JOURNAL OF LAW, TECHNOLOGY & THE INTERNET • VOL. 12 • NO. 1 • 2020 – 2021

"BECAUSE IT IS WRONG": AN ESSAY ON THE IMMORALITY AND ILLEGALITY OF THE ONLINE SERVICE CONTRACTS OF GOOGLE AND FACEBOOK*

Preston M. Torbert†

This essay argues that the behavioral-advertising business model under which an internet platform, such as Google or Facebook, provides free services in exchange for the user's personal data is immoral and illegal. It is immoral because it relies on addiction, surveillance, and manipulation of the user to deplete the user's autonomy. The contract between the company and the user is immoral. It can also be plausibly argued that the contract is illegal under California law because it is contrary to good morals, is unconscionable, and is against public policy. As society becomes more aware of these moral and legal defects, courts in the future should be more willing to find these contracts illegal and thus void. In such case, the user's consent to the contract would be nullified and the company would have no legal right to gather and monetize the personal data of the user. The companies should then be forced to convert to a subscription model with a fiduciary duty to users to restrict the gathering and monetizing of personal data. This essay employs perspectives not only from morality and law, but also from philosophy, history, political theory, and neuroscience. Part One covers morality, Part Two legality.

---

* I am indebted to Harvard Law Professor Charles Fried and his son, Suffolk University Philosophy Professor Gregory Fried, for the phrase "Because it is Wrong." *See* BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR (2010). I use the word "Essay" in the sense used by Michel de Montaigne—a trial or attempt, not something definitive.

† Lecturer in Law, University of Chicago Law School, and Visiting Professor, Peking University School of Transnational Law.

CONTENTS

"Because It Is Wrong": Immorality and Illegality of Online Service Contracts

PART ONE: MORALITY

I. INTRODUCTION

Many internet service companies have a business model that relies on advertising. A user enters into a contract with the company by accessing the appropriate web page and clicking on the consent button to confirm that the user agrees to the company's Terms of Service. A contract between the user and the company is established.[1] Under the contract, the user consents to the company's collection, aggregation, and handling of the user's personal data and the company sells the attention[2] of the user to advertisers, political parties, and others. Essentially, the user barters his or her personal information in exchange for free use of the service. Under this model, the users are not the company's customers, the advertisers are.[3] This has become the predominant business model for internet service companies.

This business model has attracted criticism. Some say that the model will inevitably be misused; that it is harmful to the health of the public sphere and politics; that under it crucial decisions are made unilaterally, without recourse, and

[1] The validity of the clickwrap license was first recognized in California in the case *Hotmail Corp. v. Van$ Money Pie, Inc.*, No. C-98 JW PVT ENE, C 98-20064 JW 1998 WL388389 (N.D. Cal. 1998). For a discussion on clickwrap licenses *see generally* Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH. L. J. 578, 579-81 (2007). See also, E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.26 (2004). More recently, courts have been moving away from the idea that a click on an icon is the same as a signature on a page. *See* Nancy S. Kim, *Online Contracting: New Developments*, 72 BUS. LAWYER 243, 244 (Winter 2016-2017). Professor Robin B. Kar and Margaret Jane Radin have proposed that certain terms, such as an arbitration clause, should be precluded from legal effect because they are not part of the "shared meaning" of the parties. Robin B. Kar & Margaret Jane Radin, *Pseudo-Contract & Shared Meaning Analysis*, 132 HARV. L. REV. 1135 (2019). The Google and Facebook user contracts do not provide for arbitration and the courts have so far assumed the contracts are properly formed and inclusive. For example, see *In re Facebook, Inc. Consumer Privacy User Profile Litigation*, MDL 2843, Case No. 18-md-02843-VC, Pretrial Order No. 20: Granting in Part and Denying in Part Motion to Dismiss First Amended Complaint, at 38 ("the contract between Facebook and its users does not merely consist of the SRR [Statement of Rights and Responsibilities], ... It also includes the Data Use Policy"). If a contract were not formed, Google or Facebook could be liable under the doctrine of promissory estoppel. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90; *see also* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.26 (2004).

[2] Some have said that Facebook "sells your data." Mark Zuckerberg has denied this. "[W]e [Facebook] don't sell people's data . . ." Mark Zuckerberg, *The Facts About Facebook*, WALL ST. J., Jan. 25, 2019, at A15. *But see* ANTONIO GARCIA MARTINEZ, CHAOS MONKEYS: OBSCENE FORTUNE AND RANDOM FAILURE IN SILICON VALLEY 328-29 (2018) (asserting that Facebook does "buy" your data). *See also* note 194 *infra*.

[3] A popular digital-age axiom is that "if you're not paying for the product, you are the product." JACOB SILVERMAN, TERMS OF SERVICE 254 (2015).

without accountability;[4] that it leads the companies to consciously addict their users;[5] that it is at cross-purposes with healthy technology usage;[6] that it involves surveillance marketing;[7] and that it involves mass behavior modification.[8] But it seems that no commentator has overtly criticized the morality of this business model and questioned the validity of the contracts that underly it.[9] Many critics have suggested legislative or administrative solutions to the problems noted above, but no one seems to have suggested a judicial solution through the interpretation of contract law. That is what this article does for the contracts of the two giants of internet advertising, Google and Facebook.[10]

These two companies were chosen for two reasons: (1) they developed the current model of behavioral advertising, take in over half of all worldwide digital advertising, and earn the overwhelming percentage of their revenues from advertising (about 90% for Google, 95% for Facebook);[11] (2) they are very powerful. According to Marc Rotenberg, Executive Director of the Electronic Privacy Information Center, "[i]t's difficult to imagine a more complete hegemony. Google and Facebook control eight of the top 10 internet services . . . They are among the five largest corporations in the world. They face no competition. And their *power came about through the unregulated collection and use of personal data*."[12] It has been said that they have reengineered the internet into vast

