

PROSUMER LAW AND NETWORK PLATFORM  
REGULATION:  
THE LONG VIEW TOWARDS CREATING  
OFFDATA

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INTRODUCTION

Platform regulation has become the *cause celebre* of technology regulation: a call to regulate the intermediaries who provide platforms for networked digital services.<sup>1</sup> These include the GAFAs: Google, Amazon, Facebook, and Apple. Many policy entrepreneurs are peddling solutions as the policy cycle turns, in a classic Kingdon case of “solutions chasing a problem.”<sup>2</sup> Yet networks are not new, and their platforms have been regulated for hundreds of years, generally unsuccessfully. In this

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<sup>1</sup> This was recognized early in the commercial rollout of the Internet and the growth of electronic commerce. See Michael L. Katz & Carl Shapiro, *Technology Adoption in the Presence of Network Externalities* 94 J. POL. ECON. 822 (1986); CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* (1999); PHILIP EVANS & THOMAS WURSTER, *BLOWN TO BITS: HOW THE NEW ECONOMICS OF INFORMATION TRANSFORMS STRATEGY* (1999); Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479 (1998); Yochai Benkler, *Communications Infrastructure Regulation and the Distribution of Control Over Content*, 22 TELECOMM. POL’Y 183 (1998); David S. Evans, *Some Empirical Aspects of Multi-Sided Platform Industries*, 2 REV. NETWORK ECON. 191 (2003); Tim Cowen & Annabelle Gawer, *Competition in the Cloud: Unleashing Investment and Innovation Within and Across Platforms*, 85 COMM. & STRATEGIES, 45 (2012).

<sup>2</sup> See generally JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984).

article, I take the long view, focusing on the railways/telegraphy regulation of the 1840s in England and the ‘fake news’ problems of 2011 to date.<sup>3</sup> I offer some historical examples that may be highly relevant to ‘prosumer’ digital capitalism 180 years later.

Prosumers (a term coined by Toffler)<sup>4</sup> are active users who are sharing and producing content, rather than passively consuming it, notably ‘hacking’ content using techniques famously described as “rip, mix, burn.”<sup>5</sup> Any Internet user who has posted content, from Facebook to Twitter to blog posts to podcasts, has become a prosumer—though there are very broad categories, ranging from the occasional tweeter to the fully developed hacker. Over two billion people now use Google to search for content; Facebook, Instagram, and WhatsApp to share news, gossip, and photos; YouTube to watch and upload videos; and Twitter, Snapchat, and other sites to say just about anything.

We are all becoming ‘prosumers’ sharing intimate details of our personal lives.<sup>6</sup> But this ‘prosumer environment’ is currently either grossly unregulated<sup>7</sup>—leaving users’ data and content at the mercy of the multinational companies who host it and sometimes claim to own it—or is subject to knee-jerk over-regulation, as with the current ‘fake news’ law (“Netzwerkdurchsetzungsgesetz”) in Germany.<sup>8</sup> The prosumer environment is a new regulatory policy cycle in network regulation.<sup>9</sup>

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<sup>3</sup> See generally CHRISTOPHER T. MARSDEN, NETWORK NEUTRALITY: FROM POLICY TO LAW TO REGULATION (2017) (I refer in this article to a much more extensive study of network neutrality and common carriage).

<sup>4</sup> ALVIN TOFFLER, THE THIRD WAVE 11 (1980).

<sup>5</sup> IAN BROWN & CHRISTOPHER T. MARSDEN, REGULATING CODE: GOOD GOVERNANCE AND BETTER REGULATION IN THE INFORMATION AGE (2013).

<sup>6</sup> Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974) (The basic insight of nudging consumers towards ‘free’ platforms and their biases builds on this study.).

<sup>7</sup> Recent UK investigations include those carried out by the Competition & Markets Authority (*Competition & Markets Authority Cases*, GOV.UK, <https://www.gov.uk/cma-cases?page=1> [<https://perma.cc/L6VU-RXFU>]), specifically those carried out by the Online Reviews and Endorsements section of the Competition & Markets Authority (*Online Endorsements*, GOV.UK, <https://www.gov.uk/cma-cases/online-endorsements-potential-non-disclosure> [<https://perma.cc/R5LW-A8Z9>]). See COMPETITION & MKTS. AUTH., THE COMMERCIAL USE OF CONSUMER DATA (2015), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/435817/The\\_commercial\\_use\\_of\\_consumer\\_data.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/435817/The_commercial_use_of_consumer_data.pdf) [<https://perma.cc/GA66-L6EF>]; David Currie, Homo Economicus and Homo Sapientis: The CMA Experience of Behavioural Economics, Speech at New Zealand Commerce Commission Public Lecture (Apr. 21, 2015), <https://www.gov.uk/government/speeches/david-currie-speaks-about-the-cma-experience-of-behavioural-economics> [<https://perma.cc/C9ZF-CKUF>].

<sup>8</sup> See Kirsten Fiedler, *Reckless Social Media Law Threatens Freedom of Expression in Germany*, EDRI (Apr. 5, 2017), <https://edri.org/reckless-social-media-law-threatens-freedom-expression-germany/> [<https://perma.cc/AQW2-5NMT>]; Andreas Splittgerber &

Regulatory responses are finally emerging, driven by both data protection and competition concerns.<sup>10</sup> Yet the overarching need to ensure greater neutrality of intermediaries has largely been limited to last mile monopolists and mobile oligopolists: the legacy telecommunications companies who provide Internet access. These solutions depend on regulatory alignment between national regulatory authorities (NRAs) in antitrust, data protection, consumer protection, communications regulation, and other fields.<sup>11</sup> That is far from guaranteed in a fragmented, technologically challenged, and budget-constrained agency field. As I explain in the final substantive section of the article, European lawmakers often use weasel words to disguise their preferred form of ‘co-regulation’ as self-regulation: the legislature and executive forcing companies to engage in what is formally termed “action short of law.”<sup>12</sup>

In conclusion, I argue that what is needed is OffData, a new regulatory agency that provides a comprehensive ‘Prosumer Law’ solution that draws on competition, technology regulation, fundamental human

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Friederike Detmering, *Germany’s New Hate Speech Act in Force: What Social Network Providers Need to Do Now*, REEDSMITH (Oct. 2, 2017), <https://www.technologylawdispatch.com/2017/10/social-mobile-analytics-cloud-smac/germanys-new-hate-speech-act-in-force-what-social-network-providers-need-to-do-now/> [<https://perma.cc/L4HA-9N84>].

<sup>9</sup> See, e.g., Joe McNamee, *ENDitorial: Fake News about Fake News Being Fake News*, EDRI (Feb. 8, 2017), <https://edri.org/enditorial-fake-news-about-fake-news-being-news/> [<https://perma.cc/T6XH-SGJU>]. See generally Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149 (2018).

<sup>10</sup> Competition law has shown concern for Internet platform dominance for twenty years. See Robert Pitofsky, Chairman, Fed. Trade Comm’n, Self Regulation and Antitrust, Prepared Remarks at the D.C. Bar Association Symposium (Feb. 18, 1998), <https://www.ftc.gov/public-statements/1998/02/self-regulation-and-antitrust> [<https://perma.cc/2LEW-4XGQ>]; Herbert Ungerer, Ensuring Efficient Access to Bottleneck Essential Facilities: The Case of Telecommunications in the European Union, Speech at the Competition Workshop, Florence (Nov. 13, 1999), [http://ec.europa.eu/competition/speeches/text/sp1998\\_056\\_en.html](http://ec.europa.eu/competition/speeches/text/sp1998_056_en.html) [<https://perma.cc/2V6V-U4R8>]; European Commission Press Release IP/98/639, Commission Clears WorldCom and MCI Merger Subject to Conditions (July 8, 1998), [http://europa.eu/rapid/press-release\\_IP-98-639\\_en.htm](http://europa.eu/rapid/press-release_IP-98-639_en.htm) [<https://perma.cc/H6S7-8J5T>]; Margarethe Vestager, Algorithms and Competition, Speech at the Bundeskartellamt 18th Conference on Competition, Berlin (Mar. 16, 2017), [https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/bundeskartellamt-18th-conference-competition-berlin-16-march-2017\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/bundeskartellamt-18th-conference-competition-berlin-16-march-2017_en) [<https://perma.cc/5A7Z-RPJW>].

<sup>11</sup> Rónán Kennedy, *Rethinking Reflexive Law for the Information Age: Hybrid and Flexible Regulation by Disclosure*, 7 GEO. WASH. ENERGY & ENVTL. L. REV. 124 (2016).

