The Promise and Limits of Lawfulness: Inequality, Law, and the Techlash

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Abstract: In response to widespread skepticism about the recent rise of "tech ethics", many critics have called for legal reform instead. In contrast with the "ethics response", critics consider the "lawfulness response" more capable of disciplining the excesses of the technology industry. In fact, both are simultaneously vulnerable to industry capture and capable of advancing a more democratic egalitarian agenda for the information economy. Both ethics and law offer a terrain of contestation, rather than a predetermined set of commitments by which to achieve more democratic and egalitarian technological production. In advancing this argument, the essay focuses on two misunderstandings common among proponents of the lawfulness response. First, they misdiagnose the harms of the techlash as arising from law's absence. In fact, law mediates the institutions that it enacts, the productive activities it encases, and the modes and myths of production it upholds and legitimates. Second, this distinction between law's absence and presence implies that once law's presence is secured, the problems of the techlash will be addressed. This concedes the legitimacy of the very regimes currently at issue in law's own legitimacy crisis, and those that have presided over the techlash. The twin moment of reckoning in tech and law thus poses a challenge to those looking to address discontent with technology with promises of future lawfulness.

Key words: law; technology; ethics; tech ethics; inequality; regulation

"Laws have to determine what is legal, but you can not ban technology. Sure, that might lead to a dystopian future or something, but you can not ban it."

−David Scalzo, Kirenaga Partners[1]

"Ferment is abroad in the law."

−K. N. Llewellyn[2]

1 The Techlash

In the past several years, the prevailing role of Silicon Valley's California Ideology as the source of hope and inspiration for the "Western capitalist imaginary" has begun to falter[3]. No longer does the tech industry stand for the propositions of inclusive capitalism and technological progress that benefit all. In the wake of Facebook's Cambridge Analytica scandal the technology industry has been the focus of increased public distrust, civil and worker activism, and regulatory scrutiny—a collective curdling of goodwill referred to as the "techlash".①

The techlash is remarkable for its depth of field. The 2020 Edelman Trust Barometer noted a continued decline in trust both globally and in the U.S. in technology and a significant distrust of artificial intelligence[4], both linked to increased numbers of people who believe these sectors should be regulated. A 2019 study conducted by the Pew Research Center

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① The techlash—and the inequality it is a response to—is a global phenomenon. However, this piece will predominantly draw its examples and focus its analysis on the United States. This is in part a reflection of the author's expertise as a US legal scholar (law is a jurisdiction-specific discipline; particularly in the United States). But it is also due to the Essay's extensive engagement with—and analytical reliance on—the particularities of the U.S. common law judicial system. The role of courts in the U.S. system, as well as the specific legal intellectual tradition in and about U.S. law, informs, constrains, and limits much of the discussion below.

found that from 2015 to 2019, the number of Americans who held a positive view of technology fell by 21 percentage points[5]. In 2018, a majority of Americans (55%) said tech companies have too much power and influence[5]. Former executives have spoken out against their company's actions[6–8], and senior engineers and civil society groups have called for moratoriums or outright bans on facial recognition technology, especially for police and immigration enforcement[9]. Student groups at universities have protested or banned companies like Palantir recruiting at their schools[10]. Community groups have pushed to dismantle and delegitimize the close ties between law enforcement and surveillance technology companies[11]. The technology industry has been the site of increased worker activism from Amazon warehouses workers[12], Uber and Lyft drivers[13], line engineers at Google[14], and the tech industry writ large[15, 16]. Digital rights' activists have pressured companies about their policies and labor practices on everything ranging from content moderation, polarization, lack of diversity, surveillance, and manipulative and extractive data collection practices.

Alongside the popular backlash, technology's harmful social effects have become the subject of increased academic inquiry. Scholars seek to diagnose and address the worst excesses of industry harm, and to develop technical methods and fields of practice less conducive to committing them. These methods produce systems that are normatively relevant to the areas of life they govern: they can amplify and reproduce inequality and entrench unjust means of social ordering. Scholars of scientific method (science and techonlongy studies, history of science, philosophy of science, and critical digital studies), as well as computer scientists have highlighted methodological limits in how algorithms are developed and the need for interventions better attuned to the social causes and effects in which such systems are entangled[17]. Increased attention to engineering pedagogy has placed renewed attention on need to educate future data scientists and engineers about the ethical and social dimensions of their work[18].

The techlash involves significant political stakes. Growing worker activism and agitation at companies like Google and Amazon have led to these companies firing senior engineers[19]. Oppressive and biased technologies such as facial recognition and the capacity of social media to manufacture dis- and misinformation campaigns are being used by authoritarian regimes abroad and reactionaries at home[20, 21]. Companies like AirBnB and Uber erode workers' rights and redistribute significant surplus wealth away from local renters and workers[22, 23]. The dominance of a handful of large technology companies (Facebook, Amazon, Apple, Microsoft, and Google) is spurring renewed debates over market concentration and monopoly. The pervasive data collection, processing, and analytic practices that undergird controversial technologies continue to erode our collective privacy (and contribute to the oppressive power of autonomous surveillance systems) amidst an industry-wide gold rush for data[24].

