Francella Ochillo:

Sure. There are lots of ways that this can go wrong, but look at where we are now. And I think that one thing I don't want to ignore is the cost of an action, because it costs us something to worry about if any move is a bad move, or if when we start, it's not going to be perfect. That's entirely possible. When I think about whether or not we're able to do this, we're the United States of America. We do hard things. I think this fear of us not getting it right is exactly where tech companies want us to be because they're making billions of dollars by the day while we're arguing about it.

Bob Sullivan:

Welcome back to the Ways & Means series, Defending Democracy From Big Tech. I'm Bob Sullivan, host of the Debugger podcast.

Bob Sullivan:

When we left off, I'd just mentioned the burning Cuyahoga River, a big, terrible mess in Cleveland that eventually during the 1960s and early '70s helped galvanize the attention of most Americans and helped to bring about the Environmental Protection Agency. Well, we have another really big burning mess on our hands right now, big tech.

Bob Sullivan:

It's too big to sue, too big to regulate, too big to live with in some ways. What do we do if a large tech company is doing something society doesn't want, but it's so big? It seems no government fine can stop them. In episode one, we talked about what we mean by too big to sue and explained why a lot of scholars have settled on the term, platform accountability to describe this problem.

Bob Sullivan:

Episode two, discussed some things that have already been tried like self-regulation, Facebook's oversight board, the Federal Trade Commission. Not going well so far. There must be a better way. So in this episode, we're calling it, Begged and Borrowed. We'll look at what's been tried in other industries. After all, this isn't the first time the US has been faced with a large runaway industry that needed to be brought back into line. Where have we had this experience before? What's been done?

David Hoffman:

This series is supported by the Cyber Policy Program at Duke University's Sanford School of Public Policy and by The Kenan Institute for Ethics. I'm Professor David Hoffman and I lead the Cyber Policy Program. At the Sanford School of Public Policy, we are training the next generation of tech policy leaders in researching how tech platforms can show that they're behaving responsibly and ethically.

Bob Sullivan:

Well, the phrase, too big to sue might sound a little familiar to you and that's on purpose. It sounds a lot like too big to fail which is the phrase popularized during the financial crisis about a decade ago that crippled the world's economies. Big banks, so big and embedded in the economy, they couldn't be allowed to fail were bailed out. That still makes a lot of people angry, but it's also a good place to look for lessons. So what can we borrow from the world of finance that might apply to large tech firms?

Bob Sullivan:

It's a good place to start, especially because one of the biggest outcomes from the efforts to reign in big banks after the financial collapse was the creation of a new federal agency, the Consumer Financial Protection Bureau. Some lingering political bickering aside, the CFPB is generally regarded as a success, certainly in giving ordinary consumers a stronger voice in their conflicts with big banks.

Bob Sullivan:

Rory Van Loo, now a Boston University law professor was there at the beginning and helped make a lot of the foundational choices at the CFPB. So let's begin with a new concept for many, certainly in Silicon Valley monitoring.

Rory Van Loo:

Yeah. One of the interesting things about that experience at the Consumer Financial Protection Bureau is how much of a paradigm shift people had to undergo to get to the right place. So at the agency at the CFPB when we were starting out, there were really two very different models out there for how the agency could have been designed. We could have done it like the FTC, the Federal Trade Commission is designed largely based on enforcement lawyers going in using court ordered subpoenas and the like to collect information and bringing lawsuits or settlements with the shadow threat of a lawsuit.

Rory Van Loo:

That's one model out there. And then the other model was the bank regulatory model, the Office of the Comptroller of the Currency, the FDIC, and these other banking regulators who really don't rely on lawyers very much at all. Instead, they have examiners who go in regularly collect information. I describe it to my students sometimes as they have x-ray vision to see what's going on. And then they try to work with banks and other financial institutions to correct any wrongdoing. And the CFPB really brought both those worlds together for a hybrid model.

Bob Sullivan:

Government examiners and workers side by side, Uncle Sam, looking over an accountant's shoulder. That sounds uncomfortable for everyone. And it was at first. Now, if I remember correctly, banks were really happy to have CFPB examiners start visiting their offices, right?

Rory Van Loo:

I'm not sure how much that was a joke, but if it's a joke, it's spot on overall. But there is an element of truth to what you just said, perhaps counterintuitively. And that is that the bank's much preferred CFPB examiners to CFPB lawyers. And in fact, when the CFPB came out with an early idea to bring enforcement lawyers along on their examinations, the banking industry was in an uproar and they were very unhappy.