<sup>12</sup> See generally CHRISTOPHER T. MARSDEN, INTERNET CO-REGULATION: EUROPEAN LAW, REGULATORY GOVERNANCE AND LEGITIMACY IN CYBERSPACE (2011).

rights, privacy, and free expression to ensure a fair and neutral deal for digital prosumers and citizens.

## I. THE GROWTH OF PLATFORMS

Platforms are vital to the exchange of goods, services, and information in the socioeconomic realm. Platforms connect two parties via an exchange—whether the parties know each other or are anonymous—thus, serving a vital function. This does not mean their role is confined to economics. The Catholic confessional, for instance, connects the penitent to their alter ego via a priest, with indirect reward via exchange of alms for virtue; yet the primary purpose of organised religion is held to be spiritual, or at least socio-political despite their economic power (and economic predominance in Western society until the Reformation). It is noteworthy that there are more adherents to Facebook's and Google's platforms than to any organised religion in the history of the world.<sup>13</sup> Both platforms, and notable rivals Apple and Amazon, have grown fastest in Latin speaking nations and those that were successfully colonised and where some of the population continues to use the language and religion of Catholicism or Western non-conformism. Their usage is restricted by consumer and/or government in Cyrillic language nations (the former Soviet bloc) and China.<sup>14</sup> Catholicism's Reformation and the emergence of platform regulation has more than just historical and geographical parallels.<sup>15</sup>

Platform power in the modern world emerged with the extraordinary innovation of the railway running over common land purchased from the public, thus creating a common carriage system that

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<sup>13</sup> Measured as either Monthly Average Users or Daily Average Users, both companies have over two billion users. See Alphabet Inc., Quarterly Report (Form 10-Q) (Mar. 31, 2017),

<https://www.sec.gov/Archives/edgar/data/1652044/000165204417000014/goog10-qq12017.htm> [<https://perma.cc/Y8PQ-KGTE>];

Press Release, Facebook, Facebook Reports Fourth Quarter and Full Year 2017 Results (Jan. 31, 2018), <https://investor.fb.com/investor-news/press-release-details/2018/Facebook-Reports-Fourth-Quarter-and-Full-Year-2017-Results/default.aspx> [<https://perma.cc/LD7G-VLMV>].

<sup>14</sup> Maps of the world based on the dominant Internet platform have been produced by, amongst others, the Oxford Internet Institute. *Information Geographies: Age of Internet Empires*, OXFORD INTERNET INST., <http://geography.oii.ox.ac.uk/age-of-internet-empires/> [<https://perma.cc/8BLF-HERP>].

<sup>15</sup> John Naughton, *Why We Need a 21<sup>st</sup>-Century Martin Luther to Challenge the Church of Tech*, GUARDIAN (Oct. 29, 2017, 4:30 AM), <https://www.theguardian.com/technology/2017/oct/29/why-we-need-a-21st-century-martin-luther-to-challenge-church-of-technology-95-theses> [<https://perma.cc/9TH9-G55S>] (explaining and summarizing John Naughton, *95 Theses about Technology*, 95 THESIS ABOUT TECHNOLOGY, <http://95theses.co.uk/> [<https://perma.cc/N78P-F46R>]).

equally applied to the rapidly emerging electrical communications systems, telegraph and telephone, that ran alongside the railway. In the fifth Kondratieff wave in which we live (sometimes termed the Fourth Industrial Revolution),<sup>16</sup> the microelectronic information technology revolution, data sharing platforms are of most concern. In this article, given my stated interest in the wider political economy and not simply economics, I focus on consumer platforms rather than business-to-business transactions. The affordances of consumer information platforms connect consumers to businesses, notably via advertising, and are rewarded by the exchange of personal data on one side for targeted advertising revenue on the other. Note that the consumer is also a citizen and a producer of information, often in small doses such as individual social media status updates. The individual is thus in fact a micro-prosumer. It is the rights of this prosumption culture that I have termed prosumer law and on which this article expands. As the prosumer is providing an inexhaustible, if not immortal stream of personal data, it is facile to compare that data to the oil in the information economy. The prosumer is actually more akin to a silkworm, producing a cocoon of silk that is harvested and recombined by the social media platform owner to sell to advertisers as a multicolored marketing dreamcoat of networked information. Thus the law applies to the personal data trails of the worms in question: all Internet users.

## II. THE LONG VIEW: LEGAL HISTORY AND THE CREATION OF PLATFORM REGULATION

Platform regulation using network effects to control downstream markets is nothing new.<sup>17</sup> The history of the creation of antitrust in the United States is that of network regulation, to attack the railroad and Standard Oil trusts built in the corrupt politics of the Civil War and its aftermath (noting Abraham Lincoln was a railroad lobbyist from 1851 at

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<sup>16</sup> See Klaus Schwab, *The Fourth Industrial Revolution: What it Means, How to Respond*, WORLD ECON. F. (Jan. 14, 2016), <https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond> [<https://perma.cc/HS39-YXXJ>].

<sup>17</sup> See MARS DEN, *supra* note 3, at 17–22 (This discussion forms part of a longer term international political economy project examining responses to previous monopolistic and oligopolistic communications industries in transition, building on my previous work examining the 1844 Railways Act.); *id.* at Chapter 2 (the ‘Edwardian Snowden’ critique of Victorian telegraph network surveillance); MARS DEN, *supra* note 12 (examining the concepts of regulation through technological means explored throughout the works from Christopher T. Marsden, *Regulating the Global Information Society* (2000)). See also Christopher T. Marsden, *Law and Technology*, in INTERNATIONAL ENCYCLOPEDIA OF DIGITAL COMMUNICATION & SOCIETY (Robin Mansell et. al. eds., 2014).

least until his entry into politics).<sup>18</sup> But competition policy in network industries has a longer history, notably in the first nation to create industrial private networked monopolies, the United Kingdom. The relationship of the United Kingdom as a superpower to the United States, China, and India was inverse to its current position. The United Kingdom was the high-technology global superpower, and the others were supplicants to British military-industrial<sup>19</sup> and legal-managerial pre-eminence.<sup>20</sup>

In 1844, William E. Gladstone, then President of the Board of Trade, created the Railways Regulation Act (“1844 Act”), passed into law on August 9 of that year, at the height of the “Railway Mania,” which peaked in the summer of 1845.<sup>21</sup> This was the largest speculative boom to that point in human history—larger by far than the South Seas bubble of 1720 or the Tulip Mania of 1637.<sup>22</sup> Technology and financial deregulation worked hand-in-hand with the dramatic growth of the railways accompanied by the financial deregulations of 1825 and 1844.<sup>23</sup> The railway bubble of the late 1830s was not halted by the 1844 Act, given

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<sup>18</sup> Sandra K. Lueckenhoff, *A. Lincoln, a Corporate Attorney and the Illinois Central Railroad*, 61 MO. L. REV. 393, 394 n.4 (1996).

<sup>19</sup> British mercenary armies raised by the private British East India Company defeated both the Chinese and Sikh Empire forces in a series of wars in 1838-49, taking full control of India, Pakistan and Hong Kong, after being comprehensively massacred in Afghanistan in 1838. See CRAIG MURRAY, SIKUNDER BURNES: MASTER OF THE GREAT GAME (Birlin Ltd. 2016).

<sup>20</sup> United States population trebled to 17 million by 1840 from only 5.3 million in 1800, but the British and Irish population was much larger until 1860 despite mass emigration: 25.5 million in 1841 (15 million in 1801) and the entire British Empire over 259 million in 1861. See *1840 Census: Compendium of the Enumeration of the Inhabitants and Statistics of the United States*, U.S. CENSUS BUREAU (1841), <https://www.census.gov/library/publications/1841/dec/1840c.html>

[<https://perma.cc/V945-93VF>]; CENSUS OF THE BRITISH EMPIRE 1901: REPORT WITH SUMMARY AND DETAILED TABLES FOR THE SEVERAL COLONIES &C., AREA, HOUSES, AND POPULATION (1901), Table 4 at 12, [https://archive.org/stream/cu31924030396067/cu31924030396067\\_djvu.txt](https://archive.org/stream/cu31924030396067/cu31924030396067_djvu.txt) [<https://perma.cc/DD3N-MR7E>].

