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I. INTRODUCTION

The European Union ("EU"), among other polities, has illuminated the ways in which hegemonic digital platforms like Amazon, Facebook, Google, and Uber have disrupted the way the public understands competition, democracy, information, and data privacy.[1] As detailed in a recent EU Commission report, the market power enjoyed by these and other digital monopolies entails not only risks to competition but also to consumer well-being itself.[2] Tribunals from diverse countries such as Australia,[3] the U.S.,[4] and the UK[5] reached similar conclusions. In fact, multiple court rulings and public investigations have established that the data of 85 million Facebook users were traded, exposed, and commodified for political purpose in violation, not only of Facebook's own terms and conditions, but of various national and international laws and treaties.[6] Such data exploitation threatens the privacy of users. And although these privacy concerns are serious, they are not the only threat.

Competition is at risk: indeed, it has yet to be studied to what extent the more than two hundred Google acquisitions during its short lifetime will compromise innovation, competition, and consumer well-being. Despite the undoubtedly useful technologies these companies have produced, the digital leviathans monopolizing the cyber ecosystem have revealed themselves as the "bad guys," as established in judicial rulings at every legal level, within and outside the EU [7] Ursula von der Leyen, President of the European Commission, warned before being elected that "it may be too late

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[1] *See Online Platforms and Market Power, Part 3: The Role of Data and Privacy in Competition, Hearing on H. Res. 965 Before the Subcomm. on Antitrust, Commercial, and Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. (2019) (statement of Margrethe Vestager, Executive Vice President, European Comm'n).

[2] *Commission Report: Competition Policy for the Digital Era*, at 73, COM (2019), https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en [https://perma.cc/XB9J-56R2] [hereinafter *Commission Report*].

[3] *Cambridge Analytica: Australia Takes Facebook to Court Over Privacy*, BBC (Mar. 9, 2020), https://www.bbc.com/news/technology-51799738 [https://perma.cc/C68W-V7NK].

[4] Patel v. Facebook, Inc., 932 F.3d 1264, 1275 (9th Cir. 2019).

[5] *See generally,* DIGITAL, CULTURE, MEDIA & SPORT COMM., DISINFORMATION AND 'FAKE NEWS': FINAL REPORT, 2017–19, HC 1791 (UK), https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/1791/1791.pdf [https://perma.cc/E9S6-KVN7] [hereinafter House of Commons].

[6] *Id.*

[7] *See* Laureen Snider, *Enabling Exploitation: Law in the Gig Economy*, *in* CRITICAL CRIMINOLOGY 26(4), 563 (2018); *see also* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER 45 (2019).

to replicate hyperscalers, but it is not too late to achieve technological sovereignty in some critical technology areas."[8] Others are also concerned about the overwhelming power of technology companies. Shortly after the European Commission presented its European data strategy with the undisguised intention of counteracting Silicon Valley's and China's data power, the United States Congress subpoenaed the top tech corporations to understand "the degree to which these intermediaries enjoy market power, how they are using that market power, whether they are using their market power in ways that have harmed consumers and competition, and how Congress should respond."[9] Digital capitalists have lied,[10] evaded taxes,[11] stolen data,[12] abused their dominant position,[13] and knowingly caused social damage by defending their position (and the benefits of their shareholders) against the collective interests of citizens all around the world.[14]

Why are criminal corporations permitted to get away with lying, tax evasion, data theft, abuse of market position, and other forms of social harm? Why, despite all the institutional big words, has so little been done in terms of regulatory developments or more effective enforcement? And why, despite the growing academic scholarship on the social harm wrought by digital corporations, do we still lack a comprehensive criminological theory that explains the rationale behind them? There are chiefly two sets of reasons: academic and political.

Academically, this highlights one of the main deficiencies of legal studies (particularly those related to criminal law): there is a myopic

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[8] Ursula Von Der Leyen, *A Union That Strives for More: My Agenda for Europe: Political Guidelines for the Next European Commission 2019–2024*, at 13 (2019), https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf [https://perma.cc/T7J9-XY87].

[9] Press Release, Congressman David Cicilline, House Antitrust Subcommittee Issues Document Requests as Part of Digital Markets Investigation (Sep. 13, 2019), https://cicilline.house.gov/press-release/house-antitrust-subcommittee-issues-document-requests-part-digital-markets [https://perma.cc/S7YA-DJQV].

[10] Alexandra S. Levine, *Did Zuckerberg Lie Under Oath?*, POLITICO (Aug. 16, 2019), https://www.politico.com/newsletters/morning-tech/2019/08/16/did-zuckerberg-lie-under-oath-718817 [https://perma.cc/79UQ-A8Q4].

[11] Rita Barrera & Jessica Bustamante, *The Rotten Apple: Tax Avoidance in Ireland*, 1 INT'L TRADE J. 32, 150 (2018).

[12] *See generally* Donell Holloway, *Surveillance Capitalism and Children's Data: The Internet of Toys and Things for Children*, 170 MEDIA INT'L AUSTRALIA 27, 28 (2019).

[13] Case No. T-612/17, Google & Alphabet v. Comm'n (Google Shopping), ECLI:EU:T:2021:763 (Nov. 10, 2021).

[14] Georgia Wells, Jeff Horwitz & Deepa Seetharaman, *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show,* WALL ST. J. (Sept. 14, 2021), https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=article_inline [https://perma.cc/P35K-YZHW].

emphasis on isolated problematic and individual perpetrators, causing a lack of meaningful structural analysis of the legal system and society as a whole. In contrast, research into the socio-economic factors behind crime are robust as evidenced by the wealth of scholarship. The best evidence of this fact is the wealth of scholarship drawn from around the globe.[15] However, and despite several remarkable works—some of them further analyzed here—theories of crime and deviance that target not just the socio-economic conditions of certain groups but the system of production, remain, at best, marginalized. The lack of critical structural analysis within legal studies affects not only criminal law and criminology but also every legal and political field. To illustrate, since the 1924 publication of *Law and Marxism: A General Theory*,[16] no other significant book outlining a general legal theory questioning the liberal legal dogma has been published in Western countries. The lack of structural critique to the foundations of legal liberalism has helped naturalize capitalism as the only conceivable system. Of course, this does not mean that the liberal hegemony has not been challenged and disputed. It has. For instance, decolonial authors such as Boaventura de Sousa Santos have defended a pluralistic legal approach, targeting the colonial and Eurocentric core of liberal legal theories.[17] In the same vein, Indigenous scholars such as Glen Coulthard and Moana Jackson have defended the decolonization of the settler-colonial states such as Canada and New Zealand.[18] For instance, Moana Jackson, in a brilliant critique of New Zealand's heavily racialized criminal justice system, defended the coexistence of Westernized law along with Indigenous legal knowledge and practices.[19] Also, Latin American political and legal theorists such as Alvaro García Linera and Carlos Wolkmer outlined, and eventually succeeded in proposing, pluralistic constitutional frameworks consistent

[15] Biko Agozino, *The General Theory of Crimes of The Powerful*, *in* REVISITING CRIMES OF THE POWERFUL: MARXISM, CRIME AND DEVIANCE 297–308 (Steven Bittle, Lauren Snider, Steve Tombs & David White, eds., 2018); Ignasi Bernat & David Whyte, *State-Corporate Crimes*, *in* THE HANDBOOK OF WHITE-COLLAR CRIME 127–38 (Melissa L. Rorie ed., 2019).

[16] *See generally* EVGENY PASHUKANIS, LAW & MARXISM: A GENERAL THEORY (Chris Arthur ed., Barbara Einhorn trans., Pluto Publishing Limited 1989).

[17] BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION 92 (Cambridge University Press 2d ed. 2002).

[18] GLENN SEAN COULTHARD, RED SKIN, WHITE MASKS: REJECTING THE COLONIAL POLITICS OF RECOGNITION (Robert Warrior ed., University of Minnesota Press 2014); MOANA JACKSON, THE MAORI AND THE CRIMINAL JUSTICE SYSTEM: A NEW PERSPECTIVE: HE WHAIPAANGA HOU (U.S. Dep't of Just. Nat'l Inst. of Just. 1987).

[19] Moana Jackson, *Justice and Political Power: Reasserting Maori Legal Processes*, *in* LEGAL PLURALISM AND THE COLONIAL LEGACY 243–56 (Kayleen M. Hazlehurst ed., Ashgate Publishing 1995).

with Indigenous and progressive values.[20] However, as promising as these are, such examples of critical legal thinking from the Global South have limited influence over critical legal scholars in the Global North.

Institutions and public servants suffer from a similar trouble, although with different ramifications. Authorities' legal response to the acts of criminal corporations—from the gentrification processes unleashed by Airbnb,[21] to the violation of labor laws in the case of Amazon or Uber[22]—arrive too late, and without offering solutions to the multiple problems. There are two principal explanations for this. The first is technical, specifically with the rapid pace of the digital transformation.[23] In an unprecedentedly short period of time, digital technologies, from mobile messaging to agriculture or finance, have become omnipresent in people's everyday lives, and that applies to both the Global North and the Global South.[24] The second is political; the acceleration of technology has outpaced and outmaneuvered liberal democracy's archaic legislative processes. Neither the Global South nor the Global North have adequately funded or implemented the digitalization of its bureaucracies and provision of services. As recently demonstrated during the COVID-19 crisis, this has prevented the public sector from adequately reflecting broader social and economic transformation:[25] a new reality in which the digital sphere is not just a part of everyday life, but in many instances, operates as its basic infrastructure.[26]

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[20] Álvaro García Linera, *Las Tensiones Creativas de la Revolución: La Quinta Fase del Proceso de Cambio*, VICEPRESIDENCIA DEL ESTADO PRESIDENCIA DE LAW ASAMBLEA LEGILSATIVA PLURNACIONAL, BOLIVIA (2011), https://www.bivica.org/files/tensiones-creativas.pdf [https://perma.cc/FGN4-FJAL]. *See generally* ANTONIO CARLOS WOLKMER, PLURALISMO JURÍDICO-FUNDAMENTOS DE UMA NOVA CULTURA DO DIREITO (Saraiva Educação SA ed., 2017).

[21] IAN BROSSAT, AIRBNB, LA VILLE UBERISEE 160 (2018).

[22] Aitor Jiménez González, *Law, Code and Exploitation: How Corporations Regulate the Working Conditions of the Digital Proletariat*, 48 CRITICAL SOCIO. 361, 366–67.

[23] Andy Becket, *Accelerationism: How a Fringe Philosophy Predicted the Future We Live In*, GUARDIAN (May 11, 2017), https://www.theguardian.com/world/2017/may/11/accelerationism-how-a-fringe-philosophy-predicted-the-future-we-live-in [https://perma.cc/8TNE-J7XS].

[24] NICK COULDRY & ULISES A. MEJIAS, THE COSTS OF CONNECTION: HOW DATA IS COLONIZING HUMAN LIFE AND APPROPRIATING IT FOR CAPITALISM 83–112 (2019).

[25] Linda Hantrais, Paul Allin, Mihalis Kritikos, Melita Sogomonjan, Prathivadi B. Anand, Sonia Livingstone, Mark Williams & Martin Innes, *Covid-19 and the Digital Revolution*, 16 CONTEMP. SOC. SCI. 256–70 (2021); Brett Milano, *Big Tech's Power Growing at Runaway Speed*, HARV. GAZETTE (Feb. 7, 2019), https://news.harvard.edu/gazette/story/2019/02/government-cant-keep-up-with-technologys-growth/ [https://perma.cc/3PL4-GDGE].

[26] Geoff Mulgan, *Anticipatory Regulation: 10 Ways Governments Can Better Keep Up with*

Large digital corporations, meanwhile, have not wasted the opportunity. Making extensive use of the "silicon doctrine,"[27] they have taken advantage of loopholes in areas ranging from privacy to labor, education, and even housing.[28] As this Article will further analyze, where there were laws, these same corporations have not hesitated to violate legislation to realize a new status quo.

Another fundamental set of motives that prevented clear action on the part of authorities, related to ideological reasons, involves the nature of law in the bourgeois state. Law— understood as the set of legal relations that articulate the social life of a territory—is not exempt from ideological burden. It is no secret that liberalism and the market economy are fundamental pillars of Global North's hegemonic liberal constitutionalism.[29] Following Pēteris Stučka, it could be said that the law is not only not neutral but serves as an instrument to guarantee private ownership of the means of production; facilitating the circulation of capital and its accumulation by the ruling classes while assuring a social formation firmly grounded in the exploitation of the working class.[30] The capitalist class amassed power not only by reifying through law the control of labor, exploitation, and private property, but also by legitimizing crimes (or criminalizing behaviors) depending upon class interests. As Evgeny Pashukanis said, "Criminal justice in the bourgeois state is organized class terror, which differs only in degree from the so-called emergency measures taken in civil war."[31] That is, criminal law operates as a political instrument, just like civil, commercial, or constitutional law.[32]

This Article aims to analyze the structural relation of capitalism and corporate crime in the context of the digital economy—in other words, the criminal strategy in which the silicon doctrine operates. Drawing upon

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Fast-Changing Industries, NESTA (May 15, 2017), https://www.nesta.org.uk/blog/anticipatory-regulation-10-ways-governments-can-better-keep-up-with-fast-changing-industries/ [https://perma.cc/HBK5-2RBV].

[27] Aitor Jiménez, *The Silicon Doctrine,* 18 TRIPLEC: COMMUNICATION, CAPITALISM & CRITIQUE 322, 323–24 (2020).

[28] *See generally* Julie Cohen, *Law for the Platform Economy,* 51 U.C. DAVIS L. REV. 133 (2017).

[29] *See generally* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); ROBERTO GARGARELLA, LATIN AMERICAN CONSTITUTIONALISM, 1810–2010: THE ENGINE ROOM OF THE CONSTITUTION (2013).

[30] *See* PĒTERIS STUČKA, SELECTED WRITINGS ON SOVIET LAW AND MARXISM 59–165 (Robert Sharlet ed., Peter B. Maggs trans., Routledge 1988).

[31] PASHUKANIS, *supra* note 16, at 173.

