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The Normative Ecology of Disruptive Technology

Vincent Gautrais*

I: Introduction

[1] *Technological Neutrality: Hogwash!* This brief text will not elaborate on the nature of disruptive technology. Neither will it express an opinion on its merits,¹ or on issues of disruption that arise when faced with controlled markets where organized and protected monopolies have been profoundly affected.² Instead, it will deal with the normative environment within which this innovation is presently developing—an environment that is necessarily shaped not only by the technology itself, but also by the sheer speed of its evolution. More precisely, it will take for granted that technology has a major impact on our way of operating. Technology—let us make no bones about it—is not neutral.³ It infiltrates our lives with myriad effects on power relations. Such issues are therefore worthy of consideration and integration into the controls that the law, conceived globally as formal and informal norms, seeks to implement. Thus law is a “tool for the

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¹ Ryan Calo & Alex Rosenblat, “The Taking Economy: Uber, Information, and Power” (2017) 117:6 Colum L Rev, online: <<http://columbialawreview.org/content/the-taking-economy-uber-information-and-power/>>. See especially Part I entitled, “The Story of The Sharing Economy”. See also Edith Ramirez, Maureen K Ohlhausen & Terrell P McSweeney, *The “Sharing” Economy: Issues Facing Platforms, Participants, and Regulators* (November 2016), online: Federal Trade Commission: <https://www.ftc.gov/system/files/documents/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission-staff/p151200_ftc_staff_report_on_the_sharing_economy.pdf>.

² Brishen Rogers, “The Social Costs of Uber” (2015) 82 U Chicago L Rev Dialogue 85.

³ Vincent Gautrais, *Neutralité technologique: Rédaction et interprétation des lois face aux changements technologiques* (Montreal: Éditions Thémis, 2012) at 54ff [Vincent Gautrais, *Neutralité technologique*].

management of power relations.” In keeping with the image of scales, the law weighs; it weighs in. But technology, due to the changes that it brings, far too frequently creates an extraordinary opportunity for calling into question the very principles and scales that have taken centuries to crystallize.

[2] *Disruptive Technology*. Implicit in the notion of the “sharing economy” is a minor anodyne dimension, as well as a major dimension that is just as untrue. As concerns the former, it is anodyne because sharing is seen as a good thing. Like apple pie, one cannot possibly be against it. And as concerns the latter, there is also a fundamental falsehood that certain of these companies “share,” when, in fact, they operate through a formidable unilateral retention of information. To be precise, they retain the information shared by others, about others. In fact, this notion of sharing as understood in the context of projects of limited size, such as those which happily flourish in municipalities everywhere,⁴ is incompatible with megastructures such as Uber and Airbnb. On the contrary, the latter companies are the poster children of retention. Such issues of retention first surface in the contract, which emphasizes the ownership of data,⁵ and this in spite of the natural suspicion that should arise when faced with such an appropriation of personal information. A lack of transparency is also at play in the manner in which the algorithms are programmed, despite the degree of accountability that is increasingly required in this respect.⁶

[3] *Revolution/Evolution*. This equilibrium is all the more difficult to attain where technology becomes infused with emotion; when faced with the “technomagic”⁷ frequently associated with technology—frequently perceived as either eminently dangerous or highly

⁴ A mapping of collaborative initiatives in Quebec can be found at OuiShare Québec, *Cartographie des initiatives collaboratives du Québec*, online: <<http://ouishare.net/fr/projects/cartographie-des-initiatives-collaboratives-du-quebec>>.

⁵ See Section ii., below, entitled, “The Quest to Control Contractual Normativity”.

⁶ See Section i., below, entitled, “The Quest to Control Individual Normativity”.

⁷ Vincenzo Susca, “Technomagie: La nature de la mutation anthropologique” (2008) 16:2 Logos 29.

lifesaving—it is important to take a calm look at the “revolution”⁸ that we face. For while we certainly observe a “factual” revolution with technology creating technological and economic⁹ upheaval, it is met by a normative “toolbox” that has both merit and tradition. Strongly creative, the law remains a marvellous means: capable of evolution, of adaptation. When faced with this technological revolution, the law may perhaps simply give rise to an “evolution” in terms of which traditional tools are considered to be sufficiently effective. This is a debate as old as the law, as old as the Internet itself. Since its very beginnings, the Internet has given rise to questions regarding the best way of managing this new reality.¹⁰

[4] *Normative Porosity*. But to return to the sharing economy: many consider that because of its technological upheavals the sharing economy has created a legal vacuum without precedent. This is incorrect. It often is the case that those who invoke the notion of a legal vacuum are the ones who consider that the law only works against them.¹¹ Quite to the contrary, there is not only a broad variety of applicable laws, but also an increased need for them. Hence norms should not be considered through the narrow lens of formal norms that (directly or indirectly) derive from the State; normativity should be grasped pluralistically, with frequent interactions between the various levels of normativity. Apart from formal texts this also obviously includes a contractual structure with its own set of particularities, but also that which I

⁸ Michel Serres, *Les nouvelles technologies: révolution culturelle et cognitive* (20 December 2007), online: Interstices <http://interstices.info/jcms/c_33030/les-nouvelles-technologies-revolution-culturelle-et-cognitive>.

⁹ Orly Lobel, “The Law of the Platform” (2016) 101:1 *Minn L Rev* 87 at 87: “A leading critic of what is termed ‘the gig economy,’ economist Robert Reich argues that the rise of platform companies is making work life unpredictable, insecure, and, ironically, not even profitable.”

¹⁰ This specifically refers to the “old” debate between Lessig and Easterbrook as to whether the regulation of cyberspace “differs” from traditional spheres. Frank H Easterbrook, “Cyberspace and the Law of the Horse” (1996) 1996 U Chicago Legal F 207; Lawrence Lessig, “The Law of The Horse: What Cyberlaw Might Teach” (1999) 113 *Harv L Rev* 501.

¹¹ André Lucas, “La réception des nouvelles techniques dans la loi: l’exemple de la propriété intellectuelle” in Ysolde Gendreau, ed, *Le lisible et l’illisible* (Montreal: Éditions Thémis, 2003) 125 at 134: “There is a real fantasy of the legal gap, one that is relayed by the media and frequently also by politicians. The trust is that pressure groups call existing rules that do not please them, ‘legal gaps.’ Clamouring for legislation with every new technological advance means leaping into a headlong rush that could only bring about legal insecurity.”

like to call individual normativity,¹² viz internal company documentation that details a certain level of requirements. Yet neither contracts nor internal company documentation entail real control. Essentially, few contracts have been analyzed by the courts—and even this jurisprudence has difficulties in assessing such (frequently technical) commercial texts.

[5] *Normative Pervasiveness.* Contrary to popular thought, we therefore have a broad range of normative tools. Among them, four contribute to the development of an ecosystem of norms—an overlapping, intersecting ecology. The Kelsinian pyramid has reached its limits; a more plural, more global vision is needed. But beyond this so-called ecosystem that needs to be described in quantitative terms, it is also important that it be evaluated, as several of these norms are not truly effective. Indeed, while certain formal norms manage, in spite of their flaws, to harness the activities that are linked to the sharing economy (Section II), other contractual or individual norms have some limitations, meaning that they are not always able to control the activities of Uber, Airbnb and the other platforms that form the subject matter of this study (Section III). Accordingly, it is an overview of these legal tools that will be presented below.

II: Formal Norms Under Oversight

[6] It is a natural reflex: when technology raises new problems, let us pass a law! Paradoxically, issues relating to the sharing economy are quite easily dealt with by judges applying existing law. The law in its traditional guise applies even though specific features are absent.

¹² Vincent Gautrais, “Normativité et droit du technique” in Stéphane Rousseau, ed, *Juriste sans frontières – Mélanges Ejan Mackaay* (Montreal: Éditions Thémis, 2015) 311 at 311-40.

i. The Relative Effectiveness of Laws

[7] Much can be said about the numerous¹³ laws that come into play in the regulation of the sharing economy. With regard to the situation in Quebec, there is, of course, the issue relating to the specific and temporal law that was imposed on Uber. A law that is not quite one: this text, called an “agreement,” does not have the generality that is typically associated with the law.¹⁴ Nonetheless, originating from a government institution, this text created quite a stir in September 2016 and was made public, meaning that it could be subjected to analysis. The same goes for the texts relating to “short term” accommodation.¹⁵

1. Law and Technology: Limits

[8] *The Law Questioned*. Naturally, laws raise questions far beyond the power relations that they introduce, in terms of which some actors receive rights while the rights of others are limited. It is often the case that those who are faced with new laws are not content to see their rights trampled upon nor their prerogatives threatened. This is not where the question arises for present purposes, as it is beyond my field of expertise. Instead, the legal enquiry envisaged relates to the two following elements.

Firstly, governments all too often adopt “communication” laws which have as a core objective to demonstrate to the population that the Government acts and that it performs its

¹³ Alison Griswold, “Uber Pulled Off a Spectacular Political Coup and Hardly Anyone Noticed” *Quartz* (21 January 2016), online: <<http://qz.com/589041/uber-pulled-off-a-spectacular-political-coup-and-hardly-anyone-noticed/>>, cited by Michael Geist elsewhere in this collection.