<sup>21</sup> An Act to attach certain Conditions to the Construction of future Railways authorized or to be authorized by any Act of the present or succeeding Sessions of Parliament; and for other Purposes in relation to Railways. Railway Regulation Act 1844, 55 & 56 Vict. c. 10 (Eng.). See Andrew Odlyzko, *The Collapse of the Railway Mania, the Development of Capital Markets, and Robert Lucas Noash, Forgotten Pioneer of Accounting and Financial Analysis* (June 25, 2011) (unpublished paper), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1625738](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1625738) [<https://perma.cc/TAW7-TB3Y>].

<sup>22</sup> See CHARLES MACKAY, MEMOIRS OF EXTRAORDINARY POPULAR DELUSIONS AND THE MADNESS OF CROWDS (1841) (noting that this bubble was forewarned in this famous journalistic work on the previous bubbles).

<sup>23</sup> 1825 6 Geo. 4 c. 91 (Gr. Brit).

that it only passed at the end of Parliamentary activity in the mania. The digital platform economy's growth is by no means as large as the first "platform economy" boom—8% of UK gross domestic product (GDP) was privately invested in the railways in the mid-1840s, equivalent to \$1.6 trillion in capital investment in the United States in 2016.<sup>24</sup>

Railway Mania was not just the result of technological progress, though railways created dramatically different economic conditions. For the first time in human history, national economies could survive a bad harvest, freeing the human condition from the basic need to avoid hunger or potential famine.<sup>25</sup> It was also the result of speculative investment that had been barred from the South Sea bubble until the repeal of the Bubble Act in 1825 (the year of the first passenger railway, the Stockton and Darlington).<sup>26</sup> This reform allowed for the formation of joint stock corporations with limited liability, with further significant reforms in 1844 and 1856.<sup>27</sup> The latter came into effect after the Railway Mania's collapse in 1847 and utilised for the manufacturing and trading corporations in the Second and Third Industrial Revolutions (from steam to steel to electrification and internal combustion).<sup>28</sup>

The comparison with the modern period is striking. The waves of financial deregulation from 1970 were synergistic with the information technology revolution that enabled near-real-time global communication via satellite, telex, telephone, and latterly fibre-optic IP-based systems. That deregulation, including the repeal of Glass-Steagall via various

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<sup>24</sup> See *United States GDP*, TRADING ECON., <https://tradingeconomics.com/united-states/gdp> [<https://perma.cc/8GXX-FHNW>].

<sup>25</sup> Tragically, Ireland in 1844-1845 suffered a vast 'Potato Blight' induced famine, exacerbated by both the Corn Laws that protected English landlords and the entire absence of railways in Ireland outside Dublin and Belfast until that year. See *Midland Great Western Railway of Ireland Act 1845*, 8 & 9 Vict. c. cxix (Eng.) (The 422 railway laws were removed from the United Kingdom statute book by the Statute Law (Repeals) Act 2013 c. 2.); *Belfast and County Down Railway (B&CDR) incorporated in 1846*; *Cork, Bandon and South Coast Railway incorporated in 1845*; *Great Southern and Western Railway (GS&WR) incorporated 1844*. The *Bill of Repeal Importation Act 1846*, 9 & 10 Vict. c. 22 was passed 25 June 1846, with tariffs reduced by 1849.

<sup>26</sup> *Bubble Act 1720* 6 Geo 1, c. 18 (Gr. Brit.) ("An Act for better securing certain Powers and Privileges intended to be granted by His Majesty by Two Charters for Assurance of Ships and Merchandizes at Sea, and for lending Money on Bottomry; and for restraining several extravagant and unwarrantable Practices therein mentioned.").

<sup>27</sup> *Joint Stock Companies Act 1844*, 7 & 8 Vict. c. 110 (Eng.); *Joint Stock Companies Act 1856* 19 & 20 Vict. c. 47 (Eng.). See Mark Freeman et al., *Law, Politics and the Governance of English and Scottish Joint-Stock Companies, 1600-1850*, 55 BUS. HIST. 636 (2013).

<sup>28</sup> CARLOTTA PEREZ, *TECHNOLOGICAL REVOLUTIONS AND FINANCIAL CAPITAL: THE DYNAMICS OF BUBBLES AND GOLDEN AGES* (2002).

reforms in the 1980s and 1990s,<sup>29</sup> contributed to the extraordinary Internet ('Dot-Com') bubble of 1998 through 2001.<sup>30</sup> Between March 2000 and October 2002, the NASDAQ index of technology shares in public companies fell in value from \$6.7 trillion to \$1.6 trillion (a fall of 76%).<sup>31</sup> The failure to arrest the bubble's causes can be partly laid as a cause of the much larger Great Recession of 2008. The failure to learn from an earlier bubble led to the latter: as with the railways in the 1830s and 1840s, so with the wider economy in 2001 and 2008. In 2008, the shocking claim repeated from the late 1990s was "this time is different"<sup>32</sup>—recalling Alan Greenspan's claim that the stock market in 1996 was "exhibiting irrational exuberance."<sup>33</sup>

### III. FAKE NEWS: THE PROBLEM WITH NO SOLUTION

If much of the growth of regulation in the nineteenth century concerns physical infrastructure on which the Internet was built in the late twentieth century, many of the twenty-first century problems in platform regulation concern content. The definition of 'fake news' as deliberate propaganda or 'disinformation' was made by the regional and global United Nations rapporteurs on freedom of information in March 2017.<sup>34</sup> This was reiterated in the European Commission High Level Expert Group report of March 12, 2018.<sup>35</sup> The most recent iteration of the 'fake news'

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<sup>29</sup> The Banking Act of 1933, 12 U.S.C.A. § 227 (West 2018) was partially repealed by the Gramm-Leach-Bliley Act of 1999, Pub. L. 106-102, 113 Stat. 1338.

<sup>30</sup> See OM MALIK, *BROADBANDITS: INSIDE THE \$750 BILLION TELECOM HEIST* (2002) (providing a near-contemporary account of the telecoms bubble).

<sup>31</sup> Chris Gaither & Dawn C. Chmielewski, *Fears of Dot-Com Crash, Version 2.0: Venture Spending Soars, Especially for Web Video. Some Say It's a Lot of Cash Chasing Too Few Ideas*, L.A. TIMES (July 16, 2006), <http://articles.latimes.com/2006/jul/16/business/fi-overheat16> [<https://perma.cc/GJS8-APRT>].

<sup>32</sup> See generally CARMEN M. REINHART & KENNETH S. ROGOFF, *THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY* (2009).

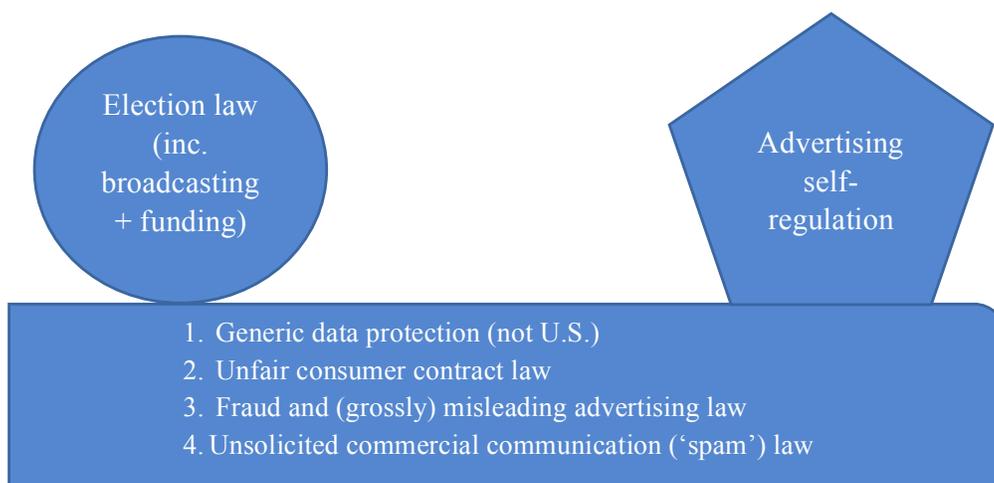
<sup>33</sup> Matthew J. Belvedere, *Ex-Fed Chief Greenspan's New Bond Bubble Warning Feels Like 'Irrational Exuberance' Déjà vu*, CNBC (Aug. 4, 2017, 9:40 AM), <https://www.cnbc.com/2017/08/04/ex-fed-chief-greenspan-new-bond-bubble-warning-feels-like-irrational-exuberance-deja-vu.html> [<https://perma.cc/99DA-DGYM>].

