PRIVACY PETITIONS AND INSTITUTIONAL LEGITIMACY

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This Article argues that a petitions process for privacy concerns arising from new technologies would substantially aid in gauging privacy social norms and legitimating regulation of new technologies. An accessible, transparent petitions process would empower individuals who have privacy concerns by making their proposals for change more visible. Moreover, data accumulated from such a petitions process would provide the requisite information to enable institutions to incorporate social norms into privacy policy development. Hearing and responding to privacy petitions would build trust with the public regarding the role of government and large companies in shaping the modern privacy technical infrastructure. This Article evaluates three possible institutional avenues for privacy petitioning: (1) state courts, (2) state agencies, and (3) mandatory disclosure of consumer petitions by companies to federal agencies.

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INTRODUCTION

Progress in the Information Age is premised on the notion that the more information society has, the more we know about how to respond to society's needs and wants.[1] Paradoxically, there is a dearth of data being produced and publicly distributed on the precise socio-technical processes that raise privacy concerns based on the lived experiences of users. While groups at Carnegie Mellon University and Harvard University's Berkman Center for Internet and Society have done some important empirical work in the area of privacy and social norms these institutions must create their own data to analyze.[2] The process of

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[1] *See* VIKTOR MAYER-SCHÖNBERGER & KENNETH CUKIER, BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK AND THINK (2013).

[2] *See* Leslie K. John, Alessandro Acquisti & George Loewenstein, *Strangers on a Plane: Context-Dependent Willingness to Divulge Sensitive Information*, 37 CARNEGIE MELLON U. J. CONSUMER RES. 858 (2011), http://www.cmu.edu/dietrich/sds/docs/loewenstein/StrangersPlane.pdf (finding, based on four experiments, that concern about privacy, measured by divulgence of private information, is highly sensitive to contextual factors); Sandra Cortesi et al., *Youth Perspectives on Tech in Schools: From Mobile Devices to Restrictions and Monitoring* (Berkman Ctr., Research Publ'n No. 2014-3, 2014), http://ssrn.com/abstract=2378590 (studying

creating data sets on privacy norms, as in other areas, is prohibitively expensive for most institutions and individuals, including, importantly, those dedicated to journalistic or other public interest pursuits.[3]

Automated, ubiquitous sensors in both real and digital space collect data outside of the consciously lived experiences of individuals.[4] This gives such data many advantages for research purposes. However, gauging the effect that technology is having on social norms from the perspective of society requires data that takes into account the subjective impressions of individuals. One need look no further than classic legislative and business debacles such as Prohibition and "New Coke" to understand that social norms play a key role in optimizing government policy making and business practices.[5]

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

The Article proceeds as follows: Part I describes the meaning to individuals of the opportunity to be heard through a petitions process, and the advantages to institutions and society of having such a process. It also contextualizes privacy petitions in the Anglo-American tradition of the right to petition, which is constitutionalized in the First Amendment's Petition Clause.[6]

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youth privacy attitudes based on a survey of thirty focus group interviews with a total of 203 participants in Boston, Chicago, Greensboro, Los Angeles, and Santa Barbara).

3 *See* David L. Cameron, *Research Tax Credit: Statutory Construction, Regulatory Interpretation and Policy Incoherence*, 9 COMPUTER L. REV. & TECH. J. 63, 158–59 (2004) ("By contrast to other types of research or product development, where expected commercial returns attract private investment, basic research typically does not produce sufficiently immediate commercial applications to make investment in such research self-supporting. Because basic research typically involves greater risks of not achieving a commercially viable result, larger-term projects, and larger capital costs than ordinary product development, the Federal Government traditionally has played a lead role in funding basic research, principally through grants to universities and other nonprofit scientific research organizations.").

4 *See* David R. O'Brien et al., *Integrating Approaches to Privacy Across the Research Lifecycle: When Is Information Purely Public?* 3–4 (Berkman Ctr., Research Publ'n No. 2015-7, 2015), http://ssrn.com/abstract=2586158 (listing the purview of questions about how data is maintained, and obtaining data from social networking websites, publicly-placed sensors, government records, and other public sources).

5 *See* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 625–32 (2000) (arguing that changes to the law directly conflicting with social norms lead to backlash and resistance, using the 1920s prohibition on alcohol as example); Ronny A. Nader, Note, *If It Ain't Broke, Don't Fix It: Senator Durbin's Disastrous Solution to an Illusory Problem*, 80 BROOK. L. REV. 323, 323–24 (2014) (detailing the negative reception of "New Coke" and its recall from circulation as a result).

6 U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom . . . to petition the Government for a redress of grievances.").

Part II argues that accessible petitions processes that allow individuals to petition institutions tend to empower and make more visible the concerns of individuals who have privacy concerns with a new technology. This tends to give the both private and public actors an incentive to act to assuage individual concerns and build trust with the public. This Part examines a suite of examples showing the power of an accessible petitions system for enhancing government legitimacy as a regulator and for enabling understanding of public concerns and social norm development.

Part III builds upon these examples in the context of privacy by outlining the regulatory structure for bringing privacy petitions in Germany. The German case shows the power of an accessible, transparent petitions system to capture and respond to the popular discomfort arising from industry violation of existing social norms.[7] This Part argues that, though the basic idea of a transparent privacy petitions system is a strong one, it should be implemented differently in the United States.

Finally, Part IV contends that the United States should offer its citizens an accessible, inexpensive, and transparent privacy petitions process. There are many potential avenues through which individuals could submit their petitions, each with advantages and disadvantages. This Article explores three possible institutional avenues for a petitions process in detail, namely (1) state courts, (2) state agencies, and (3) mandatory disclosure of consumer petitions by companies to federal agencies.

I. PETITION BRINGING AND INSTITUTIONAL INCENTIVES

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

A. *The Significance of Petitions*

Petitions have inherent significance to those who bring them, and are bellwethers of social norms and attitudes for institutions. Furthermore, the United States has a powerful tradition of hearing and

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7 *See infra* Parts II.B–C.

responding to citizen petitions, emerging from the right to petition the government enshrined in the First Amendment.[8]

The working definition of a petition in this Article is broad, borrowing from the Supreme Court's discussion of the right to petition in *Borough of Duryea v. Guarnieri*.[9] The right to petition includes any method by which citizens "express their ideas, hopes, and concerns to their government and their elected representatives."[10] As I use it, the term makes no comment about where the petition is brought, what type of interest is petitioned, or whether it is meritorious or brought in good faith.

The availability and use of a petitions process has qualitative (and quantifiable) benefits to individuals and to the institutions that meet their needs and wants. A qualitative account of petitions shows their benefit to petitioners. This Article draws upon William L.F. Felstiner, Richard L. Abel, and Austin Sarat's influential 1980 account of the value of petitions to individuals and how individuals' distress can remain hidden from view in modern society.[11] Felstiner, Abel, and Sarat use the word "claim" to describe raising a grievance generally, so analysis is pertinent to petitions from the perspective of the petitioner. In a later article, Sarat summarized the group's views as follows:

> [We] urged scholars to explore the hidden domains of civil justice and to examine processes that we labeled "naming, blaming, and claiming." . . . [M]y co-authors and I argued that "trouble, problems, [and] personal and social dislocation are everyday occurrences. Yet, social scientists have rarely studied the capacity of people to tolerate substantial distress and injustice." We suggested that responses to those events could be understood as occurring in three stages. The first stage, defining a particular experience as injurious, we called naming. The next step in the life cycle of a dispute "is the

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8 There is broad agreement among scholars that the right to petition has roots in English law and includes the right to a considered response from government. *See, e.g.*, Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153 (1998); James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899 (1997); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15 (1993); Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153 (1986); Jonathan Weinberg, *The Right to Be Taken Seriously*, 67 U. MIAMI L. REV. 149, 150 (2012). Even scholars who find the right of petition to be more limited consider it to extend to the right to petition the government for a redress of grievances, which is all that is necessary for this Article's argument. *See, e.g.*, Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 740 (1999).

9 131 S. Ct. 2488 (2011).

10 *Id.* at 2495.

11 *See* William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980–81).

> transformation of a perceived injurious experience into a grievance. This occurs when a person attributes an injury to the fault of another individual or social entity." This stage we called blaming. The third step occurs "when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy." This final stage is called claiming.[12]

Felstiner, Abel, and Sarat have two contentions that are particularly important to stress at this stage of the Article. First, they note that it is important to break down each step of the process because it illustrates that not everyone with petitions necessarily gets to the petitioning stage of dispute formation.[13] This is because some people refuse to consider themselves victims of another's wrongful act, or opt not to petition because of the mere cost of time and energy of bringing a petition.[14] Thus, in general, it is safe to assume that there are more aggrieved people than those who will be willing to bring petitions in any system.[15]

Second, they discuss the significance of lawyer intermediaries in the petition-bringing process. The job of lawyers is to alert potential clients that they have petitions. They can do this indirectly through advertisements—most infamously through seemingly ubiquitous personal injury commercials and billboards. This raises general awareness that being wrongfully injured by a third party is a kind of petition that one can bring to court. Of course, lawyers can also directly push people to recognize specific petitions through class actions.[16]

Recent organizational psychology work has suggested emotional relief benefits from bringing petitions.[17] There are significant

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12 Austin Sarat, *Exploring the Hidden Domains of Civil Justice: "Naming, Blaming, and Claiming" in Popular Culture*, 50 DEPAUL L. REV. 425, 426–27 (2000) (footnotes omitted) (quoting Felstiner et al., *supra* note 11, at 631–35).

13 Felstiner et al., *supra* note 11, at 637–38.

14 *See id.* at 652 ("[T]he cult of competence, the individualism celebrated by American culture, inhibits people from acknowledging—to themselves, to others, and particularly to authority—that they have been injured, that they have been bettered by an adversary.").

15 *See id.* at 649–50 ("Unarticulated grievances, lumped claims, and bilateral disputes certainly are numerically more significant than are the cases that reach courts and administrative agencies but are rarely studied by researchers. By directing attention to dispute antecedents, the study of transformations should illuminate both the ways in which differential experience and access to resources affect the number and kinds of problems that mature into disputes and the consequences for individuals and society when responses to injurious experiences are arrested at an early stage (e.g., depoliticization, apathy, anomie)." (footnote and citation omitted)).