¹⁴ *Agreement between the Ministère des transports, de la mobilité durable et de l’électrification des transports and Uber Canada Inc* (9 September 2016), online: <<https://www.transports.gouv.qc.ca/fr/salle-de-presse/nouvelles/Documents/2016-09-09/entente-uber.pdf>>; *Entente relative aux exigences de conformité fiscale au Québec à l’égard des chauffeurs utilisant les plateformes « uberX », « uberXL » ou « uberSELECT »*, between the *Ministère des finances du Québec and Uber Canada Inc* (15 August 2016) [Agreement between the *Ministère des finances du Québec* and Uber Canada Inc].

¹⁵ *Act respecting tourist accommodation establishments*, CQLR c E-14.2 and *Regulation respecting tourist accommodation establishments*, CQLR c E-14.2, r 1.

sovereign role of distributing interests. Thus, as Professor Atias emphasizes, the Act is a communication tool to which “the name of a discoverer might be attached.”¹⁶ As it happens, this objective of the law is manifest in the Quebec agreement relating to Uber where the text establishes general principles with which the company must comply. Thus, in addition to clearly identified obligations, the text also details extremely vague objectives such as transparency, innovation, and privacy. While the Act is prescriptive, it is therefore also somewhat “idealistic” in that it deems itself able to effect profound changes in power relations. What conceit... The same goes for the *Act Respecting Tourist Accommodation Establishments*,¹⁷ which, while identifying some specific obligations to be met, does not appear to place great value on the controls exercised by the administrative authorities.¹⁸

[9] *Partial Laws*. Secondly, immense areas are completely left by the wayside. Still speaking of Uber, the text essentially targets two kinds of power relations: on the one hand, the relation “Uber/Quebec State”; on the other, that of “Uber/Taxi Industry.” With regards to the former, the monetary aspects have been developed with great precision. A fiscal agreement is appended to the text, which provides for fees in similar detail.¹⁹ Some public safety and public interest considerations are also present;²⁰ not much more. Concerning the latter, as far as the

¹⁶ Christian Atias, “Tendance d’un temps ou inexorable loi du droit? De l’obligation au droit” (2010) Recueil Dalloz 2536.

¹⁷ *Act respecting tourist accommodation establishments*, supra note 15. S 6 reads as follows: “The operation of a tourist accommodation establishment is subject to the issue of a classification certificate. The application for a classification certificate must be filed with the Minister under the conditions prescribed by regulation of the Government.”

¹⁸ See Part II.ii.1, below.

¹⁹ *Agreement between the Ministère des finances du Québec and Uber Canada Inc*, supra note 14. The same applies to the *Entente de conformité fiscale relative à la taxe sur l’hébergement à l’égard des hôtes utilisant la plateforme « Airbnb » between the Ministère des finances du Québec and Airbnb Ireland* (21 July 2017), online: <<http://www.revenuquebec.ca/documents/entente-airbnb.PDF>>.

²⁰ In that respect, a revision request was lodged with the *Commission des transports* by the taxi industry on the express basis that the public interest should be considered. This request was rejected in view of the fact that the public interest does not constitute a revision criterion for the agreement in question. The *Commission des transports* stated that “in any event, because of the Decree the Commission need not consider the public interest in the present

relation to the taxi industry is concerned, a dividing-up of the respective territories is proposed, with a heavy reliance on technology: telephonic services and the streets are taxis' domain—Uber is limited to online solicitation.²¹ That being said, many shortcomings and issues remain outside the ambit of the text. Admittedly, there are other laws and multiple legal texts that will likely apply to Uber. Nonetheless, the following matters remain opaque: what about the right to privacy?²² What about the risks of discrimination inherent in the choice of clients or of drivers? The law of the platform²³ asserts itself; individual normativity should not only be envisaged but should above all give rise to real control.²⁴ None of these norms are considered in the slightest.

2. *Law and Technology: Mastering the Limits*

[10] *The Law and its Ability to Act.* The above being said, while one may criticize the law, the fact remains that it works. Contrary to many an Internet service, the sharing economy frequently—and specifically in the case of the ones that are best known (UberX; Airbnb)—is very much a physical reality. In the case of these frequent examples, it must be underlined that they amount to a real service of physical transport, and to a real service of physical accommodation. Hence, this is not an instance of the eternal non-application of the law brought about by the international dimensions of relations. In fact, it is indeed “Uber Canada” that is the contracting party to agreements initiated by the Government, both with regards to operating modalities²⁵ and fiscal compliance,²⁶ which enhances the “domestic” nature of the *Act*. Similarly,

matter. It only needs to apply the Decree”: *Comité provincial de concertation et de développement de l'industrie du taxi v Uber*, 2017 QCCTQ 0224 at para 185.

²¹ Agreement between the *Ministère des transports, de la mobilité durable et de l'électrification des transports* and Uber Canada Inc, *supra* note 14, s 2.12.

²² *Ibid.* The Preamble of this Agreement merely alludes to this.

²³ Lobel, *supra* note 9.

²⁴ See Part III.i., below.

²⁵ Agreement between the *Ministère des transports, de la mobilité durable et de l'électrification des transports* and Uber Canada Inc, *supra* note 14.

insofar as Airbnb in its various forms is concerned, the *Act Respecting Tourist Accommodation Establishments*,²⁷ like the *Regulations Respecting Tourist Accommodation Establishments*²⁸ applies to the whole of Quebec. The governmental response is especially specific, constituting proof that the authorities have tackled the “Airbnb issue” head-on, the *Ministère du Tourisme* having gone so far as to furnish the public with an interpretative guide.²⁹ In these two cases the government has elected to authorize. The use of these platforms is accordingly allowed, subject to compliance with conditions that do not appear—when compared to other jurisdictions³⁰—particularly onerous.

ii. The Effectiveness of Jurisprudence

[11] *Jurisprudence and Adapting to New Developments*. While new laws could apply to new developments, they nevertheless have some shortcomings that I believe are important to identify.³¹ In certain respects the “old” law is sometimes more effective than the new³² and the legislative reflex is often to hold back in relation to new issues.³³ As one author puts it, “it is

²⁶ *Agreement between the Ministère des finances du Québec and Uber Canada Inc*, *supra* note 14.

²⁷ *Act respecting tourist accommodation establishments*, *supra* note 15. S 6 provides: “The operation of a tourist accommodation establishment is subject to the issue of a classification certificate. The application for a classification certificate must be filed with the Minister under the conditions prescribed by regulation of the Government.”

²⁸ *Regulation respecting tourist accommodation establishments*, *supra* note 15. S 1 reads as follows: “Any establishment in which at least 1 accommodation unit is offered for rent to tourists, in return for payment, *for a period not exceeding 31 days*, on a regular basis in the same calendar year and the availability of which is made public is a tourist accommodation establishment.” [my emphasis].

²⁹ Tourisme Québec, *Guide d’interprétation de la Loi et du Règlement sur les établissements d’hébergement touristique*, (19 October 2016), online: <<http://www.tourisme.gouv.qc.ca/publications/media/document/services/hebergement-guide-interpretation-campagne.pdf>>.

³⁰ See the obligation envisaged by a recent French decree, in terms of which lessors located in cities of more than 200,000 inhabitants are obliged to register at the town hall: *Décret n° 2017-678 du 28 avril 2017 relatif à la déclaration prévue au II de l’article L. 324-1-1 du code du tourisme et modifiant les articles D. 324-1 et D. 324-1-1 du même code*, JO, 30 April 2017. This rule will specifically apply in Paris, Bordeaux and Nice with effect from December 2017.

³¹ See Part II.i.2. entitled “Law and Technology: Mastering the Limits”, above.

³² Vincent Gautrais, *Neutralité technologique*, *supra* note 3 at 131ff.

³³ Thus many consider in respect of block chains that this field should not be regulated too fast: see Éric Caprioli, “Les enjeux juridiques et sécurité des blockchains” (2017) 3 C de D entr 54.

urgent to wait.”³⁴ Indeed, this is what the Airbnb litigation has demonstrated.³⁵ This balancing therefore involves recourse to a judge.

[12] *Interpretation.* In Canada, the interpretation of legislation is taught as a mandatory course in the majority of law faculties. Far be it from me to try and summarize this complex subject matter in a few lines. Simply put, and beyond the three interpretative approaches that are generally identified (formerly “literal, teleological, contextual”³⁶ and nowadays rather “text, context and subject”),³⁷ it seems likely that some are by nature more applicable than others, depending on the circumstances. Depending on the situation and linked to the digital environment, I have previously drawn distinctions³⁸ based on the hypotheses³⁹ that, on the one hand, the law under interpretation plays a more “mechanical”⁴⁰ role, or, on the other hand, that it carries out a further evaluation of the issues at hand, which requires a higher level of complexity.⁴¹ Divided along these lines, I believe it is possible to identify that the teleological approach is prevalent in the first instance and the contextual approach in the second. By way of illustration, it seems likely that the jurisprudence in the Airbnb dispute has relatively straightforward objectives, the transposition of which into the digital world seems relatively easy to effectuate.⁴²

³⁴ Isabelle Renard, “Régulation de la Blockchain : Il est urgent d’attendre” (2016) 414 *Expertises* 215 at 215–18.

³⁵ See Part II.ii.1. entitled “The Effectiveness of Jurisprudence as per the Airbnb Dispute”, below.