---

[4] Zeynep Tufekci, *Facebook's Surveillance Machine*, N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/2018/03/19/opinion/facebook-cambridge-analytica.html.
[5] Roger McNamee, *Foreword in* VIVEK WADHWA & ALEX SALKEVER, YOUR HAPPINESS WAS HACKED vi (2018).
[6] *Id.* at 161.
[7] *See* JONATHAN TAPLIN, MOVE FAST AND BREAK THINGS 144 (2017).
[8] *See* JARON LANIER, TEN ARGUMENTS FOR DELETING YOUR SOCIAL MEDIA ACCOUNTS RIGHT NOW 10, 26 (2018).
[9] WOODROW HARTZOG, PRIVACY'S BLUEPRINT: THE BATTLE TO CONTROL THE DESIGN OF NEW TECHNOLOGIES 172 (2018) (suggesting that the extension of the contract doctrine of unconscionability represents an opportunity for users of online agreements to regain at least some autonomy over the flow of personal information).
[10] This essay refers to "Google" and "Facebook" generically to include all companies owned by Alphabet, Inc. and Facebook, Inc.
[11] MARTIN MOORE, DEMOCRACY HACKED: POLITICAL TURMOIL AND INFORMATION WARFARE IN THE DIGITAL AGE 140-41 (2018). *Cf.* KEN AULETTA, FRENEMIES: THE EPIC DISRUPTION OF THE AD BUSINESS (AND EVERYTHING ELSE) 23 (2018) (giving a slightly different revenue figure for Google (87%)). Google's revenue of $135 billion from advertising is almost double Facebook's. Laura Forman, *From Google: What You Didn't Know to Look For*, WALL ST. J., May 18-19, 2019, at B16.
[12] Marc Rotenberg, Letter to the Editor, N.Y. TIMES, May 7, 2018, at A21 (*emphasis added*). A further demonstration of Google's power is the fact that it has seven services that each have 1 billion users. Xavier Harding, *Google Has 7 Products With 1 Billion Users*, POPULAR SCIENCE

preference manipulation platforms[13] on which "Google defines what we think" and "Facebook defines who we are."[14]

II. MARKETS AND MORALS

What are the moral limits of the market in a liberal democracy? Do we want market forces to spread into the most "intimate spheres of life"?[15] These are the fundamental moral questions behind the behavioral-advertising business model. Unfortunately, they have not been raised or publicly debated since the creation of these digital platforms. In the legal field, the immediate reason for this silence may be "market imperialism,"[16] the triumph in the law schools during the last fifty years of market reasoning[17] and its role as the predominant analytical tool. This market view of life also lies at the heart of computer-centered technology and culture; internet boosters often speak in the language of economics.[18] The major presumption of market reasoning certainly is not without justification: that people in their market roles express important motivations and attitudes and even some fundamental truths of human nature.[19] But it has been extended to the supposition that in all spheres of life, human behavior can be explained by assuming that people decide how to act by weighing the costs and benefits of the choices before them and choosing the one that will give them the greatest welfare or utility.[20] This extension is the concept of "universal commodification."[21] This presumption and

(Feb. 1, 2016), https://www.popsci.com/google-has-7-products-with-1-billion-users/. Washington and Lee Law Professor Joshua A. T. Fairfield has written, "[t]o exaggerate only slightly: the most important social contract of the twenty-first century is not the U. S. Constitution, it is the Facebook Terms of Service." JOSHUA A. T. FAIRFIELD, OWNED: PROPERTY, PRIVACY AND THE NEW DIGITAL SERFDOM 43 (2017).

[13] YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, NETWORK PROPAGANDA 345(2018).

[14] GEORGE DYSON, TURING'S CATHEDRAL: THE ORGINS OF THE DIGITAL UNIVERSE 308 (2012).

[15] *See* NICHOLAS CARR, UTPOPIA IS CREEPY AND OTHER PROVOCATIONS 85 (2016); *see also* STEPHEN A. MARGLIN, THE DISMAL SCIENCE: HOW THINKING LIKE AN ECONOMIST UNDERMINES COMMUNITY 1-2, 71, 255 (2008) (suggesting that a concern for community should limit the application of market principles and has pointed to the Amish as an example).

[16] MICHAEL WALZER, SPHERES OF JUSTICE 120 (1983).

[17] Jon D. Hansen & Douglas A. Kysar, *Taking Behavioralism Seriously*, 74 N.Y.U. L. REV. 630, 640 (1999).

[18] LEE SPIEGEL, AGAINST THE MACHINE 31 (2008).

[19] ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 219 (1995).

[20] MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 48 (2012).

[21] Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1901 (1987). Political Science Professor C. B. MacPherson of the University of Toronto suggested that universal commodification is inherent in Locke's philosophy. He has suggested that if you accept Locke's premise that a man is human only as sole proprietor of himself only in so far as he is free from all but market relations, "you must convert all moral values into market values." C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 266 (1962).

supposition, however, avoid the fundamental question: does it make sense at all to use market norms to govern our conduct regarding a particular good?[22]

This is essentially a moral question, but both the market[23] and technology[24] lack a moral basis, so they turn every question into an analysis of costs and benefits—the greatest welfare or utility.[25] Market imperialism and technology empty public life of moral argument, and any attempts at moral thinking tend to devolve into utilitarian analyses of the costs and benefits of probable scenarios.[26] The scholar who seems to have thought about this issue most deeply, Professor Margaret Jane Radin of the University of Michigan Law School, believes that the characteristic rhetoric of economic analysis, when it is put forward as the sole discourse of human life, is "morally wrong."[27] In fact, freedom and autonomy require that certain goods be outside market relations. Michael Walzer of the Institute for Advanced Study has made the most extensive list of dealings outside market relations.[28] They include the purchase and sale of human beings; political power and influence; criminal justice; freedom of speech, press, religion, and assembly; marriage and procreation rights; etc.[29] He also includes simony, bribery,

---

[22] ANDERSON, *supra* note 19, at 219. Professor Anderson has suggested that the proper limits of the market can be partly defined by asking two questions: (1) do market norms do a better job of embodying the ways we properly value a particular good than norms of other spheres; and (2) do market norms, when they govern the circulation of a particular good, undermine important ideals such as freedom, autonomy, and equality, or important interests legitimately protected by the state? *Id*. at 143-44.

