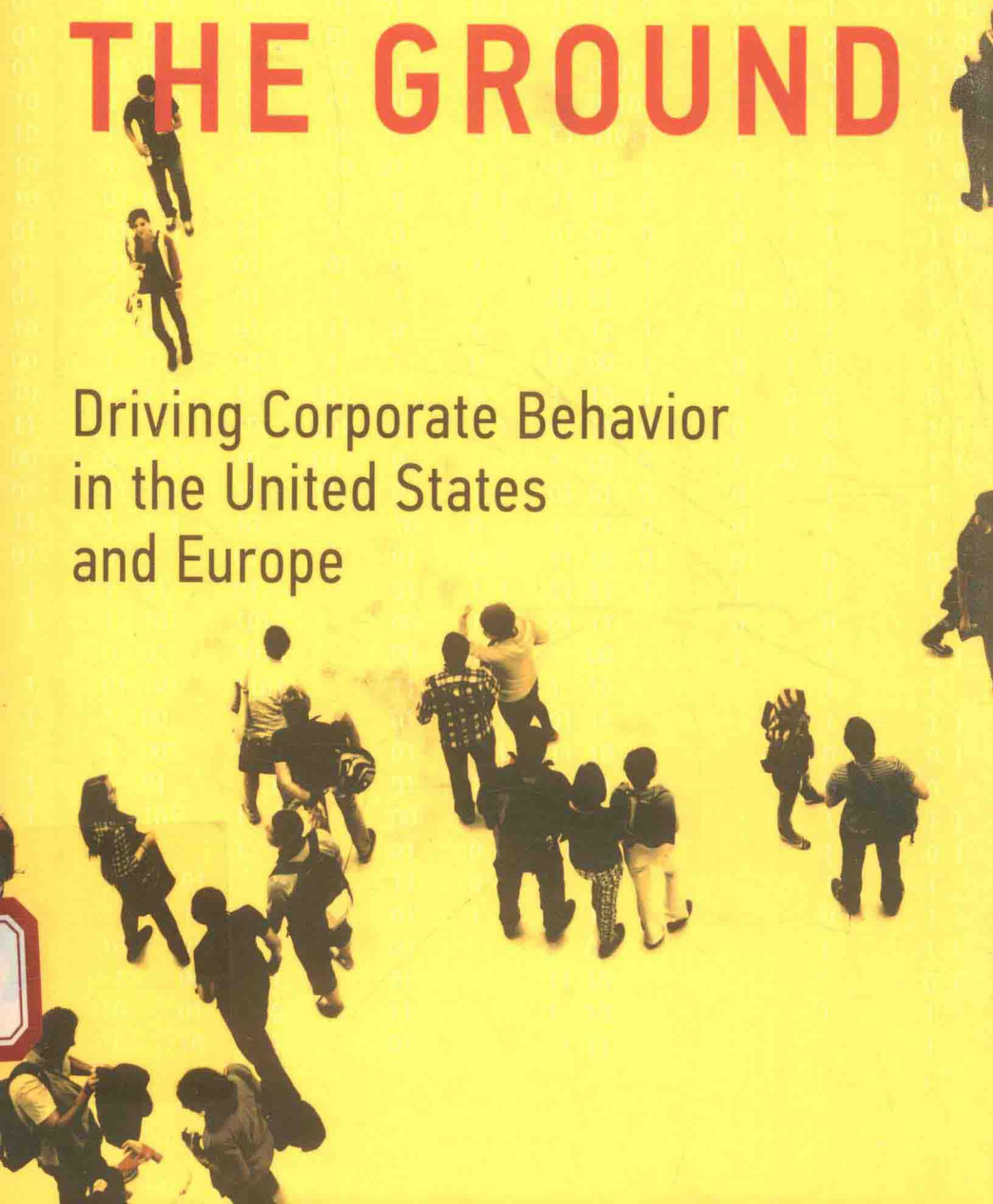


KENNETH A. BAMBERGER AND  
DEIRDRE K. MULLIGAN

# PRIVACY ON THE GROUND

Driving Corporate Behavior  
in the United States  
and Europe



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Kenneth A. Bamberger and Deirdre K. Mulligan

The MIT Press  
Cambridge, Massachusetts  
London, England

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This book was set in Stone Sans and Stone Serif by Toppan Best-set Premedia Limited. Printed and bound in the United States of America.

