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SURVEILLANCE CAPITALISM

*William Hamilton**

In 2019, Harvard Business School Professor Shoshana Zuboff published *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*.¹

What I hope to accomplish in this short presentation is to unpack some of the salient themes of this interesting, important book. I believe her book will lend context and urgency to this conference. Her book is a combination of excellent research, journalism, and scholarship. It is also a call, a plea, a supplication. Thus, the sub-title, *The Fight for a Human Future at the New Frontier of Power*, presages an unrelenting critical study of the deployment of a new economic power in the early 21st century.

However, a word of warning and a plea from me for indulgence. *Surveillance Capitalism* is a *tour de force* consisting of 525 pages of relatively small font text and over 100 pages of even smaller font footnotes. *Surveillance Capitalism* is not light reading. It is also hard reading: exciting and invigorating, but full of passion and indignation. I cannot hope to fairly present all her ideas, or even the depth of some of her ideas, in a short forty-five-minute presentation.

I will select those themes I deem most important for this conference, and I hope to inspire you to further plumb the depths of Zuboff's book.

Before diving into our exposition, a few references to a number of Western intellectual traditions will provide a helpful backdrop to the basic themes of *Surveillance Capitalism*. Shortly before the start of the workers' rebellions of 1848, a young Karl Marx drafted his *Economic and Philosophy Manuscripts*, articulating a theory of human alienation and expropriation in the industrial capitalist world that had been wrenched out of feudal landowning. Marx, of course, was no fan of feudal aristocracy, but he recognized something important in the rise of the factory and 19th century industrial capitalism. That salient fact was that capitalism stripped the worker of humanity in two ways. "Work of the hand" had become the "labor of bodies" toiling away during repetitive, monotonous, and often dangerous tasks. Second, the objects produced by the worker belonged to the factory owner. The craft worker makes a useful object, something of value. It has a *use value*. I may trade it for other items, but initially it is the work of my hands that belongs to me. Industrial capitalism transformed work into factory labor, where products created by abstract and raw human labor power. The factory labor produced things that belonged to the owner by the means of production,

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1. SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019).

not the workers. The workers never owned the products of their labor. The products of their labor were immediately divorced from the workers and stood as objects of domination against the worker. Poverty ensued. Workers became fungible; all became the equivalent of laboring animals. The 19th century worker was thus paid a miserly salary inadequate to obtain the basic needs. Poverty was writ large in major European urban areas. As we shall see, these themes of expropriation, of theft, of taking, of ownership of the “means of production,” are writ large in Zuboff’s critique of the emerging power of surveillance capitalists in the 21st century.

These themes of industrial alienation and expropriation were articulated by many others in the 20th century, including Georg Lukács in his theory of commodity reification, *History and Class Consciousness*. Later, the intellectuals of the German Frankfurt school articulated these themes, principally Max Horkheimer, Theodor Adorno, Erich Fromm, and Herbert Marcuse, who among other things, explored forces behind the fascist and communist totalitarian states. Marcuse, in particular, sought to explain the psychic distortions of 20th century capitalism in his influential book *One Dimensional Man*. An underlying theme of this tradition was the loss of human inwardness, autonomy, sense of self, and moral valuation arising from the new forms of social organization and production. This intellectual heritage was also carried forward by existentialist philosophers prior to and in the horrible aftermath of the World Wars.

A second 20th century intellectual tradition provides additional background. In the mid-twentieth century Vance Packard, a former advertising executive, published the *Hidden Persuaders*. The theme behind the work is that we are transformed into easily manipulated consumers by sophisticated and covert advertising forces informed by advances in psychological and sociological sciences. Packard continued this work in his second book, *The Naked Society*, where he criticized the use of increasingly available public information to manipulate essentially defenseless consumers.

Also, worth mentioning is a less well-known text by Jerry Mander, another escapee from the advertising world of the 1950s and 1960s. Mander’s book is *Four Arguments for the Elimination of Television*. Mander himself has described the central theme of his book:

[Television] organize[s] society in a certain way. [Television] give[s] power to a very small number of people to speak into the brains of everyone else in the system night after night after night with images that make people turn out in a certain kind of way. It affects the psychology of people who watch. It increases the passivity of people who watch. It changes family relationships. It changes understandings of

nature. [Complex information that you] would get from reading ... is flattened down to a very reduced form on television.²

Zuboff articulates similar concerns in the new and more frightening environment of the 21st century.

