

The Limits to Regulating Social Media – A Dualist Construction of the Technical and Philosophical

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In positing a narrative involving the limits to regulating social media there are two fundamental variables that must be considered. The first involves possibly one of the greatest challenges of all that the State faces to introducing additional regulation regarding the use of social media – this relates to the physical barriers to regulation such as the ability of enforcement agencies to police the millions of individual interactions occurring simultaneously around the globe.

The technical constraints to regulation could, at least in terms of an economic analysis of law perspective,^[1] be considered as a substantial factor impacting on questions of legitimacy in regulating social media. Indeed it could be argued that if the technical impediments to regulation are such to render State intervention ineffectual at best and demonstrably harmful at worst, then the State may, for the first time in history, be facing a set of very unique technological challenges to its authority and ability to maintain traditional models of regulatory structures. The problem then becomes one similar to the so called ‘war on drugs’ where critics argue the authorities will never completely eradicate the problem.^[2]

At the risk of overstating the power that social media yields over the State, a number of physical impediments to regulation might include such things as jurisdictional dilemmas and resource allocation associated with surveillance and enforcement. Technology poses significant problems for law enforcement authorities whereby sophisticated means of surveillance is crucial yet would appear inadequate given the number of users to the number of surveillance officers. The difficulties in regulating social media are further compounded due to the sheer volume and amount of data being relayed around the globe at any one time and this would make the job of law enforcement authorities near on impossible to determine if and when users are breaching the provisions of any legislation. Therefore any discussion which involves additional regulation of social media must also be mindful of the technological constraints of regulation and compliance.

A second problem exists for the State on a philosophical level. Such questions arise because of underlying philosophical beliefs regarding individual freedoms and the assumed rights we have as citizens within western democracies that connotes the proposition that individuals be allowed to do as they please, albeit with minimal constraints and without State interference.^[3] Such beliefs must be considered a crucial *meta* narrative as to why the imposition of regulation in the use of social media might be considered undesirable. As Baginni points out, 'to oppose [individual freedom] is to be opposed to the very basis of democratic society.'^[4]

Such an abhorrence towards the regulation of social media would be shared by those who believe that individual freedom has been and continues to be the cornerstone of Western political thought – a thought premised on the notion that the less control the State has, in this instance, regarding social media, the better it is for society as a whole.^[5] As Berlin asserts, the wider the area of non-interference by the State, the wider freedom the individual has.^[6] Certainly minimal State intervention regarding individual freedom is a hall mark of Western liberal democracies and it is only when there is clear and present harm stemming from particular actions should the State be allowed to intervene to protect the citizenry – even from themselves.^[7]

These two fundamental problems therefore must be addressed or at least considered before legitimacy can be claimed in regulating social media. The *duality* that exists between the technical and logistical constraints that lawmakers face with potential regulation of social media, and that which exists from an underlying philosophical tenet in Western democracies that, at its core, relies on minimal State intervention. Due to the duality of the 'logistical' and 'philosophical' there are fundamental barriers to regulation. Not only is it technically difficult to regulate social media, to do so could violate the very philosophical foundations of Western democratic values.

It is a similar situation with a range of other social phenomena such as gun control, censorship, alcohol and drug restrictions, gambling and even the wearing of seat belts. The question regarding the degree of State involvement remains the same for each of but for whatever reason, the law has been applied differently according to the cultural norms and values specific to that issue by deconstructing the issue within its socio-political context. The difference with social media however is due to the pervasiveness in which social media penetrates the lives of people in ways that might render it quite different to most other social phenomenon that has thus far been considered.

The relevant consideration thus becomes how *should* social media be deconstructed to better understand it as a product for regulation? Social media is constructed through a plurality of understanding according to its social context in which it is encountered. The problem with the multiplicity of meaning through which society views social media, is that this throws up certain challenges regarding how social media is to be understood and whether it is at all possible to think of social media as a single coherent entity despite the singularity of nomenclature with which it is commonly referred to. That is to say, is it possible to observe social media in the same way as we have done for gun control, pornography, hate speech and even seat belts? To date, what regulators have sought to do rather than restrict social media through direct regulation, is to embrace the use of social media technology and counteract the deleterious effects of it through educational campaigns and the strengthening of existing legislation. This would indicate that the State views social media as something quite different. The result appears to be somewhat 'passive' and non-engaging. Is this the correct approach?

[1] See, generally, Richard A Posner, *Economic Analysis of Law* (Aspen Publishers, 8th ed, 2010); Richard A Posner, *The Economics of Justice* (Harvard University Press, 1981); C. Edwin Baker, 'The Ideology of the Economic Analysis of Law' (1975) 5(1) *Philosophy & Public Affairs*³. The basis of such an assertion comes from the apparent expense associated with establishing a legal and enforcement regime regarding the regulation in the misuse of social media. Compliance, enforcement and prosecutorial costs associated with this would intuitively be exorbitant simply evidenced by the number of users of social media and the number of infractions of social media laws that might occur. Such costs under an economic analysis of law approach would necessarily be compared to the level of benefit associated with enforcing a hypothetical regulatory regime and given the potential and inadvertent loss of certain benefits associated with curbing the use of social media to those who use social media 'legitimately', regulation may well never be justified on this basis.

[2] There is indeed a vast amount of literature claiming the failure of drug enforcement legislation and policy. See, eg, D Baum, *Smoke and Mirrors: The War on Drugs and the Politics of Failure* (Little, Brown & Co, 1996); James P. Gray, *Why Our Drug Laws Have Failed and What We Can Do about It : A Judicial Indictment of the War on Drugs* (Temple University Press, 2001) especially Parts I and II; Ted Galen Carpenter, *Bad Neighbor Policy : Washington's Futile War on Drugs in Latin America* (Palgrave Macmillan, 2003); William L. Marcy, *Politics of Cocaine : How U.S. Foreign Policy Has Created a Thriving Drug Industry in Central and South*

America(Lawrence Hill Books, 2010); *Drug Policy : History, Theory and Consequences* (Aarhus University Press, 2008).

[3] Julian Baggini, *Making Sense: Philosophy Behind the Headlines* (Oxford University Press, 2002) 62-3.

[4] Ibid 63.

[5] Ibid.

[6] Isaiah Berlin, 'Two Concepts of Liberty' in Michael J Sandel (ed), *Liberalism and Its Critics*(Basil Blackwell, 1984) 16.

[7] See especially the writings of John Stuart Mill and other classical writers in the liberalist tradition. Mill was not saying that the individual is free to assert his or her freedom without control, rather the tenet of Mill's theory rests on the notion of freedom subject to the 'harm' principle. What constitutes 'harm' was, and still is problematic. See, eg, John Gray (ed), *On Liberty and Other Essays: John Stuart Mill* (Oxford University Press, 1991).