Rory Van Loo:

So in a certain sense when the CFPB then moved on to a model where they would mostly only send examiners in without the enforcement lawyers, yes, the banks were actually happy to see the CFPB examiners

Bob Sullivan:

Happy is probably overstating it, but the ability to make quiet course corrections during routine examinations, rather than wait until things are really off the rails and face a lawsuit that is indeed an improvement for everyone, for banks, for the consumers. Banking regulators, for example, have a tool they use called a stress test. It's an exercise, but dress rehearsal, if you will. Much better to fix your mistakes during a rehearsal than during a live performance.

Rory Van Loo:

So the Federal Reserve has the authority to impose stress tests on large banks, which means that they go in and say, "Okay, if there was a major recession, would you be able to withstand that recession and still pay your customers money back and thus avoid, potentially bring the country into financial crisis. If a large bank fails, it can cause a domino effect that brings down the economy.

Rory Van Loo:

So the idea of a stress test is to probe almost these dire circumstances. And you can imagine a world in which Facebook is stress tested for an election or election integrity or misinformation being widespread. And Facebook would be asked to develop plans, hypothetical plans for how it would respond in certain situations. That's one example of looking at a regulatory tool in other areas asking how it might apply to big tech.

Bob Sullivan:

One big benefit to this model, examiners overtime, develop expertise in a field that help them make better choices. A fair criticism of current government regulators is that they often don't know what they're getting into when they barge into a big tech company with a lawsuit. They just don't have the technology expertise. Monitors, thanks to these ongoing relationships would be in a better position. But there's an obvious potential flaw to this examiner model. It's probably already on your mind, the idea that government employees assigned to tech companies might get too cozy with them. They'd be captured. I asked Van Loo about that.

Bob Sullivan:

I do think this arm of any proposal for big tech has to answer to that skeptic system. So how would you do that?

Rory Van Loo:

I'd have two answers. First, I'd just highlight that the OCC and all of those bank regulators were so dependent on examiners that it's been described to me in some of the interviews I've done with people in those agencies as the lawyers worked for the examiners, and the lawyers only became involved in the process when the examiners said so. At the CFPB and in a well-designed agency, the lawyers can have a lot more freedom to become involved when necessary.

Rory Van Loo:

So I think actually both of these groups, both the lawyers and the examiners can be seen as providing a certain check on the other. So the examiners help to provide information and maybe a conduit for working with industry to solve problems. And then the lawyers can serve as a check on excess comfort and coziness and capture of the examiners.

Bob Sullivan:

So that's one way to do things. On the other hand, you've got the EPA, the Environmental Protection Agency. It has a set of special powers far beyond what the FTC or even the CFPB can do to shut down companies that pollute or to impose expensive changes in projects. What might be borrowed from how the EPA does things? Well, for starters, it created a new legal concept of natural resource abuse of social harm. "We don't really have that in tech right now," says Berkeley law professor Chris Hoofnagle. And maybe we should.

Chris Hoofnagle:

Well, there's some nice parallels between the challenges in environmental law and in privacy. They're not all force metaphors. They break down in some ways. But what's happened in environmental law enforcement is that creation of a number of different legal innovations to deal with problems of proof and problems of harm.

Chris Hoofnagle:

So for instance, you might have a site that's been polluted with several different toxic chemicals, and that pollution might have happened decades earlier. And there might be several different chemical companies possibly involved. From a legal standpoint, you as plaintiff bear the burden of proving pretty precisely which person contributed to the toxic release. But under environmental laws, we've basically reduced that burden and we've created systems so the plaintiff only has to show that a company released the same type of chemical, not the specific chemical, but the same type and so on.

Chris Hoofnagle:

So there are all these different burden shifting and evidentiary tools that have been developed in environmental law that might be able to be used in privacy law. And so what does that translation look like? Well, it's actually very difficult to reconstruct how an information company has used your data.

Chris Hoofnagle:

I'll give an example as in face recognition. Most people don't know this, but if you provide your photograph to any company, that company probably will run face recognition on it. It probably won't tell you, but it's so cheap to run facial recognition. And who knows? Maybe you could eke out some value from it, then it's done all the time. But from the plaintiff, if you're a plaintiff wronged by this, it's very difficult to tell that, that has occurred.

Chris Hoofnagle:

So you could imagine burden shifting or different evidentiary tools that require the defendant company to be more transparent or be more truthful about its practices. One of the problems in privacy that makes it a lot like environmental law is that information practices are basically inscrutable to the average person.

