 Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO. J. LEGAL ETHICS 137, 143 (2011) (indicating that there is a positive empirical relationship between professionalism and effectiveness in the practice of law and that with "ethical professional formation occur[ing] throughout a career... [a] highly professional lawyer is substantially more likely to be an effective lawyer").

49 Boothe-Perry supra at XX,

50 E.g., NEW YORK CITY BAR, HOW TO COMPLAIN ABOUT LAWYERS AND JUDGES IN NEW YORK CITY, June 2012,

guarantees the "dignity of the individual," and the right to the "free development" of one's personality (*allegemeines Personlichkeitsrecht*).[51] The Constitutional Court (*Bundesverfassungsgerich*) has identified some scope of privacy as essential for the right to an inviolate personality, holding that "the right of privacy (*Privatsphäre*) [is] an 'untouchable sphere of private life withdrawn from the influence of state power.'" The Constitutional Court has jurisdiction wherever anyone who "believes that his fundamental rights or other specifically mentioned in the Basic Law have been violated by public authorities" invokes its authority.[52]

The federal law that delineates data privacy processing by private actors is the German Federal Data Protection Act of 1977 (*Bundesdatenschutzgesetz*) (BDSG).[53] The BDSG created a national Federal Commissioner for Data Protection (*Der Bundesbeauftragte für den Datenschutz und die Informationsfreiheit*).[54] However, state agencies are in charge of enforcement and interpretation of the federal data protection law, as well as any state data protection laws.[55] Each state has its own agency, called its Office for Data Protection (*Der Landesbeauftragte für den Datenschutzbeauftragte*) or something similar, that is "responsible for monitoring compliance with data protection provisions."[56] The Federal Commissioner is tasked with monitoring federal agencies and state Offices for Data Protection for "compliance. . .with the provisions of [BDSG] and other data protection provisions."[57]

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[51] *Grundgesetz für die Bundesrepublik Deutschland* of May 23, 1949 (hereinafter "GG"). Article I(I) states "The dignity of the individual is untouchable. It is the duty of all governmental power to heed it and protect it." *Id.* Article 2(I) GG provides: "Every person has the right to free development of his own personality, in so far as he does no damage to the rights of others, to the constitutional order, or the moral law." *Id.*

[52] Art. 93(IV)(a) GG.

[53] *See generally* J. Lee Riccardi, *The German Federal Data Protection Act of 1977: protecting the right to privacy?,* 6 B. C. INT'L & COMP. L. REV. 243 (1983) (contemporary summary of the law and its implications).

[54] Federal Data Protection Act (BDSG) Version promulgated on 14 January 2003 (Federal Law Gazette I, p. 66), last amended by Article 1 of the Act of 14 August 2009 (Federal Law Gazette I, p. 2814), Ch. 3, § 22-26, *available at* http://www.bfdi.bund.de/EN/DataProtectionActs/Artikel/BDSG_idFv01092009.pdf?__blob=publicationFile.

[55] *Id.*

[56] *Id.* at Ch. 3, § 26(4).

[57] *Id.* at Ch. 3, § 38 (4).

When it informs the state agencies of the monitoring results, the Federal Commissioner "may include recommendations for improving data protection."[58]

The Federal Commissioner has no direct power to enforce the law against companies for infringing the law, and the states have no obligation to listen to any recommendations the Federal Commissioner might offer.[59] Representatives from all sixteen the state Offices for Data Protection and the Federal Commissioner meet to discuss privacy and data protection issues of the day biennially, and agree to resolutions.[60] However these resolutions rarely constitute specific approaches to enforcement policy, so each state agency thus operates largely based only on its own interpretation of federal and state law.

Each state agency has its own policies.[61] Such agencies enforce data privacy law on the state level, and have a sub-office dedicated to this.[62] This Article will focus on the state agency in Hesse as an illustrative example of state agency action in Germany. The overall focus of the Hessen Office for Data Protection is the legal aspects of information and communication technology (*Rechtsfragen der Informations- und Kommunikationstechnik*). This office handles data privacy enforcement and policy, among other matters.

Hesse was the first German state to pass a comprehensive data privacy law in 1970[63] and contains the city of Frankfurt, Germany's fifth largest city and a global financial hub. As such it is a strong representative of German state telecommunication agency

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[58] *Id.* at Ch. 3, §24(5).

[59] *Id.* Ch. 3, §24, 26.

[60] SACHSEN-ANHALT: KONFERENZEN, Entschließungen der Konferenz der Datenschutzbeauftragten des Bundes und der Länder seit 1992, http://www.sachsen-anhalt.de/index.php?id=18664 (last visited Ocotber 22, 2013).

[61] TECHNISCHE HOCHSCHULE MITTELHESSEN, TB BUNDESLÄNDER, http://www.thm.de/zaftda/component/docman/cat_view/25-tb-bundeslaender (last visited October 22, 2013) (a compilation of the data protection laws and regulations in each of the German states).

[62] Federal Data Protection Act (BDSG) Version promulgated on 14 January 2003 (Federal Law Gazette I, p. 66), last amended by Article 1 of the Act of 14 August 2009 (Federal Law Gazette I, p. 2814), Ch. 3, § 22-26, *available at* http://www.bfdi.bund.de/EN/DataProtectionActs/Artikel/BDSG_idFv01092009.pdf?__blob=publicationFile.

[63] Hessian Data Protection Act of Oct. 7, 1970, GESETZ UND VERORDUNGSBLATT [GVBI] 625. This statue served as a model for several other German states and the BSDG, adding to its attractiveness as a baseline case for describing the actions of state agencies.

practices with respect to privacy. In January 2012, I travelled to Germany for two weeks. There, I met with Wilhlem Rydzy, Head of Telecommunications and Media (*Referatsleiter für Telekommunikation und Medien*) in the Office for Data Protection of the Hessen state telecommunication agency (*Der Hessische Datenschutzbeauftragte*, hereafter, "Office for Data Protection") in Wiesbaden. I also examined local materials from the agency.[64]

In Hesse, the enforcement process for companies who violate Hessen privacy law is more of a negotiation process than an adversarial process. People in Hesse first submit a claim regarding some invasion of data privacy under the privacy statute German Federal Data Protection Act or the Hessian Data Protection Act. Then, the Office for Data Protection investigates the claim by working with the potential defendant, and tries to get them to modify their practices to deal with the claim. If a settlement cannot be reached, the Office for Data Protection can use injunctive power to make the company stop. Most actions stop at the second step, however, through negotiations between the alleged violator of privacy rights and the agency. Importantly, this process is not adversarial. The agency itself does investigation prompted by the concern of the citizen who raised the problem. Obviously, if there is a privacy concern that the Office for Data Protection ends up warding off through negotiation and the threat of legal action, the initial claimant may benefit. The agency does not have the power to forcibly round up companies without operations in the state. Major companies have a presence in many major cities and are subject to regulation by the Office of Data Protection of any state in which they operate.

It is also possible to bring consumer privacy claims to the courts in Germany. However, state administrative agencies have proven more influential than courts in influencing corporation behavior. This is because there are many obstacles to the use of courts in Germany.

2. American institutional structure

While the theoretical foundations of privacy law in the United States come from tort law[65] and constitutional law[66], The United

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[64] The summary that follows is based on Herr Dr. Ryzde's summary of the agency's operation. I have cited appropriate sources where applicable, when facts are uncited they can be attributed to observations and discussions I had while in Weisbaden.

[65] *See generally* Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (advocating recognition of the right to privacy as it had shown itself at common law – a broad "right to be let alone" – and for remedies for its violation); William L. Prosser, *Privacy*, 48

States Federal Trade Commission is the primary agency that brings enforcement actions against companies for unfair and deceptive data privacy practices.[67] The FTC derives the authority to prosecute companies and issue enforcement guidelines related to privacy concerns stemming from information exchange transactions between individuals and companies from the Federal Trade Act §5.[68] The FTC first announced to Congress in 1998, elaborating its approach to its FTC § 5 enforcement authority in the context of privacy in a report to Congress on the matter entitled *Privacy Online: A Report to Congress*.[69] Since 1998, the FTC has become increasingly activist in setting the practical norms for industry behavior in the area of data privacy.[70] However, that role has been questioned on the ground of the vagueness of the "unfair and deceptive" standard for FTC intervention.[71]

Cal. L. Rev. 383, 423 (1960)(outlining four discrete torts based on a descriptive evaluation of the development of privacy in tort since Warren and Brandeis).

