

Between Truth and Power: The Legal Constructions of Informational Capitalism

Featuring Julie Cohen

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Hey, everybody. Thank you so much for being here. I'm going to say a few words and then quickly get out of the way to let Julie speak. My name's Chris Bavitz. I'm one of the faculty co-director of Berkman.

We're thrilled to have you here. We're thrilled to have Julie Cohen here. A couple of just quick administrative things-- we're live streaming and recording so just keep that in mind if and when you ask a question at the end.

Please ask a question at the end. We're going to save plenty of time for Q&A. I may ask a question or two to start things off, but I'm going to quickly turn that over to you. And we'll be running microphones around the room for that.

Julie's a professor at Georgetown Law, a great friend of many of us at Berkman who know her for her influential work on all areas of tech, including copyright, which I note because Julie's Twitter handle is julie17usc. That's a little copyright inside humor for those who get it. And her new book *Between Truth and Power-- The Legal Constructions of Information Capitalism* is out now from Oxford University Press. We're going to hear a little bit about that, and I'm going to quickly turn it over to you, Julie, thanks.

Thanks, Chris. Thanks for having me. It's always great to be here back in the Berk world or whatever we're calling it these days. So I chose julie16usc, by the way, because I have trouble remembering stuff. So I can remember that.

So I wrote this book because I was annoyed. And I was annoyed at this, which is a sort of stylized way of collapsing a particular approach to framing and understanding the interaction between the legal system, and networked information, and communication technologies that sort of stylizes that interaction as the collision between an irresistible force and an immovable object. You can decide which is which. But then if you're in DC, you kind of run around going, oh my god, oh my god, how should the law respond? And if you're in California, perhaps, you say, why doesn't the law just get out of the way?

And what is lost in that framing is a much more mutually constituting set of interactions between the two, which is what I wanted to surface in this project. I think the appropriate frame is a frame that comes from political economy and is a frame that recognizes that newly valuable resources, new technologies, new ways of interacting that those technologies engender in turn then engender new appropriation strategies. And some of those strategies are legal, right? Some of the

strategies are ways of mobilizing law and legal institutions to advance one's particular self-interested projects.

And as that process winds its way along, sometimes it ends up changing the legal institutions that it has mobilized to serve the purposes. And so the question that we ought to be asking is not how should law respond or why doesn't law get out of the way but how is law already being mobilized, and how is it evolving and changing in response? Some stage setting, this slide-- I know some of you in the room have seen this slide and the next slide. So I apologize. It's useful to look back first.

And a particular touchstone for this project is Karl Polanyi's work on the great transformation in British political economy. And he was of course not talking about networked information and communication technologies. He was talking about the transformation from agrarianism to industrial capitalism. And this book did a couple things. All of which I would argue are relevant for us as we struggle to understand the current and ongoing transformation to an informational political economy.

First, it described. It mapped. And it mapped-- although this is sort of my structure, I think, more so than his. But it mapped transformation along three lines or three dimensions, a process of appropriation of resources. In particular, if you want to have a factory, you might need railroads to carry resources to the factory.

You need right of way for the railroad. You need water to run the power wheels in the factory. You might need large concentrations of land, and so you enclose it. And then you kick all the peasants that are using it off. Something that Yochai has written about in a different context as the enclosure movement.

So one dimension is appropriation of resources. A second dimension, which is equally necessary for a transformation to a regime of capitalism, is learning to think about the inputs to production in a different light. And that's as commodities, right? So we already read about the commodification in particular of labor, land, and money, the three principle inputs to this regime.

And then a third dimension along which transformation precedes is a detaching of what had previously been sort of little vocal patterns of barter and exchange and learning to see economic exchange as occurring sort of on this disembodied plain called the market, which is a fiction, which is sort of everywhere and nowhere. And that's where economic exchange happens. Second thing he did after this description was to bend stylized this process as a double movement, an initial movement to a capitalist political economy, comprised of those transformations.

And then as people began to notice some problems-- people are getting their limbs chopped off in factories. There is a lot of pollution in the skies over London from all the factories. Then a protective counter movement. The second piece of the Double Movement, which happened as lawmakers of the time had to figure out what to do. And now you may get the how should law respond piece perhaps. So the British Parliament among other things wrote the first sort of rudimentary precursors to worker protection laws during this period.