³⁶ Stéphane Beaulac & Pierre-André Côté, “Driedger’s ‘Modern Principle’ at the Supreme Court of Canada: Interpretation, Justification, Legitimization”, (2006) 40 *RJT* 131 at 142: “It [the modern principle] suggests that a proper interpretation shall take into account the object of the enactment (Mischief Rule), the words with which it is expressed (Literal Rule) and the harmony among its provisions and other statutes (Golden Rule); not one of them, or two of them, but all three aspects may be relevant and be taken into account.”

³⁷ Stéphane Beaulac, *Précis d’interprétation législative – Méthodologie générale, Charte canadienne et droit international* (Montreal: LexisNexis, 2008) at 49.

³⁸ Vincent Gautrais, *Neutralité technologique*, *supra* note 3 at 220ff.

³⁹ In terms of the dichotomy suggested by Clare Dalton: Clare Dalton, “An Essay in the Deconstruction of Contract Doctrine” (1985) 94:5 *Yale LJ* 997.

⁴⁰ For example, in contracts evidence law, the interpretation of a signature or of a hypertext link.

⁴¹ For example, in privacy law the distinction between individual and commercial interests; and in copyright law, conflicts between rights holders and users.

⁴² See the paragraph entitled “The Effectiveness of Jurisprudence as per the Airbnb Dispute”, below.

It is impossible to produce a comprehensive account of all the jurisprudence that finds application in this context. This is because the courts already have a sustained response, despite the relative newness of the economic models. Hence this article is restricted to two hypotheses. The first is that a local response emerging from the province of Quebec is concerned with the jurisprudential reaction to the phenomenon of Airbnb type accommodations. The second is more global, as it analyzes the general contractual disqualification by the courts that gives rise to the fact that Uber drivers might fall within the domain of labour law.

1. The Effectiveness of Jurisprudence as per the Airbnb Dispute

[13] *Airbnb vis-à-vis the Régie de logement*. With the emergence of shared accommodation, a series of cases have illustrated the great capacity of jurisprudence to adapt. While it is possible to locate disputes in Quebec regarding the relationship between the State and these “renters,”⁴³ several in fact concern landlords and tenants, since this subletting of short duration effectively changes the deal made in the original contract. Without entering unduly into this, one realizes that judicial interpretation can easily take place by applying the “old” texts to these new situations. In essence, the tenant who sublets his apartment through Airbnb is obliged to advise his landlord of this fact and to obtain the landlord’s consent.⁴⁴ Hence, a landlord may repudiate the contract when a tenant has contravened article 1870 of the Quebec Civil Code (CCQ) that requires the landlord’s consent to an act of subletting.⁴⁵ In addition, the landlord will be able to repudiate on the basis that the tenant has changed the destination of the leased property by subletting it to a

⁴³ Even if the sanctions are dissuasive in nature (section 37 of the *Act Respecting Tourist Accommodation Establishments* mentions sanctions ranging from \$ 2,500 to \$ 25,000), it has not been possible to locate cases where such penalties have been invoked. There is one solitary decision fining an individual (\$ 20,000) for contempt of court for failing to comply with an injunction under the new provisions of the *Act Respecting Tourist Accommodation Establishments*: *Chabot c Leblanc*, 2016 Qc Sup Ct 3825.

⁴⁴ 9177-2541 *Québec Inc v Li*, 2016 QCRDL 8129. The effect of this condition is to severely restrict such a subletting capacity.

⁴⁵ *Rouleau v Bilodeau*, RDL 2016 QCRDL 1486.

third party, and will be entitled to compensation for damages.⁴⁶ Once again, in many respects the “old texts” such as the CCQ are easier to interpret than the new ones such as the *Act Respecting Tourist Accommodation Establishments*, which poses difficulties both in relation to its interpretation⁴⁷ and its application.⁴⁸

2. The Effectiveness of Jurisprudence as per the Uber Dispute

[14] *Uber and the Status of Drivers*. A further illustration of the relative effectiveness of the traditional rules is to be found in the application of labour law to this multinational entity. First, an extensive debate has occurred in several jurisdictions over whether the drivers can be considered as employees in spite of contractual stipulations that clearly set out their status as independent contractors. More often than not, the judicial response has been to set aside the contract—as was the case, for instance, in California,⁴⁹ London,⁵⁰ and in Switzerland.⁵¹ Second,

⁴⁶ *St-Germain v Levasseur*, 2016 QCRDL 2804; *Ngo v Arakaki Inc*, 2016 QCRDL 21172; *Côté c Pilon*, 2016 QCRDL 18913.

⁴⁷ It is claimed that “ ‘Where the advertisement on Airbnb constitutes an offer in excess of 31 days, but the actual lease period is shorter than 31 days, there is no infraction. *The law contains a loophole, in that it focuses on the offer to let rather than on the physical act of letting*. In addition, it speaks of a public offer, meaning that people who privately come to an agreement among themselves do not commit an infraction either.’ The law furthermore determines that the rental offer be made ‘on a regular basis’ before it is considered as being illegal, a term that is ‘very broad, very vague’, according to Me Fauchon. [...] The *Ministère du Tourisme* acknowledges that it is well aware of the situation. Airbnb users and the users of other websites for accommodation rentals ‘who advertise rentals in excess of 31 days are not in contravention of the law,’ says spokesman Dominique Bouchard.” [my emphasis]: Philippe Orfali, “La loi anti-Airbnb est aisément contournée” *Le Devoir* (17 August 2016), online: <<http://www.ledevoir.com/societe/actualites-en-societe/477891/la-loi-anti-airbnb-est-aisement-contournee>>.

⁴⁸ Philippe Orfali, “La loi anti-Airbnb pratiquement pas utilisée” *Le Devoir* (30 July 2016), online: <<http://www.ledevoir.com/economie/actualites-economiques/476700/hebergement-la-loi-anti-airbnb-pratiquement-pas-utilisee>>: “[...] up until now, *Tourisme Québec* has issued a total of three Notices of Violation to users of websites such as Airbnb and chaletalouer.com. [...] As for the sum collected from the guilty parties, it amounts to ... \$0.00. ‘The Notice of Violation is not linked to a fine. It amounts to a letter informing the receiving party that he or she is carrying on the activities of a tourist accommodation establishment without the requisite classification certificate in contravention of article 6 of the *Act Respecting Tourist Accommodation Establishments*. The Notice also provides information on how the receiving party could comply with the Act, in order to prevent further prosecution,’ explains the spokesman for *Tourisme Québec*, Guy Simard.”

⁴⁹ Orly Lobel, “The Law of the Platform” (2016) 101:1 *Minn L Rev* 87 at 133: “While both Uber and Lyft have been firm in classifying their drivers as independent contractors, others have viewed the arrangement differently. Recent class action suits brought against both companies by drivers claiming misclassification stress the degree of control and direction the companies exercise. [...] In preliminary hearings in one such lawsuit, Judge Edward Chen stated, ‘The idea that Uber is simply a software platform, I don’t find that a very persuasive argument.’ Chen found that the

several courts have modified the contractual qualification that the multinational is not considered to be a taxi company but rather a software company.⁵² Therefore, contractual attempts to extract themselves from intensely regulated domains have not functioned very well in many instances.

[15] *Interpretation*. It thus appears that the legal complacency of which some complain⁵³ in light of the development of disruptive technology, has by no means been established. Of course, by nature the law is slow to react, and it takes time before the rules will be plainly applicable. Quite simply, whether through qualification or through the creation of new categories

fact that ‘Uber sets the rates by which drivers are paid, screens them... and can terminate them’ weighs in favor of finding them to be employees. In a parallel case against Lyft, the court stated, ‘[P]eople who do the kinds of things that Lyft drivers do here are employees.’ In June 2015, the California Labor Commissioner, citing the high degree of control Uber exercises over its drivers, ruled in an individual hearing that at least one driver of Uber was an employee.” [footnotes have been omitted].

⁵⁰ See particularly the following decision referred to in this article: Rob Price, “The bombshell Uber driver ruling could affect almost half a million ‘self-employed’ Brits” *Business Insider UK* (28 October 2016), online: <<http://uk.businessinsider.com/uber-driver-employee-ruling-could-affect-460000-self-employed-brits-rights-citizens-advice-2016-10>>. While I have been unable to trace the decision, several extracts are to be found in Shane Hickey, “Uber tribunal judges criticise ‘fictions’ and ‘twisted language’” *The Guardian* (28 October 2016), online: <<https://www.theguardian.com/technology/2016/oct/28/uber-tribunal-judges-fictions-twisted-language-appeal>>: “Any organisation ... resorting in its documentation to fictions, twisted language and even brand new terminology, merits, we think, a degree of scepticism.”; “Ms Bertram [Uber’s regional general manager for the UK] spoke of Uber assisting the drivers to ‘grow’ their businesses, but no driver is in a position to do anything of the kind, unless growing his business simply means spending more hours at the wheel.”; “We are satisfied that the supposed driver/passenger contract is a pure fiction which bears no relation to the real dealings and relationships between the parties.”

