FEDERAL TRADE COMMISSION

COMPETITION AND CONSUMER PROTECTION
IN THE 21ST CENTURY

Wednesday, November 7, 2018
9:00 a.m.

American University
Washington College of Law
4300 Nebraska Avenue, N.W.
Washington, D.C.

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1 PANEL 1: ANTITRUST ANALYSIS OF DATA
2 MS. LEVINE: Good morning, and welcome to
3 the Federal Trade Commission's hearings today. Let's
4 get started. This event, just some housekeeping
5 moments for you. This event is being live-streamed
6 and videotaped and transcribed, so your appearance
7 today may appear on the FTC website.
8 If you have questions in the audience today,
9 please write them on some question cards that are
10 going to be circulated, and pass them to my
11 colleagues, who are going to be collecting them by
12 walking around the room, and then they'll forward them
13 to us, and the panelists can field the answers to
14 those questions.
15 I'd like to introduce our panelists today,
16 starting on my farthest left. Alex Okuliar is a
17 partner at Orrick and a former adviser to FTC
18 Commissioner Ohlhausen. He's also been a trial
19 attorney at the Justice Department's Antitrust
20 Division.
21 Next to him, Renata Hesse is a partner at
22 Sullivan & Cromwell, and she was previously the Acting
23 Assistant Attorney General and the Principal Deputy
24 Assistant Attorney General and the Chief of the
25 Networks and Technology Section and a trial attorney

1 at the Antitrust Division at the Justice Department.
2 She's done it all. And she's also served a tour of
3 duty at the Federal Communications Commission as
4 well.
5 Next to her is Allen, the cofounder of
6 the -- Allen Grunes, excuse me, the Cofounder of the
7 Konkurrenz Group here in Washington, D.C. He has
8 spent more than a decade at the Justice Department's
9 Antitrust Division.
10 Next to him is Jon Baker of this very
11 institution that we are so grateful that's hosting us
12 today, American University. He's a Professor of Law
13 here at the American University Washington College of
14 Law. He is a Former Chief Economist at the Federal
15 Communications Commission, the Director of the Bureau
16 of Economics at the FTC when I was there for my first
17 tour of duty in the late '90s, and he also served in
18 the Antitrust Division of the Justice Department as a
19 Special Assistant to the Deputy Assistant Attorney
20 General.
21 Next to him is Mike Baye, Professor of
22 Business at Indiana University's Kelley School of
23 Business, a former Director of the Bureau of Economics
24 at the FTC.
25 And next to him is -- and next to me is

1 Professor Sokol, Daniel Sokol, who is a Law Professor
2 at the University of Florida, and he is also of
3 counsel in the D.C. office of Wilson Sonsini.
4 I am honored to have all of you here today
5 to answer the hard questions, partly because I want to
6 hear your answers to the thoughtful questions about
7 the antitrust analysis of data and partly because your
8 answering today means that I don't have to.
9 Dan, would you like to get us started? I
10 thought we would start with five-minute remarks from
11 each of our panelists and then go to questions.
12 MR. SOKOL: Thank you very much. Thank you
13 to American University. Thank you also to the FTC.
14 Overall, I think this is one of the really critical
15 missions that the agency plays when you have very
16 difficult issues to really spend the time and to think
17 them through. Without thinking them through, we have
18 errors in both directions, both of cases that we
19 should have brought but we didn't, but also cases
20 where it turns out as we thought them through, you
21 don't bring, and I think both are critically
22 important. And creating a framework that you can
23 operationalize is important. I think these hearings
24 aid to that effort.
25 I'm going to bring that kind of thinking, if

1 I may, to the question of big data. So I want to
2 focus on both those words -- big and data. Both
3 separately are things that the FTC throughout its 100-
4 plus-year history have thought about. For our
5 particular panel, the question is, is there something
6 different when we put those two words together, "big
7 data," that is, both as an empirical matter, are we
8 seeing something different here that we have not seen
9 before in terms of behavior; and number two, if we are
10 seeing certain things that are different, and even if
11 we're seeing certain things that are the same, is our
12 actual legal framework capable of dealing with these
13 issues.
14 So I think there are certain differences
15 between big data and what we've seen before. Some of
16 it is simply the amount of data, but what does that
17 mean? I think there's a data ecosystem that we need
18 to understand better. So this includes data
19 suppliers, data managers, service providers,
20 aggregators, platforms themselves because it turns out
21 all data is not created the same, its availability is
22 different. So we also have a sense that big data --
23 there's no one company that can collect all of it in a
24 sense not the way we conceptualize oil like there's a
25 finite amount.

1 No, the amount of big data that we're going
2 to have in five years time or maybe even three years'
3 time is literally going to dwarf all the data we've
4 ever had in human history up until this moment. So
5 number one, let's start with what does data mean?
6 We're going to see a lot more nuance because I think
7 that nuance matters when we get to issues of
8 competition. The second issue is what can data do
9 versus not do -- big data, that is.
10 So a few general points because I think this
11 has direct application to competition law. Issues,
12 number one, is competitive advantage. Overall, we've
13 seen that it's not so easy for companies to utilize
14 their data effectively. It's not what you do with the
15 data -- or rather it's not how much data you have,
16 it's what you do with the data, where there seem to be
17 diminishing returns on data size, and we've seen that
18 in terms of companies that have lots of data but don't
19 use most of it.
20 And Alex, who's on the panel, has a
21 framework that he works through, and we can sit and
22 play through some of that. I'd say part of this is
23 well known to people at the FTC because lots of
24 companies have come to you as merging parties and
25 said, wow, if we combine something like our IT

1 infrastructure, we'll have a lot of value that we'll
2 be able to capture very quickly. We call these
3 efficiencies. In practice, we don't see that often,
4 because it actually turns out it's really difficult to
5 combine different types of data, so that's sort of the
6 first premise. And then even when you do combine it,
7 again, it doesn't always work the way you think it
8 does.
9 So the third part is, do we have better
10 answers that data provides? In some cases, yes, and
11 in some cases, might there be new competition
12 questions? Maybe. So I'd say right now we still
13 don't have good empirics across fields, law,
14 economics, marketing, management, information systems.
15 It's still emerging, and until we have a robust amount
16 of empirical work, what we have are a series of cases
17 and storytelling. And that makes it more difficult
18 for us to generalize new approaches because we just
19 don't have enough information -- paradoxically, we
20 don't have a lot of information about lots of
21 information. And that suggests some caution.
22 That's not to say that you don't take cases
23 seriously, you don't investigate, but it just means
24 that you have to really think through as we're going
25 to see in the next panel with regards to remedy.

1 So where does that leave us? Number one,
2 are the general theories of law still workable? The
3 answer is yes, we think by analogy in law, does this
4 case look like some other case? And the second thing
5 is simply context. Where have we been thus far? When
6 we see the actual mergers to date and conduct cases to
7 date, there has, as of yet, not been a case that's
8 been decided blocked, that is, on merger grounds or a
9 conduct case where we actually have said there's a big
10 data problem that we need to remedy. Thank you.
11 MS. LEVINE: All right, Mike, can you give
12 us your opening thoughts? And I'd be interested to
13 hear if you have any responses to Professor Sokol's
14 points about, you know, about the lack of data, about
15 big data.
16 DR. BAYE: Absolutely. And let me just
17 begin by saying I'm an economist. In fact, just out
18 of curiosity, how many of you in this room are not a
19 lawyer? Would you raise your hand with me?
20 Excellent. So we got a handful of economists in here.
21 So I'm going to be approaching things from an economic
22 point of view.
23 MS. LEVINE: You're assuming that they're
24 economists because they're not lawyers. We come in
25 two categories.

1 DR. BAYE: There's only two types of people
2 in the world, lawyers and nonlawyers. So I want to
3 offer up what I hope are some high-level thoughts that
4 will complement kind of the legal view that Alex
5 talked about and talk about the economics of big data.
6 And there are kind of four high-level issues that I
7 think are very, very important to contemplate,
8 regardless of how you're viewing big data issues.
9 Okay?
10 The first point I want to make is that the
11 adjective "big" in front of data often conjures up the
12 notion that somehow big data is bad. That same
13 principle applies in other aspects of economics where
14 people think big firms are bad and so forth. And the
15 first caveat I want to offer up is as we're
16 contemplating the legal framework with which we
17 evaluate big data issues in antitrust and even
18 consumer protection that we begin by thinking about
19 nonspeculative theories of harm that are cognizable.
20 We typically think about cognizable in the
21 context of cognizable efficiencies, but with respect
22 to big data, it's important to recognize that it may
23 be difficult to articulate a theory of harm. Just
24 because something is big doesn't mean there's harm,
25 and let me just give you two examples. So one

1 cognizable theory of harm might be that somehow big
2 data is going to allow some greedy capitalist to
3 exploit individual consumers by raising prices.
4 That's a theory of harm that you can take to data and
5 determine whether or not prices rise as a result of
6 that data.
7 An alternative theory might be somehow big
8 data deteriorates product attributes or quality that
9 you might think of, and the natural issue that you
10 might think about there is the impact of big data and
11 security: Is big data going to be protected? Okay?
12 Those are theories of harm, but it's important for you
13 to be able to quantify those theories of harm if
14 you're actually going to do things that are in the
15 public interest because just because someone charges a
16 high price doesn't mean they're doing something
17 illegal as a matter of law.
18 Being a monopolist is not a bad thing in
19 terms of the antitrust law. You may not like it, but
20 it's not illegal it to charge high prices.
21 Competition policy is relevant when two entities merge
22 and that merger gives them the power to raise prices.
23 Okay? So from the point of view of merger analysis,
24 it's important to ask the question whether somehow
25 that merger is going to impact the ability of firms to

1 raise prices.
2 In that context, one might also want to ask
3 the question if a merger takes place, does it reduce
4 the incentives of the merging entity to protect
5 consumer data? Those are questions that are economic
6 questions that can be contemplated and, of course,
7 there's alternative theories. On the one hand, you
8 might imagine there are economies of scale in
9 protecting data and that if you have many firms trying
10 to predict data, they're going to skimp relative to
11 what one big firm would do if it were trying to
12 protect that data. That's one theory.
13 Another theory is, gee, if you eliminate
14 competition, then two platforms aren't going to
15 compete in nonprice attributes to protect consumers'
16 data. So those are two alternative theories. One
17 says, you know, mergers are bad for privacy; the other
18 one says mergers might be good, and those are things
19 that we can in principle test using data.
20 So the big point is, it's important to
21 postulate theories that are testable, theories that we
22 can actually take to data, and it's important that we
23 not confuse competition issues with other issues like
24 unfairness. Gee, it's unfair that a firm with big
25 data might be able to do a better job of extracting

1 rents from its consumers. That in and of itself, as I
2 see it, is not harm to competition. So don't confuse
3 those issues.
4 The third thing I want to emphasize is it's
5 important to recognize, particularly in markets with
6 big data, is they're very, very frequently associated
7 with platforms that serve multiple participants. So,
8 for example, Amazon doesn't just serve shoppers like
9 me that spend lots of money on Amazon. It also serves
10 merchants that are trying to get their goods and
11 services into the hands of people like me that like to
12 buy electronic gadgets, for example.
13 So it's important to recognize that when
14 we're contemplating the potentially higher prices that
15 a firm with big data might be able to extract from
16 consumers because it knows a lot more about Mike
17 Baye's willingness to pay for electronic gadgets, for
18 example, it's also important to contemplate the
19 potential benefits that are associated with that, for
20 example, Mike Baye being to more easily identify an
21 out-of-print book, or Mike Baye being able to find a
22 better match for a particular product that I'm looking
23 for, or a merchant being able better able to match
24 with a consumer looking for its product, okay?
25 So oftentimes when we do competitive

1 analysis, we're just looking at the price in a market,
2 and I think big data makes that more complex, because
3 there are typically more actors that are attached to
4 the big data, and as an economist, if we're going to
5 do a right job of evaluating whether a particular
6 business practice is procompetitive or not, it's
7 important to account not only for all the costs,
8 potential costs of that conduct or that merger or
9 whatever, it's also important to account for the
10 potential benefits of that.
11 And the last thing I want to say is that
12 especially in the big data arena, it's incredibly
13 important to beware of rent-seeking, okay, because
14 individuals in big data markets, when we talk about
15 privacy, and maybe I'll talk about this in a moment,
16 privacy can impact different players different ways,
17 but platforms' incentives are typically aligned with
18 the incentives of participants on all sides of the
19 market.
20 A platform's privacy policies may
21 disadvantage certain participants on that platform,
22 like some merchants, for example. But if consumers
23 benefit and if the overall social welfare goes up as a
24 result of those policies, one needs to take that into
25 account when the whining merchant that's harmed by

1 that privacy policy, for example, comes in and cries
2 foul. Thanks.
3 MS. LEVINE: Thank you. Right so two
4 housekeeping moments. A reminder to all of us,
5 including me, to press your mic when it's your turn to
6 talk, and a request for our able timekeeper, keep your
7 sign up a little longer because sometimes we're so
8 busy, we don't have a moment to visualize what you're
9 trying to tell us.
10 Okay. So, Jon, can you please jump in and
11 give us your thoughts on the antitrust analysis of
12 data and perhaps respond to Mike's points about the
13 need for theories that are testable and the
14 recognition that unfairness and competition harm may
15 not entirely overlap.
16 DR. BAKER: Thanks, Gail. There we go.
17 Yeah, I'm good, and no sun in my eyes.
18 Yeah, so thank you, Gail, and thanks to the
19 FTC for inviting me back to the hearings. And for the
20 most part, the antitrust conversation about the
21 potential competitive concerns arising from big data's
22 concerned with three areas, privacy as a nonprice
23 dimension of competition, which Mike talked about,
24 potential for close-to-perfect price discrimination,
25 which I think he hinted at at one point, and the need

1 for access to data as a barrier to entry.
2 And I want to talk about a fourth potential
3 competitive concern, which I think is also cognizable
4 in Mike's sense, and that concern is exclusionary. It
5 supposes that a dominant firm has access to more or
6 better data about customers or suppliers than do its
7 rivals, and the concern is that the dominant firm will
8 use that advantage to obtain, maintain, or extend its
9 market power by excluding rivals.
10 And to keep my example and explanation
11 simple, I'm going to focus on customer information,
12 but supplier information could potentially be used in
13 the same way. And I'm also going to emphasize just
14 one particular exclusionary mechanism involving
15 targeted price-cutting, but there are others and that
16 will probably come up in our discussion later.
17 Selective discounting is a more attractive
18 exclusionary strategy than across-the-board price-
19 cutting because it's a less costly means of exclusion.
20 And I want to illustrate the exclusionary
21 possibilities of the asymmetric availability of data
22 with two hypothetical examples involving Amazon's
23 shopping platform, and I'm picking Amazon because the
24 examples involving retail products tend to be easy to
25 grasp and they avoid complications that you might get

1 into when consumers are not charged directly for
2 services.
3 But the stories I'm telling here are purely
4 hypothetical. I have no idea whether Amazon actually
5 does any of this, and I'm well aware that Amazon's
6 platform has grown large and successful by providing
7 consumers and merchants and manufacturers with a
8 marketplace that they all value.
9 So the first example is concerned with harm
10 to competition among platforms. So suppose that
11 Amazon can identify occasional Amazon shoppers who are
12 -- they shop occasionally on Amazon but they're the
13 best online customers of Best Buy, Macy's, Staples, or
14 Walmart, other platforms, and that Amazon can target
15 those shoppers with low prices. And suppose further
16 that the rival platforms don't know nearly as much
17 about household preferences as does Amazon, so they
18 can't practically target Amazon's best customers in
19 return.
20 So selective -- so we're talking about
21 selective and targeted price cuts to potential
22 customers by Amazon. Now, that might seem like -- I'm
23 sorry, yeah, to customers of the platforms that are --
24 to the rival platforms. Customers -- targeting them
25 with selective price cuts. And that might seem like a

1 pure benefit to competition, and in some cases, it no
2 doubt would be, but it could also harm competition
3 when it was employed by a dominant platform to
4 exclude.
5 If Amazon can take away from its rivals a
6 substantial group of their frequent customers, it may
7 be able to raise its rivals' marginal costs of
8 attracting additional sales, and the rival platforms
9 could be led to raise prices to avoid losses or they
10 may choose to compete less aggressively with Amazon to
11 induce it to back off.
12 Either way, Amazon might be able maintain,
13 obtain, extend, you know, enhance market power in
14 online shopping, and all online shoppers might end up
15 paying more, regardless of which shopping platform
16 they use. Amazon might not even need to implement
17 targeted price cuts to induce its rivals to back off
18 competitively or at least not often, because once
19 Amazon has the ability to selectively target customers
20 of a rival platform that lacks a comparable ability to
21 target Amazon's customers and the rivals recognize
22 that ability, the threat of selective discounting
23 might be enough to induce the rivals to avoid
24 provoking Amazon by undercutting Amazon's prices. And
25 even if the threats are enough, selective targeting

1 might be an inexpensive exclusionary strategy because
2 the dominant firm doesn't have to reduce its price to
3 its existing customers, only the customers likely to
4 purchase from rivals.
5 And I can spin out a second hypothetical
6 example involving ways in which Amazon could harm
7 competition among firms participating on just one side
8 of its platform that's pretty similar to that
9 involving -- I was going to use an example of the
10 private-label diaper business where it could target a
11 rival diaper manufacturer's customers in sort of a
12 similar way with selective discounting.
13 But I see my sign about the time, and we'll
14 just jump on to say that if Amazon with its superior
15 access to data is better able than its rivals to
16 identify customers that are likely to buy from others
17 and target them with discounts, you know, it could
18 make its rivals less aggressive competitors and just
19 whether those rivals are sellers on one side of its
20 platform like, say, rival diaper manufacturers, or
21 whether those rivals are other platforms, which is my
22 longer example, so you could get prices to rise either
23 just for diapers or across the platform as a whole.
24 If I had more time, I'd say something about
25 the underlying economics, but instead I'll just simply

1 say that the exclusionary potential I've highlighted
2 wouldn't arise unless the dominant firm is less
3 vulnerable to targeted discounting than its rivals and
4 an advantage and access to customer or supplier data
5 could make that possible. Thanks.
6 MS. LEVINE: And to be clear, we're going to
7 have time to develop a lot of these ideas throughout
8 the course of the panel.
9 DR. BAKER: Good.
10 MS. LEVINE: So thank you for the teaser.
11 It's a great way to start the conversation.
12 DR. BAKER: Thank you, Gail.
13 MS. LEVINE: Sure. Thank you.
14 Allen, can you give us your thoughts on the
15 issue generally and then comment a little bit on what
16 you think the rest of the world is doing and whether
17 you think there's a time sensitivity for action here.
18 MR. GRUNES: Sure. Thank you, Gail. I'm
19 trying to keep within the five minutes, and I'll
20 probably fail miserably. So the first point obviously
21 is that the competition issues raised by big data
22 aren't going away. There are going to be more mergers
23 where data plays a significant role one way or
24 another, and there's going to be more occasions to
25 consider the collection, use, and possible misuse of

1 data when looking at dominant firm conduct.
2 I think we also are in a position, I'd argue
3 a little bit different from Danny in that we're now --
4 we have a growing body of decisions in closing
5 statements, so it's possible to look back and see if
6 there are lessons to be learned. You can see DOJ
7 grappling with access to data as a competitive issue
8 in its 2010 closing statement in the Microsoft-Yahoo
9 agreement. You can see the FTC staff asking questions
10 about the competitive significance of large volumes of
11 data Google was collecting from users in the half of
12 its staff memorandum that was inadvertently released.
13 These obviously are not easy issues, they're
14 factual, technical -- and technical challenges to
15 understanding the industries, both in terms of their
16 business models and their competitive strategies. I
17 think there's been progress in the past five years.
18 There's more understanding about the way digital
19 markets work. The German, French, and Japanese
20 competition authorities have produced reports on big
21 data, and the Australian authority is in the process
22 of doing so.
23 Really great work has been done by the OECD
24 on the digital economy and big data, and then I and
25 Maurice Stucke hopefully have helped advance the

1 discussion a little bit through our book Big Data and
2 Competition Policy. And, so, it's a long book. I
3 have five minutes. I offer the book as part of the
4 record in this proceeding.
5 Okay, but on the other hand, so in 2016, the
6 then-Chair of the FTC gave a speech in which he said
7 that the 2007 investigation of the Google-DoubleClick
8 merger was instructive on how to analyze mergers
9 involving competition between -- of firms with sizable
10 collections of personal data. I think that was a step
11 backward. I think I'd hold out that investigation as
12 what can happen if you don't have strong merger
13 enforcement in data-driven industries. Not only were
14 these two companies in adjacent markets but they were
15 starting to get into each other's market, so that's a
16 big issue here.
17 Another issue with that is you had
18 competitors complaining. So, you know, Danny says we
19 don't know enough about these markets. Well, in that
20 case, the competitors probably were the ones who knew
21 the most about the markets and could articulate the
22 exclusionary risk the best, but the FTC relegated the
23 views of competitors to a footnote as, you know, it's
24 sort of the usual agency hostility to views of
25 competitors. Maybe not the right decision.

1 Just last month, Makan Delrahim -- so I
2 don't want to just pick on the FTC. Last month, Makan
3 Delrahim gave a speech in Haifa, in which he repeated
4 a number of the myths about big data that Maurice
5 Stucke and I have discussed in our book and that most
6 European competition authorities now reject. Okay, so
7 the moral of the story, first read our book; second,
8 the rest of the world is moving forward, and the FTC
9 and the DOJ should not be left behind.
10 I'll spend less than one minute on, you
11 know, what is big data and is it different. The only
12 thing I'll point out here is there are a number of
13 definitions of big data, but what they tend to have in
14 common are what are typically called the 4 Vs, which
15 are the volume of data; the velocity, which is the
16 speed of data gathering and processing; variety, which
17 is the ability to combine data from multiple sources;
18 and value, which is how can you extract commercially
19 valuable information.
20 So I'm not going to spend any more time on
21 that, but I do want to get finally to the question of
22 the timing of government action. So assume there's a
23 problem, when is it right to intervene. So it's an
24 institutional problem with fast-changing industries
25 being too late to the dance, all right?. You know,

1 this was potentially identified as a problem in the
2 Microsoft case that DOJ brought. You kind of get
3 there and the bad stuff is already happening and you
4 can't go back in time.
5 Germany recently -- one of their ministries
6 recently issued a report suggesting that earlier
7 intervention may be warranted in data-intensive
8 markets, and the suggestion there was if markets are
9 likely to tip to a winner through powerful network
10 effects, for example, it may be important and
11 appropriate for the Government to intervene and
12 challenge anticompetitive restraints and mergers
13 before that point is reached.
14 If you intervene too late, you can't restore
15 the lost competition, and if you don't intervene at
16 all on the grounds that competition is for the market,
17 you may end up with a persistent market power problem.
18 Last thought on this, the argument for
19 earlier intervention may be supported by what's been
20 called the now-casting radar, which is something that
21 big data enables. That's the ability of a company,
22 particularly a platform company, to discover
23 competitive threats at an early stage through data and
24 analytics, and then to take steps to destroy them, for
25 example, merge with them, copy them, whatever, before

1 they've had a chance to take off. That companies are
2 able to move this early also seems to me to justify an
3 earlier governmental response. Thanks.
4 MS. LEVINE: All right. Thank you, Allen.
5 These are provocative and challenging views of some
6 proposed frameworks for analyzing these issues.
7 Renata, do you want to speak to the frame
8 that exists and whether you feel like it's a good fit
9 for the issues we're discussing today?
10 MS. HESSE: Sure, Gail. Thanks. And thanks
11 to Chairman Simons and Bilal and Gail and Katie for
12 organizing us and for inviting me to join you today.
13 Listening to everyone talk, I thought it was
14 sort of interesting that, you know, part of what
15 people are -- the question people are asking is, do we
16 need new tools, do we need to think about data markets
17 differently. But the debate that's actually going on
18 here is a pretty classic one between, I'll say,
19 different etiological camps, and I don't mean
20 Republicans versus Democrats or conservative versus
21 liberal. It's just there's a spectrum of views in
22 antitrust about how interventionist competition
23 enforcement authority should be, and you're seeing
24 that, I think, play out across this group of people.
25 So just to note, it's sort of -- it sounds

1 kind of like the same debate applied to a different
2 and new market. So I tend to think -- I usually find
3 myself in the middle of those two poles, and I tend to
4 think that we shouldn't just sit back and not do
5 anything and not think about whether or not these are
6 markets and analyze them, and I think part of what the
7 FTC is doing here is making sure there's a forum for
8 us to be able to do that and for us to have the
9 conversation, which I think is an important one to
10 have.
11 I think it's important for competition
12 authorities to reflect on how they've been doing
13 things and whether or not how they've been doing
14 things continues to work. And I think these hearings
15 are a part of a process that's an important one for
16 the agencies to go through.
17 So you've been hearing a lot from this group
18 about what's been going on, and the truth is that
19 there's not that much that has been going on, I don't
20 think, that relates directly to data as an antitrust
21 market. Allen is absolutely correct, I think, to say
22 the antitrust agencies around the world, in the U.S.
23 and elsewhere, have been, quote-unquote, grappling
24 with this. What do we do with these giant sets of
25 data? What role should they have in our analysis of

1 competition issues?
2 And I think the places where you've seen
3 them directly come into play have not been as an
4 antitrust market that's been defined but instead have
5 been looking at barriers to entry, thinking about
6 exclusionary conduct, and potentially considering
7 data-related issues as a component of horizontal
8 competition, for example, I think it was actually in
9 the Google-DoubleClick, might have been AdMob, where
10 Commissioner Harbour said, well, wait a minute, we
11 should think about privacy policies and was there
12 competition going on between these two agencies around
13 what the privacy policies look like.
14 You know, I think Jon is right, you can
15 think about exclusionary conduct in this context
16 and that data does potentially play a role in
17 exclusionary conduct, but I will tell you, having
18 worked on many of the exclusionary conduct cases, at
19 least at DOJ over the years, those are very, very hard
20 cases, and it doesn't mean we shouldn't try, but they
21 are difficult cases analytically and they're difficult
22 to prove.
23 And the fundamental reason for that is that
24 the U.S. construct is around what Mike said at the
25 beginning. It's not bad for you to have monopoly

1 power and to exploit that monopoly power as long as
2 you didn't get it unlawfully and as long as you aren't
3 doing something with it that's bad. And that's how,
4 you know, traditionally we thought about exclusionary
5 conduct.
6 So there are lots of questions floating
7 around. I'm a believer in using the competition
8 toolbox where it fits but not trying to stretch it to
9 places where it doesn't fit. And I'm not sure we know
10 exactly where data fits into that paradigm. Does it
11 fit into the normal paradigm, or are we trying to
12 stretch it out, stretch the paradigm out in a way that
13 maybe doesn't work?
14 I also believe -- and this is going to be a
15 little bit at odds with what Allen said, that
16 notwithstanding the fact that markets -- dynamic
17 markets do change very fast and, therefore, there is
18 some possibility of things happening before the
19 agencies can get a handle on them, that it's also
20 important to have -- to approach markets like this
21 carefully so that we don't disrupt the innovation
22 paradigm. And I think with that, I will stop.
23 MS. LEVINE: Renata, thanks so much.
24 All right, Alex, I know that we've been
25 talking a lot about competition law, naturally. I

1 think that you've said you wanted to address not just
2 competition law but also matters of consumer
3 protection law, so can you give us your thoughts
4 there?
5 MR. OKULIAR: Great. Thanks a lot, Gail.
6 And good morning, everyone. Thank you to American
7 University and to the FTC for holding these important
8 hearings. Thanks to Bilal and to Dan and Derek, Gail,
9 to the FTC staff for the tremendous job you're doing
10 in organizing these and for inviting me to
11 participate. I really appreciate it.
12 So I'm going to take a step back, as Gail
13 mentioned, and I'm going to talk a little bit about
14 some guiding principles and also about some analytical
15 frameworks to consider when discussing issues related
16 to data analytics. As I think Mike mentioned, you
17 know, big data offers enormous commercial promise for
18 the economy. A lot of people, including McKinsey,
19 have estimated that the uplift to the economy will be
20 in the trillions of dollars.
21 And we can already see some of this
22 occurring with a lot of the apps that people have
23 today, personal digital assistants and the like, as
24 well as in the commercial context. Analytics have
25 been tremendous in wringing additional efficiencies

1 out of, for example, the retail supply chain.
2 But big data also presents some highly
3 publicized potential risks, including to personal
4 privacy, and in some circumstances potentially to
5 competition. So in the face of this breakthrough
6 technology and the dynamic changes that are going
7 across industries and across markets, from my
8 perspective, it's imperative that antitrust enforcers
9 maintain enforcement policies that continue to foster
10 competitive dynamism and innovation in these
11 businesses while still protecting consumers.
12 This is best achieved by creating at a high
13 level and maintaining a stable enforcement environment
14 that offers predictability, transparency, and fairness
15 to all stakeholders. Those are the hallmarks of good
16 government, and by applying traditional antitrust
17 analytical tools and principles, including the
18 consumer welfare standard to reduce the likelihood of
19 overenforcement, particularly in situations of
20 speculative or difficult-to-ascertain harms.
21 So now, more specifically, I'd like to go
22 through and outline very briefly two enforcement
23 proposals for analyzing big data issues in keeping
24 with the aforementioned goals, and these are models or
25 frameworks that I've had the good fortune to work on

1 with multiple distinguished colleagues.
2 So first, when an enforcer is confronted by
3 a harm that touches on personal data, one of the
4 initial questions has always been, which body of law
5 is best suited to address that particular harm? And
6 this is a particular issue within the FTC, given the
7 agency's broad mandate. Given the enormous volume of
8 sensitive personal information being absorbed and used
9 for data analytics in some industries in particular,
10 many enforcers, academics, and consumer advocates have
11 suggested blending consumer protection, privacy, and
12 antitrust, as we've discussed a little bit earlier
13 this morning.
14 So while concerns about use of personal data
15 are understandable and important, former Commissioner
16 Ohlhausen and I suggested in a 2015 article that it
17 would actually be most effective for antitrust and
18 privacy, in particular, to remain in separate spheres,
19 except to the extent that privacy protection is an
20 existing dimension of competition.
21 We offer a three-step analysis for agencies
22 to consider in choosing between antitrust and privacy
23 or consumer protection laws as a matter of
24 institutional preference. So first, you ask what is
25 the character of the harm? Is it commercial,

1 personal, otherwise? Harm to consumer welfare or
2 maybe economic efficiency is better addressed through
3 antitrust, whereas personal individual harms are
4 likely better addressed through consumer protection or
5 privacy laws.
6 Second, you would ask does the harm arise
7 from the terms of the particular bargain struck
8 between an individual consumer and the company? Does
9 it go to the integrity of that bargain? If so, then
10 it's likely that a consumer protection or privacy law
11 is better equipped to address the problem.
12 And then, finally, we would ask, does the
13 remedy that's available under the law effectively
14 address the potential harm? And this goes a little
15 bit to what we were talking about with Google-
16 DoubleClick, but if an agency were to block, for
17 example, a merger out of concerns that a merged data
18 set would create privacy problems, it would likely not
19 stop the ability of the parties -- the very same
20 parties -- from sharing that very same data by
21 contract. However, this sharing arrangement, if it
22 violates the privacy policies of the parties or the
23 terms of use, could be Section 5 violation.
24 So turning from this first framework, which
25 is sort of a high-level framework to decide between

1 which body of law, if you assume that the enforcer
2 chooses antitrust, there's a second framework that I
3 worked on with -- in an article last year with Greg
4 Sivinski and Lars Kjolbye. We outlined a four-pronged
5 analytical screen within antitrust for determining the
6 competitive significance of data that tracks the logic
7 of these prior matters that antitrust enforcers have
8 already brought by treating data as an asset for
9 analytical purposes.
10 And within this rubric, we ask, first, do
11 the parties own or control the relevant data? It's
12 unlikely that you would have a competitive problem
13 where the relevant party is only a processor, for
14 example, of the data. Second, is the relevant data
15 already commercially available as a product or as an
16 input for downstream products? The agencies have a
17 lot of experience dealing with these types of
18 situations. Third, is the relevant data proprietary
19 and captive to the owners' or controllers' own
20 products and services?
21 These are more complex questions, but it's
22 difficult to see where a captive data set that is not
23 currently available to third parties in the stream of
24 commerce is likely to present a competition issue.
25 It's difficult to see that scenario.

1 And then, finally, is the relevant data
2 unique or do reasonably available substitutes for the
3 data exist? And this has been the key question in a
4 number of cases brought by the agencies, including
5 Thomson Reuters and others.
6 So using these screens would help maintain
7 doctrinal stability and continuity in antitrust as
8 well as other laws and provide good guidance for
9 market participants and promote continued
10 predictability, transparency, and fairness in applying
11 the law, which I think is critically important where
12 you have these type of dynamic changes across multiple
13 industries.
14 Thanks so much for your attention. I look
15 forward to the discussion.
16 MS. LEVINE: Terrific. Thanks, Alex. And
17 I'm not letting you off the hook so quickly. I wanted
18 to ask a question to you about sort of the -- maybe
19 about the premise of our conversation today about the
20 antitrust analysis of data, particularly big data.
21 Just a housekeeping matter, this is the Q&A
22 portion of our panel, so I'll be pitching questions to
23 our panelists. This is your time to write in those
24 questions on those note cards and pass them forward so
25 we can -- we would be happy to entertain those, too.

1 So, Alex, let me just quickly ask you what
2 you think of the notion of generalizing about big
3 data. Some of the panelists today have already
4 alluded to the notion that not all data is equally
5 valuable. Should we be asking about the antitrust
6 analysis of big data or data generally, or should we
7 instead be asking about the competitive harms that
8 come from the use of data?
9 MR. OKULIAR: So I would tend to hew to
10 the latter question looking at harms. I think that
11 for purposes of panel discussions and the like, it is
12 easy parlance to refer to big data very generally.
13 However, it really isn't accurate to say that all data
14 is created equal or that there's something unique in
15 particular about the sheer size of a data set that
16 makes for a unique competitive problem.
17 First, there are numerous different kinds
18 of data, and not all data are fungible. You have
19 behavioral, you have transactional data, you have
20 ambient or environmental data. They're all
21 fundamentally different forms of data. And the
22 value that is associated with data depends very
23 heavily on its intended use, right? So not only is
24 the data characteristically different or can be
25 characteristically different across different types of

1 data, it also depends upon how someone is going to
2 effectively monetize or use that data where you might
3 have a competitive issue.
4 Some data actually has no commercial value
5 under virtually any circumstances. Some data has
6 commercial value only for a limited period of time. I
7 think Allen was talking earlier about volume,
8 velocity, variety, and value. You know, data is only
9 good for -- it can get still stale, some of it very
10 quickly, and after that point, it has no commercial
11 value. So associating that data with other data does
12 not necessarily mean that you've changed the
13 competitive dynamic in any given industry or market.
14 One of the things to really look for is, you
15 know, most data is an input into machine learning or
16 into AI, and that tends to be how it's monetized
17 through those analytics. But the type of data that's
18 desirable for purposes of most analytics is data that
19 provides a multiplicity of signals and that offers
20 multidimensionality for purposes of dynamic
21 experimentation in machine learning, meaning that the
22 machine learning is going through and looking at
23 different patterns and different scenarios within the
24 data to arrive at some type of -- go through an
25 analytical process and arrive at some type of a work

1 product.
2 And, so, having different forms of data is
3 critically important. The other point to make here is
4 that the agencies have looked at data deal -- you
5 know, deals involving data, deals involving data
6 markets, many, many, many times. And what has been
7 most critical in each one of those deals, for example,
8 Thompson Reuters or Dun & Bradstreet-QED, which
9 involved a merger of two companies that provided
10 educational data, is whether or not the data sets
11 actually have reasonable substitutes. Are they
12 somehow very unique?
13 And given the fact that -- and what we mean
14 by “unique” is not just are the data themselves unique
15 but is the data actually something that could be
16 collected reasonably by another competitor? Is it, as
17 they say, nonrivalrous? Is it nonexclusive? And very
18 often data is.
19 So those are all considerations that have
20 formed part of the analysis that the agencies have
21 gone through, both in looking at mergers and then in
22 conduct matters. And in those circumstances, they’ve
23 been able to arrive at what I think are reasoned and
24 thorough examinations of the markets and conclusions
25 that at least for purposes of some deals remedy the

1 potential harm. And they didn't have to -- or didn't
2 have to modify or think about their analysis
3 differently by virtue of associating the word "big"
4 with data. It's really just data.
5 MS. LEVINE: Thanks so much.
6 I want to build on one of your observations
7 in asking a question of you, Mike. Allen mentioned
8 that, you know, the question is whether data sets have
9 reasonable substitutes or whether they can be easily
10 collected by a rival. So there's been some commentary
11 around the concept that there's evidence that consumer
12 -- a suggestion about evidence that there -- that
13 consumers may not -- may be pretty readily willing to
14 trade loose data policies for lower prices, for better
15 services, suggesting that a rival could do just what
16 Alex suggested, which is collect the information
17 afresh.
18 So two questions for you. Is that true in
19 many contexts, any contexts, all contexts? And then
20 does that make a difference to the question about
21 whether a -- whether and how a rival should -- whether
22 preventing a rival from collecting data amounts to
23 exclusionary conduct in any case?
24 MR. DR. BAYE: Great questions. Yeah,
25 clearly, if consumers don't value privacy or they're

1 not willing to pay higher prices to preserve their --
2 their purchase behavior, for example, it's going to be
3 hard. It's going to be hard for a market to sustain
4 that wish of consumers, because, ultimately, if you
5 believe in markets, you know, markets are ultimately
6 going to attempt to provide those goods and services
7 that consumers want. And I think that's one of the --
8 one of the tensions that we face as we contemplate
9 privacy is that, you know, we're all very different.
10 I remember when I was at the FTC, Debbie
11 Majoris was Chairman, and I remember her telling me
12 that, you know, she'd give up her DNA to be able to
13 get at the front of the security line, right? That's
14 her choice. But I bet there are people in the
15 audience that would not be willing to give up anything
16 to jump to the front of the security line, right?
17 So when you have heterogeneity among people,
18 it's very, very difficult to design a privacy policy
19 that's going to meet the needs of everybody and,
20 therefore, it's going to be difficult -- difficult for
21 a market to generate the privacy policies that do
22 that. So the question, then, in my mind, becomes
23 exactly the exclusionary question, which, I mean, I
24 agree with, I agree with Jon's theory. He proposed a
25 theory where there could be exclusionary practices

1 that raise prices.
2 And I also agree with Renata that it's not
3 unique to data issues and that it's very difficult to
4 disentangle kind of the targeted price cuts that Jon
5 was referring to, to legitimate, trying to steal
6 customers from a rival to increase your market share
7 through legitimate business means. So they're
8 difficult to entangle those things.
9 But in terms of the foreclosure story, I
10 think the foreclosure story in markets that involve
11 big data and in particular big data on platforms is
12 far more complex than the standard types of
13 foreclosure stories that we -- that we all know can
14 lead to a firm excluding rivals and, therefore,
15 harming consumers.
16 And the difference is, it's not like this
17 great gold bullion that we're going to call big data
18 is something that the firm, you know, built a mine to
19 get. It's not a physical asset. It's an asset that
20 the firm somehow collected from individuals. The only
21 way you create big data is somehow attract consumers
22 or induce consumers to turn that stuff over. I'm
23 assuming here we're not engaging in, you know, fraud
24 or deception, something like that. So, just bear with
25 me for a moment.

