



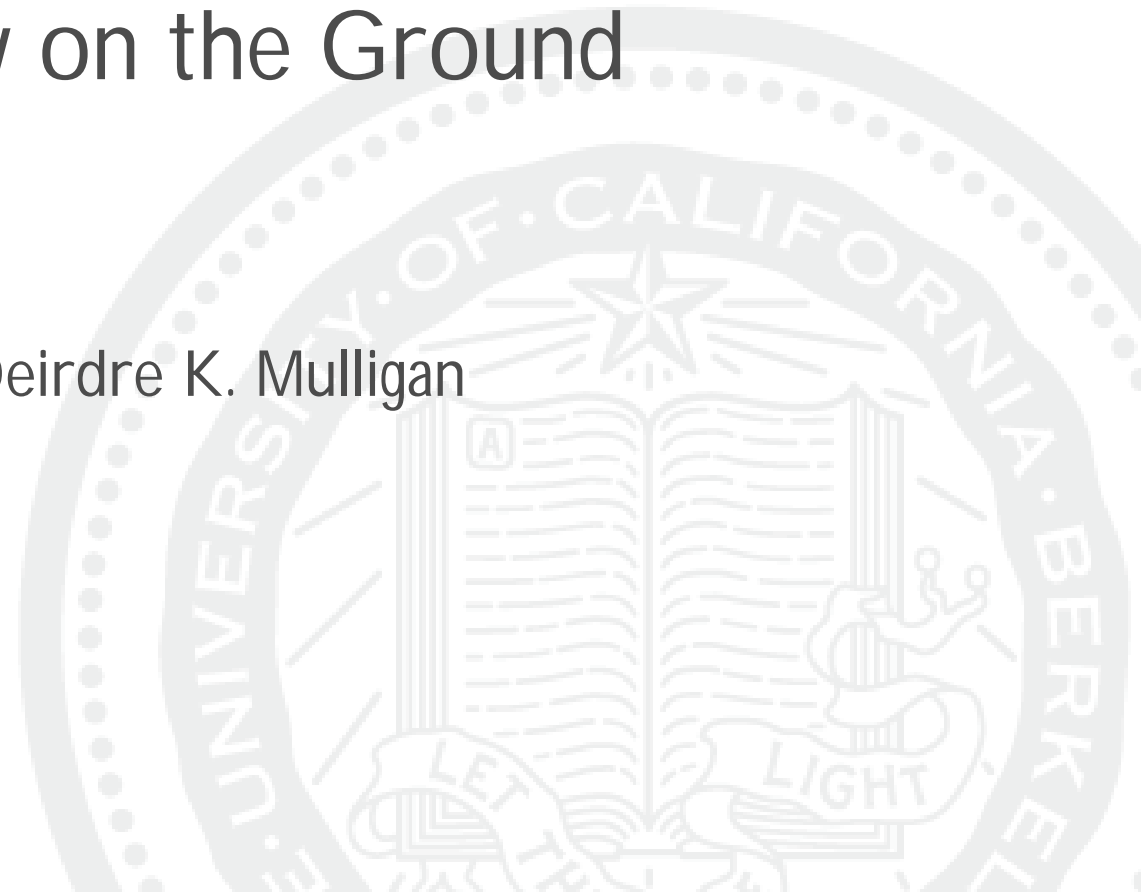
BERKELEY CENTER FOR
LAW & TECHNOLOGY



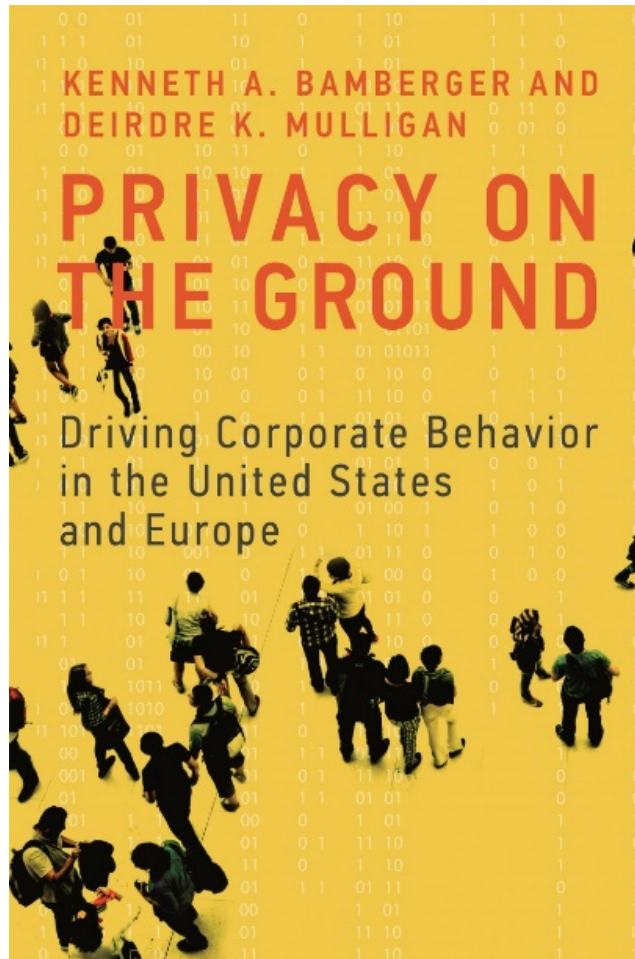
UC Berkeley School of Information

Privacy on the Ground

Deirdre K. Mulligan

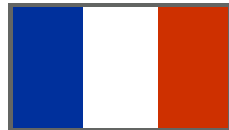
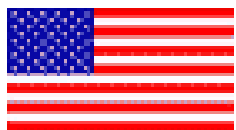


Evidence to inform practice and policy



Project

- Targeted interviews with “leading” corporate privacy officers (CPOs), as well as key informants
- Document internal firm practices
- Caveats



Findings and Policy Implications

- An emerging suite of best practices among industry leaders
- Properties of the privacy field that catalyze these best practices
- Recommendations for Policy Reform

Best Practices: Bringing the Outside In

Making the Board's Agenda

- a high level of attention, resources, access, and prominence for the privacy function within the firm

A Boundary-Spanning Privacy Professional

- a high-status privacy lead who mediates between external privacy demands and internal corporate privacy practices; and

The “Managerialization” of Privacy

- The integration of decision making on privacy issues into technology design and business-line processes through the distribution of privacy expertise within business units and assignment of specialized privacy staff to data-intensive processes and systems.

Why are these practices valuable?

Organizational Behavior/Decisionmaking Research

- Distribution vs. Siloed Function
- Empowering Internal Actors within Organization
- Tools and Technologies in Decisionmaking

Privacy Research

- Privacy by Design/PIA Approach
- New privacy threats

Where were they present?

...despite different legal rules, governance models, and definitions the U.S. & Germany were locus

U.S. Leaders' Definitions

- Limited role of compliance
- New goal: Manage Risk
- New touchstone: Protecting expectations; avoiding "creepy"

German Leaders' Definitions

- Compliance but nested in broader ethical frames
- Data Protection linked to privacy; social interests and ethical obligations; workers' rights

A New Privacy Paradox?

No, just need a new Analytic Framework