[23] *See* FRED HIRSCH, SOCIAL LIMITS TO GROWTH 117-18,143, 157 (1976); *see also* CHARLES FRIED, RIGHT AND WRONG 109 (1978) (noting that market thinking fails to see the need for a moral foundation for choice).

[24] NEIL POSTMAN, TECHNOPOLY: THE SURRENDER OF CULTURE TO TECHNOLOGY 79 (1973) ("the Technopoly story is without a moral center").

[25] For a discussion of the economics of a cost-benefit analysis, *see e.g.*, Will Kenton, *Cost-Benefit Analysis*, INVESTOPEDIA (July 7, 2020), https://www.investopedia.com/terms/c/cost-benefitanalysis.asp#:~:text=A%20cost%2Dbenefit%20analysis%20(CBA,decision%20to%20pursue%20a%20project.

[26] SANDEL, *supra* note 20, at 5, 6, 14; *see* SHEILA JASANOFF, THE ETHICS OF INVENTION: TECHNOLOGY AND THE HUMAN FUTURE 253 (2016).

[27] Radin, *supra* note 21, at 1851. In a similar vein, Stanford University Philosophy Professor Debra Satz believes that some markets are "noxious," and that their use should be blocked and, further, that they can "even undermine the conditions for a democratic society." DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS 94-96, 208 (2011). Columbia University Law Professor Bernard Harcourt in describing systems analysis has said, "[a]nd all that was necessary—that is, necessary to avoid talking about morality, was a lot of information and good statistical analyses." BERNARD D. HARCOURT, EXPOSED: DESIRE AND DISOBEDIENCE AND THE DIGITAL AGE 155 (2015).

[28] *See* WALZER, *supra* note 16.

[29] *Id.* at 100-03.

and prostitution.[30] Even this extensive list may not be complete. It does not seem to include judges selling their decisions to the highest bidder or the enforcement of unconscionable contracts. To acknowledge that the market has limits is to recognize that it has a proper role in analyzing human life. The challenge is to reap the advantages of the market while confining its analysis to those areas suited to it.[31]

Market imperialism has not only expanded market thinking to all areas of human experience, it has also necessarily resulted in precluding discussion of moral issues. The British historian Tony Judt has explained that since the 1970s, "[i]ntellectuals don't ask if something is right or wrong, but whether it is efficient or inefficient. They don't ask if a measure is good or bad, but whether or not it improves productivity."[32] The insightful internet critic Evgeny Morozov reached a similar conclusion about the last few decades. He believes that one of the greatest misconceptions of this period has been "the idea that technology ought not to intrude on questions of morality . . . [m]orality here, technology there: the two shall never overlap."[33] The veneration of technology has also precluded the discussion of moral issues because it presumes that technical innovation has only positive effects.[34]

But this preclusion of moral analysis ultimately undermines the moral legitimacy of the market economy. It is generally recognized that a market economy, even in its purest form, requires some restrictions on self-interest to prevent theft, fraud, and contracts contrary to the public interest, as well as the

---

[30] *Id.* at 9.

[31] ANDERSON, *supra* note 19, at 166-67.

[32] TONY JUDT & TIMOTHY SNYDER, THINKING THE TWENTIETH CENTURY 361 (2012). Some have questioned whether new technology is now increasing productivity: "[t]he more tech we get, the less productive we are." WADHWA & SALKEVER, *supra* note 5, at 90*; see also* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 196 (2d ed. 1998) (implying that a disregard of moral issues is attributable to liberal democracy. "Political liberalism insists on bracketing our comprehensive moral and religious ideals for political purposes …."); *see also* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 323 (1996). "A political agenda lacking substantive moral discourse is one symptom of the public philosophy of the procedural republic." MICHAEL J. SANDEL, PUBLIC PHILOSOPHY: ESSAYS ON MORALITY IN POLITICS 28 (2005).

[33] EVGENY MOROZOV, TO SAVE EVERYTHING, CLICK HERE: THE FOLLY OF TECHNOLOGICAL SOLUTIONISM 323 (2013).

[34] *Id.* at 167. As Siva Vaidhynathan, Professor of Media Studies at the University of Virginia, has observed, "[i]nnovation lacks a normative claim of significant betterment . . . . The ultimate goal of innovation seems to be more innovation." SIVA VAIDYANATHAN, ANTI-SOCIAL MEDIA: HOW FACEBOOK DISCONNECTS US AND UNDERMINES DEMOCRACY 205 (2018). Nicholas Carr has suggested that a utopian view of technology also encourages people to "switch off their critical faculties and give Silicon Valley . . . free reign to remaking culture to fit their commercial interests." ROUGH TYPE (Sept. 12, 2017). http://www.roughtype.com/.

corruption of legislators and judges. Truth, trust, restraint, and obligation are social virtues grounded in religious belief that play a central role in a market economy. Such an economy requires morality to assure that the law is obeyed and those aspects of life not covered by the law are governed by some rules. By trying to fill the vacuum left by the decline of religion and the preclusion of morality, market values weaken moral sanctions and sabotage their own legitimacy.[35]

Given that some activities are off limits to the market, might they include the behavioral-advertising business model for internet services? We can attempt to answer this question by using our common-sense moral intuitions and by allowing our moral judgments to be guided as much as possible by the reasons that can be given for opposing views.[36] Although the digital behavioral-advertising business model is in many respects unprecedented, analogies to familiar practices can be helpful in evaluating it. Appeals to both moral common sense and analogy are invoked below.