[66] S*ee, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (right to privacy in sexual and reproductive matters), Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) (collection or disclosure of information).

[67] Some have suggested that the Consumer Financial Protection Bureau could play some role in enforcing data privacy claims. As of the time of this writing, this role had not yet fully taken shape.

[68] Federal Trade Commission Act of 1914 (15 U.S.C §§ 41-58, *as amended*). The text of the FTC's organic statue confers broad authority to regulate trade, stating:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful...The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations... from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

[69] FED. TRADE COMM'N, PRIVACY ONLINE: A REPORT TO CONGRESS (1998), *available at* www.ftc.gov/reports/privacy3/priv-23a.pdf.

[70] Solove, Daniel J. & Woodrow Hartzog, *The FTC and the New Common Law of Privacy* (May 13, 2013)(unpublished draft); *see also* Lauren Henry, *Institutionally appropriate approaches to Privacy: Striking a balance between judicial and administrative enforcement of privacy Law*, 50 HARV. J ON LEGIS. 1 (2014).

[71] *E.g.*, Jedidiah Bracy, *White House Privacy Bill Taking Fire from All Sides*, THE PRIVACY ADVISOR (Mar. 2, 2015), https://privacyassociation.org/news/a/white-house-privacy-bill-taking-fire-from-all-sides/; Diane Bartz, *Commissioner to push for FTC vote on 'unfair and deceptive' guidelines*, REUTERS (Fri. Feb 27, 2015 6:56am EST), http://www.reuters.com/article/2015/02/27/usa-antitrust-ftc-idUSL1N0W10LL20150227.

While some states have FTC analogues, [72] they have not been particularly active in privacy enforcement actions. In recent years, the FTC has handled a limited number of high profile data privacy cases that touch upon the data use and privacy practices of some of the most commonly used products in America, such as Google and Facebook. Most FTC actions end in a consent order, a contract agreement between the FTC and the company to adhere to certain rules. However, others in similar lines of work to the companies that actions are brought watch these actions carefully and shape their privacy policies to attempt to avoid enforcement actions.[73] Incentives to avoid enforcement actions are getting higher, as the FTC has proven increasingly willing to impose strict punishment, as in required audits for up to fifteen years.[74]

It is possible to use state statutory and common law to bring enforcement actions against private actors that infringe individuals' data privacy. The lack of success of many cases in the courts is due to tight interpretations of harm and of damages at common law.[75] Some states attorney general's offices have expertise in and a commitment to pursuing public interest privacy litigation.[76]

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[72] But they could. Most FTC analogues have similar grants of authority to the federal FTC and interpret the scope of their authority analogously. could http://www.wiggin.com/14583.

[73] *See In the Matter of Google Inc.*, FTC File No. 102 3136 (2011)(Commissioner Rosch, concurring statement), *available at* http://www.ftc.gov/os/caselist/1023136/index.shtm (noting that he was concerned that Google was accepting the terms as leverage that "hurt other competitors as much or more than the terms will hurt [Google].").

[74] FED. TRADE COMM'N, TWITTER SETTLES CHARGES THAT IT FAILED TO PROTECT CONSUMERS' PERSONAL INFORMATION; COMPANY WILL ESTABLISH INDEPENDENTLY AUDITED INFORMATION SECURITY PROGRAM (2010), *available at* http://www.ftc.gov/opa/2010/06/twitter.shtm.

[75] *E.g.*, In re Jet Blue Airways Corp Privacy Litigation, 379 F. Supp. 2d 299, 327 (E.D.NY. 2005) (rejecting a hypothetical claim for damages based on "the loss of the economic value of their information" because "[plaintiffs] had no reason to expect that they would be compensated for the 'value' of their personal information…[and there is] no support for the proposition that an individual passenger's personal information has or had any compensable value in the economy at large); Dwyer v. American Express Co., 652 N.E.2d. 1351, 1356 (Ill. App. 1995) (holding that the use of consumer data to target third party politics did not violate the intrusion upon seclusion or appropriation privacy torts because they "did not disclose financial information about particular cardholders" and while each consumer's data is valuable to the company "a single, random, cardholder's name has little or no intrinsic value to defendants.").

[76] *E.g.*, STATE OF CALIFORNIA DEPARTMENT OF JUSTICE: OFFICE OF THE ATTORNEY GENERAL, PRIVACY ENFORCEMENT AND PROTECTION, http://oag.ca.gov/privacy (last visited Oct. 20, 2013).

California additionally has a legislature interested in creating causes of action that create better "hooks" for both the attorney general and individuals to use as a way for getting a privacy claim heard in court.[77] However, in most states, courts do not represent a viable road for most potential privacy claimants to get their claims heard.

3. Google Street View

The reception and governmental response to Google Street View in Germany offers insights into the relationship between society, corporations, and regulatory actors in the setting of privacy norms in the digital age. More specifically, the nature of regulation influences how and when corporations react when society perceives privacy wrongs or surveillance "creepiness."[78]

In Germany, early opposition to Google Street View led to substantive changes in how Google Street View ended up functioning in Germany when it launched on November 18, 2010. When it was announced that Google Street View would come to Germany, many Germans reacted highly negatively because of a perceived invasion of privacy.[79] Thomas Hoeren, a law professor at the University of Muenster's Institute for Information in Germany, has noted a historical imperative that may motivate German regulators to give particular solicitude to citizen privacy concerns: "Germany has a long tradition of protecting privacy and personality rights . . . due to the very bad surveillance practices of the Nazi régime[.]"[80]

After Google Street View's launch there were some rumblings in the press about American privacy concerns about Google Street

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[77] Erika Aguilar, *Gov. Jerry Brown signs bill increasing online privacy for minors in California*, SOUTHERN CALIFORNIA PUBLIC RADIO (Sep. 23, 2013), http://www.scpr.org/news/2013/09/23/39426/california-teenagers-could-get-an-online-eraser-bu/.

[78] *See generally* Omer Tene & Jules Polonetsky, *A Theory of Creepy: Technology, Privacy and Shifting Social Norms*, YALE J. L. & TECH., 2013, (forthcoming 2013) , *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326830 (presents a set of social and legal considerations giving substance to the intuition that a new technology is "creepy").

[79] Stephen Kurczy, *Germany's love-hate relationship with Google Street View,* CHRISTIAN SCIENCE MONITOR (August 12, 2010), http://www.csmonitor.com/World/Europe/2010/0812/Germany-s-love-hate-relationship-with-Google-Street-View.

[80] *See id.*

View[81] and court cases alleging invasion of privacy by Google, which were unsuccessful at the motion to dismiss phase.[82] However, no American government agency took action to attempt to protect consumers from perceived invasion of privacy by Google Street View.[83]

Commentators observed the similar character of the initial furor over the initial announcement of the release of Google Street View in the United States and Europe.[84]

Google Street View is a feature of Google Maps that allows users to view a street-level panorama of a given point on a map. The panorama is based on photos taken by Google cars that take photographs from the street, including anyone or anything that happens to be in view along with the buildings.[85]

Some have argued that privacy concerns arising from Google Street View are outweighed by the benefits to society it can provide.[86] But as the early pushback against perceived privacy

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[81] Miguel Helft, *Google Zooms in Too Close for Some*, N.Y. Times (June 1, 2007), *available at* http://www.nytimes.com/2007/06/01/technology/01private.html?_r=0.

[82] *E.g.*, Boring v. Google, 598 F. Supp. 2d 695, 698 (W.D. Pa. 2009), *aff'd* Boring v. Google, Inc., 363 F. App'x 273, 279 (3d. Cir. 2010). Google eventually settled with the plaintiffs of *Boring v. Google* for one dollar. Chris Davies, *Google pays $1 compensation in Street View privacy case*, SLASHGEAR.COM (Dec. 3, 2010), *available at* http://www.slashgear.com/google-pays-1-compensation-in-street-view-privacy-case-03117450/.

[83] In the process of taking the photographs for Google Street View Street View vehicles had been collecting and storing data over unencrypted Wi-Fi networks, including personal e-mails, usernames, passwords, videos and documents. The FTC investigated, and ultimately rejected a potential enforcement action against Google on the grounds of these practices. Clair Cain Miller, *A Reassured F.T.C. Ends Google Street View Inquiry*, N. Y. TIMES (2010), *available at* http://www.nytimes.com/2010/10/28/technology/28google.html. More recently, state attorneys general pursued these facts and reached a large settlement with Google, which included an admission of wrongful acquisition and use of personal information through these wifi data pickups. David Streitfield, *Google Concedes That Drive-By Prying Violated Privacy*, N. Y. TIMES (2013), available at http://www.nytimes.com/2013/03/13/technology/google-pays-fine-over-street-view-privacy-breach.html. But these matters do not get to the heart of the general concern about the privacy implications of having a scene from, for example, one's yard, made immediately publiclv available via Google Maps.