When I grew up in the 1950s and 1960s, we owned one small-screen TV for the family placed in small room. My brother and I were not permitted to watch TV on school days. Today, I have screens around my house, on my body, in my briefcase, in my office—and I have to fight with my students not to watch their screens during school days, but also in class. Our modern proliferation glass screens create a universe and dangers unthinkable at the beginning of the television.

Let's keep this in mind during our discussion today: for Zuboff, Facebook and Google and big tech are the tip of the spear, the petri dish, the incubator, the bellwether of the impact of the forces of surveillance capitalism unleashed upon us in what she calls a “coup from above.” The constant, alienating, look so nicely articulated by Jean Paul Sartre, is now part of the fabric of our everyday life. We all know what it is like to try to perform even a routine task while under the critical gaze of the Other.

Today, our screens have become the glass walls of our lives, with the Big Other watching, extracting, and collecting the data of our lived lives.

The prior social critiques we have discussed were aimed at the 19th and 20th centuries. What is new about the 21st century that is so concerning to Zuboff?

Zuboff persuasively argues that something very new and very dangerous is loose in the land: that 21st twenty-first century surveillance capitalism is driven by a voracious demand for prediction, control, and guaranteed results. Surveillance capitalism is driven by the desire to collect massive amounts of data in order to predict, and ultimately control, (all) human behavior.

But what is so new about this claim? Advertising has always had an ugly underbelly that Vance Packard and Jerry Manders documented. Yes, advertising claims to promote consumer awareness and information. Yes, advertising claims to spur economic activity. Yes, advertising creates human wants at the expense of human needs. Yes, advertising ferments personal discontent, anxiety, and envy. Yes, advertising is driven by the purchase imperative and the goals of the seller. Yes, humans are vulnerable to the sophisticated and refined techniques of advertising typified in the hit TV series *Mad Men*. Again, what's new?

2. Wikipedia, *Four Arguments for the Elimination of Television*, https://en.wikipedia.org/wiki/Four_Arguments_for_the_Elimination_of_Television [<https://perma.cc/Y357-47KE>] (as of Nov. 21, 2020, 14:36 UTC).

What is new for Zuboff is the massively increased power and effectiveness of these influencers, the information about us they obtain and use, the methods of extracting this information, and the sophisticated algorithms deployed in the control project. It is as though advertisers from the 1950s woke up and found themselves in advertising heaven.

Let's take a moment to discuss this new power. Remember the subtitle of her book is *The Fight for a Human Future at the New Frontier of Power*. Zuboff is not discussing power in the sense of government orders, violence, and physically compelled behavior. The power that Zuboff is concerned about is the power to nudge, push, cajole, edge, direct, and ultimately decide. This is her "new frontier of power." It is not rendition to a black site; it is not Mao Tse-tung's aphorism that "Political power grows out of the barrel of a gun."³ It is power that is subtle, quiet, soft, enveloping, yet ultimately domineering and totalizing. It is power that hides behind such grand mission statements as: "*to give people the power to build community and bring the world closer together*" and "*to organize the world's information and make it universally accessible and useful.*"

These perhaps originally noble, albeit naïve, mission statements, however, got perverted in the wake of the .com collapse. Suddenly, Silicon Valley had to make money for its investors. How? Suddenly, Silicon Valley discovered that it was sitting on mountains of gold. Salvation was in the trash, in the digital debris. Digital debris, digital breadcrumbs, digital exhaust, and digital waste provide big tech with the power to control our behavior while shrinking our sense of autonomy and moral foundations. It is the power to view the other as what is presented in the gold rush of extracted data artifacts. It is wonderfully (or horribly) morally neutral, driven only by the imperative to extract information from and about every aspect of our lived lives and to make perfect predictions and decisions. Whereas industrial capitalists of the 20th century found their fortunes in conquering nature (at the horrible price disrupted human relationships and in the form of climate change and species obliteration), the goal of the 21st century surveillance capitalist is to conquer human nature. We are its targets; we provide the abundant raw materials for the new means of production.