Library of Congress Cataloging-in-Publication Data

Bamberger, Kenneth A., 1968–

Privacy on the ground : driving corporate behavior in the United States and Europe / Kenneth A. Bamberger and Deirdre K. Mulligan.

pages cm. — (Information policy series)

Includes bibliographical references and index.

ISBN 978-0-262-02998-8 (hardcover : alk. paper) 1. Privacy, right of.

2. Privacy, right of—Europe. 3. Corporate governance—Law and legislation—

United States. 4. Corporate governance—Law and legislation—Europe. 5. Data

protection—Law and legislation—United States. 6. Data protection—Law and

legislation—Europe. I. Mulligan, Deirdre K., 1966– II. Title.

K3263.B36 2015

342.08'58—dc23

2015029211

10 9 8 7 6 5 4 3 2 1

*KAB*: To Michael and Phylis, role models in law and life. And in all ways,  
to Sara.

*DKM*: To my one and only.

## Series Editor's Introduction

Sandra Braman

*Privacy on the Ground* participates in a number of stories. Two have to do with transformations in law-state-society relations: the rise of governance relative to government, and legal globalization. Two have to do with trends in scholarship: the “law and society” movement, and the role of research as inputs into policymaking. Together, the book provides insight into not only macro level social processes, but also why research into such processes matters.

It is among the central thrusts of the Information Policy book series that those concerned about law and policy in the twenty-first century must take into account not only government, but also governance and governmentality—that is, informal processes as well as formal, private-sector actions in addition to those of the public sector, and the cultural habits and predispositions that make all of these possible and sustain them. *Privacy on the Ground* offers a premier example of just why that is so with Bamberger and Mulligan’s research on the perceptions of those recognized as privacy “leaders” by their corporate communities regarding how their companies translate data protection laws into organizational practice. The book provides a vivid picture of the roles of private-sector individuals and professional associations in creating workable approaches to data protection that turn the intentions of lawmakers into livable practice. In the course of fulfilling these roles, these individuals and corporations contribute to the development of the law itself.

Of course neither the difference between law on the books and law on the ground, nor recognition of its importance, is new. Many mark the beginnings of thinking about the law from a social science perspective with Oliver Wendell Holmes in the 1880s, and by 1975 legal historian Lawrence Friedman could remark upon the wide consensus that law on the books and

law in action are not the same. The Law and Society Association was formed in 1964 to support and promote the development of the kind of theoretical approach used by Bamberger and Mulligan to frame their work. As governance grows in importance relative to government, however, so does the relative salience of this kind of work.

Legal globalization, the harmonization of law and policy across states irrespective of differences in their legal and political systems, is increasingly influential in a growing number of areas of the law. Drivers are multiple, ranging from the UN mandate that has been so influential in shaping counterterrorism laws around the world at one extreme to the development of best practices for fair use in the area of copyright coming out of specific content production communities at the other end of the spectrum. The mutual massaging and spread of ideas via professional associations and personal contacts—such as that reported upon in this book—is one of the more common processes through which legal globalization occurs. Practitioner- or community-driven legal globalization, though, most often still depends upon the leadership of particular individuals. In the case of fair use, Pat Aufderheide and Peter Jaszi, working under the umbrella of Aufderheide's Center for Social Media, conceived of the process and its legal value and deserve credit for its success. In the case of electronic discovery, it was the Sedona Conference that sponsored the conversations through which best practices were developed and disseminated to lawyers and judges around the world. In the area of data protection, this work by Bamberger and Mulligan should accelerate the process of legal globalization by drawing attention to the insights of those widely recognized as privacy leaders and making very clear just what the implications of those insights for law and policy are.