[32] Grietje Baars, *Capital, Corporate Citizenship and Legitimacy: The Ideological Force of "Corporate Crime" in International Law*, *in* THE CORPORATION: A CRITICAL, MULTI-DISCIPLINARY HANDBOOK 419–33 (Grietje Baars & André Spicer eds., 2017).

critical criminology, the following question shall be examined: Why do harmful corporate antisocial behaviors so often evade the punitive reach of the state?

Part I examines corporate harm and social harm. Part II outlines a theoretical framework with which to analyze the crimes of digital capitalism related to data and competition, here termed "data crimes." Section II.A explains the grounds where digital capitalism's monopolistic structure stands by looking at the historical background of contemporary antitrust laws. Section II.B draws upon the neoliberal rule of law to explain the relationship between corporate power and data crimes, and Section II.C details data crimes and explains why they are not cybercrimes. Part III examines Facebook's data crimes, focusing on Facebook and privacy violations in Section III.A and on Facebook and anticompetition violations in Section III.B. Part IV discusses the ways in which public institutions are dealing with the violation of privacy and competition laws. Finally, Part V, analyzes the question of digital corporate criminal liability, concluding that the nature of the corporation—intrinsically criminal, intrinsically imperialist—makes it difficult to deter criminal misconduct within big tech through traditional criminal means. New approaches must be sought.

II. CORPORATE HARM AND SOCIAL HARM

In a now-distant 1949, Edwin Sutherland wrote *White Collar Crime,*[33] a trailblazing work that revolutionized modern criminology by shifting the object of study, from (mostly) underclass individuals, to upper-class individuals and to corporations themselves. In an earlier work, Sutherland stated the importance of building an adequate framework to understand violations of the criminal code that do end with a criminal conviction:

> White-collar crime is real crime. It is not ordinarily called crime, and calling it by this name does not make it worse, just as refraining from calling it crime does not make it better than it otherwise would be. It is called crime here in order to bring it within the scope of criminology, which is justified because it is in violation of the criminal law. The crucial question in this analysis is the criterion of violation of the criminal law. Conviction in the criminal court, which is sometimes suggested as the criterion, is not adequate because a large proportion of those who commit

[33] *See generally* EDWIN H. SUTHERLAND, WHITE COLLAR CRIME (1949) (developing the concept of white-collar criminality).

> crimes are not convicted in criminal courts. This criterion, therefore, needs to be supplemented.[34]

Sutherland revealed how widespread corporate crime was among respectable corporations, and how rarely their criminal behavior was criminalized, prosecuted, or punished.[35] Sutherland considered white-collar crime as inherent and functional to the American capitalist social formation. Sutherland explained that these criminal behaviors were not as firmly prosecuted as other crimes, despite being harmful to society, because of class solidarity between bourgeoisies. These wealthy individuals were more capable of understanding the criminal behavior of their peers, to avoid prosecution, and—eventually—to perpetrate the same kind of crimes. But as many have highlighted, the main lesson to extract from Sutherland's work is that crime is not limited to those criminal offenses figuring in the criminal code, but also includes those crimes of the powerful hidden under civil and administrative regulations.[36] This sociological explanation was a turning point from other works of criminology that, at the time, were trying to explain crime as a result of psychological, cultural, anthropological, or even biological traits, making its contemporaries re-evaluate the role crime, upper-classes, and institutions played in developing social structures.

It is worth analyzing the work of Frank Pearce, arguably one of the most influential contemporary Marxist criminologists. In 1976, Frank Pearce published what would become a contemporary classic: *Crimes of the Powerful*.[37] This work picked up on Sutherland's scholarship, complementing it with its critical Marxist perspective. As Pearce later explained,[38] white collar crimes were not only functional and beneficial to the upper classes as a human group, but also as a socio-political class. Unlike Sutherland, Pearce did not think that white-collar crimes were treated more leniently by the state because of the shared cultural mindset of the upper class, but as the product of a deliberate political strategy intended to reinforce bourgeois class domination.[39] Thus, for Pearce, criminal law in

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[34] Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOCIO. REV. 1, 5 (1940).

[35] Edwin H. Sutherland, *Is "White Collar Crime" Crime?*, 10 AM. SOCIO. REV. 132, 136 (1945).

[36] EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION 6–7 (1983).

[37] FRANK PEARCE, CRIMES OF THE POWERFUL: MARXISM, CRIME AND DEVIANCE 143–56 (1976) [hereinafter CRIMES OF THE POWERFUL].

[38] Frank Pearce, *Organized Crime and Class Politics*, *in* CRIME AND CAPITALISM: READINGS IN MARXIST CRIMINOLOGY 157–81 (David Greenberg ed., 1981).

[39] *See* FRANK PEARCE, MARXISM AND CORPORATE CRIME IN THE 21ST CENTURY (2015) (arguing that crime is a strategic mechanism to ensure class division) [hereinafter CORPORATE CRIME].

liberal states was an ideological instrument designed to reinforce class oppression.[40] This was evidenced by the fact that flagrant and frequent corporate criminal behaviors were not criminalized, falling outside the punitive scope of the state, while a tough-on-crime approach was adopted in cases of the often-petty crimes committed by working-class individuals, triggering the era of mass incarceration. Pierce was an avid reader of the Marxist philosopher Louis Althusser. In an influential work, Althusser analyzed the Ideological State Apparatuses, which he defined as the concrete form of the capitalist ideology:

> An Ideological State Apparatus is a system of defined institutions, organizations, and the corresponding, practices. Realized in the institutions, organizations, and practices of this system is all or part (generally speaking, a typical combination of certain elements) of the State Ideology. The ideology realized in an ISA ensures its systemic unity on the basis of an 'anchoring' in material Junctions specific to each ISA; these functions are not reducible to that ideology, but serve it as a 'support.'[41]

For Althusser, "All Ideological State Apparatuses, of any kind, contribute to the same result: the reproduction of the relations of production."[42] However, Althusser specifically underscored the importance of the Legal Ideological State Apparatuses, stating that "the law is the Ideological State Apparatus whose specific dominant function is, not to ensure the reproduction of capitalist relations of production, which it also helps ensure (in, however, subordinate fashion), but directly to ensure the functioning of capitalist relations of production."[43] Therefore, for Pearce, and his contemporaries, the act of regulating and criminalizing behaviors was a political one, rather than a technical one, revelatory of the ideology underpinning the capitalist social formation.[44] While Sutherland privileged the analysis of offenders' criminogenic behaviors to understand and explain the criminal nature of white-collar crimes, Pearce highlighted the important role the state plays in shaping and defining criminal policies.[45] Pearce focused his attention on the social structures in which legal relations are

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[40] *See id.*

[41] LOUIS ALTHUSSER, ON THE REPRODUCTION OF CAPITALISM: IDEOLOGY AND IDEOLOGICAL STATE APPARATUSES 77 (G.M. Goshgarian trans. 2014).

[42] *Id.* at 144.

[43] *Id.* at 160.

[44] Herman Schwendinger & Julia Schwendinger, *Social Class and the Definition of Crime*, 7 CRIME & SOC. JUST. 4, 9 (1977).

[45] CORPORATE CRIME, *supra* note 39, at 7.

built. That is why Pearce identified the crimes of the powerful as a set of behaviors solidly inserted in the mechanics of the capitalist political economy, within which the state operates.[46] Thus, Pearce explained that the bourgeois criminal law responds to the interests of the ruling class, as a socio-economic class, and not merely as a de facto human group.[47]

Pearce's work was extraordinarily relevant and continues to be so. Drawing upon Pearce, Paddy Hillyard and Steve Tombs proposed a move from the notion of crime to one of social harm.[48] For them (and for many Marxist scholars), crime has "no ontological reality."[49] That is, crime does not exist as a natural phenomenon; instead, it is socially constructed. Hillyard and Tombs demonstrated that the capitalist social construction of crime, while consisting of many petty events, "excludes many serious harms,"[50] for instance, environmental pollution caused by industry. For them, the Legal Ideological State Apparatuses, which include criminal law, legitimize what capitalists consider crime control, while willfully overlooking other harmful behaviors, thereby selectively constructing crime within a web of "a myriad of other power relations."[51]

Among those who followed Pearce's contributions is Gregg Barak, editor of *The Routledge International Handbook of the Crimes of the Powerful*,[52] which reframed Pierce's work in the globalized twenty-first century. Crime, rather than being an obstacle to capitalist globalization, makes it possible. In the same vein, Dawn Rothe and David O. Friedrichs published *Crimes of Globalization*,[53] providing a description and analysis of crimes committed by corporations on a global scale, resulting in deaths, murders, environmental destruction, labor exploitation, and even state bankruptcy.[54] These crimes are only possible in a neoliberal globalized context. In a time where the pernicious consequences of climate change are becoming more and more perceptible,[55] both for the general public and governing institutions, there is an increasing demand not only for further

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[46] *Id.*

[47] *Id.*

[48] *See generally* Paddy Hillyard & Steve Tombs, *From 'Crime' to Social Harm?*, 48 CRIME, L. & SOC. CHANGE 9 (2007).

[49] *Id.*

[50] *Id.* at 12.

[51] *Id.* at 15.

[52] *See generally* THE ROUTLEDGE INTERNATIONAL HANDBOOK OF THE CRIMES OF THE POWERFUL (Gregg Barak ed. 2015) [hereinafter HANDBOOK].

[53] *See generally* DAWN L. ROTHE & DAVID O. FRIEDRICHS, CRIMES OF GLOBALIZATION (Walter S. DeKeseredy ed. 2014).

[54] *Id.* at 51.

[55] J.C. Oleson, *"Drown the World": Imperfect Necessity and Total Cultural Revolution*, 3 UNBOUND: HARVARD J. OF THE LEGAL LEFT 19, 32 (2007).

corporate social responsibility, but also for their legal and criminal liability for environmental crimes. As a result, a proliferation of analyses focused on environmental crimes have emerged, demonstrating how the bourgeois law, while protecting the assets of the ruling class, allows the appropriation of the commons and the destruction of the environment.[56]

In 2018, Steven Bittle, Laureen Snider, Steve Tombs, and David Whyte edited *Revisiting Crimes of the Powerful: Marxism, Crime and Deviance*.[57] The contributions of this important book highlight the intimate relationships between corporations, crime, and the capitalist social formation. The authors revisit Pierce's classic,[58] fully engaging in a Marxist theoretical debate around crime, ideology, and the political economy of criminalization. A significant share of the contribution looks at the 'crimes of globalization' from diverse, but complementary perspectives. For instance, Ignasi Bernat analyzed the 2008 Spanish economic crisis, regarding it as a crime committed by rentier capitalists.[59] Gregg Barak scrutinized global capital,[60] while Biko Agozino offered a "General Theory of Crimes of the Powerful" through his study of imperialism.[61] In sum, the collective work establishes a dialogue with Pearce, not only as criminologists looking at corporate crime, but also as Marxists.

Along the same Marxist criminology line, Grietje Baars and Harry Glasbeek have taken a historical approach to analyze the intimate relationship between capitalism and the legal form.[62] Baars details how the capitalist class has used law to gain and reinforce its power.[63] Departing from a Marxist theoretical discussion that closely follows Pashukanis' thinking,[64] Baars identifies law as an intrinsic element of the capitalist social formation.

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[56] Michael Lynch, *Green Criminology and Environmental Crime: Criminology that Matters in the Age of Global Ecological Collapse*, 1 J. WHITE COLLAR & CORP. CRIME 50, 54 (2020).

[57] *See* STEVEN BITTLE, LAUREN SNIDER, STEVE TOMBS & DAVID WHITE, EDS., REVISITING CRIMES OF THE POWERFUL: MARXISM, CRIME AND DEVIANCE (2018).

[58] *See* PEARCE, CRIMES OF THE POWERFUL, *supra* note 37.

[59] Ignasi Bernat, *The Crimes of the Powerful and the Spanish Crisis*, *in* REVISITING CRIMES OF THE POWERFUL: MARXISM, CRIME AND DEVIANCE 217–30 (Steven Bittle et al., eds., 2018).

[60] Gregg Barak, *Global Capital, The Rigging of Interbank Interest Rates and the Capitalist State*, *in* REVISITING CRIMES OF THE POWERFUL: MARXISM, CRIME AND DEVIANCE 143–56 (Steven Bittle et al., eds., 2018).

[61] Biko Agozino, *The General Theory of Crimes of The Powerful*, *in* REVISITING CRIMES OF THE POWERFUL: MARXISM, CRIME AND DEVIANCE 297–308 (Steven Bittle et al., eds., 2018).

[62] *See generally* GRIETJE BAARS, THE CORPORATION, LAW AND CAPITALISM: A RADICAL PERSPECTIVE ON THE ROLE OF LAW IN THE GLOBAL POLITICAL ECONOMY (2019).

[63] *Id.*

[64] PASHUKANIS, *supra* note 16, at 173.

Other authors believe that law has emancipatory potential,[65] but Baars, on the contrary (following Pashukanis), concludes that the law is unrecoverable: "In conclusion, I argue that while emancipation from corporate power cannot be achieved through law, its promise lies in the alternatives (such as counter-systemic activism, building alternative modes of production, abolitionist and transformative justice work) and, with that, human emancipation."[66]

Glasbeek focuses upon how capitalist legal infrastructure shields corporations, rendering the capitalist class unaccountable for its crimes.[67] For Glasbeek, corporate impunity is the logical consequence of the neoliberal dogma, as this doctrine implies private accumulation of socially produced wealth.[68] In a similar vein, Steve Tombs and David Whyte point out the interdependence between the modern state and corporations. "Corporations are institutions that are created for the mobilization, utilization and protection of capital. As such, they are wholly artificial entities whose very existence is provided for, and maintained through, states' legal and political institutions and instruments, which in turn are based upon material and ideological supports."[69]

Other authors are also weaponizing Marxism to challenge labor exploitation under the latest versions of capitalism (and asking whether labor exploitation can be considered a crime).[70] These theoretical and empirical contributions are reinvigorating the debate, deepening in the contradiction of bourgeois law, and liberal state's inability to control the excesses of the neoliberal dogma.[71] It can be said that the impunity enjoyed by the speculators responsible for the 2008 economic crisis brought Marxist debates back to the front-line of criminology, well represented in the above-mentioned works or by new journals such as the *Journal of White Collar and Corporate Crime* (first released in January 2020).

