

INTRODUCTION

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“So look. I mean, you know, the FTC is this remarkable agency, but we are small. We’re around 1,200 people. We’re smaller today than we were at various points in the 1970s, even as the economy has continued to expand significantly.”¹ Lina Kahn, Chair of the Federal Trade Commission (“FTC”), is under no illusions about the mismatch between the FTC’s mandate and its resources. She might have continued her remarks by noting that the FTC’s budget for 2023 was \$430 million,² making it one of the least resourced of all federal agencies.³ The Department of Justice’s budget is one hundred times larger; even the Small Business Administration’s budget is three times larger.⁴

Since the FTC is the only federal agency protecting consumer privacy, Chair Kahn’s observation is the starting premise of this symposium on privacy law and technology. It gets worse. Privacy is just one sliver at the periphery of the FTC’s responsibilities. The agency must divide its resources between two major mandates: preventing unfair competition and protecting consumers.⁵ Though the scope of the consumer protection mandate can be summed up in just six words — “unfair or deceptive acts or practices”⁶ — it is a gargantuan task. In 2021 alone, the FTC received more than 3.3 million complaints through its Consumer Sentinel Network.⁷ If every member of the FTC’s staff (including Chair Kahn herself) dedicated every workday solely to reviewing complaints, they would each be responsible for a steady pace of about 1.3 an hour.

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1. Planet Money, *FTC Chair Lina Kahn on Antitrust in the Age of Amazon*, NPR, at 12:04 (Nov. 3, 2023) (quoting FTC Chair Lina Kahn), <https://www.npr.org/2023/11/03/1197954506/lina-khan-interview-amazon-ftc-antitrust-paradox-monopoly> [<https://perma.cc/X5NG-R294>].

2. *Budget and Strategy*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/budget-strategy> [<https://perma.cc/E7L5-4BC6>].

3. STATISTA RSCH. DEP’T, BUDGET OF THE U.S. GOVERNMENT FOR THE FISCAL YEAR OF 2024, <https://www.statista.com/statistics/200386/budget-of-the-us-government-for-fiscal-year-2012-by-agencies> [<https://perma.cc/G9HQ-L6SN>].

4. *Id.*

5. *What the FTC Does*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/media-resources/what-ftc-does> [<https://perma.cc/BQC8-5QDJ>].

6. 15 U.S.C. § 45(a)(1).

7. FED. TRADE COMM’N, FISCAL YEAR 2023 CONGRESSIONAL BUDGET JUSTIFICATION 11, https://www.ftc.gov/system/files/ftc_gov/pdf/P859900FY23CBI.pdf [<https://perma.cc/ND6D-YRE7>].

By the FTC's own reckoning, the consumer protection mandate covers a varied terrain.⁸ In its 2023 Congressional Budget Justification, the agency lists forty-four consumer protection initiatives, from student loans to robocalls, from the right to repair to hidden fees.⁹ Four of the forty-four initiatives relate specifically to data privacy: one for children, one for consumers, and one for social media, as well as an annual research conference.¹⁰ To sum up the enforcement side of the data privacy ledger, the FTC is a small agency with a small budget for whom data privacy represents a small slice of its strategic playbook.

On the other side of the ledger is the vast expanse of the U.S. consumer economy and many of the world's largest companies. Chair Kahn continued her remarks above: "We are also outgunned oftentimes. You know, at base, when the FTC it's [sic] doing its job, . . . that's pitting the agency against some of the most powerful and well-resourced companies in our entire economy."¹¹ Google's advertising revenue alone — which is fueled by consumer data — exceeds the FTC's entire budget by 520 times.¹² Despite tech companies' enormous size, their data collection, processing, and transfer are largely hidden from view, operating behind the scenes and under encryption.¹³ Rather than looking for a privacy violation needle in a consumer data haystack, it is more like the FTC lost its contact lens in a hayfield.

