
THE MOUSE AND THE TRAP: THREE WAYS TO ESCAPE SURVEILLANCE CAPITALISM?*

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Summary

This short post aims at discussing escape-routes for the exponential growth of surveillance capitalist models in the digital world. By proposing three different alternatives, the work questions whether it is possible to escape the massive data harvesting that feeds companies like Google or Facebook and turns ‘free’ apps like Pokémon Go into data mining lucrative tools. By analyzing three alternatives, namely i) subscriptions models, ii) nationalization of platforms and iii) information fiduciaries, the work concludes that the age of surveillance capitalism is deeply linked to our second Gilded Age and regulation of the digital sector is dearly needed.

In 1996, John Barlow, a member of the influential 60s band Grateful Dead, wrote his self-entitled ‘Declaration of the Independence of Cyberspace’, a hearted manifesto for the freedom of cyberspace away from governmental control. In one of the passages he codified the general feeling of the digital community towards public regulation at the time:

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather¹.

It is from this *hippie*-inspired idea that, in a paradox worth mentioning, a new type of capitalism is born. It is not a coincidence that a new age of capitalism is born under the digital auspices; it is rather a consequence of a privatised idea of a global and connected world, a cyber utopia, where people would finally take power. Curiously enough, the original *hippie* values of a decentralized world have now fallen hostage to the exact same traps that they so keenly fought against. In the Second Gilded Age², the state indeed takes a step back, but only to let others (and not the global community) monopolize power. However, unlike its industrial and smoky 19th century

¹ Barlow, ‘A Declaration of the Independence of Cyberspace’, *Electronic Frontier Foundation*, February 8, 1996 available at: <https://www EFF.org/cyberspace-independence>.

² Balkin, Jack, ‘The First Amendment in the Second Gilded Age’, 66 *Buff. L. Rev.* 979 (2018). Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol66/iss5/1>

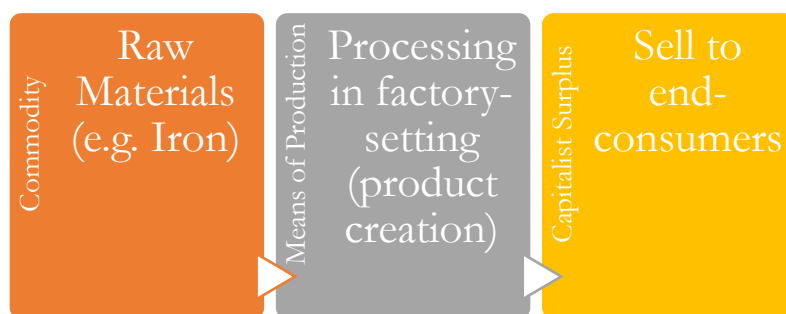
grandmother, this new Age feeds purely on us as both consumers and commodities. To achieve that objective, it reconceptualizes traditional capitalism and rebrands it “*Surveillance Capitalism*”.

To fully understand this concept, I propose to sketch this short post in two big sections:

1. To introduce the concept of surveillance capitalism and its two phases of control: surveillance and nudging;
2. To advance some solutions to the problem and to discuss why regulatory attempts have so far been minimal or inexistent.