The current Marxist critical criminology, focused on the study of

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[65] BOAVENTURA DE SOUSA SANTOS, TOWARDS A NEW LEGAL COMMONS SENSE: LAW, GLOBALIZATION AND EMANCIPATION 439–94 (2002).

[66] BAARS, *supra* note 62, at 13.

[67] *See* HARRY GLASBEEK, CLASS PRIVILEGE: HOW LAW SHELTERS SHAREHOLDERS AND CODDLES CAPITALISM 112–13 (2017).

[68] *Id.* at 51.

[69] STEVE TOMBS & DAVID WHYTE, THE CORPORATE CRIMINAL: WHY CORPORATIONS MUST BE ABOLISHED 69 (2015).

[70] Jon Davies & Natalia Ollus, *Labour Exploitation as Corporate Crime and Harm: Outsourcing Responsibility in Food Production and Cleaning Services Supply Chains,* 72 CRIME, L. & SOC. CHANGE 87, 87–88 (2019).

[71] Spencer Headworth & John L. Hagan, *White-Collar Crimes of the Financial Crisis*, *in* THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME 275–93 (Shanna R. Van Slyke, Michael L. Benson & Francis T. Cullen, eds., 2016).

corporate crimes, has left some fundamental tenets worth highlighting. As Marxist scholars repeatedly state, law serves the interest of the dominant class.[72] One of the most prominent examples of the legal form bias is the existence of corporations, a legal fiction widely used by the bourgeois to speculate and extract surplus value from workers. This legal person, while bearer of similar rights to those of the natural persons, is not criminally liable in most cases, and therefore enjoys what Baars has described as a structure of irresponsibility.[73] Thus, when criminal corporations exploit workers, they would not be acting as deviants, but as functional and necessary elements of the system. Also, Ideological State Apparatuses—and with them, the capitalist social formation—are articulated through law, mediating a significant part of the economic and social life.[74] The legal form is, in turn, the materialization of capitalist relations of production. This naturalizes socially harmful behaviors if they benefit the interest of the capitalist class, for instance, environmental destruction or the exploitation of the working class.

Finally, institutions involved in law-making and enforcing processes are not neutral. The legal construction of crime does not respond to arbitrary acts of public servants; it is indeed a deliberated and calculated political act responding to very specific interests: those of the capitalist class. The case of corporate impunity is illustrative of the control of the latter over state punitive technologies. Of course, this is just among the many examples probing how the criminal justice system serves the interests of the powerful,[75] white supremacy,[76] and patriarchal domination.[77] In sum, the crimes of the powerful are defined as behaviors that, despite being socially harmful, are not prosecuted at all or are prosecuted in a lenient way because they are functional to the capitalist social formation and benefit the bourgeoisie as a class. This Article makes a case for the criminalization of digital

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[72] *See generally* ALTHUSSER, *supra* note 41; BAARS, *supra* note 62; CRIMES OF THE POWERFUL, *supra* note 37; JAMES C. OLESON, CRIMINAL GENIUS: A PORTRAIT OF HIGH-IQ OFFENDERS xiv (2016) ("*Real* crime is colonialism, globalization, and neoliberalism. *Real* crime is climate change, shock doctrine governance, and unending war. Of course, because these crimes are the métier of the affluent and powerful, they are not even regarded as crimes: if governments wanted to wage a war on *real* crime, they would target too-big-to-fail corporations and too-big-to-jail plutocrats, even states themselves.").

[73] BAARS, *supra* note 62, at 421.

[74] *See generally* ALTHUSSER, *supra* note 41.

[75] *See generally* CRIMES OF THE POWERFUL, *supra* note 37; *see also* HANDBOOK, *supra* note 52; BITTLE ET AL., *supra* note 57.

[76] NAOMI ZACK, WHITE PRIVILEGE AND BLACK RIGHTS: THE INJUSTICE OF U.S. POLICE RACIAL PROFILING AND HOMICIDE 1–29 (2015).

[77] *See generally* ADRIENNE ROBERTS, GENDERED STATES OF PUNISHMENT AND WELFARE: FEMINIST POLITICAL ECONOMY, PRIMITIVE ACCUMULATION & THE LAW (2016).

corporations' socially harmful behaviors: data crimes. But before moving to the specifics of data crimes, the broader socio-legal context in which digital monopolistic corporations are nested must be examined.

III. THE NEOLIBERAL GOVERNANCE OF MONOPOLISTIC CAPITALISM

Part II of this Article explores the neoliberal governance of capitalist monopolies. Section II.A explores the limits of antitrust regulation. Section II.B explores the intrinsically neoliberal quality of the rule of law. Section II.C introduces the concept of the data crime.

A. Antitrust

In 1905, the United States Supreme Court ruled against the "beef trust," a meatpackers' cartel controlling the meat market, which it found to be fixing prices for their benefit.[78] This was a victory for the federal government, as the Court's ruling recognized Congress' power to regulate monopolies, and thus, to intervene in the economy.[79] This landmark ruling marked the beginning of the period known as the Progressive Era (1890s–1920s),[80] and was followed by other key Court rulings that reshaped U.S. capitalism: *Northern Securities Co. v. United States*,[81] *Standard Oil Co. of New Jersey v. United States*,[82] and *United States v. American Tobacco Co.*[83] Progressive liberal constitutionalism established clear limits around the excessive accumulation of capital in the hands of corporations, using multiple legal arguments ranging from the protection of competition to the defense of inalienable individual and collective rights and freedoms.[84] These progressive tendencies were accentuated after the 1929 stock market crash and WWII.[85] The nineteenth century version of unchained capitalism had been overturned in the U.S. by a politically active state and by courts who

[78] Swift & Co. v. United States, 196 U.S. 375, 402 (1905).
[79] Edward S. Corwin, *The Anti-Trust Acts and the Constitution*, 18 VIRGINIA L. REV. 355, 355 (1932).
[80] *See generally* RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO FDR (1955).
[81] Northern Securities Co. v. United States, 193 U.S. 197 (1904).
[82] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1910).
[83] United States v. American Tobacco Co., 221 U.S. 106 (1969).
[84] TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 37 (2018).
[85] *See* JULIE NOVKOV, CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW, AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS 233 (2001).

acted as arbiters of the truce between workers and capital.[86]

On the other side of the Atlantic, things moved in a different but parallel manner. The political left, organized through unions and parties with parliamentary representation, was incrementally gaining power, especially since the end of WWI.[87] After a period of brutal repression, progressive political parties were increasingly recognized as legitimate actors by the ruling classes.[88] Although the participation of socialist political parties within parliamentary politics lowered the revolutionary expectations of many citizens, socialist political involvement secured significant social and economic rights.[89] However, the influence gained by progressive parties in liberal democracies does not fully explain the emergence of the twentieth-century European welfare state. Why did it happen?

First, the apparition in 1917 of the Soviet Union, a workerist socialist alternative to the bourgeois liberal democracy, fed a new generation of unionists and political organizers. Workers' unions grew, and party members could be counted in the millions across Spain and Germany.[90] They challenged the dominant capitalist status quo, proposing revolutionary laws, organizing strikes, and even taking down the government proclaiming the triumph of the communes (Spain 1934 and 1936–39) and the council republic (Munich Soviet Republic of 1919).[91]

Second, the rise of far-right movements in the 1930s in countries as disparate as Germany, Hungary, Japan, Spain, and the United States shook the foundations of world and local politics, enacting unexpected popular fronts, aligning liberals, socialists, anarchists, communists, and even Christian-democratic parties against governments controlled by the German National Socialist Party or the Italian National Fascist Party.[92] Hence, moved either because of honest convictions or mere expediency, the dominant classes negotiated the grounds of a new social contract with workers' political organizations. Some countries, like Italy, constitutionalized a truce between work and capital, establishing what has been named as the social state with

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[86] *See* K. Sabeel Rahman & Kathleen A. Thelen, *The Rise of the Platform Business Model and the Transformation of Twenty-First-Century Capitalism*, 47 POL. & SOC. 177, 190–91 (2019).

[87] ANDREW THORPE, A HISTORY OF THE BRITISH LABOUR PARTY 114–35 (2015).

[88] *See* ADAM PRZEWORSKI, CAPITALISM AND SOCIAL DEMOCRACY 171–204 (1986).

[89] *See generally* BRUCE DESMOND GRAHAM, CHOICE AND DEMOCRATIC ORDER: THE FRENCH SOCIALIST PARTY, 1937–1950 (2006).

[90] *See generally* BEN FOWKES, COMMUNISM IN GERMANY UNDER THE WEIMAR REPUBLIC (1984).

[91] *See generally* PIERRE BROUÉ, THE GERMAN REVOLUTION, 1917–1923 (2004).

[92] JULIAN JACKSON, THE POPULAR FRONT IN FRANCE: DEFENDING DEMOCRACY, 1934–38, 85–145 (1990).

the anti-fascist constitution of 1947.[93] Antonio Negri described this process as the constitutionalizing of work/labor exploitation and the reconstruction of capital,[94] now under certain restrictions such as the recognition of workers' rights and a limited wealth distribution. Other westernized countries, such as the UK, adopted a social democratic approach to the economy and undertook the nationalization of key economic sectors, from railways to energy and communications.[95]

Thus, the capitalist legal infrastructure of westernized countries was modulated in two ways. First, restrictions on excessive capital accumulation were effectively enforced via a real increase in salaries. Second, as a consequence of the wider recognition of social rights, states ensured generalized access to services such as education, health, and transportation.[96] Of course, this complex legal machinery was dismantled during the neoliberal revolution, unleashing the flow of capital, allowing unchecked accumulation of capital, and fundamentally substituting the controls of public law with corporate self-regulation.[97] During the mid-1970s, the influential Chicago School, well-represented by academics and jurists Robert Bork and Richard Posner, argued against the progressive structure-focused approach to antitrust, and following neoliberal dogma, proposed to replace it with the Chicago price theory.[98] As Lena Khan has pointed out, paraphrasing Posner:

> The essence of the Chicago School position is that "the proper lens for viewing antitrust problems is price theory." Foundational to this view is a faith in the efficiency of markets, propelled by profit-maximizing actors. The Chicago School approach bases its vision of industrial organization on a simple theoretical premise: "[R]ational economic actors working within the confines of the

[93] Donald Sassoon, *The Role of the Italian Communist Party in the Consolidation of Parliamentary Democracy in Italy*, *in* SECURING DEMOCRACY POLITICAL PARTIES AND DEMOCRATIC CONSOLIDATION IN SOUTHERN EUROPE 84–103 (Geoffrey Pridham, ed., 1990).

[94] ANTONIO NEGRI & MICHAEL HARDT, LABOR OF DIONYSUS: A CRITIQUE OF STATE-FORM 45–52 (1994).

[95] *See generally* ROBERT MILLWARD & JOHN SINGLETON, EDS., THE POLITICAL ECONOMY OF NATIONALISATION IN BRITAIN, 1920–1950 (2002).

[96] *See generally* KATHLEEN A. THELEN, UNION OF PARTS: LABOR POLITICS IN POSTWAR GERMANY (1991).

[97] Luiz Carlos Bresser-Pereira, *The Global Financial Crisis, Neoclassical Economics, and the Neoliberal Years of Capitalism*, 7 REVUE DE LA RÉGULATION, CAPITALISME, INSTITUTIONS, POUVOIRS, 20 (2010).

[98] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 15–106 (1978); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 926–35 (1978).

> market seek to maximize profits by combining inputs in the most efficient manner. A failure to act in this fashion will be punished by the competitive forces of the market." [99]

The ideology of the Chicago School was promptly adopted by conservative judges and justices, manifesting as mainstream legal policy under Ronald Reagan's presidency.[100] This legal ideology began to take root in the 1970s, assume control in the 1980s, and then consolidate in the 1990s, resulting in the neoliberal rule of law.[101]

B. The Neoliberal Rule of Law

The neoliberal rule of law could be described as the corporate-friendly and antipublic regulatory governance deployed by neoliberal governments since the 1970s.[102] It implicates a variety of policies and legal strategies intended to strengthen the private sector while stripping down to the minimum the public sector. Among the techniques of neoliberal governance, we find the privatization of public assets,[103] the war on unions,[104] and the dismantlement of the antitrust and financial regulatory framework.[105] The privatization of public monopolies is especially relevant with regards to the rise of privately owned, but state-backed, telecommunication monopolies in countries such as France (Orange, formerly France Telecom) or Spain (Telefónica). There, formerly public assets became gigantic corporations profiting on a global scale.[106] This came along with the strengthening of corporate rights. To exemplify, since the U.S. Supreme Court's landmark decision in 2010, *Citizens United v. the Federal Election Commission,* corporate rights include free speech, especially relevant to

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[99] Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 719 (2016).
[100] *Id.* at 720.
[101] *Id.* at 718–19.
[102] *See* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 65 (2005); Khan, *supra* note 99, at 716.
[103] HARVEY, *supra* note 102, at 65.
[104] *See generally, e.g.*, THOMAS G. ANDREWS, KILLING FOR COAL: AMERICA'S DEADLIEST LABOR WAR 1–19 (2008); TRADE UNIONS IN A NEOLIBERAL WORLD (Gary Daniels & John McIlroy, eds., 2009).
[105] *See* Richard Hofstadter, *What Happened to the Antitrust Movement?*, *in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188 (1965), *reprinted in* THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES (Daniel A. Crane & Herbert Hovenkamp eds., 2013).
[106] Fabio Bulfone, *The State Strikes Back: Industrial Policy, Regulatory Power and the Divergent Performance of Telefonica and Telecom Italia*, 26 J. EUR. PUB. POL'Y 752, 766–67 (2019).

technology companies such as Facebook.[107]

A parallel process to the dismantlement of public monopolies was the privatization of public services. Public entities, such as water treatment plants,[108] the welfare system,[109] aspects of the public education system,[110] or even of the criminal justice system,[111] were externalized into the private sector. The same thing happened to the Internet, which was privatized between 1990 and 2000.[112] That led not only to the private management of digital infrastructure but also to colonization of what is produced in the cyberspace, including what is today considered the most important public utility: data. This has not only impacted the economy, but also the collective imaginary. Another of the neoliberal revolution's priorities was to undermine the power of unions, ending with it a tradition of collective bargaining regulated by public law. The public labor law framework was replaced by a corporate-friendly regulatory framework, where private companies defined the contractual and working conditions between companies and their workers, with little or no state oversight whatsoever.[113] This precarization of working conditions and labor law, along with the extraordinary development of technological surveillance tools, settled the grounds for today's unprotected situation of the digital proletariat.[114]

The neoliberal rule of law institutionalized forms of previously illegal macro-speculative flows of capital. For some, the process which unleashed the movement of capital in the early 2000s is explained as a consequence of de-regulation, or more appropriately, neoliberal governance of the financial sector in the 1980s and 1990s.[115] However, what actually happened was a

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[107] Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).