1 So in an environment like that, if a
2 competitive platform is at a disadvantage with respect
3 to the data that it has, one hypothesis is it's at a
4 disadvantage because it's not creating the value that
5 consumers need to turn that data over in the first
6 place. Right? So it's easy to cry foul, but it's not
7 at all transparent that that foul is due to
8 anticompetitive behavior. In fact, it could just
9 simply be that the platform's offering lots of value.
10 I don't know how many of you folks in the
11 audience use Google Maps, for example, but I'm very,
12 very careful with what I turn over to platforms like
13 Google, but I tell you, when I need to get somewhere
14 quickly, I adjust my privacy settings so I get optimal
15 information from Google about where I might stop along
16 the way for gas and stuff. And that's a conscious
17 tradeoff this rational economist makes, right?
18 MS. LEVINE: Fair enough.
19 Renata, let me ask you your thoughts on
20 whether we should be using -- we at the agencies, we
21 at the courts -- should be using data as -- defining a
22 relative antitrust market as data. Is that
23 appropriate in a merger context, in a nonmerger
24 context? Can you think of examples where a data
25 market has been used either by the agencies or by the

1 courts in this setting?
2 MS. HESSE: So, before I get to that, I just
3 -- commenting on this discussion, I do think there's
4 an element of the bigness of the data sets that, you
5 know, that is relevant to how people feel about their
6 impact on competition. So I tend to agree that, you
7 know, data is different, but I also think that part
8 of what people are worried about and, again, the
9 question is whether antitrust is the right tool to
10 address that concern, is that these data sets are so
11 big that they make the machine learning dramatically
12 easier or they make the artificial intelligence that
13 much better or price discrimination that much better.
14 So the bigness of the data sets isn't just a fun word
15 to use. It is actually relevant to what the concern
16 is that people -- that -- that's arising.
17 So I think you can't answer this question in
18 the abstract, I think, is the right answer. Right?
19 Data might be a product market that one could define,
20 but it might not be. And I think it depends on what
21 the transaction is what the parties are, and what
22 their products and services are. I don't think, up to
23 this point, people have focused on data itself as a
24 relevant product market but rather have been thinking
25 about it as an element of competition and an element

1 of potentially the impacts, the competitive analysis.
2 So thinking about Microsoft-LinkedIn, you
3 look at the EC's 6(1)(c) decision and you can see
4 they're thinking about the data that LinkedIn has and
5 whether or not that's going to be a problem when
6 Microsoft acquires it, but it's not that that's the
7 product market that they're focused on. And I think
8 up to this point, that's largely what we've seen.
9 So you would have to have a transaction
10 where the asset that is being acquired or the product
11 that is being acquired is actually the data, and I
12 think we just haven't quite seen that yet.
13 MS. LEVINE: I'll ask an unfair question
14 predicting the future. Do you reckon we'll see a case
15 like that in the future? Or can you hypothesize a
16 theoretical case where that might be appropriate?
17 And, Renata, I don't mean to put you on the spot. If
18 your colleagues want to jump in with an answer here,
19 they should feel free.
20 MS. HESSE: It looks like Allen --
21 MR. GRUNES: Well, I think the FTC has
22 defined data as a product market. So, Alex, maybe you
23 can tell us more about the case or cases?
24 MR. OKULIAR: Sure, and maybe I'll just
25 qualify it. So I don't know that there's been any

1 definition of sort of a big data market. I'm not
2 aware of that. But there have been cases where data's
3 being monetized as a product and the agencies have
4 defined that as a market. One of the examples that I
5 gave was Dun & Bradstreet and QED, which is a merger,
6 it was about five years ago or so. You know, and in
7 that matter, the parties were selling K-through-12
8 educational data, and so that was, I think, the market
9 that they looked at. So there are some examples of
10 that.
11 Thompson Reuters, it was sort of -- it was
12 financial data, financial products that were being
13 sold to analysts. And in that circumstance, the DOJ
14 was particularly concerned because there -- it was
15 because, in part, because of the size of the data sets
16 that were required, how unique the data sets were, the
17 companies had to gather historical data. They had to
18 gather data across the world in all different
19 jurisdictions. They had to interpret that data
20 through different accounting standards to make it
21 meaningful for financial analysts. And so all those
22 factors went into the decision matrix, and,
23 ultimately, they decided that these two companies were
24 the only ones that provided those particular data
25 products and, as a consequence, the deal would be a

1 problem.
2 MS. HESSE: Yeah. So I tend to think of
3 those, and perhaps incorrectly, those cases as being
4 about services that use a lot of data to provide
5 information to consumers. So I don't think about the
6 -- but maybe that's not the right -- maybe that's not
7 the right way to think about it.
8 Obviously, the data is important. And in a
9 lot of financial services markets, you see that, that
10 people are -- but when I think about Bloomberg, for
11 example, I'm not thinking about the data that
12 Bloomberg is collecting; I'm thinking about the
13 service that Bloomberg is providing, the clearing
14 trades and things like that. So --
15 MR. OKULIAR: It's almost like a distinction
16 between maybe like the raw data, right?
17 MS. HESSE: Right.
18 MR. OKULIAR: Versus data that has actually
19 been turned into a product, right, so it's been
20 transformed in some way, I think maybe is one way to
21 think about it.
22 MR. SOKOL: Jumping in for just -- a very
23 quick intervention. So the other thing there is it
24 was historic data on financials that went back
25 literally roughly 100 years. That's not what these

1 hearings are about. We're talking about, if I
2 understand correctly, like information that's
3 collected daily if not by the minute. And, so, the
4 thing that made that a unique data set is not
5 typically what we're thinking about when we see any
6 number of companies collecting our data based on our
7 location as -- closest to whichever cell phone tower
8 we're at or what app we're opening, et cetera
9 MS. LEVINE: A question from the floor that
10 is in this vein I want to interject with. Can greater
11 data collection be considered tantamount to an
12 extraction of higher prices? Does anyone want to jump
13 in on that?
14 MR. GRUNES: So this -- it's a really
15 interesting question. You can think about data as
16 currency, and I could give you an example of where
17 that's not metaphorical. That's real. Your terms of
18 service with some online platforms say in exchange for
19 this service, you have an -- you will do something for
20 us. It's a financial exchange. You could think about
21 data as currency. You could think about giving too
22 much data as being equivalent to a price increase.
23 I don't -- it might be hard to model it,
24 especially in a free setting. But there's no reason
25 you couldn't. The thing is, I think, in the U.S., we

1 don't have this idea of exploitative monopoly or
2 exploitative abuse of dominance. And if do you, as
3 Europe does and a lot of the rest of the world, I
4 think it's a little easier to get at these issues than
5 under the U.S. framework which is exclusion,
6 collusion, predation.
7 MS. HESSE: But, I mean, I could think of --
8 I mean, for example, if you're looking at competition
9 across -- you get two firms and they have different
10 policies about how they collect data and what they do
11 with it. You could envision thinking about a price
12 increase being possible if one of the firms has a
13 dramatically different policy about how they use or
14 extract data from -- right? I think you could fit it
15 into that.
16 I think you're saying that, but it seems
17 like -- but, again, you're sort of fitting it into the
18 framework that we already -- the existing framework
19 that we have and thinking about -- you know, I think
20 people think about qualitative features as competitive
21 effects, so increases in quality, decreases in
22 quality, innovation, all of those things. So the way
23 you extract data seems to me like it could just fit
24 neatly into that paradigm, I think.
25 DR. BAYE: Yeah, I mean, I concur. That was

1 kind of what I was trying to imply at the beginning,
2 right? If you start out with a firm that already has
3 big data and is using that to charge high prices,
4 higher prices to extract additional rents, unless
5 there's foreclosure or something else going on, that's
6 not enough under competition law. But if two firms
7 merge and you combine the two data sets and because of
8 that you can enhance the prices that you're charging,
9 I mean, that's anticompetitive.
10 The merger is leading to the combination of
11 assets that allows the entity to raise prices. But if
12 there's some offsetting benefits to that raising of
13 the prices, then you got to take that into account.
14 That's the two-sided market story that I was telling
15 earlier, but that's why you don't focus on just one
16 side of the market. You got to look at the entire
17 benefit.
18 DR. BAKER: But I thought Renata's point was
19 that the merger could lead to worse privacy policies
20 or something like that so that -- and that's in effect
21 an increase in the quality adjusted price. And, so,
22 it's not the price, per se, that you necessarily have
23 to focus on. You can think of what -- competitive
24 effects in terms of quality adjusted prices, for
25 example.

1 MR. OKULIAR: I just want to note that
2 one -- I mean, one practical difficulty that I think
3 someone had mentioned is just how do you actually
4 assess the change in price, assuming that the
5 extraction of data can be analogized to a price or an
6 increase in price, you know, how as a practical matter
7 do you actually, you know, put that into an antitrust
8 analysis and make sense of it?
9 MS. LEVINE: Let me ask a question about
10 that antitrust analysis and ask you, Allen, about the
11 -- about data as a barrier to entry, right? We've
12 been talking about data using metaphors like currency.
13 Viewing data as an input, does it matter -- can a
14 firm's data set constitute a barrier to entry for
15 purposes of our antitrust analysis? And if it does,
16 does it matter how you got it?
17 We talked about getting it through a merger.
18 Does it matter if the firm spent a lot of money and
19 resources building and developing the data? Does it
20 matter if the data was developed internally versus, as
21 we said, in a merger or an acquisition? Does it
22 matter if the data is nonrivalrous, and as one of the
23 questions from the floor has asked, you know, can be
24 generated -- a question from the floor posited --
25 pretty easily by a new company?

1 Do those points matter when we're thinking
2 about data as a barrier to entry?
3 MR. GRUNES: So if I had -- if I had slides,
4 if I had done my slides on time, I would show a slide
5 that shows a castle with moats, and I kind of think of
6 the moat -- the moat as potentially barriers to entry.
7 I'm not an economist. Economists think differently.
8 But in the slide, you know, there are a number of
9 things like, okay, two-sided markets, getting at all
10 these other sorts of things that could become barriers
11 of entry.
12 But data is also one of them, even if --
13 even if data -- even if data tapers off at some point,
14 data's listed as one possible barrier to entry. But I
15 think, you know, in answering your question, really,
16 you got to -- I would -- I'd first say, you know, this
17 also is case by case. You can't -- I don't think you
18 can make any rules that one size fits all.
19 If data is a critical input, you've got
20 examples of the FTC's Nielsen-Arbitron case where the
21 FTC has an entire section describing the barriers to
22 entry there and why they're high. Same thing if you
23 go back a number of years to the European case of
24 TomTom-Tele Atlas, which had to do with digital
25 mapping. There's a discussion of why those are high

1 barriers to entry.
2 But those are the cases where the data is --
3 you know, we'd call it a critical input, right? So
4 the -- another -- and you know, more challenging
5 question is, okay, what about things where you don't
6 think the barriers to entry are high? You know, where
7 somebody else can get access to the same data and
8 maybe they are. You know, geo location, for example,
9 doesn't just come from one source. Or, you know,
10 where a user can simply click on or select a different
11 app. Are those situations where barriers are high?
12 And the answer is, well, you know, they look
13 like they're low, but they could -- but it could --
14 they could be high. One easy example is search.
15 Okay? So when Google started to do search, it didn't
16 have a lot of data. I mean, it was essentially
17 developed in somebody's garage. Okay? After a while,
18 another competitor -- you know, if you wanted to
19 develop a search tool, good luck competing with
20 Google. Microsoft's Bing, you know, as far as I know,
21 is still losing money. Okay? And it's the second
22 largest search provider. So there's something in the
23 ability to scale up that makes barriers to entry
24 higher. Okay? That's point one.
25 Point two is when data's involved, there may

1 be additional reasons to think barriers to entry are
2 higher. Data-related barriers to entry could extend
3 to things like algorithmic learning by doing, you
4 know, the more data you have, the better your product
5 is going to be. Now, that's a product attribute, so
6 I'm not saying it's a bad thing, but it could turn
7 into a barrier for somebody else to enter.
8 MS. LEVINE: Please.
9 MS. HESSE: Yeah, so I get a little bit
10 uncomfortable in this area, in part because I feel
11 like if you're picking on Google, for example, you
12 know, the reason why people use Google search
13 generally is because they like it better. If -- now,
14 one could argue potentially that -- and Google is not
15 a client.
16 MR. GRUNES: Former client.
17 MS. HESSE: It's a former client, but it's
18 not a current client, and I'm not saying this because
19 of that. You know, the fact that they have all this
20 data makes it easier for them to be better. But this
21 goes to -- you know, right to the question that, I
22 think Gail was asking in part, which is, does it
23 matter whether the firm spent substantial resources
24 developing and building. Right?
25 So this is when I start to worry about, you

1 know, are we going to punish someone because they did
2 a great job? They got a lot of data, so they have a
3 great product that people like. And if people didn't
4 like it, it is really easy to switch. Right? It's
5 not hard. So there -- so, I mean, I kind of take your
6 point that the barriers to entry look low, but, for
7 whatever reason, you're not seeing people switch.
8 And the question is, does that have
9 something to do with what -- again, we're picking on
10 Google here, but you could apply this in any other
11 market. You know, is that because Google's doing
12 something that they shouldn't be doing, or is it
13 because, for whatever reason, the other product just
14 isn't as good?
15 MR. GRUNES: So let me just respond briefly,
16 you know, and I don't mean to pick on Google, but, you
17 know, there is a record of looking at Google on these
18 issues. And so if you look back at the Google-
19 DoubleClick merger, one way to characterize it is
20 Google had a lot of data about where users went when
21 they searched on Google itself. And DoubleClick had a
22 lot of data about where people went when they went
23 elsewhere on the web.
24 You combine those two things, and it's
25 potentially game over, so -- for competition, okay?

1 So maybe this does come back to the question of did
2 you do it yourself or did you develop it through
3 mergers. Maybe it comes back to the question of, if
4 you're going to look at mergers, should you be focused
5 on mergers in a product market, or is there something
6 about data where you've got to look at adjacent
7 markets or nearby markets kind of the way Europeans, I
8 think, have done it a bit. Correct me if I'm wrong,
9 Renata.
10 MS. HESSE: No, no, no. I think that's a
11 different panel discussion, which is, you know, are
12 the agencies doing a great job looking at potential
13 competition and are they getting at that well enough.
14 And Google-DoubleClick is an example of a merger that
15 people like to talk about along with Facebook-
16 WhatsApp. You know, did the agencies miss something
17 there?
18 And, again, I think that's -- these are all
19 conversations that it's good to have, and I think it's
20 good to think about. But that doesn't strike me as
21 fitting neatly into the exclusionary conduct kind of
22 paradigm but more by acquisition.
23 MR. GRUNES: So I guess my last response
24 will be to say our old agency in Bazaarvoice, you
25 know, took a merger between people where you'd think

1 the entry barriers were low, but the market
2 participants thought they were high and successfully
3 challenged it.
4 MS. HESSE: Bad documents.
5 MR. GRUNES: Well, bad documents or no
6 documents, it's sort of the same theory. Right?
7 MS. HESSE: Okay.
8 MS. LEVINE: Danny, did you want to --
9 MR. SOKOL: Just two things. I want to just
10 bring it up to a more theoretical level. So we say
11 that data is the new currency. So let me actually
12 walk you through a thought experiment. Let's call
13 this currency cash. Right? So if we had one company
14 acquiring another company that had a lot of cash,
15 would we block the merger merely because there was
16 more cash? Actually, I think what the agencies do
17 correctly is say, what are the competitive effects?
18 Cash itself is not what matters. It's what you can do
19 with it.
20 And then actually to Allen's point of do we
21 have, you know, a series of cases? We do have an
22 emerging series of cases, and, in fact, if we don't
23 look at what competition authorities around the world
24 have done in terms of their discussion documents but
25 in terms of the actual cases, let's just, again -- big

1 picture -- look at these. Have we seen any deal
2 blocked because of a data barrier to entry? The
3 answer is no.
4 And, in this, there's no difference between
5 the EU and the U.S. if we look at the big, you know,
6 cases involving all your platforms, Apple, Microsoft,
7 Amazon, Facebook, Google, et cetera, these deals have
8 gone through. Right? So, then, there -- takes us
9 back to the next question. So is the framework wrong?
10 Because here it would have to be wrong both for us and
11 the Europeans on this issue. It could be that the
12 framework is working and we haven't actually seen in
13 reality these kinds of data barrier to entries in
14 practice, acknowledging on a theoretical basis that
15 they may in some cases exist.
16 DR. BAKER: Danny, why isn't Bazaarvoice an
17 example of a merger block where data is an entry
18 barrier?
19 MR. SOKOL: So I'm actually with Renata that
20 these were bad docs more than anything else.
21 DR. BAKER: But doesn't the theory still --
22 MR. SOKOL: But this was --
23 DR. BAKER: -- include that it was difficult
24 for other firms to enter?
25 MR. SOKOL: So this was, I'd say, not a big

1 data type merger the way we're thinking about big
2 data. The way that -- not you and I, but overall,
3 when the Wall Street Journal or Forbes or what have
4 you covers something called big data, Bazaarvoice is
5 two small companies in a nonreportable transaction. I
6 don't think that that's what they're thinking about.
7 DR. BAYE: They're getting people to give up
8 their ratings and reviews. That's personal views
9 about products and that's what was hard for someone
10 else to replicate. It's not literally, you know,
11 personal demographics or something, but doesn't it
12 have the same flavor?
13 MR. SOKOL: I think it's a little bit
14 different, but I think the case also would have looked
15 different but for the fact that literally I can't
16 imagine a single case in U.S. antitrust history that
17 had worse smoking gun documents.
18 MR. OKULIAR: Can I just -- I just want to
19 add very quickly. So I would be very concerned about
20 overenforcement in this space and chilling innovation.
21 I think that data gathering and data analytics are
22 certainly forms of innovation, and I would really be
23 framing this more as an analysis or a discussion of
24 innovation competition in thinking about, for example,
25 in the merger context whether you -- in the merger of

1 two parties whether there would still be sufficient
2 number of parties innovating in the space to maintain
3 competition. That's how I would be framing this and
4 thinking about it.
5 MR. LEVINE: Okay. Oh, please, please,
6 absolutely.
7 DR. BAYE: Can I please say one more thing?
8 Just not to take -- this is a very
9 interesting conversation. But I just want to remind
10 you as an economist that there's some old literature
11 that grew out of the AT&T case when AT&T was
12 ultimately divested into the 13 Baby Bells. And that
13 literature is on -- there's a great little book called
14 Theory of Natural Monopoly by Sharkey, and that
15 literature really builds out the whole notion for the
16 structural environments in which you're going to end
17 up with one big player.
18 And in that world, it was the old landline
19 world that has now been supplanted by wireless towers
20 and so forth. But to the extent that you view data as
21 a barrier to entry, the -- one of the potential
22 reasons -- and I'll just throw this out for it being a
23 barrier to entry is that there are economies of scale
24 and economies of scope in collecting data.
25 Economies of scale talks about the depth of

1 data, the more data that you get, the easier it is to
2 utilize that data, the more you can do with it. The
3 economy as a scope is about the breadth of the data.
4 Don't only have detailed data about Mike Baye; you
5 have data from Jon and everyone else in this room.
6 That's breadth. And as you collect that, you do
7 better.
8 I remember being in an economic conference
9 five years ago maybe, ten years ago, somewhere in that
10 ballpark, when Hal Varian and Susan Athey -- at the
11 time, Susan was chief economist for Microsoft and Hal
12 still is chief economist for Google -- were arguing
13 about economies of scale in search. And Hal was
14 arguing that, eh, you don't need large numbers. You
15 know, and the law of large numbers come in, and he
16 talks about "t" statistics and stuff and tries to make
17 the argument that you don't need a lot of searches to
18 get good results.
19 Susan comes back and says, well, it's really
20 all about the long tail. You know? It's true that
21 there's a lot of searches that a lot of people do and
22 you don't need a lot of information on that, but when
23 Mike Baye wants to find that bizarre book that only
24 Mike Baye wants called David's Order Statistics, you
25 know, there's just not a lot of searches for that.

1 And, so, if you got one player that kind of is a
2 monopoly for those searches, it can do more than
3 someone else, and that gives Microsoft Bing a
4 disadvantage.
5 So I'm not coming up with Microsoft's good,
6 Microsoft's bad or whatever, but that argument, it
7 seems to me, is just the reality that, you know what,
8 we'll get better search results if we got some bloody
9 monopolist to have all our information. Now, there
10 may be consequences from that that we don't like from
11 a public policy standpoint, right?
12 But, you know, forcing Google -- and again
13 I'm just throwing this out not because they're paying
14 me because they're not, it's just an example that we
15 all get -- forcing, you know, Google to turn over its
16 data to Microsoft so that each of them have half the
17 data doesn't necessarily make us better off as
18 consumers. Yeah, you get more competition, but
19 neither party can then operate on the long tail.
20 Right?
21 So it's a complex issue. If it's
22 structural, if that's the reason that we have big data
23 concentrated in the hands of only a handful of
24 players, there may be a structural reason for that.
25 And there may require other remedies to remedy social

1 problems that we perceive.
2 MS. LEVINE: So, Jon, let me ask you a
3 question --
4 DR. BAKER: May I just --
5 MS. LEVINE: Go for it.
6 DR. BAKER: -- just something to what
7 Michael said before we do it.
8 MS. LEVINE: Please.
9 DR. BAKER: Which is I'm not quite clear on
10 why you -- what you see as the relevance of Bill
11 Sharkey's book about natural monopoly because if we're
12 talking about -- well, you can think of, you know,
13 network effects, scale economies in demand and we have
14 scale economies and supply, which is more in scope
15 economies, which is more what he was worrying about,
16 but you can have -- there are some settings where the
17 scale economies are so powerful we had natural
18 monopoly and then we regulate them.
19 And there are other settings where multiple
20 firms can achieve sufficient scale economies to
21 compete, and maybe it's only a handful, and then we
22 have kind of an oligopoly market, you know, relative
23 to the size of the market. That is to say multiple
24 firms can achieve the scale economies given the scope
25 of industry demand.

1 And then we have an oligopoly market, and
2 maybe there are only two. And then we have other
3 settings where lots of firms can get sufficient scale
4 economies and then we don't worry so much. And I
5 wasn't sure that you were trying to argue that Google
6 was a natural monopoly or simply just observing that
7 you might have a market where only two firms could
8 achieve sufficient scale economies to compete and that
9 maybe Google still gets more than Bing but there's
10 diminishing returns and Bing has enough, and you get
11 competition.
12 So how you come out on -- there's like an
13 empirical question about what actually the scale
14 economies are and what the implications are for market
15 structure and competition that you have to resolve
16 before you can figure out what the antitrust response
17 is.
18 DR. BAYE: I don't disagree with anything
19 you said. I've not conducted such an empirical
20 analysis. What I was pointing out, though, is that
21 Susan Athey was suggesting that Microsoft's Bing
22 wasn't big enough to get the kind of economies of
23 scale that they needed.
24 So, I mean, again, I'm not trying to put
25 words in either of their mouths. I'm just trying to

1 point out, hypothetically, if it's a structural issue,
2 then it's a structural issue. Let's deal with that
3 and figure out how best to deal with structural issues
4 than try to, you know, prevent firms from becoming big
5 because big data is a bad problem. You lose the
6 benefits associated with that. That's the dialogue
7 between Susan and Hal was about that.
8 MS. LEVINE: So, Jon, let me ask you to help
9 us switch gears slightly. You've got a question from
10 the floor, Jon, about the selective discounting theory
11 you put forward. So I want to talk about data as a
12 competitive advantage.
13 So the question from the floor is, you know,
14 understanding your hypothetical about selective
15 discounting as something you could do if you have a
16 critical and well-managed big data set, the question
17 is, why would such selective discounting be bad for
18 consumers? Or are you implying a look to other
19 doctrines like predatory pricing or something like
20 that to find a harm?
21 DR. BAKER: Oh, it could be bad for
22 consumers if what it does -- if the consequence --
23 well, first of all, selective discounting can often be
24 good for consumers. And I'm not arguing otherwise
25 that -- because that could be a way in which

1 competition happens. But it could be bad for
2 consumers if it operates to exclude rivals. And how
3 could it operate to exclude rivals? Well, it could
4 operate to exclude rivals by either raising their
5 marginal cost of getting new customers or discouraging
6 them from being aggressive competitors.
7 I mean, we have -- I mean, I'm thinking of
8 there an analogy to the chain store paradox, let's
9 say, and, you know, in predatory pricing literature,
10 but a firm can threaten a rival with -- or even just
11 entry deterrence models generally. A firm can
12 threaten a rival with aggressive competition and
13 induce it to back off. And that's what it could do
14 with selective discounting.
15 So it's -- there's nothing unusual about the
16 theory. It's well within the four corners of what we
17 think about with exclusionary conduct generally.
18 MS. HESSE: But does it have to fit into the
19 predation? I mean, what's the framework you use to
20 analyze that? Because what you just described sounded
21 like the American Airlines case which was a predation
22 case that DOJ lost. I'm just curious. I'm not
23 challenging the theory. I'm just wondering, how do
24 you judge whether the selective discounting is
25 anticompetitive or procompetitive?

1 DR. BAKER: Oh, well, you have to -- I mean,
2 the issue is -- has to do with the rival reactions.
3 If the -- you know, in some markets, everybody
4 competes more aggressively and everybody selectively
5 discounts to each other's customers and you get very
6 competitive outcomes. And other markets, you could
7 get something like what I was describing as possible,
8 which is the rivals back off.
9 And that's -- I mean, what -- if you're
10 asking as an economic matter, we don't necessarily
11 have to call it predatory pricing or exclusionary
12 conduct or anything. If you're asking as a legal
13 matter, then you get into what -- whether it's -- what
14 piece of the doctrine applies, and that's kind of a
15 different question that I wasn't focusing on in what I
16 was saying.
17 MS. LEVINE: Any thoughts or responses to
18 that?
19 Okay. Let me change now slightly to a new
20 subject, mergers. And, Danny, I'd like to ask you a
21 couple of questions about this. We use the word
22 "data" in the 2010 Horizontal Merger Guidelines but
23 not in the way we're using it today. Are the
24 Horizontal Merger Guidelines from some eight years ago
25 flexible enough to do the job now to handle database

1 theories of competitive harm?
2 MR. SOKOL: In short, the answer is yes.
3 But actually, let me just go back to what we've been
4 talking about here to give you proof of that, which
5 is, in every single case that we've been talking
6 about, we've been analogizing back to other cases
7 involving data, to other cases involving exclusionary
8 conduct or predatory conduct, and we have specific
9 cases in mind, and we say, does this look like this
10 other case enough that it gives us a theory of harm
11 that is potentially winnable in court? I think very
12 effectively, by the way, I say humbly on the same
13 panel as one of the authors of the leading antitrust
14 law case book.
15 What I would say is, is there -- the basic
16 question you have to ask is the following one: Is
17 there something, some theory that we're not seeing by
18 the agencies and/or by the parties that's not
19 happening in the Merger Guidelines? That is to say,
20 is there something in practice that is different than
21 what the Merger Guidelines -- how the Merger
22 Guidelines in practice are working? Is there some
23 kind of dissonance?
24 Or, in the alternative, if we assume that
25 the merger guidelines are actually not reflective of

1 practice but are aspirational of the practice that we
2 want to see, is there something that seems to be
3 missing from the merger guidelines in the way that we
4 think about it? Well, every one of our theories, we
5 seem to have been evaluating in mergers, I have yet to
6 hear something incredibly new that the guidelines
7 haven't thought through as of yet. And I'll just
8 leave it at that.
9 DR. BAKER: Well, I mean, we always proceed
10 by an analogy to past cases, and so there's nothing
11 new about that, but for what it's worth, the Merger
12 Guidelines are focused on horizontal mergers, and the
13 harms are either coordination or these unilateral
14 effects, but it's basically in some broader sense
15 collusive, you know, counting unilateral effects
16 collusive, and it's not really focusing on
17 exclusionary issues, for example.
18 And, so, that's why when we talk about -- we
19 gravitate -- the closest we get is when we think about
20 data as barrier to entry. That's how we got there in
21 this conversation, that, because in the merger
22 analysis, that's what sort of looks like exclusion.
23 But you could also worry that acquisition of data
24 would do just what I was describing, selected --
25 targeted discounting. It could allow -- or there are

1 other kinds of exclusionary conduct that -- involving
2 big data that you could worry about.
3 So it's not so different from what I was
4 arguing about target discounting to say that the
5 merging firm can -- the merged firm can use its data
6 to better emulate the products -- characteristics of
7 rivals and to exclude them that way by -- you know,
8 through -- and it will have the same pros and cons.
9 That looks like competition. You're giving consumers
10 better products, but it also could be a rapid, you
11 know, emulation of rival products could also be a way
12 of excluding rivals and forcing rivals to back off
13 competitively, invest less and that sort of thing,
14 too.
15 All of these things are exclusionary
16 theories that aren't really well developed in the
17 merger guidelines and are potentially available as a
18 merger theory.
19 MS. LEVINE: We have fewer than five minutes
20 left. I want to throw out a very practical question
21 to this panel, because I know some of you have already
22 told me you have thoughts on the question. If we're
23 going to take big data seriously, what questions
24 should staff at the agencies be asking to get evidence
25 on the big data questions you've been talking about

1 today?
2 MR. GRUNES: So can I jump in on this one?
3 All right. So what sort of data are we talking about?
4 Is this industrial or personal? Is it user-generated?
5 Is it observed? Is it inferred? How does it
6 contribute to the rationale of a deal? What does the
7 acquirer intend to do with it? And in a lot of these
8 deals, I suspect the answer is, I don't know, you
9 know, I'm going to figure out how to monetize it, but
10 that's a legitimate question.
11 How replicable is it? It's a question that
12 we've talked about today. What stops the acquiring
13 firm from getting it without the merger? Okay? And
14 what sort of data assets do competitors have? I think
15 those are some of the staff questions. And I'm sure
16 Renata's old section asks those questions routinely.
17 One problem for agencies is if you have one
18 section asking those questions but you've got other
19 sections that also have data issues coming in their
20 mergers, how do you transfer that knowledge over to
21 the other sections?
22 DR. BAYE: Just real briefly, regardless
23 of whether it's a consumer protection matter or an
24 antitrust matter, I would say make sure you're looking
25 at the appropriate actual world and the appropriate

1 but-for world, because the tendency is, for example,
2 to contemplate what the world might look like if it
3 were perfectly competitive, how happy would consumers
4 be, and that's not generally the correct but-for
5 world.
6 MR. OKULIAR: So thanks, Gail. All I would
7 say -- or all I would add to what Allen and Mike said
8 is that I would really focus on -- because those are
9 questions that we would ask in Renata's old section.
10 And, you know, really focus on whether the data itself
11 is unique -- truly unique -- like in a Thompson
12 Reuters situation -- and whether that would enhance
13 the ability -- the market power or the ability and
14 incentive of the merged parties, for example, to
15 exercise market power and raise prices somehow.
16 MR. SOKOL: Very quickly, because that's all
17 really helpful. We didn't talk about efficiencies.
18 We might also want to consider those. I guess that's
19 implicit in what we're saying. But let's make it
20 explicit.
21 MS. LEVINE: Are there a different set of
22 questions you'd be asking to elicit that information,
23 or is it the same sort of suite of questions that's
24 been outlined already? Just that information about
25 efficiencies.

1 MR. SOKOL: Oh, okay, right. So
2 efficiencies are always difficult. They're difficult
3 conceptually for courts. Quality efficiencies -- you
4 know, something that Allen talked about, particularly
5 difficult for courts to understand. On the agency
6 side, you all get it better than courts do. You have
7 frameworks. You have a way of getting at these
8 questions.
9 And I think, dare I say, the agencies
10 typically do a really good job. To the extent that
11 people complain at the spring meeting, it's about one
12 case oftentimes which they were involved in, you know,
13 and -- but overall, I think we should recognize also
14 when agencies do it right. The framework seems to
15 overall work. The methodologies seem to work.
16 This is an area -- there are some areas I do
17 have more concerns with others, but the ability of
18 agencies to sift through information, including
19 thinking through efficiencies, I think the agencies do
20 this well.
21 MS. LEVINE: Danny, thank you for that
22 closing and optimistic note. Let me ask everyone here
23 to join me in thanking this extraordinary panel for
24 their thoughts this morning.
25 (Applause.)

1 MS. LEVINE: There's a break. All right,
2 now for the important information. I've just been
3 told there's a 15-minute break. Please enjoy.
4 (End of Panel 1.)
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1 PANEL 2: REMEDIES FOR COMPETITION PROBLEMS
2 IN DATA MARKETS
3 MS. AMBROGI: We're now live and back from
4 our short break. Thanks to everyone who's rejoined
5 us. My name is Katie Ambrogi, and I'm an attorney
6 adviser at the FTC's Office of Policy Planning, and
7 I'm really thrilled to be moderating this panel on
8 remedies where we will explore the range of potential
9 solutions, both in law and in policy, for competition
10 challenges in markets involving big data. And this
11 includes a wide range of potential remedies from
12 licensing and divestiture of data sets in the merger
13 context to other possible options such as data
14 portability and interoperability.
15 So I'm thrilled to have these wonderful
16 participants on this panel. And I direct you to their
17 full bios for their list of accolades, but just by way
18 of short introductions, we have Andrew Gavil who is a
19 Law Professor at Howard University and past Director
20 of FTC's Office of Policy Planning; Courtney Dyer,
21 who's a partner at O'Melveny & Myers; Frank Pasquale,
22 Law Professor at University of Maryland's Francis King
23 Carey School of Law; Kevin Bankston, Law Professor at
24 University of -- sorry, I'm rereading Frank's bio.
25 Moving right along. Kevin is Director of New

1 America's Open Technology Institute; and then Daniel
2 Sokol, Law Professor at University of Florida Levin
3 College of Law and Senior of Counsel in the D.C.
4 office of Wilson Sonsini.
5 So we will follow the format of each
6 participant will give five-minute opening remarks, and
7 then we'll have a moderated Q&A. And as with past
8 panels, we'll have someone from the FTC walking around
9 taking your questions that we will incorporate into
10 the Q&A. So without further ado, we'll start with
11 Professor Gavil.
12 MR. GAVIL: Thank you, Katie, and good
13 morning, everyone. Just thanks to the Federal Trade
14 Commission and to Bilal Sayed, the Director of the
15 Office of Policy Planning, and Katie and to American
16 University for hosting today. It's a pleasure to be
17 part of this discussion, and I'm glad to be here.
18 Just a quick disclaimer that anything I say
19 today are my own views in terms of what we might be
20 are talking about in remedies.
21 I guess the big point I would like to start
22 with is that remedies are all too often thought of and
23 discussed in a context of a litigation mindset. And
24 even this morning, you could see that a lot of the
25 discussion about big data-related theories and issues

1 have been focused on litigation. And what I'd like to
2 suggest is that the FTC has a far broader set of tools
3 available to it, and I'll start by talking a little
4 bit about the limitations of litigation remedies and
5 the possibilities for far more flexible remedies using
6 some of the other tools the FTC has, particularly
7 competition advocacy, which the Office of Policy
8 Planning has historically done a lot of.
9 Debates about privacy, big data, and
10 competition are more likely to play out actually in
11 the context of legislation, regulation, self-
12 regulation, industry standards than they are through
13 conduct-focused enforcement. Enforcement takes a long
14 time. The agencies may, through investigation, be
15 able to identify particular conduct that is worthy of
16 an enforcement action.
17 But, if we look back historically -- and
18 this was something the panel was talking about this
19 morning as well -- it has become very difficult to
20 bring Section 2-like cases, even for the Federal Trade
21 Commission. It is a long process. It takes years in
22 some cases. And if the notion is that we're going to,
23 at the end of the day, have structural remedies, well,
24 go reread the decision of the D.C. Circuit in
25 Microsoft and look what the standards are for trying

1 to impose structural remedies in the case of conduct
2 that is anticompetitive as opposed to conduct like
3 serial mergers.
4 So it's very hard to win on liability. It
5 is very hard to achieve remedies. Remedies are
6 generally constrained in the context of litigation by
7 prior cases. And, so, all of that, plus the
8 likelihood that we're going to see a variety of issues
9 dealing with big data and competition arising in the
10 context of, as I said, regulation, legislation, and
11 even self-regulation, leads me to think that the
12 agency ought to go forward with a fuller appreciation
13 of the range of tools available to it.
14 So why do I think some of those tools are
15 better? So let's think about typical litigation is
16 going to be after the fact. And if we are thinking,
17 as was clear from this morning, about exclusion, we
18 have that problem of the rivals perhaps being
19 vanquished or gone and there is no remedy that can
20 bring rivals back from the dead, not for a court.
21 So what's the benefit of the agency being
22 engaged sort of at an earlier stage following
23 industries, looking at guidelines, looking at the
24 possibility of comments on legislation regulation?
25 Well, it's before the fact. So there's an opportunity

1 there to influence the direction of industry. The
2 other advantages are cost-effective. It is a whole
3 lot less resource-intensive than bringing enforcement
4 actions to think in terms of an advocacy program.
5 It is a lot quicker and more nimble, and
6 there's a broader range of possible solutions. And
7 we'll talk about, as the panel progresses, what are
8 the concepts of things that might fix competition
9 problems. And I think that's the big point I'm trying
10 to make is if you start thinking about remedies solely
11 in terms of litigation, you think of enforcement and
12 you think of remedies that are geared to the
13 particular conduct in the enforcement action.
14 If you start thinking about competition
15 advocacy more broadly, suddenly, you have a wider
16 range of potential ways to influence the direction of
17 the market to use the FTC's voice through speeches,
18 like I said, through comment letters, but also a whole
19 range of things like these hearings, which are a form
20 themselves of soft advocacy. And they are much more
21 flexible, and you can use them in different ways to
22 build agency expertise. And it might later translate
23 into support for enforcement, but it should be part of
24 the bigger package of remedies that we think about and
25 talk about today, remedies for competition problems,

1 not necessarily remedies for anticompetitive conduct.
2 MS. AMBROGI: Great, thanks.
3 And now Courtney.
4 MS. DYER: Hi. Thank you, Katie. And good
5 morning, everyone. Thank you for inviting me to be on
6 this panel. I'm honored to be here.
7 As the practitioner on the panel, I want to
8 talk about my experience in merger remedies that seek
9 to address competition concerns where data is involved
10 in the markets and the challenges that they may
11 present that are a little bit different than what you
12 see in a traditional context of divestitures.
13 Two things I wanted just to kind of touch
14 briefly on this morning before we talk more amongst
15 the panelists is how you define the assets to be
16 divested when data is part of those assets. Data
17 remedies have been or seem to be inappropriate in
18 cases where you are trying to restore competition in
19 markets where data itself is the relevant product
20 market or a key component of the relevant product
21 market.
22 But once you define the asset and the
23 agencies identify what they think needs to be divested
24 to restore competition, I think it's really important
25 to ensure that that data remedy doesn't lessen the

1 incentives of either the merged party or the remedial
2 party to innovate and to use that asset to create
3 value and to use that data to compete more efficiently
4 in the market.
5 In defining the assets to be divested in
6 some cases like the CoreLogic case, the relevant
7 product market was the data itself, and so the FTC
8 alleged that CoreLogic's acquisition of DataQuick
9 would lessen competition in the license of publicly
10 available real property data to third parties. And,
11 so, it requires CoreLogic to license that big set of
12 nationwide real property data to a remedial party so
13 that it can relicense it to others in competition with
14 CoreLogic. So the actual product was this nationwide
15 set of house and property and tax characteristics.
16 In others, the data has been a critical
17 component to what the agencies have defined as the
18 relevant product market. In Nielsen-Arbitron, the FTC
19 required the divestiture of assets related to
20 Arbitron's cross-platform audience measurement
21 business, and it was then in development and Nielsen
22 and Arbitron were the only two developing this
23 business, but along with that divestiture required a
24 royalty-free perpetual license to Arbitron's
25 individual-level demographic data that it collected