Instead of focusing on the presence or absence of specific actors, institutions, etc. we readjusted our lens and considered ***functional roles and interactions.***

Some were common and identified as critical to the development of both privacy fields, even if ***performed and supported by different actors and institutions.***

Catalyzing Best Practices: Key Properties

Ambiguity with Accountability

- Broad legal mandates and open regulatory approaches, activist regulators, and meaningful stakeholder scrutiny fostered dynamism in the face of changes and pushed more accountability onto firms;

Boundary-Spanning Community

- Privacy leads situating themselves in a broad and inclusive community of outside stakeholders, including other corporate privacy professionals as well as those from civil society and government, who both challenge the inside privacy officers and empower their role in the firm; and

Disciplinary Transparency

- Greater transparency around privacy failures, including data breach laws, enabled nonregulators, such as civil society groups and media, as well as the broader public, to become credible enforcers in the court of public opinion, leading corporations to invest greater resources and authority in internal privacy professionals and processes. .

Key properties at play: US and Germany

The US: A Network of Norms

- “New Governance” at the FTC
- State Laws/DBN & EU Directive
- Professionalism
- Social License

Germany: Nested Norms/ Negotiation of Privacy’s Meaning

- Legal provision of DPOs; expansion of the role
- Internal attention
- Nested Norms – Others laws; Shoah; Nuremberg Protocol
- Ex ante dialogues with multiple regulators
- Stakeholder negotiations –works councils ; DPOs
- Professional Network Growth

Regulatory Reforms: Bringing the Outside In

Encourage and empower professional communities

- Employ regulatory structures and practices that require firms engage in interpretive work.
- Require meaningful transparency
- Utilize regulatory processes that engage firms and other stakeholders in defining privacy norms and making the rules that promote those norms.
- Exploit market, corporate, and advocacy capacities to develop collective understandings of risks and solutions to future privacy problems.