[108] NAT'L RES. COUNCIL, PRIVATIZATION OF WATER SERVICES IN THE UNITED STATES: AN ASSESSMENT OF ISSUES AND EXPERIENCE, at 20 (2002).

[109] *See generally* SHEILA B. KAMERMAN & ALFRED J. KAHN, PRIVATIZATION AND THE WELFARE STATE (1989).

[110] *See generally* ANTONI VERGER, CLARA FONTDEVILA & ADRIÁN ZANCAJO, THE PRIVATIZATION OF EDUCATION: A POLITICAL ECONOMY OF GLOBAL EDUCATION REFORM (2016).

[111] *See generally* Veena Dubal, *The Drive to Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco's Taxi & Uber Economies*, 38 BERKELEY J. EMP. & LAB. L. 73 (2017).

[112] Rajiv C. Shah & Jay P. Kesan, *The Privatization of the Internet's Backbone Network,* 51 J. BROADCASTING & ELEC. MEDIA 93, 95–100 (2007).

[113] *See generally* SCOTT LASH & JOHN URRY, THE END OF ORGANIZED CAPITALISM (1987); TREBOR SCHOLZ, UBERWORKED AND UNDERPAID: HOW WORKERS ARE DISRUPTING THE DIGITAL ECONOMY (2017).

[114] *See generally* SCHOLZ, *supra* note 113.

[115] *See* ÖZGÜR ORHANGAZI, *Financial Deregulation and the 2007–08 US Financial Crisis*, *in* THE DEMISE OF FINANCE-DOMINATED CAPITALISM, 289–307 (2015).

transfer of sovereignty over economic matters, from states to corporations.[116] Financial providers, banks, and venture funds were granted self-regulatory powers.[117] Notwithstanding the incalculable social harm caused by the criminal speculative activities of financial providers and creditors during the 2007–2008 global financial crisis, a mere forty-seven bankers went to jail (and of these, half were from Iceland).[118] Despite the tremendous damage of the global financial crisis, estimated at $22 trillion in the U.S. alone,[119] and the theatrical show-trial of Bernie Madoff, speculative business remained open as usual.[120] Venture capital firms reoriented their capital from the land rentier economy to the tech rentier economy.[121]

Taking advantage of the crisis and confusion caused by the collapse of the dot-com bubble and the 2008 crisis, tech corporations grew in a capital-rich world unbounded by the circulation of goods and characterized by the rise of tech-rentier capitalism controlled by global speculators.[122] These corporations have comfortably deployed their activities in open markets, with weak unions, and with workers rapidly losing formerly concrete rights. Digital capitalists have skillfully exploited the neoliberal state's legal architecture, and when they have been strong enough, they have criminally challenged it by taking advantage of globalization. In other words, digital capitalists have been exploiting both the erosion of state sovereignty and the fragmentation of the working class.[123]

The neoliberal rule of law model has been incapable of intervening and regulating the digital economy or prosecuting the crimes of digital corporations. So far, the timid (and never punitive—although this might change) measures of the vestigial federal antitrust agencies have been unable to stop the illegal activities of powerful corporations. Companies who

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[116] *See id.*

[117] Julia Black, *Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World*, 54 CURRENT LEGAL PROBS. 103, at 103–05 (2001).

[118] Laura Noonan, Cale Tilford, Richard Milne, Ian Mount & Peter Wise, *Who Went to Jail for Their Role in the Financial Crisis?,* FIN. TIMES (Sept. 20, 2018), https://ig.ft.com/jailed-bankers/ [https://perma.cc/RBV9-APGE].

[119] U.S. GOV'T ACCOUNTABILITY OFF., FINANCIAL REGULATORY REFORM: FINANCIAL CRISIS LOSSES AND POTENTIAL IMPACT OF THE FRANK-DODD ACT (2013), https://www.gao.gov/products/gao-13–180 [https://perma.cc/NS29-4KBY].

[120] *See generally* COLLEEN P. EREN, BERNIE MADOFF AND THE CRISIS: THE PUBLIC TRIAL OF CAPITALISM (Stanford Univ. Press, 2017).

[121] *See generally* Jathan Sadowski, *The Internet of Landlords: Digital Platforms and New Mechanisms of Rentier Capitalism*, 52 ANTIPODE 562 (2020).

[122] *See generally* Kean Birch, *Technoscience Rent: Toward A Theory of Rentiership for Technoscientific Capitalism*, 45 SCI., TECH. & HUMAN VALUES 3 (2020).

[123] *See generally* Kathleen A. Thelen, *Regulating Uber: The Politics of the Platform Economy in Europe and the United States*, 16 PERSPECTIVES ON POL. 938 (2018).

dominate the global market, like Google, obtain huge profits from this situation, and maintain near-absolute technological dominance in fields such as machine learning. But perhaps what is more important is that the neoliberal state has been ideologically disarmed, having stripped itself of the most fundamental sovereign instruments to intervene in national economic processes that occur within its borders. This disempowerment came with no adequate legal instruments to force corporations to comply with law, nor make them accountable for their violations. As a result, big tech monopolists can impose their legal ideology—the western version of digital capitalism—or as it has been called: the silicon doctrine.[124]

The crushing power of contemporary technology monopolies invites comparison, with only slight hyperbole, to the notorious Ludlow massacre,[125] fictionalized in D.W. Griffith's 1916 film masterpiece, *Intolerance*.[126] Perhaps this scenario of dystopian digital dominance explains the state's antitrust backlash. Many scholars, activists, and political organizations are turning back to the study of the old legal progressive era.[127] As Campbell Jones observes, the return of economic planning has arrived.[128] Formerly vilified nationalization and economic planning policies are attracting attention and are once again being discussed seriously. Hence, old ideas and new formulas are being evaluated to counter technological capitalism and its unbridled, elusive power. Disciplines as different as politics, economics, communication, engineering, urban studies, and sociology are taking part. Now we are prepared to deal with the relevant question: What are the crimes inherent to digital capitalism?

Section II.C examines data crimes. The concept encompasses two kinds of criminogenic behaviors from which digital corporations have especially benefited. The first kind of data crime involves privacy violations and data mismanagement. The second kind relates to the breaching of competition rules. These two types of violations have been traditionally

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[124] Jiménez, *supra* note 27, at 322.

[125] *See generally* ANDREWS, *supra* note 104.

[126] JAMES C. OLESON, *Writing History with Lightning: D. W. Griffith's Intolerance and the Imagined Past*, *in* INTOLERANCE, POLEMICS, AND DEBATE IN ANTIQUITY: POLITICO-CULTURAL, PHILOSOPHICAL, AND RELIGIOUS FORMS OF CRITICAL CONVERSATION IN THE ANCIENT NEAR EASTERN, BIBLICAL, GRAECO-ROMAN, AND EARLY-ISLAMIC WORLD 546 (George van Kooten & Jacques van Ruiten eds., 2019).

[127] *See generally* Konstantin Medvedovsky, *Hipster Antitrust: A Brief Fling or Something More?*, COMPETITION POL'Y INT'L (Apr. 17, 2018), https://www.competitionpolicyinternational.com/hipster-antitrust-a-brief-fling-or-something-more/ [https://perma.cc/4VNZ-5MLS]; Lina Khan, *Sources of Tech Platform Power*, 2 GEO. L. TECH. REV. 325 (2018).

[128] *See generally* Campbell Jones, *Introduction: The Return of Economic Planning*, 119 S. ATL. Q. 1 (2020).

presented as disconnected with no interdependency whatsoever. But this has changed in the hands of digital capitalists who have exploited their control over data to seize control of market dominance.

C. Data Crimes

Orla Lynskey was among the few scholars who, as early as 2014, called attention to the key role data was playing in the shape of a new form of corporate power.[129] Her works analyzing the political and legal roots of the EU's General Data Protection Regulation ("GDPR")[130] laid the foundation for her conceptualization of a new and influential form of corporate power: data power. The concept is used to describe the power digital corporations exert on politics, society, and markets, relying on their dominant position over data management. Lynskey justified her decision to employ the notion of data power instead of following alternatives such as platform or market power, because:

> Whereas market power concerns the constraints placed on a company by its competitors and consumers on a particular market and on the economic harms that may follow from the exercise of such power, a more comprehensive conception of power is needed in order to capture adequately the power that data-intensive companies wield. Data power is a multifaceted form of power available to digital platforms, arising from their control over data flows. As online platforms act as an interface between their various constituents (content providers, advertisers, individual users, etc.), they are in a unique position to control the flow of information between participants in the digital ecosystem, and to gather data about the actions of each of these parties in the digital sphere.[131]

As Lynskey explained, control of user data by digital corporations grounds their dominance over markets and strengthens their political influence.[132] For her, a revaluation of data protection and competition laws

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[129] *See generally* Orla Lynskey, *Deconstructing Data Protection: The 'Added-Value' of a Right to Data Protection in the EU Legal Order*, 63 INT'L & COMP. L. Q. 569 (2014).

[130] Council Regulation 2016/679 of 27 April 2016 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) 1, 43–45, 87 [Hereinafter GDPR].

[131] Orla Lynskey, *Grappling with "Data Power": Normative Nudges from Data Protection and Privacy*, 20 THEORETICAL INQUIRIES L. 189, 196 (2019).

[132] *Id.*

is required to adequately regulate the rising "platform power."[133] However, one question arises: Is that even possible? Some of the biggest tech companies—including Alphabet, Amazon, Apple, Facebook, and Microsoft—have achieved their dominant position through the violation of data and competition laws.[134] And despite being found guilty, those companies not only have not stopped their activities, but persist in them.[135] They recidivate deliberately and repeatedly. As demonstrated in this Article, countless court rulings, institutional reports, and academic works shows that the relationship between digital corporations and crime is not casual, but structural.

This Article goes one step further from Lynksey's notion of data power, a situation of corporate domination that, in Lynskey's opinion, could be regulated.[136] Instead, this Article reconsiders data power as the consequence of a deliberate criminal strategy, fundamental to digital capitalism, inseparable from its business model, and therefore, uncorrectable with conventional means. This criminal strategy manifests in *data crimes*. Data crimes relate to upstream and downstream data operations, data extraction, trading, management, processing, and analysis (among others). That is, data crimes involve a variety of behaviors, processes, mechanisms, actions, and actors, all of them necessary to perpetrate an abusive, unlawful, and exploitative data extraction. These operations aim to reach a socially harmful market domination. In short, data crimes are the corporate violation of data and competition rules, aiming to seize a socially harmful dominant position. However, before outlining this argument, several points central to an understanding of data crimes must be clarified to specify how this form of criminality relates with the material conditions of digital capitalism's globalized political economy.

For some, cyberspace, and with it the digital economy, should not be regulated following the same rules as the "real world." This position is well represented by John Perry Barlow's "Declaration of the Independence of Cyberspace," in which Barlow fiercely advocates for a libertarian utopian cyberspace, completely free of state interference:

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[133] Orla Lynskey, *Regulating Platform Power*, LSE Working Papers (2017); Francisco Costa-Cabral & Orla Lynskey, *Family Ties: The Intersection Between Data Protection and Competition in EU Law*, 54 COMMON MKT. L. REV. 11, 30 (2017).

[134] *See generally Competition Law and Data*, AUTORITÉ DE LA CONCURRENCE & BUNDESKARTELLAMT (May 10, 2016) (Ger.).

[135] Natasha Lomas, *Google's Adtech Targeted by Publisher Antitrust Complaint in EU,* TECHCRUNCH (Feb. 11, 2022), https://techcrunch.com/2022/02/11/epc-google-antitrust-complaint/ [https://perma.cc/926Y-PWB3].

[136] *Id.*

> Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather. We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear. Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours. We did not invite you. You do not know us, nor do you know our world. Cyberspace does not lie within your borders. Do not think that you can build it, as though it were a public construction project. You cannot. It is an act of nature and it grows itself through our collective actions.[137]

At the time Barlow issued his Declaration, it was not difficult to see cyberspace as a utopian immaterial place, disentangled from the "real world." However, today we are aware of how deeply connected the digital and analogical spheres are by the same material conditions of exploitation. For instance, cyberspace would not exist without what has been labeled as the physical Internet, which among other things includes networks, data centers, energy plants, and of course the millions of workers feeding the machinery of digital capitalism. Despite all the evidence, Barlow's cyber-libertarianism has been Silicon Valley's mantra for years, producing today's disastrous situation of corporate dominance.

Following Joseph Sommer and Frank H. Easterbrook,[138] this Article also rejects the idea of cyberlaw as a specific and differentiated body of law. Cyberspace is as material as the house you live in or the road you often drive. It is a space that, although digital, is hosting palpable material relations of production. For instance, as these lines are written under the coronavirus quarantine, thousands of workers have been told not to go to their working places and instead, telecommute. Cyberspace exists, for sure, but as a very material place that should be subjected to the same rule of law as anywhere

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[137] John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. BLOG (Feb. 8, 1996), https://www.eff.org/cyberspace-independence [https://perma.cc/RZ48-LN63].

[138] Joseph H. Sommer, *Against Cyberlaw,* 15 BERKELEY TECH. L.J. 1145, 1147 (2000); *see* Frank. H. Easterbrook, *Cyberspace and the Law of The Horse*, U. CHI. LEGAL F. 207, 208 (1996) (concluding that the best approach to cyber law is to develop a sound intellectual property law and then apply it to the Internet).

else. Hence, data crimes should not be considered as cybercrime, but as crime. It is an extremely serious form of criminality causing tremendous social harm, affecting the social and economic life of countries and continents, limiting freedom and technological development.[139]

This Article recognizes that the taxonomy of crimes here proposed entails multiple nuances and raises relevant technical questions: should data crimes be considered a crime? If there is a crime, where does it occur? What principle should be followed to prosecute such kinds of crimes? Territoriality? Active personality? Passive personality? These are utterly important questions given the nearly universal extension of digital business, the newness of coexistence with the digital sphere, and the pace of technological changes—all of which are difficult to answer.

