Book Review

Review of Zuboff, Shoshana. 2019. *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*. New York: Public Affairs.

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Surveillance Capitalism as Legal Entrepreneurship

The Age of Surveillance Capitalism is both a descriptive tour de force and a theoretical triumph. Patiently culling from a variety of sources, including press releases and media exposes but also patents and disclosures to securities regulators, Shoshana Zuboff develops a richly detailed and deeply perceptive depiction of an activity that is at once a new business model, a new mode of extraction, and a new mode of knowledge production. She then offers a brilliant retheorization of data-driven, algorithmic commercial surveillance as instrumentarian power, or power that is agnostic as to ends and radically behaviorist as to means. The historical and conceptual distinctions she draws between instrumentarianism and totalitarianism are elegant solutions to a problem that has long bedeviled writers puzzling over how to name and understand the various forms of information power. In between, she develops an origin story for surveillance capitalism and a taxonomy of its methods.¹

When it comes to excavating the roles of law and legal institutions in the construction of surveillance capitalism, however, the book stumbles. As prelude to a brief review of a series of US legal developments that have facilitated surveillance capitalism's rise, Zuboff observes that because a principal modus operandi of surveillance capitalism involves brushing legal restrictions aside, surveillance capitalism is best characterized as an assertion of a right to lawless space (pp. 103-04). The relationship between surveillance capitalism and law, however, is both far more complex and far more productive than either that characterization or Zuboff's subsequent analysis suggests.

Like my own account of the legal constructions of informational capitalism (Cohen forthcoming 2019), Zuboff's account of surveillance capitalism is situated within a Polanyian theory of political economy, so

¹ All scholarship is to some extent a travelogue, and Zuboff draws thought-provoking and essential connections between surveillance capitalism and Skinnerian behaviorism, which she first encountered in her graduate student days (pp. 361-75). One might wish she also had engaged with, for example, widely read and cited accounts of the emergence of surveillant assemblages designed for extraction and corporatized control (e.g., Gandy 1995; Haggerty and Ericson 2000; Elmer 2004; Andrejevic 2007) and of surveillance practice as constituting a new political economy of interiority (Ball 2009).

it is useful to begin there. As Polanyi (1957) explained in his influential analysis of Britain's "great transformation," the movement from agrarianism to industrial capitalism involved large-scale resource appropriation but also significant conceptual and organizational shifts. The basic factors of industrial production—labor, land, and money—were reconceptualized as commodities, while at the same time patterns of barter and exchange were detached from local communities and reembedded in the constructed mechanism of "the market." On Polanyi's telling, mismatches between the demands of the emerging market system and those of human wellbeing eventually elicited a protective countermovement that included distinctively legal and regulatory components.

The protective countermovement, however, was not the British legal system's first response to industrial capitalism's demands. The initial movement to industrial capitalism also both relied on and transformed existing legal institutions. Processes of appropriation of natural resources, enclosure of common lands, construction of factories that relied on the labor of populations displaced from farms to cities, construction of railways and shipping lines to support supply and distribution chains, and trade in the products of industrial manufacture all required enabling legal constructs in order to work. A series of gradual, ineluctable changes in the British legal system worked to facilitate each of those developments, providing the frameworks within which appropriation, enclosure, displacement, extraction, and accumulation could proceed.

Applying a Polanyian analysis to the present era, it is helpful to frame the current process of political-economic transformation to a regime of informational capitalism (Castells 1996: 14-18) in terms of three large-scale shifts: the propertization (or enclosure) of intangible resources, the dematerialization and datafication of the basic factors of industrial production, and the embedding (and rematerialization) of patterns of barter and exchange within information platforms (Cohen forthcoming 2019, ch. 1). And, once again, it is essential to understand those shifts as moving on legal-institutional levels.

Information-economy actors do not simply act in markets; they also mobilize legal tools and institutions to advance their goals. Put differently, legal institutions are not simply superstructure but rather the means through which expressions of economic rationality become specific, detailed, and actionable (Deakin et al. 2017). Legality permeates economic behavior through and through, but its nature and its forms also are contested. As interested parties struggle to define what constitutes "normal" economic or government activity and what qualifies as actual or potential harm, the legal institutions involved in those struggles may begin to undergo changes of their own. Gradually, ineluctably, they become reoptimized for the new roles that they are called upon to play. We are living in an era of such reoptimization now.

Begin with the processes of data extraction that Zuboff characterizes as "unilateral incursion" in aid of dispossession (p. 139). Those processes constitute a breathtaking assertion of power, but they also mobilize a legal construct that is ordinary and unremarkable to intellectual property lawyers. As I have explained elsewhere (Cohen 2018), that construct is the idea of a public domain of raw materials that are there for the taking and that are framed as both available and raw precisely because of their perceived economic and competitive value. The idea of a public domain underwrites relations of legal privilege—privilege to take (purportedly) raw data, to subject them to processing, and to impose one's own ideas of legibility and logic on the results. At the same time, and by its own terms, it underwrites converse legal powerlessness to object to acts of taking, processing, rendering, and interpretation. So when Zuboff argues, later, that the issues arising from the pervasive datafication of everyday life cannot simply be characterized as problems of privacy or monopoly (p. 194), she is right, but she is right in part because preexisting legal constructs relating to entitlement and disentitlement have a way of filling in the empty spaces that surround new technologies and business models.