1. The mouse trap: surveillance capitalism

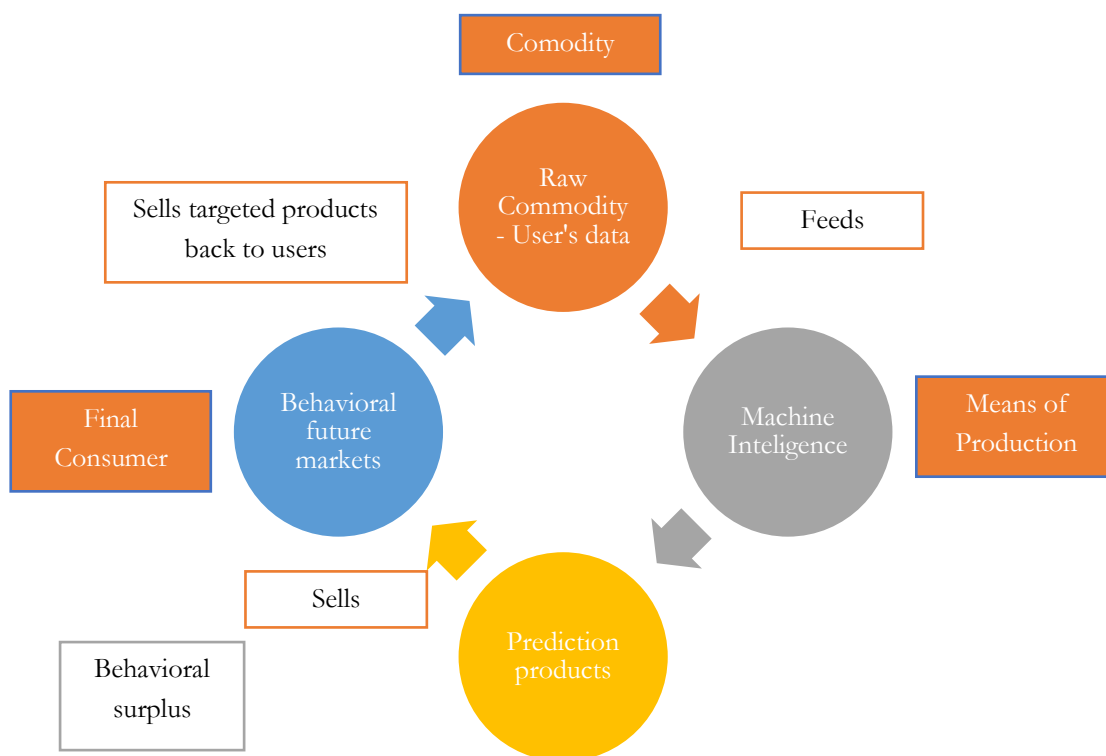
To understand the concept of surveillance capitalism, as introduced by Zuboff³, let us think of a classic 20th century assembly line:



In this classic capitalism structure, people act solely as the final consumer of a product which is the result of the processing of a certain raw commodity. The capitalist surplus is then made of a simple equation consisting of the final price, which the capitalist has asked for the final product, minus the costs incurred in transforming the commodity into a final product. Simple as that. This was roughly the model that supported the 20th century economy, and which was initiated by the great monopolies of the First Gilded Age (see the example of US Steel or the Railroad Monopolies of J.P. Morgan or the Vanderbilts).

³ Zuboff, Shoshana, *The Age of Surveillance Capitalism*, Profile Books, 2019 (would recommend chapter 3); also Zuboff, Shoshana, Big Other: Surveillance Capitalism and the Prospects of an Information Civilization (April 4, 2015). *Journal of Information Technology* (2015) 30.

Surveillance capitalism differs in the method but agrees on the monopolistic end-result. Unlike traditional capitalism, Surveillance Capitalism is more accurately represented as a continuous circle of information exchange:



Unlike the production of Ford-T, for example, surveillance capitalism begins and ends with users/consumers. We feed the process with information, our daily habits, tastes, schedules etc, collected through varied inputs (from clear cases such as the information you provide to Facebook through pictures and geo-location, to less obvious cases such as the amount of time it took you to read a book on your Kindle). That massive collection of information is then processed into a product which is but a **prediction**:

Mr. Smith⁴, as a standard representative of the Smiths type, is likely to take long hikes every Sunday to read his Kindle. In those days he listens to 60s music and reads crime-novels. By the end of those days he traditionally watches an episode from his favorite series, 'The Mentalist', and phones his family by 9pm. He logs off from Whatsapp and Facebook at around 11pm, probably going to sleep.

⁴ It is important to stress that neither of these companies really sells your name or individual personal data. You, as an individual, are indeed quite useless from the advertisement point of view. What is important is a bundle of "yous", representative of a certain social group.