<sup>34</sup> U.N. Special Rapporteur on Freedom of Opinion and Expression et al., *Joint Declaration on Freedom of Expression and "Fake News," Disinformation and Propaganda*, U.N. Doc. FOM.GAL/3/17 (Mar. 3, 2017), <https://www.osce.org/fom/302796?download=true> [<https://perma.cc/5TZC-TPM8>].

<sup>35</sup> Euro. Comm'n, Directorate-Gen. for Comm. Networks, Content & Tech., *A Multi-Dimensional Approach to Disinformation* (Mar. 12, 2018), <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation> [<https://perma.cc/VC93-ET7W>].

problem reached the West in the wake of claims of Russian interference in the 2016 U.S. presidential election and UK referendum on leaving the European Union.<sup>36</sup> The problem of state-sponsored social media inaccuracy was first identified in the Ukraine in 2011, when Russia was accused of deliberately faking news of political corruption.<sup>37</sup> The problem of fake news, however, is as old as the tablets of Hammurabi and almost as difficult to decipher.

The issues implicated by fake news are very complex, and the solutions are drawn from two extremes, which can be represented on a non-intersecting Venn diagram.



There is a vast gulf between commercial speech in newspapers and advertising self-regulation in printed and online publications on the one hand and broadcast content together with electoral spending by political parties on the other. Commercial speech is generally only subject to self-regulation, while broadcast content is typically rigidly regulated by both a broadcast and an electoral regulator.<sup>38</sup> In the UK, these regulators are Ofcom and the Electoral Commission, respectively. Generic regulation

<sup>36</sup> See Robert Epstein & Ronald E. Robertson, *The Search Engine Manipulation Effect (SEME) and its Possible Impact on the Outcomes of Elections*, 112 PROC. NAT'L ACAD. SCI. E4512 (2015) (describing search engine manipulation for election interference).

<sup>37</sup> See Sergey Sanovich, *Computational Propaganda in Russia: The Origins of Digital Misinformation* (Oxford Computational Propaganda Research Project, Working Paper No. 2017.3, 2017), <http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/89/2017/06/Comprop-Russia.pdf> [<https://perma.cc/2339-9EKH>].

<sup>38</sup> See, e.g., Jessica Elgot, *Brexit: CPS Considers Complaint that Leave Campaigns Misled Voters: Case Argues Vote Leave and Leave. EU Made 'Knowingly Misleading' Assertions of Fact, Including Claim EU Cost UK £350m a Week*, GUARDIAN (Nov. 7, 2016, 7:34 AM), <https://www.theguardian.com/politics/2016/nov/07/brexit-cps-considers-complaint-that-leave-campaigns-misled-voters> [<https://perma.cc/K26D-LYA4>].

applies in varying degrees, especially in the EU context where consumer law is well-developed, especially for online transactions with the e-Privacy<sup>39</sup> and Distance Selling Directive.<sup>40</sup> EU generic privacy law also applies, notably the General Data Protection Regulation.<sup>41</sup>

Case studies can illustrate the problem. The first is egregious but obvious: the editor of the *Daily Telegraph* newspaper (which leans strongly towards the Conservative Party and is owned by non-domiciled billionaires) was fined £30,000 in 2017 by the privacy regulator, the Information Commissioner,<sup>42</sup> for sending unsolicited electoral communications (specifically an email on General Election Day) to approximately 500,000 subscribers to the website. The email implored the recipients to vote for the Conservative Party.<sup>43</sup> Readers may ponder whether a £30,000 fine fits the violation of user consent in providing their email to the Telegraph Group.

The second case is that of Cambridge Analytica's (CA) role in the Brexit referendum. CA is a company that develops psychological warfare (psy-ops) tools for use in election campaigns based on research conducted by British spy agencies in the Cold War.<sup>44</sup> CA was used by the Steve

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<sup>39</sup> Council Directive 2002/58/EC Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, 2002 O.J. (L 201) 45.

<sup>40</sup> Council Directive 97/7/EC on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) 40 (no longer in force, date of end of validity: 06/13/2014, repealed by Council Directive 2011/83/EU amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2011 O.J. (L 304) 54).

<sup>41</sup> Council Regulation 2016/679 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and repealing Directive 95/46/EC (General Data Protection Regulation) 2016 O.J. (L 119) 59; See Nadezhda Purtova, *The Law of Everything. Broad Concept of Personal Data and Overstretched Scope of EU Data Protection Law*, 10 L. INN. & TECH. (forthcoming 2018), <https://ssrn.com/abstract=3036355> [<https://perma.cc/9QYR-B8W3>].

<sup>42</sup> Empowered under The Freedom of Information Act 2000 c. 36 § 18 (Eng.) and associated legislation.

<sup>43</sup> *ICO Fines Telegraph Media Group for Election Day Email Campaign*, ICO (Dec. 21, 2015), <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/12/ico-fines-telegraph-media-group-for-election-day-email-campaign/> [<https://perma.cc/N7LY-FAZV>].

<sup>44</sup> CA's founder Nigel Oakes founded the Behavioural Dynamics Working Group in 1988, the Behavioural Dynamics Institute (BDi) in 1990, and the Strategic Communication Laboratories in 1993. See *History of Behavioural Dynamics Institute*, BEHAVIOURAL DYNAMICS INST. (Oct. 31, 2016), <https://web.archive.org/web/20171230210521/http://www.bdinstitute.org/about-us/history/index.html> [<https://perma.cc/Q5WP-AL8U>]; Sharon Weinberger, *You Can't Handle the Truth: Psy-ops Propaganda Goes Mainstream*, SLATE (Sept. 19, 2005, 6:31 AM),

Bannon and Mercer alt-right groups to help Nigel Farage's unofficial Vote Leave group, which was also funded by Russian interests via near-bankrupt insurance shill Aaron Banks, whose wife is a Russian national. Investment in social-media targeting was directly funnelled, via CA, to a Canadian web metrics company Aggregate IQ,<sup>45</sup> Vote Leave. There were also two extremely unusual investments by a 23-year-old Brighton University student, Darren Grimes, who gave £625,000 and the Northern Ireland Democratic Unionist Party, which donated £400,000.<sup>46</sup> This amount—over £1,000,000—was spent in the last week before the referendum with the Canadian company. Some studies suggest a million potential swing voters were impacted by the Facebook misinformation campaign in which the Canadian company targeted potentially gullible undecided voters with known falsehoods about UK membership of the European Union.<sup>48</sup> CA's actions are being slowly investigated by the Electoral Commission.<sup>49</sup>

In the latter case, the Electoral Commission requires the cooperation of companies that are non-domestic; all of whom are except Cambridge Analytica. It is also dealing with targeted social media profiling rather than standard electoral expenditure in qualifying media,

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[http://www.slate.com/articles/news\\_and\\_politics/dispatches/2005/09/you\\_cant\\_handle\\_the\\_truth.html](http://www.slate.com/articles/news_and_politics/dispatches/2005/09/you_cant_handle_the_truth.html) [<https://perma.cc/35D8-A7NU>] (explaining the pioneering analysis of their role in psyops).

<sup>45</sup> Digital, Culture, Media & Sport Committee, *Evidence from Christopher Wylie, Cambridge Analytica Whistle-Blower* (Mar. 28, 2018), <https://www.parliament.uk/business/committees/committees-a-z/commons-select/digital-culture-media-and-sport-committee/news/fake-news-evidence-wylie-correspondence-17-19/> [<https://perma.cc/E3TY-2UZW>].

<sup>46</sup> Carole Cadwalladr, *Electoral Body Rejects Claim by Vote Leave that it Allowed Donations: Electoral Commission Denies Assertion by Group's Former Chief that it Sent Letter Permitting Payments to Other Anti-EU Campaigns*, *GUARDIAN* (Nov. 25, 2017, 4:00 PM), <https://www.theguardian.com/politics/2017/nov/25/electoral-body-rejects-claim-by-vote-leave-that-it-allowed-donations> [<https://perma.cc/CQ5V-FCBM>] (providing this election analysis).

<sup>47</sup> Northern Ireland electoral donations can be made anonymously as a result of past terrorist financing of political parties and the 1998 peace agreement that essentially adopted a “don't ask don't tell” attitude to political funding. *See, e.g.*, 638 Parl Deb HC (2018) col. 259-260 (UK), <https://hansard.parliament.uk/commons/2018-03-21/debates/3D25C28E-9619-4E3C-99E3-1AD565870B54/PoliticalPartiesLoansAndDonations> [<https://perma.cc/D86D-4WX5>].