Digital activism is not new—in the United States, groups like the Electronic Frontier Foundation and the American Civil Liberties Union have long advocated for civil rights protections online. Yet these organizations have traditionally focused on civil libertarian concerns over privacy, strong free speech protections, and government overreach. As a result, their advocacy efforts focused on issues like the Edward Snowden revelations over extensive US security surveillance programs, the Digital Millennium Copyright Act and Section 230 of the Communications Decency Act. In each instance, digital advocates defended free speech (and the absence of government surveillance necessary for free speech to thrive) of users and content creators online. This strain of digital advocacy emphasized protecting individuals' online freedom but did not typically focus on other forms of injustice, such as the wealth accumulation that motivated corporate advertising-based surveillance practices or on the distributive or relational effects of the digital economy writ large. In short, while there is a long history of concern over surveillance online, this tradition of digital activism did not historically focus on the social problems of inequality that arise because of surveillance-based economic activity.

The techlash, on the other hand, evinces marked egalitarian concerns over the highly unequal distributions of wealth and power within the digital economy. It expresses a rejection of the tech industry's justificatory narrative for the inequality it generates: that technological progress on its terms will, in the long-run, benefit everyone. There is growing skepticism over technological advancement as a project of shared prosperity and a growing understanding of the technology political economy as one that works to the benefit of the few to the detriment of the many[5, 25].

Critics of digital technology firms argue that their technological progress relies upon extractive practices and oppressive purposes. This begs the question of how to achieve an alternative result, and what role (if any) "tech ethics" will play in achieving it.

2   Ethics Response and Lawfulness Response: Troubling the Distinction

In the ensuing public debate, some have advocated for tech to become more "human", and more "ethical"[18]. Others suspect that appeals to traditions of ethics and humanism have less to do with the moral lessons such traditions offer, and more to do with their rhetorical and public-relations capacity to forestall legal and regulatory action[26–32]. Such debates set off second order debates over whether appeals to "ethics" negate rather than require regulatory action[33, 34]. These in turn spawn tertiary debates over what such appeals substantively or materially entail, under what conditions appeals become demands, and who gets to decide what ethical practice means for the technology industry[18, 35, 36].

This initial emphasis on "responsible", "humane", "human-centered", or "ethical" technology and the resulting set of discursive moves are all part of what I call the *ethics response*. The ethics response has real power to marshal bureaucratic and material resources. The call for more ethical technology has spawned a series of ethics boards, company-funded corporate wellness and social responsibility initiatives, the rise of "ethical AI" consultancy practices, and a flurry of publications that outline ethical AI principles for industry[18, 37, 38]. This response has received much attention and been the subject of considerable debate.

Alongside an increased emphasis on ethics, a risk-averse, law-abiding modus operandi pervades the C-suites of Silicon Valley that recalls a certain attitude among banks post-2008 crisis: a patina of cowed mea culpa alongside assurances that lessons have been learned. This second response is marked by an initial commitment from executives that the era of "move fast and break things" is over, and that the strictest interpretation of legal protections will be followed. Like the ethics response, this legalistic mode coalesces from a particular set of discursive moves. Critics call for legal investigations, lawsuits, or new regulation. Companies seek to comply with these calls or proactively offer alternatives as simultaneous signal of compromise and

seriousness. Like the ethics response, this response can marshal resources for meaningful new regulatory agendas. Companies change corporate governance and business practices[39, 40], embrace regulatory agendas they had previously fought[41, 42], and even join activist calls for increased oversight and regulation[43, 44]. This attitude marks another strain of response to the techlash that I call the *lawfulness response*.

The lawfulness response is often positioned in contrast to the ethics response as a more serious alternative[31–33]. While critics view the ethics response as ineffectual (or even a harmful distraction), the lawfulness response is often advanced as more capable of disciplining the excesses of the technology industry: "we do not need ethics, we need regulation." And indeed, the lawfulness response generally accompanies companies' acquiescence to a more significant regulatory agenda. Depending on how such demands were articulated and then negotiated by industry actors, the lawfulness response may result in private regulation—a change in corporate governance or firm policy, often in response to threatened or actual litigation—or legislative action, with companies joining advocates in calling for industry regulation. Where the ethics response is viewed as either too vague or too readily co-opted to provide a meaningful form of discipline, the lawfulness response appears to offer a more robust vehicle for realizing the social demands of the techlash.