And that brings us to the deontological question of the value of social science research on legal problems altogether. It is useful, of course, to understand how things are working, and why, from a sociological perspective, and for this alone the book not only stands but will continue to have value long after any legal decision making immediately in sight takes place. It is possible, though, to go further. The ways in which research can inform law and policy are themselves complex, muddy, and rarely as one expects, intends, or has seen depicted in maps of decision-making flows. But ideas do matter and research does have policymaking impact; thus the postscript, in which Bamberger and Mulligan speak directly to policymakers, has its valuable place as well.

## Acknowledgments

This book has taken several years, spanned five countries and two institutions, and benefited from the time and goodwill of many people. We have, therefore, many people to thank. In the few pages we have it's not possible to convey the depth of our gratitude, so we will do no more than scant justice to those we mention given the outsized nature of many of their contributions.

None of this work would have been possible without the generous support of the National Science Foundation and others who fund the Team for Research in Ubiquitous Secure Technology (TRUST) (NSF award number CCF-0424422); the Berkeley Center for Law and Technology, including funds from a Nokia Corporation research grant; the Miller Institute for Global Challenges and the Law at Berkeley Law; the Privacy Projects.org; the Intel Corporation; the Rose Foundation for Communities and the Environment Consumer Privacy Rights Fund; and the Institute for Information Infrastructure Protection (US DHS grant 2006-CS-001-000001).

But for former Berkeley Law Dean Chris Edley's vision, wise council, and excellent ability to read people, the collaboration at the heart of this project might not have emerged. Edley saw in our related but not yet intersecting agendas the possibility for something bigger and more important. We don't know that we've met his vision, but we are deeply grateful to him for suggesting that we collaborate. It has been a rewarding journey, a solid partnership, and from our perspective yielded our most important scholarly contributions. We cannot thank him enough for the introduction.

The strong personal and professional support we received from Chris, and from Robert Barr, Annalee Saxenian, and Shankar Sastry has been essential to sustaining this project. We are grateful in so many ways.

We have benefited from our broad community at UC Berkeley. Colleagues, Ph.D., Masters, and J.D. students from the law school, the Ischool, the Berkeley Center for Law and Technology, the Center for Law and Society, and the Department of Electrical Engineering and Computer Science, as well as undergraduates, have shaped and contributed to this project. We are particularly grateful for the assistance of several colleagues in developing this project: Chris Hoofnagle, Jen King, Aaron Burstein, and David Thaw.

Our deep appreciation goes to colleagues at Berkeley and elsewhere in the privacy landscape, who shared their knowledge and provided advice, feedback, and constructive criticism along the way: Catherine Albiston, Anita Allen, Colin Bennett, Michael Birnhack, Julie Brill, Herbert Burkert, Jenna Burrell, Beckwith Burr, Fred Cate, Danielle Citron, Mary Culnan, Lauren Edelman, Alex Fowler, Bob Gellman, Mark Gergen, Rosann Greenspan, Leslie Harris, Dennis Hirsch, Trevor Hughes, Bob Kagan, Cameron Kerry, Colin Koopman, Christopher Kuner, Mark Lemley, Toby Levin, Maryanne McCormick, David Medine, Helen Nissenbaum, Anne Joseph O'Connell, Nik Peifer, Shari Pfleeger, Richard Purcell, Joel Reidenberg, Ira Rubinstein, Pamela Samuelson, Michael Samway, Peter Scharr, Fred B. Schneider, Jason Schultz, Ari Schwartz, Paul Schwartz, Viola Schmid, Spiros Simitis, Dan Solove, Jeff Sobern, Rainer Stenzel, Peter Swire, Eric Talley, Omer Tene, Jennifer Urban, Nico van Eijk, David Vladek, Steve Weber, Phil Weiser, and Daniel J. Weitzner.

