Spring 2022 www.uclajolt.com Vol. 27, No. 2

UCLA

JOURNAL OF LAW & TECHNOLOGY

SPECIAL ISSUE: GOVERNING THE DIGITAL SPACE

BUILDING THE PLANE WHILE FLYING IT: TECHNOLOGY AND LEGAL SCHOLARSHIP

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SPECIAL ISSUE INTRODUCTION

It has become almost a cliché to note the disruptive influence of new technologies on virtually every facet of our day-to-day lives. But what makes the law and governance realm unique is its reliance on precedent and continuity, which prevents traditional ideas and methods from being discarded like VHS tapes or bankbooks.[1] One cannot simply invent a new form of contract law out of whole cloth to replace traditional ideas of offer, acceptance, and consideration. Instead, legal scholars must parse out how these ideas should apply in a modern context. The struggle to adapt 18th and 19th century principles to blockchain, social media, and algorithmic amplification lies at the heart of the modern law and technology discourse. The fact that these modern applications would, in many cases, be quite literally beyond the comprehension of the original authors of these terms is

* Executive Director, UCLA Institute for Technology, Law & Policy. Thanks to the UCLA Journal of Law & Technology editors-in-chief, Leeza Arbatman and Madeline Thorpe, as well as all of the journal staff, for their ongoing commitment to this special issue, as well as our Faculty Director John Villasenor and Visiting Affiliated Faculty Jane Bambauer, both of whom offered invaluable feedback in its development.

1. *See, e.g.*, Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

part of what makes the discipline so challenging. The articles in this special issue all relate, in their own way, to the ongoing push and pull between the breakneck pace of innovation and the centuries-old concepts which constitute the foundation of our legal system.

The first article, *Virtual Governments*, by Edward Lee, addresses the growing disconnect between our traditional understandings of public accountability and governance, and the enormous and virtually unchecked power being wielded by private sector tech companies, particularly online platforms.[2] While Lee is not the first scholar to note the enormous power of these companies,[3] or to draw a parallel between online platforms and governments ,[4] he takes this analogy significantly further, positing that their position should afford them a status above traditional jurisdiction and arguing for something analogous to the principle of comity of nations, including "the recognition of mutual respect and courtesy" for the platforms' internal rulemaking ability.[5] This approach is particularly welcome in the context of a growing tide of national governments seeking to co-opt or browbeat platforms into a role resembling privatized censors, or to subject them to an increasingly convoluted and conflicting global patchwork of content rules.[6] It also gels interestingly with proposals to develop quasi-independent "social media councils" as co-regulatory structures to take global content moderation questions out of the hands of State governments.[7]

Lee notes, however, that a significant challenge underlying the platforms' assumption of this position is their own lack of institutional

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2. Edward Lee, *Virtual Governments*, 27 UCLA J.L. & TECH. (SPECIAL ISSUE) 1 (2022).

3. *See, e.g.*, Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011 (2018).

4. *See, e.g.,* Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807 (2012); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

5. Lee, *supra* note 2, at 26.

6. Michael Karanicolas, *Subverting Democracy to Save Democracy: Canada's Extra-Constitutional Approaches to Battling "Fake News"*, 17 CANADIAN J.L. & TECH. 200, 215–22 (2019).

7. *See, e.g.*, ARTICLE 19, THE SOCIAL MEDIA COUNCILS: CONSULTATION PAPER (2019), https://www.article19.org/wp-content/uploads/2019/06/A19-SMC-Consultation-paper-2019-v05.pdf.

maturity, and their failure to appropriately grow into their new role by developing the kinds of institutions and structures that we would expect from entities exercising quasi-governmental power.[8] Although Lee is skeptical of government-driven efforts to break up big tech platforms through antitrust or competition investigations, he sees the pivot towards a more decentralized web (Web3) as working independently to dilute the power of these major players.[9]

Christoph Busch's article, *Regulating the Expanding Content Moderation Universe: A European Perspective on Infrastructure Moderation*, also grapples with the enormous power of private sector interests over the global information ecosystem.[10] His focus, however, is on the Internet's infrastructure layer, which has hitherto received far less attention from both regulators and the public-at-large than the major user-facing online platforms like Facebook and YouTube. Nonetheless, as Busch notes, there are equally profound concentrations of power among companies that operate deeper in the Internet stack, such as Amazon, Cloudflare, and Apple.

For many years, conventional wisdom held that companies within the infrastructure layer should eschew direct engagement in content moderation.[11] Rather than jumping headlong into the dirty business of adjudicating content disputes, so the argument went, online infrastructure providers should view their role as analogous to mobile phone or power companies, which provide their services in a way that is relatively agnostic regarding how customers choose to utilize those services. But high profile content decisions—such as Cloudflare's discontinuation of services to the Daily Stormer and 8chan, or Amazon Web Services' eviction of Parler—suggest that the era of infrastructure neutrality may be coming to an end.[12] As Busch notes, regulators, particularly in the European Union, are also increasingly muscling into this territory.[13] Both developments necessitate

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8. Lee, *supra* note 2, at 14 (discussing the "three priorities for Internet platforms").

9. *Id.* at 30–31.

