

PREFACES

Enforcing and Expanding Legal Protections for Vulnerable Subjects

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Technological advance is almost always a double-edged sword. The same AI that can propose different chemical compounds for medicinal purposes can also suggest new poisons. Advertising targeting software may be immensely useful, but may also take advantage of vulnerabilities (by, for example, marketing cosmetics to a person when it calculates they are feeling most unattractive). Generative AI creates an enormous range of useful images, but also dramatically reduces the cost of disinformation.

Is there a way to encourage the positive side of digital advance, while curbing its negative effects? If so, law is among the most important tools for achieving this end. In *The New Shapes of Digital Vulnerability in European Private Law*, Camilla Crea and Alberto De Franceschi have assembled a remarkable set of authors to chart the path forward. The authors in this volume both propose expanded enforcement of extant law, and postulate important new protections. While I cannot convey the breadth of their contributions in a brief preface, I describe below a set of perspectives in the volume that illustrate one particular achievement of this collection – its simultaneously solid grounding in present controversies and ambitious aspirations toward a better future.

Emilia Mišćenić has starkly laid out the stakes of the present inquiry in her chapter, *Information, Transparency and Fairness for Consumers in the Digital Environment*. As she observes, “Despite the existing legal framework, businesses are only purportedly complying with legal rules. More often than not, they are circumventing or ignoring the requirements of EU consumer law related to mandatory information duties and transparency.” This is an important diagnosis, justifying further inquiry into both improved enforcement and reform of present legal authorities.

In terms of law reform, Mateja Durovic and Eleni Kaprou recognize that “digital asymmetry captures the position of imbalance between traders and consumers online, alongside the embedded vulnerability of consumers.” They argue in *The New Concept of Digital Vulnerability and the European Rules on Unfair Commercial Practices* that “more holistic and extensive

reform of the [Unfair Commercial Practices Directive] will be required to thoroughly adapt consumer law regulations to the fluctuating digital economy.” This is an important level-setting, establishing the stakes of vulnerability-related legislation and the importance of advancing it.

Federica Casarosa and Hans-W. Micklitz expertly state the case for caution with respect to online dispute resolution systems, especially with respect to the disabled and impoverished. Their chapter *Addressing Vulnerabilities in Online Dispute Resolution* recognizes both the uses and shortcomings of digital literacy approaches. They articulate three dimensions of digital asymmetry which must be at the core of future legislation and enforcement in the area. First there is relational asymmetry, “due to the position [consumers] have in a complex digital environment where equal interaction is made impossible.” The old problem of “one-shot” versus “repeat players,” noted in Marc Galanter’s *Why the Haves Come Out Ahead*, is profoundly exacerbated in massive platforms which are older than a fair number of their users—and more powerful than nearly all of them. Second, there is architectural asymmetry, which is only belatedly and partially addressed by restrictions on dark patterns and similar forms of manipulation via interface. Third, they analyse the problem of knowledge-based asymmetry, where “the trader benefits from detailed insights about the consumer while the consumer often knows - or understands - very little about how the trader and the service operate.” Large platforms may base their calculations on billions of transactions, while consumers have far less information—and, in concentrated commercial environments, few “exit” options to alternative providers.

Recognizing this knowledge-based asymmetry, Irina Domurath’s philosophically sophisticated chapter articulates the importance of privacy to help level the informational playing field. Many forms of manipulation are based on intimate knowledge of a consumer or worker. Privacy law is not simply about informational self-governance, but also helps reduce the ability of other entities to erode the data subject’s autonomy. Domurath proposes “that the concept of digital vulnerability could be stronger if it were to conceptualize the idea of privacy as the very foundation for any human action (including consumer choice).” This is a thought-provoking challenge to surveillance capitalism, logically extending Shoshana Zuboff’s critique of behaviorism by deeply considering the foundations of the philosophy of action. Real human action (or human agency, in Charles Taylor’s framing), rather than mere conditioned response, is premised on free

ing). Grochowski observes that “EU consumer law has never developed a systematic framework for including non-economic interests and non-economic harm,” despite an “expansion of the digital economy” that has “made this deficit particularly vivid and troublesome.” This insight should be taken seriously by EU policymakers, particularly as the field of affective computing advances to develop more sophisticated methods of simulating and stimulating emotions.³ But these same policymakers deserve credit for advancing regulation in a way that opened up space for legal academic consideration of the proper scope and force of consumer protection law.

This volume demonstrates a remarkable symbiosis between policy-oriented legal academic work, and more theoretical and philosophical scholarship. Because Europe has taken on the challenge of digital vulnerability in its privacy and consumer protection laws, it has sparked a number of fascinating inquiries into the nature of manipulation, fair trade, and commercial ethics. Meanwhile, because of the existence of this substantial body of literature, those developing new regulations and applying them are privy to deeply considered analyses of the strength and limits of the vulnerability concept. This is a virtuous cycle to which the present volume makes a sterling contribution. I congratulate the editors and authors on their remarkable capacity to refine our normative understanding of asymmetries of power and harm in online contexts, while proposing concrete advances in the legal regime meant to address these asymmetries.

3 Frank Pasquale, “Affective Computing at Work: Rationales for Regulating Emotion Attribution and Manipulation,” in *Artificial Intelligence, Labour and Society*, edited by Aida Ponce del Castillo (Brussels: ETUI Press, 2024).