Despite this perception, the ethics and lawfulness responses function quite similarly. Like the ethics response, the lawfulness response may also yield anti-egalitarian results. Cynical actors may appeal to law to seek moral cover for instituting (and then complying with) with a low standard of behavior. But well-meaning critics may also appeal to legal solutions that inadvertently legitimize the very business practices they seek to reform. Similar to the ethics response, the capacity for the lawfulness response to discipline the technology industry depends on its capacity to express and enforce egalitarian demands.

Two examples of the lawfulness response are instructive.

The first involves Uber. In its early rise to prominence, Uber gained considerable notoriety and begrudging admiration for operating at the edge of legality in pursuit of rapid and aggressive growth[45, 46]. In 2017, this strategy appeared finally to be catching up with Uber. In that year alone, Uber faced a federal criminal

investigation into its Project Greyball[②] became embroiled in a legal fight with Waymo over its alleged theft of self-driving car technology, and was experiencing growing backlash from drivers over low pay and poor working conditions[47–49]. In addition, the company was embroiled in allegations of sexual harassment and a toxic work culture for women and minorities[50]. Many commentators thought this collection of scandals marked the end of the company—a fate that longstanding critics of Uber welcomed.

Focusing on the workplace culture allegations, the company's board of directors promptly hired former U.S. Attorney General Eric Holder (then at Covington & Burling) to conduct an internal investigation and issue a report, a high-profile step that was extensively covered in the media. The report resulted in the board adopting a series of corporate governance practices and ultimately firing then-CEO Travis Kalanick. This change in leadership and attendant set of institutional changes were generally understood to end the company's "wild west days" and to usher in a new era of a law-abiding Uber focused on "ensur[ing] a tone of support and a culture of compliance"[40, 51]. In line with this new culture, Uber dropped many of its more openly aggressive tactics, such as Project Greyball.

Uber's lawfulness response was an impressive display of threading the needle: it addressed the public attitude of Uber (as a deviant and morally suspect company) by signaling legal seriousness, while keeping intact a business model that was also a primary subject of critique[51]. Focusing its response on workplace culture allegations at its headquarters, Uber drew fire away from its continued use of pricing manipulations and other techniques to squeeze profit from drivers.

A second, more proactive example of the lawfulness response is Microsoft's approach to developing facial recognition technology. As questionable business practices of facial recognition companies have come to light[1], the social pressure to ban[52] or place a moratorium[53] on facial recognition technologies has

grown—even Alphabet CEO Sundar Pichai has suggested a temporary moratorium on facial recognition technologies may be needed[43].

Microsoft has called for legalistic restraint as one way to temper concerns while continuing development. The company is publicly refusing to sell their technology to California police (citing Fourth Amendment concerns), endorsing federal regulation, such as the Commercial Facial Recognition Privacy Act, and introducing its six principles for facial recognition software that include "lawful surveillance" and prohibitions against use for "unlawful discrimination"[54]. This middle path appeals to the restraint of law to narrow public critique of facial recognition to its most egregious (and, it is proposed, unlawful) applications, while preserving other areas of application intact. Microsoft's chief legal officer Brad Smith likened a wholesale ban to "try[ing] to solve a problem with a meat cleaver" when a "scalpel" is required to "enable good things to get done and bad things to stop happening"[9]. The lawfulness response provides precisely such a scalpel-like approach: a cautious-yet-optimistic program of continued development of facial recognition technology under the guiderails of existing law. As Smith notes, "This is young technology. It will get better. But the only way to make it better is actually to continue developing it. And the only way to continue developing it actually is to have more people using it"[9].

As these two examples show, the turn to lawfulness during moments of popular backlash serves an important role for companies. In the case of Uber, bringing in a high-profile legal investigator like Eric Holder—the embodiment of a trusted form of lawful authority, the Obama Justice Department—shifted perception of the company from lawless adolescence to reformed and responsible corporate adulthood, while preserving its core business model. In the case of Microsoft, faced with a far more aggressive regulatory alternative in the form of bans or moratoriums, the company emphasized the importance of continued, yet responsible, development of the technology. This tack grants Microsoft the ability to craft through law a basis for its own legitimacy: by proceeding with its business under the imprimatur of law, the company may reap the financial benefits of the technology without suffering reputational harm. In both examples, the lawfulness response is marshaled to chart a middle path, softening calls for abolition—of an entire

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② Beginning around 2014, Uber used a program called Greyball. It operated this scheme in cities like Boston, Paris, Portland, and countries like Australia and China—all places Uber had been restricted or banned—to evade detection by using geo-fencing around government buildings and "greyballing" users identified as law enforcement or city officials[47]. While approved by Uber's general counsel at the time, other legal experts thought the program may constitute a violation of the Computer Fraud and Abuse Act or an act of intentional obstruction of justice, and a federal criminal investigation into the company's misleading tactics with local regulators soon followed.

business model or a technology—into steps for continuation, just in a more procedurally robust and accountable manner.