10. Christoph Busch, *Regulating the Expanding Content Moderation Universe: A European Perspective on Infrastructure Moderation*, 27 UCLA J.L. & TECH. (SPECIAL ISSUE) 32 (2022).

11. *See* Corynne McSherry et al., *Content Moderation is a Losing Battle. Infrastructure Companies Should Refuse to Join the Fight*, ELEC. FRONTIER FOUND. (Apr. 1, 2021), https://www.eff.org/nb/deeplinks/2021/04/content-moderation-losing-battle-infrastructure-companies-should-refuse-join-fight.

12. Busch, *supra* note 10, at 35–36, 45–46.

13. *Id.* at 50–52.

significant conceptual work in developing safeguards to facilitate responsible content moderation in the infrastructure layer. Given that standards for content moderation among online platforms, where the debate is far more advanced than in the infrastructure layer, are nonetheless in their relative infancy, the contributions of this work towards advancing our understanding of principles like subsidiarity, transparency, and procedural due process are a welcome and timely contribution to a field of emerging importance.

Aileen Nielsen's contribution to this special issue also addresses content moderation, and the legitimacy gap inherent to the private sector's immense power to shape the contours of online speech. *The Rights and Wrongs of Folk Beliefs About Speech* explores the impact of widespread misunderstandings about First Amendment speech protections on perceptions of legitimacy regarding private sector content moderation structures.[14] Nielsen's study—which used a large, representative sample of American adults—assessed the impact of a targeted constitutional educational intervention on opinions of private sector content moderation decisions. Interestingly, the study confirmed that many Americans believe the First Amendment protects against speech restrictions by private entities,, and that these erroneous beliefs correlated with a lack of support for content moderation.[15] But, the study also found that a targeted intervention meant to correct this erroneous belief backfired among participants in the experiment, leading, in many cases, to a further reduction in support for content moderation.[16]

Nielsen concludes that the widespread existence of erroneous beliefs about the U.S. Constitution supports a need for better legal education, but that these education processes should be mindful of potential ancillary impacts.[17] However, the results of her study are also interesting in light of the articles by Edward Lee and Christoph Busch, both of which point to serious deficits in procedure, accountability, and transparency in the exercise of private sector moderation functions. Private sector entities, of course, do not carry the same obligations in this regard as government actors. Yet it is precisely because of their need to maintain public confidence

14. Aileen Nielsen, *The Rights and Wrongs of Folk Beliefs About Speech: Implications for Content Moderation*, 27 UCLA J.L. & TECH. (SPECIAL ISSUE) 118 (2022).

15. *Id*. at 152–53.

16. *Id*. at 155–56.

17. *Id.* at 166–67.

and public trust that it is crucial for government entities to demonstrate their adherence to principles like transparency, accountability, and due process. Because private entities wield power over the online discourse that is often comparable to that exercised by governments—and they do so unencumbered by the procedural safeguards that protect individuals from governmental overreach— it should not be surprising that content moderation decisions often engender strong perceptions of illegitimacy. Without discounting Nielsen's core conclusion on the value and importance of Constitutional education, it would be interesting to see how perceptions of the legitimacy of platforms' decision-making would change if they were to place greater emphasis on procedural protections and public accountability.

Finally, the special issue includes an article by Joshua Fairfield and Niloufer Selvadurai which addresses the disconnect between traditional methods of contractual interpretation—which place heavy emphasis on the intent of the parties—and the fact that many modern contracts are generated between parties which are not capable of formulating intent.[18] *Governing the Interface Between Natural and Formal Language in Smart Contracts* considers the challenge posed by blockchain-based contracting, where transactions are often concluded by machines in a manner which is more or less autonomous from their human masters. As a consequence, efforts to corral smart-contracts within the regular rules of contracting need to grapple with the removal of humans—and thus, the removal of intent—from the transaction.[19] Fairfield and Selvadurai's article provides a framework for courts to navigate these challenges through a revised understanding of both the relationship between language and contract, and the relationship between contract and intention.

The article's thorough comparative examination of how different jurisdictions treat smart contracts, and the different ways contract law frameworks have been updated to accommodate the rise of electronic contracts,[20] illustrates another common tension that pervades the law and technology space: In crafting new rules, policymakers across the United States and around the world face a tension between designing legal frameworks to be resilient to future technological change, and pressure to cater rules to the specific challenges manifested by current iterations of

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18. Joshua Fairfield & Niloufer Selvadurai, *Governing the Interface Between Natural and Formal Language in Smart Contracts*, 27 UCLA J.L. & TECH. (SPECIAL ISSUE) 79 (2022).

19. *Id.* at 102-04.

20. *Id.* at 106–11.

products, services, or practices. The former approach sacrifices precision for longevity, while the latter guarantees that whatever rules are put in place will need to be revisited as technology continues to evolve. While smart contracts, as the authors note, pose a fundamental conceptual challenge to traditional understandings of contract formation, the essence of contract law requires a focus on the human element of these mechanisms which transcends change in their mechanical application.

All four articles present important and timely contributions to their respective areas of thematic focus, and all four feed into pressing public policy debates about how traditional legal concepts should adapt to technological innovation. On behalf of the UCLA Institute for Technology, Law & Policy, we are delighted to present this special issue of the UCLA Journal of Law and Technology, and are grateful to the authors and editors who made it possible.