Between Truth and Power (New York: Oxford Univ. Press, 2019)

Part I
Patterns of Entitlement and Disentitlement

The chapters in this part of the book are about the ways that law and legal institutions have facilitated the emergence of informational capitalism by defining patterns of entitlement and disentitlement in new informational resources. Some parts of that story are well understood. Legal scholars are keenly aware of the central importance of intellectual property rights in the emerging information economy, and of the corresponding pressures to define those rights ever more broadly. Legal scholarship also has helped policymakers and judges understand the ways that control of code can confer control over information flows.[1] Legal scholars of the information economy, however, have tended to focus a bit too narrowly on the themes of propertization and control and not enough on others that are equally important.

As we will see throughout Part I, the ways that law shapes processes of entitlement definition are complex. A useful starting point from which to begin thinking through the issues is the classic taxonomy of jural "primitives" developed by Wesley Hohfeld over a century ago.[2] Hohfeld's central insight was that entitlements are relational and that the rights-duties relationship—the relationship that arises when one person has a right that others have a duty to respect—is only one of the possibilities. Entitlements also may take the form of privileges, powers, or immunities, each of which affects others in different kinds of ways. In choosing that particular starting point, I do not mean to invoke the taxonomy as a substantive legal (or moral) theory about the ways that information-economy entitlements should be defined or allocated. Rather, my purpose is the one described by Pierre Schlag: the taxonomy is an analytical method for identifying "mistakes of ambiguity, slippage, and blending" in descriptions of legal relations.[3] So understood, Hohfeldian analysis takes aim at a particular kind of analytical sloppiness that, as a practical matter, tends to unspool in ways that benefit and entrench political and economic power.

But the accounts of information-economy entitlements and disentitlements developed in Part I also introduce significant complications. At bottom, Hohfeldian analysis is an exercise in intellectual purism. For example, if one finds that party A enjoys a privilege to engage in certain conduct, one should find that party B is under a correlative disentitlement to require A to act differently, and if one finds that A's privilege has been misdescribed as a right in order to justify imposing legal duties on B, then one is justified both in concluding that sloppy thinking has occurred and in thinking that, once the sloppy thinking has been identified, the relevant decision-makers, typically judges, will realize the error of their ways. And yet the landscape of entitlements and disentitlements that we are about to explore is in motion in ways that the Hohfeldian account did not contemplate. A descriptive thesis that emerges powerfully from the

chapters in Part I is that, during periods of rapid transformation in the mode of political economy, decomposition and recomposition of entitlements and disentitlements is the rule rather than the exception.

In particular, the chapters in this part of the book highlight two factors that have facilitated the remixing of entitlements in ways that benefit powerful information-economy actors. First, networked information and communication and technologies can be configured to tilt the playing field this way or that. So, for example, we will see in chapters 1 and 2 that the networked information environment has been systematically configured to facilitate the extraction and enclosure of data flows of various types, and we will see in chapters 3 and 4 that platform-based, algorithmic processes for intermediating and filtering information flows have facilitated the emergence of new legal relations revolving around legal immunity, legal power, and the interplay between them.

Second and relatedly, processes of decomposition and recomposition are fundamentally performative. Online interactions between information businesses and users of their services play outsize roles in stabilizing and reifying emerging patterns of entitlement and disentitlement. Additionally, in an age in which communication is cheap and nearly instantaneous, and in which information overload has replaced information scarcity as the defining characteristic of the contemporary media landscape, it is essential to understand the ways that participants in information-economy legal debates use discursive strategies—including especially narratives about innovation and markets that are rooted in the dominant ideology of neoliberal governmentality—to shape prevailing perceptions about both the existing legal landscape and possible pathways for legal change. Those narratives unfold within an institutional landscape that offers many more points of entry for legal and normative entrepreneurship than the one that Hohfeld's illustrations and explanations described.

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[1] The literatures here are vast. On the politics and economics of enclosure and appropriation of informational resources, see James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge, Mass.: Harvard University Press, 1998); James Boyle "The Second Enclosure Movement and the Construction of the Public Domain," *Law and Contemporary Problems* 66 nos. 1-2 (2008): 33-74; Madhavi Sunder, "IP^3," *Stanford Law Review* 59 no. 2 (2006): 257–332. On the transformative potential of informational resources held as commons, see Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven: Yale University Press, 2006); Brett M. Frischmann, *Infrastructure: The Social Value of Shared Resources* (New York: Oxford University Press, 2012); On the ways that intellectual property law and policy structure global dynamics of development and resource distribution, see Anupam Chander & Madhavi Sunder, "The Romance of the Public Domain," *California Law Review*, 92 no. 5 (2004): 1331-1373; Margaret Chon, "Intellectual Property and the Development Divide," *Cardozo Law Review* 27 no. 6 (2006): 2821-2912. On the uses of code as a regulatory instrument, see Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999); Joel R. Reidenberg, "*Lex Informatica*: The Formulation of Information Policy Rules Through Technology," *Texas Law Review* 76 no. 3 (1998): 553-593.

[2] Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal* 23 no. 1 (1913): 16-59.

[3] Pierre Schlag, "How to Do Things with Hohfeld," *Law and Contemporary Problems* 78 nos. 1-2 (2015): 185-234.