<sup>48</sup> *Id.*

<sup>49</sup> Press Release, Electoral Comm'n, Electoral Commission Statement Regarding Vote Leave Limited, Mr. Darren Grimes and Veterans for Britain Limited (Nov. 20, 2017), <https://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/news-releases-donations/electoral-commission-statement-regarding-vote-leave-limited,-mr-darren-grimes-and-veterans-for-britain-limited> [<https://perma.cc/44R6-AUE2>].

such as outdoor posters or newspaper adverts. UK electoral law does not permit any type of television or radio advertising by political parties.<sup>50</sup> Separately, the Information Commissioner (ICO) is examining whether CA abused the consent of Facebook and other identities which it targeted in its search for gullible undecided voters.<sup>51</sup>

Electoral laws are national by nature (even for the European Parliament with some reservations), but the European Union recognized the trans-national character of the law in a 2017 communication and the establishment of a High Level Expert Group on fake news in 2018.<sup>52</sup> However, the latter was given approximately five weeks from its first meeting on January 15 to an internal drafting deadline of February 23 to arrive at its conclusions. Stuningly, the thirty-eight experts hit their deadline and published on March 12.<sup>53</sup> Their recommendations were claimed as self-regulation using Codes of Practice, to which Google, Facebook, and Twitter signed up:

[A] self-regulatory approach based on a clearly defined multi-stakeholder engagement process, framed within a binding roadmap for implementation, and focused on a set

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<sup>50</sup> Communications Act 2003 §§ 319(2)(c), 320, 333, sch. 12, ¶ 18 (Eng.); ROYAL CHARTER FOR THE CONTINUANCE OF THE BRITISH BROADCASTING CORPORATION, 2016, Cm 9365; Representation of the People Act 1983 §§ 66A, 92–93 (amended by Political Parties, Elections and Referendums Act 2000 § 144). *See Rules on Party Political and Referendum Broadcast*, OFCOM (Apr. 3, 2017), <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-six-elections-referendums> for details [<https://perma.cc/MR2G-DUKU>].

<sup>51</sup> 363 Parl Deb HC (2018) Q.895, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/digital-culture-media-and-sport-committee/fake-news/oral/79824.html>

[<https://perma.cc/5MR9-KU5R>] (“Our investigation is comprehensive. It is a high priority for my office. I have about 10 people working on the investigation full time. It involves more than 30 organisations—social media platforms, as well as data analytics companies like Cambridge Analytica—and political campaigns and parties.”); *see also* Elizabeth Denham, Information Commissioner (ICO), ICO Opening Remarks - The Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament - Hearing on the Facebook/Cambridge Analytica Case (June 4, 2018), <https://ico.org.uk/media/about-the-ico/documents/2259093/ico-opening-remarks-ep-libe-facebook-cambridge-analytica-20180604.pdf> [<https://perma.cc/26CD-6AA2>].

<sup>52</sup> *Experts Appointed to the High-Level Group on Fake News and Online Disinformation*, EUROPA (Jan. 12, 2018), <https://ec.europa.eu/digital-single-market/en/news/experts-appointed-high-level-group-fake-news-and-online-disinformation> [<https://perma.cc/33TF-EZQ9>].

<sup>53</sup> Euro. Comm’n, Directorate-Gen. for Comm. Networks, Content & Tech., *A Multi-Dimensional Approach to Disinformation* (Mar. 12, 2018), <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation> [<https://perma.cc/5NWN-6EJR>].

of specific actions. All relevant stakeholders . . . are called upon to commit to a Code of Practices. This Code should reflect stakeholders' respective roles and responsibilities.<sup>54</sup>

The European Commission then asked for multi-stakeholder monitoring of whether the Codes are sufficient and “recommend[ed] establishing a Coalition representing the relevant stakeholders for the purpose of elaborating such a Code of Practices and ensuring its implementation and continuous monitoring and review.”<sup>55</sup> The government role is restricted to monitoring self-regulation: “by March 2019, consider options that may include additional fact-finding and/or additional policy initiatives, using any relevant instrument, such as competition instruments or mechanisms to ensure a continuous monitoring and evaluation of self regulatory measures.”<sup>56</sup>

Note also that leading research from the London School of Economics and Oxford Internet Institute in the UK<sup>57</sup> and Harvard University Berkman Center in the United States,<sup>58</sup> produced no workable comprehensive definition of fake news (thus proving it to be a contextual term or political slogan), though many interesting insights into its propagation were observed.

The relatively trivial reform that can be made to combat disinformation is to make it illegal to knowingly distort information and broadcast it to the public during electoral campaigns; and it is this law which was reformed in Germany and France in 2017.<sup>59</sup> However, simply banning misinformation does not address non-affiliated campaigns by non-traditional political parties, nor does it deal with periods other than official elections. Russian propaganda, for instance, aims to construct a false narrative; create chaos and confusion in the perceptions of the broad, lesser-educated populace; and ensure truth and deception are equal in the worldviews of the non-politically engaged populace. This strategy does

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<sup>54</sup> *Id.* at 7.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 36.

<sup>57</sup> See DAMIAN TAMBINI, FAKE NEWS: PUBLIC POLICY RESPONSES, LSE MEDIA POL'Y PROJECT (Mar. 2017), [http://eprints.lse.ac.uk/73015/1/LSE%20MPP%20Policy%20Brief%2020%20-%20Fake%20news\\_final.pdf](http://eprints.lse.ac.uk/73015/1/LSE%20MPP%20Policy%20Brief%2020%20-%20Fake%20news_final.pdf) [<https://perma.cc/5WWW-LRCL>]; Philip N. Howard et al., Creativity and Critique: Gap Analysis of Support for Critical Research on Big Data (July 15, 2016) (unpublished research note), <http://dx.doi.org/10.2139/ssrn.2822389> [<https://perma.cc/ER53-YC53>].

<sup>58</sup> ROBERT FARIS ET AL., PARTISANSHIP, PROPAGANDA, AND DISINFORMATION: ONLINE MEDIA AND THE 2016 U.S. PRESIDENTIAL ELECTION, BERKMAN KLEIN CTR. (Aug. 21, 2017), <https://ssrn.com/abstract=3019414> [<https://perma.cc/K45Y-SLXW>].

<sup>59</sup> Fiedler, *supra* note 8.

not require electoral periods or political parties to manifest on social media. With this mindset, the bad actor simply requires some ‘alt-right’ subversion and an audience prone to conspiracy theories. It is therefore not just social media and far-right broadcasting but also charities and non-governmental organizations (NGOs) which can be the cause of intentional ‘fake news’.

Preventing public debate by NGOs is a tactic deployed by Putin’s Russia and many other less democratic states to prevent foreign, notably U.S.-financed, NGOs from arguing for anti-corruption campaigns, as they did in the Ukraine. The ‘colours revolutions’—fostered and partially financed by the Central Intelligence Agency in the late 2000s (orange in Ukraine, yellow or red in Georgia)—led governments to pass legislation that prevents such movements from being financed.<sup>60</sup> To adopt similar legislation in democratic Western nations in order to combat Russian state-inspired revenge propaganda is a similarly unattractive speech-limiting tactic. Moreover, withdrawing tax-exempt status from NGOs and charities which engage in political lobbying would place the regulator in the position of regulating speech. This has been an issue in the UK since the Lobbying Act 2014 put the Charities Commission in exactly the unenviable position of banning charities from lobbying for environmental, social, and peace objectives.<sup>61</sup>

Disinformation, thus, exposes an interesting and challenging divergence of regulations imposing fairness requirements.<sup>62</sup> These divergences limit states to strengthening electoral law and to reinvigorating often moribund electoral regulators. The alternatives are to make all commercial and NGO advertising subject to general rules, thus wildly expanding electoral law, or to extend broadcasting law. Broadcast advertising is either state regulated or, as in the UK, co-regulated under strict regulatory supervision.<sup>63</sup> To extend such advertising limits to the Internet—even if only to major Internet platforms and newspaper websites—would be a political impossibility given the lobbying strength of the traditional media over traditional politicians. As Vint Cerf puts it:

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<sup>60</sup> See EVGENY FINKEL & YITZHAK M. BRUNDY, *COLOURED REVOLUTIONS AND AUTHORITARIAN REACTIONS* (2013).