This new power of influencers is derived from our own creations. Let's consider primitive television advertising as an example. Do you remember the old commercial for StarKist tuna? It pictured an underwater tuna named Charlie doing artistic things like playing a violin, the piano, and singing classic melodies. Meanwhile, StarKist was fishing for tuna. But to Charlie's dismay, StarKist did not want to hook Charlie. StarKist rejected poor Charlie. StarKist wanted "tuna that tasted good,

3. *Mao Zedong: Quotes*, BRITANNICA, <https://www.britannica.com/biography/Mao-Zedong/quotes> [<https://perma.cc/JNY6-RTDZ>] (last visited Jan. 26, 2021).

not tuna with good taste.” It was a pretty good commercial. I still remember it decades later. But I never purchased any StarKist tuna.

When did StarKist run these television commercials? Who was the audience? Somehow StarKist had to figure out how to maximize the impact of the commercial by reaching the audience that might purchase the StarKist product. Whatever the choice, the TV audience at any time was composed of viewers, like me, who either did not purchase food for the family or did not eat tuna. In short, the audience was always massively overbroad.

Let’s move forward forty years. How many of you have had this experience? You are searching online for a product, say a cake dish, one evening. When you check your Facebook account the next day, low and behold, there is an advertisement for some brand of cake dishes. From an advertising point perspective, this is incredibly valuable. I get to market my product to a motivated consumer, and *only to* motivated consumers, dramatically cutting down the waste of traditional forms of television and print advertising. Today, I get advertisements all day long in my feeds, text messages, and searches about the things reflecting my online activity. As one Facebook executive stated, to paraphrase, we know so much about you we can direct you to the restaurant you want to go to when your plane lands in a new city. Think about it! This would be similar to a newspaper publisher being able to sell customized or particularized advertising to every subscriber. My neighbor would get the morning paper filled with advertisements about what my neighbor was doing yesterday, and I would get the same paper, but with different advertising about what I was doing yesterday. Every subscriber gets different so called “personalized” advertising. And we wonder why paper newspapers are struggling?

Here is the source of the original transgression by surveillance capitalism. Where did the surveillance capitalist get the information to target me with tailored advertisements? The information was stolen from me, excised, brazenly pilfered. It was extracted from my online behavior in the case of Facebook from likes, comments, posts, and the flood of digital gold rushing from our apps into analytic programs. Who gave Facebook the right to look at my searches, the feeds of my Friends, the comments of my friends, the locations of me and others like me **to determine how to manipulate and control me?**

How is this so-called “personalization” possible? A number of social preconditions are required. First, back forty years ago, there was little public information about me that could be easily harvested. Some, yes; massive amounts, no.

Today, as we all know, my personality is online. Facebook holds gigabytes of information about me (and 2.5 billion other accounts). Much of this information I have put on their webpage: pictures, posts, likes, comments, groups, friends, tags, etc. Additionally, Facebook obtains

voluminous information about me from other websites that I visit. This is called my Facebook offline activity. In the past few months, Facebook has provided a website that discloses some of the offline information sources supplying information to Facebook about our internet activity. I checked mine. The result: 124 of my favorite websites were sending information about me to Facebook that Facebook uses to continually refine its detailed profile of me. That profile is then used to sell advertisement placement on Facebook's pages, to nudge, push, incline, touch, poke, and prod me relentlessly. That is the secret strength of surveillance capitalists: they are relentless.

Here, we have one of Zuboff's major concerns and one of the sources of the indignation that flows through her book. My information is being turned against me! Data extraction is the compulsion and life blood of surveillance capitalism. Zuboff's critique recalls the young Marx's theory of alienation and theft of my labor by the 19th century capitalists. But now we have a new form of exploitation: the data about me. Zuboff focuses on what she calls data surplus, that information that is collected, extracted, and utilized to make predictions increasingly valid and accurate. Surplus value for Marx is what the capitalist steals from the factory workers by paying wages lower than the value of the factory production. For Zuboff, it is the excess of my digital activity; it is the content and metadata of my digital activity. The discovery of this surplus is for Zuboff the "game changing asset that turned Google into a fortune-telling giant."⁴

Facebook promotes itself as a way for me to keep in touch with my friends, neighbors and colleagues. I like this service. I use it. But what does Facebook do with my information? It turns my data against me by selling it to advertisers to nudge me in various directions; to peel away my privacy; and to investigate my soul. For example, Facebook says to an advertiser, "Do you want to sell books about 'law' and 'electronic discovery.'" We can identify a narrow group of likely purchasers and just advertise to them. Perhaps more alarmingly, as we all know, Facebook nudges and pushes not mere commercial products, but beliefs and political goals.