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

17 *See* John T. Jost et al., *System Justification Theory and the Alleviation of Emotional Distress: Palliative Effects of Ideology in an Arbitrary Social Hierarchy and in Society*, in 25 ADVANCES IN GROUP PROCESSES: JUSTICE 181 (Karen A. Hegtvedt & Jody Clay-Warner eds.,

quantifiable benefits to a petitions process, as well. This explains the prevalence of petitions processes in private industry and the administrative state.[18] Colin Rule, the framer and former director of the eBay-PayPal Online Dispute Resolution process, ably constructed an economic defense—economic benefits that can be gleaned from the deployment of effective redress processes.[19] He found that eBay customers who went through a petitions process spent more time browsing and more money on eBay in the three months after the month in which they went through a petitions process than in the three months before the petitions process.[20] This held true regardless of whether the petition was successful or not.[21]

Individual privacy petitions regarding a new technology are not merely grievances for existing wrongs, but petitions to a powerful body, either private or public, to consider making a change. The mere fact that these petitions are heard adds to the legitimacy of companies that contribute to shaping privacy social norms. When a company is nearly a monopoly—with powerful network effects that push most to use the product, or when standard industry practices preclude other options—people may rationally choose to use their services despite privacy concerns. A petitions process legitimizes the progress of technology in light of individual privacy concerns.

B. *Factors that Influence the Number of Petitions Brought*

Several factors influence the number of petitions that are brought by individuals.[22] In general, rational individuals will balance the time and money costs of bringing the petition against the expected value of the benefit accrued from bringing the petition. The relevant factors include: (1) the benefit from making the petition itself, (2) the benefit of having the petition meaningfully heard, (3) the speed with which the petition is resolved (regardless of outcome), (4) the likelihood of success

2008); Cheryl J. Wakslak et al., *Moral Outrage Mediates the Dampening Effect of System Justification on Support for Redistributive Social Policies*, 18 PSYCHOL. SCI. 267 (2007).

18 However, the lack of literature quantifying the benefits until recently has led to shortsighted cuts in these programs. *See, e.g.*, Denise Richardson, *Local Dispute Center Loses Funds, Jobs*, DAILY STAR (Oneonta, N.Y.) (June 17, 2011, 3:30 AM), http://thedailystar.com/localnews/x1678756287/Local-dispute-center-loses-funds.

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

20 *Id.*

21 *See id.* at 771–73.

22 *See generally* Tom R. Tyler, *The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities*, 66 DENV. U. L. REV. 419 (1989) (using a psychological framework to examine dispute resolution processes).

and the amount of expected damages, and (5) any limitations on standing.[23] Where there are intermediaries—notably, lawyers—involved in bringing a petition, their incentives can also influence the number of petitions observed.[24]

Individuals experience psychological and social benefits from submitting their petitions and having them heard and understood; the process is not always entirely, or even mostly about winning on the merits. To quote Felstiner, Abel, and Sarat, an important objective of petitioning "is to increase the disputant's understanding of the motives, feelings, and behavior of others."[25] Completing a petitions process tends to increase that petitioner's trust in an institution because it allows the individual to know that such institution will attempt to make things right if something goes amiss.[26] The more the process appears to be responsive to the concerns of the petitioner, the more meaningful the opportunity to be heard becomes. If the opportunity to be heard appears meaningful, the petitioner is more likely to perceive that there is a benefit to bringing a petition, and more petitions will be brought. Holding all other factors constant, the quicker the petitions process is, the more beneficial it will be to consumers.[27]

The amount of expected damages can influence the number of petitions that are brought.[28] If there is a high chance of low damages—as

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23 *See* Felstiner et al., *supra* note 11, at 639–45 (describing the factors that impact whether individuals raise grievances, and noting that the easier it is for individuals to bring petitions, the more petitions the petitioning body will receive).

24 *Id.* at 645–46 (describing the role of representatives in bringing a grievance). Intermediary incentives compound some of the factors impacting whether an individual will bring a petition. The psychological benefits of bringing a petition and being heard are personal to the petitioner. These only marginally impact intermediaries and only those intermediaries that are public interest oriented. Assuming intermediaries are paid by the petitioners for their services, the latter three factors—that is, speed, likelihood of success and amount of damages, and limitations on standing—would all influence the expected amount that a petitioner would be willing to pay for intermediary assistance.

25 *Id.* at 648–49.

26 *See* Ethan Katsh, *Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace*, LEX ELECTRONICA, Winter 2006, at 6, http://www.lex-electronica.org/articles/v10-3/katsh.pdf ("Dispute resolution processes are generally perceived as having a single function, that of settling problems. What has come to be understood online, perhaps more than it is offline, is that dispute resolution processes have a dual role, that of settling disputes and also of building trust.").

27 *See* Rule, *supra* note 19, at 773 ("The only group of buyers who filed a dispute and decreased their activity on the site in the three months after the active month were buyers for whom the resolution process took a very long time . . . . These buyers filed a dispute and, for one reason or another, had the resolution of that dispute take longer than six weeks. If the dispute was resolved within six weeks, then the Activity Ratio was higher than the non-dispute-filing accounts, but if the resolution process stretched beyond six weeks, then the Activity Ratio fell lower than the non-filing accounts. That was the only outcome in which the Activity Ratio was lower than the non-filing buyers.").

28 *See id.* at 769; *see also Managing NPS*, GENESYS, http://www.genesys.com/solutions/customer-experience/managing-nps (last visited Jan. 27, 2016) (describing the Net Promoter

in worker's compensation or no-fault insurance regimes—or a low chance of very high damages—as in medical malpractice tort actions—individuals will bring a substantial number of petitions. However, while the likelihood of success on the merits is a factor in the decision to make an individual happy with a petitions process, it is not the only factor, or even necessarily the most important.[29]

C. *Individual Petitions and Political Actors*

The idea that agencies are merely executors of legislative policy has long been abandoned in considering the modern administrative state.[30] This raises the questions of what influences agencies to create their policies, and how agencies can be motivated to consider public opinion and social norms. Several authors have discussed the potential of the internet to enable accessible, responsive government, and in this way promote government legitimacy in the digital age.[31] Furthermore, a recent study suggested a reinterpretation of legitimacy that emphasizes

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Score (NPS) as a tool that uses consumer satisfaction metrics to help clients increase sales, including a "worldwide standard for organizations to measure, understand and improve their customer experience").

29 *See* Joel Brockner et al., *When Trust Matters: The Moderating Effect of Outcome Favorability*, 42 ADMIN. SCI. Q. 558 (1997).

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

31 *E.g.*, John C. Reitz, *E-Government*, 54 AM. J. COMP. L. 733, 735 (2006); Jennifer Shkabatur, *Digital Technology and Local Democracy in America*, 76 BROOK. L. REV. 1413, 1424 (2011). *But see* Reeve T. Bull, *Making the Administrative State "Safe for Democracy": A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611, 611–12 (2013) (arguing that the best way to seek input from citizens is not direct solicitation of petitions but rather "the use of advisory committees, including demographically representative panels of citizens to provide public input on matters of agency policy").

giving the governed reasons to accept authority, rather than defining legitimacy purely in terms of compliance with the law.[32]

Individuals are not among the actors that substantially influence federal administrative agencies.[33] Rather, most scholars maintain that federal administrative agencies are influenced by some combination of the three federal branches of government and interest groups.[34] This is precisely the reason for the anxiety about the vast power of a body that is not directly accountable to the American public.[35] It is another question, however, whether that anxiety is warranted.[36] The American public is largely ambivalent or even skeptical of the federal administrative state.[37]

This has adverse effects on the perceived legitimacy of the administrative state.[38] In the standard account of the administrative rulemaking process—a primary way in which administrative agencies make law—individual complaints by citizens play no role at all.[39] Instead, business groups and public interest organizations take center stage in negotiating the perspectives of the public relative to government actors, including the executive branch, the legislative branch, and of course, the administrative state itself.[40] Public choice theory tells us that federal administrators bargain with influential interest groups,

32 Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCHOL. PUB. POL'Y & L. 78, 79 (2014).

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

34 *Id.* at 2264–69.

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

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

37 *See* JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 31–57 (1978) (describing the crisis of public ambivalence toward agency action).

38 *See id.*

39 *See, e.g.*, CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 193–268 (4th ed. 2011) (describing business groups and citizen organizations as instrumental to the rulemaking process in federal administrative agencies).

40 *See id.*

dispensing benefits and expecting political support in return.[41] Often, the real negotiation for the major regulatory action happens before the public is even aware of what is at stake.[42] Even more worrisome, empirical studies suggest that even repeat players who purport to represent the public interest have little to no influence on the actual administrative rulemaking process.[43] There is a growing volume of scholarly work examining the factors that influence the "real" negotiation for administrative policy: checks and balances within the executive branch.[44]

However, public attitudes, especially ones that can be quantified over a period of time through a petitions process, are not irrelevant to the actions of regulatory actors. There has long been empirical evidence of the influence of public opinion even on the political institution most insulated from direct public rebuke, the Supreme Court.[45]

A petitions process creates well-being for consumers and substantially adds to the legitimacy of consumer trust in the institutions as a major policy decision maker for the community. A rational institution, therefore, should seriously consider a petitions process for actions that it aims to encourage.[46] Prominent, meaningful company policies attentive to consumer policy help build trust between customer and company.[47] Leading privacy scholars Neil Richards and Woodrow

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41 JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 13–30 (1997) (describing challenges to positive political theory).

42 *See* Kagan, *supra* note 33, at 2360 (noting that interested groups interact with agencies before regulatory rulemaking to set boundaries for the rulemaking, without the public knowing about this parameter setting).

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

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

45 *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957) (quantifying the influence of public opinion on Supreme Court appointments and holdings over the course of its history).

46 *See* Rule, *supra* note 19, at 777.