It is not difficult to think about how advertising companies would drool over this information: Long hikes require good comfortable shoes and hiking gear. 60's music has remarkable memorabilia attached to it (who would not like to have that cool Jimi Hendrix phone cover?). Agatha Christie books are now suddenly half-price and come in a great Amazon 'two for one deal' together with a very interesting "How do you know if a criminal is lying?" book. Advertisements for flights back home keep popping up at around 9pm (maybe it is time to pay a visit to family...).

This massive collection of information is only possible, however, because of two contributing factors: i) a fundamental shift in the economic model of media attention; ii) the destruction of individuality through a growing "bundlelization" of society.

First, the 20th century model, that of broadcasters and newspapers, was based on a conceptual framework which could be described as "few-to-many": few people would enact content which was aimed at reaching the masses. This is why it is generally called mass-media because of its end goal of reaching the masses. Contemporary social media have replaced this model with a new one which can be described as "many-to-many". Anyone can post and everyone should read it. The more the merrier. Stupid thoughts? Go for it. You are tired of society and you want support? Post it out there. You thought Joaquin Phoenix was great in the Joker? You think he was awful? No matter, post it. The more information you give platforms the more accurate will their prediction products be and the more valuable will their end-products become.

Second, because surveillance capitalist brings about the destruction of cultural liberalism, while continuously selling the idea of the promotion of your "your unique self". The fact is that, in the majority of cases, we are rather not unique at all (this is not a fault of the capitalist system, it cannot be all its fault!). We can easily be "bundled" into groups based on our tastes, habits or affections. In fact, we have been doing it since the birth of mankind, way before Weber or Durkheim even took notice of it. As humans we tend to like people who like the same things as we do, that have similar schedules and defend the same values; and to push away those who do not. It is just human nature.

And in this act of social-group definition lies the heart of surveillance capitalism.

Things get trickier, however, when stage 2 of surveillance capitalism kicks-in. Now, the capitalist realizes its fundamental power not only to accurately describe reality, but rather to shape it. Let us turn back to Mr. Smith's example:

Mr. Smith is born in the 90's. During his days of infancy he really liked Pokémon and gameboys and just the memories of those two things make him smile. Not surprisingly, he is a big Pokémon-Go fan and he now chooses his Sunday hikes based on where it is more likely to find Fire-type pokémons (lately he has been running against Poliwhirls⁵ all the time and he needs to broaden his deck).

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The capitalist already knew about his habits and has been selling this information to advertisers. Now, however, it has a new way to nudge Mr. Smith (or all Mr. Smiths) into the physical world: if it places a Moltres⁶ in a specific location, chances are that Mr. Smith will follow. Now, imagine you work for Burger King and you want to dethrone Macdonalds as the major fast-food chain in Mr. Smith's hometown. You go to Nintendo (Pokémon Go's producer), pay a nice sum, and ask them to lead Mr. Smith's Sunday hikes to the front of the newly opened Burger King. Moreover, every Sunday morning you make sure that Google pops a few juicy double cheese whooper adds.

Now Mr. Smith wakes up and checks his phone; burgers pop-up; he receives a message from his friend on WhatsApp:

"Wake up Winston, there is a Moltres downtown! Run man, run!"

He rushes downtown and feels some discomfort on his feet. "Damn, I really need some new shoes..." he thinks. After some exhausting hours he manages to catch Moltres and rejoices sitting on a bench on the nearby park. Now, hungry from his successful quest, he decides what to do with the rest of his afternoon. *"A whooper would be really nice..."* he naively thinks. *"And I cannot forget to get some Timberland hiking shoes (why Timberland? Who cares they look so cool)"*.