⁵¹ In Switzerland, diametrically opposed positions are found in two reports put forward by labour law specialists. On the one hand, Professor Kurt Pärli published on 10 July 2016 a study in terms of which the employee was in a dominant position, mainly based on the fact that a situation of *de facto* dependency existed between the driver and Uber: Philip Thomas, *Résumé de l’expertise du Prof. Kurt Pärli concernant les “Questions de droit du travail et des assurances sociales dans le cas des chauffeuses et chauffeurs de taxis Uber”* (10 July 2016) at 5, online: <https://www.unia.ch/uploads/tx_news/2016-08-29-r%C3%A9sum%C3%A9-expertise-droit-du-travail-assurances-sociales-chauffeuses-chauffeurs-taxi-Uber-professeur-Kurt-P%C3%A4rli_01.pdf>. In particular, this Report states that “Uber drivers are not obliged to accept the requests that they receive via the Uber application. As well, they are not obliged to offer their services during predetermined periods or for a specified period. Such circumstances demonstrate the absence of a subordination relationship from the company’s point of view. However, it would appear that the Uber application excludes those who regularly refuse to accept rides from consideration for further rides—which amounts to the *de facto* equivalent of an obligation to accept rides. Moreover, the operating agreement provides for automatic termination in the event that no ride is undertaken for a period of 90 days.” On the other hand, a very recent study conducted in June 2017 at the behest of Uber finds that “criteria qualifying this activity as independent are largely predominant”. For further information, see “Le statut des conducteurs d’Uber: un casse-tête” *Tribune de Genève* (5 July 2017), online: <<http://www.tdg.ch/suisse/Le-statut-des-conducteurs-d-Uber-un-cassetete/story/31508990>>.

⁵² Note in particular the position in Taiwan, where the authorities denied such status. Further references are available in Michael Geist’s contribution in this collection.

⁵³ “Much of [Uber’s] spectacular growth has been fueled by outdated regulation,” says Rafi Mohammed: Rafi Mohammed, “Regulation Is Hurting Cabs and Helping Uber” *Harvard Business Review* (9 July 2014), online: <<https://hbr.org/2014/07/regulation-is-hurting-cabs-and-helping-uber>>.

of workers,⁵⁴ jurisprudence constitutes a marvellous tool for adapting the facts to the law—as indeed the Airbnb example demonstrates.

III: Norms in Search of Oversight

[16] Traditional normative tools work. They have their deficiencies, especially in the case of statutes, but they work. That said, they are often insufficient. For reasons of complexity, laws cannot specify certain types of obligations in too much detail. Being general and impersonal, they cannot always define with the necessary finesse what exactly the parties in question should respect. Among the normative tools that can sometimes go further, there are contracts, and what I like to call “individual normativity.” Contracts naturally include those of adhesion (standard form contracts) that the platforms impose on their partners. In order to limit the scope of the analysis, the focus here is on contracts between Uber and its clients, as well as those between the landlords and tenants of Airbnb. But then there are the norms that the platforms self-proclaim: these establish their level of diligence in relation to privacy rights, security, and the “choice” of algorithms that occasionally are loaded with discrimination and bias.⁵⁵ These rules, much like the contracts, do not give rise to meaningful legal oversight. Due to their technicality, a significant degree of *laissez faire*, their newness, and the changing nature of the data, legal interpreters are not very prompt in their analysis of these tools. Here we have a real normative “gap”⁵⁶; certainly not a vacuum, but a zone that passes under the radar. And yet these norms are quite real, even

⁵⁴ Professor Arthurs, in this collection, notably claims that the second route is preferable: “my aim is not to advocate for any particular form of words but rather to demonstrate that it may be preferable (and technically possible) to create new categories of protected workers, rather than try to hammer the square peg of employment into the round hole of the sharing economy.”

⁵⁵ Yanbo Ge, Christopher R Knittel, Don Mackenzie & Stephen Zoepf, *Racial and Gender Discrimination in Transportation Network Companies* (October 2016), online: National Bureau of Economic Research <<http://www.nber.org/papers/w22776>>. This study specifically demonstrates that the waiting time and the cancellation percentage is higher among Black Americans and that women pay more on average.

⁵⁶ To quote Calo & Rosenblat, *supra* note 1, who state: “A central aim of this Essay is to address this gap and put forward a positive vision of how consumer protection law should engage with the sharing economy.”

though they operate in relative autonomy. This autonomy must be subjected to oversight.⁵⁷ Each of these categories of individual norms (i.) and contracts (ii.), will now be considered more closely.

i. The Quest to Oversee Individual Normativity

[17] In one of his works, the philosopher Bernard Stiegler advances that in the digital sphere, data poses at once the problem and the solution; the disease and the remedy. Similar to Pharmakon in Greek thought,⁵⁸ this normative production that originates from the actors themselves disposes, on one hand, a real capacity to regulate, but on the other, these rules do not lead in practice to any oversight. Hence, individual normativity is essentially the solution that has almost unanimously been proposed in multiple domains of law and technology, particularly in several legal texts; however, this approach gives rise to very weak legal oversight. It is expected that such oversight will increase in density in years to come.

1. Delegated Individual Normativity

[18] *Generalization of Individual Normativity.* This increase is undoubtedly linked to the fact that contemporary society gives rise to ever more complexity. To put it in ancient law terms: in order to manage this complexity, it is preferable to consider the law as a “process,” as presented by Plato, rather than a substantial principle, proposed by Aristotle in his writings. Indeed, the quest

⁵⁷ This notion of technological autonomy brings to mind the work of Jacques Ellul, *Ellul par lui-même: Entretiens avec Willem H. Vanderburg* (Paris: Éditions de La Table Ronde, 2008) at 100: “To begin with, as a system technology follows its own laws, its own logic. Technology is autonomous, it is wrapped up in itself. [...] The difficulty is that, like any system, technology should have its own regulation, its own feedback. But we are not there. I note that there is zero self-regulation of the technology system.”

⁵⁸ Bernard Stiegler, “Pharmacologie des métadonnées” in Bernard Stiegler, Alain Giffard & Christian Fauré, *Pour en finir avec la mécroissance: quelques réflexions d’Ars Industrialis* (Paris: Flammarion, 2009) 87 at page 108: “Any technical object is pharmacological: it simultaneously comprises poison and remedy. The pharmakon is at once that which allows for care to be taken and that in respect of which care must be taken, in the sense that one should pay attention to it: it is a healing power where proportional, and where inproportional, it is a destructive power.”

for legal objectification can no longer simply proceed through general substantive principles such as “adequate” security, “reasonable” management, etc., but increasingly requires that the law be proceduralized, which may lead to an *a posteriori* assessment. This could be undertaken in isolation by judges who would accordingly evaluate whether the documents in question are based on “rational justifications,” as Jacques Lenoble puts it.⁵⁹

[19] *Documentation*. When faced with the complexity of factual situations, one often sees laws requiring actors to document their practices. Whether this is in the domain of privacy⁶⁰—where the notion of accountability has made incredible strides since the beginning of 2010—or in the domain of security⁶¹—where the same process is evident—it is clear that this is an olive branch for the actors themselves. They accordingly should develop the documentation in question by basing themselves directly on either formal norms (laws or regulations) or (most likely) on “community” norms derived from commercial associations or national and international standardization bodies. Thus, sharing economy companies are expected to demonstrate more transparency when it comes to their use of the data that is at the core of their business model.

⁵⁹ Jacques Lenoble, *Droit et communication. La transformation du droit contemporain* (Paris: Éditions du Cerf, 1994).

⁶⁰ Documentation is expressly stated in legal texts, both in Canada (in the *Personal Information Protection and Electronic Documents Act*, RSC 2000, c 5 [PIPEDA], specifically in Annex 1 thereto, in which there are close to 25 references to terms such as “policy,” “documentation,” “procedure,” etc. Although less explicit, the same principle is to be found in Quebec laws such as the *Act respecting the protection of personal information in the private sector*, CQLR c P-39.1 and the *Act respecting access to documents held by public bodies and the protection of personal information*, CQLR c A-2.1) and in Europe (see especially Jan Philipp Albrecht, *Report on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)* (22 November 2013), online: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2FBREPORT%2BA7-2013-0402%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=EN>> [Albrecht Amendment], and more specifically arts 40ff.).

⁶¹ For instance, the documentation concept has grown strongly in several recent statutes in the field of law of evidence. The *Act to establish a legal framework for information technology* (CQLR c C-1.1 and specifically arts 17, 20, 31, 34, etc.) entails such a requirement in several instances. Implicitly, the position is the same insofar as the federal evidence law is concerned (*Canada Evidence Act*, RSC 1985, c C-5, s 31.1). Such references are even more obvious in texts of a technical, or community nature: whether these are from the International Organization for Standardization (ISO), American National Standards Institute (ANSI), ARMA, Modular requirements for records systems (MoReq), etc., such organizations draft texts that systematically require procedures to be put in place.

This calls for management with oversight: a standard should be proposed and an oversight entity identified. Moreover, many of the older digital companies have followed this approach: for instance, in 2011 Facebook negotiated an agreement with the United States Federal Trade Commission under which the company undertook to open up its books.⁶² This generalized form of oversight is operationalized by the implementation of an audit procedure.