There is also another thing to consider. As we will see, corporate criminal liability—and more widely speaking, the way we think of criminal law—has been mediated by the capitalist ideology. This has helped to shape what Baars has labeled as a structure of corporate irresponsibility.[140] Thinking about the criminalization of data crimes entails considerable technical challenges, but before we can even consider those technical aspects, we should carefully think about the nature of the crimes of digital capitalism. That is the aim of Part III. Section III.A examines the ways in which digital corporations have violated privacy laws, while Section III.B focuses on the violation of competition laws. Part III scrutinizes Facebook, one of the most successful (and representative) companies of digital capitalism.

IV. DATA PRIVACY

Until recently, the different regulatory frameworks regarding privacy rights were mostly intended to protect individuals from state surveillance. As early as 1970, the nascent European Community already had a robust data protection legal framework, reflecting the legal development of the Federal German Republic, prone to demonstrate its "democratic" credentials in contraposition of the Democratic German Republic, accused of operating mass surveillance over its population.[141] The right-based European legal regime firmly advocated for a strong take on citizens' control

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[139] *See* Nick Couldry & Ulises Mejias, *Data Colonialism: Rethinking Big Data's Relation to the Contemporary Subject*, 20 TELEVISION & NEW MEDIA 336, 336 (2019).

[140] Baars, *supra* note 32, at 421 (citing Steve Tombs & David Whyte, *The Corporate Criminal. Why Corporations Must Be Abolished in* KEY IDEAS IN CRIMINOLOGY (2015)).

[141] DAVID H. FLAHERTY, PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES: THE FEDERAL REPUBLIC OF GERMANY, SWEDEN, FRANCE, CANADA, AND THE UNITED STATES 21–34 (2014).

over their data and privacy.[142] However, the legislation was mostly targeting the public management of data, and hence it was insufficient to tackle the corporate data revolution.[143]

The regulation of data privacy and data rights in the U.S. was, although different in its motivation, similar in its results.[144] Publicly managed data was regulated at a federal level, whereas privately managed data remained fragmented because it was state regulated due to intense corporate lobbying.[145] So, by the time that the surveillance capitalism arrived, making data one of the most valuable assets—and consequently followed by a plethora of data-thirsty corporations—public authorities were disarmed and unprepared for the digital capitalist offensive.[146]

In 2012, amid a palpable evolution of the digital economy, the European Commission proposed a comprehensive reform of its data protection rules which would result in the General Data Protection Regulation.[147] Consistent with previous European legislation on privacy, the text of the GDPR proposes management of data that, while not opposed to its processing and commodification, does require the express consent of users, conceived not as consumers but as citizens with rights.[148] In the EU, the right to privacy is considered a fundamental right, a key aspect of human dignity.[149] That is the ideological inspiring principle of the GDPR:

> The protection of natural persons in relation to the processing of personal data is a fundamental right. Article 8(1) of the Charter of Fundamental Rights of the European Union (the 'Charter') and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) provide that everyone has the right to the protection of personal data concerning him or her.[150]

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[142] *Id.*

[143] *See generally* John Shattuck & Mathias Risse, *Privacy, Personal Data, and Surveillance: Reimagining Rights & Responsibilities in the United States,* CARR CTR. HUM. RTS. POL'Y (2021).

[144] *See id.* at 15–22.

[145] The California Consumer Privacy Act of 2018 exemplifies fragmented, state regulation. *Id.* at 22.

[146] *See id.* at 22–25.

[147] European Commission Press Release IP 12/46, Commission Proposes a Comprehensive Reform of Data Protection Rules to Increase Users' Control of their Data and to Cut Costs for Businesses (Jan. 25, 2012), https://ec.europa.eu/commission/presscorner/detail/en/IP_12_46 [https://perma.cc/6C7P-BLSY].

[148] *See generally* Paul Schwartz, *Global Data Privacy: The EU Way*, 94 N.Y.U. L. REV. 771 (2019).

[149] *Id.* at 772.

[150] GDPR, *supra* note 130, at 1.

Even more important is what is mentioned in Article 8 of the Charter of Fundamental Rights of the European Union:

> Article 8 - Protection of personal data 1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority.[151]

Hence, from a legal perspective, a privacy violation is a violation of a fundamental right, at least for those living in the European Union.[152] For its part, the U.S. was following a different path. A document written by the EU's directorate general for internal policies with the explicit title of *A Comparison Between U.S. and EU Data Protection Legislation for Law Enforcement Purposes* pointed at the gap between the EU's and U.S.'s legal frameworks:

> The most prominent and important divergence concerns the constitutional protection of personal data. While data protection and privacy are fundamental rights in the EU and are also applicable in the LE context, there is no equivalent protection in the US. The EU's understanding of these rights have been shaped since the 1970s by comprehensive case law of the ECtHR and was been further developed in recent years through important EU instruments such as the Directive 95/46/EC, the TFEU and the Charter of Fundamental Rights, as well as the EU courts' case law. The US, with its restrictions to the protection of the Fourth Amendment, through the Third-Party Doctrine, and the exclusion of non-US persons from both the Fourth Amendment and the Privacy Act protection, follow a very different approach, which is contrary to the EU's perspective of privacy and data protection as comprehensive fundamental rights.[153]

The EU's data protection rules became the role model of digital socio-liberal legislation. It does not prevent corporations from managing private

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[151] *Id.* art. 8.

[152] *See id.*

[153] *Directorate-General for Internal Policies Study: A Comparison Between US and EU Data Protection Legislation for Law Enforcement Purposes*, at 1, 67 COM (2015).

data, but, in coherence with the comprehensive EU's social human rights frameworks, it protects and empowers citizens from blatantly abusive corporate behaviors, conferring them agency over their data, as well as confirming EU's jurisdiction, and hence legal protection, over EU citizens' data.[154] This agreement, which received the support of the broad European Parliament's ideological spectrum, was harshly opposed by Silicon Valley, triggering a legal and political war between EU institutions and Silicon Valley, evidencing with it a wider geopolitical conflict.[155] In the end, as has been revealed, what was in dispute were the terms under which European users' data—one of the most valuable assets of the digital economy—would be harvested. In Section III.A, this Article briefly summarize some aspects of Facebook's litigation related to its, in the words of Germany's national competitor regulator, "exploitative business."[156]

V. FACEBOOK DATA CRIMES

A. Facebook and Privacy Violations

Facebook is one of the corporations obtaining great benefit from breaching privacy laws.[157] It has built a virtual monopoly on communication out of the voluntary and involuntary exploitation of users' and non-users' data.[158] Moreover, it can be said that privacy violation is written in its DNA.[159] Facebook's predecessor was FaceMash, an extraordinarily simple web application.[160] It displayed the photo of two Harvard students at a time, allowing its users to choose the "hottest" of them.[161] Its coder, then-Harvard-undergraduate Mark Zuckerberg, was accused by Harvard's Administrative Board of copyright and privacy violation because he used, without permission, photos from nine Harvard Houses uploaded to the web.[162] In declarations to a Harvard newspaper, Zuckerberg stated that "I understood

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[154] *See id.* at 11–13.

[155] *See e.g.*, Max Schrems, *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/5JT5-KG8M].

[156] Bundeskartellamt [FCO] [Federal Cartel Office] Feb. 6, 2019, B6-22/19.

[157] *See generally* House of Commons, *supra* note 5, at 111.

[158] *See id.*

[159] Katharine Kaplan, *Facemash Creator Survives Ad Board*, HARV. CRIMSON (Nov. 13, 2003), https://www.thecrimson.com/article/2003/11/19/facemash-creator-survives-ad-board-the/ [https://perma.cc/R2XZ-WF2H].

[160] *Id.*

[161] *Id.*

[162] *Id.*

that some parts were still a little sketchy and I wanted some more time to think about whether or not this was really appropriate to release to the Harvard community."[163]

Facebook's criminal history could be divided into three different periods: Disruption (2004–2007), Suspicion (2008–2015), and Domination (2015–Present).[164] The distinction of these three periods is based on relevant episodes of Facebook's long history of litigation, which are in fact landmarks of contemporary digital capitalism.[165] Each of them represents a qualitative leap in Facebook's scale of privacy violation.[166]

Despite the FaceMash precedent, when Facebook appeared in 2004, the public was not really concerned with privacy issues.[167] In fact, media and society alike were charmed with Facebook's big leap forward in social networking.[168] In an extraordinarily short period, Facebook surpassed its direct competitor, the microblog site MySpace.[169] Controversy, however, didn't arise until November 2007, just one month after Microsoft heavily invested in the company,[170] when Facebook launched Beacon, a new advertisement system.[171] Third-party sellers provided Facebook with information about online activities of its clients, mainly purchases.[172] Facebook then contrasted that information with its database and broadcast that information through its users' newsfeed and profile, without user's consent.[173] In other words, Facebook was profiting off of users' private

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[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] Catherine Dwyer, Starr Roxanne Hiltz & Katia Passerini, *Trust and Privacy Concern Within Social Networking Sites: A Comparison of Facebook and Myspace*, AMCIS 2007 PROCEEDINGS, 339 (2007).
[170] Dan Fromer & Rani Molla, *It's Been 10 Years Since Microsoft Invested in Facebook Now Facebook is Worth Almost as Much as Microsoft*,VOX (Oct. 23, 2017, 6:00 AM EDT), https://www.vox.com/2017/10/23/16412108/facebook-microsoft-2007-investment-market-cap-chart [https://perma.cc/27R7-LAA6].
[171] Juan C. Perez, *Facebook's Beacon More Intrusive Than Previously Thought*, PCWORLD (Nov. 30, 2007), https://www.pcworld.idg.com.au/article/200756/ca_facebook_beacon_more_intrusive_than_previously_thought/?pp=2 [https://perma.cc/R4BR-AFNS]; Brad Stone, *Facebook Executive Discusses Beacon Brouhaha*, N.Y. TIMES (Nov. 29, 2007), https://bits.blogs.nytimes.com/2007/11/29/facebook-responds-to-beacon-brouhaha/ [https://perma.cc/83TR-JX9J].
[172] Perez, *supra* note 171; Stone, *supra* note 171.
[173] Perez, *supra* note 171; Stone, *supra* note 171.

data.[174] This resulted in a class-action lawsuit ending in a settlement in which Facebook agreed to create a $9.5 million fund for a privacy foundation.[175] This was widely criticized by privacy rights organizations, such as the Electronic Privacy Information Center ("EPIC"), which stated, "With this structure, the proposed Privacy Foundation will not be sufficiently independent of Facebook to serve as an effective tool for consumer privacy protection."[176]

The second phase of Facebook's criminal saga with the courts began with a complaint filed before the Irish Data Protection Commissioner in 2013 by one of its users, a law student named Max Schrems. Schrems, who is also a privacy activist, was concerned with his data being transferred from Facebook's subsidiary in Ireland to Facebook's data servers which were in the U.S. As EPIC reported:

> [Schrems] contended in his complaint that the law and practice in force in that country did not ensure adequate protection of the personal data held in its territory against the surveillance activities that were engaged in there by the public authorities. Mr Schrems referred in this regard to the revelations made by Edward Snowden concerning the activities of the United States intelligence services, in particular those of the National Security Agency ('the NSA') . . . Since the Commissioner took the view that he was not required to investigate the matters raised by Mr Schrems in the complaint, he rejected it as unfounded. The Commissioner considered that there was no evidence that Mr Schrems' personal data had been accessed by the NSA.[177]

Schrems appealed the rejected complaint before the Irish High Court, which referred several questions to the Court of Justice of the European Union ("CJEU").[178] What started as an individual complaint

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[174] Dawn Jutla, *Layering Privacy on Operating Systems, Social Networks, and Other Platforms by Design*, 3 IDENTITY INFO. SOC'Y 319, 320 (2010)*; see* Couldry & Mejias, *supra* note 139, at 336.

[175] Lane v. Facebook, Inc., 696 F.3d 811, 816 (9th Cir. 2012).

[176] Letter from Electronic Privacy Information Center, Center for Digital Democracy, Consumer Action, Consumer Federation of American, Privacy Rights Clearinghouse & Patient Privacy Rights, to Honorable Richard G. Seeborg, U.S. Dist. Ct. for the N. Dist. of Cal. San Jose Div,.Lane v. Facebook, Proposed Settlement, Case No. 5:08-CV-03845-RS (Jan. 15, 2010), https://epic.org/wp-content/uploads/privacy/facebook/EPIC_Beacon_Letter.pdf [https://perma.cc/9WYR-H78A].

[177] Case C-362/14, Schrems v. Data Prot. Comm'r, ECLI:EU:C:2015:650¶¶ 28–29 (Oct. 6, 2015).

[178] *Id.*

against a potential privacy violation ended in a judicial decision of global impact. The 2014 *Schrems v. Data Protection Commissioner* Rule of the CJEU declared the Safe Harbor privacy principles, framing the data flows between the EU and U.S. invalid. In the opinion of Yves Bot, the Court's Advocate General:

> [T]he scale and scope of United States surveillance programmes raised concerns over the continuity of protection of personal data lawfully transferred to the United States under the safe harbour scheme. It observed that all companies involved in the PRISM programme, which grant access to United States authorities to data stored and processed in the United States, appear to be certified under the safe harbour scheme. According to the Commission, this has made the safe harbour scheme one of the conduits through which access is given to United States intelligence authorities to the collecting of personal data initially processed in the European Union . . . It follows from these factors that the law and practice of the United States allow the large-scale collection of the personal data of citizens of the Union which is transferred under the safe harbour scheme, without those citizens benefiting from effective judicial protection.[179]

The *Schrems* case embodied the transition to a new era of global data politics. It became clear that Facebook was a major actor in the new geopolitical game where data was fiercely disputed. Facebook's next data privacy scandal arrived just two and half years later, opening the era of constant massive privacy violation. On May 7, 2017, an article published by Carolle Cadwalladr in *The Guardian* flagged the attention of the global public with resounding words: "A shadowy global operation involving big data, billionaire friends of Trump and the disparate forces of the Leave campaign influenced the result of the EU referendum. As Britain heads to the polls again, is our electoral process still fit for purpose?"[180] That was the beginning of the Cambridge Analytica scandal, a case that forever changed politics, media, populism, and of course, data and privacy.