III. ADVERTISING

A. THEN AND NOW

In 1922, Herbert Hoover remarked about radio that "[i]t is inconceivable we should allow so great a possibility for service, for news, for entertainment, for education, and for vital commercial purposes to be drowned in advertising chatter."[37] Later, at the dawn of the television age, the respected columnist Walter Lippman observed that "while television is supposed to be 'free,' it has in fact become the creature, the servant, and indeed the prostitute, of merchandizing."[38] In 1958, Vance Packard's book *The Hidden Persuaders* referred to advertising firms as "one of the most advanced laboratories in psychology" and quoted an adman's statement that psychology held great promise for understanding people and "ultimately for controlling their behavior."[39] In the 1980s, some philosophers wrote that persuasive advertising was immoral because it manipulated people and reduced autonomy.[40] Advertising, nevertheless, was adopted as the primary revenue stream

---

[35] R. C. O. Mathews, *Book Review*, 87 THE ECON J. 576-77 (1977) (reviewing FRED HIRSCH, SOCIAL LIMITS TO GROWTH (1976)); HIRSCH , *supra* note 23, at 141, 143: *see also*, AMARTYA SEN, ON ETHICS AND ECONOMICS 22-25 (1987).

[36] JAMES RACHELS, THE ELEMENTS OF MORAL PHILOSOPHY 11-12 (4th ed. 1986).

[37] TIM WU, THE ATTENTION MERCHANTS 86 (2016).

[38] *Id.* at 150.

[39] Robert L. Arrington, *Advertising and Behavior Control*, 1 J. BUS. ETHICS 4 (1982)

[40] *See, e.g.*, Paul C. Santelli, *The Informative and Persuasive Functions of Advertising: A Moral Appraisal*, 2 J. BUS. ETHICS 27-33 (1983); Roger Crisp, *Persuasive Advertising, Autonomy, and*

for radio and television and later became the revenue model for internet services.[41] Before the rise of Google, Silicon Valley viewed advertising with some disgust—it was considered a core sin of the old media, especially television.[42] The idealists were adamant that information should not be monetized online.[43]

But, of course, ubiquitous radio and television services depended on advertising. And this common use of advertising on radio and television suggested that advertising on an internet service should be acceptable too. But the analogy of internet services to free radio and television is misleading. There is a fundamental difference between internet and other services: the nature and amount of personal data disclosed by the user. Computers and digitization have profoundly changed the personal data available to advertisers.[44] The data collected through internet platforms have four distinguishing characteristics: the data is essentially permanent, is easily transferable, is all-pervasive, and is gigantic. Market imperialism suggests that these characteristics make the data a commodity and, indeed, a very marketable one.

In considering the amounts of information on users, a better analogy than radio and television might be mail and telephone service. As distinguished from radio and television, consumers have used the mail service and telephone to exchange large amounts of personal information. In this respect, they are similar to Facebook's services. But they are different in that customers have always paid a fee for mail and telephone service and the service providers have always been prohibited from using the personal information contained in the messages for commercial purposes.[45] Why has no one seriously suggested free mail or telephone

---

the Creation of Desire, 6 J. BUS. ETHICS 413-18 (1987); Tom L. Beauchamp, *Manipulative Advertising*, 3 BUS. & PRO. ETHICS 1-22 (1984).

[41] LANIER, *supra* note 8, at 97.

[42] JARON LANIER, YOU ARE NOT A GADGET: A MANIFESTO 82 (2010).

[43] JARON LANIER, WHO OWNS THE FUTURE? 207 (2013).

[44] Jeroen van de Hoven et al., *Privacy and Information* Technology, STAN. ENCYCLOPEDIA OF PHIL. (*revised* October 30, 2019) https://plato.stanford.edu/entries/it-privacy/#PerDat (discussing the history and advances of digital privacy and the implications of technology).

[45] As to mail, Justice Stevens stated in his dissent in United States v. Ramsey, 431 U.S. 606, 626 (1977) that "throughout our history Congress has respected the individual's interest in private communication. The notion that private letters could be opened and inspected without notice to the sender or the addressee is abhorrent to the tradition of privacy and freedom to communicate protected by the Bill of Rights." *See also ex Parte Jackson*, 96 U.S. 727, 733 (1877) (asserting that letters and sealed packages subject to letter postage are fully guarded from examination and inspection, except as to their outward form and weight). As for the telephone, eavesdropping for commercial or private purposes has been legally prohibited starting with state statutes enacted as early as 1862. The Crime Control Act of 1968 authorized electronic surveillance, but only subject

service in exchange for the collection and use of the information contained in the letters or the calls? An economist's answer—and partially an accurate one historically—would be that, before the computer, it was too costly to gather and aggregate the information. But even today the answer is surely that most people would feel uncomfortable with such an arrangement and, if they thought about it, would consider it immoral. Perhaps the conclusion should be the same for internet services.[46] The case seems even stronger and the privacy and autonomy concerns much greater for internet services because the providers collect vastly more personal information.

These analogies point out two moral issues not applicable to advertising on radio or television: privacy and autonomy. Essentially, the word "privacy" denotes a "cluster" of problems.[47] The specific privacy problem referred to here is the right to control over information about oneself provided by oneself. This issue arises because the user discloses personal information and then loses control over it. The service provider sees the relationship solely in market terms and collects, aggregates, and processes data in ways that violate the user's expectation of privacy. This creates a moral problem of depriving the user of privacy.