[20] *Audit of Activities*. We are therefore witnessing the generalization of a process-based approach in every shape and form,⁶³ and that takes shape in Michael Power's world famous book, *The Audit Society: Ritual of Verification*, in which he documents a significant increase of this practice.⁶⁴ Despite the lack of a definition,⁶⁵ the models vary over time; originally conceived of as a means of detecting fraud, in the 20th century the audit was focussed more on getting an overview of the state of play.⁶⁶ However, while the public still sees this role as a protective one, this is not the case in practice,⁶⁷ where auditors are apprehensive that this will give rise to too extensive liability.⁶⁸ Audit therefore has an inherently dark side in spite of the alleged quest for objectification. Auditors sometimes recognize the lack of clarity, even the doubts, that arise with regards to effectiveness, even more so given the fact that big investments are often the order of

⁶² A very American procedure that applies to various legal domains holds that it is possible to obtain judicial recognition of particular agreements entered into between a governmental institution and a private company. In addition, on 29 November 2011, Facebook undertook to be more transparent insofar as the utilization of its members' personal information is concerned. For further information, see US, Federal Trade Commission, *Agreement Containing Consent Order – In the matter of Facebook, Inc., a corporation* (092 3184) (2011), online: <<http://www.ftc.gov/sites/default/files/documents/cases/2011/11/111129facebookagree.pdf>>.

⁶³ Daniel Mockle, "Gouverner sans le droit? Mutation des normes et nouveaux modes de régulation" (2002) 43 :2 C de D 143 at 202ff.

⁶⁴ Michael Power, *The Audit Society: Rituals of Verification* (Oxford: Oxford University Press, 1999) at 31–2.

⁶⁵ Sasha Courville, Christine Parker & Helen Watchirs, "Introduction: Auditing in Regulatory Perspective" (2003) 25:3 Law & Pol'y 179 at 179: "audit has a series of overlapping definitions. Power [...] suggests that 'definitions are attempts to fix a practice within a particular set of norms or ideals.' In other words, the use of the word *audit* (and its definition) is itself often an attempt to claim a particular mission, social status, or policy objective for a practice of accountability and control."

⁶⁶ Power, *supra* note 64 at 58.

⁶⁷ *Ibid* at 60.

⁶⁸ *Ibid* at 65.

the day. They acknowledge being the bearers of “comfort”⁶⁹ rather than of evidence. In sum, as Power argues, internal audits will soon eclipse external audits and the distinction between them will become extremely vague. Internal auditors will play a role in matters of regulation and internal oversight will be outsourced to external agencies.⁷⁰

[21] *Specific Cases in the Sharing Economy.* Insofar as the sharing economy is concerned, there are multiple hypotheses wherein this normative solution would appear to be unavoidable. Firstly, we know that companies abuse consumer data that they source ubiquitously. Admittedly, privacy laws apply, but these only indicate a general duty of “responsibility,”⁷¹ of accountability. Hence—and this goes beyond data that is forwarded due to State mandates⁷²—we need to know more about the use to which such data is put by the company itself, whether the data derives from drivers or clients, landlords or lodgers. Secondly, the same goes for the scant oversight that exists in respect of the calculations effected by algorithms and their impacts in terms of discrimination. Here, again, there is not a legal vacuum at play but rather ignorance of the way in which to apply general principles as recognized by the Charters and other constitutional texts. In both instances, the problems appear by accident, because of an inquest, or due to a leak by a former employee.

⁶⁹ Brian Pentland, “Getting Comfortable with the Numbers: Auditing and the Microproduction of Macro-order” (1993) 18:7/8 *Account Organ Soc* 605. This notion of “comfort” has been taken up in several other pieces that followed. See e.g. Jagdish Pathak & Mary R Lind, “Audit Risk, Complex Technology, and Auditing Processes” (March 2003) 31:5 *EDPACS* 1 at 3: “For an auditor to offer an opinion on the material correctness of a corporation’s financial statements, he or she must rely heavily on the company’s business practices and internal controls in order to gain comfort in the reported numbers.”

⁷⁰ Power, *supra* note 64 at 267.

⁷¹ See especially Principle 1 of Annex 1 of the PIPEDA, *supra* note 60.

⁷² See especially the points made by Professor Scassa in this collection.

2. Individual Normativity in Search of Oversight

[22] *Two Kinds of Individual Normativity.* In order to address these shortcomings, and so as to ensure the improved oversight of such activities, it is important to illustrate how such individual normativity might occur. Two main hypotheses may be made in this regard. The first concerns the internal documents with which the company directs in sufficient detail that which the law cannot do directly. In fact, such commercial structures are characterized by a plurality of policies and procedures and there is no doubt that these can bring about a high level of turnaround in the conduct of the actors involved (be they drivers or lodgers). Second, and even more insidiously, the increased use of algorithmic calculation methods points to the likelihood of neutrality and of a level of technicality that greatly reduces or eliminates the need for judicial oversight. However, nothing could be further from the truth.

[23] *Documentary Normativity.* Initially I did not take an *a priori* negative view regarding the drafting of documents based on informal benchmarks, frequently originating either from commercial associations or from associations where the industry has a say. In fact, there undoubtedly is no other way. But the fact remains that it is necessary to press for a thorough thinking-through of both the document's drafting process and the benchmarks on which it will be based. And a multitude of voices are challenging this firm but very little thought-through tendency of norm imposition.⁷³ The important observation to be made here is that we are unfortunately at present very far from it, as much due to the "industry of norms" as to the "norms of industry"⁷⁴ themselves.

⁷³ Roland Gori, *De l'extension sociale de la norme à la servitude de la norme*, online: Appel des appels <<http://www.appeldesappels.org/interventions-de-la-journee-du-22-mars-2009/de-l-extension-sociale-de-la-norme-a-la-servitude-volontaire--762.htm>>. The author argues that "the first act of resistance comprises analyzing and deconstructing the functioning of our standardization devices. It is there that the tyranny of contemporary power is to be found."

⁷⁴ This distinction was suggested by Nicolas W Vermeys, *Responsabilité civile et sécurité informationnelle* (Cowansville: Éditions Yvon Blais, 2010) at 103.

[24] *Deficient Normativity*. To begin with, deficiencies arise in respect of the financial context within which such norms are drafted. All too often the norms “flourish,” in the words of Thibault Daudigeos, creating a multiplicity that is characterized by confusion.⁷⁵ We are faced with a veritable “bazaar” of norms⁷⁶ where, on the one hand, it is not known when and why government requires recourse to such norms,⁷⁷ and, on the other, where it is in the interests of certain organizations to “sell” theirs. This excessive profusion that needs to be analyzed is all the more problematic because certification and advice services are directly dependent on the norms in question.

[25] *Normativity at a Cost*. In the second instance, in addition to this normative multiplicity, there is an openness that is inherent to law, in that there is the need for law to be accessible and available to all who wish to navigate it. This seems very remote to someone who has had to pay 150 Swiss Francs for a set of ISO norms. It is problematic, to say the least, that one cannot dispose of such “norms” freely, when legal doctrine acknowledges beyond a shadow of a doubt the “values” that are of importance, and instructs to take them seriously.⁷⁸ Such norms are thus “techniques,” but they are not only that; they also constitute norms with a real political reach that are aimed at both things and persons.⁷⁹ This is all the more so in the case of copyright

⁷⁵ Thibault Daudigeos, “Des instituts de normalisation en quête de profit et de légitimité. Étude comparée de la production de normes de développement durable en France et en Angleterre” in Corinne Gendron, Jean-Guy Vaillancourt & René Audet, eds, *Développement durable et responsabilité sociale : De la mobilisation à l’institutionnalisation* (Montreal: Presses internationales Polytechnique, 2010) 175 at 175.

⁷⁶ Stacy Baird, “The Government at the Standards Bazaar” (2007) 18 *Stan L & Pol’y Rev* 35.

⁷⁷ *Ibid* at 37: “However, to date there has been no objective analysis by which the need for and nature of government action may be determined. It is up to government policymakers to determine the best course in the public interest.”

⁷⁸ Benoît Frydman, “Prendre les standards et les indicateurs au sérieux” in Benoît Frydman & Arnaud van Waeyenberge, eds, *Gouverner par les standards et les indicateurs : De Hume aux rankings* (Brussels: Bruylant, 2014) 5.

⁷⁹ Karim Benyekhlef, “Une introduction au droit global” in Karim Benyekhlef, ed, *Vers un droit global?* (Montreal: Éditions Thémis, 2016) 1 at 21, citing Frydman, *ibid* at 55.

laws, which are completely ridiculous and where the online sale process is very far removed from the best practices that these laws are supposed to uphold.⁸⁰

[26] *Algorithmic Normativity*. The second hypothesis mentioned above relates to the “choices” effected by the industry itself, both in terms of complex algorithmic calculations as well as strictly commercial decisions. Thus, by way of example, it has been observed that Uber’s rate-fixing system is flexible and can be adjusted in terms of neighbourhood and the relationship between supply and demand. Hence there are peak times (surge pricing)⁸¹ that provide drivers with a higher rate of remuneration.⁸² On the one hand, the drivers do not always have access to all of the information that the company has at its disposal, and, on the other hand, the company sometimes transmits messages to drivers that encourage them to work during specific time periods, while the forecasted traffic volumes are not necessarily very reliable. A real information symmetry is accordingly needed. The same goes for the rating system for drivers whose apparent “neutrality” still needs to be considered. In essence, the calculation methods remain nebulous for the main persons involved.⁸³

[27] *Zone of Tolerance*. In spite of this reflex, which first made its appearance at the beginning of the digital era,⁸⁴ the purported “legal vacuum” was soon discarded.⁸⁵ To the

⁸⁰ For instance, it is very expensive to purchase ISO norms (between 1000 and 2000 Swiss Francs) and, in addition, several of these norms give rise to a contractual process where the contractual information is only available after payment has been effected by credit card (and the copyright licenses in particular are excessively stringent). This very approach is contrary to best practices.