A year and a half later, on October 24, 2018, the Information Commissioner Office ("ICO"), UK's privacy watchdog, fined Facebook £500.000 (the maximum fine) for its involvement in the Cambridge

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[179] *Id.* ¶¶157–58.

[180] Carole Cadwalladr, *The Great British Brexit Robbery: How Our Democracy Was Hijacked*, GUARDIAN (May 7, 2014), https://www.theguardian.com/technology/2017/may/07/the-great-british-brexit-robbery-hijacked-democracy [https://perma.cc/K84M-GN4G].

Analytica scandal.[181] As reported in the ICO's investigation into the use of data analytics in political campaigns places,[182] the data of around 87 million Facebook users, of which one million were UK citizens and 300,000 were Australians,[183] was harvested by consultancy company Cambridge Analytica using deceptive tactics and with the complicity of Facebook.[184] The data was used to micro-target users with private messages and content during two specially contested political campaigns: the UK's EU membership referendum and the 2016 U.S. presidential election.[185] In a declaration before the Digital, Culture, Media and Sport International Grand Committee, Elizabeth Denham, ICO's commissioner, stated:

> We fined Facebook because it allowed applications and application developers to harvest the personal information of its customers who had not given their informed consent—think of friends, and friends of friends—and then Facebook failed to keep the information safe . . . It is not a case of no harm, no foul. Companies are responsible for proactively protecting personal information and that's been the case in the UK for thirty years . . . Facebook broke data protection law, and it is disingenuous for Facebook to compare that to email forwarding, because that is not what it is about; it is about the release of users' profile information without their knowledge and consent.[186]

In 2018, the Electronic Privacy Information Center submitted an amicus curiae brief in a "privacy suit brought against Facebook to challenge the company's use of cookies to track Facebook users even after they have logged out of the platform."[187] Facebook's product management director admitted to the fact but considered it essential to improve "product and services."[188] On January 29th, *The New York Times* reported that Facebook

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[181] INFO. COMM'RS OFF., INVESTIGATION INTO THE USE OF DATA ANALYTICS IN POLITICAL CAMPAIGNS A REPORT TO PARLIAMENT (Nov. 8, 2018) (UK).

[182] *Id.*

[183] *Cambridge Analytica: Australia Takes Facebook to Court Over Privacy*, BBC (Mar. 9, 2020), https://www.bbc.com/news/technology-51799738 [https://perma.cc/C7QP-N7NV].

[184] *Id.*

[185] *Id.*

[186] House of Commons, *supra* note 5, at 23.

[187] Brief for the United States as *Amicus Curiae* Supporting Petitioners at 1, Perrin Davis v. Facebook, Inc., 17-17486, No. 85 (9th Cir. Apr. 9, 2020).

[188] David Baser, *Hard Questions: What Data Does Facebook Collect When I'm Not Using Facebook, and Why?* META (Apr. 16, 2018), https://about.fb.com/news/2018/04/data-off-facebook/ [https://perma.cc/3XJ2-V75J].

settled a lawsuit that would cost the company around $550 million.[189] Facebook violated Illinois' privacy law with its facial recognition tool; basically, Facebook enabled their auto-tagging tool without consent, and with it, harvested a massive amount of sensitive biometric data.[190] The United States Court of Appeals for the Ninth Circuit stated, "[T]he panel concluded that the development of a face template using facial-recognition technology without consent (as alleged in this case) invades an individual's private affairs and concrete interests."[191] California Attorney General Xavier Becerra petitioned the San Francisco Superior Court to order Facebook to comply with a subpoena issued by the California Attorney General on June 17, 2019:

> In 2018, California Attorney General Xavier Becerra launched an investigation into the business practices of Facebook Inc., following widespread that Facebook allowed third parties to harvest Facebook's user's private information. What initially began as enquiry into the Cambridge Analytica scandal expanded over time to become an investigation into whether Facebook has violated California law, by among other things, deceiving users, and ignoring its own policies and allowing third parties broad access to user data.[192]

One month after the subpoena was issued, the U.S. Federal Trade Commission ("FTC") imposed an unprecedented $5 billion penalty on Facebook, as "'[d]espite repeated promises to its billions of users worldwide that they could control how their personal information is shared, Facebook undermined consumers' choices.'"[193] Multiple investigations against

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[189] Natasha Singer & Mike Isaac, *Facebook To Pay $550 Million To Settle Facial Recognition Suit,* N.Y. TIMES (Jan. 29, 2019).

[190] Patel v. Facebook, Inc., 932 F.3d 1264, 1275 (9th Cir. 2019).

[191] Patel v. Facebook, Inc., D.C. No. 3:15-cv-03747-JD, No. 18-15982, at *2 (9th Cir. Aug. 8, 2019).

[192] Petition to Enforce Investigative Subpoena and Investigative Interrogatories, California v. Facebook, Inc., Case No. OPF-19-516916 (Cal. Super. Ct. Nov. 16, 2019) at 1, requesting that the court order Facebook Inc. to comply with a subpoena issued by the California Attorney General on June 17, 2019, https://oag.ca.gov/system/files/attachments/press_releases/Filed%20Petition%20to%20Enforce%20re%20Facebook.pdf [https://perma.cc/PX5D-XQZH].

[193] *FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook*, FED. TRADE COMM'N, (July 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions [https://perma.cc/D3CK-X2ZZ]; *see* United States v. Facebook Inc., No. 19-CV-2184, (D.D.C. 2019).

Facebook are still works-in-progress. As evidenced, the breach of privacy laws is common practice among one of the leading tech companies. Facebook is an incorrigible recidivist, and, at least under the EU's perspective, is a human rights violator. Yet Facebook has been heavily fined for its repeated data privacy violations, and under a cost/benefit analysis, the company still wins by breaking the law. It would be a mistake, however, to demonize only a single company for what is a common pattern in the big tech industry. Digital capitalism depends on the appropriation and exploitation of private data; for that reason, it has been defined as surveillance capitalism or information capitalism.[194]

B. Facebook's Problems with Competition Law

One of the defining features of the new digital business was the network effects of the new social media (a service's value increases as the number of users increases), thereby forcing platform companies to escalate, quickly and massively, to make profits. Being dominant in a market was not only beneficial, but the only way to secure profits in the most relevant markets. This fact is eloquently summarized by Peter Thiel: "Competition is for Losers."[195] For Silicon Valley, corporate dominance is a positive attribute that, contrary to what some argue, does not strangle innovation:

> The dynamism of new monopolies itself explains why old monopolies don't strangle innovation. With Apple's iOS at the forefront, the rise of mobile computing has dramatically reduced Microsoft 'decades-long operating system dominance. Before that, IBM's hardware monopoly of the '60s and '70s was overtaken by Microsoft's software monopoly. AT&T had a monopoly on telephone service for most of the 20th century, but now anyone can get a cheap cell phone plan from any number of providers. If the tendency of monopoly businesses were to hold back progress, they would be dangerous and we'd be right to oppose them. But the history of progress is a history of better monopoly businesses replacing incumbents . . . Monopolies drive progress because the promise of years or even decades of monopoly profits provides a powerful incentive to innovate.

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[194] *See, e.g.,* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019); JULIE COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM (2019).

[195] Peter Thiel, *Competition Is for Losers,* WALL ST. J. (Sept. 12, 2014), https://www.wsj.com/articles/peter-thiel-competition-is-for-losers-1410535536 [https://perma.cc/QB9F-N65F].

> Then monopolies can keep innovating because profits enable them to make the long-term plans and to finance the ambitious research projects that firms locked in competition can't dream of.[196]

In the race to dominance, digital capitalism simultaneously broke privacy and competition rules.[197] The problem was that the regulatory framework was not ready (or intended) to contain the youthful, creative, imaginative, and energetic criminal activities of companies like Google or Facebook. Let us remember that the progressive antitrust and antimonopolist rules conceived in the late nineteenth and early twentieth centuries in the U.S. were aimed to tackle not only corporate market power, but also corporate political power. But, as we have seen, the neoliberal revolution, blessed by the Chicago School's intellectuals, dismantled the progressive-era antitrust legislation that could have served to stop tech power.

The consumer-centered approach of the neoliberal hegemonic take on antitrust was: as long as prices are not growing as a result of the lack of competition, everything is fine.[198] This, along with the narrow interpretation of entry barriers—which is the price a company has to pay to enter a particular market—has been useless in the new digital ecosystem of network effects, two-sided markets, and zero-price products.[199] In fact, it was not clear what the commodity or who the client was.[200] For instance, is Facebook Messenger a product offered by Facebook to its clients in exchange for data? Or is Messenger the means to take advantage of resource-rich users by extracting valuable data, which will later be sold to Facebook's real clients: the ones paying for the ads in the platform (making 98% of Facebook's revenues)?[201] Some have considered that digital platforms, such as Facebook, are a good example of two-sided (or multisided) markets, meaning that there are different groups of users benefiting in different ways from the network effects created by the corporation.[202] For others, it is a

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[196] PETER THIEL & BLAKE MASTERS, ZERO TO ONE: NOTES ON STARTUPS, OR HOW TO BUILD THE FUTURE 33 (2014).

[197] Marcus Botta & Klaus Wiedemann, *The Interaction of EU Competition, Consumer, and Data Protection Law in The Digital Economy: The Regulatory Dilemma in the Facebook Odyssey*, 64 ANTITRUST BULL. 428 (2019).

[198] *See generally Commission Report*, supra note 2.

[199] *See id.*

[200] *See id.*

[201] Trefis Team, *What Is Facebook's Revenue Breakdown?*, NASDAQ (Mar. 28, 2019), https://www.nasdaq.com/articles/what-facebooks-revenue-breakdown-2019-03-28-0.

[202] *See generally* Sebastian Wismer, Christian Bongard, & Arno Rasek, *Multi-Sided Market*

place of capitalist exploitation, accumulating users' data.[203] Whether benevolent or evil, as we are about to see, corporate titans such as Facebook have become monopolies.

In 2014, the European Union allowed Facebook's discussed acquisition of WhatsApp (*European Commission v. Facebook*).[204] Two years earlier, Facebook showed its interest in taking on Instagram. Despite the red flags raised by academics and experts, the operation was authorized by U.S. authorities. Both acquisitions strengthened Facebook's dominant position in the online communication market. U.S. and EU authorities decided that this merger was not creating conflicts of competence. In the opinion of the Office of Fair Trading, "the parties' revenue models are also very different. While Facebook generates revenue from advertising and users purchasing virtual and digital goods via Facebook, Instagram does not generate any revenue."[205]

Facebook has an instant messaging application, Messenger, which apparently did not compete with WhatsApp, another instant online messaging app. WhatsApp's business model was officially based on a paying subscription—something that was vaguely enforced, and in fact, WhatsApp was running in the red.[206] Instagram and WhatsApp investors were not pursuing short-term profits. Their patient capital investors were waiting for exponential growth, which would eventually result in market dominance.[207] WhatsApp could then experiment with different approaches to monetizing the platform.[208] Another possibility is that WhatsApp was waiting to be acquired by a large corporation in an adjacent business sector. In this case, an acquisition would provide cash and shares of the purchaser.[209]

Economics in Competition Law Enforcement, 8 J. EUR. COMPETITION L. & PRAC. 257 (Oct. 15, 2016).

[203] Martin Kenney & John Zysman, *The Platform Economy: Restructuring the Space of Capitalist Accumulation*, 13 CAMBRIDGE J. REGIONS, ECON. & SOC'Y *55, 57* (2020).

[204] Commission Decision (EC) No. 139/2004 of Mar. 10, 2014, O.J. (C2014), available at https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf [https://perma.cc/RJC3-SLK9].

[205] OFF. OF FAIR TRADING, ANTICIPATED ACQUISITION BY FACEBOOK INC. OF INSTAGRAM INC., ¶ 23 (Aug. 14, 2012) (UK), https://assets.publishing.service.gov.uk/media/555de2e5ed915d7ae200003b/facebook.pdf [https://perma.cc/VJK3-BM2A].

[206] Kurt Wagner, *Facebook Paid $19 Billion for WhatsApp, Which Lost $138 Million Last Year*, VOX (Oct. 28, 2014), https://www.vox.com/2014/10/28/11632404/facebook-paid-19-billion-for-whatsapp-which-lost-138-million-last-year [https://perma.cc/55WF-7K4Z].

[207] Mark Lemley & Andrew McCreary, *Exit Strategy,* 101 B.U. L. REV. 1, 4–5 (2021).

[208] *See id.* at 5, 45.

[209] *See id.* at 6–7.

This second scenario is what happened.[210] The U.S. and EU merger authorization revealed blatant disinformation about the nature and scope of the new digital corporation's strategies. As the EU Commission documented, these acquisitions, which the Authors of this Article purport are illegal, served to establish monopolistic domination over the flow of data in online communication.[211]

Facebook is now under investigation in the United States for this same reason. On October 22, 2019, New York State Attorney General Letitia James announced that forty-seven attorneys general from states and U.S. territories are investigating Facebook's potential antitrust violations.[212] As will later be demonstrated, the U.S. regulatory bodies governing competition in commerce, the Federal Communications Commission and the Federal Trade Commission, are undertaking their own investigations that extend to other leading companies.[213] As with privacy, competition in commerce law violation is a constant among big tech. Or in other words, a behavior considered as a deviation is rather intrinsic to the digital capitalism business model. No matter how large the fines are, corporations reoffend. What are governments doing to tackle data crimes?