1 through its audience measurement panel.
2 And the FTC in this case found that Nielsen
3 and Arbitron were the only ones who had these audience
4 measurement panels, so the data that's required to
5 fuel a cross-platform audience measurement system was
6 required to be licensed to a remedial party for them
7 to be able to compete going forward with Nielsen.
8 Similarly in Google-ITA, the DOJ required
9 Google to license ITA Technology in the underlying C
10 class and fair accessibility data to online travel
11 intermediaries. Google planned to compete with these
12 -- against these OTIs with the assets it acquired, and
13 the agency was concerned about foreclosing these OTIs
14 from access to that same data to be able to compete in
15 the market.
16 In each of these matters, the agencies
17 concluded that a data remedy was appropriate when,
18 again, the data itself was the relevant product
19 market, and they found that that market had few
20 competitive alternatives for that data or in a product
21 market that relied on the data that only the combined
22 company would have access to after the transaction.
23 But once these assets are defined and these
24 remedies are crafted, I think it's important to ensure
25 that the remedy preserves the incentives of both of

1 the remedial party and the merged firm to use those
2 assets to innovate and to not impose conditions in
3 those agreements that get beyond what is necessary
4 that may have an impact of deterring companies from
5 applying kind of their own expertise and ingenuity and
6 innovative spark to really derive assets from that
7 data.
8 With regards to the remedial party, I think
9 the agencies should avoid overly prescriptive remedies
10 that may reduce their incentive to enhance the data.
11 It may be in cases less important for the remedial
12 party to step in the shoes of the acquired entity's
13 current customer contracts, for example, by forcing
14 them to divest -- forcing the merged party to divest
15 ancillary products that may be outdated or
16 complementary data that the remedial party may be able
17 to obtain on its own more efficiently, and, more
18 important, to provide the technical resources and
19 knowledge for the remedial party to be able to use
20 that data and to incorporate it into an existing
21 business or sell products and market products to new
22 customers because data is -- data-driven markets are
23 innovative markets and ones which change rapidly.
24 With regards to the merged firms, I think
25 it's important not to deter them from taking advantage

1 of the efficiencies and the transaction by forcing
2 them to pass along any R&D and any enhancements that
3 they want to make to their new data set to the
4 remedial party and to their competitor. And, you
5 know, behavioral remedies that go along with these
6 structural divestitures do have, through the compelled
7 licensing, the risk of losing the incentives for the
8 merged firm to continue to make the products better.
9 Thanks.
10 MS. AMBROGI: Thanks, Courtney.
11 Professor Pasquale.
12 MR. PASQUALE: Yes. And for the slides,
13 should I -- is there a controller or -- sorry. Should
14 I stand up from there?
15 MS. AMBROGI: I can just pass it down.
16 MR. PASQUALE: Great. Excellent. Well,
17 thanks so much. And I just wanted to begin my
18 testimony today by thanking Katie and others -- oh,
19 sorry for the mic. Thanks.
20 Just thanks so much, Katie, for terrific
21 organization here and for the chance to speak about
22 the potential for remedies and especially to think
23 about platform power and a new age of competition
24 policy, particularly as Allen Grunes discussed in the
25 last panel when the U.S. might be falling behind if it

1 doesn't think more creatively and expansively about
2 the nature of its competition policy.
3 So I want to be sure to emphasize that, as I
4 mention in my book, The Black Box Society, we've got
5 to think about new industrial combinations and new
6 ways of using data as being something as epically
7 different and important and in some ways unprecedented
8 as the utilities that emerged in the late 19th and
9 early 20th Century.
10 Now, of course, oftentimes, there is a
11 divide or a tension that is characterized between
12 antitrust policy and utility regulation. But I think
13 we also see the ways in which these can either
14 complement one another and can lead to synergies,
15 particularly in work by Spencer Waller talking about
16 the nature of merger conditions as effectively
17 involving agencies in ongoing regulation of certain
18 entities, particularly in the tech -- high-tech
19 context.
20 I start here just with respect to data
21 interoperability. I think that's really critical and
22 that the example of the FCC making people's cell phone
23 numbers portable should stand as a great example of
24 something that really increased the value of a certain
25 service to everyone that was using it and that was

1 ultimately something that we could bring that sort of
2 model and that sort of ideal to many different areas
3 if we wanted to have an industrial policy that
4 actually promoted competition or federations of social
5 networks as opposed to one that leads to
6 monopolization.
7 I think also with respect to portability,
8 again, data portability, should be something that
9 should be considered part of individuals' rights and
10 in an effort to create a competitive market in many of
11 these data-intensive fields.
12 With respect to licensing of intellectual
13 property, I know there's been some talk about the ways
14 in which certain firms can gain certain advantages
15 over different fields and can attain just massive
16 amounts of intellectual property and that might be
17 seen as an essential facility. And I think that a
18 revival of that doctrine is necessary, or ways in
19 which it could be implemented in -- through, say,
20 merger conditions or other sorts of conditions.
21 Regulation, ongoing regulation, again, isn't
22 our focus but is something that I think needs to
23 complement these other procompetitive elements. And I
24 also just want to be sure to get into a few fines in
25 thinking about how do U.S. fines for anticompetitive

1 behavior, how do they compare to fines in other parts
2 of the world?
3 Now, in terms of thinking about these types
4 of policies, in cabining platform power, I like to
5 draw a distinction between Jeffersonian tech policy
6 and Hamiltonian tech policy. And this was drawn in an
7 article I wrote for American Affairs a few months ago
8 that I was very grateful to the economists. They used
9 it as their frame for their special issue on digital
10 companies.
11 And the Jeffersonian tech policy would be
12 one that would encourage fragmentation of large firms.
13 I mean, the ideal there would be potentially requiring
14 a breakup of Facebook from Instagram from WhatsApp,
15 right? The idea there would be that you'd want to
16 have more opportunities for individuals to socially
17 network, to communicate, to do other forms of digital
18 sociality without having to worry about one company
19 gathering all of that data and sort of centripetally
20 bringing together data in ways that increased its
21 advantage over rival firms.
22 But we also have to keep in mind Hamiltonian
23 tech policy, particularly K. Sabeel Rahman's article,
24 "The New Utilities." And Rahman was a professor at
25 Brooklyn. He is now leading the Demos Institute, and

1 I think that his work in terms of firewalling
2 core necessities away and recognizing these
3 infrastructural goods of imposing public obligations
4 on infrastructural firms and creating public options
5 all must be part of competition advocacy.
6 So I have plenty more to say, and I have
7 other slides that will be entered into the record, but
8 I just hope this is an opening to a conversation about
9 thinking in larger terms and in a larger framework
10 about the nature of competition policy and how we can
11 add more dimensions to it. Thank you.
12 (Applause.)
13 MS. AMBROGI: Great. Thanks.
14 Kevin?
15 MR. BANKSTON: Thank you, Katie. And thanks
16 to the FTC for having me here for this important forum
17 where I'm going to talk a bit about the difficult but
18 hopefully resolvable tensions between privacy and
19 competition when it comes to portability and
20 interoperability.
21 Hypothetically, imagine that after a huge
22 privacy scandal involving a social network that you
23 use you want to hashtag delete it. What about your
24 data? What about your posts? What about your private
25 messages? What about all those baby pictures? What

1 are you going to do?
2 There is, thankfully, I think, a growing
3 consensus, post-Cambridge Analytica, that users should
4 be able to take back copies of the data that they
5 previously uploaded to a service, and this is indeed
6 now a right for Europeans under GDPR. And I think
7 there are three good reasons for this.
8 One, it respects the user's right to control
9 their own data, as does privacy -- as do privacy
10 protections. Two, it hopefully lowers the switching
11 costs for consumers that want to change services,
12 similar to how number portability lowered the
13 switching costs of changing cell providers. And,
14 third, it hopefully makes it easier for competitors to
15 grow more quickly so that the network effects of the
16 incumbents aren't insurmountable.
17 So, for example, it was thanks to
18 portability of contact data that several of today's
19 social network incumbents were able to grow so quickly
20 in the first place. And, now, several -- there are
21 several tools -- several of the larger companies have
22 offered data portability tools for many years now, but
23 post-GDPR, they are working to improve them both in
24 terms of comprehensiveness of the data and usability
25 of the formats of the data.

1 But people have mostly just used these
2 download-your-data tools to archive their stuff rather
3 than move it, in part because they are download-your-
4 data tools. Actually having to download your stuff
5 and upload it somewhere else, especially if you're a
6 mobile user, is a pretty big barrier. And that's also
7 been a barrier to, like, the development of recipients
8 of that data.
9 But there's been a positive development in
10 the formation of the data transfer project, which is
11 an open source project that currently involves Google,
12 Microsoft, Facebook, Twitter, where basically they are
13 trying to develop standards for one button or a couple
14 of buttons, couple drop-downs, ability to move your
15 data between services. And this is, I think, over the
16 next few years going to help us deal with the low-
17 hanging fruit of portability, things like your photos,
18 your address books, your stored files, things that are
19 based on common standards and that are clearly yours.
20 But then we get to the edge cases. Let's
21 come back to the hypothetical. Getting my photos out
22 is nice, but what about the photos I'm in that aren't
23 mine? What about the tags that people have added to
24 my photos that I didn't add? What about my comments
25 to other people's posts? What about other people's

1 comments on my posts, things that aren't clearly mine?
2 And most especially what about my social graph? What
3 about the network of friends that is really probably
4 the most important thing I'd want to be able to move?
5 Many commentaries, including my
6 organization, want companies like Facebook to free the
7 social graph and make it more portable. But,
8 unfortunately, it's not as easy as number portability
9 because we're actually talking about the data of other
10 people and about other people. Essentially, the same
11 kind of profile and contact information that was at
12 the heart of the Cambridge Analytica scandal in the
13 first place and sometimes contact information that my
14 friends haven't even chosen to expose to me on the
15 platform in the first place.
16 Now, let's be clear. Facebook has been
17 finding ways to avoid letting users get this kind of
18 information out of the platform for years based on
19 privacy arguments that were also super conveniently
20 and suspiciously aligned with their business
21 interests. For example, the privacy setting that lets
22 you decide whether or not friends can download your
23 contact information is set to default private unlike
24 almost every other privacy setting on Facebook.
25 But especially now in the political and

1 legal environment that we have, I can't blame them for
2 being very wary of sharing such data. And there is a
3 privacy issue there. And that's not an easy --
4 there's not an easy answer on how to square that
5 privacy issue and the desire for meaningful
6 portability, which takes us to the last important
7 theme here, which impacts both portability and
8 interoperability, that is, services talking to each
9 other in an ongoing way.
10 At this point, all the incentives for the
11 companies are to lean toward privacy over portability
12 and interoperability whenever they're in tension, in a
13 way that I fear will ironically strengthen their
14 hegemony over our data and make it harder for us to
15 leverage our data on other services. We're seeing
16 this especially in the context of interoperable third-
17 party apps that run on top of the Facebook platform or
18 lately on the Gmail platform.
19 Those types of open platforms have been a
20 huge source of innovative features and tens of
21 thousands or even hundreds of thousands of apps and
22 new businesses and economic growth, but at this point,
23 if I were one of the big guys, I'd be locking those
24 ecosystems down pretty completely and only letting
25 users interact with a much smaller population of

1 companies that are totally trusted and well
2 established and totally vetted -- Spotify and not the
3 little guy, Fortune 500 companies but not the smaller
4 companies, you know, Google Drive and Microsoft
5 OneDrive and iCloud but not the scrappy new drive
6 entrant. And that is the trend, the direction where
7 we're going.
8 And, so, I think the big question on the
9 table is how can the FTC and Congress and other
10 policymakers ensure that we find the right balance to
11 both protect privacy and ensure continued competition
12 and innovation in a space which we can talk about in
13 questions.
14 MS. AMBROGI: Thanks, Kevin.
15 Professor Sokol?
16 MR. SOKOL: Thank you. I also have slides.
17 (Brief pause.)
18 MR. SOKOL: Before I get to the slides, so
19 pardon me for this, just two quick thoughts. Frank
20 gave a number of very compelling types of remedies.
21 Two things I want to just add to for the Q&A. Number
22 one, I'd say remedies look different as between
23 private parties versus when the Government is a
24 plaintiff. And I want us to think about that.
25 Number two, also missing from the list was

1 no remedy! Right? Every once in a while, it could be
2 that the best remedy is to not to intervene because
3 either it's on the merger side and we think that these
4 are complicated markets. Alex, in the last panel,
5 brought that up. Others do as well. Sometimes no
6 remedy simply because we don't have a good remedy.
7 And to that -- there are two books
8 roughly a decade apart that show really great case,
9 Microsoft, mediocre remedies. We have the Page and
10 Lopatka book, and then we have the Gavel first book.
11 Both of them -- to the extent they agreed on anything,
12 it would be that the remedies were not good.
13 So here we have some data-related mergers.
14 We're going to get through some of this. So I'm going
15 to talk about refusals to deal and essential
16 facilities. So we have a number of refusal-to-deal
17 cases. And I want to cabin this as different than
18 essential facilities because some of these cases in
19 the lower courts actually made the essential
20 facilities claims at the Supreme Court level that
21 didn't come up.
22 And some of these are great cases. I mean
23 great in terms of doctrine. I loved Lorain Journal.
24 I love Otter Tail. I love Aspen for what Aspen
25 actually stood for. And, so, I think part of it is,

1 like, let's read the cases carefully, particularly the
2 Supreme Court cases, for what they say and what they
3 don't say.
4 Now, what does this do specifically for
5 essential facilities? The Supreme Court is deeply
6 suspicious, particularly for a particular type of
7 essential facility claim, which is involving a single
8 firm type essential facility claim. This also come --
9 you know, on this, they're very clear. They haven't
10 totally closed the door on it, but they're pretty
11 close to it. And the treatise is equally troubled by
12 that.
13 And what I would suggest once we get to Q&A
14 is that there is good reason to be deeply suspicious
15 of essential facilities as a single firm type claim.
16 And so this is essentially what do we need to have?
17 Right? Bottleneck, and typically we see it, as Frank
18 alluded to earlier, in a regulated industry type
19 setting. And the real critical thing is here that
20 it's really the only gateway available. And in this
21 tech setting, we have to ask ourselves is really this
22 the only possible way that we -- or like is --
23 essentially is tech some kind of public utility?
24 Should it be regulated as such?
25 And I suspect most people who are antitrust

1 people would say no. And I think that that's the
2 right answer. And here's the problem. The essential
3 facilities doctrine, I think, creates a lot of
4 uncertainty. I think that it's just not the right
5 tool in this particular setting, and some of that we
6 teased out, why not, in the prior session. Some of it
7 you heard a little bit about yesterday. And I'd say
8 we'd be -- I'd be very -- very reluctant based on what
9 we know in terms of the economics right now to impose
10 this kind of framework.
11 Refusals to deal are limited. Where exactly
12 they're limited are going to be case to case, but
13 particularly with regards to large firms, dominant
14 firms, it's one thing to say refusals to deal. It's
15 another thing to say essential facilities. I'm going
16 to push back very hard against essential facilities.
17 Refusals to deal are more limited under case law. And
18 sometimes you get imposed -- I think Aspen as Aspen,
19 where there was, you know -- the Supreme Court is even
20 clear there. Right? Even if it's at the periphery,
21 it's something that is still good law. That's very
22 different than what we're talking about today.
23 Thanks.
24 MS. AMBROGI: Thanks. I think, as the
25 opening statements reflect, there are a wide range of

1 potential solutions here, and each proposed solution
2 has some upsides and some downsides to it.
3 Ginger's presentation yesterday, I thought,
4 laid out one way of thinking about a range of these
5 solutions, and that might be that on the far side of
6 no intervention to the other side where there's total
7 intervention, you have the free market, on the one
8 hand, and then moving a bit towards industry self-
9 regulation, then industry self-regulation plus
10 consumer education, and moving further along, ex post
11 enforcement of the laws, and then moving on from
12 there, ex ante regulation of some of these conducts.
13 So there's a wide variety of options and
14 mechanisms to achieve these options. So we'll try to
15 touch on what folks have discussed in their openings.
16 And we'll begin by looking at some of the practical
17 aspects that we in the antitrust community are maybe
18 more familiar with through our agency work, and that
19 is in the context of FTC and DOJ consent remedies, in
20 the context of mergers, is data different than other
21 assets like factories or retail stores? And does data
22 present unique challenges when compared with some of
23 these other assets? And if so, how can data remedies
24 be tailored to effectively remedy competitive harm,
25 and the point to remedy competitive harm as well as

1 what Courtney mentioned to preserve incentives that
2 the merged party has to keep innovating and keep
3 providing good products to the market. So we'll start
4 with Courtney, if you want to respond to that.
5 MS. DYER: Sure. So, from a practical
6 matter, you know, the data, and I can speak personally
7 to the CoreLogic matter, which is ongoing, but in that
8 case, it was public data that anybody could go out and
9 get from county assessor and recorder offices. I
10 mean, the complexity of it involved going out and
11 collecting it from all of the counties and the offices
12 in all of the jurisdictions across the country,
13 processing the data, normalizing the data, and getting
14 it in a format in which you can license it to third
15 parties.
16 So there's the aspect of the strict here's
17 the assets to be defined, here's the data that needs
18 to go to the remedial party. But with that said,
19 agreements -- remedies that impose some long-term
20 entanglements between the parties I don't think are
21 necessarily always beneficial.
22 I think it's important, and you'll see in
23 these remedies that involve data, there's specific
24 provisions on making sure that you give them the
25 technical knowledge and access to employees and

1 information that they'll need to be able to use the
2 data and get it to consumers, access to business
3 records, customer contracts, et cetera, and then
4 unfettered ability to hire employees without the risk
5 of them getting counter-offered and hired back by the
6 merged party. And those come in a variety of contexts
7 and, obviously, are very case-specific.
8 I think those are important to promote that
9 the remedial party doesn't just take the data and step
10 into the shoes and do exactly what a company did at a
11 specific point in time but has the knowledge and the
12 tools and the resources to be able to enhance that
13 data, incorporate it in the complementary businesses
14 that they might already have, and attract new
15 customers because this data is current data that is
16 being updated daily and delivered daily to the
17 remedial party and then to third parties.
18 I think what makes it a little more complex
19 in a data context, too, is unlike a retail or factory-
20 type divestiture and you've got goods and you got to
21 deliver to customers, here, you've got maybe the same
22 exact data, the number of bedrooms in a house, being
23 delivered to a customer that might want to incorporate
24 that into an MLS listing or otherwise, but you've got
25 them wanting you to call the field a different name or

1 wanting you to format it with a comma in this space
2 versus this space. So you've got all of these
3 customer interfaces that are different, so you've got
4 to be able to pass along that knowledge, too, so they
5 can actually replicate what each of the customers of
6 the acquired party had at the time. So it adds some
7 complexities into that.
8 In terms of tailoring the data remedies,
9 again, I think the focus should be on how to get the
10 remedial party to be able to use this data in a way
11 that enhances competition in the market, and I think
12 through that, you need to be able to pass on this
13 technical knowledge and these resources, and I think
14 it has to be less focused on making sure millions of
15 records are delivered perfectly to the remedial party
16 and more about being able to successfully interpret
17 and adapt that to attract new customers in an industry
18 that changes all the time.
19 MS. AMBROGI: Makes sense.
20 Anyone else want to weigh in on this topic?
21 Frank?
22 MR. PASQUALE: I just wanted to -- just make
23 a quick intervention to say that I really valued
24 Senator Warner's staff's proposals for 20 different
25 types of social media regulation, and part of the

1 foundations of those proposals was the idea that once
2 an entity has a certain very large amount of data and
3 a data advantage, that data advantage can become self-
4 reinforcing and almost insuperable.
5 I was making that type of argument back in
6 2008-2009 and was laughed out of some rooms where
7 people told me, you're talking about Google now, but
8 Google won't even exist in ten years. No one will
9 have heard of the company, right?
10 And, so, what I think what we're seeing is
11 that very gradually establishment -- economists and
12 others -- are starting to catch up with the reality of
13 insuperable data advantages and self-reinforcing data
14 advantages, and that is something that makes data very
15 different than many of the other contexts in the
16 precedent that are now governing this field. Thanks.
17 MR. GAVIL: I think the last two comments
18 sort of highlight a point I was trying to make
19 earlier, that when we're talking about remedies in the
20 context of litigation, it's really quite different
21 from when we're talking about it in the broader
22 context of some kind of regulatory setting where you
23 can really think much more broadly about what you want
24 to do.
25 But I want to say one thing about -- in

1 response to Katie's question. Is it the same, is it
2 different? I think the answer is it's both, that data
3 can have sort of similar characteristics to, you know,
4 we're going to look at competitive overlaps and we're
5 going to do some kind of slice-and-dice remedy.
6 Now, putting aside whether those kinds of
7 remedies actually work in the typical horizontal
8 merger, two points I would suggest. One is a point
9 that was raised this morning. In cases where what
10 we're worried about is post-merger exclusionary
11 conduct, that might not be the right solution.
12 It could be the kind of things that Frank
13 and Kevin have talked about, might be better solutions
14 if what we are worried about as a result of a merger
15 that will result in higher entry barriers, instead of
16 thinking about slicing and dicing data and, again,
17 something that's alike, we'd have to think about
18 economies of scale, just like we would in breaking up
19 factories, but assuming data could be sort of made
20 into chunks of data or shared, it might be better to
21 think about, well, what's the problem with the
22 portability of the data? What's the problem with the
23 interoperability of data?
24 So it could be that we could think of a
25 remedy as more directed towards the competitive

1 problem. And that might be different for data than it
2 might be in, you know, brick-and-mortar industries.
3 So I think that, as was said this morning, it really
4 depends on the particular case and the characteristics
5 of the industry. Whether or not parties are willing
6 to negotiate those decrees as opposed to litigate
7 those sorts of remedies may make a big difference for
8 the agencies.
9 So I think what you're seeing is that
10 there's this range of options. When you're in the
11 litigation context, you really are limited by the
12 facts of the case and the particulars and the
13 willingness of the parties to either resolve it or
14 litigate some data-related issues have been resolved
15 through negotiation. Others have been more difficult.
16 We've tried remedies involving technology industries
17 that haven't worked very well.
18 And that's why I think it's important for
19 the agency to not put all of its big data eggs in the
20 enforcement basket but to be mindful of the range of
21 activities that are going on, some of which have been
22 mentioned. Kevin mentioned some of the -- whether
23 it's industry self-regulation, whether it's bills
24 being introduced. I think there's an important role
25 for the agency to play in representing competition and

1 making sure that sort of competition issues and
2 competition values are at the table when we're talking
3 about things like restricting data.
4 We'll probably get into this a little later,
5 but there clearly is a potential for tension between
6 locking down data in the interest of privacy and what
7 might be best for competition. And that's starting to
8 emerge in a number of industries where essentially
9 privacy could be used as a pretext for conduct that
10 might eliminate competition, make competition more
11 difficult.
12 MS. AMBROGI: And, Andy, you mentioned some
13 remedies where it hasn't worked out so well in the
14 past with data. Did you have any in mind in
15 particular?
16 MR. GAVIL: So one of the more interesting
17 ones are at the time, the U.S. Government was not
18 really fond of it, but here's an example. The Koreans
19 in looking in the Microsoft cases at what the U.S. had
20 done in terms of remedy and what Europe had done in
21 terms of remedy kind of concluded that neither of
22 those were very effective. The issue was the ability
23 to -- switching costs for browsers and the ability of
24 consumers to easily switch.
25 And, so, they came up with a novel solution,

1 which is to require that there be a browser option on
2 the desktop to try and get out the entry barrier and
3 switching cost problem. I don't know that they ever
4 studied it to see whether it worked. It ran into that
5 problem, I think, that we talked about this morning,
6 where consumer preferences for particular browsers was
7 already fairly locked in. But that was an attempt to
8 do the kind of thing that we're talking about is use a
9 remedy in a conduct case that might more directly
10 address barriers to entry and switching costs by
11 making it easier for consumers to do those things.
12 MR. SOKOL: Just some quick thoughts. Some
13 of this teases what we've already heard but just puts
14 a different spin on it. I think the most basic
15 question is one of institutional choice, and the first
16 one is, is this a -- what is it that we're trying to
17 solve and what's the appropriate institution? So this
18 builds on not just what we heard here but also earlier
19 today, Alex's framework of competition versus privacy,
20 I'd actually say even across different institutions
21 going to what Andy's talking about when we think about
22 it as enforcement cases, you know, in the litigation
23 context we're thinking about judges. Maybe sometimes
24 we're thinking about ex ante regulation. We have to
25 think really about what's the appropriate

1 institutional choice. Frankly, when we say market,
2 that, in itself, is its own institutional choice as
3 well.
4 And, so, then the next question is, it's so
5 obvious but no one said it yet, so I want to take
6 credit. Does the remedy actually fix the harm? Okay.
7 Sometimes you get credit for saying the obvious. And
8 I think that that's another important overlay in this
9 kind of situation, that -- and then it, therefore,
10 goes back to something else Andy said, which is,
11 ultimately, it depends on the situation. And,
12 therefore, we're going to see a wider variety of
13 institutional choices and remedies based on the
14 particular harm, but, ultimately, the remedy only
15 works if it fixes the harm.
16 And then one final thought. The other
17 agency has not taken kindly in the last two years to
18 behavioral remedies. Also, just that sometimes
19 behavioral remedies do work, but they actually have to
20 remedy the behavior. To the extent that their
21 critique is really, if the behavior's been going on
22 for 60 or 70 years, that doesn't seem like an
23 effective behavioral remedy, there's probably some
24 truth to that. But I don't think that means that we
25 should pooh-pooh behavioral remedies generally when

1 actual behavioral remedy is a good fix for the harm.
2 MR. GAVIL: One more thing I want to add. I
3 think that there's a temptation to think of data as
4 some kind of commodity that, you know, our data exists
5 -- my name, my phone number, my friends -- that it
6 exists in that way. And I think that part of the
7 challenges, and I'd be interested in Kevin and Frank's
8 response, because I think they know a lot more about
9 the technology -- but part of the concern I have is
10 whether data really exists in that way as a commodity
11 or whether it is deeply integrated with analytics that
12 a company may be using to sort of massage and create
13 value out of that.
14 And going back to Courtney's observation
15 about mergers, there is an analogy here. So let's say
16 we're going to spin off a factory but we're not
17 spinning off with it the real technical know-how, you
18 know, the company's magic sauce, that it knows how to
19 operate that factory in an optimal way. So we spin
20 off the factory, but it doesn't really have all of the
21 tools necessary.
22 Now, that's something that traditionally
23 agencies take into account in thinking about
24 divestiture remedies, but if we're talking about data,
25 the first question is a technical one. Is it really

1 separable from the analytics that's used to derive
2 value from it? Does it really exist in that way? And
3 even if it does, what is the use of separating out the
4 raw data in a way that doesn't provide that same
5 analytical ability?
6 Now, maybe that's something that competition
7 should be left to provide if somebody wants the raw
8 data, then they need to figure out what to do with it.
9 But I do think that's something that potentially makes
10 data a little bit different. When we start talking
11 about interoperability and portability and you and I
12 think about our name and our phone number, I don't
13 think in many instances it's that simple.
14 MR. PASQUALE: So, oh, completely agree that
15 it's not that simple, but I also think that it's very
16 easy to overemphasize the tension between competition
17 promotion and privacy. I know that James Groman
18 (phonetic) and Randy Picker have done very interesting
19 work in that area. But as I've studied that work, I
20 have also simultaneously been working in the field of
21 health data. And think about health data and regional
22 health information exchanges as promoted by the health
23 information for the HITECH Act, the Health Information
24 Technology for Economic and Clinical Health of 2009.
25 If you think about the ways in which we promoted

1 interoperability and how the Office of the National
2 Coordinator for Health Information Technology has
3 released very sophisticated reports attacking
4 information blocking by healthcare entities, we're not
5 writing on a blank slate.
6 We don't have a tabula rasa here. We have a
7 very well established history of health authorities
8 using data, combining the data, and trying to gather
9 that data in order to promote precision medicine and
10 to promote cures. And if we had the same level of
11 political will that we had about precision medicine
12 and about promoting cures with respect to competition
13 policy, we could think about ways in which to
14 anonymize, we have the HIPAA de-identification
15 standards that there were rules put out by HHS in 2012
16 on this matter. We have a whole infrastructure and
17 apparatus of thinking about ways to share data safely.
18 And I think that it's time to bring that here.
19 I would also say that just with respect to
20 Kevin's points, and I do think that those are very
21 important points and certainly there are attacks on
22 the idea of anonymization, there's always this whole
23 pure science literature saying it's very, very hard to
24 anonymize properly. But I would say that at the very
25 least one might say that a simple rule would be

1 anything I upload I can download back, right? If I
2 can put up a photo, if I put a comment on, et cetera,
3 that I think that would be at least some way in which
4 we could try to ensure that there is a base level of
5 this form of interoperability and portability.
6 And, finally, I'll get to Andy's other point
7 about the nature of inferences and data versus
8 inferences as in recent European and California
9 developments have shed some light on that, but I'll
10 wait on that. So thanks.
11 MR. BANKSTON: If I could respond to a few
12 of those points and answer some of the things I
13 promised I would. First off, I tend to agree with
14 Frank that the tension is not irresolvable and that
15 finding venues to actually work through these hard
16 problems, the FTC being one of them, is critically
17 important. I'm not quite sure how the health example
18 bears on the social graph example, but I can see its
19 application in other areas.
20 In terms of what Congress and the FTC can or
21 should do in this particular area, I think that
22 Congress, as part of comprehensive privacy
23 legislation, should include a basic portability right
24 similar to the one in the GDPR. However, the one in
25 the GDPR is really too simple in a way. It delivers

1 this basic right and then says this right is
2 completely subsidiary to all the other privacy rights,
3 such that it basically sidesteps all of the hard
4 questions and says, no matter what happens, the
5 privacy rule trumps.
6 I would hope and imagine that something in
7 the U.S. law would give more flexibility, perhaps
8 through rulemaking at the FTC, that would allow for
9 more specific regulation or guidelines in the harder
10 cases, where there's a particular competition or other
11 consumer benefit need that countervails the privacy
12 need.
13 I also think it's important for the FTC,
14 looking at mergers and acquisitions in this space, to
15 look at the portability and interoperability practices
16 of the companies involved and consider remedies that
17 require new portability that may require new
18 interoperability. And there is some precedent for
19 this, you know, in the AOL-Time Warner merger when
20 AIM, may it rest in peace, was at the time the
21 dominant chat client. And one of the conditions was
22 they needed to become interoperable with, I believe --
23 it was sort of staggered over certain months, but one
24 or two other competing messengers. And, so, I think
25 considering those kinds of things as we look at future

1 mergers and acquisitions is going to be really
2 important.
3 MS. AMBROGI: So a lot of good stuff here.
4 I'm going to pose a question that came from the
5 audience. It's rather a combination of a few
6 questions, which all seem to focus on the same issue.
7 So for remedies that involve forced sharing or
8 interoperability or portability or licensing or maybe
9 just all remedies in this space, are folks, outside of
10 Courtney, who already articulated this, concerned
11 about the effect on innovation, or do you think it
12 will increase innovation and/or should we be worried
13 about intellectual property rights in that space? Are
14 those a hurdle to interoperability and how do we think
15 about those things and overcome some of those
16 potential challenges?
17 MR. BANKSTON: I mean, I'll take off a bite
18 of that. I am not concerned about a threat to
19 innovation from requiring portability. I think it's
20 worth considering maybe some sort of size threshold
21 that you need to meet before that's required, but then
22 again, there's also a value to forcing people to start
23 with portability by design, just as we want them to
24 start with privacy by design.
25 Interoperability is very different, and this

1 will require a little -- I think there are two basic
2 big models of interoperability online. There's the
3 decentralized interoperability of open standards,
4 where any of us can run an email server that can talk
5 to another email server, or a web server that can talk
6 to another web server. We used to have chat clients
7 that relied on an open standard. Now we have a bunch
8 of different ones with different standards.
9 Then there is the sort of centralized
10 interoperability of apps on a platform that are
11 basically relying on data from a platform that they're
12 running on top of the Facebook platform is a good
13 example. Both of these raise very different
14 questions, and I think that, for example, mandating
15 that a product design itself to be interoperable over
16 open standards could entail a huge revamp of the
17 product and could also limit certain types of
18 innovation.
19 I think, for example, there is a debate in
20 the chat client world about -- it would be great if we
21 resolved the fact that there are all these competing
22 chat clients that don't talk to each other with a
23 single standard, but even people like Moxie
24 Marlinspike, the coder of Signal, are like, yeah, but
25 if I tether myself to an open standard like that, I

1 will be much slower in adapting to consumer need
2 around features.
3 And, so, there are definitely costs there
4 that would need to be considered before you said
5 something like, yeah, let's just make Facebook and
6 Twitter be able to talk to each other. Making sure
7 that companies that offer platforms are offering
8 interoperability in a way that doesn't stifle
9 competition, I think, could be good for innovation.
10 And I know I keep picking on Facebook, but
11 they have a provision right now in their platform
12 terms of service that says you can't have an app on
13 the platform that replicates a core functionality of
14 Facebook. So if you wanted to live on that platform,
15 while offering a newsfeed-like product or a direct
16 messaging product, you can't do that right now. And,
17 so, I think requiring that kind of interoperability
18 would actually foster innovation rather than
19 threatening it.
20 MS. AMBROGI: So thinking about requiring,
21 what is the mechanism that would achieve some of these
22 portability and interoperability goals? You mentioned
23 that if there was comprehensive privacy legislation
24 that some of these could be baked into that
25 legislation. So in the view of the panel, is that a

1 role for Congress? Is it a role for the states,
2 assuming this is a goal?
3 We'll leave the question of whether it is or
4 isn't a state that we want out and talk about the
5 mechanism, or should it be industry self-regulation?
6 Kevin, you mentioned the data transfer project
7 earlier. What's the best mechanism to achieve some of
8 these goals?
9 MR. BANKSTON: Since I've been talking a
10 lot, I'll just say very briefly, I think mandating
11 portability is straightforward and we should do it,
12 but we should make sure we do it in a flexible way. I
13 think interoperability is a much more case-specific,
14 technology-specific, fact-specific inquiry, and just
15 saying things should be interoperable as a mandate
16 doesn't make any sense.
17 MR. GAVIL: I'd also add, Katie, going back
18 to your last question, that forced sharing is not the
19 same as trying to come up with a system that allows
20 things to be portable and interoperable. Forced
21 sharing is like a dirty word in antitrust, and we
22 associate it with, you know, undermining incentives
23 for innovation, forcing, you know, forced licensing,
24 compulsory licensing. There's a whole bunch of
25 imagery that goes along with that, but that's not

1 necessarily what's being discussed.
2 And the one thing I would add is, you know,
3 in terms of targets for enforcement, when you see
4 conduct that is impeding interoperability, impeding
5 portability, and doesn't really have a business
6 justification, and this is what I said earlier, I
7 think the health IT may be an example, Frank, where
8 one of the arguments made is, oh, but we are really
9 worried about privacy. And, so, we've erected these
10 barriers to information flow in order to protect
11 privacy.
12 That's exactly the kind of situation where
13 the FTC can play a role, saying, all right, well,
14 you've adopted this pro-privacy policy; it has this
15 anticompetitive consequence; and asking the
16 traditional question that the agency has always asked,
17 are there less restrictive available means to achieve
18 that? Is it a genuine concern to begin with? Those
19 are sort of the bread and butter of advocacies that
20 have come out of the agency for years. And that might
21 be an appropriate sort of use of that advocacy to
22 identify things that are greater than necessary to
23 protect some genuine issue.
24 The last thing I will say about Trinko,
25 because Trinko, I do want to pick on Trinko, one of

1 the great, colorful phrases that influences our
2 thinking about forced sharing is Justice Scalia's "We
3 must not reach into the bowels of Verizon," because,
4 like, judicial proctology, ooh, who wants to do that.
5 So a great phrase from Justice Scalia. That
6 was the motion-to-dismiss case. Never got to any
7 factual inquiry as to what really was required to
8 facilitate the interaction of Verizon and AT&T, was
9 the company seeking access. You can look at that case
10 and think of it as a refusal to deal case, forced
11 dealing. You can also understand it as a dirty
12 dealing case. It wasn't really about refusing to
13 deal. It was about refusing to deal in a way that was
14 required by regulation.
15 So our imagery of these sorts of forced-
16 dealing cases has been influenced by a line of cases,
17 and we ought to understand that, you know, the
18 essential facilities, Areeda wrote an article called
19 "An Epithet in Search of a Rationale." The Supreme
20 Court cites it in Trinko. Obviously never read it
21 because in that article he says he thinks MCI versus
22 AT&T was rightly decided. What is that case? Is it
23 essential facilities? Is it a refusal to deal? It's
24 exclusionary conduct, and the labels don't really add
25 much to it. So I'd be cautious about viewing these

1 things as forced sharing.
2 MR. PASQUALE: And I think also one of the
3 things that I think is really interesting, and, you
4 know, I've been following the debate about structural
5 versus behavioral remedies, and, you know, I was just
6 reviewing this article by Kwoka and Moss, John Kwoka
7 and Diana Moss from 2012, sort of critiquing the
8 regulatory capacity and the capacity of agencies to
9 sort of really monitor and follow up on behavioral
10 remedies that are sort of part of the thing -- cases
11 like Google-ITA, Comcast-NBC Universal, et cetera, and
12 I think that there's a role that we should definitely
13 have a sense of the limits there, but two caveats, one
14 being sometimes this is just a resource problem,
15 right?
16 It's just do you have the resources to do
17 what you need to do and with, like, the FDA when they
18 didn't have enough resources, you have PDUFA, you
19 know, in terms of the Prescription Drug User Fee Act.
20 You have other ways of funding these types of
21 activities. And, so, I think that having those
22 resources, that should be something agencies should be
23 unafraid to ask for.
24 The other thing that I would note is that
25 we've got to be really careful in terms of thinking

1 about the context when we see a critique of any
2 particular approach. So, of course, originally when
3 these big firms came up, there was a utility
4 regulation, but then that gets critiqued and people in
5 antitrust say, you know, that is just so inefficient,
6 really antitrust can solve the problem. But then when
7 antitrust authorities try to impose structural
8 remedies, historically then there was all this
9 resistance. You know, we heard some of that in Andy's
10 testimony earlier in terms of that, and so then they
11 sort of backed down the behavioral remedies.
12 Now, we're hearing that behavioral remedies
13 are really very problematic and that they exhaust the
14 capacity of the agencies and we can't pursue that.
15 And, so, is the idea that we're eventually going to
16 shrink it to nothing? You know, I mean, I don't know.
17 And I think that if we don't complement those sorts of
18 ideas with the idea that, hey, maybe the ultimate
19 remedy is fines like what the European Commission can
20 levy, 2 to 4 percent of global turnover, if we don't
21 try to expand that, then we essentially have promoted
22 a evolution in policy that just continually gets more
23 and more shrunk, as opposed to dealing with the
24 liberalities of the new economy.
25 MR. SOKOL: Just some thoughts. One, I'll

1 push back against Frank in one area. So I think that
2 agencies do best the things that are their core
3 competencies. And, so, sometimes when you see an
4 agency sort of shrink in terms of what it's willing to
5 do, it's not because we think that there should be no
6 solution; it's that there are other processes, other
7 institutional choices that are simply better suited.
8 So we see across a number of different
9 areas, agencies have overlapping or even let's say
10 parallel powers, but not exactly the same powers. And
11 they have different pluses and minuses, so we should
12 always think, you know, which agency is best suited,
13 and by agency I shouldn't say agency, right, because
14 it could be sometimes the remedy is statutory, it
15 could be the remedy is market, whatever it is. There
16 is an institutional choice that seems to be better
17 than the others in terms of ability to get at the
18 problem. And, again, all this assumes that there's a
19 problem. It gets at the problem and does it more
20 effectively.
21 And part of, I think, what we have to do is
22 to figure out, you know, which institutional choice is
23 better at that. And I think largely that goes to core
24 competencies.
25 The second thing is to take what Andy was

1 saying and just extend it further with regard to
2 Trinko, right? If the real concern was forced
3 sharing, and Andy says, but maybe it wasn't forced
4 sharing, maybe it was just a certain type of behavior,
5 I think that the push at the time of the Supreme Court
6 was send this to regulatory agencies because maybe
7 that was the better institutional choice at that time,
8 whereas I'd say back to the MCI case and to AT&T, the
9 problem is the FCC wasn't doing anything. And that's
10 the reason why we -- in terms of antitrust -- really
11 made the big difference in antitrust because we saw a
12 gap and a real competitive gap.
13 But that's a very different question than I
14 think the basic one today, is if we're looking at data
15 markets and competition problems, A, what are the
16 specific competition problems case by case, what Kevin
17 was saying and Andy was saying, then which particular
18 remedies can we map onto those specific competition
19 problems and the kind of day-to-day work that the FTC
20 does. And I think that's a little bit different than
21 what we've just been talking about.
22 MR. GAVIL: So I would just add one thing
23 quickly to that, and it's the limitations of case by
24 case. Case by case takes a long time, and it is, by
25 its nature, case by case. And if there are broader

1 issues in the industry, maybe as a result of these
2 hearings, the agency will better understand them. And
3 if there is active regulatory efforts going on, the
4 agency needs to be at that table, and the agency needs
5 to be thinking about what are the tradeoffs that are
6 being made to be a voice for competition, because,
7 again, that's where advocacy can actually affect the
8 direction of an entire industry, where case by case
9 tends not to have that broad an impact.
10 MS. AMBROGI: So we've touched on this a
11 little bit. How likely is it that a plaintiff could
12 succeed in arguing that data is an essential facility
13 or whatever you want to call it, unilateral refusal to
14 deal or that it's involved -- implicated in
15 exclusionary conduct under the current antitrust
16 jurisprudence? What would a plaintiff have to show?
17 Does anyone want to take that on?
18 MR. SOKOL: I had a slide on that, you know,
19 from the 7th Circuit.
20 MS. AMBROGI: Yeah.
21 MR. SOKOL: It turns out it's not easy.
22 Now, to be sure, that was a Section 1 case, not a
23 Section 2 case. But it turns out -- it begs the
24 question, is the data essential, right? So even just
25 to get to your question, there are a number of things

1 we have to bake in -- or we -- or there are certain
2 ingredients that we need to have to even bake whatever
3 it is that we're baking, to figure out if there is
4 some kind of remedy.
5 So, thus far, it seems not easy, but then it
6 begs the question of, well, why is that? Is it not
7 easy because it's just difficult to bring a case? Or
8 is it there's something very interesting about this
9 kind of case that perhaps doesn't lend itself to an
10 essential facility.
11 And that's where I would push you to say
12 it's not clear to me that these are essential
13 facilities because of issues like multihoming --
14 because, in fact, data sets can be assembled and
15 disassembled, you know, with ease -- this is what I
16 talked to earlier, in the last panel, about the entire
17 data ecosystem, can you more or less replicate the
18 data, can you buy the data from a third party, et
19 cetera. And there's just -- there's a lot of
20 complexity here, and when we reduce it to everything
21 being essential, I just don't think that's right.
22 MR. GAVIL: So I agree with Danny that
23 regardless of the theory of the case, these cases are
24 hard to bring. There's a reason that DOJ and FTC have
25 not brought very many Section 2 unilateral conduct

1 cases, and there's a reason you don't see a lot of
2 private cases, and there's a reason that it's a
3 challenge to find plaintiffs that prevail in any of
4 these cases. There just aren't a lot of them because
5 the law is very demanding.
6 But I think the theory of the case makes a
7 big difference, and this goes back to something we
8 were just saying. If the challenge is simply refusal
9 to deal, I want data, I want something that this
10 dominate firm has, and the conduct is the refusal to
11 share it. That's quite different from a situation
12 where you have conduct that is impeding sharability or
13 is in some sort of artificial way that's hard to
14 justify for business reasons. And that's potentially
15 a difference between looking at something like Aspen
16 Skiing and Trinko. So I think that that makes a lot
17 of difference, and the theory of the case would affect
18 the theory of the remedy, but there's no doubt that
19 these cases have become very difficult to bring.
20 MS. AMBROGI: Frank, I know you mentioned in
21 your opening statement interest in potentially
22 reviving some of these theories in the data context,
23 and I wondered if you could speak to, you know, your
24 current understanding of the jurisprudence and what
25 would it take to stake a claim in this space.