If you are a big spender, Facebook will even assign you specific advisors and experts to work closely with your campaign. Turning a moment to the political domain, Facebook was imbedded in the 2016 Trump election campaign. The Clinton campaign declined Facebook's offer. We all know who won the election out of nowhere. According to a recent report in *The Atlantic*, the Trump organization has a billion-dollar

4. ZUBOFF, *supra* note 1.

campaign planned for the coming election.⁵ The Trump organization is rumored to have 1,000 data points about every U.S. voter.

Google is Zuboff's surveillance capitalist poster child. Google's search technology is beyond parallel. Page ranking is pure genius. Google also uses your searches to improve search. Google's algorithms can predict what I want to search even if my search is skewed and off mark. How does Google compute this? Easy. Just watch millions of others search to see their mistakes, selections, and corrections. This is Google using our searches to improve its search service. But what happened next was that Google had to make money. What is the solution: advertising! How can we create the best targeted advertising: use our customers search data! So suddenly, Google searches and research and development machines, composed of the best and brightest computer scientists, are perverted from the original goal of providing democratizing access to the web content. My searches have now turned against me, and the raw materials are collected, refined, crunched, and used to predict with incredible accuracy what I will do.

Zuboff's claim is that Google and other surveillance capitalists broke the critical link of reciprocity that help maintain 20th century social boundaries and bonds. Ford recognized that his workers had to buy his cars. Workers dwelling in a 19th century level of misery would not bring in revenues. So, workers were paid a wage that would allow them to purchase the basic commodities of 20th century existence.

Surveillance capitalists broke this social contract in numerous ways, but perhaps the most egregious is that Google did not merely use our searches to refine search and thereby produce a better product for us to use. The search activity of the Google user became the raw material of its predictions. Google applied sophisticated algorithms and machine learning to the search activity of millions of users to parse the torrents of digital information. Thus, began for Zuboff the conversion of the "raw material into the firm's highly profitable algorithmic products designed to predict the behavior of its users."⁶ And it is not merely the actual search content that is mined, but all the artifacts surrounding the search: my diction, the length of the search, the particular search phrases, the time it takes me to compose the search, the time it takes me to enter the search, the hesitations in my search, the abandoned words and phrases, the frequency of the search, whether the search suggestions are followed and in what order, and so on. This is the secret sauce that reveals who we really are, but this is just the beginning of the story. Surveillance capitalism loves data processing, algorithms, and machine learning.

5. McKay Coppins, *The Billion-Dollar Disinformation Campaign to Reelect the President*, THE ATLANTIC (Feb. 10, 2020, 2:30 PM), <https://www.theatlantic.com/magazine/archive/2020/03/the-2020-disinformation-war/605530/> [<https://perma.cc/4VB2-T7A2>].

6. ZUBOFF, *supra* note 1.

Surveillance capitalism is only possible because of the power of machines. My little iPhone can now perform a trillion operations a second. What amazing things engineers can do with a little silicon: dope it with a little boron and phosphorus, creating switches linked together that create billions of integrated circuits. We all know what machine learning can do: the algorithm learns from examples to identify similar content. This task sounds simple, but it takes immense computing power. Googles server farms crunch enough data to light cities.

In my area of professional specialization, litigation is now dominated by machine learning. We provide the software with examples of relevant documents, and then the software proceeds to rank the remaining documents in the collection as to how likely relevant. The software acts as a bloodhound tracking down relevant documents.

The bloodhound analogy is not far off. Law enforcement officials use facial recognition machine learning to track down and identify alleged criminals. Of course, the software is not perfect. A prediction is being made by the machine with a certain level of confidence. So, what are the risks in identifying criminals with only on a certain level of confidence? Law enforcement officials do perform good investigative police work, but law enforcement officials, like all humans, are very interested in justifying early decisions. I would not want to be a person falsely identified by a machine review of a database of facial images. These kinds of issues are discussed in *Weapons of Math Destruction, How Big Data Increases Inequality and Threatens Democracy*, by Cathy O’Neill.