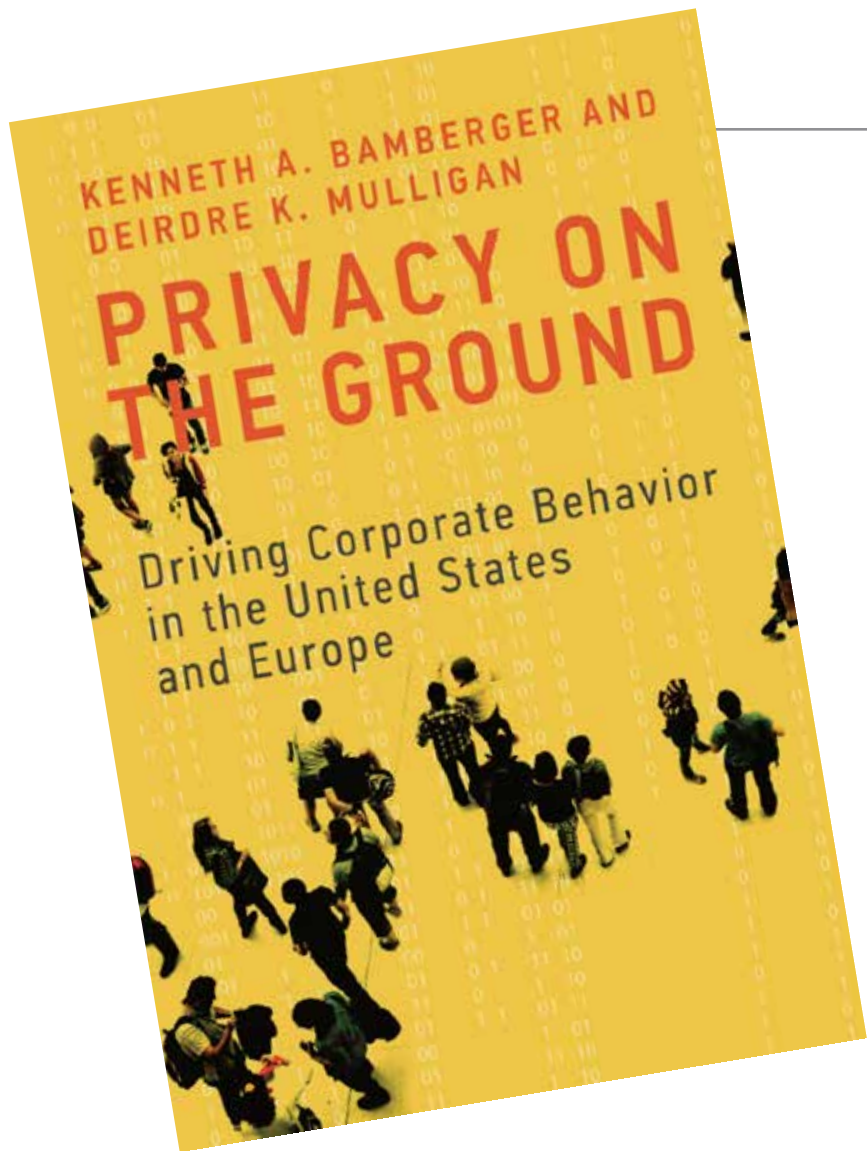
These make firms more permeable to external demands and vulnerable to external pressure and enhance the authority, available resources, and independence of the “boundary spanning” corporate privacy officers.

Regulatory Reforms: Bringing the Outside In

DO NOT:

- Narrowly pursue regulatory coherence and uniformity
- Focus on developing government agencies as the primary locus of professional expertise

Rule-bound governance acts to diminish corporate reliance on high-level internal privacy experts, and in turn reduces these professionals' capacity to embed privacy into corporate culture and business operations.



Prof. Kenneth A. Bamberger
UC Berkeley, School of Law

Prof. Deirdre K. Mulligan
UC Berkeley, School of
Information

MIT Press