Privacy is closely linked to the second moral issue, autonomy. In fact, privacy can be seen as a precondition for autonomy. The problem of autonomy occurs at a later stage, as the service provider's business develops after privacy has been weakened. The service provider goes public (Google in 2004[48], Facebook in 2012[49]) and needs to satisfy the demands of its shareholders and Wall Street for larger profits. To support greater revenues in an advertising-based business model, the service provider needs more users and more engagement to gather more data to better target the advertisements.[50] Monetizing users' private data to the greatest extent becomes the goal.[51] With enormous amounts of data obtained both from the user's activity on the site and outside sources, the service provider is able to

---

to strict judicial control. *Electronic Eavesdropping*, ENCYC. BRITTANICA ONLINE. *See also Katz v. United States*, 389 U.S. 347, 352 (1967) (asserting that the protection of the Fourth Amendment applies to an individual in a telephone booth).

[46] The legal answer to this question is that the user has consented to the collection and use of the personal information.

[47] DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 172 (2008).

[48] Jay Ritter, *Google's IPO, 10 Years Later,* FORBES (Aug. 7, 2014), https://www.forbes.com/sites/jayritter/2014/08/07/googles-ipo-10-years-later/#ad157ff2e6ca.

[49] Justin Walton, *When Did Facebook Go Public*, INVESTOPEDIA (June 9, 2020), https://www.investopedia.com/ask/answers/111015/when-did-facebook-go-public.asp.

[50] *See generally* Suketu Gandhi, Bharath Thota, Renata Kuchembuck & Joshua Swartz, *Demystifying Data Monetization,* MIT SLOAN MGMT. REV., (Nov. 27, 2018), https://sloanreview.mit.edu/article/demystifying-data-monetization/.

[51] *See id.*

manipulate the user and deprive the user of autonomy, shunting him or her in directions that benefit it, not the user.[52] This manipulation and loss of privacy and autonomy are immoral. This is why advertising has been called the Internet's "original sin."[53]

A full recounting of the history of Google and Facebook would reveal many failures to fulfill commitments to users and to government authorities.[54] This article treats, however, only those moral failings that are the direct result of the advertising-based business model and therefore does not cover many events in the history of the two internet giants. It generally avoids discussion of privacy abuses by the founders in the daily conduct of the business (e.g., Cambridge Analytica scandal[55]) even if these actions were perhaps incentivized by the business model. The focus of analysis is on the business model, not the individuals, even though the founders held extreme corporate powers as noted below.

B. THE ADVERTISING-BASED BUSINESS MODEL

The successful advertising-based business model was first developed by Google and then adopted by Facebook. To consider the moral and legal issues in this business model, we need to understand the history of these two companies. In large part that is the history of the founders. The unusual multiple-class share structure of these two companies gives the founders voting control over the company's management.[56] The founders also served for many years in the most important management roles.[57] Therefore, to an almost unprecedented extent in

---

[52] Natasha Singer, *Just Don't Call It Privacy*, N.Y. TIMES, Sept. 23, 2018, at SR 4.
[53] HARTZOG, *supra* note 9, at 78.
[54] *See infra* pages 136-141; FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 144-45 (2015); Gabriel J. X. Dance, Miguel LaForgia & Nicholas Confessore, *Facebook Offered Users Privacy Wall, Then Let Tech Giants Around It*, N.Y. TIMES, Dec. 19, 2018, at A1;
Daisuke Wakabayashi, *Google Plus Shutting Down After User Data Was Exposed*, N.Y. TIMES, Oct. 9, 2018, at B3; Cecilia Kang, *F.T.C. Is Said to Consider Hefty Fines for Facebook*, N.Y. TIMES, Jan. 19, 2019, at B1.
[55] Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout so Far*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html.
[56] SHOSHANNA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER 101-02 (2019).
[57]Until recently, Sergey Brin was President of Alphabet, Inc, the holding company of Google, and Larry Page was CEO (the chief operating decision maker) of Alphabet. Letter from Josh Paul, Dir. of Acct., to SEC Staff (Dec. 15, 2017),
https://www.sec.gov/Archives/edgar/data/1652044/000165204417000048/filename1.htm [https://p

major corporations, the views and conduct of the founders and owners of these two companies influence the actions of the companies and, specifically, its business model. In effect, Larry Page and Sergei Brin have been Google and Mark Zuckerberg is Facebook. To an unusual degree, these individuals, not Wall Street investors, are responsible for the corporate ethics of the two companies.[58] Facebook's use of the advertising-based business model has attracted more attention and Mark Zuckerberg is now at the center of a discussion about the moral character of Silicon Valley and its leaders.[59] The discussion below emphasizes Facebook, although it starts with Google, the pioneer in developing the advertising-based business model. It suggests that we can understand how we arrived at our current predicament only by understanding the history of the two companies.

IV. THE HISTORY OF GOOGLE

A. BEFORE ADVERTISING

Larry Page and Sergey Brin, two fellow Ph.D. students in the computer sciences department at Stanford, incorporated Google in 1998 with a goal of promoting an internet search engine.[60] From the beginning, the company's mission was "[o]rganize the world's information and make it universally accessible and useful."[61] This was a grand, pretentious, but seemingly noble cause—and perhaps all young men exhibit some degree of grandiosity. But Elias Aboujaoude, Director of the Obsessive Compulsive Disorder Clinic at Stanford Medical School, has described "grandiosity" as "an exaggerated belief in one's importance and

---

erma.cc/P6U2-BY8B]. In December 2019, Brin and Page gave up their management positions. Jack Nicas & Daisuke Wakabayashi, *End of Era for Google as Founders Step Aside*, N.Y. TIMES, Dec. 4, 2019, at B1; Mark Zuckerberg is Chairman and CEO of Facebook. Facebook, Inc., Definitive Proxy Statement (Form DEF 14A) (Apr. 13, 2018).