And so if you were to ask or if I were to ask you where's the role for law in this story, as I've just indicated, you could tell a story about this process that takes the form of the how should law respond narrative, but that's not the story that I think ought to be told because if you look back at that transformation, legal institutions are involved at both phases of the Double Movement. You can't kick the peasants off the land without the laws permitting you to enclose the land. You can't have the factories, and the railroads, and the British East India Company without a legal framework permitting you to amass capital and use it for various purposes. Law is used to facilitate the first phase, the movement to a capitalist political economy before it becomes sort of mobilized for protective purposes.

So let's just run the parallels really quick. We've got now sort of happening underneath and around us, and have had for some time, increasing focus on appropriation of intangible resources. And that process begins way back in the early to mid 20th century with a drastically increased focus on things like patentable inventions, and copyrightable expression, and industrial trade secrets. But it's achieved warp speed as that universe of resources has widened to include data, and algorithms, and things of that nature.

We have, I would argue a parallel, process of reconceptualization of the inputs to production, labor, land, and money, and now also people as data, datafication of everything. If you're wondering how you can datafy land, just think a little about the mortgage crisis, and you'll have your answer. And we can dive into some of the other things later if you want.

Organizationally, we're seeing a shift that consists of these patterns of barter and exchange now becoming detached from the everywhere and nowhere construct of the market and becoming, if you will, re-materialized and re-embedded in platforms. And I don't just mean Google and Facebook. I mean everything, special purpose platforms for interbank financial trading, special purpose platforms for hiring, and tasking, and monitoring, and firing workers, special purpose platforms for commodities trading, special purpose platforms for doing lots of things, and then the general purpose platforms that we all encounter as consumers and users, vendors of cloud storage, providers of policing technologies.

Platforms are everywhere. And platforms are not everywhere and nowhere at once. Platforms have very concrete material and protocological entailments and lend themselves to different kinds of control. OK, what about this?

So what I want to do in the book-- let me come back to that actually. I want to map these processes of transformation-- that was the goal-- to show how legal institutions are already being mobilized to produce these transformations, giving us the movement to informational capitalism which is a legal institutional process as well as an economic one. The question whether that process is producing mounting cost to human well-being and whether we need a protective counter movement and whether anything that's being talked about so far is likely to work, I'm going to leave up to you. But a signal purpose of the book is to just really poke hard on that, right? And you may have some hints about what I think.

OK, so how is lobbying mobilized to produce this process of legal institutional transformation? Part 1 of the book looks at the level of baseline relations of entitlement and dismantlement. And

since we're sitting in a law school and some of you probably know who Hofeld is or was rather. The inspiration for that part of the book is somewhat Hofeldian. The idea is that entitlements and dis-entitlements correlate with one another.

And when you change them, you change relationships. And then the second part looks at things that might be more familiar to us all as institutions, courts, and the regulatory state, and human rights instruments, and so on. So with regard to baseline entitlements and dis-entitlements, I want to just draw out I think three big points here, so one on this slide and two on the next. So the first point is that this process of appropriation of valuable resources is a process in which entitlement relationships become targets of legal entrepreneurship, right?

If intellectual property law, for example, won't quite do what you want, we'll push on it, and stretch it, and twist it, and manipulate it until it starts to do what you want. And so funnily enough, we have seen the contours of even those somewhat bold IP rights, patents, copyrights, trademarks, trade secrets re-envisioned as assets, and as portfolios of assets, and as investments. And we have seen a similar sort of pushing, and pulling, and stretching happening in the area of corporate governance.

So a lot of the big tech firms you may know use a dual tier ownership structure for their stock, which means that even after they have gone public, extra voting power and extra control is reserved to the foundational innovators and the VCs, which means that everything you might have thought you could say about the power of the public capital markets to discipline the behavior of these companies has to kind of be rethought. And that's an innovation that originated actually back in the mid 20th century for I believe to help certain closely held family corporations transition into the capital markets. I think it was invented for John Wiley & Sons. I may be wrong about that. But it didn't come from big tech.

It's a tool that big tech found lying around, right? And they picked it up and they repurposed it to make it do something that would serve their purposes. We see what I term performative enclosure of data and algorithms. What do I mean by that? So if you took a class in intellectual property, you learn before you got through say the second week that you can't own facts or algorithms.