But this is not Zuboff’s point. Her point is that the surveillance capitalist imperative is to obtain more and more data. More data means better predictions. Better predictions means more revenues. The scary implication of her point is that, unchecked, surveillance capitalists will invade all aspects of our lives and appropriate one domain of lived experience after another.

Facebook, Google and certain others are the advance guard. I’m reminded of the scene from Kevin Costner’s epic movie *Dances with Wolves*.⁷ Costner plays a U.S. Army officer alone by force of circumstance on the U.S. Western frontier who forms a bond with a native American tribe. The tribal chief keeps asking the Army officer, “How many more whites will be coming?” The officer hesitates to answer. He knew the answer—and the looming result for native American people. As with the whites, more surveillance is coming and coming and coming, perhaps an unstoppable avalanche in the form of the “Internet of Things,” smart devices, and sensors.

Let’s take a simple, albeit hypothetical, example. Suppose I purchase a wonderful new vacuum cleaner that bounces around my house

7. DANCES WITH WOLVES (Orion Pictures 1990).

automatically vacuuming and sweeping the floors. This smart device is equipped with sensor technology that enables this wonderful time saving device go do its job. I can vacuum while I am at work! What a luxury. This smart device is WIFI connected, so that I can turn it on an off remotely and get software updates to improve performance. Sounds great. But what if the device is also mapping the interior of my home and creating a picture of my home's layout, furniture locations, rugs and carpet styles. What if it "knows" the kinds of debris on my floors: pet hairs, food crumbs, food crumb locations, lint, texture and fiber of my rugs, color of my rugs, etc. In short, my wonderful cleaning device is a mobile crime scene investigator that we may soon see in the TV series *Law and Order*.

In the movie *Elizabeth*, about the 16th century Protestant English Queen, the Catholic traitor Norfolk says he will be a martyr to the people once his head is chopped off.⁸ The scene fades to darkness as Elizabeth's advisor Francis Walsingham steps back and whispers to Norfolk, "No, they will forget." They did, and Elizabeth prevailed, but our 21st century smart vacuum does not forget, ever. And what if all this information is being uploaded to our friendly vacuum cleaner manufacturer. And what if the manufacturer is selling this information?

The violation is twofold. Such a "smart" vacuum would likely be transmitting data without my knowledge and permission albeit covered by a legalist, extensive, and largely incomprehensible terms of a service contract or privacy statement. But more fundamentally, another domain of my life—my home—has been captured by the surveillance capitalist and is potentially being used to manipulate and control me. My home has become an open book; my sanctuary where I can be alone is lost. Yes, the information is valuable, but equally important is the fact that my home has now been what Zuboff calls "rendered," made available, disclosed, and exposed and in the process diminished. I believe Zuboff would say, "Stolen, expropriated, extracted."

For Zuboff, Google is at the front of the pack in misappropriating domains formerly thought beyond reach. Google has mapped my street and house for all to see in Street View. But this is my home and neighborhood, filled with the lives of my children, neighbors, block parties, accidents, divorces, and all the stuff of real existence. Google has made it a denuded treasure trove for gawkers, voyeurs, marketers, and realtors.

The infamous Google Glass is the perfect example of domain invasion by name and object. Google Glass was a product Google introduced some eight years ago. Google Glass was an inconspicuous miniature computer subtly attached to the frame of real or fake glasses. The camera "saw"

8. ELIZABETH (Gramercy Pictures 1998).

what I looked at. It recorded your personal interactions. Google Glass could ultimately detect lying by the facial tics, blinks, frowns, etc., of anyone I was speaking with. Simultaneously, all this information would be returned to Google. If I did not recognize someone, just look at the person and tap the glass and my database of pictures would find a match. I no longer needed a personal assistant at my shoulder reminding me of the names of people at parties. Everything I see became capable of being rendered. Google Glass is the constant accumulation of surplus data from the most personal aspects of our lives. Data that was never available is now rendered. How often do my students blink when I am lecturing in class? How often do my friends blink when I am at a cocktail party. This information was never before available to social scientists. Google Glass, a failed consumer experiment causing public outrage, is a metaphor. For the surveillance capitalist we are living in glass houses, glass offices, glass automobiles, glass streets, where everything can be expropriated for, of course, the common good.