1 MR. PASQUALE: Sure. I mean, I think that
2 one of the issues here is -- and here just to engage
3 in like maybe a friendly colloquy with Danny, you
4 know, I mean, in his thinking about this sort of area
5 is let's say that we had a situation with the
6 acquisition of content in Google Books, you know, and
7 that was a long-term investment, you know, that I give
8 Google a lot of credit for doing that, and very highly
9 fraught with respect to would they win the fair use
10 case against publishers, could they coordinate
11 libraries, et cetera, et cetera, to acquire this
12 massive collection of books.
13 And you have also the possibility -- and
14 let's say imagine that an upstart comes in and, I
15 don't know, some foundation maybe gives someone
16 millions of dollars -- tens of millions, whatever it
17 might take, and then the library will say to them,
18 look, you know, we've already had our books scanned
19 once, and to do it again, it's just -- it's going to
20 break the book spines or something, and we just don't
21 want to have this all done again, right?
22 That's a situation where I think we have to
23 think deeply about, you know, just as we thought with
24 respect to do we want to have the sidewalks dug up 15
25 times so 15 different phone companies can bring wires

1 to your home, we might think very deeply about to what
2 extent do we want to force every book to be scanned
3 over and over again, et cetera.
4 Now, of course, the idea that would come
5 back is who will, you know, going back all the way to
6 the 1995 Guidelines and innovation markets, et cetera,
7 the idea might be, well, who's going to invest all the
8 resources necessary to put together a corpus this
9 large if they know that it could essentially be
10 licensed in the future, right?
11 But I think that we've got to be able to
12 respond to that in some cases and say that, look, you
13 know, we could create different types of fair and
14 reasonable, nondiscriminatory licensing patterns in
15 many different situations in commercial life. This
16 might be one that we should open up some sort of
17 possibility to. So that's one example, and I know
18 that the IP, the interaction of IP in that makes it a
19 little bit complex, but I still think it's interesting
20 because, you know, data is those scans.
21 I'd also say that with respect to gathering
22 that data in alternative ways, I mean, I wrote a whole
23 book, The Black Box Society, about how secretive these
24 companies are, right? I've talked about, and this has
25 been followed by a big follow-on literature of a

1 triple layer of legal secrecy, actual technical
2 complexity and purposeful obfuscation with respect to
3 critical aspects of the functioning of many large tech
4 platforms.
5 So -- and this was something that was, of
6 course, part of the difficulty in ongoing regulation
7 and enforcement of antitrust litigation with respect
8 to Microsoft, say the trade secrets and different
9 aspects of their platform or their software. And, so,
10 what I want to just bring up there is that I don't
11 think we can just very easily say, eh, go get it
12 yourself or go get that data yourself. It may be that
13 for the past -- for quite a long period of years the
14 only place that data exists is within this triply
15 protected moat, you know, it's like a moat, is what
16 Warren Buffett calls it, entities. And we have to
17 start to taking more seriously the possibility that
18 these are truly unique and essential resources.
19 MR. GAVIL: The only thing I'd add to that
20 is there certainly has been a lot of literature
21 generated about this tension between the innovation
22 incentives of the incumbent dominant firm versus the
23 innovation incentives of the challenger. And it's not
24 easy to resolve that. This was discussed at this
25 morning's panel as well.

1 And we do have to be concerned about
2 adopting standards that will inhibit firms from
3 seeking to become a monopolist. You know, one of the
4 great lines from Judge Hand's Alcoa decision is having
5 encouraged the firm to compete, we don't turn on them
6 when they succeed. There's an important antitrust
7 sort of cornerstone to a lot of what we've done based
8 on that.
9 Having said that, I think sometimes some of
10 the commentary focuses too much on fears about
11 impeding the incentive of a firm that has achieved
12 dominance and doesn't consider the impact of the
13 potential innovation being offered by the entrant.
14 And that's what brings me back to going beyond the
15 simple refusal to deal and looking for conduct that is
16 in some way affirmatively impeding that new entrant
17 because that new entrant is also an important source
18 of innovation for the economy.
19 Striking that balance is difficult. The
20 agencies have had to think about it; the courts have
21 had to think about it. There are two sides to that
22 debate, and we shouldn't dismiss either side of it,
23 particularly when we've got exclusionary conduct.
24 MR. PASQUALE: And I would just add to that,
25 you know, that I think that, you know, looking at some

1 of Lina Khan's work on Amazon, it's very interesting
2 to sort of think about some of those potential for
3 intervention, and also how Singer's work with respect
4 to pointing out what net neutrality can't do and what
5 antitrust could do with respect to platform
6 nondiscrimination. So I think both of those are just
7 very -- just to add on to Danny's points.
8 MS. AMBROGI: So how do we, at the end of
9 the day, assess relative --
10 MR. GAVIL: It's not even lunchtime.
11 MS. AMBROGI: -- the proverbial day, how do
12 we assess the relative success of data remedies, and
13 can we draw any conclusions today about past remedies
14 involving data and any lessons learned?
15 MS. DYER: I can start from a practical
16 perspective with that one. I think, you know, if you
17 feel like you've got a remedy that's crafted
18 appropriately in terms of getting what the remedial
19 party needs to compete and restore competition in the
20 market, I think data does present a little bit unique
21 issues in determining the success of that remedy. You
22 know, it's one thing to say, okay, did you transfer,
23 you know, everything that manufacturing facility had
24 into the hands of the remedial party.
25 Here, you're giving them big reams of data

1 that they need to be able to use and incorporate into
2 their business. But is the success that, you know,
3 every one of those millions and millions of records
4 gets into the hand of the remedial party, or is it are
5 they then understanding the data, are they then
6 acquiring data from other sources to enhance that
7 data, are they gaining new customers and attracting
8 new potential customer segments to the market because
9 of the innovative ways that they're using the data?
10 Are they lowering prices in the market? And
11 not lose sight of the competitive dynamics that are
12 happening as a result of the remedy and focusing more
13 on the technical divestiture to make sure they've got
14 everything that they need because what they need may
15 evolve as the industry evolves and technology evolves.
16 I think the other risk, too, in measuring
17 success is, you know, was the remedy too broad. And
18 you've got some cases where these parties are forced
19 to enter into remedial agreements with the remedial
20 party that now gives them access to data that they can
21 almost use unfettered, or at least unfettered in the
22 context of the remedy itself, and that happened in
23 Neilsen-Arbitron where the data was supposed to be
24 limited to being able to use the data for the cross-
25 platform measurement services versus the television

1 only, and the remedial party started using it for
2 television only, and so Nielsen had to go and sue them
3 privately because they couldn't resort to the agencies
4 because they weren't a party to the agreement.
5 You know, similar things have happened in
6 other cases where, you know, once the data is in their
7 hands, how do you not give them an unfair advantage
8 because they now have access to things that they can
9 use to compete more effectively but in markets that
10 didn't need to have any sort of competitive impact
11 restored.
12 MS. AMBROGI: Andy, not to put you on the
13 spot, but you've articulated that competition advocacy
14 may be one way to work to advance some of these goals.
15 It's always a perennial question how would we know --
16 how would we know if competition advocacy is effective
17 in this space and how would you suggest that that
18 particular tool be implemented in a way that's
19 effective?
20 MR. GAVIL: It's always been a challenge for
21 the advocacy program, is taking -- undertaking efforts
22 and using resources to look back at prior advocacies
23 to see if they've been successful and how to measure
24 success. You know, the agency takes a position in
25 favor of or against a regulation or a statute, and you

1 could mark it as a success if the regulatory body or
2 legislative body adopts the position that was
3 advocated. But that doesn't tell you whether it was
4 successful from the point of view of competition.
5 So I think that that's an important
6 question. It's why we do retrospective studies. It's
7 why we do this sort of, you know, hearings to try and
8 understand the state of the industry, and I think that
9 to the degree we are still -- I embarrassed myself
10 yesterday in my complex litigation class by revealing
11 to my class that when I was an associate, document
12 review meant, like, really document review, sitting in
13 a warehouse with documents. I think it's -- and how
14 much things have changed in such a short period of
15 time.
16 I think that we are still very early in the
17 information age. We are early in dealing with these
18 issues. I don't know that we have any data ourselves
19 on big data remedies that is enough to answer that
20 question, but I think it's important to the degree the
21 agency undertakes either enforcement or advocacy that
22 it think about how to answer that question going
23 forward, how to track the results of their efforts so
24 they do have a good sense of what is a measure of
25 success and whether their efforts have succeeded.

1 MS. AMBROGI: Great, and with that, we're
2 out of time. And join me in thanking our panelists
3 for this discussion today.
4 (Applause.)
5 MS. AMBROGI: And now it's lunch. We'll be
6 on a 45-minute lunch break, a little bit shorter
7 today, but hopefully you guys can get the job done.
8 (End of panel 2.)
9 (Lunch recess.)
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1 PRESENTATION: ECONOMICS OF ONLINE ADVERTISING
2 DR. COOPER: All right, welcome back.
3 Welcome back from lunch, everyone. I'm James Cooper
4 with the Bureau of Consumer Protection at the Federal
5 Trade Commission, and I'll be moderating this panel
6 that's going to look at the competition and consumer
7 protection issues surrounding online advertising.
8 And to kick this panel off, we are going to
9 have a presentation from Garrett Johnson on the
10 economics of online advertising, which is the area
11 he's quite expert in. Garrett is an Assistant
12 Professor at Boston University Questrom School of
13 Business. And, so, without any further ado, I will
14 turn it over to Garrett for our introductory talk.
15 DR. JOHNSON: Well, thank you very much.
16 It's a great honor to be able speak to you today. My
17 job is to set the table. So to get us started, I just
18 want to give you a sense of where digital advertising
19 fits in the wider picture of advertising. As of last
20 year, digital advertising overtook television to be
21 the top advertising spending medium. And it had
22 always been the case that search advertising was the
23 largest part within digital advertising until a year
24 ago when display advertising overtook search.
25 Now, in modern advertising, three-quarters

1 of the dollars spent are in mobile rather than
2 desktop. And part of what's contributed to mobile
3 being so successful is that video is very big on
4 mobile and also in display.
5 So just at a high level, some economic
6 benefits of online advertising are that it subsidizes
7 publisher content and the online services that we
8 enjoy in our daily lives. This is not merely a
9 theory. We have some work -- or there's some
10 suggesting that ad blocking has actually reduced
11 publisher's content and the quality of their content.
12 Advertising certainly has a role to play in both
13 informing consumers and in reducing search costs. And
14 on the advertiser side, it furthers goals, whether
15 that be increasing sales, increasing donations, or
16 increasing the number of votes.
17 Now, ad tech is a particularly dynamic and
18 high-growth sector within the American economy. And
19 American firms dominate in the ad tech sector
20 worldwide.
21 So in my talk today I want to talk about
22 three distinguishing features of digital advertising.
23 The first is the lower cost of targeting, and this is
24 something that Avi Goldfarb has talked about in his
25 review paper. Certainly, if you look at search

1 advertising you are advertising to consumers that are
2 arriving at the search engine with some intent, and
3 whether it be through paid or organic search, this
4 medium is going to facilitate a match between
5 consumers and firms.
6 Now, display advertising has seen a massive
7 increase in the ability of targeting as well, from
8 contextual advertising to now following what consumers
9 are doing in the past through their browsing history
10 to target consumers behaviorally. The most famous, or
11 infamous, of this -- example of this is retargeting.
12 And, increasingly, we see the use of offline data in
13 the online world through firms engaging in database
14 matches. One distinguishing feature of mobile
15 advertising is there is an additional form of
16 targeting, which is location targeting, which can be
17 extremely fine-grained.
18 So what does the economics theory literature
19 have to say about this increase in the ability to
20 target? Well, several papers make the point that this
21 should soften competition because it’s easier for
22 advertisers to find the consumers that are loyal to
23 them in the marketplace. From the perspective of
24 publishers, we may think that this could either
25 increase or decrease revenue, and the basic tradeoff

1 is that increasing targeting increases the valuation
2 advertisers would have for the ads but could thin
3 marketplaces, though empirically we've seen that this
4 generally creates revenue on net.
5 One other phenomenon in this industry is the
6 increased use of ad blocking. And we have some theory
7 papers talking about the externality that causes for
8 the rest of us that are still not blocking ads and how
9 this can create some inefficiencies in the market.
10 Finally, some theory papers have examined
11 the tradeoffs between offline and online advertising.
12 And the basic difference there is it's much easier to
13 target consumers online.
14 Now, the second distinguishing feature of
15 modern digital advertising is an increase in the
16 ability to measure the effects of advertising. Now,
17 some of this starts by just having simple data that
18 connects the ads that people are seeing to the actions
19 that they take at the consumer level, something that's
20 certainly not possible with billboards or, in most
21 cases, television.
22 With this has come new ways of measuring the
23 effects of advertising such as clicks and conversions
24 that can be specific to individual ads, and that has
25 allowed the industry to optimize campaigns mid-flight

1 using this feedback that they get from these outcomes,
2 albeit with the tradeoff that these are maximizing a
3 proxy metric rather than ROI so that you can get --
4 create some inefficiencies.
5 Now, also as a result of advertising going
6 digital, it's much easier to run large-scale
7 experiments to measure the effects of advertising.
8 Now, there is a burgeoning academic literature on
9 this, but for the purposes of today, I want to talk
10 about three important lessons that we've learned from
11 this literature. The first is that it's really
12 important to run experiments to measure the effects of
13 advertising because when you don't, you typically come
14 out with the wrong answer.
15 The second thing we've learned is that it's
16 now possible to do scalable experimentation for low or
17 no cost, and that has caused a large influx of
18 advertisers that are now using this technique to
19 measure their return on investment.
20 And the third thing we've learned is that
21 it's extremely hard to get precise measurement on the
22 effect of an ad campaign in that it requires something
23 like millions of user observations to be able to learn
24 something.
25 So the net effect of this is that because

1 it's going to be very hard to measure the effects
2 of advertising, that's going to create some
3 accountability challenges that will hinder the
4 effectiveness of the functioning of these ad markets.
5 Now, the third distinguishing feature of
6 modern display -- or digital advertising is the wide
7 use of auctions. Now, auctions are very helpful
8 because they facilitate the process of price
9 discovery. There's no one at Google whose job it is
10 to find out, you know, what is the price of Civil War
11 reenactment costumes and how does that price vary
12 around the anniversary of the Gettysburg battle.
13 This is something that is done by the
14 marketplace that can be done at very large scale. So
15 economists have looked at many features of these
16 auctions and how to run them optimally. One feature
17 that distinguishes this form of auctions is that we
18 don't just include the bids of users and search
19 advertising. We also weight those bids by the quality
20 of the advertising in order to have a good match
21 between what advertisers are offering and what
22 consumers are looking for in the marketplace. So this
23 is one way that these platforms balance their
24 interests with those of their consumers and those of
25 their advertisers.

1 Now, the final consequence of this is that
2 by automating advertising sales and moving away from
3 the sort of Mad Men, you know, sharing a bottle of
4 scotch back and forth way of selling ads to computers
5 selling ads back and forth is, well, first of all,
6 there's less scotch being sold, but it certainly
7 reduces the transaction costs in this marketplace,
8 allowing for improved targeting.
9 So I wanted to talk at a high level about
10 how the display advertising marketplace works.
11 Obviously, on the advertiser's side is we've got the
12 demand side of the marketplace; and on the supply
13 side, we have publishers like the New York Times that
14 are trying to sell advertising. But there's a third
15 agent here, which is consumers like you and I that are
16 creating the opportunity for ads to be shown.
17 Now, ad impression is a single ad on a
18 single webpage by a single consumer for a single load
19 of that page. So it's a very fine-grained level of
20 analysis that's very different from television where
21 you're buying, you know, Modern Family on a Saturday
22 night for all of the United States.
23 This is also going to mean that the supply
24 of these impressions is random and not something that
25 publishers are going to exactly know. So these two

1 are going to meet in a marketplace, and for most
2 publishers, that marketplace takes one of two forms.
3 The first is guaranteed contracts. Guaranteed
4 contracts are bulk buys of advertising specifying the
5 price and quantity and targeting attributes and time
6 of the campaign.
7 And ad exchanges are platforms running
8 realtime auctions. It's kind of a miracle of
9 technology that happens in less than .1 seconds and
10 allows advertisers to find these individual users and
11 individual impressions that they're interested in.
12 Now, this is important to recognize because
13 in the search ad space, 100 percent of ad sales are
14 programmatic; and in the display side, 82.5 percent of
15 these transactions are done programmatically. Now,
16 most of this happens in mobile, but one sort of thing
17 on the horizon here is that currently less than 10
18 percent of TV advertising is transacted
19 programmatically. And that's something we see
20 expanding in the future quite a bit, which is probably
21 why we see firms like AT&T buying AppNexus.
22 All right, so in today's session, we're
23 going to be talking about market power and about
24 privacy issues, so I wanted to give a high-level
25 introduction to both. The challenge with market power

1 in this setting is first in defining the market. So
2 when we think of concentration on the online
3 advertising side, we need to remember that there's
4 also substitutability with the offline advertising as
5 well. And Avi and Catharine have a nice paper showing
6 that empirically.
7 The other challenge that has been brought
8 up, I think, in the previous hearings as well, is the
9 challenge of understanding multisided platforms. So,
10 in particular, this is not a case where, you know, a
11 monopolist is making the price very high. In fact,
12 this is usually the case that platforms are providing
13 free content and services, whether it be search or
14 email or maps, that provide a lot of benefit to us in
15 our daily lives at no cost.
16 Now, there is actually some work showing
17 some countervailing power on the demand side. And the
18 way this arises is that advertisers are typically
19 working with intermediaries like ad agencies to
20 purchase advertising, which creates some
21 countervailing power on their side.
22 Now, another challenge in this industry is
23 the prevalence of lack of transparency and the
24 prevalence of fraud, which has been the subject of a
25 major report by the National Advertising Association,

1 as well as, I gather, a FBI investigation currently,
2 but when we talk about market power, one kind of
3 important thing to have in the back of our minds is
4 just the market concentration of the top two firms.
5 So Google and Facebook collectively make up
6 57 percent of online ad spending. Google's dominance,
7 of course, arrives from its dominance in the search
8 space, whereas Facebook's dominance arises from its
9 dominance of the display ad space. Two of every five
10 dollars spent in the display ad space is spent with
11 Facebook. And this is a consequence of basically
12 having the audience, as well as the targeting and
13 measurement capabilities that draw advertisers to
14 spend money there.
15 Now, pretty recently, there's been two big
16 companies -- Amazon and AT&T -- through their
17 acquisition of AppNexus that are entering this
18 marketplace, and we could anticipate some changes
19 there. But in the shadow of those two great big
20 companies, there's a very vibrant industry. Here's an
21 illustration from a company called Luma that shows you
22 all the different companies that are involved in this
23 space. And you get a sense of how rich this is.
24 In the top center, you see ad exchanges,
25 which we've talked about before, but I haven't

1 mentioned the plethora of intermediaries that
2 advertisers and publishers use to provide services
3 that allow them to buy and sell advertising in this
4 marketplace. So there's a vibrant marketplace with a
5 lot of acquisitions that's going on in the background.
6 Turning now our attention to the other topic
7 of this hearing, which is consumer protection issues,
8 I'm going to focus on the issue of privacy, but
9 certainly we have literature that deals with other
10 issues like ad disclosure in native advertising as
11 well as equity in ad targeting that Anja could speak
12 to very knowledgeably.
13 So I've been very interested for a long time
14 in the privacy consequences of the online display
15 advertising marketplace. Here, what I've done is I've
16 visited a newspaper in Pennsylvania called The Morning
17 Call, and I'm using an extension to my browser called
18 Disconnect, which allows me to visualize all the third
19 parties that are notified of me visiting there. And
20 you can see that dozens of advertisers are -- and
21 intermediaries have been notified of my visit without
22 my explicit consent. And this is something that's
23 pretty widespread across the web.
24 So what's the regulatory environment for
25 this like in the United States? Well, currently,

1 there is no regulation except for honest business
2 practices. U.S. regulators have favored for the past
3 decade an opt-out policy, whereby consumers that are
4 concerned by tracking and that are concerned by online
5 behavioral advertising can opt out and avoid these
6 practices.
7 And around 2010, the industry banded
8 together with a self-regulatory program to provide an
9 opt-out for consumers. So this regulatory program is
10 called the AdChoices Program, and the way it works is
11 that it has a notification function where there's
12 small icons basically on all display ads that
13 consumers can click on to arrive at a consumer choice
14 page. And on the consumer choice page, consumers can
15 click to opt out of online behavioral advertising and
16 tracking.
17 Now, this page functions a lot like the
18 FTC's Do Not Call List with the caveat that the Do Not
19 Call List refers to phone numbers, which are stable
20 over time, whereas our computers don't have
21 identifiers for these devices that are stable over
22 time, which creates some challenges in the persistence
23 of this choice mechanism.
24 So I was very interested in studying this
25 because this issue hadn't been studied or at least the

1 self-regulatory approach hadn't been studied by
2 economists and marketing people. And to set the
3 stage, kind of what is the number of people we should
4 expect are opting out? Well, if you survey people,
5 reliably two-thirds of people say that they dislike
6 online behavioral advertising.
7 So we might expect that a lot of consumers
8 are taking action here, but when we looked at the
9 data, what we found is that only, in fact, 0.23
10 percent of U.S. impressions arose from consumers that
11 had opted out of tracking. So what we observe is a
12 privacy paradox where there's a huge gulf between
13 people's stated preferences and the actions that they
14 take.
15 Now, this is not unique to our setting.
16 Certainly a lot of other privacy research has found
17 sort of similar gaps, like a gap between the
18 willingness to pay and the willingness to accept when
19 it comes to privacy, but still this gulf is
20 particularly wide in this setting. And we can talk
21 more about that in the panel.
22 The challenge, though, is that this form of
23 advertising provides a tremendous amount of value.
24 So, basically, the consensus in the literature is that
25 the value of a cookie to this marketplace is either a

1 lot or even more than a lot. So estimates range from
2 50 percent to 65 percent in terms of the reduced value
3 that you have when you remove online behavioral
4 advertising. And, so, this creates a very difficult
5 challenge for policymakers in examining this issue.
6 Lastly, I wanted to speak very briefly to
7 some issues with privacy policy because they can
8 overlap with competition policy. Now, one way that
9 this can be anticompetitive is that it's -- when you
10 impose costs on firms, like the cost of getting
11 consumer consent, it can be easier for large firms to
12 get this consent than small firms, which can create an
13 anticompetitive effect. Also, large firms have lots
14 of resources to throw at the problem, and so they may
15 be able to succeed more so than small firms in the
16 marketplace.
17 Now, on the other side, there may be some
18 procompetitive effects of privacy policy. The first
19 is that large companies endure a lot more consumer and
20 regulator scrutiny when it comes to their privacy
21 practices. So there's no regulators in Europe that
22 are currently targeting the number 551st website in
23 Lithuania, but it's really only a matter of when that
24 they go after Facebook or Google.
25 So this is not to my -- this has not been,

1 to my knowledge, emphasized in the literature, but
2 this creates a bit of a safety in the herd effect
3 where as long as you're not sticking out as too large
4 of a firm or sticking out as a firm that's engaging in
5 particularly egregious privacy practices, the chances
6 that you're going to be singled out with regulatory
7 actions is smaller.
8 So the task of summarizing, you know, 20
9 years of literature is a very challenging one. So for
10 those of you that are interested in further reading, I
11 would recommend these three review articles by
12 Catherine Tucker and Avi Goldfarb, who is in the
13 audience today.
14 Also, this is such a dynamic industry, that
15 I actually probably spend about 20 minutes every day
16 just keeping up with the trade press, and all of the
17 goings-on in the industry. So those of you that are
18 interested in doing that, I would encourage you to
19 check out the AdExchanger newsletter.
20 So with the table set, I will now turn
21 things over to the panel.
22 (End of Presentation.)
23
24
25

1 PANEL 3: COMPETITION AND CONSUMER PROTECTION ISSUES
2 IN ONLINE ADVERTISING
3 DR. COOPER: Thank you, Garrett, that was
4 great, and it is a perfect stage-setter for the panel.
5 Like the other panels, people will be walking around,
6 taking -- with cards from the audience, if you want to
7 answer -- or want to ask questions. And before I get
8 started, on the off chance that I say anything
9 remotely substantive, anything I say today are my
10 opinions only and don't represent the Federal Trade
11 Commission or any individual Commissioner.
12 So each one of the panelists will have about
13 five minutes to talk before we get into a discussion.
14 Let me just briefly introduce them. Their full bios
15 are in the book, but just in the interest of time,
16 I'll be quick with this.
17 So Anja Lambrecht, right next to me, she's
18 an Associate Professor of Marketing at the London
19 Business School.
20 Next to her is Leigh Freund. She's the
21 President and CEO of the Network Advertising
22 Initiative.
23 Next to Leigh is Allie. Allie Bohm is
24 Policy Counsel at Public Knowledge, where she focuses
25 on government affairs, including broadband and privacy

1 policy.
2 Next to Allie is Howard. Howard Beales is a
3 Professor of Strategic Management and Public Policy at
4 George Washington University. And he's also a former
5 Director of the Bureau of Consumer Protection at the
6 FTC.
7 And, finally, Katie McInnis is a Policy
8 Counsel at Consumers Union in their Washington, D.C.
9 office.
10 So to start off with our presentations here
11 for the panel, let me turn it over to Anja.
12 DR. LAMBRECHT: Thank you. Do you have a
13 clicker?
14 DR. COOPER: It's here. Do you want to come
15 up here?
16 DR. LAMBRECHT: Can you hear me? Yes.
17 Okay. Well, thank you so much, James, for the
18 introduction. Thank you, Garrett, for the first
19 introduction into online advertising. I want to very
20 briefly build on what Garrett said and go in a little
21 bit more depth of what is one important trait of when
22 we speak about competition and consumer protection in
23 online advertising.
24 So this is what advertising used to be,
25 right? Advertising used to be an information message

1 targeted -- untargeted almost -- to massive consumers
2 out there, which could be on a billboard and other
3 advertising. It could be in TV advertising or it
4 could be in magazines perhaps. In each of those
5 cases, the advertiser speaks to a mass of largely
6 anonymous consumers.
7 Well, what advertising is today when we
8 speak about data-driven online advertising, it is
9 about an individual consumer who visits, for example,
10 this fashion website, and after having visited that
11 fashion website, based on all the tracking mechanisms
12 that Garrett briefly mentioned, is shown an ad that
13 precisely placed the product the consumer looked at
14 before and potentially other related products. Now,
15 this form of advertising is typically referred to as
16 retargeting.
17 Now, why do firms use this type of
18 advertising to reach out to highly specific consumers?
19 Well, the underlying idea is that while they're
20 targeting a large mass where some people might or
21 might not be interested in the specific product being
22 offered, we focus on those who are most likely to be
23 in the market, and the key measurement criteria here
24 that the industry uses is what is typically referred
25 to as the lift, which is the change in the probability

1 of purchasing if a consumer does not see an ad
2 relative to a consumer actually seeing the ad, right?
3 And, so, you can probably imagine that if
4 you focus on consumers who are more likely to buy, the
5 average lift is going to be larger. So I studied this
6 type of advertising, retargeted advertising, and part
7 of the question being, well, if an advertiser actually
8 implements that, what type of messages should they be
9 sending to the consumer?
10 And it turns out rather than showing the
11 specific product, in many circumstances while
12 targeting the specific consumer, the advertiser might
13 benefit from showing a more generic ad. Now, what
14 does this mean without going into detail here? It
15 actually means it's incredibly hard for advertisers to
16 find the best ways, even in a data-driven environment,
17 to evaluate the data and target consumers, right? So
18 while there is a value to targeting, it is not always
19 easy to implement.
20 Now, the second point I would like to make
21 is getting on the other side of the tradeoff. So,
22 here, first, we looked at the view of the advertiser
23 and the benefits of targeting to an advertiser. Well,
24 the other side is that advertising today -- data-
25 driven, online advertising supports a large number of

1 free content and services. And you might think about
2 online content providers, which range from ESPN to CNN
3 to New York Times or LA Times that essentially are
4 able to provide information services to consumers for
5 little price or no price at all. And these revenues
6 come from advertising, as you're well aware of.
7 Now the question is, what is the situation
8 for these type of firms when we take away or reduce
9 targeting? As I said before, what targeting means, it
10 allows advertisers to have a higher probability, a
11 higher lift, a higher increase in the probability of
12 converting a consumer. And when we have -- in a world
13 of less granular targeting, this may potentially go
14 down, meaning that any individual advertising
15 impression creates less value for an advertiser and,
16 by consequence, this might -- may potentially press
17 advertising prices.
18 And you can see what this is leading to,
19 potentially reduced revenue opportunity for these type
20 of platforms. In one of these papers, we studied a
21 specific setting of ESPN and find that they benefit
22 particularly from online advertising in periods of
23 high demand, when it's actually more beneficial to
24 give content away for free because of the particular
25 structure of the consumers coming into the market.

1 And you can see that especially in periods of high
2 demand to depressed prices this may have a potentially
3 significant effect for the platforms.
4 Now, let me summarize what are the key
5 policy issues that we're facing when we're considering
6 a particular tradeoff. It is that on the one hand,
7 data-driven, online advertising can make ads more
8 relevant to consumers. It can allow firms to enter
9 the market or to continue existing in a market by
10 offering free services or content. And on the other
11 hand, we obviously have data-driven advertising that
12 may raise privacy concerns in terms of tracking,
13 storage, and sharing of data, which is potentially
14 opaque for consumers and not controlled.
15 However, I think what we see with GDPR in
16 Europe now is that control can be potentially very,
17 very effortful. And, so, to wrap this up, I think the
18 key question here is how to get the balance right.
19 This can be very hard, especially since consumers, and
20 many consumers, benefit substantially from getting
21 access to services or content in a free or free(mium)
22 economy. Thank you.
23 DR. COOPER: Thank you.
24 Leigh, you're up next.
25 MS. FREUND: Okay. Can everybody hear me?

1 Good. By the way, I just wanted to make one comment
2 before I get started that online advertising firms do
3 drink scotch. So maybe scotch in the market is not
4 completely dead.
5 So thank you so much, James, and to the FTC
6 for including me. For those who don't know me or the
7 organization I represent, my name is Leigh Freund, and
8 I head the NAI, or the Network Advertising Institute.
9 It is a nonprofit, self-regulatory organization that
10 was set up in 2000. So even though the entire
11 industry -- sorry, the entire industry began its self-
12 regulatory efforts in 2010, the NAI is composed of
13 basically the third parties or those folks in the
14 middle of that Lumascape that you just saw, the pipes
15 that connect the consumers to the advertisers and the
16 publishers.
17 We bound together in 2000, 1999-2000. At
18 this stage in time, we have over 100 member companies,
19 each of which are required to adhere to the privacy
20 protections that are set out in the NAI code of
21 conduct. So our members include, as I said, all of
22 the folks that make up the middle of that Lumascape,
23 ad networks, exchanges, platforms, other technology
24 providers. And our member companies basically form
25 the backbone of that industry that you've been hearing

1 about, helping advertisers reach consumers that are
2 most likely to be interested in their products and
3 services and allowing those consumers to receive the
4 ads that are personalized to their interest.
5 So the NAI code and our guidance continually
6 evolves to adapt to changes in technology and changes
7 in consumer expectations. So, for example, I think
8 Garrett spoke a little bit about the programmatic TV
9 space. Earlier this year, we issued guidance to
10 address how our members may and may not collect and
11 use information about video content that consumers see
12 on television and helping to ensure that those
13 consumers receive notice and choice with respect to
14 that medium of advertising.
15 We're currently also undertaking a pretty
16 major update to our code of conduct that will include
17 some robust new privacy protections. And, so, in
18 essence, we're constantly adapting, as self-regulatory
19 organizations do, to adapt to kind of rapid changes in
20 technology, and the requirement that our members
21 provide consumers with choice regarding those
22 technologies and how they collect and use information
23 about consumers is a vital component of what we do
24 every day. We have published three updates to the
25 code, four guidance documents since 2012. And, so, it

1 is always our mission to keep up with and stay ahead
2 of the technologies that our industry puts forth.
3 So, today, a broad -- I'm going to leave
4 most of the economics to the economists, but today a
5 broad array of rich content is available on the
6 internet: news content, information, video and music
7 streaming services, interactive software services,
8 email, social networks. They've all experienced
9 robust growth over the last several years.
10 And they provide those services and
11 information to consumers for free or little cost
12 because they are supported by digital advertising, so
13 digital advertising including personalized
14 advertising, which is the way we refer to it at the
15 NAI, has basically been the lifeblood for the
16 internet. It's the reason, I think, that the U.S.
17 firms dominate globally in this space, providing
18 benefits to consumers while also providing the
19 opportunity for those businesses.
20 So as the internet-based media ecosystem has
21 become richer and far more diverse, one thing has
22 remained constant, and that is by far the most popular
23 model for consumers is free or low-cost, ad-supported
24 content. We've done pretty significant research.
25 We've got data from Nielsen that suggests while the

1 media landscape expands, the type of content consumers
2 are spending time with, which is the free content, has
3 remained fairly consistent, and it remains the medium
4 that consumers gravitate toward the majority of time
5 when you look at their viewing habits online.
6 So the share of time spent with ad-supported
7 content on platforms such as TV, radio, smartphones,
8 video games, and tablets for adults in 2017 was 86
9 percent. That seems to have remained flat over the
10 last decade. And research also demonstrates the
11 considerable economic contribution provided by this
12 industry. So our ad-supported internet has created a
13 little over 10 million jobs by 2016, and the
14 interactive marketing industry has contributed over $1
15 trillion to the U.S. economy, which has doubled in the
16 last four years and accounts for 6 percent of gross
17 domestic product. So when we put privacy and consumer
18 protection into -- we must remember the robust effects
19 on our U.S. economy.
20 So when thinking about data collection and
21 use in connection with digital advertising, I think
22 it’s important to recognize -- and I think there’s a
23 little bit of a misperception out there -- data in
24 this context has an extremely short shelf life.
25 Companies are interested in data only to the extent

1 that it's relevant to the personalized advertising
2 they want to show, and data used, for example, to show
3 me an ad when I'm interested in going to Cancun, which
4 I often am, is not relevant once I've taken that
5 vacation or purchased my plane tickets.
6 So there's a definite point of diminished
7 return that disincentivizes companies to keep a
8 massive vault of consumer data. Typical data use for
9 personalized advertising by many of our companies is
10 relevant for 30 days or less, unless I think you're
11 buying a car, in which case it's a little longer.
12 So I think it's important that self-
13 regulation -- and any future legislation -- I know
14 that's probably a topic at these hearings -- any
15 future legislation or regulation encourages companies
16 to embrace privacy protective practices that are
17 tailored to the sensitivity of the data that those
18 companies are processing rather than kind of lumping
19 all kinds of data together with broad definitions,
20 which would remove incentives that we have, for
21 example, in our code for data deidentification,
22 pseudonymization, data minimization practices, et
23 cetera.
24 So I think full names, email addresses,
25 phone numbers can be collected, but our business goals

1 can also be met by using pseudonymous identifiers. So
2 under our code, pseudonymous identifiers allow
3 companies to recognize an internet-connected device
4 without directly identifying the user of that device,
5 and they're particularly important for privacy
6 protection because they allow companies to recognize a
7 browser or a device without collecting any additional
8 information that reveals the identity of the
9 individual.
10 So I think when we talk about privacy, we
11 think about the types of data that are collected, and
12 I'm sure we'll talk more about that. And our
13 companies really strive to do privacy-protective
14 practices and data minimization practices within their
15 businesses.
16 DR. COOPER: Allie?
17 MS. BOHM: Hi, everyone. So in 2002, Target
18 wanted to identify which of its customers might be
19 pregnant. It recognized that the arrival of a new
20 child often led to changes in consumers' buying
21 habits. And if they could identify when people were
22 expecting children, they could potentially win them
23 over as customers for years to come.
24 So they crunched the data in their pregnancy
25 -- I'm sorry, their baby registries -- that's what

1 those things are called -- and they identified 25
2 products that pregnant women were buying. And using
3 that, they were able to create a pregnancy prediction
4 score that they applied to customers who didn't have
5 baby registries with Target. And they used that to
6 figure out, you know, what coupons to send them to
7 lure them into the store as customers.
8 Data-driven advertising has only mushroomed
9 since 2002. Data-driven advertising has some distinct
10 advantages. It allows for customized online
11 experiences for users. It can reduce irrelevant ads,
12 help consumers discover new relevant products, reduce
13 search times and costs that make online shopping
14 easier, and as Leigh pointed out, it can help folks
15 access content without having to pay money for it.
16 It can also help businesses, particularly
17 small and local businesses, reach very niche
18 audiences, but that's not the full story. Data-driven
19 advertising can facilitate higher prices and reduce
20 competition. So algorithms can monitor prices and
21 other terms of sale in near real time, allowing
22 companies to adjust their practices based on a more
23 detailed view of the market.
24 Notably -- and often that means that they
25 don't have to cut prices to remain competitive.