And if you acceded to the terms of a software developers kit or interacted with a data-rich platform as a user, whether an individual or a business, you would be acceding to these terms, to boilerplate and protocol based terms, that effectuate a de facto enclosure of the data and the algorithms. And in the process of these terms being propagated, and reiterated, and insisted upon, it starts to become sort of common wisdom that these resources are proprietary. And I would actually bet that in a couple more decades when you took that intellectual property law course, facts and algorithms would start to be described differently. It's a process of enclosure that's driven by the performative, that's driven by repetition and iteration.

And we see data harvesting from all of us all the time and the use of a narrative that's very old that comes from intellectual property law also about the privilege to appropriate and use what one finds lying around in the public domain. But that narrative is used to cover a multitude of

really interesting things, a building out of the networked environment to generate and throw off these data flows. So they aren't just lying around there.

They are manufactured under cover of a narrative that gives privilege to those that harvest the data. All of this is not simply economic entrepreneurship. It's legal entrepreneurship, and it starts to create sort of deeply intertwined thickets of de facto right and privilege to control intangible resources.

OK, here are the other two big points, and I'll just throw them all up at the same time. Oops, that's not what I wanted to do. Entitlements don't just have to do with control of resources. They have to do with relations of accountability and immunity. And that's a Hofeldian base pair if you remember your Hofeld.

If someone can be accountable for harms to others, that's one way that entitlements could be allocated. But if someone is insulated or immune from accountability, then everybody else is under correlative disability. They are not able to hold the party that has injured them accountable. And we see sort of broadening, and coalescing, and increasingly powerful constellations of de jure and de facto immunity from accountability for information harms. CDA 230 is probably something that you all are familiar with in this room.

First amendment shelter for information processing, which would not have been a thing half a century ago, is something that now is broadly acknowledged to exist in the doctrine. It was the product of a sort of conscious litigation campaign to create a set of interpretations that would extend the First Amendment to data. And in some cases, you do see state actors pushing back, right? The Europeans, for example, have pushed back really hard on obligations to take down terrorist-related information on the right to be forgotten.

And there's a struggle that has shaped up between powerful state actors and powerful private actors like the Facebooks and Googles of the world. But even where there's formal accountability to the state as there is, for example, with the European obligation to remove terrorist information within a certain amount of time, this devolves in practice to privately operated self-regulatory structures, the thing that we may be familiar with under the label of content moderation at scale because that's a term that the information industry wants us to learn. It's a term that is laden with political valence because moderation is nice.

It's papering over, some would argue and I would argue, a whole lot of immoderation at scale which is built into the design of many of the processes to which content moderation is now being applied. But when you filter an interdiction obligation through structures for private content moderation, or content takedown, or whatever you want to call them, you have the state's power to impose liability being sort of displaced by private power to impose or not to impose, to take down or not to take down, to de-platform or not to de-platform. That's a shift, again, in the baseline allocation of entitlements and entitlements. And, again, all I'm trying to do is map, right? That's what I'm trying to do here.

OK, what happens next? Something is strange. OK, yes, thank you. So let's talk a little about the back half of this project. I have to maybe before I even flip to the next slides say something about surveillance capitalism as a way of understanding these changes.

There are lots of things that the surveillance capitalism frame is good for. But one thing it is not very good for is understanding how legal institutions have been remade via their interactions with networked information technologies. That is a process that has been under way well before the start of the 21st century. And it's a process that is best understood by looking to literatures, and management, and organization studies about how the private organization took on board and was transformed by information technologies.

So there's a very famous book by a person who is on the history and science faculty here, James Beniger. He was on the faculty here. I forget the department, maybe government. Called *The Control Revolution*. And in that book, he mapped how when you take into the organization sets of technologies that permit more fine-grained control over the processes of that organization, whether they're manufacturing, or mining, or delivering services, or what have you, you enable a fundamental kind of managerial transformation in the way that that organization is operated.

There's all sorts of things you are empowered to do. And in consequence of all of those things that you're empowered to do, the operations of management themselves are restructured. You need a lot more management also. And management does very different things.

Every bit of what I just said applies equally to the courts, the regulatory state, and so on. It's just that we haven't really been accustomed to thinking about those institutions that way. It's sort of common to teach about our legal institutions as though they are timeless and as though there are sort of underlying fundamentals were carved on stone tablets and carried down from Mount Sinai and to overlook even that the forms of those institutions themselves as they are taught in US law schools today are overwhelmingly Industrial Era artifacts.