⁸¹ This practice has even been prohibited in Delhi, India. See in this context the piece by Michael Geist in this collection.

⁸² Alex Rosenblat & Luke Stark, “Algorithmic Labor and Information Asymmetries: A Case Study of Uber’s Drivers” (2016) 10 Int J Commun 3758 at 3772: “Through surge pricing’s appeal to the concept of algorithms and automated management, Uber can generate and coordinate clusters of labor in response to dynamic market conditions [...] without explaining the reliability of its cluster incentives or guaranteeing the validity, accuracy, or error rates of its labor deployments.”

⁸³ *Ibid* at 3775.

⁸⁴ The infamous 1996 cyberspace declaration of independence comes to mind: John Perry Barlow, *A Declaration of the Independence of Cyberspace* (1996), online: Electronic Frontier Foundation <<https://projects.eff.org/~barlow/Declaration-Final.html>>.

⁸⁵ See para 11, above.

contrary, we instead see an explosion of law, with new rules being added to the old. Yet, while I consider the use of the “vacuum” expression to be erroneous, it cannot be ignored that some areas of normativity remain under the half-hearted oversight of the law. Of this what I call “individual normativity” is a good example. In fact, whereas this mode of regulation remains fundamentally new, because the mode of regulation has become generalized, I have not yet sufficiently evaluated the extent of the change and jurists have not yet sufficiently considered the domain that needs to be overseen. Although they bear different titles, the same propositions can be found with regards to the quest for improved transparency of algorithmic calculations,⁸⁶ for a decrease in informational asymmetry,⁸⁷ for greater accountability,⁸⁸ in the need for more diligent processes,⁸⁹ as well as in the notion of “platform loyalty.”⁹⁰ While there thus is relative unanimity on the need for greater oversight—in fact, there has been for a long,⁹¹ long,⁹² time—what form should such oversight take? What means could be put into place to ensure that lack of transparency loses ground?

⁸⁶ Frank Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* (Cambridge: Harvard University Press, 2015).

⁸⁷ Calo & Rosenblat, *supra* note 1.

⁸⁸ Joshua A Kroll et al, “Accountable Algorithms” (2017) 165 U Penn L Rev 633 at 636: “Many observers have argued that our current frameworks are not well-adapted for situations in which a potentially incorrect, unjustified, or unfair outcome emerges from a computer. Citizens, and society as a whole, have an interest in making these processes more accountable. If these new inventions are to be made governable, this gap must be bridged.”

⁸⁹ Danielle Keats Citron, “Technological Due Process” (2008) 85:6 Wash U L Rev 1249.

⁹⁰ See especially s 3, “*Loyauté des plateformes et information des consommateurs*” of the *Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique*, JO, 8 October 2016, even though this very vague text only serves for consumer protection purposes.

⁹¹ Paul Schwartz, “Data Processing and Government Administration: The Failure of the American Legal Response to the Computer” (1992) 43 Hastings LJ 1321 at 1323–25: “So long as government bureaucracy relies on the technical treatment of personal information, the law must pay attention to the structure of data processing [...] There are three essential elements to this response: structuring transparent data processing systems; granting limited procedural and substantive rights [...] and creating independent governmental monitoring of data processing systems.” Cited by Kroll, *supra* note 88 at 668.

⁹² See in particular the SABRE airline reservation system that in the 1950s led to a better indexing of specific airline companies, notably American Airlines. This company was obliged to prove the transparency of its system through the passing of a specific anti-competition law. For more on this, see Christian Sandvig et al, *Auditing Algorithms: Research Methods for Detecting Discrimination on Internet Platforms* (2014), online: <<https://perma.cc/DS5D-3JYS>>.

[28] *Development of Tools for Oversight*. Insofar as this issue is concerned, the tools are well known. They are documentary, legal, or are derived from information technology. First, in managerial contexts, as previously discussed, both an explosion of individual documents and of oversight by skilled persons (via internal or external audits) can be observed. Despite the previous generalization, such solutions are not a cure-all. Documentation certainly contains clearer objectives thanks to technical norms that detail the obligations to be respected. In fact, audits, aside from their cost, are limited in terms of effectiveness. Documentary deficiencies have been measured in financial security matters,⁹³ as well as in the particular instance of electronic voting.⁹⁴ Second, there is a completely natural reflex towards a more technological solution. In this context authors propose a range of solutions for purposes of ensuring oversight if desired. One that stands out is software testing, which makes it possible to measure potential biases associated with particular algorithms. Another is cryptologic captures that freeze the informatics tools under analysis in time.⁹⁵ In all of these cases such means nevertheless contain deficiencies. One of them, of a politico-economic nature, is that the testing is generally done by an agency, a “certification body.” This means that although the managerial solution rests on the shoulders of the company, the technological approach appears rather to require the intervention of an entity that closes in on a function usually fulfilled by the State.⁹⁶ This is no innocent distinction:

⁹³ A good example is the excessive documentary requirements that were imposed pursuant to the financial scandals that marked the early 2000s and that led to the adoption of the *Sarbanes-Oxley Act*. See especially Henry N Butler & Larry E Ribstein, *The Sarbanes-Oxley Debacle: What We've Learned; How to Fix It* (Washington: AEI Press, 2006); Vincent Gautrais, “La gestion électronique de l’information financière: illustration de l’acculturation du droit des affaires électroniques” in Jean-Louis Navarro & Guy Lefebvre, eds, *L’acculturation en droit des affaires* (Montreal: Éditions Thémis, 2007) 379.

⁹⁴ Kroll, *supra* note 88 at 661.

⁹⁵ *Ibid* at 662–74 under the subtitle “Technical Tools for Procedural Regularity.”

⁹⁶ *Ibid* at 667: “This means a government agency or other organization can commit to the assertions that (1) the particular decision policy was used and (2) the particular data were used as input to the decision policy (or that a particular outcome from the policy was computed from the input data). The agency can prove the assertions by taking its secret source code, the private input data, and the private computed decision outcome and computing a commitment and opening key (or a separate commitment and opening key for each policy version, input, or decision). The company or agency making an automated decision would then publish the commitment or

oversight takes on a different centre of gravity. And this brings us to a third pathway: judicial oversight. In view of the area's newness and its inherent complexity, there has not yet been a real appropriation of this oversight, if not by the law, then at least by the judiciary. Thus, there still is scope for improvement in the courts' reception of this normativity. While jurisprudence has the marvellous ability to adapt itself to the circumstances, judges are hindered by the inherent complexity of the subject matter, the references to technical norms,⁹⁷ and the frequent interventions by expert witnesses. There is a discrepancy at work. The ties between law and technique need strengthening. We will have no other choice but to promote a new *lex electronica*,⁹⁸ a new *lex informatica*.⁹⁹

ii. The Quest to Control Contractual Normativity

[29] The contract, pillar of commerce, is a very flexible legal tool. With a few exceptions, it takes no specific form, with consent sufficing to conclude one.¹⁰⁰ Bolstered by this flexibility, Canadian jurisprudence has given a generous interpretation to contractual performance in the digital context, and laws—especially those pertaining to consumers—have established procedures that are easy to comply with.¹⁰¹ This decrease in legal oversight has led industry to adopt contractual practices that would appear to be contestable. These are practices that deserve

commitments publicly and in a way that establishes a reliable publication date, perhaps in a venue such as a newspaper or the Federal Register. Later, the agency could prove that it had the source code, input data, or computed results at the time of commitment by revealing the source code and the opening key to an oversight body such as a court.”

⁹⁷ Vincent Gautrais, “Preuve et développement durable: objectivation du droit par la normativité individuelle” in Vincent Gautrais & Mustapha Mekki, eds, *Preuve et développement durable* (Montreal: Éditions Thémis, 2016) 43.

⁹⁸ Vincent Gautrais, *Le contrat électronique international* (Brussels: Bruylant, 2002) at 220.

⁹⁹ Joel R Reidenberg, “Lex Informatica: The Formulation of Information Policy Rules through Technology” (1997) 76 *Tex L Rev* 553.

¹⁰⁰ Art 1386 CCQ.

¹⁰¹ For instance, arts 54.1ff of the *Consumer Protection Act*, CQLR c P-40.1.

more stringent legal oversight that is more attuned to the first principles that prevail in contract law.