1 Notably, this practice is probably not redressable
2 under existing antitrust law because there's no
3 express agreement to fix prices. Moreover, pervasive
4 data collection allows companies to develop detailed
5 user profiles about their customers and their
6 customers' willingness to pay, which allows them to --
7 that enables personalized pricing strategies and
8 precise manipulations of consumer choice.
9 And, you know, I should step back,
10 particularly following Leigh, to say, you know, often
11 the information that is used here is not the sensitive
12 data points. It's not your name. It's not your
13 Social Security number. It's not even your health
14 status. Think back to my Target example. The
15 information that was used was these women's buying
16 histories. They are buying lotion. They were buying
17 unscented lotion. They were buying zinc, they were
18 buying magnesium. None of this is sensitive, right,
19 but it revealed very sensitive information. It
20 revealed their health status, their pregnancies. So
21 when we talk about privacy, we do need to talk about
22 the panoply of data and not just sensitive
23 information.
24 Data-driven online advertising also
25 forecloses opportunities for consumers. When we show

1 relevant ads to folks, we're excluding them from
2 seeing things that the algorithm has determined are
3 not relevant to them, right? But that may mean that
4 they're unaware of particular opportunities that they
5 don't see. And, so, maybe that doesn't matter if
6 you're advertising unscented lotion, but if you're
7 advertising housing or job opportunities, that matters
8 tremendously. And that's not conjecture.
9 So employers have used algorithms to prevent
10 women and older folks from seeing high-level
11 management positions. Landlords have used algorithms
12 to prevent minorities -- racial minorities -- from
13 seeing certain housing postings. Data-driven
14 advertising also incentivizes the collection of more
15 data, which jeopardizes privacy.
16 And the data demonstrate that although some
17 really like targeted advertising, the most -- many
18 consumers find the most privacy-intrusive ads, quote,
19 unquote, unnerving. So, interestingly, and I'm going
20 to sort of throw this out as a new idea, maybe, online
21 advertising may actually be a space where more
22 privacy-enhancing approaches may actually be
23 competition-enhancing as well. So long as we rely
24 primarily on targeted advertising, we're going to
25 entrench the duopoly of companies that have access to

1 vast troves of data.
2 But if we were to limit the ability to --
3 and I realize Congress might have to do this. This
4 might not be something the FTC can do. But if we were
5 to limit the amount of data that can be used in
6 advertising, we might see a return to contextual
7 advertising, so, you know, trying to reach sports fans
8 on ESPN or music fans on Rolling Stone. That's a
9 practice that more companies can participate in. It's
10 also more privacy-protective because you don't
11 actually have to know much about the consumer other
12 than that she's gone to ESPN or to Rolling Stone or,
13 you know, searched for music.
14 And interestingly, that may have some
15 benefits for companies. So we heard yesterday from
16 one of the researchers who said that targeted
17 advertising has raised revenues by 0.00008 percent,
18 but can be 500 times more expensive than contextual
19 advertising. Now, I went to law school, so you know
20 I'm not good at math -- or at least that's the joke --
21 but that doesn't sound like a great return on
22 investment to me.
23 In addition, from a brand safety concern,
24 question, you know, if you're doing contextual
25 advertising, your brand is like -- you're likely to

1 know the closed universe of what your brand is going
2 to show up next to a lot better than you would in a
3 targeted advertising environment.
4 So, in sum, data-driven online advertising
5 has transformed the market. It poses opportunities.
6 It also poses threats to privacy, to competition, and
7 to consumers' well-being, but it doesn't have to be
8 this way. So the FTC should encourage Congress to
9 enact privacy protections. And we can talk in the Q&A
10 about what my organization would like that to look
11 like.
12 But the FTC can also take some actions on
13 its own. For example, it could use its UDAP authority
14 to determine on a case-by-case basis whether it is
15 deceptive for websites and services to place third-
16 party trackers all over the internet and track
17 consumers when they're on other websites without their
18 knowledge or consent.
19 So I appreciate the opportunity to be here
20 and to testify, and I look forward to addressing your
21 questions in the Q&A.
22 DR. COOPER: Thanks, Allie.
23 Howard, you're up.
24 DR. BEALES: James, could you pass the
25 clicker, please?

1 MR. DR. COOPER: I could throw it, but...
2 DR. BEALES: Thank you. The big green
3 arrow. There we go.
4 Thanks for the opportunity to be here today.
5 I want to make just a few points, some of which have
6 been made already. Most of what we enjoy on the
7 internet is, from an economic perspective, a public
8 good. Content isn't used up, and it's essentially
9 free to add another viewer to most kinds of internet
10 content. Now, there are some things that are
11 different like email services and things like that,
12 but most of the content that we enjoy is a public
13 good.
14 Throughout the history of publishing, the
15 way we've gotten public goods in all sorts of media
16 markets has depended heavily on advertiser support.
17 There are models that are pure subscription models,
18 but they're very small markets and very small parts of
19 the market. Typically, media markets are heavily
20 dependent on revenue that comes from advertising, and
21 that's the way markets provide the public good.
22 Advertising converts the public good of
23 content into a private good of advertising exposures
24 that can be sold to somebody. And that's how this
25 market works. There's no reason to think financing of

1 internet content is going to be any different from any
2 of those other media markets or from the couple of
3 hundred years of history we have of the economics of
4 those markets that says advertiser support is likely
5 to be a crucial element of providing that content.
6 Second key point is information really adds
7 value to online advertising. There's two studies that
8 I did. One is a survey of major advertising networks
9 at a time when advertising networks were the main way
10 that third-party advertising was sold. We looked at
11 behaviorally targeted advertising versus run-of-
12 network advertising, and the price was just short of
13 three times higher for the targeted advertising
14 compared to the nontargeted run-of-network advertising
15 that could be anywhere.
16 We did a more recent study in 2013 of
17 auction prices on two different ad exchanges. And
18 what we found was if there was no cookie, there's one
19 price for the advertising. If there's a new cookie
20 that was just placed there, the price of the
21 advertising roughly triples. Okay, and the longer the
22 cookie's been there, the more the advertising sells
23 for. The more information that you have, the more
24 valuable the advertising is to publishers.
25 Now, losing somewhere in the neighborhood of

1 two-thirds of your revenue, if you can't target based
2 on information value, is something that's likely got
3 serious implications for the kinds of content that
4 publishers can provide.
5 The other thing that's important about this
6 is the sales that happen through third parties are
7 much more important to smaller websites. This is data
8 from Adomic that tracks where the -- and it's a count
9 of the ads, where does each ad come from that is
10 served on a particular webpage. And I don't know that
11 you can read it, but the website rank is the
12 horizontal axis, and the percentage of the ad
13 impressions that are sold that way is the vertical
14 axis.
15 Even the largest websites sell a majority of
16 their advertising through networks or programmatic
17 advertising. And for the smaller websites, number
18 4,000 there -- and obviously websites get a lot
19 smaller than that -- two-thirds of their -- some two-
20 thirds of their advertising revenue is sold through --
21 comes through -- it comes through sales through third
22 parties. All right, it's not sold direct; it's sold
23 through either a network or an ad exchange as the way
24 they make money to finance the content that they're
25 providing.

1 If you think about that Lumascape that you
2 saw, which is a great graphic, most of those companies
3 nobody ever heard of. I was looking for examples
4 because I never heard of these companies. And so I
5 looked at the list of NAI members, and here's the
6 first four members. Thirty-three across, Acuen,
7 Acuity, Adara. How many of you have ever heard of any
8 of them? Not very many.
9 Certainly, most consumers have not, but
10 those kinds of intermediaries are an important source
11 of competition in an online advertising market that's
12 mostly Google and Facebook. If you can't use
13 information that you obtain through cooperation with
14 publishers and the placement of cookies to find out
15 about how consumers are using the internet, then you
16 can't sell that advertising in a way that is
17 competitive.
18 If consent requirements get more elaborate
19 for these behind-the-scenes companies, if you have to
20 agree to them, that's going to selectively
21 disadvantage these companies compared to the Googles
22 and Facebooks of the world that consumers have
23 actually heard of. And that's something that's much
24 more likely to entrench a duopoly than to undermine it
25 just because consent is difficult.

1 Finally, it's important to remember
2 advertising is actually a good thing. The FTC
3 actually for a long time has been a leader in
4 recognizing the benefits of advertising for
5 competitive markets. Advertising tends to lead to
6 lower prices. It leads to product improvements. It
7 narrows the differences between demographic groups.
8 And it's FTC studies that have established a lot of
9 those propositions.
10 There's no reason to think online
11 advertising is any different. It's a cheaper way to
12 do what is a good thing for consumers and likely to
13 enhance market performance across the board. Thanks,
14 and I look forward to our discussions.
15 DR. COOPER: Thanks, Howard.
16 Katie?
17 MS. MCINNIS: Thank you, James. Thank you
18 for organizing this panel. And thank you to the FTC
19 for hosting these hearings and for the opportunity to
20 talk to you today.
21 As James mentioned, my name is Katie
22 McInnis, and I serve as policy counsel for Consumers
23 Union, which is the advocacy division of Consumer
24 Reports. So my comments here today will be focused on
25 the consumers' perspective of a lot of these

1 practices.
2 So consumers currently don't really
3 understand the advertising ecosystem as it currently
4 affects them. They have some sort that they're being
5 tracked across the web and that their online and
6 offline activities are being correlated in order to
7 serve them with ads, but they're not really sure how
8 to take control of their digital footprint or how to
9 push back on companies who are tracking them across
10 the web entirely.
11 Although they have some tools at their
12 disposals such as like ad blockers and the use of a
13 virtual private network, these tools don't have a lot
14 of market depth, in part because it's hard, it takes
15 the consumer doing a couple of really positive steps
16 in order to put these into action. But we're seeing
17 the ad blockers this year will have about a 30 percent
18 use across the web, which is fantastic. And then
19 we've an increased use of virtual private network use
20 among consumers, due in part to the reversal of the
21 broadband privacy protections at the FCC by the
22 Congress last year.
23 So we see this disconnect between consumer
24 knowledge of tracking and how much consumers are
25 actually tracked, but there's also some competition

1 issues at work here as well. As companies amass more
2 and more knowledge about individuals and how they use
3 the web, they're able to manipulate the kind of
4 services that consumers are presented with and the
5 kind of economic opportunities that they are presented
6 with as well.
7 So we've seen online retailers such as
8 Amazon artificially preference some products over
9 others on the virtual shelf on Amazon in order to
10 favor the companies that they have business practices
11 with. We've also seen that consumers are not being
12 served with the same sort of ads as other consumers
13 based on decisions that are based on their online
14 activities. For instance, we've seen this effect
15 especially in the Equal Employment Opportunity and
16 Fair Housing Acts. And these opportunities are a huge
17 -- these ads that are serving opportunities are a huge
18 disservice to many consumers because if some people,
19 especially women, are being shown ads or the some ads
20 -- are being shown the same ads as men, they're not
21 going to have the same access to opportunities for
22 employment and advancement as other people.
23 But we're going to deal with those comments
24 next week more on the panels on algorithmic bias and
25 algorithmic transparency. But we've also seen

1 companies take advantage of their dominant place in
2 the online advertising ecosystem in order to push out
3 other competitors. For instance, we saw the use of
4 Facebook buying Onavo, a really poor VPN, please don't
5 use this VPN, in order to kind of sniff out what their
6 possible users and their users were doing on their
7 phones in other applications.
8 This led to Facebook realizing that Snapchat
9 was going to be a huge competitor for them, and so
10 they developed some practices that would -- some
11 offerings on their platform that were similar to
12 Snapchat in order to kind of regain dominance and
13 influence in this spectrum.
14 In addition, consumers are also being shown
15 prices that are based on their online activities, what
16 are decisions that are being made about them based on
17 their online activities. This is especially apparent
18 in the travel ecosystem where consumers are shown
19 different prices than others based on their searching
20 techniques and also how often they've been looking at
21 prices. In all these previously mentioned instances,
22 two things come out. Consumers don't have knowledge
23 or transparency about the kind of ways that their
24 privacy is being invaded upon and how companies are
25 using their information.

1 Unfortunately, the self-regulatory response
2 to this has completely failed. We saw an abandonment
3 of do not track years ago. The resources that are
4 offered by industry now are not comprehensive.
5 They're only followed by a few companies. And these
6 markers are easy to override.
7 And consumers deserve the right to protect
8 their privacy and to push back on companies' tracking
9 practices across the web. In light of this, we
10 strongly support a federal data privacy law that would
11 give consumers the right to control access and know
12 what companies are doing with their information.
13 One of the most important things that have
14 been introduced recently that may serve to help --
15 give consumers these controls is the Senator Wyden's
16 discussion draft of the Consumer Data Protection Act,
17 which allows for consumers to have controls in order
18 to cover their digital footprint and to make sure
19 their privacy preferences are acknowledged and
20 followed by the companies that wish to track them
21 across the web. Thank you.
22 DR. COOPER: Thanks, Katie. All right.
23 So let's dive in. There was a lot put on the table.
24 One thing, and this was in -- we heard this in
25 Garrett's opening talk and people who have looked at

1 the market, I think, recognize this, is we don't see a
2 lot of consumer uptake on privacy-enhancing
3 technologies when it comes to online advertising. I
4 think -- and I forgot the exact, I think it was 0.23
5 percent was what Garrett cited.
6 At the same time, you know, we see surveys
7 that suggest that consumers are concerned about
8 privacy. I'd just like to throw it out there and see
9 what explains this disconnect. And we haven't heard
10 from Garrett in a while, so let me let Garrett start
11 that off.
12 DR. JOHNSON: Well, thank you. I've thought
13 a lot about this specific issue because there is this
14 huge gulf between the people that take action and the
15 people that say that they're very concerned about
16 these practices. So I think part of the challenge is
17 that when people are asked about their privacy
18 preferences, it makes it very salient, but they have
19 fairly ill-defined preferences over privacy. It's
20 hard for people to think about. That's why you see --
21 basically people will sell their information and their
22 mother down the road if you give them a slice of
23 pizza. And it's very easy to move people's privacy
24 preferences and actions with small costs and small
25 incentives. So that's the challenge that we face.

1 Certainly when it comes to online display
2 advertising and the AdChoices program, one issue is a
3 lack of awareness. So awareness numbers range from 6
4 percent to 37 percent on the specific mechanism, but
5 there, too, awareness is a choice. This is something
6 that people could find out about if they wanted to.
7 I think one underlying challenge here is the
8 technological sophistication of the average consumer.
9 That's one reason why we see AdChoices have a higher
10 adoption rate for nondefault browsers like Chrome and
11 Facebook. One usability study by Laurie Kramer and
12 coauthors examined many different options available to
13 consumers, and what they found is that all of them
14 were failing usability tests, even the ones that were
15 developed by private corporations for the specific
16 purpose of helping consumers with their privacy.
17 Just to give you some sense of the numbers
18 when it comes to online privacy protection demand, we
19 looked at use of various privacy-protecting extensions
20 on Chrome and we found that there is 68,000 users of
21 the AdChoices extension, but the two top extensions,
22 which are Ghostery and Privacy Badger, only have 2.7
23 million and 0.5 million users worldwide respectively.
24 Not only do we see low adoption of these
25 privacy-preserving technologies, but we also see very

1 low consumer search. So we went on Google Trends and
2 we found that there's about the same amount of search
3 volume for AdChoices as there is for internet privacy
4 topics as there is for Do Not Track. And to benchmark
5 this, I went and looked at some pretty niche search
6 terms like the candy Swedish Fish, the Star Wars
7 character Jar Jar Binks, the 2003 film Tommy Wiseau
8 film The Room, and those all had two to five times
9 more search volume than these topics. You know,
10 Ghostery received three times more search volume than
11 AdChoices, but still, at some point, we have to
12 confront the fact that this is not top of mind in
13 terms of many observables for many consumers.
14 DR. COOPER: Thanks.
15 Anyone else like to weigh in on this? Let
16 me do Allie and then Howard, if that's okay, and then
17 Anja.
18 MS. BOHM: Sure. So I think that first of
19 all, there's certainly a sentiment of resignation
20 among consumers and sort of I can't control it, I will
21 be tracked; I don't like this, but what can I do, that
22 it's something that has to be pushed back against. I
23 also think the question is which privacy-enhancing
24 technologies are not being used. So 92 percent of
25 Facebook users change their privacy settings from the

1 default. That, to me, says consumers, in fact, want
2 to control what audiences are seeing their
3 information. It's not that they don't care about
4 privacy, but that may be a tool that folks have sort
5 of figured out how to use.
6 I think AdChoices in a way is a really bad
7 example because the ad industry actually did some
8 marketing research with Future of Privacy Forum to
9 figure out what phrases and what symbols were going to
10 be most salient and helpful to consumers. And the
11 results came back with something like there was a
12 symbol called the asterisk man, and that was the one
13 that the most people clicked on. And there was a
14 phrase like "why did I get this ad." And people
15 understood that.
16 So instead of going with those things that
17 performed really well with consumer understanding, the
18 ad industry decided to go with the little, you know,
19 triangle with the tiny little eye and with AdChoices,
20 which was not something that polled particularly well
21 with consumers. So if the tool is designed to be -- I
22 don't want to say deceptive but maybe a little bit
23 deceptive, not exactly user-friendly to consumers,
24 it's not exactly surprising to me that consumers
25 haven't had a huge uptick in using it.

1 DR. COOPER: Howard, would you like to weigh
2 in?
3 DR. BEALES: Yeah. I think it's important
4 to keep in mind that this kind of a disconnect between
5 surveys and behavior is really quite commonplace. I
6 actually -- I went searching for what people think
7 about organic foods. And half of people have a
8 preference for organic foods. Market share is about 5
9 percent. All right, behavior and preferences don't
10 connect. The problem with preferences and surveys is
11 they have no price.
12 So at best, what you're looking at is demand
13 if the price is zero. And that's going to be
14 different than price and demand in the real world
15 where there is a price, where there is a cost of using
16 privacy-enhancing technologies, but the cost is not
17 particularly high. And what revealed preference says
18 is consumers don't care enough about the tracking
19 kinds of privacy concerns to be willing to do anything
20 about it. And that says this is not from consumers'
21 perspective an important problem for them, even if
22 they do change their Facebook settings. That's a
23 whole different kind of privacy concern.
24 DR. COOPER: Anja, do you want to jump in?
25 DR. LAMBRECHT: Yeah, so Garrett made this

1 point, it's just simply not top of mind for many
2 consumers. And along with what Howard just said, I
3 would agree that if you ask consumers a fairly generic
4 question without offering a tradeoff, you're likely to
5 get a very different response than if you actually
6 asked consumers to trade off, right, and to invest.
7 So coming from Europe, the land of GDPR,
8 while I haven't seen any broad data summarizing this,
9 you know, let me just offer some case-based evidence,
10 so to speak. When you browse in Europe, you're asked
11 on every individual website for permissions, right,
12 and the way this is implemented varies across
13 websites, but it's basically about the right for
14 websites to collect your data and use it for different
15 purposes, including how information is being displayed
16 but also for advertising.
17 Well, it turns out if you do that 20 times a
18 day, it gets pretty time-consuming and hassle-intense.
19 And, so, I think -- I wouldn't be surprised if data
20 were to show that many consumers are actually not
21 willing to invest this time, amount of effort. And,
22 so, Allie talked about consumer resignation. You
23 know, this is not very hard. You do a couple of
24 clicks and change your settings. And, so, I wouldn't
25 say consumers have resigned here if this is what data

1 were to show. I would rather argue that the cost for
2 a consumer is perceived as not outweighing the
3 potential benefits.
4 DR. COOPER: Let me get Katie and then
5 Leigh.
6 MS. MCINNIS: So, first of all, I wanted to
7 respond to Howard's positioning here that this is
8 similar to an organic food situation where people
9 might preference having organic food but they're not
10 actually buying it. And in that instance, I think,
11 well, the problem is I don't know really that much
12 about the market, but I imagine that part of the
13 problem is access and money. And just organic foods
14 cost much more, it's harder to find. So it's not
15 really a one-to-one comparison.
16 And I think in this situation, consumers are
17 trading an extreme amount of time in order to have
18 their privacy preferences acknowledged. And it's not
19 just a couple of clicks. Most of these opt-outs are
20 really buried quite far down. They're hard to
21 navigate. They change month to month, day to day.
22 Even me, my job day to day is to look at these privacy
23 policies, I still have a hard time finding where I'm
24 supposed to opt out, where I'm supposed to delete my
25 data, and where I'm supposed to file some sort of

1 redress.
2 So I think the thing is the main problem
3 here is that we framed this whole situation
4 incorrectly. The onus shouldn't be on the consumer at
5 all. And that's one reason why Consumer Reports has
6 introduced our digital standard in order to test
7 products for privacy and security because consumers
8 just can't evaluate these things on an even playing
9 field, especially when they are required to read these
10 long and extensive privacy policies, where really it's
11 a choice of yes to the privacy policy or no, I can't
12 use the service, which is not really a choice at all
13 for many consumers.
14 So the framing should be on -- the onus
15 should be on manufacturers to make it easier for
16 consumers to have their ad choices and tracking
17 preferences easily and universally enforced across
18 platforms. We shouldn't require consumers to do this
19 many times for every service they use. Thank you.
20 DR. COOPER: Thanks, Katie.
21 Leigh, you wanted to weigh in?
22 MR. FREUND: Yeah. I mean, I think -- you
23 know, look, consumers clearly care about privacy.
24 Although I think as Howard mentioned, the way you
25 devise your survey is really important because words

1 matter and definitions matter. So I think almost
2 everybody in this room would answer a survey
3 affirmatively if the question were do you care about
4 privacy, but I also think folks really like the
5 internet the way it is. And I think the choices that
6 consumers seem to be making are indicative of that
7 fact. And I think it's a little bit of a fallacy to
8 say because that consumers aren't choosing to opt out
9 that means they either don't understand it or are not
10 exercising a privacy right. Perhaps they are.
11 DR. COOPER: Howard, I didn't know if you
12 wanted to -- give you a rebuttal, since you were
13 mentioned by name.
14 DR. BEALES: Oh, I mean, I agree with what I
15 think is the fundamental point here. We framed this
16 issue wrong because if you say this issue is about
17 control, I think this is a hopeless proposition. Any
18 more than you can control the people that are in the
19 transaction chain between you swiping your credit card
20 and any retailer and it actually appearing on your
21 statement, this is not a control problem. There is a
22 consumer protection problem here if things are being
23 done with the information that are harmful to
24 consumers, but online advertising is not one of those
25 things. This is a thing that by and large is

1 beneficial to consumers, both in terms of the content
2 it makes available to all of us and to markets because
3 of the competitive effects of advertising.
4 DR. COOPER: Thanks, Howard.
5 Kind of related to that, I mean, a couple of
6 the policy prescriptions we've heard today would --
7 and I think it was Allie who had suggested that maybe
8 we should get away from behavioral targeting and go to
9 contextual -- back to a land of only contextual ads,
10 but we've also seen from Howard's presentation and
11 from some of the work that Garrett presented is that
12 behavioral targeted ads bring more revenue.
13 So if we were -- what would be the tradeoff
14 there? I mean, you know, what would the world look
15 like without behavioral targeting where you have less
16 revenue? Would that send more things behind a
17 paywall? Would we have less rich content? Would
18 there be exit? How would that shake out for
19 consumers?
20 So that's to anyone who wants to jump in and
21 talk about that.
22 DR. BEALES: You know, I guess -- I mean, we
23 don't really know. It's an experiment that I think
24 we're better off not running. But it is -- what seems
25 to me to be the most likely outcome is less content.

1 Some stuff will retreat behind a paywall and survive,
2 but even stuff behind a paywall often comes out and
3 has spillover benefit in advertising markets.
4 If you think about movies, okay, you got to
5 pay to go to a movie, but the advertising revenue from
6 when the broadcast television rights to that movie are
7 sold is an important part of the economics of the
8 movie business. If you can't have the advertising
9 revenue or as much advertising revenue, it's likely to
10 have adverse effects on content, and especially on
11 content from small publishers.
12 DR. COOPER: Anja?
13 DR. LAMBRECHT: In addition to the points
14 Howard made, you can imagine a world where there is
15 just more ads on websites, right? So each individual
16 ad impression earns less money and you want to keep
17 the revenue inflow constant, you can just put more ads
18 out there. Now, what is the effect on consumers then
19 is the question. Are consumers going to visit less
20 often because they don't want to see lots of ads in
21 front of them? Do they have, when they visit, perhaps
22 a lower utility because they get less access to
23 information? That's another question.
24 What happens to the quality, right? So we
25 might still be providing information, but if on

1 average the inflow is going to be less, perhaps the
2 quality, let's say the generalistic quality, is going
3 down because there is less investment. So I think
4 these are all possible outcomes. How precisely the
5 world would look like is hard to predict.
6 DR. COOPER: Allie?
7 MS. BOHM: So I was in the room yesterday,
8 and I think my major takeaway yesterday was that it's
9 -- the jury is out on the benefits. And, you know,
10 maybe today we have different scientists in the room
11 so they feel differently, but the scientists we heard
12 yesterday really had questions about the return on
13 investment for targeted advertising.
14 They also really had questions about how
15 we measure who sees the targeted ad and whether
16 advertisers are effectively measuring their
17 impressions. For example, I'm a huge Indigo Girls
18 fan. I see targeted ads for Indigo Girls when they
19 release a new album all the time. I've also already
20 bought the album by the time I see those targeted ads.
21 So that impression is wasted on me. I was going to
22 buy the album whether I saw the ad or not, and in
23 fact, bought the album before I saw the targeted ad.
24 So I think until we have really good data on
25 the return on investment, I don't think it's really

1 appropriate to entertain sort of these doomsday
2 scenarios. I think also, you know, we lived in a
3 world of contextual advertising for a very long time,
4 very, very long time. That's what we saw in
5 magazines; that's what we saw in broadcast media.
6 And I'm not saying magazines and broadcast
7 media are the same thing as the internet. They're
8 not, but marketers still figured out how to reach
9 their audiences. In fact, my understanding is the
10 percentage of GDP spent on advertising actually hasn't
11 increased since the 1950s. It's just sort of shifted
12 where it's being spent, so I think we need more data
13 before we can jump to conclusions here.
14 DR. COOPER: Anja, and then Leigh. I think
15 Anja had just a really quick point on --
16 DR. LAMBRECHT: Yeah, just two quick points
17 actually. I think -- so I think what -- you're
18 probably referring to the need to measure precisely
19 advertising effectiveness, and I think that's
20 definitely a very important part. You know, and some
21 advertisers -- I work a lot with advertisers, and some
22 advertisers, I've seen how some are good and some are
23 less good in terms of mirroring effectiveness.
24 I would say that we've come a long way the
25 last even five years, and there's a lot more knowledge

1 in terms of measuring precisely advertising
2 effectiveness, implementing some type of AB testing,
3 field experiments, and using that information to infer
4 advertising effectiveness. So I completely agree that
5 this data is important and should be the fundament of
6 any such analysis and decision. I think we know a lot
7 about advertising, know a lot now about advertisers,
8 know a lot about how to measure and assign a
9 particular value. And indeed these are those values
10 that then inform the bidding decisions.
11 So I've done some research that Garrett
12 previously referred to very briefly where we look at
13 potential -- or apparent algorithmic bias and look at
14 economic actions between different economic actor,
15 which indicate that ultimately in a particular field
16 experiment women are less likely to see employment ads
17 for careers in the science/technology/engineering/math
18 field, but not because of any evilness on the side of
19 the advertiser, but simply because they have higher
20 value to other advertisers because women do more
21 shopping, right?
22 And I think what this indicates indirectly
23 is that advertisers do have a pretty good idea who is
24 buying, roughly how much they would spend, how much
25 they would earn from a particular impression, and that

1 informs the bidding decisions, right? So I think
2 there is actually -- we are in a world now where there
3 is a pretty high level of sophistication in terms of
4 understanding advertising effectiveness. That was my
5 very short point.
6 My other very short point, and then I'll
7 hand over to Leigh, when we talk about who would
8 actually suffer in terms of content providers, right,
9 who actually benefits -- and I think Howard had this
10 data and this graph before -- who actually benefits?
11 Well, if I'm the New York Times, right, I sell front-
12 page ads. I don't have any insight about New York
13 Times sales mechanism, but front-page ads I could
14 probably sell bulk to a buyer, right? I sell them all
15 a certain share of front-page advertising impressions
16 because I know I get a lot of high-quality consumers
17 in there.
18 If I'm a small website, small content
19 provider, then I'm more likely to be in the behavioral
20 advertising business. I'm selling to particular
21 consumers because I can't make the point that, you
22 know, my content is so great because nobody actually
23 knows my website very well. And, so, you start
24 thinking about moving away from behavioral advertising
25 and retargeting, for example, we need to consider what

1 are the effects for small sites and small firms
2 relative to large firms, and it's possible that small
3 firms might be more effective.
4 DR. COOPER: Next go to Leigh.
5 MS. FREUND: Yeah, thanks. Just a couple of
6 points here. One, I think, you know, when it comes to
7 ad effectiveness, I'm going to leave the discussion to
8 the economists, but I do think that the perception in
9 this case is reality, that targeted ads are perceived
10 as being much more valuable in the economic industry
11 that we live in, and so, therefore, it's relevant to
12 talk about it.
13 I also think in the conversation about
14 contextual ads versus targeted ads, it's important to
15 note for those that are really worried about the
16 privacy piece of that that contextual ads have data
17 associated with them, too. You know, we do things --
18 it's a little different than selling a magazine where
19 you know that they've printed this number of magazines
20 and you're paying per magazine. You have to have some
21 data associated with the ad to show where it was and
22 if somebody viewed it, and so I think, you know, if
23 we're talking about contextual advertising as a
24 solution for privacy, we have other conversations to
25 have.

1 But I'd like to bring up the competition
2 issue with respect to the concept of paywalls. Anja
3 just mentioned the New York Times and how strong an
4 advertising market it is. It's clearly also a strong
5 market for those that would think about paywalls. A
6 lot of consumers -- first of all, there's the digital
7 divide issue of who can pay and can't pay to get
8 access to content. And I think access to content is
9 vital, especially in this day and age.
10 We just finished an election, and access to
11 content was certainly important to many of us who
12 voted, but I also think consumers, to the extent that
13 they're spending their limited dollars, would probably
14 pay for the New York Times or for CNN or for Fox News
15 or whatever, but they might not -- they might no
16 longer pay for the small single-mom blog or the
17 cooking site for, you know, down-home, southern
18 cooking. And, so, that really chills what makes the
19 internet great.
20 And, also, if paywalls or micro transactions
21 or whatever other alternative we're thinking about
22 comes into play, it's much harder for those smaller
23 publishers to implement that. It's very time and
24 resource-intensive, so I think there's a real
25 competitive effect to that as well. Thanks.

1 DR. COOPER: Garrett and then Howard.
2 Yeah, Garrett, go ahead.
3 DR. JOHNSON: So in my other life, my focus
4 is measuring the effectiveness of advertising using
5 large-scale experiments. And I can definitely tell
6 you that there's a lot to be learned by industry
7 there, but it shouldn't be completely far off. I
8 mean, the point was raised, you know, we need more
9 data on does behavioral advertising create more value
10 than contextual advertising alone. I would push back
11 on that. Howard presented research looking at price
12 differences.
13 I've done my own version of that accounting
14 for as much as possible differences between opt-out
15 users and the sort of websites that they're spending
16 time on and the sort of browsing history that they can
17 be associated with. And, still, you know, we're
18 coming up with very similar numbers, in our case minus
19 50 percent; in his case, minus 50 percent. On one ad
20 exchange, minus 72 percent; on another -- Avi Goldfarb
21 also has a nice paper with Catherine Tucker comparing
22 before and after in Europe the European e-privacy
23 directive, which is a temporary clampdown on
24 behavioral targeting. And there, they saw that in
25 terms of survey measures about effectiveness, this

1 went down by two-thirds.
2 So I think, you know, we've seen time and
3 time again that there's somewhere between a twofold to
4 fourfold increase in value created by online
5 behavioral advertising, so certainly some privacy
6 tradeoffs that we need to think very hard about, but
7 in terms of monetary value, I don't think that there's
8 too much debate there.
9 DR. COOPER: Howard, did you want to --
10 DR. BEALES: I had two quick points. One is
11 we have a market test here of the value of this kind
12 of advertising, and it's reflected in advertiser
13 behavior every day. There is an academic literature
14 that goes back at least 80 years, trying to think of
15 the earliest paper I can remember, on the returns to
16 advertising. In 80 years, it has come to no
17 conclusion. If we wait for a conclusion about the
18 academic assessment of the value of advertising, we
19 won't have any advertising or any internet content.
20 Second, I don't think any advertising has
21 ever been purely contextually targeted. Media sellers
22 and advertisers do a tremendous amount of research on
23 the average characteristics of members of the audience
24 in order to figure out where they want to reach the
25 kind of people that they think will buy their product.

1 I mean, you've all heard of soap operas, I'm sure.
2 What many of you may not know is they were created by
3 soap companies to attract a particular audience that
4 they thought would be interested in their product.
5 Even when it looks contextual, there's a lot more
6 behind it than that.
7 What's different now is the information is
8 person-specific rather than the average
9 characteristics of the audience.
10 DR. COOPER: Thanks, Howard.
11 I want to shift gears now and talk about
12 southern cooking websites. That just got me thinking.
13 That sounded good. For at least the next 30 minutes,
14 we'll talk about the consumer protection and
15 competition issues surrounding online advertising,
16 southern cooking websites.
17 Anyway, I wanted to shift gears a little bit
18 actually to behavioral targeting. I mean, it's about
19 making predictions of who is likely to buy your
20 product using consumer data to figure that out. Both
21 Allie and Katie touched on this a little bit. More
22 generally, it's about using -- we can think about
23 using data to make all sorts of predictions,
24 predictions about who -- you know, and target who may
25 be pregnant, who may not be pregnant, predictions that

1 can lead us to give some people different prices.
2 We heard -- I think Allie talked a little
3 bit about personalized pricing. We've seen a little -
4 - we haven't seen much of this in a while. We heard
5 about Amazon tried it -- allegedly tried 10, 15, maybe
6 longer than that ago and got a lot of pushback on
7 that. There was a little bit in the news about
8 Expedia maybe listing higher-priced hotels -- putting
9 the higher priced hotels higher for Mac users than PC
10 users. That was a few years ago, but we haven't seen
11 a lot of that.
12 So I kind of had a two-part question here.
13 One, why don't -- we seem to have the data to target
14 ads and it happens, but we don't see a lot of -- we
15 don't really seem to see personalized pricing but we
16 hear a lot talked about that. So that's kind of
17 question one, is maybe why don't we see it.
18 And then number two, just more generally
19 from a policy standpoint, should we -- when we think
20 about accurate predictions where, you know, some may
21 win and some may lose but nonetheless they're
22 accurate, should we think about those as a privacy
23 harm more generally? So let me throw that out.
24 Allie, I don't know if you want to talk.
25 Well, I'll go Allie and then Katie. I know both of

1 you have expressed an interest.
2 MS. BOHM: Sure. So I'm going to talk first
3 about one area where we do see personalized pricing.
4 And the Wall Street Journal did an interesting study
5 on personalized pricing. For any of you with
6 computers, you can Google it. But one of the things
7 they found was they were looking at Staples and, you
8 know, pricing of various products at Staples. I think
9 there are a few other examples in the article, but if
10 you lived closer to a rival store, you would get a
11 cheaper price. Understandably, right, they wanted you
12 to buy online from them, not, you know, go down the
13 street to the store.
14 It turned out that the people who were
15 getting lower prices also tended to be wealthier
16 because those are the folks who have stores near them.
17 So, you know, sort of query as to who this
18 differential pricing is benefitting and whether it's
19 actually entrenching some of the economic divide that
20 we currently experience.
21 I think as to, you know, when predictions
22 are accurate is there harm, so I think the question is
23 accurate about what. You know, so if you are
24 advertising senior management positions in STEM fields
25 and you only advertise to men because, you know, most

1 people who are in STEM fields are men or because
2 somebody bid higher in the instant ad auction, you
3 know, to show women something for nail polish -- that
4 was really condescending, I'm sorry, or really
5 flippant, I'm sorry.
6 Maybe you get a great job candidate, right?
7 Like maybe that happens, but two people lose. First
8 of all, you lose because you probably missed out on a
9 really awesome woman who might have transformed your
10 business; and second of all that woman who might have
11 had a really awesome transformative experience in her
12 own career missed out.
13 So I think for me, the who loses is really
14 what are you advertising. You know, if you're
15 advertising an Indigo Girls album and I don't see the
16 ad, I'm still going to buy the album, I don't lose
17 out, right? Maybe Indigo Girls lose out, however, if
18 I see the ad because they've spent the money on the ad
19 to show it to me and I was going to buy it anyways.
20 But when it gets to job postings or housing postings,
21 you can see loss on both sides, losing qualified
22 candidates and then also qualified candidates losing
23 access to what could be real cool opportunities for
24 them.
25 DR. COOPER: Thank you for the '90s

1 reference, Indigo Girls. I did not know they were
2 still around or someone your age would even know they
3 existed.
4 MS. BOHM: They put out a really awesome
5 symphony album. You should check it out. That was
6 your promotion for this panel.
7 DR. COOPER: Katie, I'll let you jump in
8 next.
9 MS. MCINNIS: So we don't really know about
10 the prevalence of first-degree price discrimination --
11 also known as dynamic pricing -- because it depends on
12 outside researchers to uncover these practices. And,
13 so, that's one reason why we don't know about them.
14 But Consumer Reports has been since the early -- since
15 2000 -- has been looking into dynamic pricing schemes
16 in the online travel and airline industry. And we've
17 found some instances of price discrimination, first-
18 degree price discrimination, for different users
19 across a couple different websites.
20 So it's definitely going on at least in the
21 airline industry, especially since the Air Transport
22 Association, which is a global airline industry trade
23 association, unveiled recently their new distribution
24 capacity, which was to enhance product differentiation
25 and to have a dynamic availability of fair products,

1 that means prices, for consumers.
2 And, so, this is based on your information
3 as you travel the web. And, so, they're giving you a
4 different price than your neighbor, which I don't
5 think seems fair. And, also, there's no transparency
6 around how these fair prices are reached or what kind
7 of information they're using in order to serve you
8 with that price.
9 We've also seen first-degree price
10 discrimination in ride-share apps such as Uber and
11 Lyft, which uses a lot of personal information on your
12 phone, including your battery, in order to give you a
13 different kind of fare increase than another
14 individual might have.
15 In addition, Uber in different countries
16 has identified who might be regulators who might
17 regulate their activities and has served them with a
18 completely different ad interface in order to skew how
19 they felt and how they might regulate this industry.
20 So first-degree price discrimination and first-degree
21 discrimination on what kind of ads you're served with,
22 what kind of app experiences you have are definitely
23 happening. We just don't have a lot of transparency
24 around it, which is one reason why we endorsed Senator
25 Chuck Schumer's call for the Federal Trade Commission

1 to investigate the airline industry and get some real
2 answers about the use of dynamic pricing because we
3 can't just depend on consumer groups like Consumer
4 Reports to unveil these practices. We have to ask for
5 more policies from our regulators to protect us in the
6 first instance.
7 DR. COOPER: Let's see, Anja, I know you
8 wanted to jump in.
9 DR. LAMBRECHT: Quickly because you asked is
10 it that the accuracy of prediction can lead to privacy
11 harm. I think that's a very interesting question.
12 And I think on the one point, I would say as a
13 marketer, fairness is a very fickle concept. You
14 know, it's very hard to define what consumers regard
15 and disregard as fair. And, you know, I can also say
16 it's the accuracy of the prediction that somebody is
17 or maybe self-identifies as a student or a senior
18 citizen of privacy harm because everybody else in the
19 population will pay a higher fare for buses or entries
20 to the zoo.
21 So I think to some extent, you know, the
22 predictions are being made by somebody else, so people
23 self-identify, but it's really such a different type
24 of question.
25 DR. COOPER: Thank you, Anja.