So, for Zuboff, two things are happening. One previously unexplored domain of our lives after another is being invaded and catalogued by the technology grim reaper and the data that is being collected is being used for purposes driven by the behavioral modification goals of surveillance capitalism. We are all living in a giant Skinner box. For those in the audience not familiar with Skinner, he was a famous American psychologist who developed the theory of operant conditioning. All you need is the right pattern of stimulus and reward and any behavior can be created, modified, and adjusted. Problems at work? We have a behavior modification program for you and your co-worker. You will get along soon and be more productive. Our six-year-old neighbor, a wonderful little boy told us one day he was on a behavior modification program, a kind of token economy. For good behavior, he got a token in the jar he could redeem for things he wanted, e.g. candy. When we ask him how that was going, he replied he had a "negative balance." His parents did not have a very good program. But when he is on Facebook, his behavior will be more perfectly controlled and socialized?

Let's take another example. Truck accidents are a major highway concern. Truck accidents are caused in part by driver drowsiness. To combat driver fatigue, rules were implemented regarding the number of hours truck drivers can operate a truck. Sensors were placed in the vehicles to record operating hours. However, a new approach is being implemented: monitor the actual drivers' bodies with sensors. Cameras, hats, bands, and other devices with sensors are being attached to truck drivers to measure eye lid droop, head bobs and jerks, the various biometrics associated with fatigue. Brain waves are being measured and translated into predictions of alertness. All this is accomplished in the name of safety, an important social goal. But does anyone really think

that the information collected will not be used to decide who should and should not be employed?

A creepier example is the smart sleep mattress. It adjusts to movements, shapes, and body sizes to provide the most comfortable mattress shape. Of course, it can only work with a multitude of sensors. And the sensors need to be updated periodically with state-of-the-art software to make the smart mattress work even better for you. So that it can stay smart, it is WIFI connected. You can turn on the warming coils remotely when you are getting ready for bed. But what is being captured and transmitted to the mattress company are the hours you sleep and the regularity of your sleep. Add sound, and the mattress can tell if you have sleep apnea. And who knows what else it can sense about you in bed.

For the surveillance capitalist, nothing is sacred, and anything can be appropriated, stolen, rendered and co-opted. My house, my work, my office, my friends, my family, and my body, are all being digitized in the name of profit by private companies driven in the last analysis to maximize shareholder value. The distorted doctrine of shareholder value as the end-all-be-all of the corporation is horrible, but that is a different story.

Well, if all this is so terrible, how did we allow this to happen? First, Zuboff suggests, it snuck up on us. The Internet was originally perceived as a democratizing force. Technology was at the forefront of human advancement (and wealth). Our guard was down.

Second, there are benefits to the deployment of technology. We were seduced. The Internet is a vast repository of information; my colleagues and family are on social media sites; shopping is easier; and those ads are helpful at times. It was all too easy and comfortable for us to pay attention.

Next, Zuboff suggests that technology companies were less than forthright in their use of our information. They were and are secretive. To use another Hannah Arendt metaphor from the *Origins of Totalitarianism*, trying to expose the truth of surveillance capitalist operations is like peeling back the layers of an onion. So called privacy policies—what Zuboff calls “surveillance policies”—were crafted by lawyers using technical terminology and phraseology that few could understand and were presented as contracts of adhesion. If you want to be on Facebook, agree. If not, you are off. There is no negotiation, no choice, no compromise, no meeting of the minds. It is what Zuboff calls an un-contract.

Our ability to be shocked is being worn down. The constant creep of extraction of data surplus has a numbing effect. We have become habituated to its erosion so that hardly anything is shocking. Google Glass was too shocking eight years ago, but one wonders whether it would be today. Was it delivered just too early?

