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**INFLECTION POINTS IN TECHNOLOGY LAW
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For the past fifteen years, *I/S: A Journal of Law and Policy for the Information Society* published important articles on cutting edge topics at the intersection of law, technology, information regulation, and policy.

While the Journal's commitment to continue to publish path-breaking, impactful scholarship remains as strong as it ever was, the sixteenth year has brought several changes to the Journal. The most salient of those is a change of its name. Starting with this sixteenth volume, the Journal has been renamed the *Ohio State Technology Law Journal*. This name, we believe, better reflects both the Journal's institutional connection to the Ohio State University Moritz College of Law and its focus on law and technology. Another notable change has to do with the Journal's leadership. After fifteen years as the Journal co-founder and chair of its board of editors, Professor Peter Shane decided to step down from those roles. He has been replaced by Professor Efthimios Parasidis and the two of us, who now serve as the Journal's faculty co-advisors.

To commemorate those changes, in September 2019, the Journal organized distinguished lectures by two of the foremost thought leaders in law and technology: Mary Anne Franks and James Grimmelman. Their lectures, which are published in this issue, consider the state of the internet and the laws that affect and are affected by it twenty-five years after the launch of Netscape Navigator, which, in many respects, marked the start of the mainstream, commercial internet.

Professors Franks and Grimmelman comment on the reality in which the internet has moved, and is likely to continue to move, from the outskirts to the center of the law.¹ The gravitational weight has shifted from whether and how cyberlaw can shed peripheral insight by revealing "latent ambiguities" in the law,² to whether mainstream law is properly

¹ See James Grimmelman, *Continuity and Change in Internet Law*, COMM. ACM, May 2019, at 24, <https://cacm.acm.org/magazines/2019/5/236418-continuity-and-change-in-internet-law/fulltext>.

² See Ryan Calo, *Commuting to Mars: A Response to Professors Abraham and Rabin*, 105 VA. L. REV. 84, 89 (2019) ("Much law and technology literature follows . . . Lawrence Lessig in understanding new technology as revealing '[l]atent ambiguities,' or gaps in the law that jurists must now resolve.") (quoting LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 22 (1999)).

focused on the most salient aspects of a society that now meets, works, and resides substantially online.³ While most commentators acknowledge that various laws—from intellectual property, to torts, to contracts, and more—are affected by the state of current technology, it is often controversial whether the law can address technological changes by applying existing legal norms or whether a new technology requires exceptional treatment by the law.

When it comes to cyberlaw, the most famous example of this conflict is found in Frank Easterbrook’s classic 1996 essay, *Cyberspace and the Law of the Horse*,⁴ and in the responses that it generated.⁵ Easterbrook passionately called for the application of existing laws to emerging technology (back then, the Internet itself). He claimed that generally applicable laws could be employed in various contexts without the need to create separate exceptional norms. As contract law, property law, and tort law can apply to the relationship between individuals and horses, so they can apply to the Internet. Cyberlaw as a separate legal discipline, Easterbrook argued, makes as much sense as “The Law of the Horse.”⁶

As Mary Anne Franks demonstrates in her lecture, entitled *How the Internet Unmakes Law*,⁷ this debate—to what degree should we utilize generally applicable law in cyberspace—is still with us today. Franks explains that when Congress enacted the Communications Decency Act of 1996—and in particular section 230 thereof, which grants interactive computer service providers a broad immunity for various online

³ See Jack M. Balkin, *The Path of Robotics Law*, 6 CALIF. L. REV. CIRCUIT 45, 46 (2015) (“When we consider how a new technology affects law, our focus should not be on what is *essential* about the technology but on what features of social life the technology makes newly *salient*.”).

⁴ Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (1996).

⁵ See, e.g., Ryan Calo, *Robotics and the Lessons of Cyberlaw*, 103 CALIF. L. REV. 513, 550–53 (2015) (answering that a technology is “‘exceptional’ in the legal sense” when it “invites a systemic change to laws or legal institutions in order to preserve or rebalance established values”); Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 502 (1999) (“We see something when we think about the regulation of cyberspace that other areas would not show us.”).