47 *See generally* ANN CAVOUKIAN & TYLER J. HAMILTON, PRIVACY PAYOFF: HOW SUCCESSFUL BUSINESSES BUILD CUSTOMER TRUST (2002) (discussing the relationship between trust and privacy); *see also* Gene Marks, *Why Did T.J. Maxx's Share Price Surge After a Data Breach that Affected 94 Million Customers?*, FORBES (June 2, 2014, 11:09 AM), http://www.forbes.com/sites/quickerbettertech/2014/06/02/why-did-t-j-maxxs-share-price-surge-after-a-data-breach-that-affected-94-million-customers (describing how the trust factor arising from its response helped T.J. Maxx actually improve its standing with consumers following a major data security breach). There is also a growing industry dedicated to helping companies that traffic in personal information manage the risk of breach—despite the fact that there is only limited liability against corporations for data breaches. *See e.g.*, *What We Do*, KROLL, http://www.kroll.com/what-we-do (last visited Oct. 6, 2015).

Hartzog have argued that privacy should be understood as "enabling trust in our essential information relationships."[48] A key aim of privacy policy, then, should be facilitating trust between government, private corporations, and individuals, which is exactly what a transparent privacy petitions process enables.

II. Understanding When Petition Bringing Helps Institutional Decision Making

This Part begins by explaining the characteristics of the cases where petition bringing substantially contributes to institutional decision making—namely, when a petition is nontangible and is shaped by social norms. Then, it describes the case study of German institutional structure for receiving citizen concerns regarding the privacy implications of new consumer technologies. Through describing how German institutions responded to community privacy complaints about Google Street View, this Part discusses why access to a petitions process is the critical difference between German and American institutions. Finally, this Part stresses the particular need for such a petitions system in the context of information privacy, by both showing the extreme lack of petitions process relative to other possible individual concerns, and outlining the exceptional characteristics of the interest of consumer privacy.

A. *Characteristics of Cases Where Petition Bringing Substantially Helps Policy Making*

This Article's primary contention is that a local point of access and lower financial barrier to making petitions would lead to more individual petitions in response to perceived consumer privacy infringements from new technologies. More petitions make responses more likely by political actors—especially state legislatures. This principal is at a broad enough level of generality that several different institutional structures could satisfy it. An institutional system of this type is particularly important in the case of petitions regarding information privacy, which is a personal interest that has positive externalities to the community, and has contours that are at least in part dependent on social norms. Furthermore, the market fails to distribute

[48] Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. (forthcoming 2016) (manuscript at 2), http://ssrn.com/abstract=2655719.

the information privacy interest in line with said externalities and norms. Even if the petitions process has a negligible effect on actual policies, the mere fact that individuals have a meaningful opportunity to be heard would legitimate the actions of public and private entities with respect to the privacy implications of new technologies.[49]

Information privacy shares characteristics with other regulatory areas that feature petitions systems that serve a similar function of offering the public a regulatory check on corporate behavior. This Section will consider patent registration, state data breach notification statutes, and legal disciplinary action petitions.

Patent registrations were originally called petitions,[50] and registering patents through the United States Patent and Trademark Office (USPTO) is an example of a petitions process that provides valuable information to policy makers about developments in fields where practices and norms are in flux. It is also a process that is readily accessible to members of the public. An individual or organization that wishes to file a patent can submit an application online to the USPTO. There is a relatively low cost to file a patent. The fee schedule varies based on whether the submitter is a large entity, small entity, "micro entity" or an individual.[51] Perhaps more importantly, average Americans who are not otherwise repeat players in intellectual property or innovation policy perceive a patent as something within reach. The ubiquity of mass advertising for inventions is a testament to the perception that the opportunity to patent is open to all. Innovation is common among Americans.[52] There are many ongoing debates as to how to reform patent law, mostly focusing on the overbroad scope of patents and how patents may interplay with, or unduly limit, innovation.[53] However, reform of the opportunity to register a patent

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49 *See* discussion *supra* Part I.

50 *See* Camilla A. Hrdy, *State Patent Laws in the Age of Laissez Faire*, 28 BERKELEY TECH. L.J. 45, 74 (2013) (discussing the early history of patent law).

51 35 U.S.C. § 2 (2012) ("[The USPTO] shall recognize the public interest in continuing to safeguard broad access to the United States patent system through the reduced fee structure for small entities . . . ."); *USPTO Fee Schedule*, U.S. PAT. TRADEMARK OFF., http://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule#Patent%20Fees (last updated Jan. 1, 2016).

52 *See, e.g.*, INVENTHELP, http://inventhelp.com (last visited Oct. 31, 2015) (describing itself as a company dedicated to "help[ing] everyday Inventors patent and submit their ideas to companies"). One of my first memories of the notion of a patent was my father's doodles of a possible invention, an ingenious design for a fly trapper. While his days were fully booked with his work in finance, he told me that someday he would patent the trapper and make a business out of it. As far as I know, to date, he has not followed through on the business aspect of this ambition, and I am not sure if he ever got the patent.

53 *E.g.*, John M. Golden, Commentary, *"Patent Trolls" and Patent Remedies*, 85 TEX. L. REV. 2111, 2147–60 (2007) (discussing the question of what rules or standards should govern the issuance of permanent injunctions for patent infringement); Jeffrey P. Kushan, Essay, *The Fruits of the Convoluted Road to Patent Reform: The New Invalidity Proceedings of the Patent*

through a brisk administrative process is generally not considered a possible remedy for the problems facing the patent system. The USPTO's practices are informed by the registration process and the information that incoming petitions provide about who is petitioning what. An increasing chorus of voices has argued that the USPTO should receive *Chevron* deference[54] from federal courts,[55] but even without formal *Chevron* deference, USPTO policy and information has consistently influenced the courts,[56] the major source of change in patent policy.[57] In this way, the registration avenue for patents provides legitimacy and influence to the USPTO.

State data breach notification legislation, like patent registration, gives voice to public perceptions. These laws require that affected consumers receive notice of security breaches of personal data.[58] In 2002, California passed the first state data breach notification law, and over the next decade, most other states followed suit by enacting their own variations of the California law. Currently, forty-seven states have data breach notification laws.[59] In this case, the legislature decides what constitutes a "data breach," and when such a data breach occurs, a company is required to report it to affected individuals.[60] The data breach notifications provide notice when there are grounds for consumers to be worried about the safety of their information. This way consumers can change who they give their business to, or the businesses can give the consumers reason not to depart. It is up to consumers and companies to decide how to proceed after disclosure, but such

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and Trademark Office, 30 YALE L. & POL'Y REV. 385 (2012); Megan M. La Belle, *Patent Litigation, Personal Jurisdiction, and the Public Good*, 18 GEO. MASON L. REV. 43, 45–46 (2010) (proposing legal reform that would make declaratory judgments more common); James G. McEwen, *Is the Cure Worse than the Disease? An Overview of the Patent Reform Act of 2005*, 5 J. MARSHALL REV. INTELL. PROP. L. 55 (2005); Xuan-Thao Nguyen, *Dynamic Federalism and Patent Law Reform*, 85 IND. L.J. 449 (2010).

54 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); *see* Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990).

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

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

57 *See* Camilla A. Hrdy, *Dissenting State Patent Regimes*, 3 IP THEORY 78 (2013).

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

59 *See Security Breach Notification Laws*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 22, 2015), http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx.

60 *See id.*

disclosure typically result in consumers airing grievances and companies making amends. However, the mere fact of notification of a bad data breach or even bad data protection practices does not mean aggrieved consumers have causes of action in court or in state administrative agencies.[61] In fact, most state data breach legislation does not create such an individual cause of action, and advocates have called for reform to give individual consumers more agency.[62] These proposed reforms call for strengthening the petition-like features of data security breach legislation by creating a direct avenue for brining petitions based on concerns about disclosed data breaches.

Transparent petitions processes providing records of current practices and changing social norms for groups whose interests are not represented by repeat players in the litigation or legislative process can work outside of the substantive field of technology. Disciplinary conduct review processes, which exist in all fifty states, provide an administrative avenue for unprofessional behavior by attorneys to be reported.[63] Like patent registration and data breach mandatory disclosure, the goal of such legal discipline is to give society a forum for enforcing an acceptable standard of care among the attorneys that serve them.[64] Neil Hamilton and Verna Monson have demonstrated that there is a direct connection between professionalism and the effectiveness of legal practice, so legal misconduct petitions serve the interest of the broad, diffuse set of anyone who uses lawyers.[65] Legal misconduct petitions can be litigated in court, or individuals can submit petitions requesting disciplinary action to the state bar association.[66] Grievances can be filed with local bar associations quickly and inexpensively.[67]

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61 *See* Rachael M. Peters, Note, *So You've Been Notified, Now What? The Problem with Current Data-Breach Notification Laws*, 56 ARIZ. L. REV. 1171, 1183–84 (2014).

62 *See id.* at 1194–1201.

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

64 *See id.* at 7–10 ("[A]ddress[ing] the distinct but interrelated definitions of 'professional conduct/professionalism,' 'disciplinary conduct,' and 'legal malpractice' in order to provide a framework for incorporation.").

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

66 *See* Boothe-Perry, *supra* note 63, at 7–9 (defining legal malpractice and disciplinary conduct, and distinguishing them from one another).

67 *See, e.g.*, COMM. ON PROF. DISCIPLINE, N.Y.C. BAR ASS'N, HOW TO COMPLAIN ABOUT LAWYERS AND JUDGES IN NEW YORK CITY (2012), http://www.nycbar.org/pdf/brochures/Complaints_Lawyers_Judges/complain.pdf.

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

B. *An (Imperfect) Privacy Case Study: Google Street View Controversy in Germany*

1. German Institutional Structure

The need to protect data privacy has deep foundations in German law. The Constitution (or Basic Law) of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) guarantees the dignity of the individual and the right to the free development of one's personality (*allegemeines Personlichkeitsrecht*).[68] The Federal Constitutional Court (*Bundesverfassungsgericht*) has identified some scope of privacy as essential for the right to an inviolate personality, holding that the right of privacy (*Privatsphäre*) is an "untouchable sphere of private life withdrawn from the influence of state power."[69] The Federal Constitutional Court has jurisdiction over any matters arising from a violation, by public authorities, of an individual's fundamental rights or other rights specifically mentioned in the Basic Law, when such individual invokes the court's authority.[70]

The federal law that delineates data privacy processing by private actors is the German Federal Data Protection Act

68 GRUNDGESETZ [GG] [BASIC LAW], *translation at* http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html. Article 1(1) states "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." *Id.* Article 2(1) provides: "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law." *Id.*

69 J. Lee Riccardi, Comment, *The German Federal Data Protection Act of 1977: Protecting the Right to Privacy?*, 6 B.C. INT'L & COMP. L. REV. 243, 245 (1983) (translating BVerfG, 27 BVERFGE 1, 6, July 16, 1969).