The lawfulness response offers companies a pathway to regain or retain legitimacy for their business in the face of accusations of injustice. It does so in part by collapsing the distinction between lawfulness and legitimacy in the company's actions. This separates out unlawful/illegitimate actions from lawful/legitimate ones—an important separation that distances those practices that are of central importance to a company's business from those that are not. By dealing seriously with the unlawful/illegitimate practices, the category distinction between these practices and the rest of the business is reinforced. This reinforced separation has significant material stakes. In the case of Uber, the lawfulness response undergirds an all-important distinction for the company: that sexual harassment at work is illegal, whereas harsh contracting terms for independent contractors are not. In the case of Microsoft, this distinction is proactive—a campaign to disambiguate the illegitimate/unlawful uses of facial recognition (backroom deals with law enforcement, warrantless searches), from the legitimate/lawful ones (a category the company argues requires further exploration). The unlawful actions thus identified and addressed, the company's remaining actions regain or retain legitimacy.

3 Lawfulness As Anti-Regulatory

Lending credence to the lawfulness response is that a corollary version of it—what I call the *legalist-reform response*—is accepted and even championed among some of big tech's fiercest critics. When such critics emphasize the *lawlessness* of company actions, it sets up technology companies to reply credibly to popular frustrations with the lawfulness response.

The legalist-reform response suffers from two limitations as a strategy for democratic egalitarian reform. First, it misdiagnoses the role of law in current processes of technological production as one of absence. Second, and more importantly, by invoking an absence of law or a failure to comply with existing law, such responses concede the status of such law as capable of expressing the particular demands of justice in the techlash. Such responses thus concede the legitimacy of lawfulness responses without specifying the substantive

and normative commitments such an intervention should aim to secure and upon which legitimacy would seem to be contingent. Legalist-reform responses may thus articulate a claim that "compliance" or "regulation" is needed, but do not, in and of themselves, provide substantive or conceptual specificity regarding what such law should achieve or enact in order to be satisfactory.

Both limitations combine to make this form of critique conceptually vulnerable to anti-egalitarian agendas. Critics advancing legalist-reform agendas risk misdiagnosing the role of law and conceding the legitimacy of law. This then allows companies to defend exploitative business models as lawful and therefore legitimate, particularly by applying the "scalpel" of legal intervention to separate and excise the worst instances of abuse while preserving the core business practices that give rise to them. Both invoke a popular imagination of the role of law that is quite distinct from the role that law in fact plays.

3.1 Law as absent, law as present

Some of big tech's fiercest critics propose legalist-reform solutions. For example, Zuboff[55] reserves a key role for data protection and greater transparency in averting the disasters of surveillance capitalism. Her critique focuses on the lawless and un-governed "dark data continent of… inner life" that, absent any regulatory protection against plunder, is "summoned into the light for others' profit". She cites the General Data Protection Regulation (GDPR) as a significant positive force that may help make "the life of the law … move against surveillance capitalism". In her account, such laws provide a way to turn the interrogatory spotlight back onto tech companies. Others have similarly advocated the need for applying existing law, particularly fundamental rights protections, as "able, agile, and flexible"[56] when used against technology companies to "shape, apply, and enforce" data rights[57].

The enormity of injustice catalogued by these critics appears at odds with the solutions they propose in response to them. Indeed such proposals suggest that once companies do comply with laws like the GDPR— once the law has trained a spotlight on these companies' inner workings—they may credibly claim to engage in an "acceptable form" of surveillance capitalism: a transparent and compliant version. Legalist-reform responses concede the essential legitimacy of the legal

frameworks that bind these companies, and in so doing concede the essential legitimacy of the business models that have developed within those frameworks. Under this account, the problem is not whether such technology—a platform optimized to exploit drivers, a technology designed for at-scale personal surveillance—should exist at all, but simply one of law's absence in ensuring its use is "up to code". Once companies achieve this standard of compliance, the problem is addressed.

Faith in a new regulatory regime to fill tech's legal lacuna can be misplaced, as companies actively work to shape such regimes and use them to further their ends. For instance, both critics and industry executives expected companies like Facebook and Google to come under harsh penalties and increased scrutiny for new attempts at aggressive data extraction under the GDPR. But enforcement has been largely absent, as under-resourced European authorities struggle to build complex investigations against wealthy international companies (though defenders would rightly point out that enforcement has picked up as of last year). More troublingly, companies have used the GDPR's consent rules to re-introduce technologies previously banned in the region[58]. In the U.S., state attempts to pass privacy legislation have come under heavy scrutiny from industry lobbyists; in Virginia, Amazon increased political donations tenfold over four years before successfully getting lawmakers to pass an industry-friendly privacy bill that Amazon itself drafted[59]. In Washington, Amazon lobbyists negotiated to have language inserted verbatim in the state's pioneering biometrics bill that meant the law, when it passed in 2017, would have "little, if any, direct impact on Amazon's services"[59]. Companies do not just advance new business-friendly regulatory regimes, but also shape existing doctrines into shields from accountability, distorting the doctrines of trade secrecy and commercial speech protections to protect valuable data assets[24, 60].