Chris Hoofnagle:

So maybe what we do is we find a solution where the plaintiff has to allege some wrongdoing and we shift the burden so that the defendant information company has to actually show its practices and explain why it is not done facial recognition or some other process. A lot of companies are already doing things like this. And in fact, many companies that are using machine learning are testing their models to ensure that there are not racially disparate impacts on their decisions based on their ML models.

Chris Hoofnagle:

So some companies are already getting ready for this idea that they're going to face lawsuits surrounding discrimination. And so in their development process, they're thinking about how we can show what we did, show our math and show that we checked our math so that we were not discriminating against people unjustly.

Bob Sullivan:

Rory Van Loo likes this idea too, and it fits with the idea of ongoing monitoring.

Rory Van Loo:

One of the things that the EPA does nicely that say that the FTC does not in regulating big tech is the EPA partners, lawyers with engineers to gather information from companies and then to problem solve side to figure out how big a problem it is and what should be done about the problem. Whereas the FTC is mostly, again, only lawyers coming in, often after the fact to fix a problem. The EPA sends in typically engineers as the first inspector really to understand what's going on. They'll then collect a report and go back and sit down with a lawyer if they have any questions about whether something is a violation of the law or what legal authority the EPA should use to address it. So that's one example of something that I think works well in, say, the EPA context.

Bob Sullivan:

Let's pivot quickly now to an area near and dear to my heart. I've spent a lot of time in my life working in bars and restaurants. I've even written a book about that. So I've learned a lot about the rather challenging relationship between food establishments and local health departments. But if you think about it, there are roughly 1 million restaurants in the US, 1 million. And how often do you hear about severe outbreaks of food poisoning?

Bob Sullivan:

Again, it's not perfect, but it works pretty well. And there's certainly a lot that can be learned from the way food inspections work. Hoofnagle thinks so too.

Bob Sullivan:

I'm picturing a surprise inspection of a restaurant to see whether or not there is enough detergent in the rinse for cleaning glasses, for example. Those happen. And sometimes a restaurant will get shut down after an inspection like that. Although normally what happens is the inspector says, "I'll come back tomorrow and this better be fixed." And then the restaurant is clean. How is that as a metaphor for what you're describing?

Chris Hoofnagle:

That's great. And the way you put it, it serves the policy goal of protecting people's health. We don't have to be harshly disciplinary to achieve that goal. So the example of the leeway, some people would say, "Oh, well, the regulator is capture. The regulator is in bed with the restaurant." Ah, what you described is a regulatory experience that results in the outcome you want at pretty low cost.

Bob Sullivan:

Even the people who eat at the restaurant probably don't want it closed. And then we don't necessarily want Google Maps to go offline.

Chris Hoofnagle:

Exactly.

Bob Sullivan:

Take this idea up one notch and you get the Food and Drug Administration, which regulates not just food, but also approves drugs for use in the US. We all know far more about the FDA than we used to thanks to the COVID-19 vaccine approval process. Recall that drug trials are often halted when there are just a few unpredicted adverse events on test subjects. Maybe big tech could learn something from the drug approval process, perhaps critical technology that are used on large populations should face some kind of preapproval, a test for harms before they become widespread.

Rory Van Loo:

One of the ideas that's floated in this paper in FDA for algorithms is to require some of the higher risk algorithms to get approval before they can be released and implemented and used with billions of users, for example. With drugs, for example, the FDA requires a drug company to submit a proposal before just releasing a drug on to the population. And so then the FDA looks over the data to make sure it's safe and so on. That's probably familiar to a lot of people because that's what's happening with vaccines, for example. So the idea would be to do something similar with tech.

Bob Sullivan:

Creation of a new government agency or new expanded powers for existing agencies will always face pushback from industry. But empowered government regulators aren't the only potential fix here. There are many other tools. Instead of David versus Goliath, one of them, I like to think of as the Godzilla versus King Kong model. Make it easier for large companies to fight each other over potential misdeeds. That's largely how things work in the advertising world, where there's a mechanism which lets advertisers cry foul against each other. Duke's David Hoffman explains how it came to be.

David Hoffman:

It's because the advertisers all recognized that it made sense for them to have a dispute resolution mechanism where they could raise issues with each other's advertising without it necessarily involving the regulators at that point or a lawsuit at that particular point. And so the Better Business Bureau set up something called the National Advertising Division, which allowed different companies to allege that an advertisement that they'd seen by another company was misleading, false, or deceptive. That National Advertising Division then would investigate those claims and publish decisions on those which the companies could either then accept that decision, or then the issue could end up going to the Federal Trade Commission.