⁶ Easterbrook, *supra* note 4, at 207–08.

activities⁸—Congress rejected Easterbrook’s approach and adopted a law of the Internet that is fundamentally different from the laws that apply in the physical world. This “law of cyberspace,” she suggests, “has unmade the law of real space.”⁹

Over time, Franks claims, section 230 was interpreted broadly in a way that is inconsistent with its text and goals. That interpretation created an unjustifiable and indefensible distinction between the rules that apply to intermediaries in the physical world and in cyberspace.¹⁰ This separate treatment “violates principles of fairness and equal protection,” and worse, it offers “no obvious stopping point to the Internet’s erosion, and in some cases eradication of settled legal principles.”¹¹

In 2018, however, a countermovement succeeded in convincing Congress to amend and limit, for the first time, section 230.¹² Franks hails those efforts and calls for broader application of general legal principles in the online world and for a reexamination of the scope of section 230. Those calls are being heeded by the Department of Justice, which has proposed more aggressive measures to reform the Section 230 framework.¹³

⁷ Mary Anne Franks, *How the Internet Unmakes Law*, 16 OHIO ST. TECH. L.J. 10 (2020).

⁸ 47 U.S.C. § 230 (1996).

⁹ Franks, *supra* note 7 at 14.

¹⁰ *Id.* at 17-19.

¹¹ *Id.* at 22, 24.

¹² See Allow States and Victims to Fight Online Sex Trafficking Act (“FOSTA”), Pub. L. No. 115-164, 132 Stat. 1253 (2018). *But see* Woodhull Freedom Found. v. United States, 948 F.3d 363 (D.C. Cir. 2020) (reinstating lawsuit challenging FOSTA on free speech grounds).

¹³ See Jeffrey A. Rosen, Deputy Attorney General Jeffrey A. Rosen Speaks at the Free State Foundation’s 12th Annual Telecom Policy Conference (Mar. 10, 2020), <https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-speaks-free-state-foundations-12th-annual-telecom>.

James Grimmelmann's lecture, entitled *Spyware vs. Spyware: Software Conflicts and User Autonomy*,¹⁴ also considers a world in which software occupies center stage, but deals with a different issue: how to handle conflicts between software. For example, how should the law resolve situations in which one software blocks or interferes with the operation of another?

Grimmelmann explores three main approaches, but comes up with a fourth and more sophisticated one. The three approaches he rejects as insufficient are (1) labeling some programs as simply bad and as deserving mistreatment by others—an approach that is challenging to apply beyond the most trivial cases;¹⁵ (2) allowing any software that the user installs to do as it pleases, which leads to inconsistent results unlikely to reflect users' needs;¹⁶ and (3) a contractual approach that lets users consent, through standard-form agreements, to the actions that each program will take, which similarly does not seem to preserve users' actual preferences.¹⁷

Instead of those three approaches, Grimmelmann develops a complex flexible framework aimed at honoring users' *actual* autonomy. For example, he suggests treating click-wrap agreements as presumptive evidence of digital consent, but holding that presumption defeasible when “a program's behavior falls outside of the range of typical behavior users are accustomed to.”¹⁸

Grimmelmann's approach seems to be focusing on a process—an algorithm if you will—to fulfill each user's individualized, idiosyncratic autonomy and preferences. As such, this ambitious project has interesting parallels in general law, and in particular, in the standard-form agreements scholarship.

¹⁴ James Grimmelmann, *Spyware vs. Spyware: Software Conflicts and User Autonomy*,

¹⁶ OHIO ST. TECH. L.J. 25 (2020).

¹⁵ *Id.* at 35–39.

¹⁶ *Id.* at 39–45.

¹⁷ *Id.* at 45–49.

¹⁸ *Id.* at 56–57.