[58] *See* ROGER MCNAMEE, ZUCKED: WAKING UP TO THE FACEBOOK CATASTROPHE 101 (2019) ("When called to account for this [exploiting human weaknesses to make money], tech companies blame pressure from shareholders. Given that the founders of both Facebook and Google have total control of their companies, that excuse falls short").

[59] Evan Osnos, *Ghost in the Machine*, NEW YORKER, Sept. 17, 2018, at 35. Facebook seems to have met more public criticism because it has been more forthcoming. To a certain degree, Google has been able to let Facebook take the criticism that applies to the business model both companies employ.

[60] *See* Samuel Gibbs, *Google has 'outgrown' it's 14-year old mission statement, says Larry Page*, GUARDIAN (Nov. 3, 2014), https://www.theguardian.com/technology/2014/nov/03/larry-page-google-dont-be-evil-sergey-brin#:~:text=Page%20insists%20that%20the%20company,it%20universally%20accessible%20and%20useful%E2%80%9D.

[61] *How Search Works*, GOOGLE, https://www.google.com/search/howsearchworks/mission (last visited Sept. 6, 2020) [https://perma.cc/NM88-APDW].

abilities...[that] seems to be in the Internet's DNA."[62] It is a characteristic and stubborn trait of the "e-personality," the unwitting creation of extensive online interactions.[63] The e-personality may explain the business philosophy of Silicon Valley start-ups pioneered by PayPal: "raise a boatload of money, expand quickly, and present lawmakers with a fait accompli. Here is the future, deal with it."[64]

Even before the incorporation of Google, Larry Page and Sergey Brin were struggling with the moral issues of the internet search business. In a 1998 paper, "The Anatomy of a Large-Scale Hypertextual Web Search Engine," they noted an ethical problem they called "Advertising and Mixed Motives." They observed that "[c]urrently, the predominant business model for commercial search engines is advertising. The goals of the advertising business model do not always correspond to providing quality search to users."[65] They saw an irreconcilable conflict between the integrity of a search engine's search function and the business of search.[66] They concluded, in effect, that advertising caused so many conflicts of interest between the integrity of search and the lure of profits that only a transparent and academic search engine could preserve the integrity of search.[67] An objective search engine would have to be located in a non-profit environment like a university. They did not seriously consider other possible business models, such as paid subscriptions. They believed that the company would make money, in part, from licensing fees and selling search services to corporations.[68] The search engine was an end in itself and too important to be corrupted by financial interests.[69]

---

[62] ELIAS ABOUJAOUDE, VIRTUALLY YOU: THE DANGEROUS POWERS OF THE E-PERSONALITY 48 (2011).
[63] *Id*. at 20. The other traits are narcissism, darkness, regression and impulsivity. *Id.* at 43. This grandiosity seems related to Ayn Rand's famous quote "[w]ho will stop me?" described as Google's "founding principle" by Director Emeritus of the Annenberg School for Communication and Journalism at the University of Southern California, Jonathan Taplin. He has described the principle as meaning: "Google will do whatever it wants without asking permission and the results will be so awesome that no one will complain." He points to Gmail, Google Street View, and the effort to digitize the world's books as examples. TAPLIN, *supra* note 7, at 97-99. In a similar vein, writer Franklin Foer asserts that "Google is never plagued by second-guessing." FRANKLIN FOER, WORLD WITHOUT MIND: THE EXISTENTIAL THREAT OF BIG TECH 42 (2017).
[64] TOM SLEE, WHAT'S YOURS IS MINE: AGAINST THE SHARING ECONOMY 167 (2017).
[65] Larry Page & Sergey Brin, *The Anatomy of a Large-Scale Hypertextual Web Search Engine*, STAN. INFOLAB PUB. SERVER, http://ilpubs.stanford.edu:8090/361/1/1998-8.pdf (last visited Sept. 6, 2020).
[66] *See id.*
[67] *Id*.
[68] KEN AULETTA, GOOGLED: THE END OF THE WORLD AS WE KNOW IT 61 (2009); STEVEN LEVY, IN THE PLEX: HOW GOOGLE THINKS, WORKS, AND SHAPES OUR LIVES 95 (2011).
[69] RICHARD L. BRANDT, INSIDE LARRY AND SERGEY'S BRAIN 40 (2005).

An incident from 1999 demonstrates the founders' attitude toward advertising at that time. Sergey Brin told Susan Wojcicki, an employee in the marketing department, "I have a good idea . . . [w]hy don't we take the marketing budget and use it to inoculate Chechen refugees against cholera. It will help our brand awareness and we'll get more new people to use Google."[70] If that didn't work, he had a backup plan: "[w]hat if we gave out free Google-branded condoms to high-school students?"[71] Two years later, Eric Schmidt was hired to provide "adult supervision" to the young founders.[72]

At a 2001 internal meeting to consider Google's evolving position in the marketplace, the attendees spent the first fifteen minutes describing what Google was not and what it would not do.[73] Larry Page urged that Google should be "a force for good," which excluded marketing tricks like sweepstakes, coupons, and contests that took advantage of people's cognitive biases.[74] He declared that it was evil to prey on people's stupidity.[75] Google would not deceive people by selling placement in search results.[76]

B. AFTER ADVERTISING

The aftereffects of the 2000 collapse of the dotcom bubble[77] threatened the existence of the young company and changed the founders' views. Advertising seemed unavoidable; it was the prevailing business model for commercial search engines.[78] The two founders did not know how ads would function, but they had one condition: the ads had to be useful to users and not slow down the site.[79] They looked at the possibility of paid listings in search results, but rejected that as crossing an invisible ethical line.[80] Instead, Google began to experiment with