VI. THE DATA PRIVACY AND COMPETITION APPROACH

To be fair, the EU and the U.S. are trying new ways to approach the double-sided question of privacy and competition law violations. In 2016, the competition authorities of France and Germany published a joint document exploring the intimate relation of market power and data.[214] There, the Autorité de la Concurrence and the Bundeskartellamt stated that:

> Recent developments in digital markets have led to the emergence of a number of firms that achieve extremely significant turnovers based on business models which involve the collection and commercial use of (often personal) data. Some of them enjoy a very high share of users in the service sector in which they are active. The Google search engine and the Facebook social

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[210] Chris Hughes, *It's Time to Break Up Facebook*, N.Y. TIMES (May 9, 2019), https://www.nytimes.com/2019/05/09/opinion/sunday/chris-hughes-facebook-zuckerberg.html [https://perma.cc/Z835-VYP5].

[211] *See Commission Report*, *supra* note 2, at 73.

[212] Annie Palmer, *47 Attorneys General Are Investigating Facebook for Antitrust Violations*, CNBC (Oct. 22, 2019), https://www.cnbc.com/2019/10/22/47-attorneys-general-are-investigating-facebook-for-antitrust-violations.html [https://perma.cc/96GY-JLDS].

[213] *See infra* Part IV.

[214] *See* Bundeskartellamt, *supra* note 156.

> network are probably the most prominent examples. While many of the services provided by these firms are marketed as 'free', their use involves in practice making possible the collection of personal information about the users. This has spurred new discussions about the role of data in economic relationships as well as in the application of competition law to such relationships, in particular as regards the assessment of data as a factor to establish market power.[215]

Since then, what was a hypothesis has become EU's official position on the question of data/competition. For instance, in February 2019, Giovanni Buttarelli, the European Data Protection Supervisor, published a short paper titled "This is Not an Article on Data Protection and Competition Law," noting the importance of enhancing the cooperation between competition and data watchdogs to protect markets and individual rights.[216] As he stated, "[W]e are living in a time when we urgently need to get back to the heart of privacy and competition laws to understand how closely they are intertwined and how much they could support each other in tackling some of biggest challenges of today's world." [217] Buttarelli's paper came after the decision of the German Antitrust Authority forbidding Facebook from combining users' data from different sources/platforms under its control, such as WhatsApp or Instagram.[218] The German antitrust authority pointed out how Facebook's disdain for privacy rights or competition rules reflects a deliberate strategy of pursuing domination:

> Using and actually implementing Facebook's data policy, which allows Facebook to collect user and device-related data from sources outside of Facebook and to merge it with data collected on Facebook, constitutes an abuse of a dominant position on the social network market in the form of exploitative business terms pursuant to the general clause of Section 19(1) GWB . . . . As Facebook is a dominant company users cannot protect their data

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[215] *Id.* at 3.

[216] Giovanni Buttarelli, *This is Not an Article on Data Protection and Competition Law*, COMPETITION POL'Y INT'L (Mar. 1, 2019), https://www.competitionpolicyinternational.com/this-is-not-an-article-on-data-protection-and-competition-law-2/ [https://perma.cc/L5NW-AC8W].

[217] *Id.*

[218] *See* Bundeskartellamt, *Case Summary: Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing* (Feb. 15, 2019), https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3 [https://perma.cc/5CX4-MN3Z] (Ger.).

> from being processed from a large number of sources, i.e. they cannot decide autonomously on the disclosure of their data. However, it must be ensured that the interests of the opposite market side are sufficiently considered if a provider is a dominant company which is not subject to sufficient competitive control.[219]

In the same vein, the U.S. Congressional Research Service published a surprisingly critical working paper, stating, "A number of commentators have argued that the significant volume of user data generated by certain digital platforms confers important advantages on established companies . . . . Some commentators have accordingly argued that access to 'big data' can resulting a feedback loop that reinforces the dominance of large firms."[220]

In mid-2019, U.S. media reported that the FTC and the Department of Justice ("DOJ"), both responsible for enforcing U.S. federal antitrust laws, divided responsibility over inquiries into the monopolistic practices of the 'Big Four' (Google, Apple, Facebook, and Amazon).[221] As a result of these investigations, the FTC reached a $5.5 billion settlement with Facebook concerning privacy.[222] There is another FTC antitrust inquiry pending.[223] The FTC complaint states that Facebook "subverted users' privacy choices to serve its own business interests" through a series of deceptive practices.[224] These practices include obtaining data without permission, allowing non-authorized third parties (such as Cambridge Analytica) to use Facebook users' data, and failure to comply with previous FTC orders.[225] The FTC acknowledged that previous fines and oversight mechanisms had not been enough to deter Facebook.[226]

Digital corporations are recalcitrant recidivists. That is why the settlement is not only economic in nature, it also imposes a series of data security obligations, and, what is more important in the opinion of the FTC chairman, "a new corporate governance structure, with corporate and

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[219] *Id.* at 7–12. The Authors propose such disdain is criminal in nature. *See id.*

[220] JAY B. SYKES, CONG. RSCH. SERV., RL45910, ANTITRUST AND "BIG TECH" 7 (2019).

[221] Jason Del Rey, *Why Congress's Antitrust Investigation Should Make Big Tech Nervous*, VOX (Feb. 6, 2020), https://www.vox.com/recode/2020/2/6/21125026/big-tech-congress-antitrust-investigation-amazon-apple-google-facebook [https://perma.cc/Y9D5-PPLJ].

[222] FED. TRADE COMM'N, *supra* note 193.

[223] Complaint at 2, FTC. v. Facebook, Inc., CV 20-3590, 2021 WL 2643627 (D.D.C. Dec. 9, 2020).

[224] *Id.* at 2.

[225] *Id.* at 2–6.

[226] *See* FED. TRADE COMM'N, *supra* note 193.

individual accountability and more rigorous compliance."[227] More recently, the Subcommittee on Antitrust, Commercial and Administrative Law of the U.S. House of Representatives' Committee on the Judiciary launched a series of hearings on "Online Platforms and Market Power."[228] The sixth of these hearings examined the dominance of Amazon, Apple, Facebook, and Google.[229] There, the subcommittee members requested the testimony of the mentioned companies' CEOs (Jeff Bezos, Tim Cook, Mark Zuckerberg and Sundar Pichai, respectively) about the monopolist and dominant practices of their companies.[230] None of them apologized or showed any regret for the proven misbehavior of their companies, nor did they accept responsibility for their corporate crimes.[231] Instead, they drew a sweetened, benevolent, and philanthropic version of digital capitalism built by self-made entrepreneurs, the body and flesh of the new American Dream.[232]

In their testimonies, they denied the accusation of monopolistic behavior. For instance, Zuckerberg defended the acquisition of Instagram and WhatsApp as beneficial not solely for Facebook's own sake, but for those companies, and society in general:

> These benefits came about as a result of our acquisition of those companies and would not have happened had we not made those acquisitions. We have developed new products for Instagram and WhatsApp, and we have learned from those companies to bring new ideas to Facebook. The end result is better services that provide more value to people and advertisers, which is a core goal of Facebook's acquisition strategy.[233]

It is good to bear in mind the different judicial and political instances, such as the German or the European, where those very same acquisitions

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[227] *Statement of Chairman Joe Simons and Commissioners Noah Joshua Phillips and Christine S. Wilson*: In re Facebook, Inc., FED. TRADE COMM'N (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536946/092_3184_facebook_majority_statement_7-24-19.pdf [https://perma.cc/6AWL-UVYU].

[228] *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google: Hearing on H.R. Res. 965 Before the Subcomm. on Antitrust, Commercial, and Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. (2020) [hereinafter *Online Platforms*].

[229] *See id.*

[230] *Id.*

[231] *Id.*

[232] *Online Platforms*, *supra* note 228 (statement of Jeff Bezos, Chief Executive Officer, Amazon, Inc.).

[233] *Id.* at 3 (statement of Mark Zuckerberg, Chief Executive Officer, Facebook, Inc.).

have been denounced as an example of monopolistic behavior.[234] The same hypocritical tone was used in a statement by Pichai:

> At Google, we take pride in the number of people who choose our products and services; we're even prouder of what they do with them — whether it's the 140 million students and educators using G Suite for Education to stay connected during the pandemic . . . the 5 million Americans gaining digital skills through Grow with Google, part of our $1 billion initiative to expand economic opportunity . . . or the millions of small business owners connecting with customers through Google products such as Maps and Search.[235]

Pichai failed to mention that Google violated privacy and competition rules with these same apps.[236]

Multiple governmental and civil society organizations participated in the subcommittee hearings as well.[237] The European Commission Executive Vice-President, Margrethe Vestager (EU's Commissioner for Competition), addressed two statements to the subcommittee.[238] In these brief but densely worded documents, Vestager outlines the EU's stake on the interwoven issue of data and competition, confirming and developing Bertarelli's arguments.

In Vestager's first document, written while she was Commissioner for Competition but not yet Executive Vice-President, she highlighted recent litigation between Europe and Google, specifically the infamous *Google Shopping,*[239] *Android,*[240] and *Google AdSense*[241] decisions regarding the company's abuse of its dominant position in the online shopping services:

> In *Google Shopping*, we found that Google had abused its dominant position as a search engine by treating its own

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[234] *See supra* notes 147–56 and associated text (outlining European position).

[235] *See Online Platforms*, *supra* note 228, at 1 (statement of Sundar Pichai, Chief Executive Officer, Alphabet Inc.).

[236] *See supra* Section II.C.

[237] *See Online Platforms*, *supra* note 228 (listing parties providing statements for the record).

[238] *Online Platforms and Market Power, Part 3: The Role of Data and Privacy in Competition: Hearing on H.R. Res. 965 Before the Subcomm. on Antitrust, Commercial, and Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. 2 (2019) (statement of Margrethe Vestager, Executive Vice President European Commission); *Online Platforms, supra* note 228 (statement of Margrethe Vestager, Executive Vice-President, European Commission).

[239] *Id.* at 2.

[240] *Id.*

[241] *Id.* at 2–3.

> comparison shopping service more favourably in its general search results than rival comparison shopping services in terms of placement and presentation . . . Then last year in *Android*, we found that Google had abused its dominant position by the use of certain contractual obligations and financial incentives aimed at protecting and strengthening Google's dominance in general internet search. . . . In the most recent *Google AdSense* decision . . . the Commission looked at hundreds of contracts and the impact that their terms had on the market. Through an exclusivity provision, the most commercially important customers were contractually prevented from sourcing any search ads from Google's rivals on their websites.[242]

Vestager's second statement, focusing on how the EU was—and/or would be—tackling corporate dominance, is organized in the form of three pillars:

> 1. Continued vigorous competition law enforcement using our existing case framework;
>
> 2. Possible *ex ante* regulation of digital platforms, including additional requirements for those that have a gatekeeper role; and
>
> 3. A possible new competition tool to deal based on case-by-case investigations with structural competition problems across markets which cannot be tackled or addressed in the most effective manner on the basis of the current competition rules.[243]

Although coherent with the EU compromise with a regulated and ordered free market, Vestager's proposed measures do not offer a solution to an ungovernable problem.

For its part, the Australian Competition & Consumer Commission ("ACCC") launched, in 2017, an inquiry into digital platforms looking at the impact that digital moguls had on the Australian media landscape,[244] especially on the ad revenues, which were the basis of the Australian media business model.[245] Australian media organizations sustained that their

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[242] *Id.* at 2.

[243] *Online Platforms*, *supra* note 228, at 3 (statement of Margrethe Vestager, Executive Vice-President, European Commission).

[244] *Digital Platforms Inquiry, Project Overview*, AUSTL. COMPETITION & CONSUMER COMM'N, https://www.accc.gov.au/focus-areas/inquiries-finalised/digital-platforms-inquiry-0 [https://perma.cc/4K9R-9J5Z].

[245] Jake Goldenfein, *The Australian News Media Bargaining Code*, PERISCOPE (June 2021), https://periscopekasaustralia.com.au/briefs/the-australian-news-media-bargaining-code/ [https://perma.cc/P2SP-96JZ].

worrying diminishing benefits resulted from the tech firms' advertising dominance, achieved through the *appropriation* of the contents generated by the media.[246] For the Australian media organizations, tech giants were profiting from the contents that the media were producing without fairly sharing the earnings.[247]

In 2020, the Australian government entrusted the ACCC to draft a bargaining code, an instrument that aimed to ensure fair distribution of earnings through an arbitrated negotiation process between media content producers and digital platforms.[248] Specifically, the law proposed that digital platforms should pay when links to news are shared on social media.[249] The draft was turned into a bill and sent to the Australian Parliament in December 2020.[250] Google and Facebook, fiercely lobbying against the law, threatened the Australian government to withdraw their services from their territory.[251] While Google finally reached an agreement with Australian media corporations, Facebook blocked Australian users from sharing links on its platform, causing a major commotion.[252] The Australian government finally surrendered to the mafia-like tactics used by Facebook, reaching an agreement with the company in February 2021, which meant the bargaining code had to be amended[253] As *The Guardian* reported:

> The changes mean the government may not apply the code to Facebook if the company can demonstrate it has signed enough deals with media outlets to pay them for content. The

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[246] *Id.*

[247] Amanda Meade, *Australia Is Making Google and Facebook Pay for News: What Difference Will the Code Make?*, GUARDIAN (Dec. 8, 2020), https://www.theguardian.com/media/2020/dec/09/australia-is-making-google-and-facebook-pay-for-news-what-difference-will-the-code-make [https://perma.cc/DF89-ZQ3B].

[248] Goldenfein, *supra* note 245.

[249] *Draft News Media Bargaining Code*, AUSTL. COMPETITION & CONSUMER COMM'N, https://www.accc.gov.au/focus-areas/digital-platforms/draft-news-media-bargaining-code#about-the-draft-code [https://perma.cc/CD7L-D92P].

[250] Ryan Browne, *Australia to Force Google and Facebook to Pay News Publishers*, CNBC (July 31, 2020), https://www.cnbc.com/2020/07/31/australia-to-force-google-and-facebook-to-pay-news-publishers.html [https://perma.cc/WE4P-XM73].

[251] *Google Threatens to Withdraw Search Engine from Australia*, BBC (Jan. 22, 2021), https://www.bbc.com/news/world-australia-55760673 [https://perma.cc/RLT9-YMY2].

[252] Josh Taylor, *Treasurer Says Facebook Has 'Damaged Its Reputation' with Australian News Ban*, GUARDIAN (Feb. 17, 2021), https://www.theguardian.com/australia-news/2021/feb/18/facebook-to-restrict-australian-users-sharing-news-content [https://perma.cc/EB6P-SC67].