Legal observers have long understood that injustice is rarely a matter of law being absent. Instead, claims of injustice often arise from the ways that existing law structures patterns of exchange and establishes a particular distribution of power among actors[61, 62].

Katharina Pistor provides a compelling example in her account of the role law plays in facilitating contemporary capitalism by encoding global capital using certain well-trodden legal properties[63]. Her account makes clear that global inequality does not arise due to the capacity of assets and their owners to escape the law, but instead through their ability to *use* the law (and, by extension, the state) to distribute risk and reward in maximally beneficial ways. In his history of global neoliberalism, Quinn Slobodian further troubles the easy supposition of law's absence from the neoliberal justificatory narrative. He shows how the policy package of "privatization, deregulation, and liberalization" associated with the neoliberal mode of governance was at its core a project of legal institution building that embraced, rather than shrank from, active re-working of global projects of governance[64]. Britton-Purdy and Grewal[65] provided a similar account of law's active role in furthering and bolstering a neoliberal form of market-style governance. Cohen's[24] account of how law and technology shape one another in the emergence of informational capitalism similarly refutes the simple account of law as a powerful yet regrettably absent tool for disciplining the information economy. Instead, she shows how the formation of informational capitalism was as much a product of legal innovation as technical innovation.

What these analyses make clear is that law is a terrain of contestation for the regulatory arrangements that structure any social process—including our technology economy. Just as companies actively shape the ethics response to enhance their interests and shield them from accountability, so too does the daily business of informational capitalism actively rely on specific theories and forms of law. The problem is not law's absence from the technology industry, the digital marketplace or platform, and informational capitalism. The problem is precisely how existing law mediates the institutions that it enacts, the productive activities it encases, and the modes and myths of production it upholds and legitimates.

3.2 Conceding law's democratic legitimacy

The second (and perhaps more conceptually significant) limitation of the lawfulness/legalist-reform response is that it concedes the democratic legitimacy of law absent any interrogation of why such legitimacy may or may not be warranted, or under what conditions it may not hold.

Invoking law as a backstop against the harms of technology relies on the premise that law enacts our popular will regarding such harms. In other words, the

lawfulness response implicitly or explicitly relies on the view that law: (1) can express our democratic will, (2) does express our democratic will, and therefore (3) offers a legitimate democratic response to the popular frustration of the techlash and social egalitarian claims that arise from it. The legalist-reform response appeals to law's role as a moral floor on what we owe one another: we may not trust technology companies, but we can trust the laws to which they are beholden.

This tees up corporate interests to invoke the lawfulness response as a way to trade on the authority and legitimacy of law itself. Where law is proposed and then invoked as moral cover, it serves to justify the patterns of wealth accumulation or technological development that law itself facilitates. Pistor notes that "strategic and well-resourced actors" quietly push for change outside the limelight of the public sphere; they couple such efforts with "claims to the authority of law to fend of critique and legitimize success"[66]. Indeed, few claims to legitimacy are more powerful at present than that something is "legal"[63].

Such normative appeals to law only warrant the legitimacy they invoke insofar as the law itself is widely accepted as a (sufficiently) legitimate expression of our social code of conduct and thus a viable channel for enforcing collective accountability. Yet a gap persists between the moral standing the lawfulness response means to invoke and the obligations its invocation in fact incurs—law's actual response to claims of injustice. This gap complicates how one evaluates the political purpose of the lawfulness response as well as the political limitations of its legalist-reform corollary. As a result, the lawfulness response (like the ethics response) may also be anti-regulatory, albeit in a more complex way.

To understand how this reliance on the legitimacy of law may be in tension with the project of democratizing technological progress, we need to turn from the techlash to a parallel phenomenon: the growing legitimacy crisis of law. The discipline of law itself is in foment over the normative gap between (1) the political ideals that form the basis of law's legitimacy and (2) how the law actually serves to bind and obligate agents to such ideals. This poses a significant challenge to the normative and political appeal of the lawfulness response. What does it mean to address the crisis of legitimacy in tech with the tools of law at a time when law is undergoing its own growing legitimacy crisis?

4 Law's Legitimacy Crisis

In near parallel with the emergence of the techlash, ferment is once again abroad in the law (to paraphrase Llewellyn[2]). This ferment has engulfed a broad swathe of legal regimes and institutions, but for the purposes of illustration, a focus on the Supreme Court is instructive. The Court is the paradigmatic institution of U.S. law. It enjoys cultural significance as a stand-in for the legal system more generally, and debates regarding the Court can plausibly be read to reflect broader political sentiment towards the legal system writ large. The Court is not just a cultural talisman; due to the practice of (and current standard for) judicial review, it has immense importance for the substance of U.S. law: how lawyers and regulators practice, interpret, and implement the law.