<sup>61</sup> See HOUSE OF LORDS, LIBRARY NOTE, *LOBBYING AND POLITICAL CAMPAIGNING: CHARITIES AND TRADE UNIONS*, Aug. 2, 2016, LLN 16/041, at 2, <http://researchbriefings.files.parliament.uk/documents/LLN-2016-0041/LLN-2016-0041.pdf> [<https://perma.cc/6RRC-EJA7>]; Kirsty Weakley, *Charities ‘Outraged’ After Government Rejects Calls to Amend Lobbying Act*, CIVILSOCIETY (Sept. 15, 2017), <https://www.civilsociety.co.uk/news/charities-outraged-after-government-rejects-calls-to-amend-lobbying-act.html> [<https://perma.cc/FDD6-7RBU>].

<sup>62</sup> Christopher Marsden, *Looming Battles in Britain: Fairness Regulations Meet the Marketplace* 12 MEDIA STUD. J. 80 (1998).

<sup>63</sup> MARSDEN, *supra* note 12, at 151–52.

The technical community has the opportunity to produce tools that can be used by Internauts everywhere to separate quality information from dross, but the application of those tools falls to individual users willing to exercise critical thinking to get at the facts.<sup>64</sup>

There is no comprehensive solution to the disinformation problem. In the UK, whose print media is notoriously right-wing, this is hardly a novelty. In 1922, *The Daily Mail* published a forged letter, ostensibly from the Soviet government to the UK Labour Party, in order to destroy Labour's electoral ambitions. This politically explosive episode became known as the "Zinoviev affair" and continues to resound in British politics today.<sup>65</sup> Ninety years later, the Parliament-appointed Leveson Inquiry concluded the first part of its "Inquiry into the culture, practices and ethics of the press" by recommending comprehensive co-regulatory press regulation reform.<sup>66</sup> This has not been carried out despite a legislative provision in 2013. The newspaper press' outrageous partisanship continued in the 2015 and 2017 elections, as well as the 2016 referendum.<sup>67</sup> In March 2018, the British government cancelled Part 2 of the Leveson Inquiry into police collusion with the national newspaper industry despite widespread evidence of continued criminality and corruption in public office for over two decades.<sup>68</sup> Disinformation by the existing print press is tolerated and encouraged by lack of regulation, alongside claimed interest in the effects of social media falsity. Prospects for reform are vanishingly weak.

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<sup>64</sup> Vinton G. Cerf, *Can Liberty Survive the Digital Age?*, 60 COMM. ACM 7 (2017).

<sup>65</sup> See John Ferris & Uri Bar-Joseph, *Getting Marlow to Hold His Tongue: The Conservative Party, the Intelligence Services and the Zinoviev Letter*, 8 INTELL. & NAT'L SEC. 100 (1993).

<sup>66</sup> LORD JUSTICE LEVESON, AN INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS (Nov. 29, 2012) (UK), <https://www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press> [<https://perma.cc/9JTP-RZZP>].

<sup>67</sup> See J. Green, *British Election Study: The Politics of Competence-Paries, Public Opinion and Voters*, ECON. & SOC. RES. COUN'L. (Sept. 2017), <http://gtr.ukri.org/publication/overview?outcomeid=5aa9110a25f396.35296039&projectref=ES/K005294/1> [<https://perma.cc/CNJ3-RC4A>].

<sup>68</sup> Graham Johnson, *Hack Attack and Kompromat: Tony Blair's Government Under Sunday Times Surveillance*, BYLINE (Mar. 8, 2018), <https://www.byline.com/project/90/article/2080> [<https://perma.cc/GZJ8-SMKU>].

## IV. PROSUMERISM AND PRIVACY: THE PORTARLINGTON EFFECT

U.S. platforms operate in the European Union under regulation imposed by European law. This is known in U.S. legal scholarship as the “Brussels effect,” whereby consumer data protection, and even competition law, is aligning globally to a *de facto* European standard that neglects the regulatory fragmentation of the European Union.<sup>69</sup> Observers are aware that one of the twenty-eight Member States is about to “Brexite,” subject to successful negotiation of its retreat from European law’s “acquis communautaire.” However, there is a major regulatory alignment problem that is not cited in either Brussels or London.<sup>70</sup> That is what I term the “Portarlington effect.”

Separate the rhetoric from reality: it is the U.S. federal and state authorities and litigants in court which have far more vigorously pursued Facebook, Google, and others for their failures to guarantee users’ privacy. In 2012, Google settled a \$22.5 million case brought by the Federal Trade Commission (FTC) involving the tracking of cookies of Safari browser users.<sup>71</sup> Before that, in 2011, Google reached an \$8.5 million settlement with the FTC for privacy breaches involving Google Buzz. Two months after the Google Buzz settlement, Facebook settled a class action with a \$20 million payment into a compensation fund that—as with the Google Buzz settlement—largely funded privacy advocacy and education groups.<sup>72</sup> In 2012, both companies agreed to settle privacy complaints and allow FTC privacy audits of their products for a twenty-year period.<sup>73</sup> It is noteworthy that the Irish Data Protection Commissioner did not fine either company a single Euro in either of the cases highlighted above, both of which were examined at length in the famous *Schrems*

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<sup>69</sup> Bert-Jaap Koops, *The Trouble with European Data Protection Law*, 4 INT’L PRIVACY & DATA L. 250 (2014) (“The trouble with European data protection law, as with Alfred Hitchcock’s Harry, is that it is dead.”).

<sup>70</sup> See David Erdos, *European Data Protection Regulation and Online New Media: Mind the Enforcement Gap*, 43 J.L. & SOC’Y 534 (2016).

<sup>71</sup> *United States v. Google Inc.*, No. CV 12-04177 SI, 2012 WL 5833994 (N.D. Cal. Nov. 16, 2012). See Lauren-Kelly Devine, *Court Approves Google’s Privacy Settlement*, REG. REV. (Nov. 27, 2012), <https://www.law.upenn.edu/blogs/regblog/2012/11/27-devine-ftc-google.html> [<https://perma.cc/WJT3-NXRN>].

<sup>72</sup> *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011). See Christopher T. Marsden, *Fraley v. Facebook, Inc. - \$20m Settlement for Private Education/Research of Social Media Users*, REGULATING CODE (Jan. 26, 2013), <http://regulatingcode.blogspot.co.uk/2013/01/fraley-v-facebook-inc-20m-settlement.html> [<https://perma.cc/5ALM-CQFJ>].

<sup>73</sup> See BROWN & MARSDEN, *supra* note 5, at 134, 188 (providing analysis of the FTC privacy cases).

European Court of Justice cases of 2015 and 2017.<sup>74</sup> Sector-specific regulation of social networking already exists *de facto* in the United States, while European member states wring their hands on the sidelines as ‘flag of convenience’ national regulators in Luxembourg and Ireland provide inadequate oversight.<sup>75</sup>

For European data protection law purposes, U.S. multinationals are required to establish a legal presence in the European Union if they choose to process European citizens’ data (which, in practice, affects any Internet company of significant size).<sup>76</sup> Many establish themselves in the Republic of Ireland, a small economy with strong socioeconomic and cultural links to the United States. The Republic achieved fast economic growth based on minimal regulations; so much so it was nicknamed the “Celtic Tiger.”<sup>77</sup> It became the European base, for data protection purposes, of Google, Apple, Facebook, and many other U.S. multinationals.<sup>78</sup>

Portarlinton is a small town built on a railway and canal junction in the middle of the Republic of Ireland. It is an inconsequential place of pebble-dashed houses, with twenty-eight public houses and not a single cinema or cultural space.<sup>79</sup> As this poll took place, the entire Irish Data Protection Commissioner (IDPC) office was uprooted from Dublin to the Portarlinton.<sup>80</sup> The thirty or so staff were to move as one, but

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<sup>74</sup> Case C-362/14, *Schrems v. Data Protection Comm’r*, 2015 E.C.L.I. 650 (Grand Chamber); *see also* Case C-498/16, *Schrems v. Facebook Ireland Ltd.*, 2018 E.C.L.I. 863 (3d Chamber).

<sup>75</sup> Erdos, *supra* note 70.

<sup>76</sup> Cedric Ryngaert, *Symposium Issue on Extraterritoriality and EU Data Protection*, 5 INT’L DATA PRIVACY L. 221 (2015).

<sup>77</sup> The low tax economy attracted German and then U.S. inward investment from the 1960s onwards, making the Republic known as the “mouse capital of Europe” due to low cost manufacturing based around Knock Airport tax/duty free zone. *See* MERVYN O’DRISCOLL, *IRELAND, WEST GERMANY AND THE NEW EUROPE, 1949-73: BEST FRIEND AND ALLY?* (2018).

<sup>78</sup> BROWN & MARSDEN, *supra* note 5, at 134–35.