David Hoffman:

I think this is the type of model that we ought to explore in the technology industry as we're starting to see different companies who are not... It's not only that individuals are impacted, but it's that the companies are impacted also. Having companies regulating each other in some fashion could be a way to provide additional resources to have more accountable organizations.

Bob Sullivan:

So they fight with each other, there's this arena where the two large entities can just duke it out themselves?

David Hoffman:

Yeah.

Bob Sullivan:

Is there a "for instance" that springs to mind?

David Hoffman:

As an example of a place where that would be the case, I think issues where we're seeing algorithmic amplification of content that violates platforms, terms and conditions, then hate speech might be an example where one platform might say, "Look, I see this algorithmic amplification that's happening on this other platform." And it violates not only that platforms, terms and conditions, but it violates the growing industry norms around what content is going to be allowed on technology platforms.

David Hoffman:

That's a place where government is not well positioned to come in and to tell a particular platform that, that speech should not be allowed on the platform. But where platforms could agree with each other to allow each other to be held accountable in that type of a framework where the companies are going and bringing the dispute.

Bob Sullivan:

So there's some structure where a large social media company might drag another large social media company before this board and say, "Cut it out. You're allowing this stuff we both agree we wouldn't allow."

David Hoffman:

I think that's absolutely right. And so you can imagine that this could happen across a number of different areas where there's content that is going up on these platforms that we don't think as a society is something that we want to see. I think another example is where we see foreign nation states impersonating other users in a way to try to influence democracy in certain countries. That's the place where it's very difficult for government to come in and actually prohibit that kind of speech and get it taken off of platforms.

David Hoffman:

However, that would be a place where this type of mechanism where different companies could bring that to the attention of the other company and someone could in an objective way as a neutral arbiter, come up with a decision about whether that account should still exist or whether certain content should be taken on.

Bob Sullivan:

Of course, letting corporations duke it out for the best product and the best service is theoretically the American way, the capitalism way, the market economy way. But in many portions of the economy, that

kind of fair fight is a fantasy. Consumers have become used to the idea that for many products they buy, internet access for one. They have only one or two options. In that world competition isn't going to fix anything. And that's why Duke professor, Barak Richman favors an approach that enables competition.

Bob Sullivan:

But it's not easy. As he told us in episode one, consumers who get angry at Coke can easily switch to Pepsi, but consumers who don't like Facebook's algorithm can't so easily switch to what? But what if there were another way to create competition? Richman offers one of the more unique proposals you'll hear. I started calling it BYOA in my head. You probably know what BYOB means, bring your own booze to a restaurant.

Bob Sullivan:

Well, what if you could BYOA, bring your own algorithm to the Facebook platform. Kind of like you can now bring your own telephone to the phone network. I'll let Richman explain the whole idea.

Barak Richman:

Facebook is unlikely to lose market share because of the notion of positive externalities, the scale economies. The more people there are in a particular social network, the more valuable it is. If that's the case, then maybe the best way to create competition is to allow individuals to work on top of Facebook's platform. Maybe I can use all of my Facebook friends and I can use all of the expansiveness and the diversity of Facebook social network.

Barak Richman:

But instead of using Facebook's algorithm, I can purchase, or I can use another company's algorithm. Or maybe instead of using Facebook's search tools or game tools, I very happily bring on other apps and other tools on top of the Facebook platform.

Bob Sullivan:

Richman published a paper recently with a set of Stanford University scholars where they flush out the idea. It's something they call middleware for dominant digital platforms.

Barak Richman:

We were really concerned about the power of Facebook's algorithms, not because they entrenched Facebook's market power. I mean, they were probably part of the market power. They certainly helped Facebook make more money and made their market power more profitable. But we were really concerned about their algorithms because they had the capacity and have exhibited the capacity to really dominate rhetoric, dominate our national discourse. And Twitter, and also, I think Google search terms and YouTube, these are all platforms that have extraordinarily powerful algorithms.

Barak Richman:

They shape what we see. They shape what we think. They shape what we say. And these are all curated and shaped by private actors without really any kind of oversight. So, yes, it's true that these algorithms are designed to encourage clicks and they're designed to create money and they might have certain kinds of any competitive consequences. But our concern really is that the algorithms, control over the algorithms had enormous political and cultural power.

Barak Richman:

And our solution was that instead of having one algorithm that determines what everybody sees on Facebook, we need to allow individuals to bring in their own algorithms. And that is not really an antitrust remedy to a monopoly problem. It's a remedy that tries to shore up real vulnerabilities to our polity, to our system of democracy, and it's a remedy that's consistent with the First Amendment.

