

INFORMATION PLATFORMS AND THE LAW

Julie E. Cohen*

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INTRODUCTION

Encounters between networked information technologies and law tend to be framed as examples of what happens when an irresistible force meets an immovable object. For example, some argue that networked information and communication technologies are technologies of freedom, able to help human civilizations solve all of our most pressing problems—if only the law will stop undermining technology’s potential and either get with the program or get out of the way. Others assert that it is information technology that fatally undermines the rule of law—that unbreakable encryption and untraceable alternative currencies will plunge society into chaos, or that unaccountable and fundamentally nonhuman artificial intelligences spell the end for antiquated models of social control and regulation.

Whether any of those inspiring or doom-laden predictions will come to pass is beyond our ability to know, but their premises are wrong. Networked information technologies inevitably will alter, and are already altering, the future of law but not because there is any single, irresistible arc of technological progress. The reason, rather, is very nearly the opposite: information technologies are highly configurable, and their configurability offers multiple points of entry for interested and well-resourced parties to shape their development. For similar reasons, law is not an immovable object. Legal institutions are not fixed, Archimedean points around which modes of economic development shift and cohere. They are arenas in which interested parties struggle to define what constitutes “normal” economic or government activity and what qualifies as actual or potential harm, and they are also human-created artifacts whose form and function are not preordained.

For some time now, political economies in the developed world have been undergoing a transformation from industrial to informational

* Mark Cluster Mamolen Professor of Law & Technology, Georgetown Law. Portions of this essay are adapted from the introduction to my book, JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTION OF INFORMATIONAL CAPITALISM (Oxford Univ. Press, forthcoming).

capitalism.¹ That transformation in turn has begun to reshape legal institutions, gradually optimizing them for the new roles they are called upon to play. Our current legal system is to a great extent the product of an earlier period of sociotechnical and economic transformation. From the late eighteenth century through the mid-twentieth century, as accountability for industrial-age harms became a pervasive source of conflict, legal systems in the industrializing world underwent profound, tectonic shifts. In the U.S., important doctrinal, procedural, and institutional changes included newly expansive conceptions of tort liability, the drafting of a uniform commercial code, new rules for exercising personal jurisdiction over faraway parties to civil disputes, liberalized pleading standards, the modern form of the class action lawsuit, the emergence and gradual refinement of the corporate form, and the structure of the modern regulatory state. Shifts occurring on a global scale included the emergence of new institutional structures for defining and vindicating human rights and for resolving disputes about global finance and world trade. Today, ownership of information-age resources and accountability for information-age harms have become pervasive sources of conflict, and different kinds of change are emerging. We are witnessing the emergence of legal institutions adapted to the information age, but their form and their substance remain undetermined and often hotly contested.

Information platforms and the firms that operate them have begun to play central roles in both the evolution of networked information technologies and the reoptimization of legal institutions. Platforms have become omnipresent intermediaries, restructuring both patterns of economic exchange and patterns of information flow more generally. The platform is not simply a new business model, a new social technology, or a new infrastructural formation (although it is also all of those things). Rather, it is the core organizational form of the emerging informational economy.² Importantly, however, platform *firms* are also discrete legal entities with interests and agendas of their own. Platform firms also rely on law and legal institutions to advance their own self-interested goals. A familiar narrative inside the Beltway pits “regulation” against “innovation,” but that dichotomy too is self-interested, and it is far too

¹ See generally 1 MANUEL CASTELLS, *THE INFORMATION AGE: THE RISE OF THE NETWORK SOCIETY* 14–18 (1996); DAN SCHILLER, *HOW TO THINK ABOUT INFORMATION* 3–35 (2007); see also DANIEL BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING* (1973); JAMES R. BENIGER, *THE CONTROL REVOLUTION: TECHNOLOGICAL AND ECONOMIC ORIGINS OF THE INFORMATION SOCIETY* (1986).

² For more detailed development of these points, see Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 131 (2017).

simple. It is an intervention designed not to marginalize law but to encourage legal institutions to assume the particular forms that economically powerful industries find most convenient.

Understanding the various interactions between platforms and the law—and acting to reshape those interactions if their results are too socially costly—have become profoundly important projects. The essays in this symposium issue of the *Georgetown Law Technology Review* seek to broaden and deepen that discussion. Taken as group, the conceptual frameworks and regulatory proposals that the essays offer reflect efforts to bridge the space between old and new ways of thinking about the functions that platforms perform and the appropriate ways of governing those functions.

The essays are grouped around four sets of questions:

First, how should we understand the information services that platforms provide, and how should the answers to that question inform the discussion about external regulatory oversight? Twenty years ago, when Internet intermediaries were new, application of preexisting frameworks suggested a basic distinction between publishers and conduits—plain vanilla intermediaries that connected people to the Internet so they could post their own content for others to see. The functions that today’s information platforms perform are very different. As Tarleton Gillespie explains, platforms do not simply transmit information flows but rather moderate them, and in fact, flows of information have become so unthinkably unmanageable that moderation has become the essential commodity users look to platforms to provide. James Grimmelman, in contrast, conceptualizes the core platform dynamic as one based on virality and sensationalism. Content creators have learned to optimize for attention and sharing, and platforms optimize to prolong user “engagement.” Both of these perspectives offer profound challenges to early, utopian visions of the online information environment, and equally important, they challenge the premises underlying the statutory framework enacted to shelter it.³ But if—as increasing numbers of critics now argue—that framework now needs major modification, what should take its place? Ambivalence about the extent to which platform-based intermediation is both essential and offensive to fundamental values of privacy and political self-determination inform the perspectives offered by Gillespie, Sabeel Rahman and Mireille Hildebrandt on that question. Rahman proposes to adapt familiar techniques of public utility regulation

³ Communications Decency Act, Pub. L. No. 104-104 § 509, 110 Stat. 56, 138 (1996) (codified as amended at 47 U.S.C. § 230 (2012)).

to the task of regulating what he calls information infrastructural power, while Hildebrandt urges a more comprehensive overhaul along the lines of the European data protection model, within which automated, data-driven profiling must be minimized and its recommendations explained and justified. Gillespie, in contrast, thinks that governing the new media hybrids requires correspondingly hybrid regulatory approaches; he recommends new statutory obligations loosely modeled on commonly understood best practices for media organizations coupled with enhanced transparency obligations that would ensure data portability for users, data access for researchers, and accountability to regulators.