[84] Christian Linder *Persönlichkeitsrecht und Geo-Dienste im Internet*, TO 292 (2010), available at https://beck-online.beck.de/.

[85] WIKIPEDIA, GOOGLE STREET VIEW (last visited Nov. 3, 2013) http://en.wikipedia.org/wiki/Google_Street_View.

[86] John C. Dvorak, *Google Street View: A Valuable Public Resource*, PC MAG., Mar 2012.

invasions of Google Street View from some Americans illustrates, the move towards that point was by no means inevitable.

There is no evidence that the proportion of German consumers who had privacy concerns about Google Street View prior to its rollout was higher than the proportion of American consumers who had privacy concerns about Google Street View. What accounts for the difference in regulatory agencies' sensitivity to consumer's privacy concerns, and the greater responsiveness of Google to change the functionality of Google Street View to deal with said concerns? This question matters because in a world where innovative technology companies with market power contribute significantly to setting social norms, it is significant to understand the channels through which society can influence how corporations creates technological architecture.[87]

When considering the relationship between regulation and the establishment of consumer privacy norms, it is useful to compare the rollout process of Google Street View in Germany to the process in the United States. Google launched Google Street view in the United States in 2007.

When Google first announced its intention to launch Google Street View in Germany, and photos started to be taken, many Germans contacted their states' (*Bundesländer*) Office for Data Protection with privacy concerns. Furthermore, a prominent court case alleging Google's violation of the right of privacy was filed in the district of Berlin.[88]

In Hesse, the individual claims submitted to the Office for Data Protection followed a pattern. Hessens noticed that homes appeared on Google Street View. Sometimes, given the random time when the Google Street View image capturing cars passed, they worried that image of a person's home might include an embarrassing or self-implicating image of the person. These claims often betrayed basic misunderstandings about how Google Street View works. Many claimants erroneously assumed that Google was actually constantly monitoring their homes.[89]

The Hessen Data Privacy Office was not alone in receiving many claims from its residents regarding Google street view. Many of the German states began investigating Google Street View. Some

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[87] Lawrence Lessig, *The New Chicago School*, 27 J. OF LEGAL STUD. 661, 664 (1998) (defining "architecture" in the sense I use it here).

[88] Maureen Cosgrove, *Germany court rules Google Street View legal*, JURIST (March 22, 2011), http://jurist.org/paperchase/2011/03/germany-court-rules-google-street-view-legal.php.

[89] Interview with Wilhelm Ryzde, Head of Telecommunications and Media, Hesse Office for Data Protection (Jan. 20, 2012).

threatened to impose sanctions or regulations. Some states have a more activist attitude towards enforcing privacy protections than others. For example Schleswig-Holstein Office for Data Protection has proven very proactive in dealing with privacy concerns. In fact, the state banned the Facebook like button on all sites within the state.[90] Other states, Hesse included, took the more moderate approach of having users be able to turn off the like button if they wanted.

With respect to Google Street View in particular, the Hessen Office for Data Protection was skeptical about the existence of an actual interest being violated in this case. The grievances, more often than not, were based on factually inaccurate interpretation of how Google Street View worked. But other states were more eager to take swift action.

With German states poised to impose a variety of different regulations on Google Street View, Google met with representatives from the Office for Data Protection from all the states. In 2010, after three years of negotiation, each of the German states and Google agreed to a uniform Google Street View opt-out mechanism, by which anyone in Germany could fill out a web form showing that they lived at an address, and Google would blur out the image of that address after mailing a code to the address in order to verify that the person really lived at the address. [91] Google gave Germans a month before Google Street View went live in November 2010 to register their objections, even taking out ad space in newspapers to publicize the option to opt-out.[92] The number of Germans who requested that Google take down their information even before the official process was created and publicized was in the five figures, so one can imagine that a non-trivial percent of Germans were interested in having their home blurred out. [93]

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[90] *German State Imposes Ban on Facebook 'Like'*, INT'L. BUS. TIMES (Aug. 20, 2011), http://www.ibtimes.com/german-state-imposes-ban-facebook-302257 (last visited Oct. 20, 2013).

[91] Matthias Kremp, *Courting Controversy: Google Prepares Street View Launch in Germany*, DER SPIEGEL (Aug. 10, 2010), http://www.spiegel.de/international/germany/courting-controversy-google-prepares-street-view-launch-in-germany-a-711090.html. See ALSO JOHANNES FRITZ, NETZPOLISCHE ENTSCHEINDUNGPROZESSE: DATENSCHUTZ, URHEBERRECHT UND INTERNETSPERREN IN DEUTSCHLAND UND GROSSBRITANNIEN 158-168(2013)(recounting the Google Street View controversy in Germany).

[92] *Id.*

[93] The residence where the author did research for this Article, Guiollettstr. 67

60325 Frankfurt a.M., was one such address.

This would seem to be a happy ending, an agreement that assuages the concerns of those most concerned about privacy, but allows everyone else access to a good resource, and of course, Google access to a major market. What's more, the Berlin Superior Court affirmed the permissiveness of Google Street view under German privacy law.[94] However, after the process was finished, Google elected to stop updating Google Street View.[95] All the German states ultimately chose to agree to the same opt-out method with Google, but during the negotiation process, certain states proved rather mercurial, and Google could have reasonably doubted that any sustainable solution could have been reached.[96] After all, Google is constantly changing and updating its technology. Given that each state is not answerable to any uniform federal authority, one of the more activist states could offer up some opposition, and start the whole process again.

However, the functioning of the market prevented that from coming to pass. Soon after Google stopped updating Google Street View in Germany, Microsoft's Bing entered the market for street-level viewing, using a similar opt-out provision to the one Google Street View has.[97] Bing was able to piggyback on the negotiation process that Google already did with the states because it had a highly analogous product. There has not been a similar outcry about the beta launch of Bing Streetside, despite it being the functional equivalent to Google Street view. Bing Streetside has proved less controversial among Germans, possibly because it gained consumer trust from the start by having privacy provisions built into Streetside from its very rollout.

This is likely due to a combination of greater consumer understanding of what a street view application does and Microsoft's education and outreach efforts about Bing Streetside to the German public.[98] Bing's market share in Germany grew because

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94 Maureen Cosgrove, *Germany court rules Google Street View legal*, JURIST (March 22, 2011), http://jurist.org/paperchase/2011/03/germany-court-rules-google-street-view-legal.php.

95 Matt McGee, *Google Has Stopped Street View Photography In Germany*, SEARCH ENGINE LAND (Apr. 10, 2011), http://searchengineland.com/google-has-stopped-street-view-photography-germany-72368.

96 Interview with Wilhelm Rydzy, Head of Telecommunications and Media, Hesse Office for Data Protection (Jan. 20, 2012).

97 MICROSOFT, STREETSIDE**:** ERLEBEN SIE DIE WELT ALS WÄREN SIE VOR ORT,

https://www.microsoft.com/maps/de-DE/streetside.aspx (last visited Oct. 20, 2013) (website introducing Streetside, Microsoft's privacy policy, and the opt-out option).

98 *Id.*

it is a resource that is up-to-date and more complete than Google Street View itself.[99] Because of concerns from certain holdout states, including the Bavarian State Office for Data Protection,[100] Microsoft ended the beta phase of Bing Streetside in mid-2012, and plans to post a final version of Bing Streetside after all parties are satisfied.[101] Microsoft clearly sees an opportunity in Germany to gain a competitive advantage over Google; it is aggressively pursuing litigation to ban the use of Google Street View in Germany on patent grounds.[102] At the time of this writing, the litigation has not been resolved and Google Street View still works for Germany.[103]

For his part, Herr Dr. Rydzy of the Hessen Office for Data Protection lamented the way the Google Street View matter turned out in Germany as a failure on the part of the regulators. But the grass always seems to be greener on the other side. This case can be used to tease out what is good – and what is problematic – about both the American and German regulatory structures for data privacy.