For the *Harvard JOLT*-UIowa IBL Symposium: Beyond the FTC, two dozen of the world's leading privacy scholars met at Harvard Law School in Spring 2023 to address the resource gulf between the FTC and the massive data ecosystem it polices. The symposium gathered computer scientists and lawyers in the same room, fostering the kind of cross-disciplinary exchange from which any meaningful privacy protection must emerge. While most prior privacy research has addressed the substance of consumer data rights and the technologies that

8. FED. TRADE COMM'N, STRATEGIC PLAN FOR FISCAL YEARS 2022-2026, at 5 https://www.ftc.gov/system/files/ftc_gov/pdf/fy-2022-2026-ftc-strategic-plan.pdf [<https://perma.cc/X6Q3-ZHP4>] ("[T]he FTC has jurisdiction over a wide range of consumer protection issues.").

9. FISCAL YEAR 2023 CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 7, at 17–30 (listing the following initiatives: "Children's Online Privacy Protection Act," "Consumer Privacy," "Privacy Conference," and "Orders to Social Media and Video Streaming Companies").

10. *Id.* at 23–25.

11. Planet Money, *supra* note 1, at 12:20.

12. Tiago Bianchi, *Advertising Revenue of Google from 2001 to 2022*, STATISTA (Sept. 20, 2023), <https://www.statista.com/statistics/266249/advertising-revenue-of-google> [<https://perma.cc/Q95H-EJDM>].

13. Abbas Razaghpanah, Rishab Nithyanand, Narseo Vallina-Rodriguez, Srikanth Sundaresan, Mark Allman, Christian Kreibich et al., *Apps, Trackers, Privacy, and Regulators: A Global Study of the Mobile Tracking Ecosystem*, NETWORK & DISTRIBUTED SYS. SEC. SYMP. 2018, Feb. 2018, at 1, 12 ("Due to the opacity of the tracking ecosystem, it is difficult to uncover and track how organizations collect personal data from end users, and how they store and share it with each other.").

undermine them, symposiasts surfaced privacy enforcement as a distinct concern. Their task was to propose a range of enforcement strategies, devices, and resources to supplement and support the FTC's privacy work.

Just one symposiast, Alicia Solow-Niederman, was optimistic about the present state of the FTC's power.¹⁴ The remaining contributions cluster around three agents of change. Several contributors identified underutilized potential for consumer action. Stacy-Ann Elvy, for example, argued that the implied warranty of merchantability in the Uniform Commercial Code can help consumers resist surveillance in the internet-of-things ecosystem.¹⁵ Ignacio Cofone showed how courts can pave a path for privacy class actions by recognizing commonalities among several types of privacy losses.¹⁶ James Cooper and Kirsten Martin both believed market forces can discipline privacy violators, but only if the FTC holds firms to their public privacy commitments and antitrust enforcers promote healthy competition between platforms, respectively.¹⁷

A second group of symposiasts was more skeptical about the existing legal landscape and advocated for legislative or regulatory intervention. Christo Wilson proposed mandating new technological standards to address difficulties enforcers have monitoring digital advertisements.¹⁸ Neil Richards, Woodrow Hartzog, and Jordan Francis advocated for legislation that would allow suits against firms that use data in a disloyal manner.¹⁹ Helen Nissenbaum, Katherine Strandburg, and Salomé Viljoen offered a contextually sensitive approach to privacy that would close the gaps firms have exploited in recent years to dodge enforcement.²⁰ Brett Frischmann and Paul Ohm recommended a new regulatory framework requiring firms to create "governance seams" that could serve as leverage points for enforcers.²¹ Serge Egelman advanced a framework that would shift liability to the hubs of the

14. Alicia Solow-Niederman, *The Overton Window and Privacy Enforcement*, 37 HARV. J.L. & TECH. 1007 (2024).

15. Stacy-Ann Elvy, *Commercial Law as a Source of Privacy and Cybersecurity Protection*, 37 HARV. J.L. & TECH. 1177 (2024).

16. Ignacio Cofone, *Certifying Privacy Class Actions*, 37 HARV. J.L. & TECH. 1149 (2024).

17. James C. Cooper, *Does Privacy Want to Unravel?*, 37 HARV. J.L. & TECH. 1039 (2024); Kirsten Martin, *Platforms, Privacy, and the Honey-pot Problem*, 37 HARV. J.L. & TECH. 1087 (2024).