For critical assistance in Europe we extend thanks to Pascale Gelly, Françoise Gilbert, Christoph Klug, Marcos Judel Meléndrez, Fabrice Naftalski, Eduardo Ustaran, Stewart Dresner and Privacy Laws and Business, Rita DiAntonio and the International Association of Privacy Professionals, and Ulrich Wuermeling and Euroforum.

For excellent research assistance we also thank very much Hailey Anderson, Emily Barabas, Maydha Basho, Marta Porwit Czajkowska, Nathalie David-Warcholak, April Elliot, Heather Ford, Kim Fox, Jonathan Francis, Ilan Goldbard, Cory Isaacson, Lea Mekhneche, Alisha Montoro, Mary Morshed, Parichart Munsgool, Celia Perry, Katy Robinette, Sarah Ruby, Quinn Shean, Tatyana Shmygol, Sara Terheggen, James Wang, Andy Wiener, and for excellent administrative assistance we are grateful to Rebecca Henshaw and Jean S. Hayes.

Portions of our research were presented in "Privacy on the Books and on the Ground," *Stanford Law Review* (2011); "New Governance, Chief Privacy



Officers, and the Corporate Management of Information Privacy in the United States: An Initial Inquiry," *Law & Policy* (2011); and Privacy in Europe: Initial Data on Governance Choices and Corporate Practices," *George Washington Law Review* (2013). Many thanks to the student and peer journal editors who worked with us along the way.

Behind every good book is an excellent editor. This one is no exception. Kerry Tremain stepped in at just the right time to assist us in making hard decisions, finessing prose, and architecting a narrative that is both true to our research and accessible to the range of audiences we hope to reach. We are grateful for his sage advice, excellent organizational skills, structural and technical editing, and, most importantly for the confidence he had in the book, and our project, and his constant reminder that at the end of the day, this is our book.

But Kerry was not alone.

Michael Berger arrived at the Ischool in time to share with us his formidable talents in research, synthesis, and editing. Without his efforts during the last few months of this project our book would have no footnotes or endnotes, no table of contents, or index. Yes, it would not have been noticeable as a book.

Jen King has been at our side helping us wrangle, interpret, and manage our data since day one. She has managed other students, dealt with multiple transcription companies, trained students on Atlas TI, joined us on interviews to provide feedback on methods, and assisted in perfecting our survey instruments. We are indebted to her for the time, organizational skill, and expertise she has put into this project over the past eight years.

This book benefited enormously from the astute comments of three reviewers. It is much improved thanks to the diligence and care with which they considered our work, and the expertise and knowledge they brought to bear on our research findings and conclusions. Given the state and length of the manuscript when they received it, we are particularly impressed by the quality of their advice. We hope they find the book vastly improved by their efforts; we surely consider it to be so.

We appreciate Sandra Braman's early interest in the project, and her feedback and support through the process of going from manuscript to book. Thank you to the MIT Press for working on tight deadlines to bring this book to market quickly.

We are immensely grateful to the chief privacy officers, data protection officers, former and current regulators, privacy lawyers, and other experts who shared hours of their time with us. Of course, without them this book would not have been possible, but our gratitude also runs in other directions. As individuals our data traverses the systems and resides in the databases governed by policies, practices, and technical protections that they—with vision and chutzpah, cunning and skill—create. Most of their work remains hidden from the public it serves. They and their work are mostly known due to failures. Yet we have confidence and admiration for the effort and creativity with which they seek to protect our privacy from the gaping mouth of technology, bureaucracy, and the ever-present bottom line. We thank them for championing privacy in all its messiness in their institutions. They may not always win, and they surely do not always get it right, but we walked away certain that they make a difference in more ways than those on the outside can possibly know. Within these pages we've had to protect their privacy, but we hope that despite going unnamed they understand how thankful we are for their time, candor, interest, and work.