Administrative agencies in each state have the power to regulate Google regarding Google Street View. Because of that authority, they were able to engage in direct negotiations with Google. But the courts also have a role to play. The Supreme Court of the State of Berlin (*Kammergericht*) held for Google in a suit in which plaintiff alleged privacy harms from Google Street view, on the grounds that the harms the plaintiff alleged were purely speculative.[104] At that time, however, Google Street View had not

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[99] Matt McGee, *After Little Resistance in Germany, Bing Expands Streetside Photos Across Europe*, SEARCH ENGINE LAND (Oct. 11, 2011), http://searchengineland.com/after-little-resistance-in-germany-bing-expands-streetside-photos-across-europe-96351.

[100]Matt McGee, *Bing's Streetside Already Facing Objections In Germany*

SEARCH ENGINE LAND (Apr. 8, 2011), http://searchengineland.com/bings-streetside-already-facing-objections-in-germany-72264.

[101] MICROSOFT, STREETSIDE**:** ERLEBEN SIE DIE WELT ALS WÄREN SIE VOR ORT,

https://www.microsoft.com/maps/de-DE/streetside.aspx (last visited Oct. 20, 2013)

[102] Richard Holt, *Google Maps facing ban in Germany*, THE TELEGRAPH (Mar. 8, 2013), http://www.telegraph.co.uk/technology/google/9918177/Google-Maps-facing-ban-in-Germany.html.

[103] GOOGLE MAPS, https://maps.google.com/ (last visited Oct. 20, 2013).

[104] Kammergericht [OLGZ] October 25, 2010, 10 OLGZ 127/10, *available at* http://www.berlin.de/sen/justiz/gerichte/kg/presse/archiv/20110315.1545.335632.html

yet been rolled out in Germany, so the holding still left Google in an uncertain position as to how a German court would hold when the company actually made the product available.[105] Because the state administrative agencies negotiate directly with Google, court statements on the topic have been peripheral to actually setting architectural norms in terms of technology in Germany.

C. The centrality of an accessible individual claims process in information privacy

The previous section has shown that it is fairly easy for an individual to bring a claim regarding privacy concerns about a new technology to a state administrative agency in Germany. It also showed that a concerned individual would have a reasonable expectation that state data protection officials would read and respond to her claim. In the United States, it is difficult and expensive to bring a claim in the course, and there is a low likelihood of meaningful engagement by the FTC with a complaint by an unaffiliated individual. I contend that the ease with which the German system allows individuals to submit claims both satisfies an important psychological outlet for individuals concerned about privacy and provides information about social norms and practices that could be useful for policy development in information privacy. It also provides built-in political pressure in support of information privacy protections.

Before turning to elaborate this argument further, I must note that there are several other differences between the two regulatory systems in place. There are three key differences between the German and American administrative procedures for regulating information privacy that account for their disparate responses to the privacy implications of new technology. These differences have the net effect of giving Germans more meaningful avenues to air their claims and provide German governmental actors with the political incentive to address said claims. First, Germany's primary enforcement power for consumer privacy complaints is vested in state administrative agencies, whereas a federal agency is the primary enforcement power for consumer privacy complaints in the United States. Second, individuals can register administrative complaints to the primary avenue for consumer complaints in Germany and reasonably expect a response, whereas in the United States, a consumer advocate group or other repeat player normally need submit a complaint in order to receive an investigation. Third, Germany has specialty agencies that address information privacy

[105] *Id.*

and data security matters, whereas in the United States, generalist agencies and courts handle information privacy matters.

However, a quick examination of them suggests that the meaningful opportunity to be heard is a critical difference.[106] This is a feature that the American system should take pains to incorporate in order to improve information privacy discourse and policy.

There is lively debate in the literature as to whether state or federal administrative agencies are more susceptible to be over-influenced by moneyed interest groups.[107] One interpretation of the comparison in the previous section might be in support of the proposition that state administrative agencies allow people who are not affiliated with interests groups to allow their voices to be heard. However, whether the body that receives the claims is state or federal, what is important is that the individual perceives the agency as listening to the claim.

It has been suggested that a properly implemented collaborative model of agency governance of industry, in contrast to a more adversarial model, would do a better job in producing results that serve the public interest in certain areas.[108] This is actually not germane to the current argument. What we are talking about here is the signaling process for what is important to individual directly signaling what social norms are and indirectly suggestion action for political actors. I am not making a claim that this would necessarily in all cases produce the most public interested oriented result. Furthermore, in her influential article on the subject of collaborative governance, Jody Freeman suggests that "Collaborative experiments are more likely to develop in the context of health and safety and environmental regulation because technical, data-driven disputes lend themselves to adaptive solutions, or because the regulated industries in these sectors have accepted the inevitability of regulation and are willing to discuss implementation." It is far from clear that information privacy is

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[106] The other differences certainly may matter. But this Article's argument is limited to the significance of a meaningful opportunity to have individual consumer privacy concerns

[107] *Compare* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 636-41 (2001) (suggesting that public choice pathologies favoring interest groups are more pronounced at the federal level), *with* Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1104 (2009) ("Observers have suggested that the federal government is less subject to public choice pathologies than many states, which may be dominated by a particular industry group and may lack the strong presence of environmental advocacy groups.").

[108] Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 97-98 (1997)

sufficiently similar to those sectors of regulation to make collaborative governance an advantage. While there are important technical aspects to the field, an important element of deducing when government wants to construe a harm are wholly non-technical social norms and expectations.

Similar reasons preclude placing determinative emphasis on whether a specialty agency or court should be tasked with handling information privacy matters. The actors within a specialized institution have a tendency to protect the interest the values that the institution is designed to serve; this is what Mark Tushnet has called "mission commitment."[109] This phenomenon is not limited to agency capture; it can apply to court too. The case of the Federal Circuit, the appellate court dedicated to patent law, among a limited number of other specialized matters, is instructive.[110] Since its creation, it has developed pattern of expanding the scope of patentable works to the point of needing to be regularly curtailed by the Supreme Court.[111]

If an institution provides an avenue for individuals to bring information privacy claims, it will keep track of how many claims are brought, and for what, regardless of whether the claim was considered "successful." Courts have standard motion practice to ensure such records, and administrative agencies have intake paperwork.

If this point seems facile, consider the impact of the lack of information. Rachel Harmon has written extensively on the impact of the lack of publicly available information on policing practices.[112]

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[109] Mark Tushnet, *Epstein's Best of All Possible Worlds: The Rule of Law*, 80 U. CHI. L. REV. 487, 502-03 (2013).

[110] UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, COURT JURISDICTION, http://www.cafc.uscourts.gov/the-court/court-jurisdiction.html ("It has nationwide jurisdiction in a variety of subject areas, including international trade, government contracts, patents, certain money claims against the United States government, federal personnel, veterans' benefits, and public safety officers' benefits claims. Appeals to the court come from all federal district courts, the United States Court of Federal Claims, the United States Court of International Trade, and the United States Court of Appeals for Veterans Claims. The court also takes appeals of certain administrative agencies' decisions[.] . . . The court's jurisdiction consists of administrative law cases (55%), intellectual property cases (31%), and cases involving money damages against the United States government (11%). The administrative law cases consist of personnel and veterans claims. Nearly all of the intellectual property cases involve patents.").

[111] *E.g.*, Alice Corp. Pty. Ltd. v. CLS Bank Int'l, 134 S. Ct. 2347 (2014); *see also* Robin Feldman, *Coming of Age for the Federal Circuit*, THE GREEN BAG, Forthcoming, available at http://ssrn.com/abstract=2496763.

[112] *See, e.g.*, Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119 n. 11, 1146 (2013) ("Police departments collect some data about their

She argues that the lack of information available on policing practices decreases political pressure to reform policing and furthermore, makes reform more difficult even given adequate political will due to inadequate information about the status quo.[113]

Germany has meaningful, affordable administrative avenues for citizens to raise privacy claims. By assigning review of individual to the same agency that handles regulatory change, administrative officials become more likely to have a keen sense of the concerns of members of the public about data privacy practices. Furthermore, the power that each state has allows each state to serve as a test case. In a time period where norms and technology are fluid, having each state empowered to act can allow the best way of dealing with issues to rise to the top.[114]

On the other hand, having no regulatory way to settle privacy issues on the national level can be costly and confusing for stakeholders. Relative to the German patchwork regulatory model in this area, the American custom of handling some major privacy concerns nationally via FTC enforcement action is attractive.