<sup>79</sup> Levine & Robert, *Behind the European Privacy Ruling That’s Confounding Silicon Valley*, N.Y. TIMES (Oct. 9, 2015), <https://www.nytimes.com/2015/10/11/business/international/behind-the-european-privacy-ruling-thats-confounding-silicon-valley.html> [https://perma.cc/H4EF-JHMJ] (“[A] Centra minimart in the Irish countryside. ‘This is the Irish Data Protection Commissioner who is in charge of Facebook, Dropbox, LinkedIn, Google — all the big names,’ he [Schrems] says. ‘It’s in a cool place called Portarlinton with about 5,000 people.’ The Irish Data Protection Commissioner has its office — pause — ‘there,’ Schrems said, pointing to the floor above the market. (The organization moved some of its operations to Dublin this year.) Imagine if the Federal Trade Commission had its headquarters above a 7-Eleven in a Virginia exurb and you’ll get the idea.”).

<sup>80</sup> Angeliq Caron, *Billy Hawkes: Blue Eyes and a Global Sway*, IAPP (Sept. 10, 2014), <https://iapp.org/news/a/billy-hawkes-blue-eyes-and-a-global-sway/> [https://perma.cc/UF9S-ME92].

unfortunately, the desirability difference between their established Dublin location and Portarlinton's pebbledash meant many senior employees chose not to move, instead taking jobs with U.S. banks and tech companies arriving in large number in Dublin's harbor zone.<sup>81</sup> As a result, the IDPC staff of thirty was made up largely of trainees and new employees in the period up to 2014—a critical period for those companies' data policies. The Commissioner, Billy Hawkes, was perceived to be 'asleep on the job' from 2005 to 2014, when many data breaches took place,<sup>82</sup> culminating in the Edward Snowden revelations that U.S. multinational firms had been engaged in widespread illegal activity in passing European citizens' personal data to the U.S. National Security Agency and its close British ally GCHQ. The IDPC had two devastating European Court of Justice defeats in 2014-15.<sup>83</sup>

The perception of the 'Portarlinton Effect' was so great by 2014 that the major technology companies requested the Irish Government to reopen a satellite office in Dublin for their convenience<sup>84</sup> and to make some effort to apply the relevant European laws, notably the ePrivacy (2009), Data Retention (2006), and Data Protection (1995) Directives.<sup>85</sup> The new IDPC since September 2014, Helen Dixon, may prove a more effective regulator. The regulatory culture in Europe remains deeply divided between those 'Club Med' less regulatory cultures and 'Club Nord' of established liberal democracies (roughly speaking those many

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<sup>81</sup> Simon Roughneen, *Ireland has Become a Mecca for U.S. Tech Companies. Can Trump Lure Them Home?*, L.A. TIMES (Feb. 10, 2017, 12:45 PM), <http://www.latimes.com/world/europe/la-fg-ireland-economy-2017-story.html> [https://perma.cc/D9LB-WEHR].

<sup>82</sup> Carson, *supra* note 80 (stating that Hawkes "had a 'soft touch'" approach on companies that took some liberties with data use policies and practices).

<sup>83</sup> Case C-362/14, *Schrems v. Data Protection Comm'r*, 2015 E.C.L.I. 650 (Grand Chamber).

<sup>84</sup> Hugh O'Connell, *The Data Protection Commissioner Is Getting a New Office, but Keeping the One Beside a Convenience Store in Laois: The DPC Is to Open a New Sub Office in Dublin Following Cabinet Agreement This Week*, JOURNAL (May 31, 2014, 7:15 AM), <http://www.thejournal.ie/data-protection-commissioner-new-office-1488473-May2014/> [https://perma.cc/DNP6-ERYK].

<sup>85</sup> Directive 95/46/EC of the European Parliament and Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O. J. (L 281) 46; Council Directive 2002/58/EC Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, 2002 O.J. (L 201) 37; Council Directive 2006/24/EC on the Retention of Data Generated or Processed in Connection with the Provision of Publicly Available Electronic Communications Networks and Amending Directive on Data Retention 2006 O.J. (L. 105) 53; Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, COM (2015) (Dec. 15, 2015) 15039/15.

NRAs on the fringes of Europe versus Nordic nations, UK, Netherlands, France, Austria, and Germany). It is this ‘Portarlington effect’ which is the greater influence on European regulation generally and the data protection regime in particular. The claims that Europe has a generally more privacy protective culture would be greeted with gales of laughter in Portarlington or Limassol, Cyprus, whatever the opinion in Hamburg or Berlin.

#### V. CO-REGULATION: A EUROPEAN APPROACH TO PLATFORM REGULATION

Co-regulation may be the answer adopted in Europe.<sup>86</sup> Co-regulation encompasses a range of different regulatory phenomena, which have in common that the regulatory regime is made up of a complex interaction of general legislation and self-regulatory bodies.<sup>87</sup> Varying interests of actors result in different incentives to either cooperate or attempt unilateral actions. Without regulation responsive to both market and constitutional protection of fundamental human rights, such as privacy and free speech, Internet co-regulatory measures cannot be responsive to information ecologies and, thus, cannot be self-sustaining.<sup>88</sup> Co-regulation has enriched conceptions of “soft law” or “governance” in the literature. Like those umbrella terms, co-regulation refers to forms of hybrid regulation that do not meet the administrative and statute-based legitimacy of regulation, yet they perform some elements of public policy that cannot be justified as self-regulation in the absence of law.<sup>89</sup> These forms of hybrid regulation establish public policies that do not emerge from self-regulation alone.<sup>90</sup> Co-regulation constitutes multiple stakeholders where

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<sup>86</sup> See Michèle Finck, *Digital Co-Regulation: Designing a Supranational Legal Framework for the Platform Economy* (Euro. L. Rev., Working Paper No. 15/2017, 2017), <https://ssrn.com/abstract=2990043> [<https://perma.cc/45RY-MQHR>]; Frydman & Isabelle Rorive, *Regulating Internet Content Through Intermediaries in Europe and the USA*, 23 ZEITSCHRIFT FÜR RECHTSOZIOLOGIE 41 (2002) (Ger.) (providing a historical view); see also Mayer-Schönberger & John Crowley, *Napster’s Second Life?: The Regulatory Challenges of Birtual Worlds*, 100 NW. U.L. REV. 1775 (2006); Giancarlo F. Frosio, *Reforming Intermediary Liability in the Platform Economy: A European Digial Single Market Strrategy*, 112 NW. U.L. REV. 19 (2017) (providing an ahistoric but relevant perspective analyzing recent European policy).

<sup>87</sup> See Lennon YC Chang & Peter Grabosky, *The Governance of Cyberspace*, in REGULATORY THEORY: FOUNDATIONS AND APPLICATIONS 533 (Peter Drahos ed., 2017).

<sup>88</sup> See Julie E. Cohen, *Affording Fundamental Rights: A Provocation Inspired by Mireille Hildebrandt*, 4 CRITICAL ANALYSIS L. 1 (2017); Brett M. Frishmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 299-300 (2007).

<sup>89</sup> See THE TRANSFORMATION OF GOVERNANCE IN THE EUROPEAN UNION (Beate Kohler-Koch & Rainer Eising. eds., 1999).

<sup>90</sup> Ira Rubinstein, *The Future of Self-Regulation is Co-Regulation*, in THE CAMBRIDGE HANDBOOK OF CONSUMER PRIVACY (2018), <https://ssrn.com/abstract=2848513> [<https://perma.cc/QR6-74JM>].

the state and stakeholder groups, including prosumers, explicitly form part of the institutional setting for regulation.<sup>91</sup>

Prosumerism should be a declared policy of the European Commission alongside the European interoperability framework (EIF). The European Commission in 2012 launched its *Code of European Union Online Rights* for European citizens using the Internet.<sup>92</sup> European e-commerce and audiovisual law is a marked departure from freedom of contract in European law. Implementation requires all member states to commit to such a step in practice, as well as theory.<sup>93</sup> This concern with prosumers was raised in European legislative priorities on March 6, 2018, with Vice President Ansip tweeting, "Pleased to see full house of colleagues commissioners discussing upcoming proposals on #data, #platforms, #AI, #disinformation and #eHealth. We plan a smart & comprehensive #DigitalSingleMarket package for end April. Stay tuned."<sup>94</sup>

The Commission enforced new Terms of Service on social media companies on February 15, 2018, announcing via Twitter "#EU4Consumers = better social media 4 consumers. No unfair terms and conditions! No fraud and scams on social media! We need a #NewDealforConsumers."<sup>95</sup> This "New Deal" for prosumer law included:

EU consumers will not be forced to waive mandatory EU consumer rights, such as their right to withdraw from an on-line purchase; they will be able to lodge their complaints in Europe, rather than in California; and the platforms will take up their fair share of responsibilities towards EU consumers, similarly to the off-line service

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<sup>91</sup> European Commission, *Better Regulation: Guidelines and Toolbox*, EUROPA, [https://ec.europa.eu/info/better-regulation-guidelines-and-toolbox\\_en](https://ec.europa.eu/info/better-regulation-guidelines-and-toolbox_en) [<https://perma.cc/V4L4-GUGL>].