The problem that the standard-form agreement literature has been struggling with for about a century,¹⁹ like the one that Grimmelmann focuses on, has everything to do with the desire to maintain consumers' autonomy and free will in a mass-market world that is too sophisticated and complicated for most consumers to grasp. While contract law binds individuals to agreements they accept,²⁰ legal scholars have long recognized that in a complex world of mass markets and standard-form agreements, users often go through a process that the law recognizes as acceptance, such as signing a form or clicking "I Agree," without reading or understanding the legal implications of those actions and in a way that might not promote their well-being.²¹ Much like Grimmelmann, those scholars are concerned that such a process does not respect the consumer's autonomy.²²

The legal system still has not adopted a solution to the standard-form agreement problem.²³ However, much of the lively discourse in this area

¹⁹ That area of law is at least as old as Friedrich Kessler's famous 1943 article, Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629 (1943), although references to the term "contract of adhesion" can be traced to at least 1919. *Id.* at 632.

²⁰ RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent."). In that respect, from an assenter's perspective, the distinction between Grimmelmann's second category (where the launching of a program represents the user's consent to its actions) and third category (where a click-wrap agreement represents that consent) seems minor. Contract law, after all, allows a party to assent to an agreement explicitly or by the party's behavior.

²¹ See, e.g., Margaret Jane Radin, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 7–8 (2012) ("[M]ost of us are used to receiving paperwork (or its electronic equivalent) during transactions. . . . Most of us don't read them, and most of us wouldn't understand them if we did."); Guy A. Rub, *Market Regulation of Contractual Terms: A Sceptical View*, 54 CAN. BUS. L.J. 258, 263–64 (2013) (explaining how standard-form agreements might not reflect users' preferences).

²² See, e.g., Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 884 (2014) (referring to those who are critical of standard-form agreement as "autonomists").

²³ Many attempts have been made to tackle this challenge. In 2012, for example, the American Law Institute (ALI) decided to draft a Restatement of Consumer Contracts. See Oren Bar-Gill, Omri Ben-Shahar & Florencia Marotta-Wurgler, *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*,

explores questions that Grimmelmann identifies and studies in the context of the battle between computer programs. For example, many contract scholars will find similarities between Grimmelmann's suggestion of defeating formal consent when "a program's behavior falls outside of the range of typical behavior,"²⁴ and the Uniform Commercial Code's (the U.C.C.) rules concerning unconscionability. The highly cited official comment to the U.C.C. rule, for instance, suggests that certain contracts, primarily standard-form agreements, should be unenforceable to "prevent[] oppression and unfair surprise."²⁵

Future work might shed more light on the ability to develop a comprehensive approach for preserving users' autonomy in the digital world. Such an attempt might benefit from exploring the principles that are being deployed in the physical world, although commentators might conclude that the digital world requires different thought-processes and doctrines, instead of the application of existing legal rules.²⁶ The development of user autonomy principles in cyberlaw may also inform the broader question concerning consumer autonomy in modern mass-markets.

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The second part of this volume consists of works by participants in the Journal's annual symposium—Artificial Intelligence and the Future of Tax Law and Policy—which was held at The Ohio State University Moritz College of Law in March 2019.

As the first published symposium in the U.S. to ask how automation and artificial intelligence might disrupt tax law, this discussion augurs more evidence that cyberlaw is essential to the organization of laws and legal institutions. As Professor Stephanie Hoffer, the symposium's organizer, explains in her introduction,²⁷ this symposium moves the scholarly

84 U. CHI. L. REV. 7 (2017). At the time of this writing, that draft Restatement has not yet been approved by the ALI. The draft Restatement faces significant criticism and its future is uncertain.

²⁴ Grimmelmann, *supra* note 14, at 57.

²⁵ U.C.C. § 2-302 cmt. 1.

