THE FTC AND THE NEW COMMON LAW OF PRIVACY

DANIEL J. SOLOVE
John Marshall Harlan Research Professor of Law
George Washington University Law School
Founder
TeachPrivacy

WOODROW HARTZOG
Assistant Professor
Samford University’s Cumberland School of Law

Senior Policy Advisor
Hogan Lovells
THE FTC AS *DE FACTO* PRIVACY REGULATOR

- Single-most influential privacy regulator
- Hardly any case law
- Scarcely covered in the literature
- Strange overlap with contract law
- Jurisprudence perceived as thin
QUESTIONS TO BE ANSWERED

• Why not contract law?
• Why no judicial decisions?
• Why is the FTC so influential?
• How should FTC privacy jurisprudence evolve?
METHOD

• Analyzed all 150+ privacy-related FTC complaints

• Conducted in-depth interviews
ARGUMENTS

The view of the FTC as merely an enforcer of privacy promises is misguided.
ARGUMENTS

The FTC’s privacy jurisprudence is the functional equivalent to a body of common law.
ARGUMENTS

The FTC could develop a robust privacy regulatory regime.
THE FTC AT A GLANCE

• Limited jurisdiction
  – Deceptive trade practices
  – Unfair trade practices
  – Statutory enforcement and Safe Harbor compliance

• Limited rulemaking authority

• Limited remedies
THE STORY OF THE FTC’S ASCENDANCE

• Privacy policies in the late 1990s
• Contracts?
• Deception
• Self-regulation gives way to enforcement with teeth
FTC SETTLEMENTS AS DE FACTO COMMON LAW

- Anatomy of an FTC action
- The influence of complaints and settlements on companies
- FTC reports and other materials
FTC JURISPRUDENCE: DECEPTION

• Broken promises of privacy
• General deception
• Insufficient notice
• Data security
FTC JURISPRUDENCE: UNFAIRNESS

- Retroactive changes
- Deceitful data collection
- Improper use of data
- Unfair design or unfair default settings
- Unfair data security practices
DEVELOPMENTAL PATTERNS

- General to specific standards
  - Data security
- Qualitative judgments
- Baseline standards
- Indirect liability
TOWARD A MORE COMPLETE PRIVACY REGIME

Broken Expectations
TOWARD A MORE COMPLETE PRIVACY REGIME

Beyond the Four Corners of Boilerplate
TOWARD A MORE COMPLETE PRIVACY REGIME

Substantive Rules