Importantly, Zuboff suggests that surveillance capitalists are willing to fight to the death to preserve their continued acquisition and use of data, to plumb new human lived experience, to continue the flow of gold. Data is the lifeblood of the surveillance capitalist. Think of it this way: your new, exciting app is designed to provide a minimal service, e.g. remind me to walk the dog and order special dog foods. Its real purpose is to collect data about you. The best apps cost little to develop and collect the most data, the most digital exhaust, the most breadcrumbs, and the most digital detritus. Acquisition is unrelenting imperative of the surveillance capitalist.

What are we to make of Zuboff's critique and where does it take us? First, the critique must be taken very seriously. We are in the fight of our lives. The future under surveillance capitalism is an addiction and a hollowed out human soul. It is Huxley's *Brave New World*, which of course was not brave or interesting, but an opiated world of control through drug addiction. Our future is a post-truth world of addiction to and participation in what Zuboff calls the Hive. Privacy, which Zuboff likens to ancient concept of sanctuary, is not merely threatened because some company may hold data about me. It is threatened on a more fundamental level because the goal of surveillance capitalism is to know everything about me to effectively manipulate and control me. Privacy does not merely mean the right to be left alone. It is the right not to have the digital artifacts of my life and body turned into alien objects that provide others a pathway to *my* soul and *their* riches.

Next, what is the path of resistance. I respectfully suggest that our traditional legal doctrines of contract, property, fiduciary duty, personal invasion, and copyright are inadequate to control surveillance capitalism.

The battle against surveillance capitalism in the United States is currently being structured in the language of full *disclosures* which is reminiscent of provisions of the Uniform Commercial Code from the 1950s. I submit that merely enhanced disclosure requirements will not blunt the continuing and unrelenting onslaught of data extraction and invasion. Indeed, the leading technology companies are being pushed to provide increasing disclosures, and technology companies are ironically posturing themselves as the protectors of privacy.

Google and Facebook constantly remind me to check my privacy settings and are involved in numerous public relations campaigns claiming privacy a personal responsibility. Is that really a fair battle, me against Facebook and Google? The knowledge asymmetry is dramatic. The surveillance capitalist has all the power, and I have none. And even if I were sufficiently motivated to study and keep abreast of what's happening to my data, can that be expect that of most users. Unfortunately, the workings of data networks, computer computational calculation, advanced analytics, machine learnings are beyond even

digitally literate consumers. The average consumer has no idea what a “cookie” is, what it looks like (text), and how browsers were originally defaulted to accept these text IDs placed on my machine by any website I visit.

Thus, we turn to regulations and laws as one of the principal methods to meeting the challenge of surveillance capitalism. Without restraining laws, the surveillance capitalist will relentlessly be collecting more and more raw surplus data. I suggest we need new laws dealing with this new challenge and a new federal agency charged with the task of enforcing the laws.

One bright light on the horizon is the European Uniform Domain-Name Dispute-Resolution Policy (UDRP), which is still in its infancy. Zuboff is hopeful that the UDRP is up to the task. However, the legions of attorneys of surveillance capitalism are on the march parsing every term to UDRP in an effort to weaken its reach.

I would suggest new U.S. “privacy” laws and regulations emerging in the United States take seriously the lessons of the General Data Protection Regulation (GDPR) regarding what I understand to be a few important provisions.

First, consumer data that is collected should only be used for the purpose intended and then immediately destroyed. A hotel does not need to keep records of my personal visit, e.g. how often I entered and exited my room using the smart key, once my visit is over. Should the hotel be permitted to keep information about me such as the age, make, brand, etc. of my vehicle gathered in video surveillance? Of course, as a general principle, data purging sounds reasonable, but in practice numerous problems emerge. The hotel may argue that keeping the data assists the company in providing better room service to know the average times guests are not in the room and the times most guests are in their rooms. Is this really a valid reason to amass customer data or a pretext for surveillance? And how is it enforced and monitored? How do we balance such claims against the user’s rights?

Second, is consent. I suggest that enhanced disclosure and restricted consent is not the right direction for future laws. Consent requires knowledge, consent requires lack of coercion, and what I would call a lack of unfair leverage. Consent requires understanding the broad implications of the decision. We will soon see a shift by companies to persuade users to allow the exploitation of their data by such devices as price discounts, special privileges, and on a more coercive level, withdrawal of services.