This small story represents stage 2 of Surveillance Capitalism and could be exemplified in the following second circle:

⁵Water-type Pokémon. Not very strong and quite common. Picture here: <https://wiki.pokemoncentral.it/Poliwhirl>

⁶ Legendary Fire-type Pokémon. Very rare. Picture here: <https://wiki.pokemoncentral.it/Moltres>

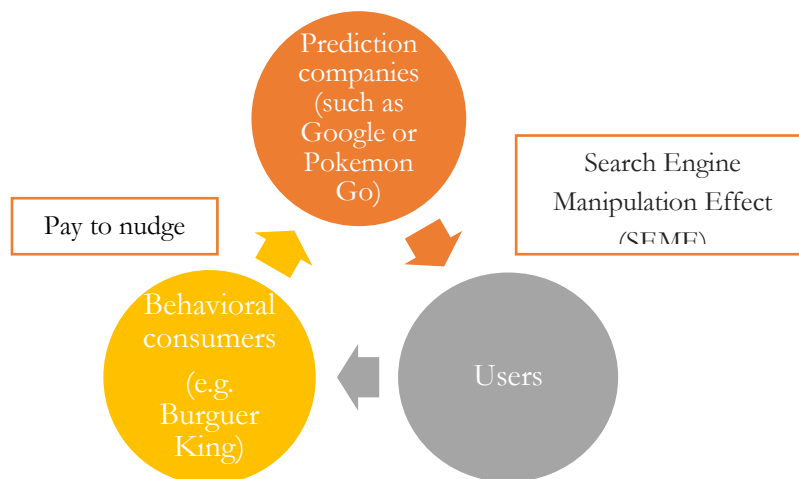


Fig. 3.

I do not intend to express any major opinion on this blogpost as I will leave this to the wider discussion. But think of the obvious dangers such a system can bring. A burger or some shoes seem rather harmless. What about political views? What if Pokemon Go takes you closer to the headquarters of the Republican Party? What if Google keeps suggesting that Trump is a member of the KKK when you type “Trump is....”. What if Amazon everyday reminds you how Communism was responsible for over 20 million deaths with the latest book “Bernie Sanders is a Commy”?

And, worst of all, what if that is what platforms are being paid to make you think ? Can we escape this?

2. Escaping the mouse trap

The first stage to escape any trap is to understand how it works. If a mouse understands how a mousetrap works, it will no longer rush to that inciting piece of cheese. *Or will it?*

I will put to the discussion three alternative models which could potentially be used to tackle this problem and explain my reservations on each:

- a. Subscription models;
- b. Nationalization of social media outlets;
- c. Information fiduciaries.

Subscription Models

One possible way to avoid this is to put an end to the “great bargain” as Balkin puts it. The great bargain is the fundamental idea that these platforms offer a free service. I find it paradoxical that a country which keeps arguing that “there is no such thing as free lunches” has an entire digital

industry based on “free services”. Well these are companies and companies will want to make money. The sooner we understand the trap, the quicker we can escape.

By suggesting a subscription model, we are basically providing an alternative source of income to these companies and diverting them from selling our data. Some companies do already possess a two-tier economic model whereby you can access a premium service, for a monthly fee, and are not bombarded by adds (Spotify, Netflix for example). However, I remain skeptical about the effectiveness of this system. The data model is just too appetizing: why should these companies look away from it, even if they are making money out of subscriptions? It seems so harmless to just give anonymous bundles of data to burger or shoes’ companies. Is it not what advertisers have always done? Why look away from such a gold mine?

This is especially relevant if you take into consideration some of the economic models these companies are basing themselves on. Most of them are yet to make any profit at all. They live out of investment rounds of big investment funds betting on the future when they will go public and they will make big sums in the stock market. This is precisely the same model that lead Larry Page, in the distant 90’s, to forsake his personal dislike for advertisement financing, when investors threatened to kill the next investment round if Google could not find a way to make search engines profitable. Chances are, I would assume, that investors will pressure the new streaming bubble and subscription will not satiate their capitalist hunger.

Nationalization of social media (or the creation of national platforms)

A different way to tackle the issue would be to look at it as states did with broadcasters. At some point, in the 20th century, states decided that news and access to information was too serious of a matter to be left alone to privates to control. Instead of regulating speech, something which directly encroached on fundamental freedoms, they rather chose to launch their own national broadcasters. BBC, French Television or Rádio Televisão Portuguesa were launched under such a premise. A trustworthy source of news which citizens could rely upon for independence.

Why not do the same to social media?