A lot of this sort of foundational moves in the sort of construction of those institutions were made in the late 19th and early 20th century and were sort of pre-information economy moves. And as the control revolution has begun to come into those institutions, we see those institutions responding to the managerial potential that the technologies create. But because they encounter other factors, in particular neoliberal ideology, the turn goes in particular ways. So the informational turn in the courts, the informational turn in the regulatory state through its encounter with neoliberalism turns toward particular kinds of implementations.

So there's a naturalization of baseline entitlements to harvest and control data in particular so that if you were to go in the courts and try to bring suit under various kinds of laws relating to information privacy, you would find the deck stacked against you in every conceivable way. But that doesn't even really get at the fundamental nature of the transformations that have been underway. So if you were to come into the court system as a plaintiff with a grievance of a particular kind, you would find a sort of rapidly accelerating kind of managerialist differentiation in the way that the court system is structured.

Entire categories of repeated sort of low sophistication, low cost, low value disputes involving employees, consumers, criminal defendants also are outsourced or distinct features of those disputes like knowledge production of the knowledge needed for sentencing outsourced. And in ways that align quite startlingly well with management and organizational studies decides literatures on when you would want outsourcing and what it is good for. If you wanted to try to bring a class action information privacy lawsuit, you would find that large scale structural reform litigation has been the subject of managerialist differentiation as well.

So instead of this sort of mythical trial that you see in the movies, the principal vehicle that has emerged for managing large scale structural reform litigation is the time to limited consent decree, right? So you get maybe as part of a settlement certification, maybe as a consent decree in public enforcement an agreement with a lot of fanfare to 20 years of supervision not that much follow-through often. And who supervises is not a judge but overlapping sets of management, lawyers, accountants, auditors, information professionals, who are brought into this sector now of dispute resolution to apply intensively informational techniques to overseeing something called compliance.

What is compliance? Well, compliance seems to entail a lot of box checking, a lot of benchmarking, and a lot of verification. It's not so clear that compliance produces say, for example, a remedy that the plaintiffs who originally started the process would recognize as one. Turning to the regulatory side of this process of differentiation, we see a great deal of stress being placed especially across the sectors that are highly informational, finance, food and drug, information privacy, other health information.

On devolution to private best practices, a lot of standards setting, a fair amount of technical standards setting now if you think about that Volkswagen defeat device or about the Boeing 737 Max or about anything that NIST does regarding standard setting and propagation of standards through the rest of the regulatory state. We see a lot of consent decree based enforcement. We see a lot of auditors. We see a lot of compliance.

All of this is very heavily informationalized. None of this whether on the court side or the regulatory state side lines up especially well with those kind of old artifactual rule of law ideals that were generated a long time ago, the idea that lawmaking should be public, should be reasoned, should be contestable, should be transparent to the persons who it affects. Instead, we see, to quote a wonderful surveillance studies scholar named David Murakami Wood-- although I don't think this is actually in the book-- "governance sort of going up and out into the ether into the realm of standardization, and audit, and compliance."

And when it intersects again with the sort of neoliberal idea that the system of political economy should be arranged in a way that privileges private market activity and that the role of the state is merely to sort of steward that process, that accelerates the turn to the managerial. And then when the processes intersect with really complex data-driven algorithmic processes, it becomes harder and harder for those supposedly tasked with governing to understand the processes that they are seeking to govern. So the last point is well recognized in the literatures on algorithmic accountability. The point I'm trying to make here is that it's also an institutional design problem for law.

And I don't want to be understood to be standing up here being all nostalgic about the old judge and jury trial or about old command and control regulation that we had back in the era when the interstate commerce commission first started setting railroad freight tariffs, that's not my point, it is absolutely to be expected that the modalities of governance should evolve to keep pace with the sort of technological predicates that underlie the system of a political economy as a whole. But it is also to be expected that we should-- I don't even want to start that way. We should expect to have a say in the design of governance institutions for the networked information economy.

And if there is a widening gulf between the ways those institutions operate and the ability to have accountability and effective governance of the conditions of the networked information economy, that's an institutional design problem, right? We should expect to have a say. If people want to come back to network and standard-based governance, I'm happy to do that. But I see that times moving on. So I want to talk a little bit about fundamental rights.