Many who once looked to the law as the primary means by which progressive justice is advanced have lost confidence that the Third Branch provides fruitful terrain on which to champion progress[67, 68]. Though still in its early days, this shift is noteworthy. The liberal-legalist mythos of the Supreme Court and liberal Justices as champions of progressive change has persisted for decades. This is despite the general trend over the last 40-odd years of the Court (and the justice system over which it presides) prioritizing the constitutional rights of corporate entities over human citizens[69, 70], eroding protections erected against discrimination[71–74], diminishing democratic governance at work and restricting employee and consumer access to recourse[75–78]. As recently as the spring of 2016, the Supreme Court was widely celebrated for providing progressive wins like *Obergefell* (2015)[79] and *Whole Women's Health* (2016)[80]. Liberal Justices, most notably Ruth Bader Ginsburg, were fêted as icons of the progressive movement, and many observed with optimism the gradual leftward drift of Justice Kennedy, the moderate swing-vote of the bench, on issues of free speech and criminal justice reform[81]. Yet four years later, the appointment of Brett Kavanaugh (despite the testimony of Christine Blasey Ford and mass protests in the wake of #MeToo) prompted popular liberal dismay at the inability of the justice system to hold itself above, let alone discipline, the political turmoil of our time. Kavanaugh's appointment marked, for many, a turning point in coming to terms with the politics—conservative

politics—of not just this Court, but the Court[82].

Of course, most reasonably sophisticated observers have always acknowledged that politics play some role in judicial reasoning and the workings of law. But the explanatory power of this role tended (in the "correct" account of both legal scholars and mainstream observers of the long 1990s) to be downplayed. On this view, while there is some partisan flavor to the judiciary, this has less to do with vulgar partisanship and far more to do with different theories of constitutional and statutory interpretation among judges that happen to fall along ideological boundaries[③]. On the whole, the prevailing sense was—and in notable swathes of the legal academy, still is—that there exists a meaningful "residual" in judicial reasoning once ideological affinity has been accounted for, a space that may be won through appeals to reason and precedent. For liberal-legal political reformers of the long 1990's this "residual" comprised a primary terrain of major progressive political campaigns such as the fight for LGBTQ rights, disabilities rights, and reproductive justice.

Yet in the span of a few years, political ideology—while still far from a dominant view—has become an ascendant explanans of judicial decisionmaking, as presumptions of apolitical judicial reasoning decline. On this account, the judiciary is not above and immune from politics; instead, it plays an active and willing role in conservative power consolidation. Three recent developments strengthen this alternative account. First, the mass appointment of under-qualified (by the old standards of the elite bar) partisan Trump appointees to the federal bench. Second, the failure of liberal-legalist tactics to discipline the excesses of Trump White House (e.g., the Mueller investigation and the Impeachment proceedings). Third, the willingness of the judiciary to play a deciding role in hotly-contested and highly political issues[83].

This turning point in ideological understanding coincides with the emergence of a community of legal scholars interested in methodological interventions in law. These aim to promote (1) a renewed sociological turn in jurisprudence[84, 85], (2) a greater attentiveness to the role law has played in facilitating inequality and excessive private power, and (3) a renewed ideological commitment to law's role in addressing these challenges.

③ Living Constitutionalism being a progressive or liberal theory and Originalism being prominent among the conservative judiciary.

Loosely grouped under the banner of "Law and Political Economy (LPE)", this methodological agenda unsettles the neat analytic separation between the economic considerations in private law and the political considerations in public law. LPE traces a methodological lineage to Legal Realism, a tradition that was itself closely allied with progressive aims. Like their Legal Realist forebears, LPE scholars largely share a commitment to social democratic or democratic socialist political reform, expanding the terrain on which legal reasoning and decision-making should be judged, and incorporating a more complete accounting of law's social consequences and structuring capacities.

Similar to reformers responding to the techlash, these legal reform projects aim to produce methodological interventions and agendas to develop and advance egalitarian and democratizing projects in legal scholarship and legal pedagogy.

Progressive critique of the anti-democratic nature of law is not new. The judicial branch has long been viewed as anti-majoritarian and operating at a technocratic remove from popular politics. Democrats as far back as Bentham have attacked the undue power of courts, recognizing the ideological power concealed in the judicial power to decide "what the law is"[68, 86].

