

DATA AS DEMOCRATIC MEDIUM: FROM INDIVIDUAL TO RELATIONAL DATA GOVERNANCE

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EXTENDED ABSTRACT

The political economy of personal data has been the subject of increasing public concern and regulatory attention for the past several years. Discussions about personal data often involve claims (explicitly or implicitly) regarding what data is or is “like,” why we should care about its collection, and what we should do about datafication—the transformation of information about people into a commodity.

This Article evaluates the legal merit of these claims via their empirical and normative consequences. How datafication is conceived of within law shapes and constrains how the law responds to its effects. If data governance law is not attentive to relevant features of how data production creates social benefits and risk, it will be poorly equipped to foster the benefits and mitigate the risks of data’s use. Missing or misdiagnosing these social effects can lead to reforms that, once achieved, fail to address harm. Proper theoretical and empirical grounding thus ensures that legal reforms are responsive to the causes of injustice that motivate reform, and sensitive to preserving potential social benefits.

Part One describes the stakes and the status quo of data governance. It documents the significance of data processing for the digital economy and evaluates how the predominant legal regimes that discipline data collection—contract and privacy law—code data as an individual medium. This conceptualization is referred to throughout the Article as “data as individual medium” (DIM). DIM regimes apprehend data’s capacity to cause individual harm as the legally relevant feature of datafication; from this theory of harm follows the inclination of DIM regimes to subject data to private individual ordering. This leads to a conceptual disconnect between the legal regimes governing data production and how data production creates economic value and social harm. Moreover, it results in two enduring problems vexing U.S. data governance. First, the “sociality problem”: how can data governance law better account for the downstream social effects of data collection? Second, the “legitimacy problem”: how can data governance law distinguish legitimate and illegitimate downstream uses without relying on the failed mechanism of individual notice and choice?

Part Two traces the workings of the data political economy to demonstrate how data's capacity to transmit social and relational meaning is central to how data produces economic value. This capacity also renders data production especially capable of benefitting and harming others beyond the data subject from whom data is collected. Such social harms present both a conceptual and normative challenge for data governance reform. Conceptually, DIM approaches to enacting data relations in law are not attentive to how relationality is an essential feature of data production. Normatively, while some DIM reforms effectively address the well-known threat datafication poses to *personal autonomy*, they are poorly equipped to address emerging concerns over how datafication drives *social inequality*. Data governance should ideally be responsive to both normative concerns. Part Two introduces relational egalitarianism as a promising theoretical basis from which to address these conceptual and normative challenges.

Part Three evaluates two prominent legal reform proposals that have emerged in response to concerns over datafication. Propertarian proposals respond to growing wealth inequality in the data economy by formalizing individual propertarian rights over data as a personal asset. Dignitarian reforms respond to excessive data extraction's threat to individual autonomy by granting fundamental rights protections to data as an extension of personal selfhood. While both reforms have some merit, because they still conceive of data as an individual medium, they are unable to resolve either the sociality problem or the legitimacy problem. First, because both proposals fail to fully apprehend the relational and aggregate effects of data, they cannot solve the sociality problem. Second, because both proposals are not adequately attentive to the relevance of the economic imperatives that drive data's extraction and the social conditions under which data is produced, they are unable to respond to the legitimacy problem.

Part Four proposes an alternative approach: data as democratic medium (DDM). Conceiving of data as a democratic medium accounts for data's social and relational effects and carries a normative commitment to enacting democratic data relations in law. Under this account, the aim of legal data governance reform shifts: from a project of securing the negative conditions of freedom (empowering individual freedom-as-choice) to securing the positive conditions that enable individuals to exercise their freedom equally (empowering collective freedom-as-social-relation). Conceiving of data as a democratic medium provides a productive analytical frame for the problems of both personal autonomy erosion and social inequality that bedevil data production. This allows for legal approaches that better address conditions at the root of both, as well as offering conceptual capacity for socially beneficial data production in line with relational egalitarian ideals. In particular, DDM

allows for data governance that is attentive to data's social effects as well as to the purposes that drive data production and the conditions under which it occurs. Thus, DDM regimes solve both the sociality problem and the legitimacy problem. Part Four concludes by tracing out key principles and outlining some directions for what DDM regimes could look like in practice.

The unsettled status of data in law is both a challenge and an opportunity: a challenge for governing digital life as well as an opportunity to experiment with the kinds of social ordering that the law may enact. In this sense, data governance offers a *tabula rasa* of sorts that, unlike other regulatory regimes, remains relatively unfixed by legal precedent. This affords an exciting opening for legal regimes that deviate from installing market relations of exchange and instead expand the areas of life governed by democratic ordering.