Google Street view provides fertile fodder to examine three broad differences between the American and German regulatory procedures for regulating data privacy: (1) state versus federal agencies; (2) individual versus class claims; and (3) collaborative versus adversarial posture toward the person or company who the claim is against. One important similarity between Germany and the United States with respect to data privacy regulation is the lack of specialized agencies to handle data privacy claims.

The net effect of the differences between the German and American privacy regulation apparatus is to amplify the voices within society that are skeptical of industry practices that tend to compromise data privacy. This section will first discuss the differences between the two systems, then, the similarities, and then will make recommendations as to what this discussion suggests are the characteristics of an optimal system for privacy regulation in the age of big data.

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activities, but not as much as would be useful, and they often share it only reluctantly with the public."); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 772, 797 n.139, 815 (2012); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 5, 28-34 (2009).

[113] Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1122-29, 1146 (2013).

[114] *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting) ("[A] state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

German state agencies do the major policy work in the area of privacy in Germany. By contrast, to the extent that there is national policymaking attempted regarding privacy in the United States, it is done by the FTC, a federal agency. Many commentators have argued that Congress should pass omnibus federal privacy legislation that more expressly confers authority to regulate consumer privacy and perhaps gives the FTC some more powerful enforcement tools than consent orders with individual companies.[115] The advantage of Germany's approach is that states can handle a more diverse docket and can deal with more local problems. They also can use a variety of different approaches and the wisdom of each state's approach can be tested over time. The FTC, by contrast, can handle only a more limited docket of only the most major claims of obvious sweeping import. The advantage of the American approach is that it offers more uniformity. Having each state act as a test case can be very expensive for companies. The result could easy be a "race to the top," where companies that operate in multiple jurisdictions just comply with the most restrictive state policy across the board. This would take away the laboratories effect.

German agencies allow individuals to submit claims, which the agency investigates and enforces at its own expense. By contrast, most privacy claims that end up making a splash in the United States agency system are either class actions or are the result of citizens' groups rallying the FTC to pay attention to an issue. The result is that American enforcement of privacy interests is that much more removed from the actual concerns of the average consumer about data privacy.

In an environment with fluid norms, many companies may end up offending privacy norms without really meaning to. Ideally, companies would gladly supply data privacy to those consumers who want them, perhaps for an additional fee. The process in Germany for regulating consumer data privacy is highly collaborative. The investigation process which follows the acceptance of a non-frivolously claim is non-accusatory; the agency first seeks to a get a sense of what is happening, inform the company of what the Office for Data Protection thinks the proper policy might be and negotiate as to how to alter it. This sounds not too dissimilar from the FTC's consent order process, but in fact, since it happens over a series of letters rather than in an open court record, it has a more informal, collaborative character, and can happen more quickly. The threat of litigation also looms more

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[115] *See, e.g.*, Connie Davis Powell, *"You already have zero privacy. Get over it!" Would Warren and Brandeis Argue for Privacy for Social Networking?*, 31 PACE L. REV. 146, 179–81 (2011).

directly in the case of the FTC; if a consent order is not reached, the FTC can file a lawsuit in a federal district court. In this way, the American process is directly connected to the adversarial legal system in a way that the German process is not.

An area of commonality between the two systems is that neither country has a whole agency dedicated to privacy issues in particular.[116] While there are sub-offices in each German state telecommunications agency for data privacy, and the FTC has a sub-area for privacy enforcement as well, in neither country is there an agency particularly tasked with privacy enforcement. In the Google Street View controversy, the insistence of some Office for Data Protection of indulging and even crediting complaints about Google Street that had no basis in fact suggested an absence of expertise or a subjugation of expertise to improving public opinion. Similarly, the United States FTC Commissioners are expected to handle and approve cases involving not just privacy, but antitrust and a variety of other matters within its broad authority. Both Germany and the United States could benefit from greater expertise in the administrative agencies that handle privacy claims and regulations.

A regulatory system that takes claims and regulates on the state level, but that can have conflicts between agency policies resolved at the federal agency level, would be an ideal way for both Germany and the United States to reform their regulatory procedures to reap the benefits of the superior characteristics of each system.
Having an administrative avenue at the state level for individuals to submit claims and to resolve questions of policy locally is a strong way to allow consumer concerns about industry data privacy practices to quickly register and be addressed by government. In this way, social norms would serve as a more meaningful counterweight to industry practice than it is in the American status quo.

This is already the status quo in Germany, but in the United States, states would have to pass laws creating state regulatory agencies with the power to hear and investigate privacy claims based on state law, and mandated to report to the FTC any patterns in claims and significant regulatory efforts promulgated.

Having conflicts in regulatory decisions resolved on the federal level would help minimize the problems presented by patchwork of different data privacy regulations in the different states. It is unavoidable that states might decide to pass substantively different

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[116] At least Hesse does not; it is possible that at least one of the German states has structured its privacy enforcement apparatus such that there is a state privacy department. However, that is certainly not necessary or the norm.

data privacy laws in the current American legal environment,[117] but this would provide a standard way of resolving conflicts in resolving matters that are left to agency discretion. This would be something like an automatic, structural version of the conference between states that happened in Germany after some states started to pass regulations regarding Google Street View.

In the United States, that would look like the FTC issuing a guidance document after consulting with state agencies and other stakeholders. In Germany, this would look like the Office for Data Protection being able to call a conference at which state agencies could hash things out, or the creation of an FTC-like agency in Germany.

IV. Toward a meaningful pathway for consumer privacy claims in the United States

A local point of access and lower financial barrier to making claims would lead to more individual claims in response to perceived consumer privacy infringements from new technologies. More claims make responses more likely by political actors, especially state political actors. This principal is at a broad enough level of generality that several different institutional structures could satisfy it. A institutional system of this type is particularly important in the case of claims regarding information privacy, a personal interest that has positive externalities to the community, has contours are at least in part dependent on social norms, and the market fails to distribute the interest in line with said externalities and norms. Even if the claims process has negligible effect on actual policies, the mere fact that individuals had a meaningful opportunity to be heard would legitimate the actions of public and private entities with respect to the privacy implications of new technologies.

Finally, I lay out options for where claims could be made by individuals in the American system (1) quasi-judicial state administrative agencies, (2) state courts applying state privacy law,

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[117] There is no American federal omnibus data privacy law, and it seems unlikely that there will be one in the short-term future. Therefore it is by default left to the states to pass laws and regulate in this space. There has recently been some movement in this area, as the Obama Administration has just released a draft version of a federal omnibus privacy statute, but it does not seem that there is much hope for a settlement between all concerned parties at this time. *See* Andrea Peterson, *The White House's draft of a consumer privacy bill is out — and even the FTC is worried*, WASHINGTON POST (Feb. 27, 2015), http://www.washingtonpost.com/blogs/the-switch/wp/2015/02/27/the-white-houses-draft-of-a-consumer-privacy-bill-is-out-and-even-the-ftc-is-worried/.

and (3) a required reporting of a claims system by companies to a federal agency, such as Consumer Financial Protection Bureau, in a manner analogous to the Food and Drug Association's mandatory reporting system. I also evaluate the advantages and obstacles to each in the American system.

A. Why American institutions must be more sensitive to information privacy claims

It is important to observe that this Article's argument is not dependent on a high number of successful claims. Many successful claims would show that existing law and process tends to vindicate individuals' privacy concerns against a new technology, which may or may not be true. As many examples in American legal history can attest to, simply giving individuals a right and a pathway to claim it does not lead to that pathway having a tendency to improve the wellbeing of those who were accorded the right.[118]

There is a consensus in the privacy literature that. In his influential article Harvard Law Review Article, *Property, Privacy, and Personal Data*, Paul Schwartz summarizes the posture of the literature as follows:

> The emerging verdict of many privacy scholars is that existing markets for privacy do not function well. Due to such market failures, which are unlikely to correct themselves, propertization of personal information seems likely to lead to undesired results--even to a race to the bottom as marketplace defects lead competitors to take steps that are increasingly harmful to privacy. This perspective is found, for example, in Julie Cohen's scholarship; in her view, a negative correlation is likely to exist between property in personal information and the resulting level of information privacy. Cohen writes: "Recognizing property rights in personally-identified data risks enabling more, not less, trade and producing less, not more, privacy." Market failure will cause people to trade away too much of their propertized personal data and thereby erode

[118] *See* Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2190-98 (2013) (showing that under *Gideon*, the Warren court case that provided the indigent with the right to counsel in criminal cases, the poor receive more process and more punishment, but the fact that a right to counsel is afforded affords this injustice more legitimacy, noting "when the problem is lack of a right, one keeps going to court until a court declares the right. When the problem is material deprivation suffered on the basis of race and class, where, exactly, does one go for the fix?"); WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 124 (1995)("rights discourse . . . . converts social problems into matters of individualized, dehistoricized injury and entitlement.").