In the U.S., progressives once similarly viewed the courts as the enemies of democracy. The American tradition of using "judges as secret agents of political transformation" has its roots in conservative, rather than progressive, fears of the majority[67, 68, 86]. In 1885, Englishman Sir Henry James Sumner Maine "sang the praises of the U.S. Supreme Court, as one of the many 'expedients' in the U.S. Constitution that would allow the 'difficulties' of any country 'transforming itself' into a democracy to be 'greatly mitigated' or 'altogether overcome'"[86]. American conservatives of the era, fearing the effects of mass suffrage, revived the then-obscure case *Marbury v. Madison* (1803)[87] to establish the constitutionality of judicial review over Congressional legislation (a reading of the case in contrast to how it was interpreted in its own time), and judges used this newfound power to invalidate progressive legislation. It "took the strife of the Great Depression, and fear of Franklin Roosevelt" to force the Supreme Court into granting many of the most significant pieces of legislation of that era, and which form the basis of the modern U.S. state. While the Progressives ultimately prevailed, FDR noted in 1937

that victory came at a "terrible cost"[86].

This antagonistic history makes the more recent progressive embrace of the Court all the more unusual. These critiques, both long-standing and renewed, are not for nothing. As the emerging crisis in law makes clear, the progressive embrace of legalist strategies to secure democratic agendas has produced meager results. The Warren court (the high point of progressive power on the Court) undoubtedly achieved victories for popular justice. Yet it "is worth asking whether the courts were necessary to the outcomes"—and whether it was worth expanding the political prominence of an antidemocratic power that "the right has now turned against progressives"[86].

The most prominent progressive victories in the court—de-segregation, voting rights, and legalizing abortion—have all been subjects of sustained erosion.④ By achieving these political goals as legal wins, their strength became subject to, and conditioned upon, the interpretative methods of judicial review—a method that in some sense marks the limits of these reforms. As the liberal character of the court waned and these victories have been reinterpreted ever more narrowly, the result has been to enshrine formal protections of these legal victories even as the functional social forms of injustice they were meant to prevent gain new purchase.

To take school de-segregation as one prominent example, more than sixty years after *Brown v. Board of Education* (1954)[88], functional segregation thrives even while being formally prohibited⑤. Despite this landmark judicial victory, more than half of American schoolchildren are in racially concentrated districts where over 75 percent of students are either white or nonwhite[89]. Even the districts most committed to integration have experienced notable re-segregation following successful court challenges from white parents[90].

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④ The 2015 decision upholding constitutional protection of gay marriage undoubtedly ranks among the key progressive victories for the Court. Unlike the other examples noted here, the constitutional and statutory protections won in 2015 for members of the LGBTQ community have simply not been enshrined in law long enough to endure the sustained, decades-long legal attack that other progressive victories face. It remains an open question therefore whether these protections will face a similar fate of strong formal, negative protection, while the positive conditions required to obtain and exercise such freedoms remain out of reach for many.

⑤ It is worth noting that *Brown* is as much a legislative and democratic victory as a judicial one. Though decided in 1954, school integration in the South did not genuinely begin until a full ten years later, precisely because it ultimately required federal legislative action to enforce.

The courts' dubious record presents a puzzle: should the project of democratizing tech and reviving an egalitarian spirit in law be to reclaim or reduce the power of the legal system over the substantive conditions of political wins and losses? If law is terrain on which the struggles of the techlash must take place, is this terrain we should seek to shield from the vicissitudes of political life or to expose further to popular accountability, access, and rule? Such questions go to the heart of longstanding debates regarding the emancipatory potential of the legal system and force us to contend with the limits of articulating the demands of justice in the language of courts, judges, and lawyers.

5   Democratizing Tech, Democratizing Law: Rescuing What Law May Offer

Despite the shortcomings of the lawfulness response, law will nevertheless play a key role in addressing the harms of the techlash. Yet doing so in line with egalitarian political aims will require re-invigorating the possibility of law to channel and enact democratic will rather than serving as a means for powerful interests to circumvent that will.

As discussed above, the processes of wealth extraction and social oppression at issue in the techlash exist by virtue of their encasement in law. The lawfulness response offers moral cover to continue engaging in these practices; the legalist-reform response either misdiagnoses these processes as occurring in the absence of law or appeals to existing legal tools incapable of addressing them. Instead, technology reformers can recast the problems of the technology's failure *as* problems of law's failure. Two clarifying reformulations of the twin crises of law and technology arise as a result.

First, this makes clear that both the crisis of law and the crisis in technology are part of a larger egalitarian political response to growing social inequality. Both legal and technical institutions structure (and drive) economic exchange, and thus serve to distribute power and resources. Both also enforce and enact the hierarchical relations that give shape to the social and cultural experience of contemporary life. Thus, both play a role in institutionalizing the current "justificatory narrative" of "property, entrepreneurship, and meritocracy" that informs how enduring inequalities are justified[25]. As this justificatory narrative grows more

fragile and contestable, so too, do the legal and technical methods that encode and enact it. The role of both law and technology in facilitating this narrative informs how people evaluate our technology-based economy and our legal system.