1 Howard, I know you wanted to jump in.
2 DR. BEALES: Yeah, I'm going to make two
3 points, I guess. One is in a lot of contexts, price
4 discrimination is a good thing, not a bad thing, when
5 it happens in markets. And the airline industry is
6 actually a good example because it probably couldn't
7 survive if it could only charge one price to
8 everybody. They need to fill the plane. That's an
9 important constraint on costs and the availability of
10 air transportation to people who can't afford as much,
11 who can't pay first class.
12 And it happens because they give lower
13 prices to people who value the transportation less
14 that are willing to stay over a weekend as an example
15 that's been with us in the airline industry for
16 decades. And why using information gathered online
17 changes that fundamental economics or the fundamental
18 benefits of that practice escapes me.
19 Second, about accurate predictions, I don't
20 think -- I mean, accurate predictions are generally a
21 good thing. And predictions based on more information
22 are generally a good thing. If you don't have
23 information, you fall back on stereotypes. And those
24 suppress information and they use -- misinformation in
25 a lot of cases.

1 When I was at the FTC in the late '70s, we
2 brought a lot of equal credit opportunity enforcement
3 actions. And every time we looked at a judgmental
4 creditor, which is somebody who looks at you and
5 assesses your worth and willingness to repay and says,
6 okay, I'll give you a loan and, no, I won't give one
7 to you, there was discrimination. Every one of them.
8 If you looked at the people who used models
9 and risk predictions and credit scoring, there wasn't.
10 All right, more information reduces discriminatory
11 problems in general -- not in every instance -- but in
12 general rather than making people rely on the
13 stereotypes they carry around with them and don't even
14 know they have.
15 MS. BOHM: Sure. So I think that, you know,
16 that may generally be true, but sort of an important
17 caveat to what Howard just says is it really depends
18 on what the data set is made from. So there was
19 recently -- Amazon revealed that they had to stop
20 their -- and I realize I'm getting outside of online
21 advertising here for a second, but bear with me.
22 Amazon had to stop their algorithmic resume screen
23 because the data was built on who -- the training data
24 set was built on who has worked at Amazon.
25 And the algorithm was systematically pulling

1 out lacrosse players and people with male names and
2 systematically dropping out of consideration people
3 who went to all women's colleges and other folks who
4 had, you know, sort of clear indicators that they were
5 female because Amazon, like many tech companies, has a
6 predominantly male workforce.
7 And, so, yes, it is certainly true that data
8 can be used to undermine -- to eat away at insidious
9 biases. It can be used to entrench those biases and
10 to hide those biases and sort of make them look
11 natural because, you know, the machine is not biased,
12 right? The machine just came up with it. We don't
13 know how it ended up with all of these male lacrosse
14 players as, like, the people we should hire next, so
15 it can cut both ways. That's what I want to say.
16 DR. BEALES: There are discrimination
17 problems out there in the world. There's no doubt
18 about that, but they are discrimination problems.
19 They are not privacy problems.
20 MS. MCINNIS: So I just wanted to make the
21 point that having accuracy in the kind of behavioral
22 ad delivery, whether or not there's a privacy issue in
23 that, is not necessarily the framing that I would
24 suggest. I would say that the privacy issue occurred
25 in the outset where you collected my data without

1 permission, online and offline, to create a kind of
2 personalized dossier about me with conclusions that
3 may or may not be correct in order to serve me with
4 behavioral ads and also different prices. And so that
5 is, I think -- the privacy infringement occurred at
6 the beginning. Also, when you didn't follow my do-
7 not-track signals, which many companies do not follow,
8 even though most browsers allow you to signal that.
9 In addition, I just wanted to point out that
10 most consumers -- some consumers might feel like
11 they're benefitting from targeted ads, but a lot of
12 consumers do not and, in fact, many consumers feel
13 freaked out or concerned about the kind of
14 advertisements they've been served with. The kind of
15 conversations around whether or not Facebook or
16 Instagram is listening to you is the kind of example
17 here where consumers have no idea how they're getting
18 such targeted advertisements based on things that they
19 only said out loud.
20 And, so, that kind of disconnect between
21 consumer knowledge and the kind of tracking that's
22 happening is a huge problem that should be addressed
23 before we talk about the efficiency or the worth of
24 these advertisements.
25 DR. COOPER: Let me -- Allie, maybe you can

1 answer this or react -- but while we're on the subject
2 of price discrimination or personalization and
3 predictions, we have a question from the audience that
4 I think is a good one, sort of clarifying perhaps.
5 You know, you mentioned dynamic pricing, but is
6 dynamic pricing really price discrimination because
7 dynamic pricing is really just adjusting the price to
8 supply and demand conditions? So should we think
9 about that as price discrimination or just kind of
10 changing the market equilibrium based on shifts in
11 supply and demand?
12 MS. MCINNIS: So I don't really think it is
13 about supply and demand, right? It's about my
14 possible willingness to pay. And by having these
15 kinds of tailored prices and tailored advertisements
16 to me, you're also diminishing my share of the
17 consumer surplus, which is a harm.
18 MS. BOHM: So I want to address two
19 definitional things. I think there's sort of dynamic
20 pricing, sort of lowercase D, which is, hey, most of
21 the tickets on this train are sold out, therefore, for
22 everyone, all of the tickets are more expensive. And
23 then there's the kind of dynamic pricing Katie is
24 talking about, which is, hey, they've realized that I
25 live in a wealthier area and, you know, I'm a lawyer

1 and whatever and they realize I really desperately
2 want to go to New York this weekend, and so they're
3 charging me a higher price. There are two different
4 things there, and at least to me, one of them raises
5 more concern than the other.
6 I also want to really quickly address
7 Howard's point that that's not a privacy concern,
8 that's a discrimination concern. I think there's a
9 definitional thing there, too. So there are certainly
10 folks who are concerned about privacy as a "I want to
11 be left alone, I am the king of my castle, leave me
12 alone." And there's nothing wrong with that. That's
13 really important. You know, privacy does extend from
14 sort of the Brandeisian property rights idea, but
15 there's also privacy is a way that we make sure to
16 protect -- or I should say lack of privacy undermines
17 some of the other values that are really important to
18 us. And that includes things like civil rights,
19 access to opportunities, having fair access to
20 information online, sort of what does lack of privacy
21 lead to? Informational disparities, discriminatory
22 access to opportunities.
23 And, so, when I talk about privacy harms, I
24 do think about some of the discrimination and more
25 civil-rightsy harms because I think that, you know, as

1 Katie sort of more artfully explained than I did,
2 these are sort of when you take the privacy violations
3 and the personalization as far as they can go or maybe
4 not as far as they can go but, you know, sort of to
5 their conclusions, that's where you end up.
6 DR. COOPER: Thanks. So I think both, Katie
7 and Allie, in your presentations you had talked --
8 said that, you know, self-regulation doesn't appear to
9 be working in this market, so I wanted to put that on
10 the table that, you know, has self-regulation failed
11 to protect consumer privacy here? And if that's the
12 case, what's the alternative?
13 So I'll let Garrett kind of take the first
14 cut at this. And then Leigh may have something to
15 say. I'm not sure.
16 DR. JOHNSON: Great. Well, I'll start by
17 saying that I think an opt-out option is highly
18 desirable in that we have the kind of two facts here.
19 Online behavioral advertising generates a tremendous
20 amount of revenue for publishers, and also we have
21 people that are very concerned about their privacy.
22 So an opt-out allows these things to coexist.
23 Other policy options have to go down the
24 ways of hard tradeoffs of ignoring one or the other
25 considerations. So I think the AdChoices program has

1 some advantages. Because it was rolled out by
2 industry, it was done relatively rapidly. It had good
3 coverage. It's kept up with a fast-moving technology
4 frontier, but there's certainly, you know, lots of
5 complaints about it. You would hope that the industry
6 would apply some of the same determination it does to
7 putting identifiers on consumers' computers as it does
8 to making sure that the opt-out choice remains
9 preserved and isn't just deleted by a cookie.
10 They have done some work on this by creating
11 a ad extension -- an app -- sorry, a browser extension
12 that preserves these preferences, but that's not very
13 easy to find on the website. You'd also expect that
14 if consumers care so much about online behavioral
15 advertising, you would also expect that they would
16 have strong preferences against things like database
17 matches. And, so, this would be something that the
18 industry might want to consider extending there as
19 well.
20 Now, the other question was about
21 alternatives. So this is a really tricky thing,
22 right, because one alternative is to go down the way
23 of a browser do-not-track route. And that would have
24 the advantage of preserving people's privacy
25 preferences, but it does have the challenge that

1 browsers could set the defaults in ways that don't
2 fully internalize the externality that that would have
3 on the advertising industry and on the web.
4 The GDPR, which we'll be talking about
5 later, is kind of an interesting case because the
6 language of the GDPR says that you need explicit opt-
7 in, where consumers need to present to every single
8 company in every single use of their data. That's
9 sort of the de jure expectation, but the de facto
10 thing we've seen so far is an opt-out. And as Anja
11 says, the experience of being a European consumer on
12 the web is not super fun. You get to see all sorts of
13 consent pages every time you visit a webpage, and
14 about 90 percent of these people are sort of going on
15 without opting out according to a data release from
16 Quantcast.
17 A couple of people have brought up this new
18 bill presented by Senator Ron Wyden, where he
19 essentially is arguing for a federal do-not-track
20 page, somewhat like the Do Not Call List. As I read
21 the legislation, it's wanted to make the Federal
22 Government a clearinghouse for some of these consent
23 mechanisms. You know, there may be some arguments
24 that suggest that the federal Do Not Call List did a
25 much better job of protecting consumers than the

1 industry version, but I think if you're the FTC, you
2 should think very, very long and hard about whether
3 you want to be doing this job, given just how
4 technologically sophisticated these things are.
5 So I think I'll leave it there. Thanks.
6 DR. COOPER: Leigh, I'll let you --
7 MS. FREUND: Thanks. Yeah, I mean, when I
8 think about content -- or the question which I'm asked
9 a lot, which is, is self-regulation failing, has it
10 failed to protect, especially now that we're talking
11 about a new privacy legislation or regulation, my
12 answer is always as compared to what. You know, what
13 is the alternative? The industry came together in as
14 early as 2000 and tried to address the issues that
15 were concerns at the time.
16 It's kind of similar to -- one of my members
17 gave me this example, so I'll give them credit, but
18 I'm going to use it. Seatbelts are not failing
19 because we still have car accident deaths. Seatbelts
20 are saving lives. A code of conduct that has strong
21 privacy protections is helping. If there is more we
22 should be doing, we're happy to engage in
23 conversations to do it, but I think you can't measure
24 the way the industry may have developed without a code
25 of conduct that has strong privacy regulation or self-

1 regulation within it.
2 So many of our members have declined
3 business model opportunities, declined to do certain
4 things, declined partnerships with companies because
5 those things would not comply with our code. So I do
6 think we have prevented harm from happening in the
7 marketplace.
8 And, so, I think the opt-out, as Garrett
9 mentioned, the opt-out regime certainly is something
10 that we strongly advocate for, but I will note that
11 our code does contain a requirement for opt-in consent
12 when the information that we're using is sensitive
13 enough. So, for example, precise location data or
14 sensitive health data. Those things cannot be used
15 without a user's explicit opt-in consent. And, so, if
16 there are more of those things that we should be
17 considering, then that is something we are always
18 talking about and always trying to do, but I resist
19 strongly the argument that self-regulation has failed.
20 DR. COOPER: Katie, I know you had your hand
21 up earlier.
22 MS. MCINNIS: Yes, thanks. With all respect
23 to Leigh and the NAI, the privacy principles they came
24 out with in the early 2000s, which, by the way, was in
25 response to avoiding legislation around this issue,

1 were not strong even back then. And then we've seen a
2 complete abandonment of these principles over the
3 course of a few years, right? These principles were
4 only supposed to be followed by coalition members,
5 then NAI allowed for other associate coalition members
6 to join, but they don't have to follow it. They just
7 have to pay dues. And a few years after --
8 MS. FREUND: That is completely 100 percent
9 untrue, by the way. You must be mixing up trade
10 associations or self-regulatory organizations.
11 MS. MCINNIS: Okay. But only a few
12 companies are following the regulations, even just a
13 few years after they were introduced. And the fact
14 that consumers don't know a lot about these tools, I
15 think, would be another example of the failure of
16 self-regulation and the call for a data policy here at
17 the federal level, and the number of committee
18 meetings we've been having around it is another sign
19 that consumers are not satisfied with the self-
20 regulatory tools that have been provided to them.
21 MS. BOHM: Well, so to pile on, so first,
22 let me just say that, you know, self-regulation is an
23 important tool as far as it goes, and public knowledge
24 has been willing and interested in working with folks
25 in the industry to come up with the best self-

1 regulatory tools they can. They only go so far. And
2 there are a few reasons for this.
3 First of all, I talked about AdChoices,
4 right? So that was their self-regulatory tool was
5 this tool that like, eehh, we know what we would be
6 useful to consumers, so let's do this other thing. Or
7 I should say, we know what would be more useful to
8 consumers, let's do this other thing.
9 I think the other piece is even taking
10 Leigh, you know, at her word, and she's been quite
11 lovely to sit next to, is not the one Katie is talking
12 about. Even if all of her companies are really,
13 really good actors and they're turning down business
14 opportunities with really bad actors, there are still
15 the really bad actors out there who aren't going to
16 voluntarily play in a self-regulatory regime because
17 they feel that they can get ahead if they don't.
18 Now, you may be saying, but, Allie, those
19 bad actors aren't going to follow the law anyways, but
20 if there was a law and, you know, it gave enforcement
21 authority to an agency or gave folks -- or to state
22 AGs, or gave folks a private right of action, there
23 might actually be redress for the folks who don't
24 follow the law.
25 So I do think that there is an important

1 role for legislation here, and I think we're seeing
2 that in the conversations that are happening in
3 Congress now. And I do want to say that, you know, I
4 don't see that legislation as legislation as pertains
5 to the advertising industry, right? I see that as
6 comprehensive privacy legislation that applies to all
7 of the actors in this space. Some of them are
8 advertisers. Some of them are ISPs. Some of them are
9 completely other entities. So it's not a "let's gang
10 up on the ad industry." It's a "there's a lot of data
11 out there, there are a lot of risks associated with
12 that, let's have some rules of the road, let's create
13 expectations for businesses, and let's create some
14 protections for consumers."
15 And I think there's an appetite for that,
16 and I think it will also benefit groups like Leigh's
17 that want to be doing the right thing because they
18 won't have that competitor over there doing the wrong
19 thing.
20 MS. FREUND: Yeah, and just if I could just
21 add to that, I think, you know, absolutely. I think
22 federal legislation and comprehensive privacy
23 legislation is something we are absolutely thrilled to
24 talk about. We've been trying to advocate, you know,
25 for the right privacy protective practices for 20

1 years. And, so, I think -- I do think, however, that
2 self-regulation has a strong role to play in that.
3 And I think, you know, the FTC is already resource-
4 constrained, and we can certainly help keep those good
5 actors in line.
6 And I agree with you about the bad actors.
7 I tend to not like them either. So, you know,
8 definitely, but I do think that privacy legislation
9 has to balance all of the stuff that we've been
10 talking about today. So it has to balance privacy
11 concerns with the innovative, open and free internet
12 that we have today, and it has to find that right
13 balance.
14 And so, you know, we are happy to engage in
15 those discussions and looking forward to it.
16 DR. COOPER: I think we have about a minute
17 left by that clock, but we're right up at 2:30 by that
18 clock because I think we started a little late. So
19 rather than getting into my next question, which was
20 what would privacy legislation look like, and solving
21 that in a minute and 15 seconds, well, I think we
22 actually did, I think Leigh and Allie agreed on what
23 that's going to look like, and they're working on it
24 right now, up with Capitol Hill.
25 So, anyway, please join me in thanking our

1 panelists for such a vibrant discussion today.
2 (Applause.)
3 (End of Panel 3.)
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1 PANEL 4: THE IMPACT OF PRIVACY REGULATIONS ON
2 COMPETITION AND INNOVATION
3 MR. DR. GILMAN: Good afternoon. I am a man
4 bereft of name tag, Dan Gilman. I work at the FTC's
5 Office of Policy Planning, and I'm really glad to be
6 hosting a terrific panel here this afternoon. Glad to
7 have you all here.
8 A couple quick things. First, as before, we
9 have staff who can collect question cards if you have
10 questions. Just raise the cards up or ask for a card,
11 we'll get them on in. Some of them we might be able
12 to read to the panel; others we'll take back to FTC
13 with us.
14 Second, in competition with my colleague
15 James Cooper over disclosures, I want to point out
16 that should I happen to say something of substance
17 here today, it does not necessarily reflect the views
18 of the Federal Trade Commission or any individual
19 Commissioners or the Office of Policy Planning at the
20 FTC.
21 That was an unanticipated effect of the
22 disclosure. Any questions I ask here today do not
23 necessarily reflect the curiosity of the Federal Trade
24 Commission or any of its individual Commissioners or
25 any other human person.

1 We have a very fine panel here. I'm not
2 going to read everyone's bios. We have them available
3 in print outside; we have them available on our
4 website. I do want to just introduce people by name
5 and affiliation and then leave time for them to do a
6 brief presentation, six, seven minutes, and then we'll
7 jump into our discussion.
8 So moving from my left, Jane Bambauer who
9 teaches at the University of Arizona James E. Rogers
10 College of Law; then Avi Goldfarb, the University of
11 Toronto's Rotman School of Management; Anja Lambrecht
12 of the London Business School; to her left, Amalia
13 Miller, the University of Virginia, where she's a
14 Professor in the Department of Economics; one down, I
15 can't even see over people. Oh, Lior Strahilevitz
16 from the University of Chicago Law School; and,
17 finally, Rahul Telang from Carnegie Mellon University.
18 So let me just turn the floor over to
19 Professor Bambauer.
20 MS. BAMBAUER: Thank you. Thanks so much
21 for including me. So I'm glad I'm speaking first
22 because it's some of the gaps in our knowledge of how
23 privacy and potential privacy regulation is going to
24 affect innovation that I'm most interested in, or at
25 the sort of highest level of conceptualizing what it

1 is that we're trying to protect when we protect
2 privacy. And this is -- I think it's important to get
3 definitions of privacy harms right so that we can then
4 compare them to potential tradeoffs with innovation.
5 And I thought for today's comments I would
6 actually use the Cambridge Analytica example to
7 illustrate that it's actually quite hard to get
8 concrete and to get agreement about what types of
9 privacy harms we ought to have the Government
10 intervening to manage. And the reason that I like
11 using Cambridge Analytica is that almost everyone
12 thinks something went wrong, and we all kind of use
13 it as -- well, we all say Cambridge Analytica and we
14 all nod and we all agree -- you know, we all use it
15 as sort of a placeholder for "ick," but if we actually
16 -- if we each individually define what we think the
17 problem is that the Government needs to solve, I think
18 we'd start rapidly splintering into different groups
19 and could not agree on what direction to go in.
20 So the first thing that might have gone
21 wrong is that Facebook users didn't realize that when
22 they were taking this little personality survey that
23 they were exposing even their own full Facebook
24 profile, including every "like" that they had ever
25 done on Facebook to this researcher at Cambridge, let

1 alone the Facebook profiles of all of their friends,
2 right. So I think descriptively that's accurate, that
3 Facebook users did not realize how much they were
4 waiving away when they clicked -- you know, when they
5 saw the screen warning them about the privacy
6 implications and it's like yes, yes, yes, just get me
7 to the survey, I need the survey.
8 So I'm going to treat the transmission of
9 their data as a decision that Facebook made, and I'll
10 come back to the consent idea. But even if we think
11 of this as being ascribable to Facebook, I still think
12 it's hard to define precisely what should be done. So
13 is it that the problem is that we're letting anybody,
14 either Facebook or third parties, study people without
15 doing IRB-style informed consent?
16 So, you know, inference winds up being at
17 the heart of much of what we love about internet and
18 smart devices and smart services. AB testing actually
19 involves interventions. I mean, they're randomized
20 controlled experiments that for some reason the
21 industry call AB testing. And, so, even, you know,
22 traditional interventions are a normal part of
23 innovation, and I don't think that we want to prevent
24 that from happening or put very cumbersome processes
25 in the way.

1 So then maybe what we should do is allow
2 Facebook to study its users in that way but not
3 permit third parties to have access to that sort
4 of -- either the raw data itself or to the sort of
5 hypercustomization that that raw data would allow
6 third parties to do. Well, that gets to the heart of
7 Facebook's and Google's, for that matter, business
8 model, right? So there's a reason that Mark
9 Zuckerberg, in his Congressional hearing testimony,
10 rejected the idea that Facebook should shift to a pay
11 service. I think he knows that people -- he knows
12 what many of the presenters at this conference have
13 already said, that people won't actually pay for the
14 services that they get in money, even though they will
15 pay in data.
16 I don't think that Congress is ready to kill
17 Facebook. I don't think we should be ready to kill
18 that sort of business model. And, actually this
19 relates to the opt-out idea. On the last panel, there
20 seemed to be at least a little bit of consensus for,
21 well, when a consumer opts out, that at least should
22 be honored. And I'm not so sure about that. As long
23 as opting out continues to happen at a rate of 0.24
24 percent, sure, let people opt out. It's a small cost
25 that content providers like Facebook can easily

1 handle.
2 But if John Oliver convinces a bunch of
3 young people, millions of people to opt out one day,
4 then that business model is severely compromised, and
5 so I don't think -- you know, consent itself could, at
6 least if it's legally enforced, could wind up wiping
7 out the payment model that we're used to.
8 Okay, so, finally maybe then the problem is
9 that Facebook can allow traditional advertisers to
10 have access to this data and to use hypercustomized
11 content, but there's something wrong with letting, you
12 know, untraditional content providers like political
13 actors have access to the same data or have access to
14 targeting in the same way.
15 And this really gets to the heart of the
16 externality that I think many people think occurred
17 with the Cambridge Analytica story. The line
18 differentiating, though, like sort of standard
19 advertising and the kind of content that we think is
20 suspect because it might distort elections, that's
21 awfully hard to define and, you know, we're
22 essentially -- what we would be doing is asking either
23 Facebook or regulators to identify what counts as a
24 bias or a manipulation versus just content --
25 persuasive or maybe nonpersuasive content -- that

1 people seem to want to view based on their clicks.
2 So this kind of raises questions that have
3 been studied for decades now in the advertising
4 context of created demand, like is there some -- is
5 there something about firm -- you know, content
6 providers like InfoWars that's actually creating
7 biases and demand for certain types of content that
8 it's bad for people. Or is it that we've kind of all
9 galvanized around blaming Facebook and Cambridge
10 Analytica for a problem that really just kind of is at
11 the heart of American democracy, that basically that
12 the only problem with democracy is its own voters,
13 right.
14 So, I'm raising a bunch of questions without
15 offering answers right now, so I want to share that
16 the way I'm starting to think about this, and I'm sort
17 of in the early phase, but that there is some, you
18 know, evidence-based work with, is I'm starting to
19 look for early signs of times that people may be
20 engaged in a short-term techno-panic and may be sort
21 of psychologically and naturally geared toward
22 resistance and hesitancy to a technology that they
23 will in a short or medium amount of time wind up
24 adopting and even liking versus persistent forms of
25 privacy preferences that seem to be nearly universal,

1 and that seem to flow and be persistent even when
2 technologies are changing. So I can say more about
3 that during the Q&A, but I don't want to take more
4 time.
5 DR. GOLDFARB: Hi, I'm Avi Goldfarb. So a
6 lot of these ideas that I'm going to talk about over
7 the next six minutes were touched on by various people
8 over the course of the day, but I want to dig into a
9 few of them -- to the extent that's possible in six
10 minutes -- to give a high-level introduction to these
11 ideas.
12 So we think about privacy. What privacy
13 used to be was either the paparazzi, it was either
14 there were a handful of people who were declared
15 public figures and they had essentially different
16 rights than the rest of us in terms of the
17 communication of their private life, or we emphasized
18 security services and the police, and there were
19 restrictions on how they could surveil the public.
20 Privacy's now a business issue. That's why
21 we're here, that's why it's at the FTC, privacy's a
22 business issue. It used to be almost purely a legal
23 issue or a media issue. Now it's more than that. Why
24 is it a business issue? It's a business issue because
25 of all the data that digitization of media and of all

1 sorts of other aspects of life have enabled.
2 And, so, what we need to recognize when we
3 think about this as a business issue is, we do know
4 already that privacy regulation can restrict
5 innovation, okay. There is -- the empirical work so
6 far is that there is a tradeoff. That doesn't mean we
7 can't theoretically construct a situation where
8 privacy would enhance innovation, but the dominant
9 empirical work so far, and you'll hear more of this
10 later, but this is, at least my work with Catherine
11 Tucker has been that privacy in the online advertising
12 space, when you restrict information flows, well,
13 there's a reason that those companies wanted that
14 information. They could innovate with that
15 information; they don't do as well without it. And
16 that's a theme you've heard. You heard it from
17 Garrett, and you heard a fair bit in the last panel.
18 Another thing to recognize, and this is a
19 thing about competition, privacy regulation can help
20 large incumbents. Okay, so what do we mean by that?
21 To the extent that there is a -- it happens in two
22 different ways. So one way is you might be much more
23 likely to trust Google than some new startup that
24 you've never heard of. And so you might be more
25 likely to give an old, established, large company,

1 large brand, data about yourself than a startup.
2 In addition to that, what this particular
3 paper is about is another idea, which is that if you
4 touch a company in lots of different places or, in
5 particular, a company touches you in a lot of
6 different places, that means that one opt-out can help
7 that company in lots of different ways. And, so, if
8 you're a startup or a smaller company that really is
9 only doing one particular product, they have to pay
10 effectively the same regulatory cost to get you to
11 consent as a very large company. And that can create
12 an opportunity, and essentially benefit incumbents
13 relative to entrants, benefit large companies at the
14 expense of small.
15 So if privacy, if the empirical, theoretical
16 structures that we have suggest privacy is going to
17 hurt innovation and it might hurt competition, well,
18 why are we talking about this at all? And the reason
19 is that consumers actually do care about privacy. So
20 this was a debate we've heard. Yes, consumers aren't
21 opting out of these things, but when we fix a
22 particular context, we see more privacy-protective
23 behavior today than we used to. So it's much harder
24 to get people to fill out surveys than it used to be.
25 The Census has to work harder to get people

1 to fill out the Census or information. Given a
2 context for communicating data or, when we fix that,
3 we're even more privacy-sensitive than we used to be.
4 What's changed, and the reason why we had the
5 discussion or at least I think the reason why we had
6 that discussion in the previous panel on, yeah, but
7 consumers don't seem to be doing anything about it, is
8 because along with more privacy concern has come with
9 huge benefits to data sharing. And so even if the
10 costs are increasing or the perceived costs of sharing
11 data are increasing, the perceived benefits, the
12 ability to have Facebook and Google, et cetera, has
13 grown as well.
14 And so the point is there's a tradeoff
15 between privacy and innovation. In lots of cases
16 there's a tradeoff between privacy and competition.
17 But that doesn't mean that privacy is bad, it just
18 means that we need to recognize these as distinct
19 values, and we need to think about weighing them
20 against each other.
21 So the policy issue -- the theoretical
22 policy issue is essentially privacy regulation can't
23 be too strict because if it's strict it will stifle
24 data-driven innovation and competition, right? If you
25 don't allow firms to use data, they can't use data.

1 And if data enables competition, as we heard earlier
2 today, or as I just described, or if data enables
3 innovation, it's maybe the core input into a lot of
4 the most exciting technologies today, artificial
5 intelligence, ad exchanges, et cetera, then data --
6 you know, then privacy regulation will be too strict.
7 Or strict privacy regulation would hurt innovation,
8 hurt competition.
9 That said, we got to remember, privacy
10 regulation can't be too lax either. If it's so lax
11 that consumers don't trust companies, then the
12 companies won't get the data either. In Europe and
13 the United States, at least the empirical evidence so
14 far is we're a long way away from that. It's not
15 clear if we are worldwide.
16 So getting the balance right is the key
17 challenge here, and given the importance of data to
18 innovation, and AI in particular, privacy policy is
19 one important way the regulatory environment is going
20 to affect the rate and direction of innovation and the
21 degree to which competition plays out.
22 With that, Anja.
23 DR. LAMBRECHT: Thank you. So I'm going to
24 build directly on what Avi just said and start with a
25 particular setting which is financial services. And,

1 so, you can well imagine that in financial services,
2 personal finance, consumers, we all worry a lot about
3 privacy and security and our data in particular
4 settings. I studied together with my coauthor at the
5 introduction of a, at the time, quite new
6 technological service, which in early 2000s, was
7 online banking. And the question is how do you
8 actually want to start sharing information with
9 consumers for the consumer's privacy and security?
10 Now, nowadays, online banking is something
11 we're used to on an everyday basis. In the early
12 2000s, it was not very much prevalent. I think there
13 are lessons that we can learn for the use of new
14 technologies in today and in the future.
15 What is the underlying tradeoff? Well, of
16 course, especially in this type of setting, consumers
17 care about privacy and security verification hurdles
18 to prevent others, third parties, to access their
19 financial information and potentially execute
20 transactions, such as money transfers, in these
21 consumers' names.
22 But the other point is that consumers, and
23 Avi briefly alluded to that, also care very much about
24 ease of use or else they may not adopt the new
25 technological service, right? And, so, this is

1 ultimately the tradeoff we worry about a lot, when we
2 speak about privacy and technology adoption, and the
3 question is what are actually the implications?
4 Now, in that particular study, in that
5 particular empirical setting, what we observed is that
6 because of privacy and security concerns, the bank
7 implemented multiple hurdles for a consumer to use the
8 service, starting with requiring a paper-based signup,
9 then sending to the consumer login information that
10 allows the consumer to use the service, in terms of
11 gathering information but not actually executing
12 transaction to the latter, an additional piece of
13 information, transaction numbers were required.
14 And, so, if what we have ultimately in
15 this type of setting and more generally it's a
16 multistage adoption process where the consumer goes
17 through the hurdles of signing up, logging in, doing a
18 transaction and potentially substantive over a time
19 repeat usage, given these hurdles that were
20 implemented in order to protect consumer privacy and
21 security, what we have here is that actually since the
22 consumer had to go through all these steps, it
23 introduced substantial delays in the process
24 And what we find is that delays that come
25 here through this process were exogenous shifters. It

1 actually reduces at any point in time the probability
2 a consumer would go to the next stage, say from
3 logging in, to actually doing first transactions.
4 And these effects are significant. So for
5 example, more than a third of consumers would not log
6 in in the month of sign-up; about a third of consumers
7 would not actually do -- initiate a transaction in the
8 month of their first log-in. And so you can see what
9 the knock-on effect of those are, both for consumers
10 who now do not use a service that is intended to make
11 their life easier perhaps or be more efficient in
12 actually handling and transferring their money,
13 keeping a certain balance in their banking account,
14 and, on the other hand, for firms who still needed to
15 deal a lot more with paper-based transactions.
16 And, so, to wrap this short summary up, the
17 key insight here is that, well, complex security
18 protocols that you might want to set up to ensure
19 privacy and security are very personal, important
20 pieces of information that might, on the other hand,
21 actually reduce adoption. And to the extent that we
22 think adoption of new technologies and innovations are
23 good for consumers, and maybe for the economy more
24 broadly, that raises a question about where the
25 balance would be, and what could be done to eliminate

1 these frustrations by consumers while at the same
2 point in time encouraging adoptions.
3 And, so, the key point, therefore, is
4 whether efforts that we have to ensure online data
5 security and the privacy can, therefore, have, and how
6 they can have, unintended consequences for the
7 diffusion of new anonymitive services. And I think
8 any discussion of these questions will need to
9 consider such unintended consequences. Thank you.
10 DR. MILLER: So what I'd like to do with
11 these remarks is to talk a little bit about some
12 empirical research that I've done focusing on the area
13 of health privacy and looking at the effects of
14 different privacy, regulations related to healthcare
15 data. And I focus on health in my research, health
16 privacy in particular, because health is an area where
17 we have sensitive information, the privacy issues can
18 be really important, the data can be persistent. And
19 also it's an area where in the United States there's
20 been the most regulatory activity on the part of
21 states.
22 So the first paper I want to talk about
23 looked at the effect of regulation that was targeting
24 one aspect of data privacy which is data security.
25 It's about controlling information and making sure

1 it's not being used in ways that are not intended.
2 And specifically what we did was we looked at what
3 happens when states passed laws that were encouraging
4 data security practices, and they were trying to
5 encourage firms to use, to adopt encryption technology
6 and encrypt their data.
7 What we found is that when states had these
8 encryption exemptions in their data privacy rules that
9 basically promoted encryption, we find that more
10 hospitals adopted encryption and data loss went up.
11 Why is that? Human error. So what happened was the
12 technology, the policy was pushing a technology;
13 people -- firms responded by adopting the technology,
14 but it didn't achieve the policy goal.
15 And I think that the theme there that I want
16 to kind of draw out from this research that I'll come
17 to again is that when we think about designing our
18 policies, we want to think about the goal, and we want
19 to think about the details of how we get there. And,
20 so, focusing on a particular technology, especially in
21 a sphere where technology is evolving, can often lead
22 to weaker effects than we expect or even reverse or
23 perverse effects.
24 That theme is going to come up on the second
25 paper I want to tell you about, which was a paper that

1 looked at the efforts -- some policy efforts -- that
2 were made to encourage the adoption of health IT as
3 part of the HITECH Act. And specifically the goal,
4 one of the goals, was to try to encourage hospitals to
5 exchange health information about patients. The
6 policy lever that was applied in trying to achieve
7 this goal was promoting a technological capacity on
8 the part of the hospitals. So they had to show that
9 they had the technology to be able to share data and
10 to exchange data, and that it could be interoperable
11 with other systems.
12 What we find -- so what we find in our
13 research is that the focus on technology again was not
14 sufficient. We find in our research that hospitals
15 that were part of big hospital systems, with lots of
16 hospitals in them, were actually more likely to
17 exchange data with other hospitals. They were more
18 likely to have the capacity to exchange data, but they
19 exchanged data internally with other hospitals in
20 their system.
21 What they didn’t do, or what they were much
22 less likely to do, was to share data outside of their
23 system, okay. And, so, the reason for that is that
24 they didn’t necessarily have a business incentive to
25 want to share the data, right? The hospital is

1 producing this information. They are creating medical
2 records, they're collecting information, they're
3 storing it and they are not necessarily going to want
4 to give it away freely to their competitors, to other
5 hospitals in their local area, even if there is a
6 policy benefit or a public benefit for that.
7 And, so, what we have is this creation of
8 information silos; by focusing on technology we didn't
9 prevent that. So this echos, again, the first theme
10 about thinking about how we design our specific
11 interventions and how that's important. The second
12 theme I think is even broader, which is, it relates to
13 this question of how do we think about data, health
14 data about individuals, but actually consumer data or
15 individual data more broadly, okay.
16 And this question about ownership, I think,
17 is a little bit new and special here. The fact is
18 that companies or businesses or organizations are
19 creating data. They are collecting data. It's their
20 data. They might think they own it, but it's data
21 about people. And, so, people might think that they
22 have some ownership, and it's actually ambiguous who
23 should own the data, and even who does own the data.
24 And I think this ambiguity about property
25 rights, and about even what there should be, is an

1 area of concern and an area that leads, I think, to
2 some potential inefficiencies. It also means that
3 when we think about privacy policy there's not a clear
4 binary on/off of do we protect privacy or not, but
5 there's -- or how much do we protect along a single
6 linear dimension, but there's questions about what
7 aspect of privacy are we targeting? Are we talking
8 about the ability to collect it, to store it, to
9 exchange it, or to use it? Are we talking about
10 users' rights to access their own information?
11 So the third paper that I want to tell you
12 about, this third research paper also in healthcare,
13 looks at variation in policies, in privacy policies
14 that actually took different approaches, all to
15 address the same common issue of genetic privacy. So
16 different states took different approaches to
17 protecting genetic information, and what we look at in
18 our research is how these different approaches affect
19 the rates at which individuals were willing to get
20 genetic tests to predict their cancer risks. So this
21 can be very sensitive information; you think privacy
22 protection could be important.
23 What we find here is that the type of the
24 protection actually makes a big difference, and that
25 the different forms of protection had completely

1 different effects. So a policy approach that focused
2 on informed consent and letting individuals know about
3 exactly who had the property rights, and how that
4 information was going to be used, and about their
5 privacy concerns actually had a significant effect of
6 lowering rates of testing. When the privacy laws
7 instead emphasized or required a, required permission
8 from consumers for their own data to be redisclosed or
9 sent to a third party, so it gave the individual more
10 ownership, that actually promoted adoption.
11 A third approach that's actually the most
12 common approach used in privacy protection for genetic
13 information is a focus on how the data can be used.
14 And, so, rules like that that limit the ability of
15 employers or insurers to use genetic information, in
16 terms of pricing or market interactions, actually had
17 no effect on adoption. So these antidiscrimination
18 laws that focus on the use of data were not effective.
19 There are various reasons for these effects,
20 and maybe we'll have time to talk about it more in the
21 Q&A, but I'm running out of time, so I want to say
22 that, right, so that this, again, I think, highlights
23 this theme earlier about the details of the policy
24 making a big difference. And even policies that
25 almost sound like they're the same thing, a genetic

1 privacy law can actually have opposite effects
2 depending on the particulars of how it's specified.
3 Okay, so to summarize, I want to just relate
4 this to the two topics of the panel. First of all, as
5 we relate to competition policy, I think the research
6 we found with the creation of data silos in big
7 hospital systems emphasizes the important concerns
8 that we should have about big data and the potential
9 to lock in consumers, and how this does create
10 potentially a competitive advantage for bigger firms
11 and make it harder for incumbents -- sorry, make it
12 harder for entrants and small firms to compete. And
13 it relates to the exchange of information.
14 Second point is that when we think about
15 innovation policy, all of these papers that I've
16 talked about and some that I haven't had a chance to
17 talk about but that Avi and Anja have talked about, I
18 think all show that there is a real connection between
19 privacy, regulation, and future innovation, and in
20 many ways, privacy policy is innovation policy in
21 healthcare and elsewhere.
22 DR. GILMAN Thank you.
23 MR. STRAHILEVITZ: Great. Hi, thanks. So
24 I've titled this "Confessions of a Convert," and I'll
25 explain that, which is that I've been writing about