<sup>92</sup> Tomas Soria, *Code of EU Online Rights Published*, EURO. COMM'N: DIGITAL SINGLE MKT. BLOG (Dec. 17, 2012), <https://ec.europa.eu/digital-single-market/blog/code-eu-online-rights-published> [<https://perma.cc/UEZ6-M5BN>].

<sup>93</sup> See also BROWN & MARSDEN, *supra* note 5, at 183–92.

<sup>94</sup> Andrus Ansip (@Ansip\_EU), TWITTER (Mar. 6, 2018, 7:29 AM), [https://twitter.com/Ansip\\_EU/status/971045072379809792](https://twitter.com/Ansip_EU/status/971045072379809792) [<https://perma.cc/8RCL-HE4K>].

<sup>95</sup> EU Consumer Affairs (@EU\_Consumer), TWITTER (Feb. 15, 2018, 4:30 PM), [https://twitter.com/EU\\_Consumer/status/964175114936909824](https://twitter.com/EU_Consumer/status/964175114936909824) [<https://perma.cc/M3YG-8LR8>].

providers. However, the changes only partially fulfil the requirements under EU consumer law.<sup>96</sup>

The area in which Google, Facebook, and other U.S. multinationals failed to take action was on ‘Notice and Action’, the removal of content claimed by complainants to be illegal, examined in greater depth by Citron, who correctly analyzes the European responses to platform law as “neither voluntary nor the product of meaningful public-private partnerships. Instead, they are the result of government coercion occurring outside the rule of law.”<sup>97</sup>

#### CONCLUSION: TOWARDS OFFDATA, A PROSUMER LAW AGENCY

History teaches us that platform regulation is not new and that platforms will resist effective regulation via interoperability. The intersection of consumer law with privacy law is driving scholars and policymakers towards the conclusion that prosumer law is emerging.<sup>98</sup> Prosumer law must do more than propose solutions to permit data deletion or algorithmic transparency<sup>99</sup> because that is only an ex-post remedy that covers users’ tracks.<sup>100</sup>

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<sup>96</sup> European Commission Press Release IP/18/761, Social Media Companies Need to do More to Fully Comply with EU Consumer Rules (Feb. 15, 2018), [http://europa.eu/rapid/press-release\\_IP-18-761\\_en.htm](http://europa.eu/rapid/press-release_IP-18-761_en.htm) [<https://perma.cc/KJU8-LWR6>].

<sup>97</sup> Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1070 (2018).

<sup>98</sup> Natali Helberger et al., *The Perfect Match? A Closer Look at the Relationship between EU Consumer Law and Data Protection Law*, 54 COMMON MKT. L. REV. 1427 (2017).

<sup>99</sup> See Lillian Edwards & Michael Veale, *Slave to the Algorithm? Why a ‘Right to Explanation’ is Probably Not the Remedy You are Looking for*, 16 DUKE TECH. L. REV. 18 (2017).

<sup>100</sup> See Mireille Hildebrandt, *Law as Information in the Era of Data-Driven Agency*, 79 MOD. L. REV. 1 (2016); Ryan Calo, *Robotics and the Lessons of Cyberlaw*, 103 CAL. L. REV. 513 (2015); Peter Brogden, *Smart Contracts and Web 3.0: The Evolution of Law?*, LINKEDIN (May 3, 2017), <https://www.linkedin.com/pulse/smart-contracts-web-30-evolution-law-peter-brogden/> [<https://perma.cc/2RKD-QJU7>]; Peter Lee & Sabrina Richards, *Res Robotica! Liability and Driverless Vehicles*, SCL (Aug. 25, 2013, 10:47 PM), <https://www.scl.org/articles/3167-res-robotica-liability-and-driverless-vehicles> [<https://perma.cc/5EX4-WBCN>]; Andrew Katz, *Intelligent Agents and Internet Commerce in Ancient Rome*, SCL (Oct. 15, 2008), <https://www.scl.org/articles/1095-intelligent-agents-and-internet-commerce-in-ancient-rome> [<https://perma.cc/NY2P-6J6K>]; Luciano Floridi, *A Look into the Future Impact of ICT on Our Lives*, 23 INFO. SOC. 59, 62 (2007); THE ONLIFE MANIFESTO - BEING HUMAN IN A HYPERCONNECTED ERA (Luciano Floridi ed., 2015); Harry Surden, *Machine Learning and Law*, 89 WASH. L. REV. 87 (2014); Ian Kerr, *Prediction, Pre-emption, Presumption: The Path of Law After the Computational Turn*, in PRIVACY DUE PROCESS AND THE COMPUTATIONAL

I suggest we need an agency, whether termed OffData or the Federal Digital Data Regulator. This is the call for a more holistic agency that encompasses functions currently held by data protection regulators, ethics regulators, communications, consumer, and competition bodies, none of whom have a current expertise in algorithmic and platform regulation. In the UK, this would encompass functions from the Information Commissioner's Office (ICO), Centre for Data Ethics and Innovation (Turing Institute), communications regulator (Ofcom), consumer and competition bodies (Competition and Markets Authority); all of whom are currently engaged in regulating aspects of the market. As the ancient Hindu proverb holds it, they are "six blind men describing an elephant."<sup>101</sup>

Prosumer law enforcement via OffData is a call to respond to digital communications with a regulatory settlement that mirrors those of the railway age (in the United States, the Interstate Commerce Commission; in the United Kingdom, the Railways Board) and the analog communications age (Federal Radiocommunications Agency under Radio Act 1926 in the United States, BBC in 1925 in the UK).<sup>102</sup> While William Gladstone famously regulated the electric telegraph in 1844, a mere seven years after its patent,<sup>103</sup> such foresight by regulators is highly unusual, and academic progress can also be slow.<sup>104</sup>

Prosumer law needs the ability for exiting prosumers to cover their traces, transfer their content and metadata, and permit interoperability to allow exit to more prosumer-friendly products than Google and Facebook, should prosumers wish to switch. It requires a combination of interconnection and interoperability, not just transparency and the theoretical possibility to switch.<sup>105</sup> Only then will information platforms

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TURN: THE PHILOSOPHY OF LAW MEETS THE PHILOSOPHY OF TECHNOLOGY 91 (Mireille Hildebrandt & Katja de Vries eds., 2013).

<sup>101</sup> Jim Gettys, *The Blind Men and the Elephant*, IETF (Feb. 10, 2018), <https://www.ietf.org/blog/blind-men-and-elephant/> [<https://perma.cc/URW9-SMNC>].

<sup>102</sup> Subject to forensic criticism by Ronald Coase for regulatory capture and the prevention of market entry. See R.H. COASE, BRITISH BROADCASTING: A STUDY IN MONOPOLY (1950); see also R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937); R.H. Coase, *The Federal Communications Commission*, 2 *J.L. & ECON.* 1 (1959); R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960); R.H. Coase, *Durability and Monopoly*, 15 *J.L. & ECON.* 143 (1972).

<sup>103</sup> MARSDEN, *supra* note 3, at 18.

<sup>104</sup> See Pierre Azoulay et al., *Does Science Advance One Funeral at a Time?* (Nat'l Bureau Econ. Res., Working Paper No. 21788, 2016), <http://www.nber.org/papers/w21788> [<https://perma.cc/M2DL-J4BH>].

<sup>105</sup> See Orla Lynskey, *Regulating 'Platform Power'* (L. Soc'y & Econ., Working Paper No. 1/2017, 2017), [http://eprints.lse.ac.uk/73404/1/WPS2017-01\\_Lynskey.pdf](http://eprints.lse.ac.uk/73404/1/WPS2017-01_Lynskey.pdf) [<https://perma.cc/JS64-DH3Z>]; James Grimmelman, *What to Do About Google?*, 56 *COMM. ACM* 28 (2013); Nicolo Zingales, *Of Coffee Pods, Videogames, and Missed*

become more competitive and prosumers have the luxury of real choice between very different standards offered by their hosts.