Bob Sullivan:

Borrowing from the CFPB, the EPA, and the FDA, forcing companies to open their platforms to competition, none of these things are cure-alls. All of them are interesting starting points. There are plenty of other ideas. One way to make sure companies are more on the hook for what happens on their watch is to take away or at least modify their legal immunity.

Bob Sullivan:

Remember, in episode one, when I talked about a lawsuit against Facebook for fraud on its platform, the company threw out its get out of jail free card and its motion for dismissal. That's referencing Section 230 of the Communications Decency Act which at the moment says tech companies aren't liable for things that happen on their platforms.

Bob Sullivan:

David Vladeck, the former head of consumer protection at the FTC says, "Any efforts at platform accountability have to begin with a fresh look at the 1996 law."

David Vladeck:

I think the original sin and I think it's a serious sin was the immunity provided by Section 230. I think that was a terrible mistake by congress. I think every grant of statutory immunity to an industry has backfired. I think it's that immunity that's allowed Facebook and the other platforms to become these sort of monolithic giants that have an outside role in our economy. So I do think that Congress needs to act. I think that if we had a national privacy statute that was robust and effective and subject to robust enforcement by providing the FTC the funds that needs to do that, I think you'd see some substantial changes.

Bob Sullivan:

Then there's Johnny Ryan, the digital right to advocate in Ireland. He admits, fines so far haven't worked very well, but he's not sure governments around the world have really flexed their muscles enough when it comes to keeping big tech in line. It has happened and it has worked. To be blunt, fines don't work, but jail time seems to.

Johnny Ryan:

Well, I think fines are clearly not a particularly useful sanction. There's no harm in fining. By all means continue. But what data protection law in the EU does is it gives the power not only to levee significant fines, but much more importantly, it gives the enforcer the power to go into the business and compel that business or have a court compel the business to change how it uses data.

Johnny Ryan:

For example, a court using the GDPR can tell a company, you must delete all data that you collected in this way or used in this manner. Now that would transform Facebook's fortunes. Overnight it would change it. Now, those are powers that are far more likely to be effective than a fine on its own. Let me give you the example actually of Italy.

Johnny Ryan:

Italy had an important moment in the last year. A young girl aged 10 killed herself by accident. She had access to TikTok, which she should not have done in that jurisdiction. She was too young and by law, she wasn't allowed to be on TikTok and TikTok was not allowed to provide her with service, but it did so. On TikTok, she encountered the Blackout Challenge. Now, the Blackout Challenge is one where you record yourself on video trying to asphyxiate yourself to the point of a blackout.

Johnny Ryan:

Unfortunately, this young girl killed herself doing the blackout challenge. And there was of course, outrage across Italy. Now its data protection law that says that TikTok should not have allowed her onto the platform. And of course, TikTok was remiss in allowing her onto the platform. What the Italian data protection authority did is it forbade TikTok from offering service in Italy for three months until it could confirm that it now knew what age people were and refused access to anyone who was under the age where they shouldn't have access.

Bob Sullivan:

That outright ban, I teased it as a metaphorical jail term, got TikTok's attention. And the company added tools to detect user's age better in Italy. But there are those who feel like it's time tech executives who know their products are causing harm and allow it, well, they should face real jail time. Here's Duke University, professor David Hoffman again.

David Hoffman:

The way I like to think about it is why have we not seen a platform perp walk?

Bob Sullivan:

What's the closest thing that we've seen so far to a platform perp walk or even a tech company executive facing jail time?

David Hoffman:

Frankly, I don't think we've seen anything that's been close yet because I don't think we've seen the will to move and take that step. I think we need to ask the question why that hasn't happened. We've seen lots of congressional hearings where executives come and apologize. I think we have to be asking how often do executives get to keep coming forward and apologizing before we hold them accountable the way we hold other people in society accountable when they dramatically harm other people?

Bob Sullivan:

"There are laws in place that would allow criminal prosecution of tech executives who lead their companies to break the law," Hoffman says.

David Hoffman:

Actually two different models already in federal law for this. One is called the False Statements Act. And another is called the False Claims Act. The false statements act, which applies any time you have an individual that's falsifying or concealing information or making a materially false or fictitious statement could be subject to five years in prison.