Finally, the most important acknowledgments:

[*From Deirdre Mulligan*] This book was made possible by the vast—seemingly boundless—generosity of my husband, Ben. He has endured my extended absences that left him with carpools to drive, music lessons to oversee, soccer games to coach and watch, and numerous chaotic mornings and bedtimes. He is the heart of our home. I am grateful to Marly and Malcolm for being well mannered and reasonable when faced with my literal and figurative absences, and for providing endless distractions when I needed a break from writing. They are the light. Finally, thanks to my parents—Steve, my most loyal reader, and Peggy, who taught me to answer tough questions—for their ongoing love and support.

[*From Ken Bamberger*] I am blessed with a gifted and generous partner, my wife Sara. Her sage counsel illuminates the clear path when it remains obscured to me. And her labors and leadership created the space in our very busy lives for this project, all with love and good humor. She and our children Max, Isaiah, Niva, Ezra, and Talia make an extraordinary superhero team, and I am grateful to be part of it.

## Contents

Series Editor's Introduction ix

Acknowledgments xi

### I Introduction 1

1 Paradoxes of Privacy on the Books and on the Ground 3

### II Framing a Privacy on the Ground Approach 19

2 Literature, Framework, and Methodology 21

### III Privacy on the Ground 45

3 Background Law 47

4 Empirical Findings—United States 59

5 Empirical Findings—Germany 89

6 Empirical Findings—Spain 105

7 Empirical Findings—France 127

8 Empirical Findings—United Kingdom 145

9 Identifying Best Practices: The Promise of U.S. and German  
Privacy Operationalization 173

### IV Placing the Law in Context 181

10 The U.S. Privacy Field 183

11 The Development of the German Privacy Field 197

V	Catalyzing Better Privacy Protection	217
12	Catalyzing Robust Corporate Privacy Practices: Bringing the Outside In	219
13	Moving Forward	239
	Notes	251
	Glossary and Abbreviations	293
	Bibliography	297
	Index	327

## I Introduction



# 1 Paradoxes of Privacy on the Books and on the Ground

By the time Chinese journalist Shi Tao was released from prison, in August 2013, he had helped to change the world, although not exactly in the way he'd originally intended.

The events leading to Mr. Shi's imprisonment—and to a United States Congressman famously condemning leaders of a major Silicon Valley firm as “moral pygmies”—had begun nearly a decade earlier, with an anonymous post to an online forum. In April 2004, as the fifteenth anniversary of the Tiananmen Square massacre approached, China's Communist Party authorities sent a document to their national media instructing them to “correctly direct public opinion” on the events in a way consistent with “central policies.” Probably hoping to call media attention to the censorship, Mr. Shi sent notes summarizing the directive via his Yahoo! China email account to a colleague at a Chinese-language web site based in New York—which posted the notes. When the Chinese government determined that Mr. Shi was the author of the anonymous post, they arrested and convicted him of sharing state secrets, and then sentenced him to ten years in prison.

But how had party officials discovered the anonymous poster's identity?

In the months after his trial, it emerged that the Yahoo! Beijing office had provided records to the Chinese government that enabled the government to pinpoint Mr. Shi as the source of the information in the web post. When pressed to defend its actions, Yahoo! clung to legality, arguing, “When we receive a demand from law enforcement authorized under the law of the country in which we operate, we must comply.”<sup>2</sup> That defense led Representative Chris Smith to ask “If the secret police, a half century ago, asked where Anne Frank was hiding, would the correct answer be to

hand over the information in order to comply with local laws?"<sup>3</sup> This revelation spawned widespread public condemnation, climaxing in a U.S. congressional hearing in which Representative Tom Lantos memorably castigated Yahoo! CEO Jerry Yang. "While technologically and financially you are giants," said the Silicon Valley congressman, "morally you are pygmies."<sup>1</sup>

Human rights, civil liberties, and journalism organizations also weighed in. One accused Yahoo! of being a "police informant" and another sued the company in federal court. Pressure from these diverse stakeholders was relentless and powerful—and felt in boardrooms throughout Silicon Valley and beyond.