---

[70] DOUGLAS EDWARDS, I'M FEELING LUCKY: THE CONFESSIONS OF GOOGLE EMPLOYEE NUMBER 59, 48-49 (2011).
[71] *Id.*
[72] Daisuke Wakabayashi, Katie Benner, & Claire Cain Miller, *Eric Schmidt to Step Down as Alphabet's Executive Chairman*, N.Y. TIMES, (Dec. 21, 2017), https://www.nytimes.com/2017/12/21/technology/eric- schmidt-google-alphabet.html.
[73] EDWARDS, *supra* note 70, at 290.
[74] *Id.*
[75] *Id.*
[76] *Id.* at 190-91.
[77] *See e.g.,* Adam Hayes, *Dotcom Bubble*, INVESTOPEDIA (June 25, 2019), https://www.investopedia.com/terms/d/dotcom-bubble.asp#:~:text=During%20the%20dotcom%20bubble%2C%20the,equities%20entering%20a%20bear%20market (summarizing the Dotcom Bubble collapse).
[78] *See id.*
[79] BRANDT, *supra* note 69, at 95.
[80] EDWARDS, *supra* note 70, at 310.

advertisements, but would not allow banner or pop-up ads that were ubiquitous on the web.[81]

The rationalization for ads went beyond utility for users and income generation. For Larry Page, at least, there was the experience of Nikola Tesla, the inventor whose lack of business sense left him in poverty despite his brilliant inventions.[82] Tesla's experience was a lesson for Page. "I didn't want to just invent things," he said, "I also wanted to make the world better . . . ."[83] But he needed the resources that Tesla did not have to do that. As one commentator put it, "[t]o realize their dreams, Page and Brin had to build a huge company."[84] Advertising would give them the necessary resources and scale to fulfill their grandiose goal of organizing the world's information and making it available to all.[85]

But even if ads were necessary both for survival and for scale, were they still reprehensible? Early in its history Google's moral vision was summarized in a phrase invented by the engineer Paul Buchheit at an in-house meeting in July, 2001 to discuss Google's corporate values. He suggested something that would make people uncomfortable but also be interesting: "[d]on't be evil."[86] The founders adopted it as their hope and mantra for the company.[87] What did the phrase mean? One interpretation was that it was an elaboration of the earlier phrase "[d]on't go commercial."[88] This interpretation fit with the 1998 article noted above regarding the conflict of interest between search results and advertising. [89] Another interpretation calls the phrase an exemplification of a sense of moral purity.[90] The trenchant internet critic Nicholas Carr has suggested that the mantra means that the company can make money without doing evil.[91] However naïve, presumptuous, or inaccurate Google's motto was, it could nevertheless rationalize the use of advertising to make money: if the company wasn't being evil, then advertising was necessarily not evil.

---

[81] *See id.* at 286-87.
[82] *See e.g.*, Gilbert King, *The Rise and Fall of Nikola Tesla and His Tower*, SMITHSONIAN MAG. (Feb. 4, 2019), https://www.smithsonianmag.com/history/the-rise-and-fall-of-nikola-tesla-and-his-tower-11074324/.
[83] LEVY, *supra* note 68, at 13.
[84] *Id.* at 6.
[85] *See supra* note 61.
[86] *See* EDWARDS, supra note 70 at 276.
[87] *See id.* at 272-76.
[88] BRANDT, *supra* note 69, at 39.
[89] *See* Page & Brin, *supra* note 65.
[90] LEVY, *supra* note 68, at 6.
[91] CARR, *supra* note 15, at 283. Financial Times columnist Rana Foroohar has said that "evil was baked into the business plan" of Google. RANA FOROOHAR, DON'T BE EVIL 32 (2019).

The founders began to see keyword-targeted text ads as an important part of the information package given to the user as part of a search result.[92] This new system was called "paid-search," but it did not provide for the direct payment to Google to improve the search results.[93] Advertisers simply bid in an auction on search words—large numbers of them—to win the right to have their ads appear alongside the search results that were generated by the use of those words for the search.[94] The ads did not affect the search itself, but they displayed next to search results.[95] Every time a user clicked on an ad, the advertiser paid a fee to Google.[96] The ads were so well targeted that, according to a test, users did not realize they were ads and actually liked them.[97] Ads would not just be necessary, they would be helpful. They could improve the user's search experience. This "paid search" advertising business broke new ground in advertising history.[98] For advertisers, it meant that for the first time they could connect to enormous numbers of consumers as individuals as they were making shopping decisions online.[99] Most important, it was also very profitable. Google's income from advertising went from zero in 2002 to over $2 billion in two years.[100] The company would not just survive but flourish beyond the founders' dreams.

The "paid search" ads that Google ran were successful because they assured advertisers that the environment surrounding the ad was appropriate—the content on the web page where Google sent it.[101] At the beginning, these ads were not directed to specific individuals. But as Google grew and acquired more behavioral data about its users, the "surplus" (more data than needed to serve its users) became a zero-sum asset that was diverted from improving service to targeting individual users.[102] This personalization of advertising has been described by Shoshanna

---

[92] DAVID VISE, THE GOOGLE STORY 99 (2005).
[93] *See* JOSEPH TUROW, THE DAILY YOU: HOW THE NEW ADVERTISING INDUSTRY IS DEFINING YOUR IDENTITY AND YOUR WORTH 66-67 (2011).
[94] *Id.* at 66.
[95] Douglas Edwards has said that these ads were displayed "directly in line with regular results" and were "a form of paid placement, the exact practice Google had railed against so vehemently when it profited others." EDWARDS, *supra* note 70, at 308. But the key distinction is that the ads were not influencing the content of the search results; the ads were simply placed next to the search results.
[96] TUROW, *supra* note 93, at 67.
[97] NOAM COHEN, THE KNOW-IT-ALLS: THE RISE OF SILICON VALLEY AS A POLITICAL POWERHOUSE AND SOCIAL WRECKING BALL 131 (2017).
[98] TUROW, *supra* note 93, at 65.
[99] *Id.*
[100] *Id.*
[101] *Id.* at 118.
[102] ZUBOFF, *supra* note 56, at 81. Jaron Lanier has described the change as an inevitable result of the advance of the internet, the devices and the algorithms. LANIER, *supra* note 8, at 97.