There is a mismatch as well that we need to pay attention to between the set of artifacts that comprise our protections for fundamental rights. And I do mean that, right? Everything that we think is a timeless legal institution, the judge, and jury, the trial-- we may not think that the regulatory state is equally timeless. But we probably think of our human rights as fairly timeless.

There are sort of post-war artifacts at least as they're currently conceptualized. And they're conceptualized in a particular way to match what were perceived to be the most urgent problems. I want to return to one point of debate about that.

So our human rights instruments on the whole have been aimed toward state-based violations, have presumed that the way that you contend with state-based violations over and above sort of diplomacy is by having courts, by rights-based tribunals. And that tribunals adjudicate cases based on discourses of obligation. And the prevailing vernacular for talking about rights is highly individualized. Individuals are the bearers of rights.

But changes in our legal institutions that are sort of wrought by and responsive to the operation of networked highly informationalized governance processes have compromised every link in that chain. So one has overwhelmingly to contend with now the ways in which privatized transnational flows of information are implicated in various kinds of rights violations and implicated in ways that governments take advantage of, right? So governments are not out of the loop, but large privatized providers of information infrastructures are in the loop there's a lot of sort of privatized governance that goes into directing and channeling those flows of information in ways that make courts sort of marginal to processes of oversight.

There are efforts to devise new ways of talking about rights particularly under the heading of corporate social responsibility that are-- I like to call them discourses of aspiration rather than discourses of obligation. And the mechanism for rights violation is the network process implemented at scale. And the result of this sort of sea change is a disintermediation of legal institutions tasked with protecting fundamental rights, right? I did skip over a slide. And I would have talked, but I didn't in the interest of time, about the ways that, for example, international trade governance bodies are implicated in this picture.

But there is a lot of-- there is a large shift in the center of gravity of governance of matters that are foundational to the enjoyment of fundamental rights out of the tribunals formerly tasked with protecting fundamental rights and into other realms, trade, internet governance, transnational, financial governance to name just a few. And then, of course, there's Google and Facebook. The bottom line here, I think, is that when we think about power, and networks, and networked information flows, many of us, including a lot of the people in this room, like to quote the sort of old chestnuts one of which is censorship. The net interprets censorship as damage and routes around it.

In the realm of governance, increasingly, it's this. Power interprets regulation as damage and routes around it. If some court somewhere is going to tell you you can't do something, maybe under the rubric of an international trade agreement or within the framework of a private platform's processes you can do the thing that you were told you couldn't do. And it's difficult to get traction on that problem now. Again, this is an institutional design problem.

So here's what I want to leave you with. And I imagine people will have a lot to they want to say. I think we are confronting these questions about what legal institutions we want to have for the political economy that has emerged. And it is very tempting, again, within a law school to let an nostalgia drive that inquiry.

And it's something to be resisted. It isn't, for example, possible to go back and have a full dress judge and jury trial for everything that has been outsourced. Every person on the planet would need to be employed by the legal system. It isn't possible to go back to some of the modes of regulation that the drafters of the Administrative Procedure Act envisioned.

It isn't possible to give individuals the rights to port their data to another platform or to withdraw their data and expect to achieve large scale structural change in the design of networked platforms that use people's data in particular ways. So that individualist paradigm may be a thing that we need to kind of move past in the interests of not getting trapped in our nostalgia. We have, though, to answer these questions. And we have to answer them, I think, within these parameters.

We need to be very skeptical about shiny new innovation rhetoric. And we need to be willing to think outside the box. So I'm going to stop. And, Chris, where did you go?

I'm right here.

Do you want to takeover the--

I'm going to ask one question.

--question and answer.

And then I'm going to start handing the mic around and ask Reuben and Megan to do the same. This is great, and there's so much here. So one thing that jumps out at me is you describe-- and it's undoubtedly true, and it's purely descriptive-- this world in which we have this institutional

design problem. We expect to have a say in the governance of ICT sector, but there's a lot of privatized governance.

And sort of as a precursor to that, I love the narrative of what you're calling legal entrepreneurship, this idea that powerful actors encounter existing legal and regulatory regimes and then re-architect them to suit their needs. And you have these great examples about re-conceiving IP rights, and changing corporate form, and all of that. I find myself thinking as you're going through those examples that for each of those, I could come up with a counterexample of re-architecting legal regimes that is not in support of the interests of the powerful corporate actors but in support of us, the people, justice, whatever value you want to put on that.