Next, consider the boilerplate that the actors in processes of pervasive datafication and platformization offer up for our automatic and unthinking ratification. The terms-of-use agreement, or what Zuboff wants us to call the uncontract (pp. 220-21), is not a declaration of lawlessness but rather an act of legal entrepreneurship. According to doctrines that have evolved over hundreds of years, data and algorithms

cannot be the subject matter of intellectual property rights. And yet, as slogans like “data is the new oil” convey, in the contemporary informational economy, data and algorithms have immense commercial value. Therefore, they have become the targets of active appropriation strategies—strategies designed both to enclose particular data sets and algorithms and to shift the law in a direction more congenial to the legal needs and desires of surveillance capitalists. The idea of a public domain of personal information constitutes the field for acts of appropriation, but more is required to move from appropriation to enclosure. Terms-of-use agreements are performative acts of consummation. Together with the technical protocols that structure interactions with platforms and other information services, they work to leverage ad hoc and contingent trade secrecy entitlements into de facto property arrangements.

Other processes of legal entrepreneurship relating to ownership and control operate on a different scale. Zuboff notes the dual-class stock ownership structure that has become characteristic of high technology companies (pp. 101-03), and that gives privileged groups of shareholders greater voting power. Dual-class stock ownership did not originate with technology companies, but it has enabled founders of technology companies (and, often, small groups of venture capital investors) to retain authority over corporate strategy long after a professional management team has come on board and the initial public offering has come and gone. One might say many things about such arrangements—some argue that hybrid ownership structures emulating those of closely held corporations promote continuing innovation within still-youthful firms; others, that they have accelerated a century-long trend toward the financialization of industrial production in aid of rent-seeking by a privileged few. The *relationships* that they create, however, are creatures of law through and through. They are permutations of the mechanisms that corporate and securities law offer for defining and transacting in shares of publicly traded corporations—for aggregating capital so that things can get done with and to it—and they also represent but one aspect of a more general and decades-long shift in the corporate governance landscape (Coates 2018).

Last but not least, constitutional and statutory strategies for avoiding accountability for the harms wrought by instrumentarian power also are acts of legal entrepreneurship. As Zuboff recounts (pp. 108-12), powerful information-economy actors argue that information processing is speech and that the first amendment to the US Constitution, which protects freedom of speech, therefore shields them from regulatory oversight. At the same time (and without acknowledging the irony), they assert that an act of Congress granting immunity to Internet intermediaries that simply transmit *others'* speech insulates them against liability to private parties. Here again, however, technology firms are not simply invoking preexisting understandings of speech rights but also working to alter the way those rights are understood. Traditionally, first amendment litigants seeking greater scope for their commercial activities have invoked the metaphor of the public sphere as a marketplace of ideas, but in light of everything the public has learned and continues to learn about data-driven manipulation of the platform-based, massively-intermediated environment, that metaphor is increasingly inapt. Surveillance capitalists and their apologists have developed and deployed a new metaphoric frame that justifies such manipulation: that of the information laboratory, a depoliticized, self-regulating apparatus for truth production within which behaviorist experimentation on users is ordinary and expected (Cohen forthcoming 2019, ch. 3). The point of those efforts is not to sideline the law but rather to catalyze profound shifts in legal relations of accountability. They create zones of immunity (and corresponding legal disability), and they do so by mobilizing changed understandings of legality on surveillance capitalists' behalf.

Understanding that these behaviors are legal strategies matters because enlisting law to restructure the playing field is a very different thing than throwing law out entirely. Surveillance capitalists and their venture backers may have hearts of ice and souls as empty and shriveled as the mummies in third-rate horror movies, but Silicon Valley also is not (yet) South Sudan. More to the point, throwing law out entirely would be self-defeating in the end, and surveillance capitalists and their venture backers are neither stupid nor shortsighted. The logics of productive appropriation, performative enclosure, and innovative and expressive immunity are so powerful because they are, in part, legal logics. They invest surveillance capitalism with authority that becomes more difficult to dislodge as it becomes more solidly entrenched.

So far, I have focused on processes of legal-institutional entrepreneurship involving relations of entitlement and disentitlement. Other, equally important changes relate to the structure and operation of regulatory institutions—courts, regulatory authorities, and the like. Many of the critiques that Zuboff (justifiably) levels at the legal system involve regulatory failures to constrain surveillance capitalism, so the balance of this review will focus on regulatory issues.