Second, how should legal regimes concerned with the various kinds of access to information services required by competitors and consumers understand the intermediation that platforms perform? The papers by Maurice Stucke and Lina Khan consider the extent to which traditional antitrust frameworks are capable of constraining abuses of power by dominant platform firms. Because they consider the problem at different levels of abstraction, they appear to reach slightly different answers. Khan argues that traditional tools such as common carriage requirements and structural separations can give regulators traction on certain kinds of platform power. Khan and Stucke are in agreement, however, that the immense power dominant platforms derive from their control of data and data flows is far less tractable. Stucke's taxonomy of the harms flowing from platform "data-opolies" offers regulators a useful starting point from which to begin thinking about what additional tools might be needed. The papers by Gigi Sohn and Olivier Sylvain seek to recontextualize the debates about network neutrality within broader sets of considerations relating to access to communicative resources and to the distributive implications of communications policy. Sohn outlines a comprehensive communications policy agenda for the Internet era that includes prescriptions for a Federal Communications Commission (FCC) reinvigorated by an express grant of authority to oversee the market for broadband Internet access and for a Federal Trade Commission (FTC) invested with broad authority to regulate the information privacy practices of communications providers. Sylvain argues that so-called zero-rating schemes that have been touted as methods for bridging the digital divide in countries around the world—and that involve mobile service providers and dominant information platforms working in partnership to craft walled gardens for online services—risk creating second-class information citizens and that policymakers should not abdicate their obligations to ensure full inclusion. The final paper in this group, by Chris Marsden, contemplates a more dramatic shift in the underlying regulatory paradigm, toward creation of a scheme that would encompass competition, communication, personal data protection, and consumer law concerns.

Third, how should media law and policy approach platforms and their information practices? Existing law encourages platforms to undertake their own moderation efforts and says nothing about design for virality. As Anupam Chander and Vivek Krishnamurthy explain, platform-based information environments cannot plausibly be understood or described as neutral marketplaces of ideas because of intentional decisions about moderation and virality and for a host of other reasons. Derek Bambauer sketches a range of alternatives that might be available to policymakers wishing to address particular problems, although he is agnostic on which, if any, to endorse. His goal instead is to highlight their different benefits and costs and to note the ways that some approaches conflict with others. The papers by Cindy Cohn and by Danielle Citron and Benjamin Wittes illustrate some of the potential conflicts that arise when questions about the appropriate regime of media regulation for platforms are put into play. Citron and Wittes argue that a tort-based “reasonable efforts” standard would obligate platforms to address the more obvious types of harmful content while still avoiding the potential harms to online freedom of expression that might follow from a stricter standard. Cohn, however, cautions against the adoption of rules that would encourage nontransparent and unaccountable exercises of private censorship. Finally, communications scholar Alice Marwick explores peoples’ motivations for sharing “fake news” and concludes that sharers are principally concerned with signaling membership in particular communities rather than with the truth or falsity of the items they choose to share. Marwick’s perspective is a useful reminder about the importance of understanding online information practices before attempting to design policy interventions.

Fourth and finally, in what ways might the toolkit typically employed by consumer protection regulators need to change to enable them to respond more effectively to platform-based algorithmic intermediation? As the papers by Terrell McSweeney and Rory Van Loo explain, consumer regulators at the FTC and the Consumer Financial Protection Bureau (CFPB) are already engaging with platforms and algorithms in creative and resourceful ways. Both interventions make clear, however, that important questions remain about both the scope of those entities’ authority to oversee the platform economy and their readiness to do so. As McSweeney describes, the FTC has used its unfairness authority to address a variety of abusive online practices, but the limits on its rulemaking authority foreclose it from taking other, more proactive approaches to help structure the rules governing the collection, processing, and use of consumer personal information. The CFPB has authority that is at once narrower and deeper; as Van Loo explains, it has the authority to monitor and audit a variety of financial practices that

affect consumers. That authority, however, does not extend to the full range of other, non-financial activities in which platforms engage. The papers by Paul Ohm and by Deirdre Mulligan and Daniel Griffin, meanwhile, observe that that platform-based, algorithmic intermediation also introduces wholly new factors and issues into the regulatory calculus. Ohm argues that the enormous scale at which platforms operate should inform both the articulation of relevant standards of care and the results of enforcement actions. Mulligan and Griffin suggest that users' demonstrated expectations about authoritativeness in search result rankings should prompt both policymakers and search engines to reconsider prevailing understandings of what search engines do and that emerging conventions for linking corporate social responsibility and human rights can provide a new way forward.

Together, these thought-provoking papers sketch an important research agenda for scholars and an equally important experimental agenda for legislators and policymakers. They are invitations to imagine the legal institutions and regulatory tools that the networked information era requires, and they are offered in that spirit.