18. Christo Wilson, *In Support of Standards for Digital Advertising*, 37 HARV. J.L. & TECH. 1063 (2024).

19. Neil Richards, Woodrow Hartzog & Jordan Francis, *A Concrete Proposal for Data Loyalty*, 37 HARV. J.L. & TECH. 1335 (2024).

20. Helen Nissenbaum, Katherine Strandburg & Salomé Viljoen, *The Great Regulatory Dodge*, 37 HARV. J.L. & TECH. 1231 (2024).

21. Brett Frischmann & Paul Ohm, *Governance Seams*, 37 HARV. J.L. & TECH. 1117 (2024).

data ecosystem — platforms and data brokers — thereby allowing the FTC to pursue a more focused enforcement strategy.²²

A final group of symposiasts saw the computer science research community as a ready and waiting partner in protecting consumer privacy. Nataliia Bielova, Cristiana Santos, and Colin M. Gray offered a case study on consent banners and showed how regulators who are not in conversation with researchers can devise misguided rules.²³ In line with the interdisciplinarity of their author team, David Choffnes, Woodrow Hartzog, Scott Jordan, Athina Markopoulou, and Zubair Shafiq described the many promises of long-term collaboration between researchers and enforcers.²⁴ We, along with Maaz Bin Musa and Lucas Ausberger, uncovered a major obstacle to that collaboration — the capricious landscape of privacy policy language that evades systematic audit — and proposed a regime of uniform privacy disclosures.²⁵

The capstone of the symposium were keynote addresses from three leaders in privacy policy. From the nonprofit world, Cindy Cohn, Executive Director of the Electronic Frontier Foundation, noted that none of the symposiasts' proposals are mutually exclusive.²⁶ Privacy violations vary widely, and so must the sources of enforcement. From the FTC itself, Sam Levine, Director of the Bureau of Consumer Protection, reviewed some of the outstanding work the FTC has done to protect consumer privacy and expressed optimism about its future path.²⁷ “[R]ather than looking beyond the FTC, those who care about privacy should be working with the FTC to make our work better and more impactful.”²⁸ From the U.S. legislature, Massachusetts Congresswoman Lori Trahan laid out the desperate need for new federal privacy statutes that protect sensitive data.²⁹ Transcriptions of all three

22. Serge Egelman, *Informing Future Privacy Enforcement by Examining 20+ Years of COPPA*, 37 HARV. J.L. & TECH. 1387 (2024).

23. Nataliia Bielova, Cristiana Santos & Colin M. Gray, *Two Worlds Apart! Closing the Gap Between Regulating EU Consent and User Studies*, 37 HARV. J.L. & TECH. 1295 (2024).

24. David Choffnes, Woodrow Hartzog, Scott Jordan, Athina Markopoulou & Zubair Shafiq, *A Scientific Approach to Tech Accountability*, 37 HARV. J.L. & TECH. 1201 (2024).

25. Mihailis E. Diamantis, Maaz Bin Musa, Lucas Ausberger & Rishab Nithyanand, *Forms of Disclosure: The Path to Automating Closed Book Privacy Audits*, 37 HARV. J.L. & TECH. 1265 (2024).

26. Cindy Cohn, Exec. Dir., Elec. Frontier Found., Keynote Address at the *Harvard JOLT-U Iowa IBL Symposium: Beyond the FTC* (Apr. 1, 2023), <https://www.youtube.com/watch?v=Crho2Sbwr-Y> [<https://perma.cc/7KFZ-QPH5>].

27. Samuel Levine, Dir., Bur. of Consumer Prot., Fed. Trade Comm'n, *Believing in the FTC*, Keynote Address at the *Harvard JOLT-U Iowa IBL Symposium: Beyond the FTC* (Apr. 1, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-to-JOLT-4-1-2023.pdf [<https://perma.cc/J3HY-DGLX>].

28. *Id.* at 1.

29. Representative Lori Trahan, Keynote Address at the *Harvard JOLT-U Iowa IBL Symposium: Beyond the FTC* (Apr. 1, 2023), <https://www.youtube.com/watch?v=j-6rtRbN3tQ> [<https://perma.cc/AAK2-3RMT>].

keynotes have been published online in the Harvard Journal of Law and Technology Digest.

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