²⁶ Grimmelmann notes that conflicts between computer programs are affected not just by contract law but by a host of other legal doctrines. Grimmelmann, *supra* note 14, at 57-58.

discourse beyond the question of *whether* artificial intelligence will impact tax law to *how* to deal with the now-undeniable changes, and how to perceive even more impactful changes that are likely forthcoming, possibly in the near future.

The nine essays that make up the symposium volume can be divided into two groups. The first group deals with the ways in which modern technology, and in particular artificial intelligence, may affect the *process* by which taxes are collected. For example, modern decentralized technology, like smart contracts supported by blockchain infrastructure, may open new pathways for tax avoidance,²⁸ but artificial intelligence may also assist the IRS in developing new mechanisms to detect tax avoidance.²⁹

Another way in which automation affects tax collection is by assisting taxpayers in navigating the complexities of the tax system. Such technological measures are available through the IRS³⁰ and through private entities like TurboTax.³¹ However, as it simplifies the tax system for taxpayers, automation might also introduce new distortions to the de facto application of tax laws, an issue that several contributors explore.³²

Instead of focusing on the *process* of tax collection, the second group of essays tackles the changes that artificial intelligence might bring to *substantive* tax law. Those essays mostly look to the future as they address the upcoming changes that artificial intelligence is expected to bring to labor and capital markets. Those contributors thus explore how

²⁷ Stephanie Hoffer, *What If Tax Law's Future Is Now?*, 16 OHIO ST. TECH. L.J. 67, 68 (2020).

²⁸ See Allison Christians, *Taxation in the Age of Smart Contracts*, 16 OHIO ST. TECH. L.J. 91 (2020).

²⁹ See Jeff Butler, *Analytical Challenges in Modern Tax Administration*, 16 OHIO ST. TECH. L.J. 258 (2020).

³⁰ See Joshua D. Blank & Leigh Osofsky, *Legal Calculators and the Tax System*, 16 OHIO ST. TECH. L.J. 73 (2020).

³¹ See Sarah Lawsky, *Form as Formalization*, 16 OHIO ST. TECH. L.J. 114 (2020); Susan C. Morse, *Do Tax Compliance Robots Follow the Law?*, 16 OHIO ST. TECH. L.J. 278 (2020).

³² See Blank & Osofsky, *supra* note 29; Lawsky, *supra* note 30; Morse, *supra* note 30.

those societal shifts should affect governments' abilities to generate revenues through taxation. The discussion on the future of taxation raises a familiar question: how should the law engage with seismic technological changes? The views are mixed: one contributor suggests that fundamental alterations to the tax system might need to be made to account for shrinking labor markets,³³ while another contributor questions whether modifications to tax laws are needed or justified.³⁴

A final topic that this group of forward-looking essays explores is the taxation of robots themselves, on top or in lieu of the current system that might tax those who create, own, or operate robots.³⁵ One essay points out that there are significant practical difficulties in setting forth such a legal scheme.³⁶ The last essay in this group, and in this symposium, tackles this question from a more theoretical and philosophical angle, using the vehicle of robot taxation to shed light on the centrality of humans in our current tax system.³⁷

³³ Anton Korinek, *Taxation and the Vanishing Labor Market in the Age of AI*, 16 OHIO ST. TECH. L.J. 244 (2020).

³⁴ Daniel Hemel, *Does the Tax Code Favor Robots?*, 16 OHIO ST. TECH. L.J. 219 (2020).

³⁵ See, e.g., XAVIER OBERSON, *TAXING ROBOTS: HELPING THE ECONOMY TO ADAPT TO THE USE OF ARTIFICIAL INTELLIGENCE* (2019).

³⁶ Robert J. Kovacev, *A Taxing Dilemma: Robot Taxes and the Challenges of Effective Taxation of AI, Automation and Robotics in the Fourth Industrial Revolution*, 16 OHIO ST. TECH. L.J. 182 (2020).

³⁷ Stephanie Hoffer, *Tax Theory & Feral AI*, 16 OHIO ST. TECH. L.J. 157 (2020).