70 GRUNDGESETZ, *supra note* 68, at art. 93(1)(4a).

(*Bundesdatenschutzgesetz*) (BDSG).[71] The BDSG created a national Federal Commissioner for Data Protection (*Der Bundesbeauftragte für den Datenschutz und die Informationsfreiheit*).[72] However, state agencies are in charge of enforcement and interpretation of the federal data protection law, as well as any state data protection laws.[73] Each state has its own agency, known as its Office for Data Protection (*Der Landesbeauftragte für den Datenschutzbeauftragte*), or a similar name, that is "responsible for monitoring compliance with data protection provisions."[74] The Federal Commissioner is tasked with monitoring federal agencies and state Offices for Data Protection "[t]o guarantee compliance with [BDSG] and other data protection provisions."[75] When informing the state agencies of the monitoring results, the Federal Commissioner "may make recommendations on the improvement of data protection."[76] Nonetheless, the Federal Commissioner has no direct enforcement power against companies that infringe the law, and the states have no obligation to listen to any recommendations made by the Federal Commissioner.[77]

Representatives from all sixteen of the state Offices for Data Protection and the Federal Commissioner meet biennially to discuss current privacy and data protection issues, and to prescribe resolutions.[78] However, these resolutions rarely constitute specific approaches to enforcement policy, which causes each state agency to operate largely based on its own interpretation of federal and state laws.[79]

Each state agency has its own policies.[80] Such agencies enforce data privacy law on the state level through sub offices.[81] This Article will

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[71] *See* Riccardi, *supra* note 69 (providing a contemporary summary of the law and its implications).

[72] Bundesdatenschutzgesetz [BDSG] [Federal Data Protection Act], Jan. 14, 2003, BGBL I at 201, BGBL I at 66, Part II, ch. III, §§ 22–26, last amended by Gesetz [G], Aug. 14, 2009 BGBL I at 2814, art. I (Ger.), http://www.gesetze-im-internet.de/englisch_bdsg/englisch_bdsg.html.

[73] *Id.*

[74] *Id.* § 26(4).

[75] *Id.* § 38(5).

[76] *Id.* § 26(3).

[77] *Id.* §§ 24, 26.

[78] *See Entschließungen der Konferenz der Datenschutzbeauftragten des Bundes und der Länder seit 1992*, SACHSEN-ANHALT (Ger.), http://www.datenschutz.sachsen-anhalt.de/konferenzen/nationale-datenschutzkonferenz/entschliessungen (last visited Jan. 27, 2016).

[79] *See Data Protection*, LANDESBEAUFTRAGTE FÜR DATENSCHUTZ UND INFORMATIONSFREIHEIT NORDRHEIN-WESTFALEN, https://www.ldi.nrw.de/LDI_EnglishCorner/mainmenu_DataProtection/Inhalt2/authorities/authorities.php; VIRTUELLES DATENSCHUTZBÜRO, https://www.datenschutz.de (last visited Jan. 12, 2016) (portal site of the German data protection agencies).

[80] *See TB Bundesländer*, TECHNISCHE HOCHSCHULE MITTELHESSEN (Ger.), http://www.thm.de/zaftda/component/docman/cat_view/25-tb-bundeslaender (last visited Jan. 27, 2016) (compiling the data protection laws and regulations in each of the German states).

focus on the state agency in Hesse—one of Germany's sixteen states—as an illustrative example of state agency action in Germany. The Hessen Office for Data Protection focuses on the legal aspects of information and communication technology (*Rechtsfragen der Informations- und Kommunikationstechnik*).[82] This office handles data privacy enforcement and policy, among other matters.[83] Hesse contains the city of Frankfurt, Germany's fifth largest city and a global financial hub. As such, it is representative of German state telecommunication agency practices with respect to privacy; furthermore, it was the first German state to pass a comprehensive data privacy law in 1970.[84]

In Hesse, the enforcement process for companies who violate Hessen privacy law is a negotiation process rather than an adversarial process.[85] First, Hessen residents submit a petition regarding an invasion of data privacy under the German Federal Data Protection Act or the Hessian Data Protection Act.[86] Then, the Office for Data Protection investigates the petition by working with the claimant, and tries to get the company that is allegedly in violation of the privacy law to modify its practices.[87] If a settlement cannot be reached, the Office for Data Protection can use injunctive power to force the company to stop its violations. Most violations are discontinued at the second step, through negotiations between the alleged violator of privacy rights and the state data protection agency. The agency itself conducts an investigation, which is prompted by the concern of the citizen who initially raised the problem.[88] Obviously, if the Office for Data Protection is able to expunge a company of its practices that infringe upon the privacy laws through this process, then the initial petitioner may benefit.[89] The agency does not have the power to forcibly round up companies without operations in the state.[90] Large companies have a presence in many major cities and are subject to regulation by the office of data protection of any state in which they operate.[91]

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81 *See* BDSG [Federal Data Protection Act], art. I, ch. 3, §§ 22–26.

82 *See Über uns und unsere Aufgaben*, DER HESSISCHE DATENSCHUTZBEAUFTRAGTE (Mar. 2, 2015), http://www.datenschutz.hessen.de/ueber_uns.htm.

83 *See id.*

84 Hessischen Datenschutzgesetzes [HDSG] [Hessian Data Protection Act], Oct. 7, 1970, GESETZ UND VERORDNUNGSBLATT [GVBI] I at 625 (Ger.). This statue served as a model for several other German states and the BDSG, adding to its attractiveness as a baseline case for describing the actions of state agencies.

85 *See* HDSG [Hessian Data Protection Act].

86 *See id.*

87 *See id.*

88 *See id.*

89 *See id.*

90 *See id.*

91 *See id.*

2. American Institutional Structure

While the theoretical foundations of privacy law in the United States come from tort[92] and constitutional law,[93] the Federal Trade Commission (FTC) is the primary agency that institutes enforcement actions against companies for unfair and deceptive data privacy practices.[94] Section 5 of the Federal Trade Act grants the FTC authority to prosecute companies and to issue enforcement guidelines related to privacy concerns stemming from information exchange transactions between individuals and companies.[95] In a 1998 report entitled *Privacy Online: A Report to Congress*, the FTC elaborated on its approach to its section 5 enforcement authority, as in the context of privacy.[96] Since then, the FTC has become increasingly active in setting the practical norms for industry behavior in the area of data privacy.[97] However, that role has been questioned based on the vagueness of the "unfair and deceptive" standard for FTC intervention.[98]

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92 *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (advocating a common law right to privacy—a broad "right to be let alone"—and for remedies for its violation); *see also* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389, 423 (1960) (outlining four discrete torts based on a descriptive evaluation of the development of privacy in tort law since Warren and Brandeis' article).

93 S*ee, e.g.*, Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977) (discussing collection or disclosure of information); Roe v. Wade, 410 U.S. 113 (1973) (discussing a right to privacy in sexual and reproductive matters).

94 *See* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 600 (2014) (describing the FTC as the "[d]e [f]acto [d]ata [p]rotection [a]uthority" in the United States).

95 Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2012). The text of the statute confers broad authority to regulate trade, stating:

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

Id. § 45(a)(1–2).

96 FED. TRADE COMM'N, PRIVACY ONLINE: A REPORT TO CONGRESS (1998), http://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf.

97 *See* Solove & Hartzog, *supra* note 94; *see also* Lauren Henry, Note, *Institutionally Appropriate Approaches to Privacy: Striking a Balance Between Judicial and Administrative Enforcement of Privacy Law*, 51 HARV. J. ON LEGIS. 193 (2014).

98 Diane Bartz, *Commissioner to Push for FTC Vote on 'Unfair and Deceptive' Guidelines*, REUTERS (Feb. 27, 2015, 6:56 AM), http://www.reuters.com/article/2015/02/27/usa-antitrust-ftc-idUSL1N0W10LL20150227; *see also, e.g.*, Jedidiah Bracy, *White House Privacy Bill Taking Fire from All Sides*, INT'L ASS'N OF PRIVACY PROFESSIONALS: PRIVACY ADVISOR (Mar. 2, 2015), https://privacyassociation.org/news/a/white-house-privacy-bill-taking-fire-from-all-sides.

While some states have FTC analogues, they have not been particularly active in privacy enforcement actions.[99] In recent years, the FTC has handled a limited number of high profile data privacy cases that touch upon the data use and privacy practices of some of the most commonly used products in America, such as Google and Facebook.[100] Most FTC actions end in a consent order, a contract agreement between the FTC and the company to adhere to certain rules.[101] However, others in similar lines of work watch these actions carefully and shape their privacy policies to attempt to avoid enforcement actions.[102] Incentives to avoid enforcement actions are getting higher, as the FTC has proven increasingly willing to impose strict punishment, such as required audits for up to fifteen years.[103]

It is possible to use state statutory and common law to bring enforcement actions against private actors that infringe individuals' data privacy. The lack of success of many cases in the courts is due to tight interpretations of harm and damages at common law.[104] However, some state attorneys general have expertise in, and a commitment to, pursuing public interest privacy litigation.[105]

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99 But they could. Most FTC analogues have similar grants of authority to the federal FTC and interpret the scope of their authority analogously. *See* Robert M. Langer et al., *Business Torts as Little FTC Act Claims: Does the Difference Really Make a Difference?*, A.B.A., SECTION OF ANTITRUST LAW: BUSINESS TORTS & RICO NEWS, Summer 2013, at 1, 3.

100 *See* Henry, *supra* note 97, at 207–14 (discussing high profile FTC privacy cases involving Facebook and Google).

101 *See id.* at 201–14 (discussing the FTC privacy and data security matters since the mid-1990s— all of which ended in consent order).

102 *See* Google Buzz, File No. 1023136 (Fed. Trade Comm'n Mar. 30, 2011) (Rosch, Comm'r, concurring), https://www.ftc.gov/sites/default/files/documents/cases/2011/03/110330google buzzstatement.pdf (noting concern that Google was accepting the terms as leverage that "hurt other competitors as much or more than the terms will hurt [Google]").