[253] Livia Albeck-Ripka, *Facebook Agrees to Pay for Murdoch's Australia News Content*, N.Y. TIMES (Mar. 16, 2021), https://www.nytimes.com/2021/03/16/business/media/news-corp-facebook-news.html [https://perma.cc/62SD-XJTV].

> government has also agreed that Facebook and other platforms which would be subject to the code would be given a month's notice to comply.[254]

The consequences of this negotiation process are unsettling. What appeared to be a possibility of regulating digital platforms, ended with a publicly safeguarded economic agreement between media and digital corporations. Moreover, the media bargaining code recognizes and legalizes Australia's technological and infrastructural dependency on tech giants.

As we have seen, the problem of digital capitalism has less to do with some deviant corporations than with a vast network of organized corporate crime. In Silicon Valley, business equates to routinized corporate crime. As Amnesty International stated in its "Letter for the Record" of the aforementioned hearing on antitrust, "Legislators cannot allow Big Tech to continue to abuse its colossal power over our everyday lives. Congress must ensure that public digital space is reclaimed from a powerful and unaccountable few and demand that it is accessible to all, with respect for human rights at its core."[255] Perhaps the notion of data crimes could help us find ways of holding digital corporations accountable for their crimes. In order to consider the viability of the above-proposed data crimes, we must first consider the question of jurisdiction and enforceability. For this reason, the last section will deal with the slippery matter of digital corporations' international criminal liability.

VII. TOWARD BIG TECH'S INTERNATIONAL CRIMINAL LIABILITY

Since the seminal work of Edwin Sutherland to the latest developments in white-collar and corporate crimes, academic contributions have consistently pointed out that corporations are far from being exemplary law-abiding citizens.[256] The issue is even more problematic in the tech industry. The top five tech companies by revenue—Apple, Samsung, Foxconn, Alphabet, and Microsoft[257]—have been involved in serious crimes ranging

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[254] Amanda Meade, Josh Taylor & Daniel Hurst, *Facebook Reverses Australia News Ban After Government Makes Media Code Amendments*, GUARDIAN (Feb. 22, 2021), https://www.theguardian.com/media/2021/feb/23/facebook-reverses-australia-news-ban-after-government-makes-media-code-amendments [https://perma.cc/FMG9-QXP2].

[255] *Online Platforms*, *supra* note 228 (statement of Amnesty International).

[256] *See* W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905 (2019) (discussing the inability of criminal law to incapacitate corporations).

[257] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001); *see Top 10 Largest Tech Companies in the World*, ALL TOP EVERYTHING, https://www.alltopeverything.com/top-10-largest-tech-companies/ [https://perma.cc/ZB2Z-NHE5].

from tax evasion, corruption, labor exploitation, fraud, price-fixing, and mismanagement or discrimination, of user data among others.[258] As we have seen, U.S. authorities discovered and proved that Facebook sold and shared private data with third parties without its users' consent. In 2012, the FTC approved a final settlement with Facebook, which, among other things, required "Facebook to take several steps to make sure it lives up to its promises in the future, including by giving consumers clear and prominent notice and obtaining their express consent before sharing their information beyond their privacy settings, by maintaining a comprehensive privacy program to protect consumers' information."[259]

In Google's case, the EU Commission settled similar competition provisions. As we know, it never worked. A plethora of case law involving digital corporations proves that soft-law and self-regulatory solutions are not enough to deal with digital corporate crime. The companies leading the digital economy—Alphabet, Amazon, Uber, and Facebook—are alleged criminals with many pending claims.[260] They are also well-known recidivists. Even the largest fines—such as the ones imposed upon Google of over €8 billion[261] or the $5.5 billion Facebook agreed to pay in a single settlement[262]—have not caused a perceptible impact on those companies.

Although there is a growing academic and institutional concern with the question of data, competition and corporate domination, this conduct is still not being criminalized. Additionally, corporate criminal liability is still, at best, at a minimum. It is an emergent trend, but poorly developed. Punitive populism has a limit: the powerful. Corporate criminal liability is very narrow. Unlike natural persons, criminal corporations can continue to roam free after breaking the law. Their crimes, despite victimizing hundreds

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[258] *See generally* Rita Barrera & Jessica Bustamante, *The Rotten Apple: Tax Avoidance in Ireland*, 32 INT'L TRADE J. 150 (2018); Jack Linchuan Qiu & Lin Lin, *Foxconn: The Disruption of iSlavery*, 4 ASIASCAPE: DIGIT. ASIA 103 (2017).

[259] *FTC Approves Final Settlement with Facebook*, FED. TRADE COMM'N (Aug. 10, 2012), https://www.ftc.gov/news-events/press-releases/2012/08/ftc-approves-final-settlement-facebook [https://perma.cc/23NY-KBXD].

[260] Daisuke Wakabayashi, Mike Isaac, Karen Weise, Jack Nicas & Sophia June, *13 Ways the Government Went After Google, Facebook and Other Tech Giants This Year*, N.Y. TIMES, https://www.nytimes.com/interactive/2019/technology/tech-investigations.html [https://perma.cc/SWN3-B3PL] (last updated Dec. 16, 2020).

[261] *See* Commission Decision (EC) No. 139/2004 of May 17, 2017, O.J. (C2017), available at https://ec.europa.eu/competition/mergers/cases/decisions/m8228_493_3.pdf [https://perma.cc/KT9D-2UPA]; Commission Decision (EC) No. 1/2003 of June 27, 2017, 2018 O.J. (C9/08), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0112(01)&from=EN [https://perma.cc/KTE2-9KDH].

[262] *United States v. Facebook, Inc.*, No. 19-CV-2184 (D.D.C. July 24, 2019).

of millions, are rarely considered as such.[263]

As we have seen, different investigations proved that user data from Facebook of at least 87 million people was exposed, traded, and processed by Cambridge Analytica, a data analysis company that at the time was working for the Trump and Brexit campaigns, among others. And remember that the European Charter of Human Rights, further developed through other EU instruments, such as the GDPR, protect data as a fundamental right. Hence, Facebook violated the fundamental rights of hundreds of millions of victims. If there is a place for the *ultima ratio legis* to be in action, it should be for those powerful subjects causing serious social harm and victimizing millions. Making corporations criminally liable for data crimes may deter corporation from further offenses. The Authors are conscious that this entails multiple legal doctrinal and jurisdictional challenges.

Many scholars, such as Grietje Baars,[264] Laureen Snider,[265] Steve Tombs, and David Whyte[266] have pointed out the challenges of corporate criminal liability (or, rather, the absence of liability). As Tombs and Whyte remind, the question of corporate impunity is not just a matter of criminal policies.[267] "[T]he corporate form and the state are thus inextricably linked to the extent that, in contemporary capitalism, each is a condition of existence of the other." [268] This intimate relation between corporations and the institutions that should be regulating them has helped to hide corporate criminal activity behind a curtain of impunity. Corporations are criminal by design as long as "the corporation was constructed as a 'structure of irresponsibility'– precisely to ensure 'corporate impunity' (and the impunity of the individuals behind the corporation). The corporation became 'capital personified,' an amoral calculator, driven by the profit imperative, or the imperialism at the heart of the corporation."[269] The structure of corporate impunity is even more perceptible at an international level. Early colonialist corporations were often entrusted by nation states with the exploitation of entire territories and their populations (often in the Global South) with the connivance, if not the applause, of the international community, which was limited to a handful of Global North countries.[270]

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[263] Daniel Solove & Danielle Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 96 TEX. L. REV. 737, 745 (2017).
[264] *See e.g.*, BAARS, *supra* note 62, at 51.
[265] *See, e.g.*, Snider, *supra* note 7, at 563.
[266] *See, e.g.*, TOMBS & WHYTE, *supra* note 69.
[267] *See id.*
[268] *Id.* at 56.
[269] BAARS, *supra* note 62, at 11.
[270] *Id.* at 343–80.

The intertwined history of capitalism and colonialism instrumentalized through corporations endures till today. For instance, as Jenny Chan and others[271] have denounced, the collusion between two giants, U.S.'s Apple and Taiwanese Foxconn (iPhone's leading manufacturer), has resulted in tremendous benefits for Apple, huge benefits for Foxconn, and poverty, suicide, and despair for the Chinese workers actually producing the product:

> In 2010, Apple demonstrated its corporate prowess by capturing an extraordinary 58.5 percent of the sales price of the iPhone, a virtually unparalleled achievement in world manufacturing . . . . Particularly notable is that labor costs in China accounted for the smallest share of the "made in China" iPhone, a mere 1.8 percent or nearly US$10 of the US$549 retail price of the iPhone 4. American, Japanese, and South Korean firms that produced the most sophisticated electronics components, such as the touchscreen display, memory chips, and microprocessors, captured slightly over 14 percent of the value of the iPhone. The cost of raw materials was just over one-fifth of the total value (21.9 percent). In short, while Foxconn carved out a niche as the exclusive final assembler of the iPhone, the lion's share of the profits was captured by Apple. In this international division of labor, Foxconn captured only a small portion of the value while its workers in electronics processing and assembly received a pittance.[272]

It is no coincidence that super-powerful corporations shielded in their Global North fortresses have bypassed, broken, tricked, or simply ignored national and international laws to steal data. As Baars reminds us, imperialism lies at the heart of the corporate form.[273] After all, the first global capitalist companies were incorporated under the protection of the English (later British) Crown to govern, dominate, and exploit entire nations. The imperialist international structure of impunity mentioned by Baars is a fundamental element of digital capitalism's data extractivist endeavor, for hegemonic digital corporations are often based in Global North countries, overwhelmingly in the U.S., while their victims are usually based overseas, commonly in Global South countries. Hence, although it extensively affects citizens in the Global North countries, data crimes are by their nature and structure, part of an imperialist phenomenon defined by Nick Couldry and

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[271] JENNY CHAN, MARK SELDEN & NGAI PUN, DYING FOR AN IPHONE: APPLE, FOXCONN, AND THE LIVES OF CHINA'S WORKERS 39–40 (2020).

[272] *Id.*

[273] BAARS, *supra* note 62, at 31–132.

Ulíses Mejias as data colonialism:

> Data colonialism is, in essence, an emerging order for the appropriation of human life so that data can be continuously extracted from it for profit. This extraction is operationalized via *data relations*, ways of interacting with each other and with the world facilitated by digital tools. The rough data relations, human life is not only annexed to capitalism but also becomes subject to continuous monitoring and surveillance. The result is to undermine the autonomy of human life in a fundamental way that threatens the very basis of freedom, which is exactly the value that advocates of capitalism extol.[274]

Thus, criminalizing data crimes at a domestic level would not be enough to put an end to the digital corporate crime. After all, Silicon Valley's champions, such as Facebook or Google, are shielded in Global North countries, such as the U.S., while most of their billions of users are spread in the Global South. Consequently, criminalizing data crimes would not only entail challenging the capitalist legal structure of nation states but would also involve dismantling the colonial structure of impunity in which criminal corporations operate.

There are several obstacles that should be considered before any realistic criminalization of data crimes is attempted. The current legal framework and enforcement agencies are not sufficiently fit or adapted to deal with a new era of big-tech, criminal corporations. As stated in this Article, despite some spectacular institutional moves against big tech, with some of the largest fines ever imposed, digital corporations still reoffend. As Zuckerberg once suggested, digital corporations inherently "move fast and break things,"[275] and they do so with impunity. And perhaps, what is more important to consider and further explore, is that big tech criminals are victimizing on a global scale, affecting hundreds of millions of persons and institutions across multiple jurisdictions. It is clear that the current legal framework and existing forms of enforcement used to tackle data crimes are not working, yet we still lack a viable alternative.

VIII. CONCLUSIONS

This Article examined a key element of the silicon doctrine's wider

[274] COULDRY & MEJIAS, *supra* note 24, at xiii.

[275] JONATHAN TAPLIN, MOVE FAST AND BREAK THINGS: HOW FACEBOOK, GOOGLE, AND AMAZON HAVE CORNERED CULTURE AND WHAT IT MEANS FOR ALL OF US 8 (2017).

strategy. Drawing on Orla Lynskey's concept of data power, the Authors of this Article advanced the notion of *data crimes*—that is a two-sided corporate crime that involves both massive exploitation of users' data, and the breaching of competition laws, with an aim of seizing a socially harmful market dominant position. Drawing upon the works of critical criminologists such as Sutherland, Pearce, and Whyte, among others, this Article outlined key elements of the literature analyzing corporate and white-collar crime. With this, the Authors aimed to explain why certain specific behaviors committed by "the powerful" are often not criminalized, and moreover, have become essential to the operation of the capitalist system of exploitation.

Many of the data crimes' evils can be traced back to the neoliberal revolution. In this regard, to provide an adequate historical framework for the spectacular rise of digital capitalism's criminal activity, this Article analyzed the unsettling Global North's switch from a progressive legal framework that tackled corporate power, into another that finally unleashed neoliberal monopolistic forces.

In the second part of the Article, the Authors delved into the two sides of data crimes: privacy and competition law violation. For that, this Article examined how one of Silicon Valley's leading companies, Facebook, exploited and abused user data as well as violating competition rules to dominate the social media market. In Part V, the Authors reconsidered the question of corporate criminality in light of the crimes of digital capitalism. This has flagged important questions around the theoretical and practical challenges of making digital capitalists accountable, especially given the colonial structure of irresponsibility in which the corporate form resides.

In brief recapitulation of the features that define data crimes: (1) Data crimes are a form of state-corporate crime that is rapidly transitioning to a form of corporate organized crime. (2) Data crimes do not respond to a single criminal activity. Instead, they are a form of corporate criminality composed by a plurality of offenses, including breaking competence or privacy laws, aiming to achieve corporate dominance or data power. (3) Data crimes are not cybercrime. This corporate criminogenic behavior happens in and outside the network, which, in any case, is not a digital space apart from the material reality, but a digitalized extension of it. (4) Data crimes are not property rights. They are serious offenses, causing tremendous social harm. According to today's westernized legal cosmovision, data rights are intrinsic to human dignity, and hence a violation of data privacy should be considered and treated as a human rights violation. (5) Data crimes are a form of organized corporate criminality threatening citizens' rights and democratic values.