Well, again the problem is more difficult than ideology. Two obstacles come to my mind. First, there is a practical network-effect obstacle which is difficult to overcome. The investment required to create a social network that would be sufficiently appealing to turn the billions of users currently on Facebook or Instagram to the State’s side is unthinkable. And it could not even work at all, namely because of the natural aversion to change (and costs of change) that users would face. This could be eventually tackled with a mandatory belonging whereby, for example, all citizens with a

national ID card would immediately be given an account on the State's social media. But this leads me to problem no. 2.

Is it really better to have a state-controlled mass surveillance machine? If we know already how efficient private companies can be in accessing and selling our data, imagine if states could harvest such tremendous power. One does not need to read 1984 to have a small glimpse of what can happen; China has been doing it and Russia is developing their own internet, closed-off from the rest of the world. The danger of an informational totalitarian system is just too great. To replace one monopoly for another does not seem to really solve the problem, especially when this new Master has an even bigger control (including the monopoly of coercion) over its users/citizens.

Information Fiduciaries

Another possibility is to use law as a regulatory tool and to come-up with a set of duties which these companies must comply with *vis-à-vis* their users. This is essentially Balkin's project and the idea of "information fiduciaries". His theory is complex and worth reading⁷ but for the purposes of this blogpost I will merely point out the highlights of his theory.

For Balkin, these media companies should be treated the same way doctors, lawyers and other professional orders are in terms of fiduciary duties (for our non-lawyer friends this is fancy jargon 'duties which arise out of a relationship based on trust'). Why would they have such fiduciary duties? It seems to come down to four characteristics, namely i) their expertise, ii) their asymmetric knowledge in relation to their users, iii) the vulnerable position of such users and iv) a relationship based on trust in the company in which the entire contract is built upon⁸. Deriving from this very special relationship, between users and the platform, would then arise three types of duties which could help us constrain the actions of big digital companies – a duty of care, a duty of confidentiality and a duty of loyalty⁹. These duties would prevent scandals such as Cambridge Analytica, as Facebook would be bound by a duty of care to duly check to whom was it allowing access to its platform's data. For Balkin, these obligations "run with the data" and so Facebook has a duty to ensure that third parties treat such data in precisely the same manner as Facebook would.

What Balkin fails to do is to develop exactly i) the source of these obligations, and ii) the enforcement of such obligations.

⁷ For a summary, if you are running short on time, <https://slate.com/technology/2018/11/information-fiduciaries-facebook-google-jack-balkin-data-privacy.html>

⁸ Balkin, *supra*, p. 1006-07.

⁹ Balkin, *supra*, p. 1008.

Answering the first, Balkin is quick in escaping his own trap. First, he claims that these duties arise from ‘the terms of service or end-user agreement’ only to then say ‘they are not limited to the specific terms’ because otherwise they would ‘[tech companies] could make those duties vanish simply by changing their privacy policy’. Rather these duties were understood as above contractual arrangements of the parties. This is hardly satisfactory and Professor Balkin knows it very well. However, it seems to be the only way to accommodate the difficult tension between private autonomy (on which the contract is made) and public functions (which these companies seem to start exercising) such as the moderation of free speech. Especially in a country where the doctrine of state action bars any horizontal fundamental rights’ litigation.

To the second point, on the enforcement, no blogpost would suffice. I will leave it aside for our heated discussion.

Conclusion

With this little blogpost I wish merely to raise questions and to provoke debate. I do not believe there are, as we write and discuss, any settled answers to any of the problems I put forth. What I hope to have given you is merely food for thought and to have raised awareness for the challenges that face us today as a global community. When Internet was born, there were many preachers of its inherent qualities of decentralization for the sake of humanity. To a great extent they were right. We live in an informational society which was never as connected and well-informed in the whole history of our human race. Nevertheless, the digital revolution is a double-edge sword which, like every revolution before it, is prone to excesses and abuses. Its instinctive march towards progress clouds our judgement and sells us the illusion that going forward is always good. I urge you rather to discuss the path before taking it and to make ensure that we do not go gentle into that good night.