David Hoffman:

The False Claims Act actually goes further and provides an important opportunity for whistleblowers to bring these claims that could end up in criminal violations and a platform perp walk that False Claims Act has not been applied yet to technology platforms. But we're talking now about what the models should be. And this idea of making certain that when organizations tell the government that they are going to be in compliance with existing laws, rules, and regulations, and when they do that fraudulently that they could be criminally reliable for that should be an important part of the model that people are looking at.

David Hoffman:

And the last really important thing about the False Claims Act that I think we should learn from is it has a very important additional provision, which is what we call qui tam lawsuits. What the False Claims Act allows us for organizations to file a false claim with the government, for things like government contracting or some other claim where they're going to receive money or property from the government. Whistleblowers can file the lawsuits themselves and can receive compensation then if it's successful and it's deemed to have been a false claim.

David Hoffman:

For example, in 2019, there was a software company, Informatica that had an employee who filed one of these claims and the employee whistleblower ended up receiving $4 million. These qui tam lawsuits and whistleblower incentives could be a critical component of an accountability model moving forward.

Bob Sullivan:

Once again, you hear the importance of whistleblowers. It's hard to deny the impact Francis Haugen and her whistleblower testimony had on this conversation. But yet to be seen is her impact on the future was Haugen's testimony just another congressional hearing turned TV show or will it lead to lasting change? Duke University professor, Jolynn Dellinger, thanks whistleblowers, the tech workers themselves have to be a big part of any accountability system that's already started. Before she went on TV, Haugen connected with an organization called Whistleblower Aid started by Duke graduate, John Napier Tye. Here's Dellinger.

Jolynn Dellinger:

One thing he recommended to her was to file the complaints with the SEC because of the Dodd-Frank whistleblower protections. And so after the financial crisis, that amendment was created in part to incentivize whistleblower. And what I'm wondering is why couldn't we have a similar thing? I mean, we're facing a similar kind of crisis in the internet arena with platform accountability. And the people who have this information are employees, they're technologists.

Jolynn Dellinger:

We have seen time and time again employees walk out of Google because of Project Maven or Facebook employees coming together to complain about something. We have people like Yael Eisenstat or Sophie Zhang, or now Haugen. We know that there are employees there that there are good people

working in these companies who want the best. But I'm telling you what I think we want to do is encourage all of these people in STEM, all technologists, computer scientists, and engineers to be able to find work that aligns with their values and to do that work in a positive way where they feel they have recourse, if something goes wrong. And the way it is now, there are such tremendous asymmetries of power with the companies that we're talking about.

Bob Sullivan:

It's these voices from deep inside tech companies who can really tell us what's going on really make a difference as we try to keep big tech accountable. And as we start listening to more of these voices, as we have more of these platform accountability conversations, we should really make sure that everyone has a seat at the table. Here's friend, Cella Ochillo, the digital rights advocate and Harvard fellow we met in episode one.

Francella Ochillo:

I think that very often it's something that happens in think tanks, in academia, in small groups of people who are tasked with thinking this through, which is why the inadvertent consequences is something that concerns me because sometimes we do need people that are in communities, that aren't in these conversations to be involved at the beginning. So when I go into these conversations, I rarely see people from groups representing people with disabilities and how they rely on technology.

Francella Ochillo:

People who are from indigenous groups who are actually still to this day the most disconnected populations. When we think about how this affects others, those are not always the people who are centered in those ideation sessions. So that's what I'm talking about when I say it's a small group of people. And I live in Washington, DC, so I am part of that small group of people, but I'm also part of the group of people saying, "Let's make room at the table for new voices."

Bob Sullivan:

As we're drafting the new rules of digital engagement for the 21st century for platform accountability, for regulation that even firms like Apple and Facebook have hinted, they will welcome, I asked Ochillo where such an effort might go wrong. And her answer surprised me.

Bob Sullivan:

If we succeed at this effort, maybe there will be a new brand, a new agency in the government that's the technology platform accountability bureau, or maybe we'll have a new part of the Federal Trade Commission that's got enough money to go after tech companies. And maybe we have embedded monitors inside each of these companies that look at algorithms to make sure there's no bias. But whatever one of those solutions arise, could you imagine for listeners how it might go wrong and specifically how communities at the margins might be overlooked in that effort so that we can avoid that as we go forward?

Francella Ochillo:

Yes. I do think there are countless ways that regulatory efforts can go wrong, creating an agency that specifically tasked with addressing this issue. Sure. There are lots of ways that this can go wrong. But look at where we are now. And I think that one thing I don't want to ignore is the cost of an action

because it costs us something to worry about if any move is a bad move, or if when we start, it's not going to be perfect. That's entirely possible.