> existing levels of privacy. Or, as [Mark] Lemley concludes, "there is no good market solution" for information privacy based around property rights.[119]

The market simply does not tell corporations or government institutions enough about what individuals care about with respect to privacy or what emerging social norms constitute. Countless studies show that consumers care about privacy but still use products that have limited data security and engage in personal information trafficking. Much has been made about the contrast between market behaviors and survey responses. A claims system could give voice to what exactly about the products

A transparent claims system could provide both corporations and government with valuable information to improve the wellbeing of the public. Private actors could respond many of the claims through internal reform. The threat of government action in response to the claims would also further incentivize private action. Finally, if there happened to be a behavior by companies that violated social norms but corporate actors refused to correct for it, state actors could step in as a last resort backstop for upholding the public good of information privacy.[120] This is why it is a policy space that is particularly well suited to having a claims system that can trigger both private and public action.

Finally, the availability of the claims process has a salutary effect on the legitimacy of the new technology from the perspective of users, regardless of the degree to which actual change is achieved as a result of their petitioning.[121]

B. Three options for reforming American consumer privacy claims

1. State Courts

One way to open up state institutions to privacy claims regarding new technologies is improving access to state courts for potential claimants. This would constitute strengthening the cause

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[119] Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2076-77 (2004).

[120] *Id.* at 2077-75(describing privacy as a public good).

[121] *See* Jerry Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 433 (1987); cf. Jerry Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 922-25 (1981)(describing a prudential argument for due process from the perspective of human dignity).

of action for privacy invasion at common law and possibly also clarifying the harm accrued by an invasion of privacy. Many scholars have written on how to expand the common law action of privacy[122] and a few have written on how to define and justify the harm caused when an individual's privacy interest is invaded.[123] It is beyond the scope of this Article to advocate for a specific robust cause of action in state court or how courts or the state legislature should define and clarify the harm in the area of privacy. Rather, this section will evaluate the implications of the institutional choice of state courts to be the handler of privacy claims by individuals in response to new technology.

The Supreme Court has suggested that the best venue for individual claims is the court system.[124] The Roberts Supreme

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[122] *E.g.*, Lauren Henry, *Privacy as Quasi-Property*, IOWA L. REV. (2015 forthcoming)(advocating a reframing of Prosser's four torts as in all in common alignment with the model employed in quasi-property tort cases); Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CAL. L. REV. 1805, 1831-50 (2010) (suggesting that courts should could employ mainstream tort doctrines such as tortious enablement of criminal conduct, strict liability and duty of confidence rather than creating new privacy torts or using exisiting ones); Pamela Samuelson, *Privacy As Intellectual Property?*, 52 STAN. L. REV. 1125, 1159-69 (2000) (arguing that default rules that impose a minimum standard of commercial morality, as in trade secret law, could provide the common law framework necessary to allow courts to protect consumer privacy); Jessica Litman, *Information Privacy/information Property*, 52 STAN. L. REV. 1283, 1311 (2000) (suggesting common consumer privacy concerns are subsumed under the breach of confidence tort).

[123] *E.g.*, Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CAL. L. REV. 1805, 1848-50 (2010)(arguing that privacy torts in the modern world have magnified harm due to technological realities: "Aside from widening the sphere of Prosser's taxonomy to include mainstream torts, there are other ways in which privacy tort law could expand to meet the needs of today's exacerbated harms. This might involve altering Prosser's existing torts by changing the burden of proof. Privacy torts have long required demanding proof to ensure that plaintiffs cannot recover for the "merely unpleasant aspects of human interpersonal relationships." In important respects, today's privacy problems dispel concerns that plaintiffs would recover for trivialities. Public disclosures online are more lasting and destructive than ever before. They often create an "indelible blemish on a person's identity." Although people may attempt to respond to damaging disclosures in other posts, many may not see them, leaving the destructive bits in the forefront."); Daniel J. Solove, *"I've Got Nothing to Hide" and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745, 758 (2007) ("A privacy problem occurs when an activity by a person, business, or government entity creates harm by disrupting valuable activities of others. These harms need not be physical or emotional; they can occur by chilling socially beneficial behavior (for example, free speech and association) or by leading to power imbalances that adversely affect social structure (for example, excessive executive power).").

[124] Saul Zipkin, *A Common Law Court in A Regulatory World*, 74 OHIO ST. L.J. 285, 325-26 (2013)

Court has addressed the value and import of the ability to bring a claim in a common law court is standing is met.[125]

In American culture, the least politically controversial way to aware individuals the ability to raise claims against another private actor is through a traditional private law claim in tort, property, and contract.[126] These are classic areas of state regulation. Awarding personal causes of action, to be pursued either in the courts or in administrative agencies, is the most way for political actors to attempt to achieve public regulation through private action in a political environment heavy with deregulatory pressure.[127]

Despite the increasing entrenchment of what Robert Kagan calls "adversarial legalism," due to its compatibility with a more limited administrative state, Kagan and other scholars are skeptical that it presents the best way to achieve regulatory goals.[128]

A standard critique for the use of courts rather than agencies is that one tool that is in the quiver of an administrative agency, but

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[125] *See* Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 289 (2008) ("Were we to agree with petitioners that the aggregators lack standing, our holding could easily be overcome. For example, the Agreement could be rewritten to give the aggregator a tiny portion of the assigned claim itself, perhaps only a dollar or two."); *id.* at 305 (Roberts, C.J., dissenting) ("Perhaps it is true that a 'dollar or two' . . . would give respondents a sufficient stake in the litigation. Article III is worth a dollar."). One does not need to endorse the Court's view of standing to understand the importance it places on the ability of an individual who feels aggrieved to bring a claim, even an unsuccessful one, or one that would provide a low-dollar remedy, into the court system.

[126] *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976) (observing that "[i]n our received tradition, the lawsuit is a vehicle for settling disputes between private parties about private rights").

[127] *See* Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL'Y ANALYSIS & MGMT. 369, 394 (1991)(" a reactive state fits nicely with a coordinate organization of authority, with its wide openings for civilian influence, its skepticism about state-enforced norms, its reliance on adversarial argument, its openness to private negotiation. In the reactive, conflict-resolving state, when government is involved in a dispute with citi- zens, the governmental official stands on the same plane, in theory, as the individual, representing just another competing interest. A judge attentive to individual rights must have the last word, not (as in the activist state) the governmental official bent on policy implementation.")

[128] *Id.* at 397-400("Increasingly, scholars are calling for alternative, less litigious ways of solving social problems, making public policy, and resolving disputes. Their solutions call for a reversal of the anti-authority spiral-to get less adversarial legalism, we must somehow reconstitute governmental authority. Legal scholars, for example, call for an administrative process based more on informal discussion and debate, a search for shared values, a spirit of compromise and cooperation."). *See also* Robert A. Kagan, *Adversarial Legalism: Tamed or Still Wild?*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 217, 236-43 (1999) (responding to critiques of alternatives to adversarial legalism).

not a common law court is the ability to explicitly make ex ante rules.[129] Courts are also generalists, and may not have the expertise necessary to make judgments about the intersection of cutting edge technology with consumer privacy concerns. Neither of these may be a particular problem here, as the role of the claim receiving body is to hear and understand the concerns of the individual claimants and apply existing law to the claim. No technical understanding is helpful for defining and understanding social norms; in fact over-much involvement with a specialized point of view might remove a decision maker's ability to properly evaluate such norms.

A more serious problem for the courts as a home for claims is the deterrents to claim-bringing presented by the time required for a claim to be required,[130] and the need for a lawyer-intermediary to mediate those claims. [131]

2. State Administrative Agencies

Another option would be to have a state administrative agency receive claims by individuals. This could be an existing state administrative agency or a new specialized one. One proposal for how such a state administrative agency could be framed goes as follows:

> [S]tates should pass laws creating administrative agencies to adjudicate privacy claims based on state statutory and common law in the areas of privacy, data security, and identity theft. The judgments of the administrative agencies would be subject to appeal to state courts…The cooperative approach that the Equal Employment Opportunity Commission (EEOC) takes with state

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[129] *E.g.*, Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 377-80 (2007) (in a discussion of the Food and Drug Administration "[t]he key is that both ex ante and ex post review are essential parts of the regulatory model-sometimes operating in tandem, sometimes as substitutes").