103 Press Release, Fed. Trade Comm'n, Twitter Settles Charges That It Failed to Protect Consumers' Personal Information; Company Will Establish Independently Audited Information Security Program (June 24, 2010), http://www.ftc.gov/opa/2010/06/twitter.shtm.

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

105 *See, e.g.*, George Jepsen, Conn. Att'y Gen., Keynote Address at the University of Connecticut Symposium: Big Data and Insurance (Apr. 3, 2014), *in* 21 CONN. INS. L.J. 255, 259 (2014) (underscoring the role of state attorneys general in protecting consumer privacy); *Privacy Enforcement and Protection*, CAL. DEP'T JUST., http://oag.ca.gov/privacy (last visited Jan. 27, 2016); *see also generally* Ganka Hadjipetrova & Hannah G. Poteat, *States Are Coming to the Fore of Privacy in the Digital Era*, LANDSLIDE, July-Aug. 2014, at 13 ("An overview of recent state legislative plans, particularly of the so-called 'California effect,' and of state attorneys

3. Google Street View

Google Street View is a feature of Google Maps that allows users to view a street-level panorama of a given point on a map. The panorama is based on photos taken by Google cars from the street, and includes anyone or anything that happens to be in view along with the buildings.[106]

The reception and governmental response to Google Street View in Germany offers insights into the relationship between society, corporations, and regulatory actors in the setting of privacy norms in the digital age. More specifically, the nature of regulation influences how and when corporations react when society perceives privacy wrongs or surveillance "creepiness."[107]

In Germany, early opposition to Google Street View led to substantive changes in how Google Street View ended up functioning in Germany when it launched on November 18, 2010. When it was announced that Google Street View would come to Germany, many Germans had strong negative reactions because of a perceived invasion of privacy.[108] Thomas Hoeren, a law professor at the University of Muenster's Institute for Information in Germany, has noted a historical imperative that may motivate German regulators to give particular solicitude to citizen privacy concerns: "Germany has a long tradition of protecting privacy and personality rights . . . due to the very bad surveillance practices of the Nazi regime."[109]

After Google Street View's launch there were some rumblings in the press about American privacy concerns relating to Google Street View,[110] and court cases alleging invasion of privacy by Google, that were unsuccessful at the motion to dismiss phase.[111] However, no

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general initiatives illustrates the leadership role states have assumed in privacy rulemaking and enforcement.").

106 *See Understand Street View*, GOOGLE STREET VIEW, https://www.google.com/maps/streetview/understand/ (last visited Jan. 12, 2016).

107 *See generally* Omer Tene & Jules Polonetsky, *A Theory of Creepy: Technology, Privacy and Shifting Social Norms*, 16 YALE J.L. & TECH. 59 (2013) (presenting a set of social and legal considerations giving substance to the intuition that a new technology is "creepy").

108 *See* Stephen Kurczy, *Germany's Love-Hate Relationship with Google Street View*, CHRISTIAN SCI. MONITOR (Aug. 12, 2010), http://www.csmonitor.com/World/Europe/2010/0812/Germany-s-love-hate-relationship-with-Google-Street-View.

109 *Id.* (quoting University of Muenster law professor Thomas Hoeren).

110 *See, e.g.*, Miguel Helft, *Google Zooms in Too Close for Some*, N.Y. TIMES (June 1, 2007), http://www.nytimes.com/2007/06/01/technology/01private.html.

111 *See, e.g.*, Boring v. Google, Inc., 598 F. Supp. 2d 695, 698 (W.D. Pa. 2009), *aff'd in part, rev'd in part*, 362 F. App'x 273, 279 (3d. Cir. 2010). Google eventually settled with the plaintiffs in *Boring v. Google* for one dollar. *See* Chris Davies, *Google Pays $1 Compensation in Street View Privacy Case*, SLASHGEAR (Dec. 3, 2010), http://www.slashgear.com/google-pays-1-compensation-in-street-view-privacy-case-03117450.

American government agency took action to attempt to protect consumers from the perceived invasion of privacy by Google Street View.[112] Commentators observed the similar character of the initial furor over the launches of Google Street View in the United States and Europe.[113]

There is no evidence that the proportion of German consumers who had privacy concerns about Google Street View prior to its rollout was higher than the proportion of American consumers who had privacy concerns about Google Street View. What accounts for the difference in regulatory agencies' sensitivity to consumers' privacy concerns, and the greater responsiveness of Google to change the functionality of Google Street View to deal with said concerns? This question matters because in a world where innovative technology companies with market power contribute significantly to setting social norms, it is significant to understand the channels through which society can influence how corporations create technological architecture.[114]

When considering the relationship between regulation and the establishment of consumer privacy norms, it is useful to compare the rollout process of Google Street View in Germany to the process in the United States. When Google first announced its intention to launch Google Street View in Germany and photos started to be taken, many Germans contacted their states' (*Bundesländer*) Office for Data Protection with privacy concerns.[115] Furthermore, a prominent court

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112 In the process of taking the photographs for Google Street View, Street View vehicles had been collecting and storing data collected from unencrypted WiFi networks, including personal emails, usernames, passwords, videos, and documents. The FTC investigated and ultimately rejected a potential enforcement action against Google on the grounds of these practices. Claire Cain Miller, *A Reassured F.T.C. Ends Google Street View Inquiry*, N.Y. TIMES (Oct. 27, 2010), http://www.nytimes.com/2010/10/28/technology/28google.html. More recently, state attorneys general pursued these facts and reached a large settlement with Google, which included an admission of wrongful acquisition and use of personal information through these WiFi data pickups. David Streitfeld, *Google Concedes that Drive-By Prying Violated Privacy*, N.Y. TIMES (Mar. 12, 2013), http://www.nytimes.com/2013/03/13/technology/google-pays-fine-over-street-view-privacy-breach.html. But these matters do not get to the heart of the general concern about the privacy implications of having a scene from, for example, one's yard, made immediately publicly available via Google Maps.

113 *See, e.g.*, Christian Lindner, *Persönlichkeitsrecht und Geo-Dienste im Internet*, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [ZUM], 2010, at 292.

114 *See* Lawrence Lessig, Essay, *The New Chicago School*, 27 J. LEGAL STUD. 661, 664 (1998) (defining "architecture" as I use it here).

115 Interview with Wilhem Rysdzy, Head of Telecommunications and Media, Office for Data Protection, in Wiesbaden, Germany (Jan. 20, 2012).

case alleging Google's violation of the right of privacy was filed in the district of Berlin.[116]

In Hesse, the individual petitions submitted to the Office for Data Protection followed a pattern. Hessens noticed that homes appeared on Google Street View. Sometimes, given the random time when the Google Street View image-capturing cars passed, they worried that image of a person's home might include an embarrassing or self-implicating image of the person. These petitions often betrayed basic misunderstandings about how Google Street View works.[117] Many petitioners erroneously assumed that Google was actually constantly monitoring their homes.[118]

The Hessen Data Privacy Office was not alone in receiving many petitions from its residents regarding Google Street View. Many of the German states began investigating Google Street View in response to the influx of complaints regarding the potential for the service to infringe upon privacy social norms. The approaches of the states varied. As a general matter, some German states have a more activist attitude towards enforcing privacy protections than others. For example, the Schleswig-Holstein Office for Data Protection has proven very proactive in dealing with privacy concerns.[119] In fact, the state banned the Facebook "like" button on all sites within the state.[120] Other states, Hesse included, take a more moderate approach.[121] With respect to Google Street View in particular, the Hessen Office for Data Protection was skeptical about the existence of an actual interest being violated.[122]

With German states poised to impose a variety of uncoordinated regulations on Google Street View, Google met with representatives from each state's office for data protection.[123] In 2010, after three years of negotiation, each of the German states and Google agreed to a uniform Google Street View opt-out mechanism, by which anyone in Germany could fill out a web form showing that they lived at an address, and Google would blur out the image of that address after

116 *See* Maureen Cosgrove, *Germany Court Rules Google Street View Legal*, JURIST (Mar. 22, 2011, 8:44 AM), http://jurist.org/paperchase/2011/03/germany-court-rules-google-street-view-legal.php.

117 *Id.*

118 *Id.*

119 *See German State Imposes Ban on Facebook 'Like'*, INT'L BUS. TIMES (Aug. 20, 2011, 5:59 AM), http://www.ibtimes.com/german-state-imposes-ban-facebook-302257.

120 *Id.*

121 Interview with Wilhem Rysdzy, *supra* note 115; *Praxis der Kommunalverwaltung Hessisches Datenschutzgesetz (HDSG)*, BECK-ONLINE, at § 2 (Mar. 2012) [hereinafter *PdK HDSG*], https://beck-online.beck.de/?vpath=bibdata/komm_pdk/PdK-He-B16He/cont/PdK-He-B16He.anhaengegliederung.gl2.htm.

122 Interview with Wilhem Rysdzy, *supra* note 115; *PdK HDSG*, *supra* note 121.

123 Interview with Wilhem Rysdzy, *supra* note *supra* note 115; *PdK HDSG supra* note 121.

mailing a code to the address in order to verify that the person really lived there.[124] Google gave Germans a month before Google Street View went live in November 2010 to register their objections, even taking out ad space in newspapers to publicize the option to opt-out.[125] The number of Germans who requested that Google take down their information even before the official process was created and publicized was in the five figures, so one can imagine that a nontrivial percent of Germans were interested in having their home blurred out. [126]

This would seem to be a happy ending—an agreement that assuages those most concerned about privacy, but allows everyone else access to a good resource, and of course, allows Google access to a major market. What is more, the Berlin Superior Court affirmed the legality of Google Street View under German privacy law.[127] However, after the process was finished, Google elected to stop updating Google Street View.[128] Although all the German states agreed to the same opt-out method with Google, during the negotiation process, certain states proved rather mercurial, and Google could have reasonably doubted that a sustainable solution was attainable.[129] After all, Google is constantly changing and updating its technology. Given that each state has the power to interpret and implement European and German data protection law,[130] one of the more activist states could oppose one of Google's technology updates, and start the whole process again. At the time of this writing, the litigation has not been resolved and Google Street View still works in Germany.[131]

This case can be used to tease out what is good and what is problematic about both the American and German regulatory structures

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124 *See* Matthias Kremp, *Courting Controversy: Google Prepares Street View Launch in Germany*, SPIEGEL (Aug. 10, 2010, 2:31 PM), http://www.spiegel.de/international/germany/courting-controversy-google-prepares-street-view-launch-in-germany-a-711090.html; *see also* JOHANNES FRITZ, NETZPOLITISCHE ENTSCHEIDUNGSPROZESSE: DATENSCHUTZ, URHEBERRECHT UND INTERNETSPERREN IN DEUTSCHLAND UND GROßBRITANNIEN 158–68 (2013) (recounting the Google Street View controversy in Germany).