1. Contractual Normativity as Pervasive and Deficient

[30] *Drafting Difficulties*. The “standard” contracts that are presently flourishing on Internet platforms, such as those used in the sharing economy, present another example of normative omnipresence in this context. Once again, claims are made of a legal vacuum when, in effect, it is overfull. This is a contractual pathology¹⁰² if ever there was one. A simple look at the Uber and Airbnb contracts induces amazement and a wringing of the hands because of their undue length, the contracts being respectively sixteen¹⁰³ and seventy-five¹⁰⁴ pages in length. In addition to being long, they are vague¹⁰⁵ and too often subject to interpretation. Moreover, the texts are crammed full of hypertext links—which serves to further increase their length.¹⁰⁶ We are therefore witnessing true contractual pathologies, both with regard to the usage conditions and the protection of personal information. This means that there is a “cost”¹⁰⁷ for the members-consumers that largely outweighs the potential advantages.¹⁰⁸ This is a “cost” that even diligent consumers who read the clauses do not manage to reduce in practice.¹⁰⁹

¹⁰² Vincent Gautrais, “Contrat 2.0: les 2 couleurs du contrat électronique” in Benoît Moore & Générosa Bras Miranda, eds, *Mélanges Adrian Popovici – Les couleurs du droit* (Montreal: Éditions Thémis, 2010) 241 at 256 [Gautrais, *Contrat 2.0*].

¹⁰³ Uber, *US Terms of Use*, online : <<https://www.uber.com/fr/legal/terms/us/>>; Uber, *Privacy Policy*, online : <<https://www.uber.com/legal/privacy/users/en/>>.

¹⁰⁴ Airbnb, *Terms of Service*, online : <<https://www.airbnb.com/terms>>.

¹⁰⁵ For instance, analyses undertaken regarding privacy policies reveal that they are almost systematically imprecise. Joel R Reidenberg et al, “Ambiguity in Privacy Policies and the Impact of Regulation” (2016) 42:S2 *J Leg Stud* S163.

¹⁰⁶ Vincent Gautrais, “Les contrats de cyberconsommation sont presque tous illégaux!” (2005) 106 *R du N* 617 [Gautrais, *Les contrats de cyberconsommation*].

¹⁰⁷ Aleecia M McDonald & Lorrie Faith Cranor, “The Cost of Reading Privacy Policies” (2008) 4:3 *I/S: JL & Pol’y for Info Soc’y* 543.

¹⁰⁸ Omri Ben-Shahar & Carl E Schneider, “The Failure of Mandated Disclosure” (2011) 159 *U Pa L Rev* 647.

¹⁰⁹ Tess Wilkinson-Ryan, “Contracts Without Terms” (2016) *U of Penn Inst for Law and Econ Working Paper No* 16-5.

[31] *Difficulties in Indicating Consent*. But that is not all: such deficiencies appear not only in the drafting of the contract but also in the way in which the parties indicate their consent. Various behaviour patterns have been developed and several among them have been interpreted by the courts. Thus “click wraps” (clicking on an icon) are generally deemed to provide more protection to the member than “browse wrap” (entering into a contract by reason of the mere presence of a contract on the site that engages the user). This certainly is better, but how very little... Indeed, an American author demonstrates that the fact that the user is given the opportunity to click on such an icon basically changes nothing in terms of awareness of the contractual content.¹¹⁰ The entire process is designed to be quick and the consumers do not read, nor do they want to read.

[32] *General Acknowledgement of the Deficient Form of Electronic Contracts*. In spite of the aforementioned pathologies, a fairly lax judicial tendency can be observed when it comes to admitting them. In Canada, the flagship case is undoubtedly *Dell Computer*,¹¹¹ where the Supreme Court in July 2007 refused to consider a long and verbose contract as being incomprehensible¹¹² or otherwise abusive.¹¹³ More specifically, the judges ruled that such violations had not been demonstrated. Even though the respondents’ reasoning was essentially quite weak, the court did not dare take the leap towards increased oversight of online contracts. The “free for all” approach that globally characterizes contractual practice was therefore condoned. The “old” American case that modified the cases preceding it,¹¹⁵ *ProCD v*

¹¹⁰ Florencia Marotta-Wurgler, “Will Increased Disclosure Help? Evaluating the Recommendations of the ALI’s ‘Principles of the Law of Software Contracts’” (2011) 78 U Chicago L Rev 165.

¹¹¹ *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34, [2007] 2 SCR 801.

¹¹² Art 1436 CCQ.

¹¹³ Art 1437 CCQ.

¹¹⁵ The pertinent trilogy is: *Step-Saver Data System, Inc v Wyse Technology*, 939 F (2d) 91 (3rd Cir 1991); *Vault Corporation v Quaid Software Limited*, 847 F (2d) 255 (5th Cir 1988); *Arizona Retail Systems, Inc. v The Software Link, Inc.*, 831 F Supp 759 (D Ariz 1993).

Zeidenberg,¹¹⁶ was followed. Consent in contract, once mythologized, thus became decorative.¹¹⁷ And what a pity!¹¹⁸ The effect of this condonation has been to extol the *status quo*. No need to improve contracts; the debate on the notion of “plain English”¹¹⁹ that took place in the 1970s was buried, although the jurisprudence occasionally sees rare instances of reminiscence.¹²⁰

[33] *Conceptual Difficulties Relating to the status of “consent.”* There is thus a jurisprudential tendency to weaken the place of “consent” within contracts. In fact, while the principle of consent remains one of the conditions for entering into a valid contract,¹²¹ consent is now relatively easy to demonstrate—even if this is known to be completely illusory in practice. In North America, autonomy of will, without being formally challenged, is diluted on two levels. As we have previously seen, this flexible understanding is confirmed both in the communication of the contractual information and in the way in which consent is manifested. Condemning this practice, and this change of an important paradigm, Mark Lemley observes that “[t]oday, by contrast, more and more courts and commentators seem willing to accept the idea that if a business writes a document and calls it a contract, courts will enforce it as a contract even if no

¹¹⁶ *ProCD, Inc v Zeidenberg*, 86 F (3d) 1447 (7th Cir 1996).

¹¹⁷ Mark A Lemley, “Terms of Use” (2006) 91 Minn L Rev 459. With regards to the period 1996–2006, the author makes the following points, at 459: “Electronic contracting has experienced a sea change in the last decade. Ten years ago, courts required affirmative evidence of agreement to form a contract. [...]”

¹¹⁸ Vincent Gautrais, “Le vouloir électronique selon l’affaire *Dell Computer*: dommage!” (2007) 37:2 RGD 407 at 420.

¹¹⁹ See Ruth Sullivan, “The Promise of Plain Language Drafting” (2001) 47 McGill LJ 97; Carl Felsenfeld & Alan Siegel, *Writing Contracts in Plain English* (St Paul, Minn: West, 1981); Jeffrey Davis, “Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts” (1977) 63:6 Va L Rev 841; Robert C Dick, “Plain English in Legal Drafting” (1980) 18 Alta L Rev 509; Carl Felsenfeld, “The Plain English Movement in the United States” (1981) 6 Can Bus LJ 408; David M Laprairie, “Taking the ‘Plain Language’ Movement too far: The Michigan Legislature’s Unnecessary Application of the Plain Language Doctrine to Consumer Contracts” (2000) 45 Wayne L Rev 1927. See also Melvin Aron Eisenberg, “The Limits of Cognition and the Limits of Contract” (1995) 47 Stan L Rev 211; Melvin Aron Eisenberg, “Text Anxiety” (1986) 59 S Cal L Rev 305.

¹²⁰ This notably brings to mind the decision in *Mofo Moko c Ebay Canada Ltd.*, 2013 Qc Sup Ct 856.

¹²¹ Catherine Thibierge-Guelfucci, “Libres propos sur la transformation du droit des contrats” (1997) RTD civ 357 at 375: “Will, in order to be effective in this hierarchical relationship, must take the form of a consent whose expression, agreement and effects must be consistent with this superior ideal.”

one agrees to it.”¹²² An erosion can thus be observed: “The idea of voluntary willingness first decayed into consent, then into assent, then into the mere possibility or opportunity for assent, then to merely fictional assent, then to mere efficient rearrangement of entitlements without any consent or assent.”¹²³ This erosion is all the more contradictory when one considers that these contracts continue to repeat that the member has read and understood the incomprehensible provisions.¹²⁴

2. Contractual Normativity in Search of Oversight

When it comes to potential pathways for increased oversight of the contracts under discussion, they present themselves in two dimensions: form and substance.

[34] *Potential Pathways to Overseeing the Contractual Form.* In contracts put forward by disruptive technology companies, as is the case with the rest of electronic commerce, it appears imperative that a real “contractual marketing”¹²⁵ could be put forward. It is therefore important to draft the contract’s content bearing in mind that it will not be read by the consumer if it keeps being presented in standard format. Drafting efforts that may have been suggested in the past, based on the use of colours or distinct characters,¹²⁶ are poor stopgaps, a Band-Aid on a wooden leg. Rather, a complete redraft needs to be considered. Apart from their length, the contracts should be integrated in the purchase process, meaning that they are part of it in the same way as the choice of product. It is an astonishing fact that on Internet sites it is only contracts that are designed with the objective of not informing. Everywhere else the objective is to retain the

¹²² Lemley, *supra* note 117 at 459.

¹²³ Margaret Jane Radin, “Boilerplate Today: The Rise of Modularity and the Waning of Consent” (2006) 104:5 Mich L Rev 1231.

¹²⁴ By way of example, the Airbnb contract mentions 26 times that the member understands (“you understand ...”) the contractual content. In the same way, the member is invited to read a particular clause nine times.

¹²⁵ Gautrais, *Contrat 2.0*, *supra* note 102 at 256.