[130] *See* Colin Rule, *Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost- Benefit Case for Investing in Dispute Resolution*, 34 U. Ark. Little Rock L. Rev. 767 (2012)(showing that the only claimants in an eBay study that bought less from eBay after going through a claims process were the ones that had claims processes that took over six weeks, regardless of outcome, illustrating the power of speed of process in determining claimant incentives).

[131] *See* William L.F. Felstiner, Richard L. Abel, and Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 LAW & SOC'Y. REV. 631, 631-54 (1980-81)(discussing the hurdles to the transformation of disputes from blaming to claiming on the basis of perceived difficulties with respect to time and the need for intermediaries, which adds to the perceived complexity).

> Fair Employment Practices Agencies (FEPAs), state agencies that enforce state anti-discrimination laws, could provide a blueprint for the relationship state privacy agencies could have with the FTC. The EEOC makes individualized agreements for sharing work with state agencies, including authorizing the state agency to handle matters that fall within the EEOC's jurisdiction (on top of the state agency's organic authority to handle appropriate state law discrimination claims).[132]

Compatible with both this approach and the state court approach of the previous section is Miriam Seifter's observation that states already have prominent role in federal administrative lawmaking.[133] In fact, her concerns about the increasing prominence of states in federal administrative law might be assuaged in this area by more expressly awarding states a prominent and substantial role in the regulation of information privacy, a role that is well within the traditional police powers of the states.

This mode of claim reception has the advantage of having the potential to be quick and through standard state administrative channels that are analogous to forms familiar to most Americans. It could be as easy to submit a claim to that office as registering to vote or getting a replacement state ID. Individuals may even be able to submit claims online, further reducing the time and psychological barrier to raise a claim.[134] Furthermore, the receiving

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[132] Lauren Henry, *Institutionally Appropriate Approaches to Privacy: Striking A Balance Between Judicial and Administrative Enforcement of Privacy Law*, 51 HARV. J. ON LEGIS. 193, 212 (2014).

[133] Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 504 (2014) ("the calls for a greater state role in the work of federal agencies, and the special role that states already play in the federal agency decisionmaking process, sit uneasily with the legitimacy values that have defined administrative law for the past century."); see also Miriam Seifter, *States As Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 1025 (2014) ("While state interest groups excel at resisting federal power and advocating states' institutional interests, the groups disserve the goals of expert decision making based on state input and of maintaining democratic accountability. I argue that these mixed results reflect inherent tradeoffs: The operationalization of the most prominent federalism goal entails sacrifices for expertise and accountability.").

[134] For example, the Food and Drug Association has an online form that patients and health professionals can use to report "adverse events that you observe or suspect for human medical products, including serious drug side effects, product use errors, product quality problems, and therapeutic failures for: Prescription or over-the-counter medicines, as well as medicines administered to hospital patients or at outpatient infusion center, Biologics (including blood components, blood and plasma derivatives, allergenic, human cells, tissues, and cellular and tissue-based products (HCT/Ps)), Medical devices (including in vitro diagnostic products, Combination

administrative agents will be specialized, even if the process is happening under the heading of an existing administrative agency.

State administrative agencies will also be able to quickly react to the consumer privacy claims they receive. Given the political process in states tends to operate more quickly due to their smaller body politics and the prevalence of effectively one-party states. This could have the effect of allowing different privacy rules to take hold in different states. This would have the salutary effect of allowing the states to operate as laboratories of democracy. Different states could test drive different policies, and have a race to the top in determining the ones that best balance social norms of privacy against technological innovations that tend to threaten them.

While allowing states to create experimental policies in leading-edge areas within the police power has long been considered an advantage of the federalist system,[135] that is subject to the critique that despite innovation in individual states, the progress tends not to diffuse to other states, creating "regulatory islands."[136] Without federal action, it's not clear by what process progressive privacy reforms might move from one state to another. Worse still, it may be that most states will wait to imitate state legislation the innovations of states generally thought of as leading innovators, such as California and Texas.[137]

While these considerations are certainly of possible concern, they are not unique to information privacy issues. Unlike many other policy areas, the FTC exists as a possible national forum to resolve large national disputes. The issues brought up by claims brought by individuals to state agencies could influence policy debates within the states. The policies that are the fruit of said debates might vary between states. This could precipitate national debate, mediated through the FTC. This pipeline has the potential

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products, Special nutritional products (dietary supplements, infant formulas, and medical foods), Cosmetics, [and] Foods/beverages (including reports of serious allergic reactions)." FOOD AND DRUG ADMINISTRATION MEDWATCH, MEDWATCH ONLINE VOLUNTARY REPORTING FORM, https://www.accessdata.fda.gov/scripts/medwatch/.

[135] Heather K. Gerken, *Foreword: Federalism All the Way Down, The Supreme Court 2009 Term*, 124 HARV. L. REV. 4, 47-48 (2010) (noting that federalism is traditionally thought to "promote[] choice, competition, participation, experimentation, and the diffusion of power").

[136] Hannah J. Wiseman, *Regulatory Islands*, 89 N.Y.U. L. REV. 1661, 1674 (2014). But see Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 610-11 (1980) (arguing that there is little true competitive innovation in policies left to the states, because states tend to simply imitate early actors perceived to be successful).

[137] *Id.*

to make regulatory islands less likely if the state administrative agency model is employed.

3. Mandatory disclosure of consumer claims to federal agencies

Finally, the federal government (or a state government) could institute a policy of mandatory disclosure of individual privacy claims to companies. Essentially, any company that traffics in personal data would have to receive consumer claims about privacy concerns and report those claims to the agency. It is important to note that any such statute should specify the companies impacted by the type of transactions impacted, not by industry.[138] As BJ Ard has observed, "rapid turnover, dense intermediation, and lack of transparency across the Internet make industry-specific regulation particularly unsuitable for the regulation of commercial actors online."[139] Limiting the companies that needed to disclose their receipt of claims to, social media companies, for example, would simply invite many data traffickers to seek to define themselves in a manner that would avoid the regulation. Also, such a rule would blatantly ignore the many data traffickers that do not directly interact with consumers at all, but instead mine information through the use of cookies, or purchase the information from third parties.[140]

Such regimes are already in place in several agencies. Two prominent examples are: (1) the Food and Drug Administration's mandatory reporting requirements of for internal claims process,[141] and (2) Consumer Product Safety Commission's recently-expanded use of a mandatory consumer claims claim reporting process.[142]

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[138] BJ Ard, *The Limits of Industry-Specific Privacy Law*, IDAHO L. REV. (forthcoming 2015).

[139] *Id.*

[140] *See, e.g.*, WHAT THEY KNOW, THE WALL STREET JOURNAL, http://online.wsj.com/public/page/what-they-know-2010.html (describing data mining practices and the third party market for personal information).

[141] FOOD AND DRUG ADMINISTRATION, MANDATORY REPORTING REQUIREMENTS: MANUFACTURERS, IMPORTERS AND DEVICE USER FACILITIES, www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/PostmarketRequirements/ReportingAdverseEvents/default.htm (last updated Jan. 13, 2015).

[142] MANDATORY SELF-DISCLOSURE OF PRODUCT PROBLEMS TO THE [CONSUMER PRODUCT SAFETY COMMISSION], BEVERIDGE & DIAMOND, P.C., May 18, 2009, http://www.bdlaw.com/news-571.html ("The Consumer Product Safety Improvement Act of 2008 ("CPSIA") is now well-known for its new requirements affecting children's products, toys, and child care articles, particularly those containing lead or

This type of reform is in line with increasing calls for oversight of consumer companies, analogous to the reforms that were put in place for financial companies following the financial crisis.[143]

This approach has several advantages. First, individuals would not need to seek articulate their concerns to a government agency; their experience would be built into the choices that they were making when using consumer products.[144] For the same reason, the claims process has very incentive to be quick and comforting for consumers. Second, the data traffickers themselves would need to come up with a way to report the claims they have received regarding data privacy concerns. This takes away the pressure and expense of structuring a claims system from the government. It also would be more salable on a federal level in light of the relative political ease of developing regulations around transparency.