125 *See* FRITZ, *supra* note 124.

126 The residence where the author did research for this Article, Guiollettstr. 67 60325 Frankfurt am, was one such address.

127 *See* Cosgrove, *supra* note 116.

128 *See* Matt McGee, *Google Has Stopped Street View Photography in Germany*, SEARCH ENGINE LAND (Apr. 10, 2011, 10:15 AM), http://searchengineland.com/google-has-stopped-street-view-photography-germany-72368.

129 Interview with Wilhem Rysdzy, *supra* note 115.

130 *See* RONALD L. WATTS, COMPARING FEDERAL SYSTEMS 35–36, 193–98 (3d ed. 2008) (describing the concurrent jurisdiction of federal and state power in Germany). Essentially most legislation is passed at the federal level, with the power to enforce and interpret the federal law left to the states. *See id.* Privacy and data protection laws are among the areas of law that work in this fashion.

131 GOOGLE MAPS, https://maps.google.com (search, for example, "Guiollettstr. 67 60325 Frankfurt am") (last visited Oct. 20, 2013).

for data privacy. Administrative agencies in each German state have the power to regulate Google regarding Google Street View.[132] Because of that authority, they were able to engage in direct negotiations with Google.[133] But the courts also have a role to play. The Supreme Court of the State of Berlin (*Kammergericht*) held for Google in a suit in which the plaintiff alleged privacy harms from Google Street View, on the grounds that the harms were purely speculative.[134] At that time, however, Google Street View had not yet been rolled out in Germany, so the holding still left Google in an uncertain position as to how a German court would decide after the company actually made the product available.[135] Because the state administrative agencies negotiate directly with Google, court statements on the topic have been peripheral to actually setting architectural norms in terms of technology in Germany.

C. *The Centrality of an Accessible Individual Petitions Process in Information Privacy*

The previous Section showed that it is fairly easy for an individual to bring a petition regarding privacy concerns about a new technology to a state administrative agency in Germany.[136] It also showed that a concerned individual would have a reasonable expectation that state data protection officials would read and respond to her petition. In the United States, it is difficult and expensive to bring a privacy claim in the courts,[137] and there is a low likelihood of meaningful engagement by the FTC with a complaint by the average individual.[138] This Section contends that the ease with which the German system allows individuals to submit petitions both satisfies an important psychological outlet for individuals concerned about privacy, and provides information about social norms and practices that could be useful for policy development in information privacy. It also provides built-in political pressure in support of information privacy protections, as the Google Street View case study in the previous Section illustrates.

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132 *Id.*; *PdK HDSG*, *supra* note 121.

133 Interview with Wilhem Rysdzy, *supra* note 115; *PdK HDSG*, *supra* note 121.

134 Kammergericht [OLGZ] [Higher Regional Court] Oct. 25, 2010, 10 OLGZ 127/10, http://www.berlin.de/sen/justiz/gerichte/kg/presse/archiv/20110315.1545.335632.html.

135 *Id.*

136 *See supra* Part II.B.

137 *See generally* Neil M. Richards, Essay, *The Limits of Tort Privacy*, 9 J. TELECOMM. & HIGH TECH. L. 357, 365–74 (2011) (discussing the limits of tort law as an avenue for grievance).

138 *Submit a Consumer Complaint to the FTC*, FED. TRADE COMM'N, http://www.ftc.gov/faq/consumer-protection/submit-consumer-complaint-ftc (last visited Dec. 7, 2015) ("The FTC cannot resolve individual consumer complaints . . . .").

When an institution provides an avenue for individuals to bring information privacy petitions, it keeps track of how many petitions are brought and for what, regardless of whether the petition was considered "successful." It is important for the law to specifically provide for the creation of data that tends to promote protection of vulnerable groups in society. Rachel Harmon has written extensively on the impact of the lack of publicly available information on policing practices.[139] She argues that the lack of information available on policing practices decreases political pressure to reform policing and furthermore, makes reform more difficult even given adequate political will due to inadequate information about the status quo.[140] Creating a transparent, accessible privacy claims process would prevent a similar failure to create and distribute information about consumer privacy norms.

Germany has meaningful, affordable administrative avenues for citizens to raise privacy petitions. By assigning receipt of individual petitions to the same agency that handles regulatory change, administrative officials become more likely to have a keen sense of the concerns of members of the public about data privacy practices. Furthermore, the power that each state has allows each state to serve as a test case. Having each state empowered to act with respect to consumer privacy concerns can allow the best way of dealing with issues to rise to the top.[141] By contrast, a consumer with a privacy concern in the United States has no simple, clear avenue to petition the government where she can reasonably expect to be heard.

German privacy policy is hardly perfect, and cannot and should not be directly transported to the United States. However, as this Section has illustrated, the system succeeds at making political actors sensitive to privacy social norms and holding them accountable. This Article suggests a major factor in this success is the availability of a privacy petitions process. The following Section discusses American institutional avenues for reaping the benefits of a privacy petitions process.

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139 *See, e.g.*, Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 5, 28–34 (2009); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 772, 797 n.139, 815 (2012); Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119, 1122 n.11, 1146 (2013) [hereinafter Harmon, *Data on Policing*] ("Police departments collect some data about their activities, but not as much as would be useful, and they often share it only reluctantly with the public.").

140 *See* Harmon, *Data on Policing*, *supra* note 139, at 1122–28, 1146.

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

IV. TOWARD A MEANINGFUL PATHWAY FOR CONSUMER PRIVACY PETITIONS IN THE UNITED STATES

This Part lays out three options for petition bringing by individuals within the American system: (1) quasi-judicial state administrative agencies, (2) state courts applying state privacy law, and (3) required reporting of a private petitions system by companies to a federal agency, such as the Consumer Financial Protection Bureau, in a manner analogous to the Food and Drug Administration's mandatory reporting system. I also evaluate the advantages and obstacles to each option in the American system.

A. *Why American Institutions Must Be More Sensitive to Information Privacy Petitions*

It is important to observe that this Article's argument is not dependent on a high number of successful petitions. Many successful petitions would show that existing law and process tends to vindicate individuals' privacy concerns against a new technology, which may or may not be true. As many examples in American legal history illustrate, simply giving individuals a right, and a pathway to petition such right, does not necessarily improve the wellbeing of those who were accorded the right.[142]

In his influential Harvard Law Review article, *Property, Privacy, and Personal Data*, Paul Schwartz summarized an important point:

> The emerging verdict of many privacy scholars is that existing markets for privacy do not function well. Due to such market failures, which are unlikely to correct themselves, propertization of personal information seems likely to lead to undesired results—even to a race to the bottom as marketplace defects lead competitors to take steps that are increasingly harmful to privacy. This perspective is found, for example, in Julie Cohen's scholarship; in her view, a negative correlation is likely to exist between property in personal information and the resulting level of information privacy. Cohen

142 *See* WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 124 (1995) ("Rights discourse . . . converts social problems into matters of individualized, dehistoricized injury and entitlement . . . ."); Paul D. Butler, Essay, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2190–98 (2013) (showing that under *Gideon v. Wainwright*, 327 U.S. 335 (1963), the Warren Court case that provided the indigent with the right to counsel in criminal cases, the poor receive more process and more punishment, but the fact that a right to counsel is afforded legitimizes this injustice, noting, "[w]hen the problem is lack of a right, one keeps going to court until a court declares the right. When the problem is material deprivation suffered on the basis of race and class, where, exactly, does one go for the fix?").

> writes: "Recognizing property rights in personally-identified data risks enabling more, not less, trade and producing less, not more, privacy." Market failure will cause people to trade away too much of their propertized personal data and thereby erode existing levels of privacy. Or, as [Mark] Lemley concludes, "there is no good market solution" for information privacy based around property rights.[143]

The market simply does not tell corporations or government institutions enough about what individuals care about with respect to privacy, or what emerging social norms constitute.[144] Many studies show that consumers care about privacy but still use products that have limited data security, and engage in personal information trafficking.[145] Much has been made about the contrast between market behaviors and survey responses. A petitions system could give voice to what exactly about the products consumers find intrusive.[146]

A transparent petitions system could provide both corporations and governments with valuable information to improve the wellbeing of the public. Private actors could respond to many of the petitions through internal reform. The threat of government action in response to the petitions would also further incentivize private action. Finally, if there happened to be a behavior by companies that violated social norms, but corporate actors refused to correct it, state actors could step in as a last resort, upholding the public good of information privacy.[147] This is why it is a policy space that is particularly well suited to having a petitions system that can trigger both private and public action.

Finally, the availability of the petitions process has a salutary effect on the legitimacy of the new technology from the perspective of users,

143 Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2076–77 (2004) (footnotes omitted) (first quoting Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1391 (2000); then quoting Mark A. Lemley, Comment, *Private Property*, 52 STAN. L. REV. 1545, 1554 (2000)).

144 *See id.*

145 There is an excellent collection of relevant studies in an online database maintained by Alessandro Acquisti. *See* Alessandro Acquisti, *The Economics of Privacy*, CARNEGIE MELLON UNIV., http://www.heinz.cmu.edu/~acquisti/economics-privacy.htm (last visited Dec. 25, 2015).

146 This could be a valuable source of information for researchers and policy makers alike. To evaluate the type of concerns one might be looking to receive in a transparent privacy petitions process, the author plans to follow up this Article with an empirical study examining actions individuals find intrusive in the digital age, borrowing from the methodology used by Christopher Slobogin and Joseph E. Schumacher in a 1993 paper that sought to understand intrusiveness for the purposes of Fourth Amendment jurisprudence. *See* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 DUKE L.J. 727, 732 (1993).