That inequality has grown should come as no surprise—the hypercapitalist, neoliberal, or radical neo-propertarian ideology that gained prominence during the past several decades espouses the view that inequality is a necessary byproduct of freer markets. Under this view, inequality is required to produce a more efficient allocation of goods and to increase overall productivity (and thus overall wealth). Yet this has not turned out to be the case. Socioeconomic inequality has increased in all regions of the world since the 1980s and identitarian violence has accompanied the faith in market action and efficient allocation[25]. Inequality has had particularly pernicious effects in the US. While the top decile's share of income (not wealth, where differences are even more pronounced) has risen almost everywhere, in the US it rose from 35% to 48% of total national income. This increase for those at the top "has come at the expense of the bottom 50 percent" of the population, which as of 2018, commanded only 10% of the total national income[25] (emphasis my own).

In response to increasing inequality and its harmful social and political effects, reformers of law and technology share a broad methodological commitment to expanding the epistemic capacity of technical or legal methods to recognize and act on inequality and a broad political agenda of reforming technology or law to further social justice goals. Both express the growing democratic and egalitarian response to the challenges of rising inequality and social oppression.

Second, and perhaps of more importance for any positive legal and political agenda, we may reformulate the crisis of techlash as, at least in part, a crisis of the failure of law. Many of the tech's democracy problems may be reinterpreted as instances of law's democracy problem. Law has been instrumental in creating the social challenges of the techlash, and law, as a terrain upon which to create, enact, and enforce democratic reform, will be instrumental in addressing those challenges.

Both popularly and intellectually, the legal system's case for its own democratic legitimacy is increasingly thin. If the primary interests served by the law are those of the powerful against the powerless, how does such a legal system continue to justify itself in a democratic society, particularly in light of growing public egalitarian challenges against the failures of the status quo? If the legal system systematically cannot serve to correct for problems of inequality, unfairness, and oppression, or even provide basic recourse to make one's case against such social effects, then what, precisely, is it for?

Critiques of law as inherently anti-democratic suggest that one priority may be reducing the prominence of existing law (and the courts that uphold it) as the primary terrain on which we pursue the democratization of technology production, and focus instead on political battles to remake the law governing technology production. Yet even in its reduced role, law remains a primary means by which democratic will is expressed and enforced. The legal system is failing to provide its most basic function: to provide recourse and enforcement of our popular expression of justice through law. Its capacity to do so has been eroded over time and across core functions of law in ways that have, if not caused, then certainly exacerbated the crisis of democratic legitimacy in tech.

Another pathway is to embrace the terrain of law as essential to the project of democratizing technology production. This strategy, too, has a notable progressive tradition. Reflecting on E. P. Thompson's understanding of law's role in traditions of radical dissent, Gordon[62] notes that the Marxist historian was well aware of law's instrumental function as "a bag of weapons and tricks for the rich and powerful to use against the poor", but he "never succumbed to a crudely instrumental view of law". Instead, he understood law to be a "crucial element in the constitution of markets and relations of power and of production" that has the capacity to enact many different social roles and relations and is thus important terrain for radical dissent.

On this view, enacting meaningful legal institutions to discipline technology will require a democratic reinvigoration of law's capacity to express and enact popular democratic strength of will. Willy Forbath offers one robust positive vision of democratizing legal reform in form of constitutional political economy, developing a theory of constitutional law that does not ask what forms of redistribution the law permits, but instead what forms of redistribution the law requires: grounding

political claims to the social and material conditions of freedom as necessary conditions for equal citizenship. These in turn produce a series of affirmative duties to secure these conditions against oligarchy[91]. Others disagree on whether a positive democratizing legal agenda needs to extend to constitutionalism, or focus instead on diminishing the power of constitutional constraints over popular legislation[92]. Yet both views hold that democratizing law will require departing from the predominant mode of *reinterpreting* law in anti-democratic courts in favor of remaking law in popular legislative political wins. These wins may occur at the local, state, or national level, take the form of new law (such as facial recognition bans or surveillance ordinances) or renewed law (such as revivals of FTC unfairness enforcement or substantive standards of merger review).

Waldron[93] notes that "a lot of what makes law worthwhile, … is that it commits us to a certain method of arguing about the exercise of public power". Situating the problems of techlash on legal terrain gives us recourse to this method, both to contend with the problems of the digital economy and to develop the democratic legal institutions in respond to them. Properly attending to the techlash and the lawfulness response will require re-politicizing "critical questions of self-governance" that have been lost as we cede democratic control of law in ways that facilitated mobility for some at the expense of the rest[66]. In other words, what we need is not technology that is more ethical, humane, or lawful. Instead, we must make our social institutions—including those of law and our tech-based economy—more democratic.

Acknowledgment

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