The Unimportance of Being Unintended
Digital Platform Harms & Reasonable Foreseeability

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Three black teenagers” vs “three white teenagers: “In typical fashion, Google reported these search results as an anomaly, beyond its control, to which I responded, ‘If Google isn’t responsible for its algorithm, then who is?’” -Safiya Noble

"I can say categorically that's not the way that our recommendation systems are designed."  
-YouTube’s Chief Product Officer Neal Mohan
EMERGENT SYSTEMIC HARM
Defining **SYSTEMIC HARM**

- Focus on **collective harms** (vs harm to any one individual) through **structural, system-level analysis**
- **Resists individualized** and **privatized** analysis of wrongdoing
- Established concept in **human rights** and **environmental law**
- Examples of systemic harm from digital platforms: online abuse systematically targeting marginalized communities and social movements such as #BlackLivesMatter; harm to democratic institutions; competition harms
Defining **EMERGENCE**

- When a system **unexpectedly** produces **complex** results that are **more than the sum of its parts**

- “the movement of low-level rules to tasks of apparently high sophistication” **without instruction** (-Stephen Johnson)

- Rooted in idea of emergent behaviour from **artificial intelligence** and **robotics** (also an established concept in physics, sociology, and environmental studies)
Emergent Systemic Harm

Systemic harm that emerged unexpectedly from a complex system. The system’s constituent components in isolation did not necessarily raise legal or ethical concerns, but together produced harmful consequences on a collective and systemic level beyond the sum of their parts.
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Platform-facilitated emergent systemic harm to historically and ongoingly marginalized communities is one specific subset of emergent systemic harms.
Elements of Platform-Facilitated Emergent Systemic Harm to Marginalized Communities

Platform’s ALGORITHMS
Platform’s DESIGN & AFFORDANCES
Platform’s BUSINESS MODEL

TIME
SCALE
USERS (HUMAN NATURE)
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PLATFORM FORESEEABILITY GAP
PLATFORM COMPANY DID FORESEE HARM

YouTube Executives Ignored Warnings, Letting Toxic Videos Run Rampant

Proposals to change recommendations and curb conspiracies were sacrificed for engagement, staff say.

Document reveals how Facebook downplayed early Cambridge Analytica concerns

Internal correspondence provides new insight into how Facebook staff reacted to concerns about use of user data by political campaign consultants

Uber knowingly rented fire-risk cars to drivers in Singapore

Honda had recalled the cars but Uber kept them on the road

Facebook may have knowingly inflated its video metrics for over a year

The inflated video views led both advertisers and media companies to bet too much on Facebook video

By Chris Welch | @cbwelch | Oct 17, 2016, 12:35pm EDT

Facebook Executives Shut Down Efforts to Make the Site Less Divisive

The social-media giant internally studied how it polarizes users, then largely shelved the research

Uber Employee Warned Self-Driving Cars 'Are Routinely in Accidents' Days Before Fatal Crash: Report

Facebook was repeatedly warned of security flaw that led to biggest data breach in its history

Exclusive: Employees described feeling remorse and 'guilt' that they 'could have prevented' the cyber
HARM FORESEEN BY IGNORED EXPERTS & VULNERABLE USERS

Snapchat’s new Snap Map feature may pose a threat to victims and survivors

Wednesday, July 19th, 2017

Sloth Mom #BlackLivesMatter @CaseyExplosion

I don’t say “listen to trans women” because we’ve got some magical 6th sense, we can’t see the future. It’s far, far simpler than that. We know because we are usually the first they target, and transphobia is a bigotry that is not only acceptable, but applauded, so nobody cares.

Kaitlyn Greenidge @surlybassey

A good rule of thumb in political analysis is that if someone claims “no one could have predicted X” I guarantee you a black feminist scholar wrote a whole ass paper outlining the possibility like 10 yrs before it happened

5:28 PM · Dec 21, 2019 · Twitter Web App

2.3K Retweets 11.5K Likes

The Black Feminists Who Saw the Alt-Right Threat Coming

Before Gamergate, before the 2016 election, they launched a campaign against Twitter trolls masquerading as women of color. If only more people had paid attention.

zeynep tufekci @zeynep

This one gets me the maddest. Facebook had no excuse being so negligent about Myanmar. Here’s me tweeting about it in 2013. PEOPLE HAVE BEGGED FACEBOOK FOR YEARS TO BE PRO-ACTIVE IN BURMA/MYANMAR. Now he’s hiring “dozens”. This is a historic wrong. 😞😞😞

Ian Kerr @iankerr

Good to see the information fiduciary concept finally gaining traction. Heads were shaking when I wrote about this concept for the Law Commission of Canada study of personal relationships of dependence and interdependence in 2000 static1.squarespace.com/static/56b8dbd...
Platform Foreseeability Gap

The discrepancy between what those who own and manage platform companies are ostensibly able to foresee, and what many employees, vulnerable and marginalized users, oppressed communities, outside experts, academics, and human rights advocates could or did foresee.
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Proposed law and policy reform goal for platform regulation: close the platform foreseeability gap (by increasing platform decision-makers’ ability to foresee harm to the vulnerable and the marginalized)
REASONABLE FORESEEABILITY
Context: Tort Liability for Platform-Facilitated Emergent Systemic Harm to Marginalized Communities?

- “Unintended” nature of harms points to negligence actions (e.g., tort of negligent discrimination [-Rakhi Ruparelia], systemic negligence)
  - To supplement, not displace, applicable human rights legislation
- Backstop to regulation; allows class actions; includes non-users
- Does not treat platform as an individual speaker or publisher of any given content so would not violate intermediary liability principles
- Legal test for negligence: Was the harm “a reasonably foreseeable consequence of the defendant’s conduct”?
  - Based on the “reasonable person” standard
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○ Based on the “reasonable person” standard
Recalibrating Reasonable Foreseeability: Who Is the Reasonable Person?
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**INTERSECTIONAL**

“[T]he standard of care should be that of the reasonable non-racist (non-sexist, non-homophobic, nonableist) person in similar circumstances.” (Rakhi Ruparelia)

Supreme Court of Canada, R. v. S. (R. D.), [1997] 3 SCR 484:
“The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the Charter’s equality provisions ... and ... is supportive of the principles of equality.”
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VULNERABLE

“The reasonable Cree person’s thinking reflects a long history of Cree legal thought and experience, but also the current political, social, economic and natural realities of today and legal relationships with other peoples. [...] I can identify nothing about our Cree reasonable person that would protect her from suffering the fate of far too many Indigenous women and girls across Canada. Nothing.” (Hadley Friedland)
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**RELATIONAL**

Relational Copyright (Carys Craig): “The importance of copyright lies in its capacity to structure relations of communication, and also to establish the power dynamics that will shape these relations.”

Relational Privacy (Ian Kerr): “On this view [of privacy], ‘people are not self-made.’ Instead, they are constituted by networks of nested relationships. Their autonomy ‘can thrive or whither . . . depending on the structures of relationships they are embedded in.’”
Relational Foreseeability

Takes into account that digital platform companies—including their founders, owners, CEOs, executives, and managers—are not “boy kings” or “loner genius nerds” above it all, but players on the ground, with the power to structure relationships, power dynamics, and sociopolitical and cultural norms, while being themselves part of and influenced by all of the above.
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The test for reasonable foreseeability in negligence law must incorporate intersectional and relational accounts of foreseeability. Otherwise, it will systematically exclude justice for the most marginalized and vulnerable—whose injuries are disproportionately more likely and yet routinely unforeseen by those in power.
Thank You

Comments or Questions?

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