147 *See id.* at 2084–90 (describing privacy as a public good).

regardless of the degree to which actual change is achieved as a result of their petitioning.[148]

B. *Three Options for Reforming American Consumer Privacy Petitions*

1. State Courts

One way to open up state institutions to privacy petitions regarding new technologies is through improved access to state courts for potential petitioners. Many scholars have written on how to expand the common law action of privacy,[149] and a few have written on how to define and justify the harm caused when an individual's privacy interest is invaded.[150] It is beyond the scope of this Article to advocate for a particular cause of action in state court, or to examine how courts or the state legislature should define and clarify the harm in the area of privacy. Rather, this subsection will evaluate the implications of the

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148 *Cf.* Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 922–25 (1981) (describing a prudential argument for due process from the perspective of human dignity).

149 *See, e.g.*, Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CAL. L. REV. 1805, 1831–50 (2010) (suggesting that courts should employ mainstream tort doctrines, such as tortious enablement of criminal conduct, strict liability, and duty of confidence, rather than creating new privacy torts or using existing ones); Jessica Litman, Essay, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1311 (2000) (suggesting common consumer privacy concerns are subsumed under the breach of confidence tort); Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1162–69 (2000) (arguing that default rules which impose a minimum standard of commercial morality, as in trade secret law, could provide the common law framework necessary to allow courts to protect consumer privacy); Lauren Henry Scholz, *Privacy as Quasi-Property*, 101 IOWA L. REV. (forthcoming 2016) (advocating a reframing of Prosser's four torts to be in common alignment with the model employed in quasi-property tort cases).

150 *See, e.g.*, Citron, *supra* note 149 at 1847, 1850 ("Aside from widening the sphere of Prosser's taxonomy to include mainstream torts, there are other ways in which privacy tort law could expand to meet the needs of today's exacerbated harms. This might involve altering Prosser's existing torts by changing the burden of proof. Privacy torts have long required demanding proof to ensure that plaintiffs cannot recover for the 'merely unpleasant aspects of human interpersonal relationships.' In important respects, today's privacy problems dispel concerns that plaintiffs would recover for trivialities. Public disclosures online are more lasting and destructive than ever before. They often create an 'indelible blemish on a person's identity.' Although people may attempt to respond to damaging disclosures in other posts, many may not see them, leaving the destructive bits in the forefront." (footnotes omitted) (first quoting Munley v. ISC Financial House, Inc., 584 P.2d 1336, 1338 (Okla. 1978); then quoting DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 94 (2007))); Daniel J. Solove, Essay, *"I've Got Nothing to Hide" and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745, 758 (2007) ("A privacy problem occurs when an activity by a person, business, or government entity creates harm by disrupting valuable activities of others. These harms need not be physical or emotional; they can occur by chilling socially beneficial behavior (for example, free speech and association) or by leading to power imbalances that adversely affect social structure (for example, excessive executive power).").

institutional choice of state courts to be the handlers of privacy petitions by individuals in response to new technology.

The Supreme Court has suggested that the best venue for individual petitions is the court system.[151] The Roberts Court has addressed the value and import of the ability to bring a petition in a common law court if standing is met.[152] In American culture, the least politically controversial way to make individuals aware of the ability to raise petitions against another private actor is through a traditional private law petition in tort, property, or contract.[153] These are classic areas of state regulation. Awarding personal causes of action, to be pursued either in the courts or in administrative agencies, is the best way for political actors to attempt to achieve public regulation through private action in a political environment heavy with deregulatory pressure.[154]

Despite the increasing entrenchment of what Robert Kagan calls "adversarial legalism," due to its compatibility with a more limited administrative state, Kagan and other scholars are skeptical that adversarial legalism presents the best way to achieve regulatory goals.[155] Unlike a common law court, administrative agencies have the ability to

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151 *See* Saul Zipkin, *A Common Law Court in a Regulatory World*, 74 OHIO ST. L.J. 285, 325–26 (2013).

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

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

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

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

explicitly make ex ante rules.[156] Courts are also generalists, and may not have the expertise necessary to make judgments about the intersection of cutting edge technology with consumer privacy concerns.[157] Neither of these may be a particular problem here, as the role of the petition receiving body is to hear and understand the concerns of the individual petitioners, and apply existing law to the petition. More problematic are the deterrents to petition bringing: the time required for a petition to be resolved,[158] and the need for a lawyer-intermediary to mediate those petitions.[159]

2. State Administrative Agencies

Another option is to have a state administrative agency receive petitions brought by individuals. This could be an existing state administrative agency or a new specialized one. In a previous work, I proposed how such a state administrative agency could be organized:

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

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

157 *See* Guido Calabresi, Judge, U.S. Court of Appeals for the Second Circuit, Address at the University of Pennsylvania Law School: The Current, Subtle—and Not So Subtle—Rejection of an Independent Judiciary (Jan. 31, 2002), *in* 4 U. PA. J. CONST. L. 637, 639 (2002) ("Judges are generalists who deal with a variety of matters and there are very good reasons why they should do so."); Ronald J. Gilson et al., *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 N.Y.U. L. REV. 170, 192 (2013) ("Most contemporary courts are generalists. They operate in a heterogeneous and rapidly changing economy, of which their institutional situation affords little detailed knowledge or experience."); Diane P. Wood, Judge, U.S. Court of Appeals for the Seventh Circuit, Address at the SMU School of Law: Generalist Judges in a Specialized World (Feb. 11, 1997), *in* 50 SMU L. REV. 1755, 1756 (1997) ("[W]e need generalist judges more than ever for the United States federal courts."). *But see* Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 524 (2008) (empirically evaluating judges as generalists and determining that courts will specialize when given the chance).

158 *See* Rule, *supra* note 19, at 772 (showing that the only petitioners in an eBay study that bought less from eBay after going through a petitions process were the ones whose petitions took over six weeks to process, regardless of outcome, illustrating the power of speed of process in determining petitioner incentives).

159 *See* Felstiner et al., *supra* note 11 (discussing the hurdles to the transformation of disputes from blaming to petitioning on the basis of perceived difficulties with respect to time and the need for intermediaries, which adds to the perceived complexity).

> Employment Practices Agencies (FEPAs), state agencies that enforce state anti-discrimination laws, could provide a blueprint for the relationship state privacy agencies could have with the FTC. The EEOC makes individualized agreements for sharing work with state agencies, including authorizing the state agency to handle matters that fall within the EEOC's jurisdiction (on top of the state agency's organic authority to handle appropriate state law discrimination claims).[160]

Compatible with both this approach and the state court approach discussed in the previous subsection is Miriam Seifter's observation that states already have a prominent role in federal administrative lawmaking.[161] In fact, her concerns about the increasing prominence of states in federal administrative law might be assuaged in this area by more expressly awarding states a prominent and substantial role in the regulation of information privacy.[162]

This mode of petition reception has the potential to be quick and familiar to most Americans, if they are through standard state administrative channels. It could be as easy to submit a petition as registering to vote or getting a replacement state ID. Individuals may even be able to submit petitions online, further reducing the time and psychological barrier to raise a petition.[163]

States with the political will would also be able to more quickly react to the consumer privacy petitions they receive than the federal

160 Henry, *supra* note 97, at 212 (footnote omitted).

161 Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 504 (2014) ("[T]he calls for a greater state role in the work of federal agencies, and the special role that states already play in the federal agency decisionmaking process, sit uneasily with the legitimacy values that have defined administrative law for the past century.").

162 *See* Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 1025 (2014) ("While state interest groups excel at resisting federal power and advocating states' institutional interests, the groups disserve the goals of expert decision making based on state input and of maintaining democratic accountability. I argue that these mixed results reflect inherent tradeoffs: The operationalization of the most prominent federalism goal entails sacrifices for expertise and accountability.").

163 For example, the Food and Drug Administration has an online form that patients and health professionals can use to report

> adverse events that you observe or suspect for human medical products, including serious drug side effects, product use errors, product quality problems, and therapeutic failures for: Prescription or over-the-counter medicines, as well as medicines administered to hospital patients or at outpatient infusion centers; Biologics (including blood components, blood and plasma derivatives, allergenic, human cells, tissues, and cellular and tissue-based products (HCT/Ps)); Medical devices (including in vitro diagnostic products); Combination products; Special nutritional products (dietary supplements, infant formulas, and medical foods); Cosmetics; [and] Foods/beverages (including reports of serious allergic reactions).

MedWatch Online Voluntary Reporting Form, U.S. FOOD & DRUG ADMIN., http://www.accessdata.fda.gov/scripts/medwatch (last visited Jan. 9, 2016).

government.[164] This could have the effect of allowing different privacy rules to take hold in different states, which would have the salutary effect of allowing the states to operate as laboratories of democracy. Different states could test drive different policies, and have a race to the top in determining the ones that best balance social norms of privacy against technological innovations that tend to threaten them.

While allowing states to create experimental policies in leading-edge areas within the police power has long been considered an advantage of the federalist system,[165] it is subject to the critique that despite innovation in individual states, the progress tends not to diffuse to other states, creating "regulatory islands."[166] Worse still, most states might wait to imitate the legislation of those states generally thought of as leading innovators, such as California and Texas.[167]

3. Mandatory Disclosure of Consumer Petitions to Federal Agencies

Finally, the federal government (or a state government) could institute a policy of mandatory disclosure of individual privacy petitions submitted to companies. Essentially, any company that traffics in personal data would have to receive consumer petitions about privacy concerns and report those petitions to a designated government agency. It is important to note that any such statute should specify the companies impacted by the type of transactions impacted, not by industry.[168] As BJ Ard has observed, "rapid turnover, dense intermediation, and lack of transparency render [the internet] industry-specific approach untenable for regulating commerce online."[169] Limiting the companies that needed to disclose their receipt of petitions to social media companies, for example, would simply invite many data traffickers to seek to define themselves in a manner that would avoid the regulation. Also, such a rule would blatantly ignore the many data traffickers that do not directly interact with consumers at all, but instead

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164 *See* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1124–35 (2014) (discussing how states serve as laboratories for national partisan politics).

165 *See* Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 6 (2010) (noting that federalism is traditionally thought to "promote[] choice, competition, participation, experimentation, and the diffusion of power").

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

167 *See* Wiseman, *supra* note 166.

168 *See* BJ Ard, *The Limits of Industry-Specific Privacy Law*, 51 IDAHO L. REV. 607 (2015).