Francella Ochillo:

When I think about whether or not we're able to do this, we're the United States of America. We do hard things. And when we go back to... I point people to the example sometimes when we're talking about tech issues and broadband regulation and things like that in general, look back at when they were creating the highways back in the '50s and '60s really dreaming that up.

Francella Ochillo:

That was all born. It actually started as a report in Congress. They were thinking about ways to connect people to every city across the country. There was no roadmap. A lot of the roads were either dirt roads. They didn't connect one another. There was no uniform way to get all the way from the East Coast to the West Coast, but they figured out a way to do it. And they decided we're going to do it no matter what. But what was really important about that effort was not just that they decided to do something that was hard.

Francella Ochillo:

They didn't know how. They didn't have the money, but they said they were going to do it. The reason why that was important was because they didn't decide at the beginning that it had to be the only remedy. They wanted to have a way to get from coast to coast, but they also acknowledged that there might be other better ways to get from one city to another, that you could add things to that framework and still make it better.

Francella Ochillo:

So I think that whatever we decide is the framework, I don't think that has to be the final framework, the final destination. It should be something that can be outfitted with complimentary things that improve the original skeleton. So I think this fear of us not getting it right is exactly where tech companies want us to be because they're making billions of dollars by the day while we're arguing about it.

Bob Sullivan:

Dellinger says these new rules, they're fundamental to the 21st century, just like bridges, and roads, and airports were fundamental to the 20th century.

Jolynn Dellinger:

I think that the way I like to describe it is just necessary infrastructure. I feel like we have an information economy. Our reality is largely digital and operating in that environment without data protection laws and without recognition of privacy interests is like operating without infrastructure. And it's dangerous. It's dangerous in ways that I think people aren't necessarily contemplating. All of this data that's floating around in this very unregulated space can be sold to a variety of entities. And I think it can be a national security concern on one level, but it can also be a concern for people in their lived lives.

Bob Sullivan:

And it's not going to be perfect the first time. It's okay to move fast and break things. At least that's what the tech companies often tell me. Here's Ochillo again.

Francella Ochillo:

One thing I want us to also think about is if we're to compare what we do when we're thinking about policies and regulations to companies, companies aren't afraid to fail. They try new things. You think about the fact that it's like we're on iPhone 12 or 13. They got several bytes at this phone and we're okay with giving them a chance to prove that every single iPhone is better than the last iPhone. Right? And we're okay with that. And we're okay with saying, "Let's invest billions of dollars into some biotech firm or maybe satellite broadband. Let's invest in those things to see if they work." And we're okay if the outcome is, we got to try again. We got to do better. We're okay with that.

Francella Ochillo:

So I think that we should apply that same level of expectation and grace to whatever we decide on as the framework is the place to start. Because number one, it doesn't have to be perfect. And number two, it should be designed with the intent of revisiting it as tech changes and improves that we should be able to have tech regulations that also change and improve and are complimentary to the baseline system.

Bob Sullivan:

It doesn't have to be perfect, but we do have to get started because we've got quite a burning fire on our hands. Runaway tech firms are making all these critical decisions for our lives causing chaos in our democracies, hurting our kids with few rules to stop them or even slow them down.

Bob Sullivan:

But podcast host privilege here, as we wind down our project, I want to go back to Ireland where we started one more time. Despite the very imposing task at hand, Johnny Ryan is an optimist. Recall his Irish consumer advocacy group wrote a report saying the Irish Data Protection Commission,. One of the world's most important tech regulators has only issued findings in 2% of the cases brought to it. Still, he told me he's confident in his fight, confident in the lawsuits he's filed, confident that right will win out over big tech might in the end.

Johnny Ryan:

When I was working at PageFair, an online advertising firm, I remember the first time I read the new GDPR and there's a recital in it, Bob that gave me tingles. I think it's recital four. And it said, "The processing of personal data should serve mankind." And thought what a beautiful idea and so far it is from the reality. But it made me think of what was possible.

Bob Sullivan:

The processing of data should serve us all. So far it is from reality. But think of what is possible. The wonders of technology aren't just for a privileged few who control it and the decisions for democracy on what we get to see, what we get to sell, how our institutions work. These were never meant to be made by billionaire tech titans. They were meant to be made by citizens, by elected representatives accountable to those citizens. Ultimately, by all of us. Accountability, isn't a new idea. It's a rather old one. It just needs a little 21st century tender loving care, and that's where we come in.