The restrictions on the use of surplus data should be mandatory and the default provision. If consent is to be allowed it should be capable of being withdrawn. Additionally, consent must not be accompanied by any

inducements or encouragement, service refusals, or reduction in service quality.

A third suggestion is that new regulations rely heavily on: (1) private rights of actions, (2) expanded class action rights, and (3) significant liquidated fines for prevailing parties. Such regulations would create channels and incentives for the private bar to bring actions to enforce the new privacy regulations. Just as the earlier industrial state required unions and governmental laws and agencies to protect the social contract and fabric, so today we need the same.

Damages and remedies for the harms inflicted by surveillance capitalism is a perfect area for new legal scholarship. How can we define this new damage caused to individuals by surveillance capitalism? Private claims have been thwarted by a lack of causes of action and difficulty of defining and proving damages. Zuboff spends a significant amount of *Surveillance Capitalism* analyzing the harm data surveillance capitalism inflicts on adolescents and emerging adults in particular. Let us keep in mind what Zuboff has succinctly stated: the plaintiff is the force of the law.

A case in point is the current litigation under the Illinois Biometric Information Privacy Act.⁹ Facebook recently agreed to a \$550 million settlement and Google is facing similar litigation filed this past week. I will note that Facebook also agreed to a \$5 billion fine with the Federal Trade Commission as part of the Cambridge Analytics settlement, but that was a data security issue more than a surplus data offense.

The question is whether these legal proceedings are really harbingers of things to come. The Illinois law only covers biometrics and has only been followed by Washington and Texas which do not provide for private rights of action. Meanwhile, California has enacted the California Consumer Privacy Act (CCPA), which protects biometric information and includes a private right of action.¹⁰ Even if Zuboff's alarm is partially true, we are in the midst of a massive societal transformation that puts the future at risk and will require the highest level of attention, creativity, and collective action. The real question is what type of society do we wish to live in? Do we want a society that surprises children and emerging adults and causes them to engage in hiding activities to avoid the glasshouse environment?

Each semester in my e-discovery civil litigation class, we do a Facebook collection exercise so students will understand how to preserve, access, and evaluate potentially relevant information that may be in a Facebook account. I ask them to collect and inspect their own data and to let me know if anything caught their attention.

9. S.B. 2400, 95th Gen. Assemb. (Ill. 2008).

10. A.B. 375, 2017–2018 Session (Ca. 2018).

Here is just a small sample of their comments. Remember these are college graduates attending one of the nation's prestigious law schools.

I do not use facial recognition for Facebook, so it was surprising to see they were collecting facial data. Similarly, the folder labeled advertisers who uploaded a contact list with my info surprised me because most of these advertisers I have not shopped with or have involvement with.

Some of the information that Facebook has of me either surprised me or made me do a "double take." For example, I was surprised they keep track of all the friends I've removed or friend requests that I've rejected.

Facebook also keeps track of every search I've done. Even the deleted ones. I'm sure if everyone knew they could find every single search their partner has done; some awkward conversations would have to take place. For instance, "why were you looking her up?" I know I'm making a comedic instance out of this, but in reality, it is very weird that they track every single search and have it available for download.

It also keeps track of every time I open the app, as well as all the IP addresses I've used to use Facebook. This is just weird because Facebook knows what you are up and where.

I was able to go through all of my old messages starting from when I created my Facebook in 2008. I went down a Rabbit hole and then discovered my messages from my eighth-grade girlfriend.

The second thing that surprised me was to see all the places I had checked in at and the fact that they had the geographical coordinates of the places that I checked in at.

Also, I thought it was creepy how they save your search history.

I was shocked by how long the list was and how many of the advertisers targeted ads were based on my browser shopping habits or random things that I had searched on Google when I was logged in to my Facebook account.

Facebook has exact time stamps of when I liked and un-liked a friend. For years, they have kept this information. It is mind blowing to think of how much data they must have stored.

I did not expect Facebook to collect my search history and locations. My instant reaction was to turn them off right

away because I felt Facebook had become an invisible “spy” disguised as a friendly social media platform. Then, I started to wonder when on earth had I authorized Facebook to collect and store all my information.

Is this the social environment we want where our best and brightest emerging adults are hiding and shocked by the practices of one of the world’s most valuable companies?