So just as corporations re-conceive of IP rights and sort of assetize IP, we have open source software licensing regimes and creative common. And just as changes in corporate form and governance allow this mixed corporate ownership of general shareholders and NPCs, we also have double bottom lines and benefits corps. And we also have models for fundraising that are based on patronage, or crowdfunding, and all of this. And I guess my question is where does all of that, the thing I'm highlighting, counterexamples, fit into your narrative? Or maybe the other way. Why do they lose out?

I'm going to just go out on a limb here. I think mostly it pacifies us. In some cases, it does worse, right? Larry Lessig wasn't trying to create the Googleverse when he dreamed up Creative Commons. Open content regimes have enabled the construction of these digital ad tech-based business models because they're the inputs, right?

Even if that's an unintended consequence, it's a consequence. And it has been such a large shift that it is threatening to bring down democracy as a political form. So, yes, small innovations can have really big ripple effects. But I am not sure I want to get on board, particularly with that example.

Crowdfunding your kid's cancer treatment instead of having a health care system that works, color me unimpressed, right? I can see the impetus to put these things in place as a stopgap, but I am just not sure that that's where I want to sign off.

I'm going to give my moderators prerogative and first hand to my friend Jessica [? Silvey. ?]

Yay.

Thank you.

My friend Jessica [? Silvey. ?] OK.

Thank you for calling me your friend. I'm your friend too. Julie, so that was incredibly succinct, and helpful, and fabulous for all the reasons that you are. I want to know where the truth in your title comes into your exegesis of the talk. That is, you didn't mention truth in all these PowerPoint slides, and so I want to give the opportunity to talk about that as a concept.

So, yeah, the only place I do actually talk about it is in the introduction and then a little at the conclusion too actually. So here's what I think. So an impetus-- I said I wrote the book because I got annoyed. And if I'm being 100% honest here, some of the woo-woo internet utopia crowdsourcing lalala rhetoric was part of what made me annoyed because you could see these effects starting to emerge. And I would argue that folks in the privacy community were kind of in the vanguard of that.

There's the sort of protest trope of speaking truth to power, which I think is often uncritically applied to a lot of very theatrical but not very effective behavior. And so for me there was a resonance there. If you go back and you look at the Quaker manifesto titled Speak Truth to Power, it's a manifesto about the rise of the military industrial complex and the foundational importance of political economy in laying down the baseline conditions for having a just or unjust society. And I wanted to allude to that.

But I also wanted to allude to the motto of my law school and then problematize it. So at Georgetown Law, it's carved in the ceiling at least one place and people say it all the time. The law is but the means. Justice is the end. And that's a Georgetown thing.

But I don't think that it's an unusual sentiment to encounter in a law school. And, yet, what do lawyers do, right? Lawyers work for power, right? And lawyers modernize.

Lawyers join the ALI. They write restatements. They issue white papers. But they also drink the Kool-Aid about what modernization consists in often. So lawyers and technologies that are used by people to communicate, I think, serve this mediating function.

Maybe you're serving justice. Maybe you're serving power. You're in between. You're between truth and power.

And actions can have ripple effects and maybe ones you didn't intend. I don't think Mark Zuckerberg intended to bring down democracy as we know it. But I don't know.

[LAUGHTER]

We could talk about that too. Maybe somebody wants to. So, yeah?

I'm wondering where behavioral and social science fits into this. I think I get in the surveillance capitalism frame that's where a lot like the predictive insights that make adtech work come from. But here it seems like these are the things that could rationalize each of these transformations like standards based, compliance, and all that. But I'm wondering like, yeah, production of knowledge by social scientists, behavioral scientists, and the ways that they could underwrite a lot of this stuff and how you're thinking about them and what institutions can use to govern that.

Yeah, I mean, I think behavioral and social sciences are useful tools, right? But they can be tools that can be used for many purposes. I'm a believer in evidence-based policymaking. I come from Washington, and I just kind of feel like I should put that out there. But there is a-- there's a distinct skill set that is necessary for policymaking that entails moving beyond the frame that you

would get from your behavioral or social science research, from your economics, from your network science to considering public policy ramifications in a more overarching way.

So I think that behavioral and social science has a place at the table, right? A thing I would like to see, for example, is an Administrative Procedure Act 2.0 that defines a suite of competencies for the regulatory state that includes computer forensics and audit, that includes behavioral and social science around particular sets of issues, especially relating to consumers. But I do think we always need to be critical about the priors and the uses if that makes sense.