Bob Sullivan:

This podcast is just a start, a start of a really important conversation. And that conversation goes something like this. When you get mad at tech, don't just get mad, get even. Or work to get even. Get a fair fight. And that's what platform accountability is all about, a fair fight, giving David more than a lucky chance.

Bob Sullivan:

Thank you, Professor Hoffman.

David Hoffman:

Thank you.

Bob Sullivan:

All right. David Hoffman, who you've heard throughout this podcast is the former head of privacy at Intel. And now he's a professor at Duke leading up the school's technology policy lab and its first major initiative, a project to establish big tech platform accountability. We had a bit of a director's chat after this podcast series was made.

Bob Sullivan:

Okay. So listening to these three episodes about how large big tech is how challenging the environment is to regulate them. Are you left hopeful or with less hope before?

David Hoffman:

I'm hopeful by nature. I think the thing that makes me particularly hopeful here is I know that the current situation is not working for companies. It's not working for individuals and it's not working for governments. So in that type of environment, everyone has something that they stand to gain from putting a new framework and putting something else in place. And so this is a great place as an academic to be able to come in and say, "Look, there are other industries that have already gone through this. Let's learn from those and actually adopt something that could work here."

Bob Sullivan:

Okay. So what could work? How do we fix big tech?

David Hoffman:

First, there needs to be an opportunity for individuals who are being impacted by these decisions the technology platforms are making to be able to understand why they're being impacted in a certain way, and to be able to dispute that and understand that some neutral arbiter who actually has the right information and has the ability to look at the situation has come to an objective decision on that. That's the first item. The second item is right now in the technology industry, we operate under a framework where we wait until bad things happen and then regulators who have limited authority and resources move to try to start some sort of an enforcement action when they don't have near enough resources to be able to follow through in a full dispute in that type of enforcement action.

David Hoffman:

There are other industries that use something that are more what we would call supervision and monitoring structures where instead of waiting for something to go wrong that you try to use almost preventative medicine to make sure that something doesn't go wrong by having someone there to make sure that the processes that are being employed by the company are appropriate to avoid those bad things.

Bob Sullivan:

So two suggestions, ongoing monitoring and some sort of dispute resolution that involves a third party. Is that right?

David Hoffman:

That's right.

Bob Sullivan:

What is Duke actually doing? I mean, what's the next step after this podcast? What does it mean to create a platform accountability project?

David Hoffman:

So we're continuing to do research and then we will be making recommendations of what we think better frameworks would be for governments being able to hold companies accountable and better frameworks for companies to be able to demonstrate to governments that they'll be accountable. And then we're going to be looking to convene events with policy stakeholders, regulators, representatives from the platforms and have discussions about what of those recommendations could be implemented.

David Hoffman:

Technology platforms are impacting democracy and countries all around the world. And they are not accountable to individuals and they're not accountable to the governments of those countries. We want to explore frameworks that can be put in place so that those types of activities by technology platforms do have the opportunity of being held accountable by the governments and by individuals. And what that will do is it will allow a clearer way for those companies who really want to demonstrate that they are accountable.

David Hoffman:

To be able to do that and to reap the benefits from having those processes and procedures, to be able to provide those protections to not impact democracy in that way. That's what we're going to be doing at Duke. We're doing research into those frameworks and how to advance them. And we're really excited about the potential.

Bob Sullivan:

And incoming Duke students and Duke staff can participate in this.

David Hoffman:

Absolutely. We've got a number of students working on the project right now and can always use more. So anybody who's interested should get in touch with us and should file applications to join. One of the unique things that we can do at Duke is bring students together from different disciplines. We have

master's of public policy students working with undergraduates, working with graduate students in the engineering school and the computer science department and the law school, all coming together to help develop these frameworks for students who are interested in that multidisciplinary approach to addressing these large public policy and law issues. Really encourage you to seek Duke out, and to apply to come join us here as a student.

Bob Sullivan:

What can a university really accomplish when it comes to issues like this? I mean, you're not a technology company, nor are you a government.

David Hoffman:

One of the great things about not being a technology company or a government is that we sit outside of those bodies and can provide what we believe are objective feedback and have a bit more time to look at these different frameworks and to do more analysis of it. So we think that the academy is the perfect place to do this type of analysis and provide these recommendations.

David Hoffman:

The other benefit that we have at Duke is that we're bringing together faculty that come from a wide variety of different disciplines. We have people who work for technology companies at senior levels. We have journalists who have worked in this area for over two decades, computer scientists, lawyers bringing that group together with the students who are studying from all of these different disciplines is where we really think we can make a lot of progress.

Bob Sullivan:

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