¹²⁶ Gautrais, *Les contrats de cyberconsommation*, *supra* note 106.

customer's interest; when it comes to online contracts, the position is the opposite. In this informational context, and because of the fact that "consent" is being reconsidered, the possibility for increasing consumer understanding of contracts is limited only by the creativity of the lawyers. A first step might be to insert images, such as pictograms, each of which represents a different clause.¹²⁷ Next, why not render the contract accessible in audio format? In an era where the number of functional illiterates approaches 50%, it is not inconceivable to vocally "translate" the contract. The digital environment makes this process possible, and there is no doubt that such a solution would of itself affect the length, the majority of current contracts not being capable of being read in a reasonable time. Then, there is scope for categorizing contracts: they could differ on the basis of the products sold, the profile of the purchaser, the consumer's geographical location, etc. Finally, and without claiming to be exhaustive, the reinforcement of "consent" could also manifest itself through the individualization of the contract: the names of the parties could be inserted into the contract. The idea behind this is that the consumer would feel more involved if he or she saw his or her name appear, and would therefore consider the contractual obligations to be more closely associated to his or her person.

[35] *Administrative Oversight*. That said, we saw that judicial oversight—especially in the *Dell* matter—has been minimalist. This is why alternative solutions in the form of contractual oversight practises have been suggested in the literature. One of the most commonly proposed solutions is to ensure that a dedicated government agency could, at an early stage, sift out "unconscionable"¹²⁸ clauses. While this solution works in the United States in other domains,

¹²⁷ The solution was envisaged in an earlier draft of the European Privacy Regulations where pictograms were proposed, notably in order to better describe the kind of processing that a site effects: Albrecht Amendment, *supra* note 60. However, a similar approach is definitely in effect in the six distinct licences envisaged by *Creative Commons*. For further information in this regard, see *Creative Commons*, online: <<https://creativecommons.org/>>.

¹²⁸ Arthur A Leff, "Unconscionability and the Code: The Emperor's New Clause" (1967) 115:4 U Pa L Rev 485; W David Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" (1971) 84:3 Harv L Rev

strongly flavoured as being a “public policy” measure—for instance concerning mortgage loans—I consider it too complex to extend to an economic sector of such a cross-cutting nature as disruptive technology. In fact, digital technology constitutes a tool and the electronic contract cannot be confined to a sector. This renders it difficult to bundle practices. As well, this is a matter of culture, and the integration of state agencies is not a common reflex in North America. Hence, notwithstanding their undeniable benefits and their real achievements,¹²⁹ the French¹³⁰ or Israeli¹³¹ solutions would not appear to be easily transposable onto other continents.

[36] *Potential Pathways to Overseeing Contractual Substance.* But beyond the form of these digital contracts, it would seem that salvation is likely to lie in oversight of substance rather than form. Llewellyn, the great architect of the United States codification around 1960, claimed that the judicial system fulfils this contractual oversight function in circumstances where it is practically impossible to consent to clauses:

Instead of thinking about ‘assent’ to boiler-plate clauses, we can recognize that so far as concerns the specific, *there is no assent at all*. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. *That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form*, which do not alter or eviscerate the reasonable meaning of the

529, cited by Ian Ayres & Alan Schwartz, “The No-Reading Problem in Consumer Contract Law” (2014) 66 Stan L Rev 545.

¹²⁹ This brings to mind in particular the French *Commission des clauses abusives* that listed a series of clauses in contracts for the supply of Internet access services and automobile rentals. This grading function has since been taken over by jurisprudence.

¹³⁰ With the *Commission des clauses abusives*.

¹³¹ Sinai Deutch, “Controlling Standard Contracts – The Israeli Version” (1985) 30 McGill LJ 458.

dickered terms.¹³²

This solution has, moreover, been integrated in certain statutory texts.¹³³ But beyond the wisdom inherent in this formula, it should be noted that this traditional mode of oversight does not operate in an optimal manner. In fact, as we have seen, there are few decisions that sanction contractual practices. In Canada, the *Dell Computer* decision has served to illustrate the judges' refusal to perform this oversight role,¹³⁴ legal security being given preference over consumer interests.¹³⁵ Neither has this oversight role been emphasized in the new legislative provisions pertaining to electronic consumer contracts that nevertheless aimed to strengthen the need for contractual information.¹³⁶

[37] *Jurisprudential Hope?* Still, despite this somewhat despondent discourse, the question arises whether there is not perhaps reason for hope. Indeed, on 23 June 2017, the Supreme Court of Canada rendered an important decision that has tempered contractual omnipotence: *Douez v Facebook*.¹³⁷ In an admittedly divided decision, the majority went in an unexpected direction in ruling that there were substantial grounds for not upholding a choice of forum clause in favour of Californian law with the District Court of Santa Clara as the court of

¹³² Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown & Co, 1960) at 370, cited by Ayres & Schwartz, *supra* note 128 at 556 [my emphasis].

¹³³ Restatement (Second) of Contracts, § 237: "Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation," cited in William J O'Connor, Jr, "Plain English" (1979) 34:3 *Bus Lawyer* 1453 at 1453.

¹³⁴ *Dell Computer Corp v Union des consommateurs*, *supra* note 111. See especially paras 101–3 on illegible or otherwise abusive clauses.

¹³⁵ Alain Prujiner, "Canada - Cour suprême du Canada - 13 juillet 2007 - Dell Computer Corp. c. Union des consommateurs, 2007 CSC 34 : note" (2007) 3 *Rev arb* 1 at 41: "the restrictive interpretation given to the external clause in adhesion contracts in cyberspace signifies a strong tendency from the Court in favour of legal security for the drafters of the contract rather than a preoccupation for the protection of the adherent."

¹³⁶ Insofar as the Quebec example is concerned, the amendments introducing the obligation to draft contracts so as to "present information prominently and in a comprehensible manner and bring it expressly to the consumer's attention" (*Consumer Protection Act*, *supra* note 101 s 54.4ff), have in ten years not given rise to a single decision.

¹³⁷ *Douez v Facebook, Inc*, *supra* note 142.

competent jurisdiction.¹³⁸ Thus the majority considered that while such clauses are usually valid, a series of arguments weighed in favour of a reversal. Among them there was first and foremost the fact that this was in a consumer context.¹³⁹ This justification is remarkable, for there is no discussion on this point: it is self-evident and the decision notes that a consumer context is involved,¹⁴⁰ even though the *Facebook* contract is offered free of charge. The lack of discussion is intriguing, although this position appears to be completely justified. It remains novel, in the sense that some older decisions have suggested the converse.¹⁴¹ The consequence is that this relationship comprises an inherent fragility, one that is emphasized and multiplied by the development of the Internet¹⁴² but also by the fact that the users are not really in a situation where they have the freedom to choose something else.¹⁴³ This is therefore a major decision in the sense that it introduces a case with an individualistic approach to contracts, even if this is limited to a

¹³⁸ *Ibid.* This appears in para 8.

¹³⁹ *Ibid.* See especially at para 33: “And as one of the interveners argues, instead of supporting certainty and security, forum selection clauses in consumer contracts may do ‘the opposite for the millions of ordinary people who would not foresee or expect its implications and cannot be deemed to have undertaken sophisticated analysis of foreign legal systems prior to opening an online account’ (Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic Factum, at para. 7).”

¹⁴⁰ From the first paragraph, the matter is classed as falling into a consumer context: “[1] Forum selection clauses purport to oust the jurisdiction of otherwise competent courts in favour of a foreign jurisdiction. To balance contractual freedom with the public good in having local courts adjudicate certain claims, courts have developed a test to determine whether such clauses should be enforced. *This test has mostly been applied in commercial contexts*, where forum selection clauses are generally enforced to hold sophisticated parties to their bargain, absent exceptional circumstances. *This appeal requires the Court to apply this test in a consumer context.*” [my emphasis].

¹⁴¹ See especially the decision *St-Arnaud c Facebook*, 2011 Qc Sup Ct 1506, where para 19 states, “Facebook does not have a consumer relationship with its Users.”

¹⁴² *Douez v Facebook, Inc*, 2017 SCC 33, particularly at para 36: “Such a development is especially important since online consumer contracts are ubiquitous, and the global reach of the Internet allows for instantaneous cross-border consumer transactions.” See the points made by Justice Abella among similar lines at para 99.

¹⁴³ *Ibid* at para 56: “In particular, unlike a standard retail transaction, there are few comparable alternatives to Facebook, a social networking platform with extensive reach. British Columbians who wish to participate in the many online communities that interact through Facebook must accept that company’s terms or choose not to participate in its ubiquitous social network. As the intervener the Canadian Civil Liberties Association emphasizes, ‘access to Facebook and social media platforms, including the online communities they make possible, has become increasingly important for the exercise of free speech, freedom of association and for full participation in democracy’ (I.F., at para. 16). Having the choice to remain ‘offline’ may not be a real choice in the Internet era.”

specific question pertaining to choice of forum. It is an approach that Justice Abella would undoubtedly be keen to extend beyond the present question.¹⁴⁴

¹⁴⁴ *Ibid* at para 104: “In general, then, when online consumer contracts of adhesion contain terms that unduly impede the ability of consumers to vindicate their rights in domestic courts, particularly their quasi-constitutional or constitutional rights, in my view, public policy concerns outweigh those favouring enforceability of a forum selection clause.”