Thank you. That's great.

Where's the mic? OK.

My name is [? Lucas ?] [? McClure. ?] Thank you very much for your work. I find it very helpful for people trying to map illegal dimensions of information on capitalism in the United States but also around the world. Something that you [INAUDIBLE] in the introduction of your book. And also people thinking about what the counter movement, how they respond to this. And I want to ask you about fundamental right, that rule of law 2.0.

Imagine a nation where designing a new constitution in 2021 from scratch through a democratic process, a constitutional assembly, what would you advise them to do? Now, this is not a mere thought experiment. Now, in Chile where I come from, a constitution making process is starting. It's very democratic. And as people in this room know, [INAUDIBLE] in a constitution that was inherited from a military regime and that makes possible a neoliberal regime.

So that's my question. What would you advise people there. That's a big question, of course. But it's also [INAUDIBLE] for this room to look to Chile in the next three years because [INAUDIBLE].

So there's stuff missing from this slide that bears on this question. The post-war settlement around what ought to be in a human rights instrument was weak on economic and social rights. I'm sure there are a lot of people in the room who know a lot more about that than I do, including, probably, you.

And as developing and the new democracies have begun to draft their constitutions, questions have arisen about putting economic and social rights in those instruments. But then beyond that, once you've got them in an instrument, how do you operationalize them. And it's relatively easy to put something in a text, right? But it turns out that when you go to operationalize, for example, economic and social rights, which I happen to believe should be part of a constitution--

There's this whole debate going on right now about whether our constitution is sort of aged out of usefulness, which is relevant here too, right? You don't-- on the whole operationalize economic and social rights by having judges issue injunctions, right? You need some kind of managerial oversight structure to get the food and the education and the water and the electric power to the people.

The problem is not that that's a kind of institutional configuration that has emerged, the problem is that the way that that kind of institutional configuration has emerged is one that doesn't actually take as its overriding goal-- getting the food and the water and the education to the people.

And when that becomes sort of sidetracked into arcane debates among experts about what the right indicators should be and who gets a piece of the grant money-- and so there is a piece of institutional design for economic and social rights that has to do with how you would do that differently in a more accountable way.

And then, of course, there's a piece that has to do with what you're going to do when one person's or one community's claim to economic and social rights threatens what someone else pursuit-- a business claim to protection for its foreign direct investment.

And so another place, I would say, that-- and this isn't going to make you happy probably. But we haven't figured out if governance is sort of dissipating into places like trade and foreign direct investment disputes and cross-border settlements about Bank Capital adequacy, then human rights needs to follow.

And so it isn't enough to have a bunch of constitutions if they are sort of little islands sitting in a larger transnational networked structure that treats human rights as sort of epiphenomenal, sort of appendages here and there. So this is like this could be a really long conversation right. Yeah?

[INAUDIBLE]

Yes. Hi, Bruce.

Hey. How do you look at the US versus EU? How are the two different? Or is it different governance?

Yeah.

[INAUDIBLE] doing things differently.

Right. And have you seen Daphne Keller's bingo card where there's that but what about China square? Well, I have to, right? Because there's a three way game shaping up-- US, EU, China-- in terms of information privacy regimes, in terms of information governance regimes. And you can't not mention it because one of the things that the US platforms are now starting to say is don't burden us too much with this EU style regulation because what about China? Check the bingo box, right?

I think that there is much to like in, for example, the GDPR. But the GDPR has like an internal identity crisis, right? There's lovely aspirational stuff about privacy by design and data minimization and not a lot of concrete learning yet about how you operationalize that at scale in an enforceable way, right? There are nice experiments here and there.

And then there's a ton of stuff about rights of erasure, rights to withdraw your information, rights to this, rights and that and a ton of learning about how you might start to operationalize giving individuals those rights. But it's not super clear to me that you achieve governance at scale of the more problematic aspects of the model by emphasizing the stuff we know a ton about.

And so I think the jury's out on whether they develop sort of the parallel body of learning about how to operationalize and enforce privacy by design. But then you still have to say, what about China? Because in the context of this three way global game, it's not completely up to them. And I'm still sort of scratching my head about that. But Kendra wants in, so jump in.

I actually do have a comment--

Yeah.

--which I'm generally not a fan of. But with your permission--

That's fine.