Fast-forward to 2013. In June of that year—coincidentally just a few months before Mr. Shi's release—the *New York Times* reported that in 2007 and 2008 Yahoo! had battled National Security Agency demands to turn over customer information to their warrantless Internet surveillance program. Rather than hide behind a legal paper tiger, Yahoo! had fiercely challenged the government, arguing that the NSA's broad requests were unconstitutional. While Yahoo! ultimately lost the litigation, the company proved it was willing to fight, even in a secret court, for its users' privacy interests.

The Electronic Frontier Foundation, a respected advocate for users' rights, wrote of the case, "Yahoo! went to bat for its users—not because it had to, and not because of a possible PR benefit—but because it was the right move for its users and the company. It's precisely this type of fight—a secret fight for user privacy—that should serve as the gold standard for companies." It awarded Yahoo! a gold star for its resistance against U.S. surveillance programs.

Why the about-face? Why had Yahoo! shifted from its defense of local corporate compliance to a defense of global human rights?

In the intervening years since Mr. Shi's jailing, the regulatory climate had changed little. While congressional hearings on privacy and human rights were held, no significant legislation was enacted. But following the Shi Tao incident, and the groundswell of diverse advocacy it unleashed, the corporation's stance toward its users' privacy "on the ground" shifted dramatically. After "being pummeled by Congress, human rights groups, the media, and shareholders," one expert wrote of the Shi Tao case, "Yahoo! finally shed its head-in-the-sand, lawyer-driven posture and actually took moral responsibility for what had happened."<sup>4</sup> The company formally apologized and quickly reached a private financial settlement with Mr. Shi's



family. Yahoo! dedicated more resources to its privacy and law enforcement staff, launched a Business and Human Rights program<sup>5</sup> covering privacy and freedom of expression, and supported several related initiatives outside the company. The company, along with other tech giants, civil liberties and human rights organizations, socially responsible investment firms, and academics, launched a voluntary code of conduct, known as the Global Network Initiative, to protect and advance freedom of expression and privacy in the information and communications technology sector.<sup>6</sup> Yahoo!'s dramatic evolution highlights three questions at the heart of this book:

- What drives corporations to adopt privacy protective practices?
- What role does law play, and what else shapes corporate understanding of privacy's meaning and corporations' obligations to advance it?
- How do those understandings manifest in firm practices?

Mr. Shi's case changed Yahoo!'s understanding of its privacy obligations to users, and it helped open the company's eyes to the forces beyond the law that affect the role of business in society. Placing this local action on the global stage brought into focus the multiple actors and instruments, beyond local law and officials, that influenced the public's view of Yahoo!'s actions. That case and other high-profile revelations about privacy breaches also had wider corporate repercussions. In 2014 alone, an estimated 176 million customer records were compromised at Target, Home Depot, and JP Morgan. Government requests for customer data, at least in large technology companies in the United States, now appear to receive a more thorough assessment by the companies, and certainly more public exposure.<sup>7</sup> Company policy and practices increasingly respond not only to the law, but also to an overarching framework of human rights norms, the sentiment and reaction of a larger set of actors, including users, media and consumer advocacy groups, government, investors, and even employees, across the globe.

Certainly, legislatures, courts, and regulatory agencies continue to play a key role in shaping privacy practices and corporate decision making—after all, Yahoo! lost when it chose to fight and was told to turn over its users' personal information to the NSA. But the center of action has shifted. A broader set of players hold sway over corporations' privacy obligations and hold them accountable for privacy blunders in myriad ways and multiple venues, and at times reward them for efforts at privacy protection, even if those measures ultimately fail in their full effect.

This book springs from an observation of new corporate activity “on the ground.” While companies continued to blunder, sometimes in disturbing