

# The law as (mere) user: affordance and the mediation of law by technological artefacts

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Technology law scholars have recently begun to consider the design studies concept of affordance, bringing it into the legal fold both as a means to explain how the law has developed the way it has,<sup>1</sup> and more recently in attempts to cast the law *per se* as an affordance.<sup>2</sup> These are welcome developments, showing a sensitivity to the inherently cross-disciplinary nature of both normative and positive enquiries into technology regulation.

In his review of Mireille Hildebrandt's 2015 book *Smart Technologies and the End(s) of Law*,<sup>3</sup> Ryan Calo suggests that her analysis lacks an overarching theory of technology regulation, and that affordance theory, which she uses to describe how the law came about, can fulfil this role.<sup>4</sup> She deploys affordance theory to diagnose the problem, but stops short of applying it in her proposed solution, "legal protection by design". This paper aims to extend Hildebrandt's thesis in precisely this direction, continuing the affordance-focused analysis beyond the limits of her stark and timely warnings about the prospects for the rule of law in the era of smart technologies.

It does so first by casting law as a mere user of technological artefacts. Law is no longer the hegemonic regulator of reality; the immediacy and instrumental power of technological constitutions give artefact designers a quasi-sovereignty that has tipped the balance of power inexorably away from law. Written law necessarily implies an interpretative gap, but technological constitutions mean the social and rhetorical power of legal fictions make way for the representationalism of "digital virtuality", through which legal reality has become to be constituted by and through the machine. The law-on-the-page is mediated by the law-in-the-code, and the two

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<sup>1</sup> M. Hildebrandt, *Smart Technologies and the End(s) of Law* (London: Edward Elgar Publishing, 2015), *et passim*.

<sup>2</sup> R. Calo, "Can Americans Resist Surveillance?" (2016) 1 *The University of Chicago Law Review* 23; R. Calo, "Privacy, Vulnerability, and Affordance" in E. Seliger, J. Polonetsky, O. Tene (eds.), *Cambridge Handbook of Consumer Privacy* (Cambridge University Press, forthcoming).

<sup>3</sup> *Supra* n. 1.

<sup>4</sup> R. Calo, "Technology, Law, and Affordance: A Review of Smart Technologies and the End(s) of Law" (2017) 4(1) *Critical Analysis of Law* 72.

may diverge significantly owing to the private spheres in which the nature of that mediation is decided.

In order to assist designers properly to deploy the quasi-sovereignty they wield in creating those architectural constitutions, affordance theory can be used to identify what the law-as-(mere)-user seeks from an artefact, using the conceptual language of their trade. Just as humans look for certain affordances in technological artefacts, so too does the law. Arguing that the instrumentality of technological mediation of law renders the latter a mere user of artefacts, this paper extends the analogy to consider how this law-as-mere-user fits into the classic user-artefact relational scheme central to affordance theory. Using a mature design concept in this way might assist us to critique the operation of individual technological artefacts with a view to developing greater sensitivity to both the weaknesses and strengths of (written) law as a medium, and thus how it might be better served as a 'user' by those who design and build the technological constitutions which embody it.