--I wanted to sort of jump in on the conversation you were having with Chris early about this sort of what might be seen as bottom up adaptations of using some of these tools. And I wonder if not just thinking about them as a palliative, as like making people feel better, but actually thinking about them as like the camel's nose in the tent, right? It's the way in which folks-- and I'm in particular thinking about copyleft licensing and covenants and conditions and broadening the scope of copyright to cover things that aren't copyright, right?

The way in which we all got really excited about the fact that you can make a whole bunch of non copyright related stuff conditions of a copyright license is the enforceability of open source software of copyleft licenses. But at the same time, that creates all kinds of opportunities for the sort of what you're describing as the rights creep of contractual obligations that now go far beyond copyright.

So I wonder, if not just thinking of it as like, oh, this makes it-- it's meant to make you feel better. But actually it is a way in which you can further advance the cause of these kinds of managerial systems while having everyone be happy about it.

I mean, that's why all that boilerplate is enforceable. And I've taught covenants and conditions myself. And it's really a puzzle. You're right. I think that there's a-- people in tech law maybe had like a little self-hatred problem, like we want to learn to transcend law in some way. And if we get block chain, we could transcend norms to. Woo-Woo. We could just transform it all.

And I actually don't think-- I think we need to evolve beyond that. You need functioning institutions to have a society. And some of those need to be legal institutions. And if the ones we have now aren't so well adapted or they become increasingly maladapted under these ideological pressures, then it's time to reinvent them but from a perspective that celebrates the need or-- maybe if you can't quite get that far-- accepts the need to have law and proceeds from there. Yeah?

So I want to follow up on Bruce's question. So if you think about-- I'm trying to put this in the context of global governance. And if you think about somebody like Dani Roderick writes about the Trilemma-- and the Trilemmas, you can have national sovereignty, you can have democracy, and you can have globalization, but you can't--

You can't help all three.

First of all, three of them are under pressure. But you can't have all three of them at the same time. You have kind of two of the three. And when I think about this in a tech world where fixed costs are huge upfront. But once you have it, the marginal cost of distributing software is close to zero.

And you can have nation states who set standards. But then those standards, the de facto often become global standards. And you're kind of framing of institutions. What's the legal institutions on a global basis? Is that just a lost cause? And so we should accept that it's going to be nation state governments of some sort or nation state laws and institutions? How does all of that kind of come together?

So thank you, first of all, because you took me to my slide that I skipped. We haven't-- it's not new to say that people who work on global governance have recognized for a long time that the old hierarchical nation state, Westphalian model doesn't work well. But there is this emergent institutional form that we see in the transnational space that is network and standard based, right?

There's this other piece of folk with wisdom about how networks are inevitably more democratic than hierarchies, which is totally not true, right? If it's network and standard based governance around a standard, then the governance is in the standard, right? And so governance is going up and out. But one of the places that's coming to rest is in standards. And you can see it, right?

You just have to go and look at the proliferation of standards bodies as appendages within trade governance or interesting like barnacles on to hold onto nominally cooperative arrangements for transnational financial governance. But by the time you take account of all the standards that have accreted around doing things a particular way, that's governance, right?

But it is not sufficiently well theorized at the level of how you put that on all fours with some high level ideas about what the rule of law requires, even if the specific lower level articulations of those principles don't seem to work anymore, right?

Some of this stuff is pretty technical, right? It's not going to be directly publicly accessible. And yet, there is the public accessibility value, right? There is a lot of speaking of where the behavioral and social sciences come in. You need game theorists involved because there are all of these interesting forms of gaming that come in to network and standard based governance.

And if you hook into the network, just like it used to be Microsoft Windows, and then it became the browser, and then it became the app store, you can hook yourself into a network and then become your own powerful dominant network. So there's a lot of opportunity to engage in governance standards wars, right?

And what I think we urgently need is to pay attention to this phenomenon of creating, overlapping, interlocking expert assemblages and network and standard based governance and see it as not weird stuff happening around the edges of what is governance but as governance as a central phenomenon to be studied and understood and then, perhaps, disciplined and constrained in a way that seems to make sense.

And off we could go on a whole discussion about how transnational governance is an inherently quixotic and aspirational activity anyway because it is, right? But I do think there's some definite room for improvement here.

And I have to end it there. Julie's book's available out in the hall here. And please join me again in thanking Julie Cohen.

Thank you.

[APPLAUSE]