1 privacy for 16 years, and often find myself at
2 conferences of privacy law scholars, all of who favor
3 a much more aggressive privacy regulation, and I've
4 been one of the few people to say, oh, let's apply the
5 brakes, let's think about the tradeoffs involved. So
6 I'll talk you through about a decade's worth of
7 research and how I got to where I am now. So exactly
8 a decade ago, I started thinking about ways in which
9 the proliferation of reputation information about
10 individuals was providing all kinds of opportunities
11 for law and legal systems.
12 Yelp, and regulation of the medical
13 profession by the AMA, are substitutes for one
14 another, and in a lot of respects, the kinds of
15 information that's generated by services like Yelp or
16 TripAdvisor provides a really nice substitute for
17 government inspectors and those sorts of mechanisms in
18 making sure that consumers are getting their money's
19 worth and that firms are behaving appropriately.
20 About half a decade ago, I started thinking
21 about the political economy of privacy, why
22 differences arise, especially between the United
23 States and Europe, which have only become more
24 pronounced since then, and tried to emphasize that
25 privacy regulations create winners and losers, and

1 that we can predict who they will be, and that
2 sometimes the impacts of privacy regulations are often
3 regressive.
4 And then just a couple years ago, I started
5 to think empirically about research. This is actually
6 a 2016 paper rather than a 2014 one. But in any
7 event, what we tried to do was make some progress on
8 one of the chief topics for this panel today, which is
9 to figure out, well, why aren't markets developing?
10 We spent a lot of time looking at the use of automated
11 content analysis with consumers' emails for the
12 purposes of serving them with personalized
13 advertisements.
14 We asked consumers -- a nationally
15 representative sample of them -- how invasive do you
16 regard these sorts of practices where gmail is looking
17 at the contents of your emails and giving you
18 personalized ads, and they said quite invasive -- 7.63
19 was the mean response on a scale of 1 to 10. And at
20 the same time, we said, well, would you be willing to
21 pay any amount of money to avoid it? No was the
22 response of about two-thirds of the sample. And
23 that's another example of the privacy paradox that's
24 been mentioned in some of the other research.
25 Among those who were willing to pay the

1 median willingness to pay stated in surveys, so not a
2 revealed preference, which was $15 per year, and
3 looking at how much consumers said this data was worth
4 to them versus how much we know it's worth to Google
5 or Facebook or Yahoo. We think that probably those
6 platforms value it more than the individual consumers
7 do, at least with respect to personalized ads based on
8 email contact.
9 So that's sort of what I've been working on
10 and how I arrived here today, and I do want to stick
11 by some earlier views that I've articulated, which is
12 that there's still lots of reasons to think that the
13 U.S. has done quite well by having a relatively
14 permissive environment, that we've seen a lot of
15 innovation, that there are technologies that have
16 developed in the United States that couldn't have
17 developed in Europe because people would have needed
18 permission to do -- to develop the kinds of
19 applications that have proved to be so successful,
20 both here and there.
21 But at the same time, there seemed to be
22 real breakdowns in the self-regulatory model in
23 laissez-faire approach. One of these breakdowns is
24 that consumers often don't know about all the problems
25 that can arise, whether it's on a data security side

1 or on a privacy side, with robust journalistic
2 efforts, with robust enforcement by the FTC.
3 Consumers can find out and make informed decisions.
4 It's not clear that adequate resources are being
5 developed to identify privacy snafues or data security
6 snafues by either of those institutions.
7 And the proof is in the pudding, to some
8 extent, which is to say that if you ask Americans, as
9 Reuters did a few months ago, whether they trust
10 Facebook to obey the laws that protect their personal
11 view -- protect their personal info, the majority will
12 say, no, we don't trust Facebook, even though Facebook
13 has a very, very strong financial incentive in getting
14 people to yes on that question. And some of the other
15 technology companies with probably better records
16 generate majority saying that we trust you, but not
17 anywhere near supermajorities.
18 Okay. So as we think about privacy from
19 where we are in 2018, I think we can talk about some
20 of the fundamental ways in which the world's looking
21 worse for privacy and the laissez-faire approach than
22 it was ten years ago. Jane talked about Cambridge
23 Analytica. Hopefully we'll be able to talk about that
24 during the Q&A.
25 I probably think there are things we can all

1 agree about that Cambridge Analytica did wrong. Most
2 prominently, I should have the right to reveal or not
3 reveal personal information about myself. And I
4 didn't choose to delegate that to the 800 friends I
5 have on Facebook. And when Facebook organized their
6 API, such that any of 800 people could choose to
7 reveal a lot of information about me that was
8 potentially sensitive, that strikes me as a
9 technological breakdown, one that potentially lends
10 itself to regulation.
11 We're seeing, especially in the last
12 election cycle, in the last couple of years, doxing,
13 instances of online harassment, online trolling that's
14 really off the charts. And I think it's scaring off
15 the sensible center from a lot of political discourse,
16 scaring off women, scaring off people of color, really
17 compromising fundamental values that are bedrocks of
18 American and democratic societies.
19 More generally, think about how often you
20 answer your cell phone now versus how often if it's an
21 unrecognized number you just let it ring and go to
22 voicemail. Lots and lots of people, as a result of
23 breakdowns in do not call, and flagrant violations of
24 do not call, lots of people have stopped answering
25 phones. Think about the cost of that. Those costs

1 are real, and they're felt by consumers, they're felt
2 by people trying to make phone calls.
3 And we can look overseas and see some of the
4 things that's happening with social credit scoring in
5 China, and be really worried about some of the
6 potential for abuses with these kinds of technologies.
7 So just in the minute I've got left, let me
8 identify a couple of issues. The first, which I think
9 we'll talk about on the next panel, is there's lots of
10 inconsistencies between GDPR and the American
11 approach. The world is going with the European
12 approach, not with the American approach. That makes
13 -- that causes real problems for American companies,
14 and for the free flow data across the Atlantic or
15 across the Pacific, between North America and Latin
16 America.
17 So one idea that harkens back to work by
18 Victor Mayer-Schonberger in his 2009 book Delete,
19 which formed the basis for the European right to be
20 forgotten, turns out, I think, to have some modern
21 adaptations, which is here's a proposal for deletion
22 by default, okay. The main problem with the right to
23 be forgotten, as currently implemented by the European
24 Union, is that it's unconstitutional under their First
25 Amendment law.

1 There are ways to accomplish the same kinds
2 of objectives without running aground of any
3 constitutional problems, and deletion by default,
4 which is certain data should automatically be deleted
5 by, let's say, ten years after it's collected,
6 purchase history information, Facebook posts, et
7 cetera, and people could always choose to opt out of
8 that, which is, I think, both constitutionally
9 permissible under the U.S. regime, and also probably
10 better.
11 So Google puts out really useful data about
12 how often people are actually exercising the right to
13 be forgotten, and it turns out that the rate of
14 utilization is about 0.15 percent of European
15 residents have exercised their rights under the right
16 to be forgotten, under a generous interpretation of
17 data from the Google transparency report.
18 So as we think about, well, what are the
19 kinds of purposes that are vindicated by the right to
20 be forgotten, the right to be forgotten, as employed,
21 which puts the onus on the consumer to delete
22 information, isn't working. Something like deletion
23 by default would work much better and it's an approach
24 worth considering. Thanks.
25 DR. GILMAN: Mr. Telang.

1 DR. TELANG: I'll try to be quick so that we
2 have opportunities for others to chime in as well. My
3 name is Rahul Telang. I'm a Professor at Carnegie
4 Mellon University. I'll pick up from where Lior left.
5 I'm not as pessimistic, I think, as maybe he is about
6 the power of markets and competition in solving some
7 other problems, but let me just highlight and maybe we
8 all agree with this. But, in an ideal world, really,
9 what we want to know is where exactly is the friction.
10 Rather than thinking about what regulations will work,
11 we want to probably sit back and ask, well, what
12 exactly is the friction that people face when they're
13 dealing with the customer data, or our own data, and
14 firms that are utilizing that information.
15 You know, think of that as essentially an
16 externality problem, that firm has my data, they are
17 somehow misusing it, or extracting too much rent out
18 of it than I would like them to do it, and that's the
19 externality they're imposing on me. And the question
20 is that how can we push that externality back onto the
21 firms.
22 Maybe I'm misquoting, but, you know,
23 generally the FTC has looked at this as a problem of
24 can we make information available to consumers so that
25 they can make better informed decisions, more or less

1 without imposing too much regulation, and I think
2 that's what Lior also sort of mentioned. And I'll
3 come back and talk a little bit about where we stand,
4 but then the idea is that, well, this should lead to
5 across-the-board innovation, both on the demand side
6 and actually at the supply side, right? I mean, if
7 you want a whole lot of privacy, then there should be
8 some firms available who are willing to provide that
9 privacy, maybe not at the firm level but maybe at the
10 intermediate level.
11 Maybe you will use a certain browser with
12 certain features in it that'll make sure that Facebook
13 might or might not be able to collect your data.
14 Maybe you're not able to do it, but at some level, the
15 idea is that -- both that there is going to be a
16 demand for privacy, security, whatever you want to
17 name it, but then also there is a potential
18 possibility of supply for privacy security.
19 And, you know, I guess the question maybe
20 some of us believe that this model can never work,
21 maybe some of us might believe that at least partially
22 this model can work. I mean, fundamentally, this
23 problem maybe just comes down to whether security and
24 privacy can be a feature that the firm can advertise,
25 and it doesn't have to be that whether we are willing

1 to pay for it monetarily. There are some other ways
2 people are willing to pay, including market share,
3 transactions, how long we want to have a relationship
4 with the firm, so on and so forth, or whether it is
5 just a bug that we are worried about, and then
6 everybody's trying to figure out a way to undermine
7 that.
8 In some aspect, the evidence is not
9 completely negative. And, in fact, if you think about
10 it, you know, maybe the data breach notification law
11 would be a good example where, you know, it forced a
12 fair amount of disclosure, at least on the parts of
13 the firm. And if you look at it, we are holding a lot
14 of firms actually accountable, even if not the firms
15 directly, we do punish the executives.
16 I mean, Equifax CEO had to resign because
17 there was a data breach. Mark Zuckerberg did have to
18 come in front of the Congress and actually provide
19 some details and, you know, at least some
20 embarrassment, Wall Street Journal reporting and the
21 New York Times press, which probably none of them they
22 would like. So there is a little bit of externality
23 that we are pushing back on the firm without any, you
24 know, serious regulation on what you can do with my
25 data or what you cannot do with the data. But at

1 least in terms of making it clear to people that,
2 look, these people might or might not be abusing of
3 our data.
4 And there is really no impact, no way for us
5 to empirically measure whether things have gotten
6 worse or better, but there is at least some evidence
7 that maybe firms are being elastic to some of those
8 changes in terms of how they are storing of our data,
9 how they are sharing of our data, so on and so forth.
10 I think, you know, one other point is that
11 sometimes we talk about, you know, when we're
12 designing policy, can you share the data, should we
13 stop the data, sharing between firms or data abuse. I
14 think at some level you will also think of, maybe
15 there is certain part of the data that is off limits,
16 and maybe there is some other part of the data that it
17 perfectly might satisfy the firm.
18 So, I mean, think about online
19 advertisement. Sure, some targeting is very
20 effective. We need some data for the targeting to be
21 very effective, but maybe there is a whole lot of
22 information that the firm uses that's really not that
23 effective, or they can find proxy for that and be able
24 to be reasonably effective without knowing my Social
25 Security number or name or what have you, and some

1 other proxies might work, too. So it doesn't have to
2 be always a zero sum game.
3 One more point. One more point I want to
4 highlight is that it's also we have to remember
5 sometimes that sometimes it's the uncertainty in
6 regulation that actually can hurt innovation more than
7 the regulation itself sometimes. Again, if you go
8 back, when the data breach notification laws came,
9 everybody complained about it, so much compliance is
10 happening, so much compliance costs are happening. I
11 don't think anybody complains about it. In fact, a
12 firm says, you know, instead of 50 different states, I
13 would rather have one national law so that, you know,
14 I can kind of get over with some of the -- or lower my
15 compliance cost. Nobody is saying that we shouldn't
16 be having those laws.
17 And, in fact, if you think about it, there
18 are second-order and third-order benefits to sometimes
19 these regulations. For example, if you talk to cyber
20 insurance policymakers, they will -- everybody would
21 agree that actually the data breach notification laws
22 led to so much cyber policy being written to provide
23 insurance against data breaches, because some of those
24 regulations actually provided some certainty about
25 what the cost would be, what the floor would be, what

1 the ceiling would be. And that led to, you know, some
2 of the significant growth in cyber insurance, which
3 also then creates good practices and what have you.
4 So there are these secondary and tertiary benefits
5 sometimes with regulations, you know, lack of
6 uncertainty can help, but it is a lot of work, not
7 just in the privacy space, but automobile space,
8 health space, environment protection space, which
9 seems to argue that if you reduce the uncertainty and
10 stop sending unclear signals to the industry actually
11 it can be very helpful.
12 Again go back, the automobile industry
13 bitterly opposed the seatbelt and the air bag. And
14 once those regulations actually came in, they figured
15 out a way to actually live with it, not only live with
16 that, actually innovate where all of us benefitted,
17 the consumers and the safety, but they also were able
18 to sell it as a feature where they were able to
19 actually price them out.
20 Something to think about where we think
21 about regulation that sometimes having some certainty
22 can be actually much more useful than sometimes just
23 arguing about what the regulation and the content of
24 the regulation should be. So I'll stop here.
25 DR. GILMAN: Okay, terrific. I guess I'd

1 like to start really with a question for the entire
2 panel. We've had -- I'm sort of reminded, we've had
3 some really excellent research-based panels. We are a
4 research-based agency. We do research-based law
5 enforcement on both the competition and the consumer
6 protection side. We do research-based policy work,
7 but I'm thinking of various threads that have come up
8 over the two days that have reminded me of an outdated
9 and terribly unfair label for economics as the dismal
10 science.
11 So what do I have in mind here? There's
12 quite a bit of research on, certainly, market
13 imperfections, whether or not they're durable market
14 failures, people might debate, so very high
15 information costs, very high maybe information
16 asymmetries when it comes to privacy issues, both
17 between firms and consumers, folks like we're sitting
18 up here, and indeed between firms as vendors and firms
19 as consumers.
20 Certainly, there's evidence of people
21 suffering these kinds of information privacy-related
22 harms, ranging from identity theft to any manner of
23 other things. We've had some very interesting and I
24 think useful and important research on some of the
25 limits of intervention in this space, right.

1 So first competition issues surrounding
2 privacy interventions, which may not always but may
3 tend to favor large firms and incumbent firms at the
4 expense of smaller firms or entrants. Certainly,
5 unanticipated effects from privacy regulations, which
6 sometimes, I'm thinking of some of Professor Miller's
7 research, say with Catherine Tucker, just health
8 effects that weren't anticipated with IT regulations.
9 One thing, or even, you know, you get -- you flip the
10 sign of your anticipated effect as with some of the
11 data security regulations. It doesn't mean that all
12 data security regulations will have these effects, but
13 it's certainly not a positive result.
14 And, so, I guess one thing is sort of just a
15 question going down the line. It seems that there is
16 maybe some pertinent research, but quite a bit less
17 that answers the policy question, what do consumers
18 win with one or another privacy or data regulation
19 intervention?
20 Plainly, consumers have concerns in this
21 space. I don't think anybody would deny that, but one
22 question is, do we have an adequate research basis for
23 saying, first of all, that these interventions will
24 actually be effective, whether in one silo or another
25 or across large sectors of the economy; and, second,

1 you know, an adequate way of assessing consumer
2 benefits, right?
3 So we have costs when we fail to intervene;
4 we have costs when we intervene. Have we developed a
5 good science of assessing and then actually achieving
6 concrete benefits? Anyone? We'll go down this way
7 unless someone wants to pass.
8 MS. BAMBAUER: So I agree that we have very
9 good research on some narrow questions. I continue,
10 though, to -- and I'm basically restating what my
11 opening comments were -- that I continue to be
12 concerned that we haven't even really defined the
13 harms well enough to then know how to measure them.
14 And that's really sort of more of a philosophical
15 question than even an empirical one.
16 And so without it, though, the foundation
17 for doing the empirical research that we would need to
18 do is lacking. So, yes, I'm concerned that we don't
19 have enough of an evidence base quite yet.
20 DR. GOLDFARB: So if we weren't the
21 dismal -- we're looking for some kind of Pareto-
22 optimal solution where everyone -- there's a market
23 failure where everyone would be better off because we
24 have a regulation. And that -- it doesn't happen
25 enough. Maybe credit scoring and the Fair Credit

1 Reporting Act was a privacy regulation that was
2 Pareto-improving but -- and in some sense we've been
3 looking for that in the privacy space for 20 years.
4 It's not obvious that such a thing happens.
5 It seems pretty clear that the empirical work says
6 there's a tradeoff. There's a tradeoff between, you
7 know, more privacy might mean less innovation; it
8 might mean less competition. I have some other work
9 that suggests it might mean more inequality but that
10 doesn't mean that it's a bad thing. We've also heard
11 a whole bunch of reasons why privacy is good.
12 And, so -- you know, and you said, you
13 know, this regulation's not effective. In some sense,
14 a lot of the regulations have been extraordinary
15 effective. If the goal was to restrict data flows,
16 the regulations restrict data flows. They do exactly
17 what they were supposed to do. That just means that
18 ads become less effective or healthcare doesn't work
19 as well. But they are effective in terms of their
20 explicit goals on restricting data flows.
21 So I just think it's important to realize
22 there's tradeoffs here. These are hard decisions.
23 And in some sense the empirical work -- like, as an
24 economist, I don't -- certainly I don't feel like I
25 have the skills to tell you about those tradeoffs.

1 What I can say is what those -- you know, I can really
2 lay out well is what those tradeoffs are.
3 DR. LAMBRECHT: Okay, so two points on that.
4 I think one interesting point is that the perception
5 of privacy changes. You know, what we regard today as
6 privacy-relevant, or what was regarded 20 or 50 years
7 ago as privacy-relevant, or sensitive information, may
8 not be regarded as such anymore today, at least not
9 all of it. And if I look at my younger students, they
10 might still have a different perception of which data
11 are, you know, privacy-sensitive than I have.
12 So I think one aspect is that these
13 sensitivities, and therefore, the tradeoffs, also
14 change over time. And I think this is just one point
15 to keep in the back of our mind as we are trying to
16 think about policies.
17 The second point is that I do believe that
18 these tradeoffs are highly context-dependent, and the
19 harms and the benefits are very context-dependent.
20 And I know similar to what Avi said, I think it's very
21 hard to lay out the overall, overarching framework for
22 how these tradeoffs should be sold.
23 So think, for example, a retailer that holds
24 information about your browsing behavior. We had the
25 example of Target earlier, but think about this

1 happening online, and using it in a way that one
2 consumer feels as privacy-invading. On the other
3 hand, the retailer might also use that information to
4 structure information displayed on -- in response to
5 product searches on their website, which may have --
6 for consequences of the consumer gets better selection
7 of product, a better choice, makes a better choice,
8 and may spend less time on making those choices.
9 And, so, this is what I mean with context-
10 dependent. There are settings where the harms may
11 more obviously -- or that the benefits may more
12 obviously outweigh the harms, and maybe other settings
13 where the harms may play out in very different ways,
14 way outside the specific context, for example, in
15 online advertising.
16 DR. MILLER: So I think these are the tough
17 questions. A few thoughts. One thing in thinking
18 about the costs and benefits of privacy protection, I
19 think it’s always helpful for me to step back and
20 think about the costs and benefits of privacy itself
21 and then think about the privacy regulation.
22 I think that, you know, some of the results
23 that we find of privacy regulation leading to less
24 adoption of technology could actually reflect an
25 underlying latent benefit or need for that regulation.

1 So to the extent that informing consumers about
2 privacy risks makes them less likely to do something
3 that entails a privacy risk, it's not obvious that
4 that's inefficient. It could be that they were
5 inefficiently unaware of privacy risks, or that it
6 wasn't salient to them.
7 And so I think that there's sort of a
8 question of how much are we -- there's a question --
9 there's tradeoffs involved in the privacy policy, and
10 I think also the point Avi made earlier is important,
11 that no privacy protection is also going to be a
12 problem. So when we think about the costs and
13 benefits of privacy protection policy, one of the big
14 costs we want to think about from not protecting
15 privacy is all of the privacy-protecting activities
16 that individuals will engage in in the absence of
17 regulation that protects them.
18 So if they don't feel that their data are
19 safe, they may not download apps on their phone. They
20 may not do different kinds of things. They may shut
21 off Facebook or never post pictures of their child
22 online because they don't feel that that privacy is
23 protected. And, so, we think about those potential
24 benefits from privacy protection. We want to take
25 those into account.

1 At the same time, you know, my own research
2 and research by others does show that sometimes
3 regulation, well intended, can have real harms in
4 terms of slowing the diffusion of technologies. I
5 didn't talk about this paper, but this other research
6 I did with Catherine Tucker looked at privacy laws
7 protecting health privacy led to less adoption of
8 electronic medical records in U.S. hospitals. And
9 then we show in another paper that this actually --
10 this slower adoption led to greater mortality, greater
11 infant mortality, because this technology itself was
12 saving infants' lives.
13 And, so, there are, you know, real
14 substantial costs to not protecting privacy but also
15 to not having these technological innovations in
16 healthcare and other spheres.
17 I just kind of want to give some, another
18 point about just the very pessimistic results that I
19 have about. I think the tradeoffs are real and I
20 think they're important to consider, but I don't want
21 the message to be -- so I think the message should be
22 that we should be cautious, and the details matter,
23 and there are a lot of ways we can go wrong. But I
24 don't want the message to be that that's an excuse for
25 inaction or for just throwing our hands up and not

1 trying.
2 I think what it means is that we should have
3 modest expectations. We should put in some effort
4 before we make rules and to try to look at the
5 research, try to experiment, try things on a smaller
6 scale, maybe where the impact is not going to be so
7 bad if we get it wrong. And try things. And then,
8 you know, be flexible.
9 If we have a policy, let's monitor, and
10 let's see if it's working or if it's not working, and
11 if it isn't, let's change it. So I don't think that
12 it's something that we sit down and, you know, in a
13 room devise the optimal solutions, you know, QED X
14 star, and we go with that. I think we just want to be
15 aware of the issues and then actively, continuously
16 try to work on that.
17 MR. STRAHILEVITZ: I think I agree with
18 what's been said. It's hard to do cost-benefit
19 analysis for privacy because privacy harms are and
20 always have been hard to quantify. Okay, so let's
21 start with that, but that doesn't mean that when we're
22 trying to do something like cost-benefit analysis we
23 have to throw our hands up in the air.
24 So one thing that you can try and do is look
25 around you, and think about whether the ways in which

1 the legal system deals with privacy are typical or
2 exceptional. And, so, I want to provide two lenses
3 from doing that. One way you can do that is by
4 looking at how privacy gets treated versus how other
5 kinds of big goofs get treated. All right, so one
6 thing that's really unusual about the way that privacy
7 is regulated by the Federal Trade Commission is that
8 the Federal Trade Commission does not start out with
9 fining authority for big privacy goofs. And, so, when
10 I explain to laypeople that it's only because Facebook
11 had previously entered into a consent decree with the
12 FTC that the FTC has the ability to impose monetary
13 fines as a result of Cambridge Analytica, they're very
14 surprised by that. You're probably not surprised by
15 that, but people you talk to who are not lawyers,
16 regulators, policy people are probably extremely
17 surprised.
18 And, indeed, that makes the United States
19 exceptional when compared to the way that other
20 countries deal with privacy, and also other parts of
21 the U.S. regulatory system deal with big goofs, right?
22 So when Ford Pintos started exploding, right, because
23 of faulty gas tanks, we didn't say, okay, Ford, you
24 know, if you make another car that starts exploding,
25 we will fine you for that but, you know, you get one

1 free goof. This was a badly designed car, you're off
2 the hook, right?
3 We kind of have that response with respect
4 to privacy, at least from a federal regulatory
5 perspective. There's other things that will happen,
6 like class action lawsuits that Facebook will be
7 dealing with. They'll lose some consumers. I'm not
8 suggesting that they face no repercussions, but it is
9 a little bit unusual how we treat privacy vis-a-vis
10 other kinds of products, or other kinds of interests,
11 and how the U.S. treats privacy versus the way the
12 rest of the developed world treats privacy. And I
13 think that can be informative in terms of how we
14 should think about what the right approach is.
15 DR. TELANG: The generic takeaway is it's
16 hard to say anything simply because -- is there a
17 generic takeaway that we can take, you know, from all
18 the research and the meta research? It's hard because
19 it's a very heterogenous problem. I think one thing
20 that I feel we can take away is that, you know,
21 consumers are really good at compartmentalizing, that
22 they -- for us, the transaction costs are very high.
23 Even reading one line every time we transact
24 with a website is just too costly for us. However,
25 you know, there's some research that I'm working on --

1 and one of the challenges of privacy research at some
2 level is that if you go survey-based then you're
3 always, you know, overestimating everything, because
4 if you ask people, and I think people already in the
5 last panel talked about the variance between survey
6 and behavior is so large that you wonder what you can
7 glean. Plus there is a long-term issue, too, but,
8 anyway, we are actually working with the actual
9 transactions. We're working with a very large bank
10 which has very detailed information on how people
11 transact. And one of the things that we clearly
12 notice is that people care if something goes wrong
13 with their financial -- that is, if something goes
14 wrong with the credit card, with the bank, with
15 something that has direct money involved, they are a
16 lot more careful. They're a lot more willing to
17 punish the firm if it's going to have -- if a fraud is
18 going to happen on your bank or your credit card
19 account, and we can see that in the data.
20 On the other hand, if Home Depot loses your
21 data or if Target loses your data, we are a lot less
22 willing to punish them. Our transaction behavior
23 doesn't change a whole lot, maybe because we think
24 that, well, Lowe's isn't going to be any better.
25 Maybe we think that the financial cost is really not

1 very high, the credit card is going to pick it up,
2 I'll get a new credit card, I really don't want to
3 kind of go through all the hassle.
4 So I feel like it's very context-dependent.
5 If I feel that I'm going to incur a significant
6 financial harm, I think people really take action.
7 And if they feel that, well, the financial harm is
8 secondary, tertiary, might harm happen sometimes in
9 the future, might not happen at all, I think they tend
10 to kind of ignore many of the privacy red lights, if
11 you would, in that regard.
12 MS. BAMBAUER: So I just wanted to add one
13 thing. I think it might be useful to distinguish the
14 intrinsic value of privacy, that people might want
15 control over the access to their data and the ultimate
16 use of their data, from the downstream harms that
17 privacy might protect. And I find that if we identify
18 the downstream harms then we can try to measure them,
19 and that gives us a lot better of a chance, I think,
20 to do this tradeoff.
21 But with the intrinsic value of privacy, you
22 know, like I don't quite know what a privacy goof, for
23 example, is. I know that when a Pinto explodes,
24 nobody wants to be in that Pinto, but -- and everyone
25 basically ascribes roughly the same value to, you

1 know, to their health and life and also their money,
2 but the intrinsic value of privacy is not clear to me,
3 and I think Ginger Jin mentioned yesterday that a
4 problem in this area is that preferences -- to the
5 extent they can be measured at all -- are widely
6 varying. They are time-dependent. They are dependent
7 on so many things that I don't even know if it's
8 useful to think about intrinsic values, and maybe we
9 should be looking at the downstream.
10 DR. GILMAN: So thank you. Interesting
11 conditions under which someone does want to be in a
12 Pinto, but so, you know, we've heard a lot, I think,
13 here about context, and maybe it's not surprising that
14 people have done very fruitful research in specific
15 contexts, specific industries, specific technologies,
16 right, whether we're talking finance, consumer credit,
17 healthcare, different research on healthcare systems'
18 adoption versus other issues in healthcare.
19 I mean, maybe in some ways, I mean, to pick
20 up on something that was mentioned about FTC, this is
21 convenient for the FTC's approach to privacy, both on
22 the competition side and the consumer protection side,
23 right? We look at transactions, at mergers that may
24 unduly burden competition and do harm to consumers.
25 We have a framework for doing that, whether in the

1 information economy or elsewhere.
2 On the consumer protection side with privacy
3 and data security enforcement we look for harms,
4 right, specific harms, cognizable under the FTC Act or
5 under special statutes, and evidence for concrete
6 harms and concrete context. And, under unfairness,
7 harms that aren't offset, say by countervailing
8 efficiencies. But I'm also wondering a little bit,
9 first, it was mentioned, I think by Professor
10 Strahilevitz -- maybe I just got it wrong -- but about
11 our authority. Well, maybe two of you, conditions
12 under which we can levy fines or pursue different
13 remedies.
14 So one question I would ask is simply what
15 adjustments might be recommended to our authority or
16 not to improve our ability to address context-specific
17 harms, whether on the competition side or on the
18 consumer protection side? And then I guess second,
19 sort of what's left out? We don't do everything. Are
20 we optimistic or pessimistic about extending some of
21 this learning to calls for much more general,
22 overarching privacy regulation, whether we're talking
23 about, you know, compare and contrast, say, HIPAA with
24 the GDPR approach or, you know, Fair Credit Reporting
25 Act with the GDPR approach, federal, state, industry

1 or overarching?
2 I guess both -- so two hard questions if we
3 could just go down the panel and I guess -- I think
4 we've actually got eight minutes, but thank you, by
5 the clock. We're scheduled to go until 4:00. No?
6 That's what it says here. Okay. Well, sorry, if we
7 could go briefly.
8 What was the question now?
9 DR. GILMAN: So FTC authority is one. Would
10 you alter it based on any findings? Maybe that's
11 enough.
12 MR. STRAHILEVITZ: I'll take a stab at it.
13 So I think one thing that would be really useful for
14 the FTC to think about are, what are the kinds of
15 problems that the courts have a hard time remedying?
16 And so, you know, a classic example is the data
17 breach, okay? So courts really struggle with data
18 breaches for the following reason. Let's suppose a
19 whole bunch of data is breached. Let's suppose that
20 every American faces a baseline risk every year of 2
21 percent -- 2 percent chance they'll be victimized by
22 identity theft, okay?
23 Now, let's suppose that the people whose
24 data was breached face a 3 percent chance of identity
25 theft. And let's say we're talking about tens of

1 thousands or hundreds of thousands of people. We know
2 that the breach was costly, very costly. We know that
3 it elevated the risk for people in the relevant pool
4 by 50 percent, but courts are going to be looking for
5 proof that a particular individual suffered identity
6 theft, the classic harm in a data breach, as a result
7 of this particular breach, okay?
8 You'll want to -- at least there's a circuit
9 split in terms of dealing with these issues -- but
10 you'll want -- in order to have an airtight ability to
11 get, first, standing and then establish the causal
12 nexus, you're growing to need to show a court that
13 it's more probable than not that particular
14 individuals suffered particular out-of-pocket harms,
15 pecuniary harms, as a result of a beach. And I think
16 courts have a hard time with those kind of cases.
17 That's not the standard model of how a court
18 proceeds. The standard model of how a court proceeds
19 is show me in a civil suit that it's more probable
20 than not that your injury resulted from their mistake.
21 So that's an area where we know statistically a lot of
22 people are harmed, but we also know courts, Article
23 III courts, are going to really struggle with it,
24 where I think there's a lot of room for the FTC to do
25 really good work because the FTC can litigate and

1 enforce on behalf of the aggregate.
2 And it doesn't so much matter whether any
3 individual happens to have been victimized because of
4 the baseline risk of identity theft or because of the
5 elevated risk resulting from a particular breach.
6 And, so, I think that when the FTC thinks about its
7 authority it should think about, okay, what are class
8 action lawyers doing and is any of that accomplishing
9 any good? What is self-regulation doing and is any of
10 that accomplishing any good? What are state attorneys
11 general doing, and is any of that accomplishing any
12 good? Okay, what are the thing they're bad at? Odds
13 are good that those are things that the FTC can add
14 the most value through.
15 DR. GILMAN: Thank you. Apparently, we're
16 also bad at time management, so I apologize for
17 cutting this short. Thanks very much to our panelists
18 for their contributions and thanks for your attention.
19 We do not have a break here. We're going to shift
20 right to -- sorry?
21 We have a five-minute break, so I'm wrong
22 about that, too. Five-minute break, but please come
23 back promptly. We've got a panel discussing GDPR.
24 Thanks to our panelists.
25 (Applause.) (End of Panel 4.)

1 PANEL 5: THE POTENTIAL IMPACT OF GDPR ON
2 COMPETITION AND INNOVATION
3 MR. STEVENSON: Hi, everybody. It's 4:00.
4 That means it's time for the last panel of the day,
5 and this is the panel on the potential impact of GDPR
6 on competition and innovation. My name is Hugh
7 Stevenson from the Federal Trade Commission.
8 We just heard a general discussion about the
9 effects of privacy regulation on competition and
10 innovation. And in a sense, this panel is now a kind
11 of case study to look in more depth at that general
12 question. And here it's the effect of the GDPR, the
13 General Data Protection Regulation that we've heard
14 referred to a number of times throughout the
15 conference.
16 This regulation, which entered into force in
17 May of this year in the European Union, it's obviously
18 still early days for GDPR, but we have a distinguished
19 panel here lined up to talk about its potential
20 effects and the effects more generally, I would say,
21 of the privacy approach reflected in the EU. When we
22 talk about the effects of GDPR, it's not just the
23 effects of the new regulation that came into effect
24 that added some new features to what existed in Europe
25 before, but also the European approach, which as we've

1 heard, varies in some significant ways from the
2 American approach, dating back at least to the '95
3 data protection directive.
4 We have lots of panelists here and little
5 time, so I've asked each speaker to give a few initial
6 thoughts before we proceed to questions. And we'll
7 start with Renato Nazzini, who's a competition expert
8 and a Professor at King's College London, and I turn
9 the floor to him.
10 MR. NAZZINI: Thank you very much, Hugh, and
11 thank you very much for the invitation to be here. So
12 in the five minutes that I have, I would like to cover
13 three points on the impact of European privacy
14 regulation, which is just recently the GDPR but
15 previously the privacy directive, on competition. And
16 I start with one first point. We heard a lot today
17 about the impact of privacy regulation on competition.
18 And I think there is no doubt in terms of
19 the theoretical work that has been done and also the
20 empirical work is there, in my view, that privacy
21 regulation may have a negative impact on competition,
22 maybe start the competitive process by favoring or
23 disproportionately certain players versus the others.
24 And there is also no doubt that there may be an impact
25 on innovation and productivity and so on.