Stresses placed on existing regulatory institutions as a result of the movement to an informational political economy have produced both institutional failure and institutional transformation. Processes of datafication and platformization have disrupted regulatory rubrics and techniques devised for the industrial economy, making it difficult for regulators working within those preexisting regimes to act effectively or even to articulate criteria for taking action. Part of the problem is an imbalance of resources; as Zuboff details, the most powerful Silicon Valley firms treat regulators and their concerns as mere speed bumps. Processes of institutional realignment also tend to reflect background allocations of rights, privileges, and other entitlements (Horwitz 1977). The logics of productive appropriation, performative enclosure, and innovative and expressive immunity introduce powerful normative force fields into regulatory processes. But the problem is not simply one of capture or leverage of preexisting institutional settlements.

Some of the earliest work on information societies reminds us that new technological capabilities can present (or appear to present) new solutions to problems of economic and social ordering. From the vantage point of administrative law, many current regulatory activities employ nontraditional methods and unorthodox institutional configurations; from a sociotechnical perspective, however, those approaches seem less unusual. Rather, they are products of the “control revolution” (Beniger 1986) that began with the introduction of automated information systems into industrial-era factories and businesses. They are intensively informational in character, and they rely heavily on competencies such as auditing, automated controls, and technical standard setting to define and achieve compliance with regulatory targets.

To understand the encounter between the regulatory state and the control revolution, however, it is also necessary to consider another type of ongoing transformation, which concerns forms of governmentality (Rose, O'Malley and Valverde 2006). The dominant forms of governmentality associated with industrial political economy were liberal, broadly speaking. The dominant forms of governmentality associated with informational capitalism are neoliberal, and relative to liberal governmentality, neoliberal governmentality represents both continuity and change. As many have remarked, liberal governmentality contained an embedded contradiction. It posited economic rationality as the most virtuous and infallible source of social ordering (Foucault 2008: 65-69, 280-85; Miller and Rose 1993), but markets are not self-sustaining. Left unattended, they tend toward monopoly, destructive extraction, and rent seeking, and so they require vigilant stewardship to ensure they remain sufficiently marketlike. Neoliberal governmentality resolves that embedded contradiction by bringing market techniques and methods into government (Gane 2012) while at the same time subjecting those techniques and methods to managerial oversight. Managerialism, which has been called “the first neo-liberal science” (Hanlon 2018), both posits organizational reshaping along competitively efficient lines as desirable and prescribes how it may best be achieved. Managerial theories presume and privilege elites with the technical and informational skills needed to coordinate productive competition while keeping wasteful bureaucracy in check.

Return now to the problem of how to design an administrative state for the networked information era—a state capable of speaking with authority to instrumentarian power. The patterns of regulatory change that have begun to emerge reflect the distinctive imprint of neoliberal managerialism, by which I mean both that they reflect beliefs about the best uses of new technological capabilities to *manage* legal and regulatory processes and that those beliefs mobilize neoliberal tropes of virtuous private ordering channeled by managerial elites (Cohen forthcoming 2019, ch. 7). Emergent regulatory modalities are procedurally informal, mediated by networks of professional and technical expertise that define relevant

standards, heavily reliant on privatization and automation strategies, and opaque to external observation. And for all of those reasons, they are more likely to enable surveillance capitalism than to constrain it.

Managerial regulation is neither a consequence nor a consciously designed byproduct of surveillance capitalism. Rather, it reflects decades of institutional entrepreneurship by powerful economic actors, a group that now includes surveillance capitalists. And, as just explained, it both reflects patterns of sociotechnical change and translates those patterns into more concrete procedural and institutional entailments.

Surveillance capitalism and managerial regulation, however, are made for each other. Legal scholars know well that patterns of institutional evolution are not neutral. To use Marc Galanter's (1974) memorable phrase, in institutional processes structured by procedural rules, the "haves" tend to come out ahead because, as repeat players with disposable resources to spare, they can play for rules in addition to results. In their interactions with the regulatory state, surveillance capitalists have encouraged modes of regulatory interaction that marginalize actual oversight in favor of self-regulation and self-certification. Consider, for example, the Federal Trade Commission's privacy and data security consent decrees, which rely heavily on attestations of compliance by private sector auditors that are largely unverifiable and that bootstrap self-defined standards of adequacy (Gray 2018). Or consider emergent regimes for "content moderation at scale," which rely on a combination of algorithmic governance, self-regulation, and standardized performance reporting as a means of demonstrating compliance (Gillespie 2018). An administrative state capable of speaking with authority to instrumentarian power would look different. One of surveillance capitalism's institutional achievements is the degree to which it has taken up the mantle not of deregulation but of managerial reregulation to prevent different institutional configurations from emerging.

In sum, the emerging regime of governance for the political economy of informationalism is many things, but lawless is not one of them. Rather, the patterns of change now crystallizing into more definite institutional form express a legality that reflects the pervasive imprint of private economic power asserted and refined over many decades. Whether those changes will elicit a protective countermovement for the information age is yet to be seen. Zuboff's important elucidation of the mechanisms of surveillance capitalism and instrumentarian power lays essential groundwork for that project, but it is also essential to understand the work that legal institutions do.

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