169 *Id.* at 608.

mine information through the use of cookies, or purchase the information from third parties.[170]

Analogous regimes are already in place in several agencies. Two prominent examples are: (1) the Food and Drug Administration's mandatory reporting requirements for internal petitions processes,[171] and (2) the Consumer Product Safety Commission's recently expanded use of a mandatory consumer petition reporting process.[172] This type of reform is in line with increasing calls for oversight of consumer companies, analogous to the reforms that were put in place for financial companies following the financial crisis.[173] This approach has several advantages. First, individuals would not need to seek to articulate their concerns to a government agency; their experience would be built into the choices that they are making when using consumer products.[174] For the same reason, the petitions process has an incentive to be quick and comforting for consumers. Second, the data traffickers themselves would need to come up with a way to report the petitions they have received regarding data privacy concerns. This takes away the pressure and expense of structuring a petitions system from the government. It also would be more salable on a federal level in light of the relative political ease of developing regulations around transparency.[175]

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170 *See, e.g.*, *What They Know*, WALL ST. J., http://online.wsj.com/public/page/what-they-know-2010.html (describing data mining practices and the third-party market for personal information) (last visited Sept. 19, 2015).

171 *Mandatory Reporting Requirements: Manufacturers, Importers and Device User Facilities*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/PostmarketRequirements/ReportingAdverseEvents/default.htm (last updated Jan. 13, 2015).

172 *Mandatory Self-Disclosure of Product Problems to the CPSC*, BEVERIDGE & DIAMOND, P.C. (May 19, 2009), http://www.bdlaw.com/assets/htmldocuments/Mandatory_Self-Disclosure_of_Product_Problems_to_the_CPSC.pdf ("The Consumer Product Safety Improvement Act of 2008 ('CPSIA') is now well-known for its new requirements affecting children's products, toys, and child care articles, particularly those containing lead or phthalates. Less well-recognized is the significant impact of the CPSIA on the long-standing requirement under Section 15(b) of the Consumer Product Safety Act ('CPSA') to report certain product problems to the Consumer Product Safety Commission ('CPSC' or 'Commission'). Under the CPSIA, the scope of the Section 15(b) reporting requirement has expanded considerably, the CPSC has greater authority to respond to the reports, and the potential penalties for failure to report have increased exponentially.").

173 *See, e.g.*, Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1312 (2015) ("This Article argues for wider adoption of the financial sector's emerging—though largely unarticulated—paradigm that views regulatory supervision of firms as central to consumer protection.").

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

175 *See e.g.*, Roy Peled, *Wikileaks as a Transparency Hard-Case*, 97 IOWA L. REV. BULL. 64, 75–76 (2012) ("Transparency's popularity among civic groups and engaged citizens has turned

There are several obstacles to this policy solution. First, it would be important to frame the disclosure requirements so that all privacy petitions were reported, and that all companies that could receive a significant number of complaints were required to report. Second, there would be a need to frame the requirements to provide a transparent look at what individual consumers are concerned about. As discussed previously with reference to the eBay study, companies have an independent incentive to hear and respond to consumer petitions.[176] However, they may also have an incentive to hide some aspects of the petitions made, especially petitions they chose not to respond to, for fear of government regulation that is not fully in line with the companies' preferences. Third, the disclosure requirements would probably face close scrutiny from the courts.

At least one court has held that data collection and processing is a form of speech by commercial actors, though the approach has not gained major traction.[177] In addition to relying on a fairly radical interpretation of speech, any privacy petitions process would directly speak to the citizens' First Amendment right to petition the government, which many commentators acknowledge is very strong,[178] and would weigh in favor of upholding a privacy petitions process. Another concern that may be raised in the courts is that state legislation seeking to create a privacy petitions process could run afoul of the Dormant Commerce Clause[179] if it could be determined by a court to discourage interstate commerce. Recent Dormant Commerce Clause cases seem to address issues far removed from the issues at stake here, namely, legislation that explicitly discriminates against interstate commerce, but a careful constitutional analysis of this issue is beyond the scope of this Article.[180]

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it into a valuable political token. It has also shallowed much of the discussion on the subject, hushed critics, and created a false impression that transparency in itself is a magic cure to many of society's diseases. It might have inadvertently delayed the development of policies, tools, and approaches that are necessary to complement transparency if transparency is to fulfill the high hopes we put in it.").

176 *See* Rule, *supra* note 19; *supra* Part I.A.

177 *See* United States v. Caronia, 703 F.3d 149, 165–69 (2d Cir. 2012) (holding that government's construction of FDCA misbranding provisions was content- and speaker-based, and defendant's promotion of off-label drug use was protected by First Amendment). *But see* Hawkins v. Medtronic, Inc., 62 F. Supp. 3d 1144, 1150–52 (E.D. Cal. 2014) (rejecting *Caronia*'s analysis and noting that the Second Circuit's approach has "gained little traction"); Ramirez v. Medtronic Inc., 961 F. Supp. 2d 977, 990–91 (D. Ariz. 2013) (explicitly rejecting *Caronia*'s analysis). *See generally* Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 64 (2014) (elaborating a general argument in favor of data as speech).

178 See *supra* note 8 and accompanying text discussing the First Amendment right to petition.

179 U.S. CONST. art. I, § 8, cl. 3.

180 *See* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 303 (1997) (holding exemption of local distribution companies from sales and use taxes on sellers of natural gas did not violate

D. *Objections*

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

1. Selection Bias

One possible concern with this Article's proposal is selection bias.[181] Selection bias occurs where only people who are disproportionately sensitive bother to submit petitions. Thus, the petitions received would not reflect social norms, but rather the norms of hypersensitive people. First, it is not necessary that the petitions submitted perfectly reflect the overall perspective of the population. As long as a person gives a substantial account of what is bothering her, some information can be gleaned about what the social norms actually are. Furthermore, merely responding to hypersensitive people could provide such individuals with a useful sense of closure, even if their concerns could not be remedied. Second, patterns within the petitions would tend to indicate whether or not petitions, however superficially odd they might seem, represented a critical mass of individuals.

Finally, as discussed in Part I.A, Felstiner, Abel, and Sarat, persuasively show that only a small percentage of potential disputes reach the petitioning phase for many reasons not related to the actual strength or legitimacy of the potential dispute.[182] Thus, sensitive people might serve as the proverbial canaries in the coalmine about real privacy concerns.

2. Petition Virality

"Virality" is a way of describing the quick permeation of thoughts, information, and trends into and through a human population.[183] The

Dormant Commerce Clause); Nat'l Ass'n of Optometrists & Opticians v. Harris, 682 F.3d 1144, 1150 (9th Cir. 2012) (holding that California's prohibition against opticians offering prescription eyewear did not violate Dormant Commerce Clause).

181 Selection bias is an important issue in health records research, a field in which patients' subjective privacy preferences play a significant role. *See, e.g.*, Sharona Hoffman & Andy Podgurski, *Balancing Privacy, Autonomy, and Scientific Needs in Electronic Health Records Research*, 65 SMU L. REV. 85, 114–19 (2012) (discussing selection bias in this field where consent is obtained and how to mediate against it to gain useful study results).

182 Felstiner, *supra* note 11, at 645–49.

183 *See generally* TONY D. SAMPSON, VIRALITY: CONTAGION THEORY IN THE AGE OF

worry with respect to petition virality is that privacy petitions about new technologies could spread virally, creating privacy panics with little basis in actual social norms or majoritarian concerns. Petitions might spread through the population and be reified through repetition and the perception that many people are worried about a given issue, rather than genuine concern about the issue raised or any actual emergent social norms. Often these panics are based on misinformation.[184]

The simple, practical response to this is that institutions have every incentive to respond to petitions that threaten to become viral sooner rather than later in an attempt to cabin their spread. This has the positive impact of encouraging the institution to respond quickly to the petition, which, as discussed earlier, tends to make petitioners happier with the process.[185]

The second, more theoretical response to this objection is that it is not difficult to distinguish between irrational, virally spread panic on the part of individuals, and the spread of a widely shared intuition. Whichever organization receives the petition must make an evaluation and respond accordingly. Furthermore, from the perspective of managing public opinion, panics may be handled somewhat differently. A meaningful substantive problem might be handled by modifying policy. Whereas the answer for a panic might be encouraging the spread of accurate information, perhaps through the press.

Importantly, this notion of privacy panics plays into this Article's theme of institutional legitimacy. A petitions system tends to make people feel that the process by which new technologies are adopted is more legitimate.[186] In a sense, this may help make privacy panics less likely because it would lead to more trust of technology companies, and also lead to government regulatory oversight.

These objections, and their responses, show that instituting a petitions system is not without limitations. Ultimately, the prudential arguments for providing information about social norms, paired with the quantifiable benefits from individual wellbeing, tend to point to the wisdom of adopting an individual privacy petitions process for contesting the privacy implications of new technologies.[187]

NETWORKS (2012) (describing a theory of virality as a way society comes together and relates, using biological, anthropological, and sociological methods).

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

185 *See* discussion *supra* Part I.A.

186 *See* discussion *supra* Part II.C.

187 In this way, this Article rises to the requirement of a dignitary theory of due process raised by Jerry Mashaw when he contended that "[t]hose in quest of a richer set of dignitary

CONCLUSION

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

The Google Street View crisis in Germany shows the limits of companies' ability to set new data privacy norms in the face of contrary public opinion. Clear disclosure of actual privacy protections may have helped assuage fears and limit the controversy. The state-based, individual petition-based system in Germany is more sensitive to the concerns of individuals than the American system. As a result, in Germany, companies cannot assume that they can bully consumers into adopting privacy-corrosive norms.[188]

In order to give individuals a forum to voice their privacy complaints, and mobilize institutions to respond to citizen preferences if warranted, there is no need for the United States to adopt the German system wholesale. This Article has explored state courts, state agencies, and a mandatory petition disclosure system as alternatives. However, many other models exist.[189]

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

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process requirements will have to move beyond the basic tenets of liberalism, or construct a complex *prudential* argument that connects additional protections to the concepts of majority rule, rationality, and privacy." Mashaw, *supra* note 148, at, 922.

188 *See supra* Part II.B.

189 For just one further example, there could be a centralized public/private cooperative that handles the petitions, similar to role played by the Internet Corporation for Assigned Names and Numbers (ICANN) in domain name registry. *See generally* INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, https://www.icann.org (last visited Jan, 9, 2016).