There are several obstacles to this policy solution. First, it would be important to frame the disclosure requirements so that all privacy claims were reported, and that all companies that could receive a significant number of complaints were required to report. Second, there would be a need to frame the requirements to provide a transparent look at what individual consumers are concerned about. As discussed previously with reference to the eBay study, companies have an independent incentive to hear and respond to consumer claims. However, they may also have an incentive to hide some aspects of the claims made, especially claims they choose not to respond to, for fear of government regulation that is not fully in line with the companies' preferences. Third, and related to the second, the disclosure requirements would probably

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phthalates. Less well-recognized is the significant impact of the CPSIA on the long-standing requirement under Section 15(b) of the Consumer Product Safety Act ("CPSA") to report certain product problems to the Consumer Product Safety Commission ("CPSC" or "Commission"). Under the CPSIA, the scope of the Section 15(b) reporting requirement has expanded considerably, the CPSC has greater authority to respond to the reports, and the potential penalties for failure to report have increased exponentially.").

143 *See, e.g*, Rory Van Loo, *Helping Buyers Beware*, U. PENN. LAW. REV. (forthcoming. 2015)("This Article argues for wider adoption of an emerging—though largely unarticulated—paradigm that views supervising firms as playing a central role in consumer protection.").

144 *See* FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE, vii (2012), *available at* http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf ("For practices requiring choice, companies should offer the choice at a time and in a context in which the consumer is making a decision about his or her data.").

face close scrutiny from the courts. Data collection and processing is gaining increasing movement as a form of speech by commercial actors.[145] Furthermore, badly drafted state legislation could run afoul of the Dormant Commerce Clause, if it could be determined by a court to discourage interstate commerce. Recent Dormant Commerce Clause cases seem to address issues far removed from the issues at stake here, namely, legislation that explicitly discriminates against interstate commerce, but a careful constitutional analysis of this issue is beyond the scope of this Article.[146]

D. Objections

There are two objections that could be made to the idea of the opportunity to bring claims at all, regardless of the actual institutional choice as to where individuals will bring claims. The two issues are (1) selection bias, and (2) claim virality. This section will examine each in turn.

1. Selection Bias

The worry with respect to selection bias is that only people who are disproportionately sensitive will bother to submit claims. Thus the claims received will not reflect social norms, but rather the delusions of hypersensitive people.

First of all, there is no need that the claims submitted perfectly reflect the overall average perspective of the population. As long as a person gives a substantial account of what is bothering her, some information can be gleaned about what social norms actually are. Furthermore, merely responding to the hypersensitive people could provide them with a useful sense of closure and being responded to, even if their claims could not be met.

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[145] *See* United States v. Caronia, 703 F.3d 149, 165-69 (2d Cir. 2012) (finding that government's construction of FDCA misbranding provisions was content–and speaker–based and defendant's promotion of off–label drug use was protected by First Amendment). But see Ramirez v. Medtronic Inc., 961 F. Supp. 2d 977, 990-91 (D. Ariz. 2013); Hawkins v. Medtronic, Inc., No. 1:13-CV-00499 AWI, 2014 WL 6611876, at *4-5 (E.D. Cal. Nov. 20, 2014) (both explicitly rejecting *Caronia*'s analysis). *See generally* Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 64 (2014) (elaborating a general argument in favor of data as speech).

[146] Gen. Motors Corp. v. Tracy, 519 U.S. 278, 303 (1997)(holding exemption of local distribution companies from sales and use taxes on sellers of natural gas did not violate commerce clause.); Nat'l Ass'n of Optometrists & Opticians v. Harris, 682 F.3d 1144, 1150 (9th Cir. 2012)(holding that California's prohibition against opticians offering prescription eyewear did not violate dormant Commerce Clause.).

Secondly, patterns within the claims would tend to indicate whether or not claims, however superficially odd they might seem, represented a critical mass of individuals. Truly unusual reactions would be more rare than reactions that were shared among many individuals.

Finally, as discussed supra, Felstiner et. al.'s work *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, persuasively shows that only a small percent of any potential disputes reaches the claiming phase, for many reasons not related to the actual strength or legitimacy of the potential dispute.[147] These sensitive people might serve as the proverbial canaries in the coalmine about real privacy concerns. That is, being moved by their sensitivity, they actually could be useful to the claims system's function as a gauge of social norms.

2. Claim Virality

The worry with respect to claim virality is that privacy claims about new technologies could spread virally, creating privacy panics with little basis in actual social norms or majoritarian concerns. When I say virality, I mean a way of describing the quick permeation of thoughts, information, and trends into and through a human population.[148] Claims might spread through the population and be reified through repetition and the perception that many people are worried about a given issue rather than genuine concern about the raised issue or any actual emergent social norms. Often these panics are based on misinformation.[149]

The simple, practical response to this is that institutions have every incentive to respond to claims that threaten to become viral sooner rather than later in an attempt to cabin its spread. This has the positive impact of encouraging the institution to respond

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[147] William L.F. Felstiner, Richard L. Abel, and Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 LAW & SOC'Y. REV. 631, 645-50 (1980-81).

[148] *See generally* TONY SAMPSON, VIRALITY: CONTAGION THEORY IN THE AGE OF CONTAGION (2012) (describing a theory of virality as a way society comes together and relates, using biological, anthropological, and sociological methods).

[149] An example of this is the viral spread of user-posted declarations on Facebook, purporing to tell Facebook how Facebook could use that user's data. *See e.g.*, David Sydiongco, *Don't Bother Posting the "Facebook Privacy Notice" That's Spreading Around*, SLATE (June 5, 2012 12:13 PM), http://www.slate.com/blogs/future_tense/2012/06/05/facebook_privacy_notice_debunked_.html.

quickly to the claim, which, as is discussed *supra*, tends to make claimants more happy with the process.

The second, more theoretical response to this objection must be that it is difficult to distinguish between irrational, virally spread panic on the part of individuals and the spread of a widely shared intuition. Whatever organization receives the claim must read tea leaves and consider, based perhaps on the period of time over which they receive similar claims. Furthermore, from the perspective of managing public opinion, panics may be handled somewhat differently. A meaningful substantive problem might be handled by modifying policy. Whereas, the answer for a panic might be encouraging spreading accurate information, perhaps through the press.

Importantly, this notion of privacy panics plays into this Article's theme of institutional legitimacy. A claims system tends to make people the process by which new technologies are adopted are more legitimate. In a sense, this may help may privacy panics less likely because it would lead to more trust of technology companies and government regulatory oversight.

These objections, and their responses, show that instituting a claims system is not without limitations. Ultimately, the prudential arguments from providing information about social norms, paired with the quantifiable benefits from individual wellbeing tend to point to the wisdom of adopting a individual privacy claims process for contesting the privacy implications of new technologies.[150]

V. Conclusion

Given an accessible avenue for individuals to bring their privacy claims regarding new technologies, individuals who feel privacy invasions will make use of those avenues to air their privacy concerns about new technologies. The record of those claims, regardless of their success, will serve to both signal what current social norms are and encourage consumer participation in e-commerce. Furthermore, broad patterns in submissions of claims could serve to pressure political actors to take action in support of the social norms laid bare by the claims process.

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[150] In this way, this article rises to the requirement of a dignitary theory of due process raised by Jerry Mashaw, when he contended that "[t]hose in quest of a richer set of dignitary process requirements will have to move beyond the basic tenets of liberalism, or construct a complex prudential argument that connects additional protections to the concepts of majority rule, rationality, and privacy." Jerry Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 922 (1981).

The Google Street View crisis in Germany shows the limits of companies' ability to set new data privacy norms in the face of contrary public opinion. Clear disclosure of actual privacy protections may have helped assuage fears and limited the controversy. The Google Street View controversy put companies on notice that consumer education about actual data privacy levels associated with their products is good for their bottom line in Germany. The state-based, individual claim-based system in Germany is more sensitive to the concerns of individuals than the American system. As a result, in Germany, companies cannot assume that they can bully consumers into adopting privacy-corrosive norms.

In order to give individuals a forum to voice their privacy complaints and mobilize institutions to respond to citizen preferences if warranted, there is no need for the United States to wholesale adopt the system seen in Germany. This Article has explored state courts, state agencies, and a mandatory claim disclosure system. However, many other possible models exist. There could be a centralized public/private cooperative that handled the claims, similarly to the Internet Corporation for Assigned Names and Numbers (ICANN)'s role in domain name registry, or even a private company that is subject to regulation, similarly to the credit card rating agencies.

Regardless of the approach taken, the goal of recording claims and creating incentives for private and government responsiveness to privacy concerns from new technologies is a laudable one. This proposal has the potential to meaningfully incorporate of social norms into privacy policy and the legitimate of the progress of technology.