1 Now, the point I'd like to make is that the
2 European approach is not really a choice between data
3 protection regulation or no data protection
4 regulation. Data protection, the right to privacy and
5 data protection, is a constitutional right, the right
6 of a constitutional standing in European Union and a
7 fundamental right. So the point is which data
8 protection regulation to achieve the desired outcome
9 should we have.
10 And I think that's really the important
11 policy debate. We haven't had enough of it. We went
12 straight into the GDPR, the privacy directive, and
13 then the GDPR type, kind of process-based, heavy
14 prescriptive regulation, which we can still have this
15 debate now. You know, it is never too late to change
16 something that doesn't quite work as well, assuming
17 that it doesn't.
18 The second point that I'd like to make is
19 that, of course there is also a lot of talk, and there
20 has been a lot of talk about the GDPR, about the role
21 of privacy regulation as an enabler of competition.
22 And I'll give you the most important example, which is
23 the right to portability in the GDPR, the right of the
24 individual who provided the data to obtain this data
25 transfer then or have them transferred to another

1 supplier.
2 Now, the point I'd like to make here is that
3 this portability right, which is there -- or may be
4 there also to address issues such as consumer
5 switching in certain markets where data are important
6 and there is a significant switching cost in the loss
7 of data, financial services, messaging apps, social
8 networks, and so on and so forth. It's not really a
9 competition remedy, and it's not, therefore, going to
10 be very effective, in my view, at addressing any
11 competition concerns that we may have on these
12 markets.
13 And the key reason for that is that actually
14 together with switching costs and data, the other
15 problem you have in this market is consumer inertia.
16 There is quite a lot of research and certainly even
17 case law in Commission practice in Europe on this
18 point. Therefore, the right to portability, which
19 depends entirely on the choice and the initiative of
20 the consumer, is not really going to be very effective
21 if we do not have a very well informed and active
22 consumer.
23 I'd like to contrast it for just a moment
24 with the open banking remedies in the U.K. Open
25 banking in the U.K. is a set of remedies which is

1 there to address competition concerns in the retail
2 banking sector. And one concern was very low levels
3 of switching of consumers and actually small
4 businesses as well. And the remedy there imposed on
5 certain U.K. banks is -- it relates to actually the
6 obligation of these banks to make transaction data
7 available to other financial service providers, such
8 as innovative fintech companies.
9 And this comes together with a very
10 significant package of remedies really tailored to
11 give consumers and small businesses the information
12 they need to make an informed choice and prompting
13 them almost to make the choice overcoming, therefore,
14 their inertia. So that is a proper competition
15 remedy, may work well or not, it's too early to say,
16 but that is a competition remedy, as opposed to the
17 right to portability.
18 And so my second point was actually using
19 privacy regulation to enhance competition, remedy
20 perceived competition problems. It's not likely to
21 work very well.
22 And the third point I'd like to make in
23 really a very, very short time is that one more thing
24 to bear in mind is this idea of privacy regulation and
25 privacy standards as a parameter of competition, and

1 whether a breach of privacy regulation can be an
2 element of a case of anticompetitive abuse or
3 anticompetitive practice against a company, for
4 example, a dominant company. And there is an ongoing
5 investigation against Facebook in Germany precisely on
6 this theory.
7 Now, for example, the Italian competition
8 authority has addressed that very problem -- the use
9 by Facebook of data from third-party websites, you
10 know, when the consumer is on third-party websites
11 rather than on Facebook itself -- under their consumer
12 protection legislation.
13 And, therefore, my third and final point is
14 that actually while business and markets and perhaps
15 life becomes more complex and privacy and data do
16 become an element of competition analysis, in so many
17 ways, I think there is a point in going back, perhaps
18 sticking to basics in keeping these different tools
19 that we have -- privacy enforcement, whatever it might
20 be, private enforcement or regulation, competition
21 enforcement, or consumer enforcement -- clearly
22 distinct to avoid costly mistakes. Thank you.
23 MR. STEVENSON: Thank you very much for
24 that.
25 We turn next to Garrett Johnson who we heard

1 -- from Boston University, we heard from earlier
2 today, and we actually got an audience question about
3 what is the impact of GDPR on innovation and
4 competition and how can this measured. And I think
5 Garrett can say a little bit on that subject from his
6 perspective.
7 DR. JOHNSON: Thank you. So yesterday,
8 several of you heard research from Jia, Gin, and
9 Wagman on the short-run effects of GDPR on technology
10 venture investment. They found an 18 percent
11 reduction in the number of weekly venture deals and a
12 40 percent reduction in the amount raised in an
13 average deal following the rollout of the GDPR.
14 That's obviously not great news.
15 Today, I want to tell you about some joint
16 work that I have with Sam Goldberg at Kellogg, who is
17 in the audience, and Scott Shriver at Colorado, where
18 we're looking at what happened online in Europe. The
19 first way we're going to look at this is we're going
20 to look at site visit and conversion outcomes on a
21 panel of 2,300 websites. The second thing we're going
22 to look at is third-party interactions and tracking on
23 a panel of 28,000 websites. And the final thing we're
24 going to look at is competition by looking at the
25 number of sellers that publishers in Europe use

1 looking at a panel of over 100,000 websites.
2 So I want to stress at the outset that this
3 is not so much research that's hot off the presses as
4 much as research that hasn't even made it to the
5 presses, so take things with a grain of salt. This is
6 a case of, I think, supply rising to meet demand.
7 So, first, I want to talk about the results
8 for the panel of websites and site visits and
9 conversions. For 2,300 websites, we see something
10 like a 10 percent reduction in site visits and
11 something like a 10 percent reduction in sales or
12 conversions after the GDPR. And this is of the 900
13 websites that are in our data that have that
14 information.
15 Now, these findings are very provocative and
16 very alarming, so I want to give you three big
17 caveats. The first is that we're still trying to
18 determine to what extent this is a real decrease and
19 not an artificial decrease of reduced ability to
20 collect data in Europe.
21 The second thing is that when you're looking
22 at the effects of a policy that impacts an entire
23 continent at a certain period in time, it's pretty
24 hard to find a good control that can give you a
25 benchmark to evaluate that with. We're using the 2017

1 data in Europe as a benchmark.
2 And, finally, this data, by nature, is
3 extremely noisy and, so, we need to be careful in
4 drawing strong conclusions for that. Now, the second
5 thing that we looked at is compliance by EU websites
6 in terms of the amount of third-party interactions or
7 tracking that happens on those websites. The way that
8 I went about this is I collected data from the top
9 2,000 websites in every European country, EU country,
10 as well as Canada, the U.S., and globally for an
11 overlap of 28,000 websites.
12 And what I did is I represented myself as
13 being a French user via VPN and collected, using
14 software, every single third party that interacted
15 with my browser, whether it be through cookies or
16 through HTTP requests or JavaScript. And what I saw
17 there is in the week after the GDPR, there is a 12
18 percent reduction in third-party interactions relative
19 to the days leading up to the GDPR. And because
20 everyone is sort of scrambling to get in accordance
21 with the GDPR, you might expect that that number would
22 continue to go down, and, in fact, that is what
23 happened in Denmark, that is what happened in the
24 Netherlands.
25 But if you look at Bulgaria and Poland and

1 other countries, you actually see that it goes down
2 and then it bounces right back up again. So you look
3 at an average of all my data, these third-party
4 interactions by now are essentially where they were
5 pre-GDPR levels. So one thing that I want to do is
6 try to see what explains whether or not these
7 increases happened or not because we think it has
8 something to do with basically how afraid these
9 companies are of regulators in their local area, even
10 though the GDPR was supposed to be uniformly applied,
11 and so we used a survey metric of data providers that
12 tried to quantify just how lenient they think their
13 regulator is.
14 And that turns out to be a really great
15 predictor of whether or not tracking third-party
16 interactions went back up post-GDPR. And that's after
17 accounting for wealth and for accounting for ad
18 blocking and characteristics of the website, like the
19 amount of content and ads that they have on the
20 website.
21 Another finding that we found is that the
22 place where you saw the most reduction in third-party
23 tracking was actually where there were the least
24 European users, so the websites that had 10 percent or
25 less European users had the largest reduction, and we

1 think that that's probably a result of a set of
2 incentives that says that you will receive a fine of 4
3 percent of your global revenue if you violate the
4 rules.
5 Now, the last thing when it comes to
6 competition on this point, the evidence is pretty
7 mixed if you split by top ten tracking firms versus
8 below. The top ten were affected -- or reduced less
9 than the bottom ten or the firms below the top ten
10 trackers. But if you split it by top 50 versus
11 outside that top 50, that pattern reverses.
12 And, so, we have a third piece of evidence
13 that speaks to the competition issue that I'll go
14 through briefly, and that is that we thought that when
15 you tell firms that they're going to be liable for
16 sharing data with others and that they need to get
17 consent that firms would be less likely to interact
18 with more firms. And, so, we looked at a self-
19 reported measure of the number of ad sellers that
20 European web publishers use called the Ads.Text
21 initiative, and there we basically found nothing,
22 which we were quite surprised by. So there's a small
23 increase in the number of sellers that these websites
24 are using, but, you know, there's a small increase in
25 Canada, too, and so there was really not -- there was

1 no sort of massive decrease as we might expect.
2 So with that, I'll pass things on.
3 MR. STEVENSON: Thank you for giving us this
4 preview of this very interesting research, and you all
5 heard it here first.
6 So next we turn to Jim Halpert to get a
7 practitioner's perspective. Jim is a well-known
8 privacy lawyer at DLA Piper and has been involved in
9 some of these issues for quite some time. Jim?
10 MR. HALPERT: Thank you, Hugh, and thanks
11 for the opportunity to speak. I'm actually here today
12 with the head of our Polish IPT practice, Ewa
13 Kurowska-Tober, who can speak further about Poland and
14 the enforcement environment, which I think is a little
15 bit different than the assumption behind the survey
16 data, but it's nonetheless a very interesting survey.
17 I'd make a few points that are more from a
18 practitioner's sort of practical perspective. I've
19 seen it for non-EU entities that are -- that have some
20 presence in Europe but do not have a lot of users,
21 GDPR -- the decision about whether to comply with GDPR
22 if they were a website operator was a fairly clear
23 decision for those who were not among the largest.
24 And you can see data that the top third of the 100 --
25 or a third of the top 100 websites responded to GDPR

1 by blocking EU visitors, and there are a number of
2 articles about this.
3 The same thing is true of nearly 100 public-
4 facing websites that a survey that
5 Data.VerifyJoseph.com came up with as well. So you
6 see a parade of entities that just were not making
7 that much money in Europe who said it's not worth it.
8 So from a competition perspective, you know, probably
9 the crafters of GDPR smiled at that because they don't
10 really want competition necessarily coming from the
11 United States in the Internet market, but nonetheless,
12 there clearly was, at least when this regulation went
13 into effect, a drop-off effect on public-facing
14 websites that just didn't want to deal with the GDPR
15 compliance through their ecosystem.
16 Another thing to think about is that
17 requirements for granular consent necessarily
18 disadvantage entities that have fewer customers and
19 need to rely on the notice and consent being floated
20 by the website operator and put them at a
21 comparatively weaker position to craft a consent that
22 will fit their business models.
23 We see this also in terms that -- and this
24 is not something that's public, but the term -- the
25 processing term, processor terms or subprocessor or

1 co-controller terms that were passed down to smaller
2 entities by bigger entities under GDPR. The fact was
3 that smaller entities took an awful lot of
4 obligations, contractually, and an awful lot of
5 liability that they probably were not able to handle,
6 but nonetheless, the formality of the processing
7 agreement led to bigger entities exercising their
8 greater bargaining power to drive through obligations
9 to be able to absolve themselves of compliance.
10 Another thing to look at in the ecosystem
11 environment like the advertising ecosystem -- and
12 Chuck Kerr who represents Better Ads is in the back
13 and does a lot of work; I know that Leigh Freund was
14 here as well -- is that the GDPR did create at least
15 temporary disruptions with a sort of whipsaw effect
16 where the entities, there were several of them that
17 are very big in the internet advertising environment
18 and were under a lot of scrutiny by regulators. So
19 they needed to, you know, break it -- to make an
20 omelet, you need to break a few eggs, and they needed
21 to come up with a compliance structure that was
22 auditable, and ecosystem providers needed to conform
23 to that.
24 I would suggest that a less granular set of
25 obligations on downstream entities that was more

1 outcome-spaced, would be a better way to avoid drop-
2 off and disruption in the ecosystem, and I'm not here
3 to praise the CCPA, the California privacy law, in all
4 aspects. There are ways in which it's very poorly
5 drafted. But its processor obligations, its service
6 provider obligations are very outcome-based.
7 Really, the question for the service
8 provider, they need to sign an agreement saying to be
9 a service provider then be outside of the disclosure
10 obligations under the CCPA, they need to promise only
11 to process the data, store it, use it for the duration
12 of the service contract that they have with the entity
13 that is the business that's giving them the data, and
14 not to sell it or use it or disclose it for any other
15 purpose.
16 And that may be a more neutral way to get to
17 an outcome where the core interest, which is in
18 preventing further pollution, if you will, of the data
19 -- personal data ecosystem out there is achieved
20 without being so granular for obligations that need to
21 be passed along to smaller entities that really can't
22 say no. Thank you.
23 MR. STEVENSON: Thank you, Jim.
24 So we've heard a little bit about the role
25 of the regulator in the EU system under GDPR, and

1 there's a data protection authority, or DPA, in every
2 country, so it's only fitting we include a DPA
3 perspective on the panel, so we turn next to Simon
4 McDougall from the U.K.'s DPA, which is called the
5 Information Commissioner's Office. And Simon even has
6 innovation in his title, so he seems perfect for this
7 panel. So we'll give him a couple of minutes to
8 describe their perspective.
9 MR. MCDOUGALL: Thank you. I've had this
10 title, Executive Director of Technology Policy and
11 Innovation for a whole five weeks now. Before that, I
12 ran a privacy consulting practice for Promontory,
13 which is now part of IBM, and spent most of the last
14 few years helping large corporations with their GDPR
15 implementation. So my comments now are informed as
16 much by what I saw in my time in the private sector as
17 now.
18 I want to just first talk to a couple of
19 points that have already arisen. First of all, you
20 could get the impression that Europe was some kind of
21 blazing wasteland on May 26th and nobody got any ads,
22 and that was all terrible. It really was not like
23 that, and I don't think anybody noticed any particular
24 difference in their experience on a day-to-day basis.
25 I also think that to quote Chairman Lai in

1 his conversation with Henry Kissinger about the French
2 Revolution, it's too early to tell what the impact of
3 the GDPR will be. And I think Rahul made a great
4 point on the last panel that uncertainty is as
5 damaging as prescriptive regulation. And what we
6 definitely saw leading up to the GDPR and then
7 afterwards was a lot of uncertainty. So it will be
8 really interesting to see how this data pans out over
9 the next few months and indeed next couple of years
10 because right now the GDPR seems to be going okay, to
11 be honest. And in terms of the market in Europe, you
12 know, again, I'm not hearing anything terrible from my
13 old private sector clients.
14 I want to mention one thing in relation to
15 competition and then a couple of points around
16 innovation as well. The points I'll raise on
17 competition is just to note in passing that the GDPR
18 has some interesting mechanisms in it, which I think
19 have the possibility of really enhancing competition
20 in the medium term. And that's codes of conduct and
21 certifications.
22 And the difference there is that a code of
23 conduct in GDPR-speak is where a body such as a trade
24 association creates some rules specific to its
25 vertical, and then a data protection authority will

1 sign them off. Certification involves certification
2 bodies and a more complicated scheme.
3 We're seeing a lot of interest right now in
4 codes of conduct, less so in certifications because I
5 think they'll take longer to implement. I think if
6 for certain markets we get simple, practical codes of
7 conduct, then that could be very helpful to new
8 entrants because it will reduce this uncertainty and
9 add clarity.
10 Conversely, if we end up endorsing -- as
11 European data protection authorities, we end up
12 endorsing very complicated codes of conduct, obviously
13 that could provide a barrier to entry by just creating
14 more rules around particular environments that are
15 deterring to smaller firms. So that's something we
16 need to look at, but I think good, clear codes of
17 conduct can be very helpful in these circumstances to
18 reduce this uncertainty.
19 But I want to spend a couple of minutes also
20 talking about the innovation side of my job because I
21 think often today competition and innovation have been
22 conflated in different ways. So let's talk about
23 innovation in terms of its classical definition,
24 whereby we're talking about the process where we go
25 from somebody having a really bright idea, some people

1 in the garage, an innovation hub of a large firm, an
2 academic, all the way through to realization, i.e., a
3 retail product goes out or a government does something
4 for its systems which is cool and wasn't done before.
5 So let's talk about innovation there.
6 My role is new at the ICO, and I'm building
7 an innovation department which we're still staffing
8 with some amazing people, but we're very focused on
9 innovation as innovation, and we're doing a whole
10 range of different things to promote it. Three areas
11 quickly in the time I have.
12 Firstly, we're engaging with thought leaders
13 around key areas, such as artificial intelligence,
14 digital ethics where a lot of this innovation is
15 happening. So we've been very active in helping set
16 up the Center for Data Ethics and Innovation in the
17 U.K., which is a government-backed center which is
18 just being founded now as we speak. And we're working
19 with the Alan Turing Institute around explainable
20 artificial intelligence and how we can help ensure
21 this trust in AI.
22 I think there's a huge risk here that AI
23 goes the same way as GM, where, hey, you guys have got
24 it, we haven't got GM, genetic modified foods, in
25 Europe because everyone lost trust in that particular

1 technology. AI could easily go the same way unless
2 the industry explains to people what on earth is going
3 on. So explaining AI is a big thing.
4 Secondly, we are building a regulatory
5 innovation hub whereby we're accepting that we're a
6 horizontal regulator in a world of vertical
7 regulators. And when a firm comes with innovative
8 ideas to our financial services regulators or our
9 telecoms regulators and they have questions, we then
10 can help make sure it's a one-stop-shop for that
11 regulatory question by being in the room with that
12 regulator or being at the end of the phone to help
13 them.
14 Thirdly and finally, we are setting up a
15 regulatory sandbox, leveraging the success of
16 financial services regulatory sandboxes with
17 innovative firms whereby firms can apply to be in the
18 sandbox. And if we say yes, they develop a close,
19 continuous, collaborative relationship with, in this
20 case, us, the ICO, where they can take their project,
21 they can pilot it, and they can work with us so that
22 they end up doing something exciting and innovative
23 but in a privacy-respectful way.
24 So my key message here is that as a privacy
25 regulator and I think it's applicable to privacy

1 regulators around the world, we do not have to be
2 passive here. We can be on the front foot and we can
3 do interesting things to promote both competition and
4 innovation. And there I'll stop, thanks.
5 MR. STEVENSON: Thank you very much. We
6 appreciate that particular description of the many
7 interesting projects that the ICO has underway.
8 We have next Rainer Wesley, a friend and
9 colleague from the EU Mission, and before that,
10 formerly of DG Comp, and we give the floor to him.
11 DR. WESSELY: Thank you very much for
12 inviting me to this panel. It will not surprise you
13 that we in Brussels at the European Commission are
14 following these hearings with big interest because
15 most of, if not all of the topics discussed here, are
16 equally of high relevance also for our internal
17 discussions.
18 Originally, my intention was actually to
19 start off to give you a very brief overview of how we
20 deal at DG Competition at the European Commission with
21 big data, data, and data protection in our Commission
22 -- press the microphone, it is on, it tells me -- with
23 data protection for specific markets. But taking that
24 this was part of an earlier session this morning
25 already and taking our time constraints, I will limit

1 myself to one key observation. We have gathered over
2 the years a lot of experience, in particular in merger
3 cases, of how to assess data and big data markets, but
4 what we see recently is that the assessment of data
5 protection in our competition and merger analysis is
6 getting ever more important. And the reason for this
7 is certainly that consumers give always more
8 importance to their protection of the data, and we can
9 see that, and this is reflected in our decisions.
10 And, actually, it also mirrors my own
11 experience. Five or ten years ago I think I would not
12 have cared so much about what happens to my personal
13 data, but nowadays I think if I have an option where I
14 can go for safer and more protective measures then I
15 would always try to opt for that.
16 As our competition commissioner, Margrethe
17 Vestager, put it already in 2016, we would not use our
18 competition enforcement to fix privacy problems, but
19 that does not mean that we will ignore genuine
20 competition problems just because they have a link to
21 data, which takes me now to the topic of today's panel
22 and the question of the actual or potential effect on
23 innovation and competition of the GDPR.
24 And I would like to structure it in three
25 points, basically where we are coming from. As Renato

1 already said before, data protection in Europe is
2 nothing new. We have had rules for many, many years,
3 over two decades. And, intuitively, I think that
4 would speak for questioning whether there should be a
5 negative impact on competition and innovation in the
6 first place.
7 Then I would look at where we are now. We
8 have created a very strong, level playing field across
9 Europe, which reduces compliance cost and reduces
10 burden for companies. And looking forward, I think I
11 will add some words on the entry barriers which
12 allowed -- through GDPR, as also Renato mentioned
13 already, we have built in innovation incentives,
14 thanks to privacy by default and by design. So I
15 think in the end and eventually the GDPR should
16 actually stimulate innovation and competition.
17 So if I look at where we're coming from in
18 the past, we had a directive and a patchwork of many
19 national laws. Since the beginning of the data
20 protection reform and the discussion of the reform, we
21 saw that competition and innovation were at the heart
22 of these discussions. The aim was to create a level
23 playing field addressing the consumer trust deficit
24 and simplifying and harmonizing the data protection
25 leading framework as a key element of the digital

1 single market, which is, as many of you will know, one
2 of the key priorities of the current European
3 Commission.
4 In other words, the patchwork that existed
5 in the past has been replaced by one single pan-
6 European law. Instead of having to deal with 28
7 different data protection laws and 28 ways of
8 interpretation, since May last year -- this year
9 operators doing business in Europe can rely on one set
10 of uniform rules.
11 This brings me to where we are now. The
12 GDPR has put these rules into a new shape, making them
13 more coherent and directly applicable. Of course, we
14 had heard many concerns, and I heard them yesterday
15 and today again, that certain economic experts say
16 that their business models will actually not work with
17 the GDPR and that they are competitively disadvantaged
18 with big and foreign operators.
19 As already also mentioned, it is probably
20 too early to make a long-term assessment at this point
21 in time to see whether these claims are actually true.
22 We have seen fear of some companies because of
23 compliance, because of risk of fines, and there has
24 been lot of uncertainty, but I think generally the
25 first evidence that we see points in a different

1 direction.
2 For many companies, compliance with GDPR has
3 actually brought along opportunity to bring their data
4 house into order. They could look at what kind of
5 data they actually collect, they could see what they
6 use it for, how they assess it, and how they process
7 it. For some of them, this brought actually new
8 opportunities because they could find out what data
9 they possess and use it in new, more innovative forms.
10 In doing these checks, and there was also
11 already mentioned some of them have also eliminated
12 unnecessary risks, which we see in the recent past
13 that risks of data breaches can lead to high financial
14 interpretation of costs. I think there was a study
15 last week which tried to put a price tag on the loss
16 of revenues due to reputational risk which was a
17 multi-billion sum.
18 Without consumers' trust in the way that
19 data is handled, there can be no sustainable growth in
20 the way of our data-driven economy. So the GDPR has
21 harmonized and simplified data protection and this in
22 return has led to a significant reduction of
23 compliance cost and administrative burden. I think
24 these are very tangible direct results and benefits
25 for, in particular, small and foreign companies which

1 want to be active in the European market and which do
2 not have the resources to make studies of legal
3 requirements of different national systems.
4 Now, looking forward, the GDPR has, as
5 already mentioned, introduced mechanisms to lower
6 entry barriers. We look at Article 20 of the GDPR,
7 which stimulates and facilitates the entrance of new
8 players. The right to data portability has a clear
9 competition rationale, and there I would slightly
10 contradict Renato because I think you can draw a
11 comparison to the right of number portability in the
12 telecommunication sector, and we saw that this was a
13 very stimulating effect, and we hope to replicate this
14 effect also for data portability.
15 MR. STEVENSON: Thank you.
16 We turn now to our final panelist, who is
17 Orla Lynskey, a Law Professor and Data Protection
18 Expert at the London School of Economics, who I see
19 way down there. And we'll hear her perspectives now.
20 DR. LYNSKEY: Thank you, and many thanks for
21 the opportunity to provide some remarks for this
22 hearing today. I think before I start I just want to
23 highlight again the very different constitutional
24 context in which this discussion has occurred in
25 Europe because of the presence and the EU charter of

1 fundamental rights of both a right to privacy but also
2 a separate right to data protection.
3 And as a result, there is a legal obligation
4 to have data protection rules in place to protect the
5 data of European individuals. And I think that's an
6 important differentiating factor between this
7 discussion in the EU and this discussion in the U.S
8 I'd like to think about two interrelated
9 claims about how EU data protection rules can impact
10 on competition and on innovation. And the first is a
11 very obvious one, which is that the GDPR and its
12 predecessor, the 1995 data protection directive,
13 formed part of the legal and regulatory landscape that
14 competition authorities needed to take into account
15 when undertaking competitive assessments and thinking
16 about the application of competition policy.
17 Now, this sometimes led to the incorrect
18 assumption that the mere existence of data protection
19 regulation meant that these markets, data markets,
20 were functioning effectively for consumers. And I
21 think you can see this, for instance, in some of the
22 European Commission's decisions. So if you look at
23 merger decisions like Google-Snelfie or Microsoft-
24 LinkedIn, you see before the GDPR had even been signed
25 off that the Commission is saying that the mere

1 potential for the right to data portability to be
2 exercised meant that consumers couldn't be locked in.
3 And I think that's an erroneous assumption
4 to work from because we have clear empirical evidence
5 that there are many impediments to individual control
6 over personal data. So my own research has focused on
7 the role and the limits of informational self-
8 determination in European data protection law. But
9 also I think we have a documented cycle of what
10 Farrell, a former Director of the Bureau of Economics
11 here, described as a dysfunctional equilibrium. And
12 that is the fact that firms who do wish to
13 differentiate their offerings on the basis of more
14 privacy-protective products find that there is little
15 incentive to do so because consumers have already
16 resigned themselves to the fact that there is no
17 better offering out there, and this creates a vicious
18 cycle.
19 And I think we have -- that idea was
20 proposed in 2012. And if you fast forward to this
21 year, the consumer organization which in the U.K.
22 documented similar phenomenon when they say that we
23 have a situation of rational disengagement from data
24 protection policies. And that is that, in fact, the
25 rational thing for a consumer to do might be to

1 simply not engage with those policies in certain
2 circumstances because they are so complex and the
3 ability to control data is so limited.
4 So, then, the second point I want to make
5 is, or a query I want to ask is, what might GDPR do in
6 order to improve this situation. And, here, I think
7 that although the core system of checks and balances
8 in EU data protection law has remained unchanged from
9 the 1995 rules, the GDPR introduces some small but
10 significant substantive changes that have the
11 potential to really clean up the European data
12 ecosystem and, in particular, online.
13 And, so, I just want to highlight one that
14 has currently become the focus of complaints to
15 European data protection regulators. And, so, if we
16 consider how data is processed or the legal basis for
17 data processing, one of the most commonly used ones
18 online is consent. It's not the sole legal basis for
19 processing but it is one of the most frequently used.
20 And consent has to be freely given, specific, and
21 informed. So far, so similar to the 1995 rules.
22 However, what the GDPR does do is specify
23 that freely given consent -- in considering whether
24 consent is freely given, you need to take utmost
25 account of whether or not the performance of the

1 contract is made conditional on the processing of data
2 that is not necessary. And, so, here the idea is that
3 you will use or acknowledge that consent is not freely
4 given if it leads to unnecessary data processing and
5 if, therefore, consumers can't access services or
6 goods that they wish to access as a result.
7 So this conditionality requirement is, in
8 fact, a presumption, so there's a presumption that if
9 access is conditional on unnecessary data processing,
10 that consent is unlawful; that, therefore, has the
11 potential to seriously alter the way in which data-
12 driven -- and in particular data-driven advertising
13 models, and in particular programmatic advertising, is
14 operated in Europe. Because if the European Data
15 Protection Board, the new agency for data protection
16 in Europe, takes a hard line or a strict
17 interpretation of this provision, it could say that
18 data as counterperformance for the offering of a
19 particular goods or service is not necessary for the
20 performance of the service. And we have several
21 opinions of its predecessor, the Article 29 working
22 party, to indicate that that's the way in which it is
23 thinking.
24 And this, I think, would then push us
25 towards a model of advertising in Europe that is no

1 longer behavioral and programmatic but rather
2 contextual as was highlighted in the previous panel.
3 And just to say finally because I need to
4 wrap up, that these small but significant substantive
5 changes are coupled with very significant enforcement
6 changes. And the fines -- the 4 percent of annual
7 global turnover have received all of the attention,
8 but, in fact, in my opinion, what's likely to be far
9 more significant is the creation of a new agency, the
10 European Data Protection Board, in order to ensure
11 consistency across Europe of decision-making, but also
12 the potential to mandate a representative organization
13 to take actions on your behalf, which is provided for,
14 for instance, under Article 80 of the GDPR.
15 And, so, we have the potential also here for
16 private litigation in order to really render
17 individuals' data protection rights more effective.
18 And then I think we'll be in a different data-driven
19 environment.
20 MR. STEVENSON: Thank you very much for
21 those comments. And I think that these and some of
22 the earlier comments remind us that here we are
23 dealing both with some different constitutional
24 contexts, as Renato and Orla mentioned, some different
25 administrative contexts, the kind of comitology of the

1 system in Europe for deciding the sort of -- the
2 rules, and also a different enforcement context.
3 There was a reference to the fines and what has been
4 added from GDPR on that subject.
5 I'd like to take up first the issue that you
6 just raised about the European Data Protection Board
7 and the other sort of related aspects of this system
8 that deal with interpreting the law and how that
9 looks. This is a 99 article sort of document, it's a
10 long thing, the GDPR, but it has a number of
11 provisions that deal with interpretation. How
12 important is interpretation to the effect of GDPR on
13 competition and innovation and how fit for purpose is
14 the mechanism that's been set up, the European Data
15 Protection Board and the DPAs within that?
16 Maybe I'll start with Simon and then Jim and
17 then others who might want to comment.
18 MR. MCDOUGALL: I think having the
19 consistency mechanisms in place is critical. And to
20 echo some of the other speakers, we shouldn't forget
21 that both this regulation and also the preceding '95
22 directive, you know, work specifically around having
23 the free movement of data around Europe, as well as
24 with the regulation and introducing privacy as a
25 fundamental right as well.

1 So it has always been around both those
2 mechanisms and having a level playing field across
3 Europe. We had a really practical problem in the
4 buildup to GDPR where, quite rightly, many local data
5 protection authorities were issuing lots and lots of
6 guidance to help their national organizations, all the
7 firms they regulated, get up to speed with GDPR.
8 For international organizations, that meant
9 there was an awful lot of different guidance to keep
10 track of, and with the best will in the world,
11 sometimes there was variation. We've just had the
12 EDPB provide guidance on one particular area, which is
13 around rationalizing the shopping list of conditions
14 that might mean a firm has to undertake a DPIA, a data
15 protection impact assessment, where there were
16 differing lists across different countries.
17 That's really practical, helpful stuff, so
18 we do need these mechanisms, and over time hopefully
19 we'll see a lot of these wrinkles be smoothed out.
20 MR. HALPERT: This is a great example --
21 sorry. Simon offered a great example of the work that
22 the EDPB needs to do, but the fact remains that the
23 much ballyhooed one-stop shop and harmonized set of
24 rules that Rainer described did not exist as to key
25 elements of ambiguity prior to adoption or GDPR going

1 into effect. And the cost of GDPR implementation
2 exceeded $10 million for most firms that were
3 multinational and had more than $500 million in sales.
4 So the result was significant uncertainty
5 with -- our firm developed a DPI assessment tool and
6 had to customize it before this guidance came down to
7 different requirements in different states. And this
8 is a very common process. With regard to personal
9 data breach, Ewa and I were speaking this morning and,
10 you know, one assumes that risk to fundamental rights
11 and freedoms of the data subject would be a uniform
12 breach notice requirement across Europe.
13 Well, in Poland, the regulator, when given
14 the advance notice, will not say in any circumstance,
15 even a trivial one, that there isn't a risk to the
16 fundamental rights and freedoms of individuals, which
17 is a different standard than in other EU member
18 states. So really the EDPB needs to be very active to
19 counter the centripetal forces that are at work among
20 autonomous DPAs.
21 I'd also add that there is no uniformity
22 with regard to issues like children's consent, labor
23 laws. The German implementation of GDPR contained a
24 whole separate labor code, labor privacy code that was
25 enacted. So while I don't think that actually GDPR

1 offers a good model of uniformity at this point for
2 the United States to look to in its eventual privacy
3 regulation, and while I'm very sympathetic to data
4 portability and many of the other points that Rainer
5 mentioned, I think it's really worth looking at the
6 EDPB as a work in progress to try to fulfill the idea
7 of a uniform set of rules across Europe.
8 MR. STEVENSON: Thank you. I think Rainer
9 wanted to comment, and then Garrett.
10 DR. WESSELY: Well, yes, I think I can
11 confirm that obviously the current definition and way
12 of interpretation of the GDPR is extremely important
13 but we have seen also from the EDPB that throughout
14 last months there has been guidance. There have been,
15 I think, in total 18 guidance papers in the meantime
16 published, which builds on top of the guidance which
17 was given previously already by the Article 29 working
18 party.
19 So that is obviously a first challenge also
20 to see where the guidance is most important in the
21 first place. And to the uncertainty which is and was
22 in the market, I think that is probably normal with a
23 big new regulation like the one that we saw. But on
24 the other hand, what we can see is that there have
25 been certain companies which have decided to play safe

1 in the first place, said that they would suspend for a
2 certain time the activity, vis-a-vis Europe would
3 block European customers, but what we see now is
4 actually already a trend that most of these pages are
5 in the meantime accessible. Again, which shows that
6 we have to clearly distinguish between the very short-
7 term effects, the midterm, and the longer term
8 effects, and that is exactly also where we then have
9 to focus our guidance, I think.
10 MR. HALPERT: Absolutely. Totally agree.
11 MR. STEVENSON: Thank you. Garrett and then
12 Renato.
13 DR. JOHNSON: So I think the question of
14 interpretation is a really important one because, you
15 know, we're here talking about this because the U.S.
16 and certainly many business leaders or some business
17 leaders are calling for a GDPR-style regulation in the
18 United States. So the reason interpretation is
19 difficult is that, as someone said, I think Simon
20 said, you know, on May 26th, Europe didn't burn down.
21 Now, it would be hard to conclude from that
22 that there were no impacts of GDPR. Certainly the
23 research that was presented yesterday, and some of my
24 research suggests that there are some impacts of the
25 GDPR and some of those are troublesome. But a larger

1 issue is that, you know, what we have yet to see is an
2 enforcement action in Europe that clarifies some of
3 these issues.
4 So I think Orla brings up a really good
5 point about the state of programmatic advertising in
6 Europe. Currently, the sort of de facto way that most
7 websites have handled this is an opt-out notice that
8 shows up when you arrive on their website, and
9 basically 90 percent of people are consenting or not
10 going through the process of opting out.
11 Now, the laws, as you say, if the regulators
12 want to take a hard take on this, the laws pretty
13 clearly say that they want opt-in consent, that's
14 specific to purposes, so imagine as you're a consumer,
15 you need to check, you know, 50 different companies
16 that get to know your website -- get to know that you
17 visited a website and eight different purposes, you're
18 going to be checking a lot of boxes. And, of course,
19 that's going to mean that basically no one's going to
20 be checking these boxes.
21 And then you'd see a very different effect
22 of the GDPR on the web. So I think the truth will
23 continue to evolve here.
24 MR. STEVENSON: Thank you.
25 Renato.

1 MR. NAZZINI: Yes, very briefly on this
2 point, and coming to that from a competition
3 perspective, I think even the regulatory setup in
4 Europe, what is very important and is happening to an
5 extent is that competition authorities and data
6 protection regulators talk to each other. Of course,
7 interagency cooperation always comes at a cost in
8 terms of resources and time, but I think it is very
9 important, especially if, as Rainer was saying,
10 certain of the provisions of the data protection of
11 the GDPR ought to be interpreted in a way that fosters
12 competition.
13 I'm very happy that the right to portability
14 is there, obviously. I'm just saying that it is not a
15 panacea for competition problems in these markets, in
16 which it's law. Data are a little bit more complex
17 than just a six or seven or eight-digit number to
18 port. And, for example, where interpretation will be
19 important, and we have seen already good evidence that
20 we are going towards that direction, you know, let's
21 interpret, for example, the right to data portability
22 in a way which is more conducive to competition.
23 The regulation says, data provided by the
24 individual, well, clearly a broader interpretation
25 that provided by which includes as much as the data

1 which is necessary for others to compete as possible,
2 that would be a good thing for competition. So I
3 think this point is quite important.
4 MR. STEVENSON: Thank you.
5 Let me turn to another subject that often
6 comes up in connection with GDPR, and that is the up
7 to 4 percent of total worldwide annual turnover as
8 potential sanctions, which has already been mentioned
9 in the conference several times, even outside this
10 panel. What effect do those provisions have
11 potentially on innovation and competition? Are there
12 certain effects, either pro or con, of having these --
13 I think anyone would describe them as, indeed I think
14 even one of the authors of GDPR describe them as heavy
15 sanctions. Orla?
16 DR. LYNSKEY: Well, I think the fines were
17 initially modeled, in fact, on antitrust fines with
18 the antitrust and the competitional provisions as the
19 source of inspiration for that. However, I do think
20 regulators, including the ICO, for instance, in the
21 U.K., have been very quick to point out that they will
22 continue to work with those data controllers and data
23 processors that are endeavoring to comply with the
24 regulation and that fines are kind of a backstop here.
25 But as I said, I think there are other

1 mechanisms, such as the potential for strategic
2 litigation that is provided by the regulation, that
3 will lead to, as we were just discussing, more
4 interpretive clarity.
5 If I can come back to the point that Garrett
6 made about the problematic impact of GDPR, well, if
7 that is fewer third-party trackers, well, again,
8 that's a question of whether or not you think that is
9 problematic because, in fact, at the moment there is a
10 complaint pending before the ICO in the U.K. and the
11 Irish data protection commissioner that the entire
12 realtime bidding system is inconsistent with many core
13 principles of GDPR, including data minimization,
14 fairness, transparency, and many others. And that is
15 a question, then, of looking at the entire system that
16 is in place and seeing whether or not that's data-
17 protection-compliant.
18 And then on the issue of less investment,
19 which the Wagman paper mentioned yesterday, I think
20 this comes back to what Simon said, which is it
21 depends on whether or not we can encourage investment
22 in privacy-protective technologies and privacy-
23 enhancing technologies. For instance, that paper
24 doesn't consider at all the jobs that will be created
25 for data protection officers and others.

1 So I think a narrow focus on simply the
2 fines and the sanctions ignores all of these other
3 potential mechanisms for interpretation and
4 innovation.
5 MR. STEVENSON: Jim.
6 MR. HALPERT: Actually, I'd like to make one
7 quick point with regard to the group actions point. I
8 think that group actions can make sense, but they only
9 make sense if the legal requirements are relatively
10 clear. And it's a little bit troubling to think of
11 group actions as the battering ram to get clarity,
12 where in a system, the question of what's a legitimate
13 interest of the data controller, for example, that
14 overrides the interests of the data subject.
15 That's something that the regulators really
16 should provide guidance on. I totally agree with you
17 that the question about how realtime exchanges work in
18 relation to data protection, some guidance would be
19 helpful on that, but a regulator really should be
20 doing that sort of work.
21 I'd also point out that there are very
22 different sorts of incentives in class action
23 litigation in the United States, and one shouldn't
24 assume, as some do, that while GDPR has class action
25 risk that should be, for example, the mechanism for

1 enforcement of the California Consumer Privacy Act or
2 some federal law that was based on GDPR.
3 There's no e-discovery regime in Europe, so
4 the asymmetrical costs, which are about a million
5 dollars anytime a lawsuit is filed, that are only
6 borne by the defendant, are very, very different.
7 There are also -- are typically not the ability to
8 obtain attorneys' fees; and, in fact, there are no
9 damages available under GDPR group actions. So this
10 is really an apples-to-oranges comparison, and I just
11 wanted to give that frame and then give back the time.
12 MR. STEVENSON: I just wanted to put one
13 more question out. We only have a few minutes left.
14 And that is, and I know one of our Commissioners has
15 sort of raised the issue of one thing that U.S. law
16 does in some ways is to tailor the regulation that
17 exists to the risk, to tailor regulation to the risk.
18 Is that important to do here, and does the GDPR do a
19 good job of tailoring the regulation to the risks that
20 exist?
21 Renato.
22 MR. NAZZINI: I think I can have the first
23 go at that. I mean, it seems the GDPR is actually a
24 set of rules that in principle, I mean there are other
25 exceptions and modulations, but apply to all firms and

1 all data with the higher threshold for certain
2 particularly sensitive data, such as health data,
3 political opinions, et cetera.
4 In principle, it's not the kind of risk-
5 based, outcome-based regulation, but it's a process-
6 based regulation which applies across the board. So
7 it doesn't really do so, but I think it is fair to say
8 that the objective of the regulation was actually to
9 set out that level playing field across the board.
10 And that's where some of the problems that Garrett and
11 others actually have highlighted come from.
12 MR. HALPERT: In fairness, though, fines are
13 geared to risk of harm, too, so there is some -- if
14 one looks at the eye-popping sanctions, they do depend
15 on high risk, for example.
16 MR. STEVENSON: Okay. Simon?
17 MR. MCDOUGALL: Well, to echo what Jim was
18 saying, yeah, there's definitely elements to the GDPR
19 which do talk directly to considering risks. The
20 accountability regime is also a new entrant, and I
21 think it's critical to understanding how the GDPR can
22 reward good behavior in firms large and small.
23 But I also want to say one word on just how
24 this wraps into the other risks that large
25 organizations and small organizations deal with and

1 reputational risk. And what I think we're seeing on
2 both sides of the Atlantic right now is an ongoing
3 breakdown in trust. And that's an ongoing breakdown
4 in trust in many ways, but one of the ways is in how
5 people -- whether people trust organizations in
6 handling their data. And that has a massive
7 competitive impact, and sometimes it's dragging all
8 organizations down, so it's not a relative thing, but
9 I think in many cases it favors the incumbent because
10 people aren't going to make the leap into a new
11 venture or a new technology if they don't really trust
12 the environment they're in. And that's a critical
13 part of the GDPR that it can help rebuild trust and
14 give people confidence in using new services because
15 they believe their data will be handled responsibly.
16 MR. STEVENSON: Orla, did you have a
17 comment?
18 Oh, I'm sorry, Rainer.
19 DR. WESSELY: I would strongly agree to
20 that. I mean, certainly it is process-based, and what
21 we think that the challenge is that the GDPR has to be
22 sufficiently flexible actually to adapt itself to new
23 risks which we could not even predict at the time that
24 the GDPR was planned.
25 Just let me make one additional point. We

1 try, as from the first day of the GDPR, to be as
2 constructive as possible in the dialogue with the
3 economic operators on the market. I think by now it
4 is clear that GDPR is not used as a fining sword and
5 so as a very smooth phasing-in, which is also
6 underlined by -- I don't know whether you followed
7 that, but Commissioner Joureva just said that in June
8 next year, 2019, people have one day -- we will have a
9 stock-taking exercise in order not to wait until 2020,
10 which would be the set time for when we have to report
11 back to the European Parliament. So next year, we
12 should be able to address actually many of these
13 questions and look into the effects on innovation and
14 competition.
15 MR. STEVENSON: Any other last words on
16 this? Yes, Renato.
17 MR. NAZZINI: Just one point about fines,
18 actually. I think one positive aspect to the 4
19 percent worldwide turnover fine is it actually -- an
20 argument that obviously not too explicitly but it has
21 been made and I've heard in Europe that, you know, you
22 have to use competition enforcement to in effect
23 bolster privacy regulation because fines were too low
24 and ineffective cannot be made any longer.
25 So really, now, you have effective

1 sanctions, so in mergers, in abuse-of-dominance cases,
2 et cetera, we shouldn't use competition policy to
3 punish and deter privacy breaches.
4 MR. HALPERT: I'd add one point with regard
5 to big data and data protection. If we're talking
6 about an incumbent that has a lot of personal data, it
7 is difficult to open up that data in personally
8 identifiable format to other competitors without
9 having some data protection measures in place. So
10 there is some inherent tension here that's worth
11 considering as we move into the pure antitrust
12 analysis of this sort of problem, and I just wanted to
13 raise that as something to think about.
14 MR. STEVENSON: Thank you very much. Three,
15 two, one, we're out of time. So please join me in
16 thanking our panelists.
17 (Applause.)
18 (End of Panel 5.)
19 (Hearing concluded at 4:59 p.m.)
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