Zuboff, Professor Emerita at Harvard Business School, as "surveillance capitalism."[103]

This new form of capitalism is characterized by two phenomena, the "extraction imperative" and the "prediction imperative." Extraction refers to the gathering of a user's data.[104] Prediction refers to the use of that data to predict and manipulate the user's behavior.[105] Google was the first company to integrate an array of tools, such as cookies, proprietary analytics, and algorithmic software capabilities into a new system that centered on the unilateral expropriation of behavioral data.[106] In contrast to industrial capitalism, which requires "economies of scale in production in order to achieve high throughput combined with low unit cost . . . [,]" surveillance capitalism necessitates "economies of scale in the extraction of behavioral surplus."[107] Under surveillance capitalism, competitive pressures compel an ever-expanding need for raw material—personal data.[108] This explains Google's drive to expand its supply chain of data surplus to other activities than mere search through such free services as Gmail, Google Maps, Google Calendar, Google News, and Google Shipping. Actual extraction entails a dispossession cycle consisting of a carefully designed sequence of incursion, habituation, adaptation, and redirection.[109]The prediction imperative necessarily involves manipulation because "the way to predict behavior is to intervene at its source and shape it."[110] This new type of advertising was called "online behavioral

[103] The description of "surveillance capitalism" is taken from ZUBOFF, *supra* note 56. The term "surveillance capitalism" may be derived from the term "surveillance society." *See* Kirstie Ball and David Murakami Wood *infra*, note 237. Al Gore has gone even further and suggested that we now have a "stalker economy." Alisha Foster, *Al Gore at Southland: We Now Have a Stalker Economy*, USA TODAY (June 10, 2014), https://www.usatoday.com/story/tech/2014/06/10/al-gore-tech-southland-conference/10299753/. Other authors who have used the capitalism metaphor are NICK COULDRY & ULISES A. MEJIAS, THE COSTS OF CONNECTION: HOW DATA IS COLONIZING HUMAN LIFE AND APPROPRIATING IT FOR CAPITALISM 3 (2019).

[104] *See* ZUBOFF, *supra* note 56, at 87.

[105] *See* ZUBOFF, *supra* note 56, at 200-03.

[106] *Id.* at 87. Nicholas Carr has described this system as "vampiric." "Their [Google's and Facebook's] overriding goal is to know us, to transfer into their data bases our informational lifeblood. Their thirst is unquenchable. To survive, they must suck in ever more intimate details of our lives and desires." CARR, *supra* note 15, at 51.

[107] ZUBOFF, *supra* note 56, at 87.

[108] *See* ZUBOFF, *supra* note 56, at 81.

[109] *Id.* at 138-55.

[110] *Id.* at 202. Franklin Foer says that Facebook's "whole effort is to make human beings predictable—to anticipate their behavior, which makes them easier to manipulate." FOER, *supra* note 63, at 77.

advertising" because it altered people's behavior[111] and it was an advertiser's dream come true. The advertisers could not only persuade users to buy, they could manipulate them to purchase.

This surveillance capitalism model of online behavioral advertising deprives users of autonomy and is immoral. But users' loss of autonomy was not the only moral issue raised by this business model; it also compromised search integrity in three ways.

First, as Larry Page and Sergey Brin said in their 1998 talk, "a search engine could add a small factor to search results from 'friendly' companies, and subtract a factor from results from competitors. This type of bias is very difficult to detect but could still have a significant effect on the market."[112] "Difficult to detect" is an understatement. While there has been no indication that Google currently adjusts the search algorithm to favor a third party, it is impossible to show that Google does this or to prove that it does not. We will never know whether the integrity of the search is affected because, for competitive reasons and to prevent the "gaming" of search results, Google will never explain—if it even can—how its search algorithms work.[113] This is a moral hazard.

---

[111] TUROW, *supra* note 93, at 176. Others have used different words to describe this phenomenon. Professors Paul M. Schwartz and Donald J. Solove refer to it as "behavioral marketing." *See* Paul M. Schwartz & Daniel J. Solove *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814, 1854 (2011). Professor Robert H. Lustig refers to this advertising as "neuromarketing." *See* ROBERT H. LUSTIG, THE HACKING OF THE AMERICAN MIND: THE SCIENCE BEHIND THE CORPORATE TAKEOVER OF OUR BODIES AND BRAINS, 190 (2017). Siva Vaidhyanathan calls it "contextual advertising." *See* SIVA VAIDHYANATHAN, THE GOOGLIZATION OF EVERYTHING: (AND WHY WE SHOULD WORRY) 27 (2011). The Federal Trade Commission has defined the term "behavioral advertising" as "the tracking of a consumer's activities online – including the searches the consumer has conducted, the Web pages visited, and the content viewed – in order to deliver advertising targeted to the individual consumer's interests." FED. TRADE COMM'M, ONLINE BEHAVIORAL ADVERTISING MOVING THE DISCUSSION FORWARD TO POSSIBLE SELF–REGULATORY PRINCIPLES (2007), http://www.ftc.gov/sites/default/files/documents/public_statements/online-behavioral-advertising-moving- discussion-forward-possible-self-regulatory-principles/p859900stmt.pdf. Some have criticized the term "behavioral advertising" as a euphemism for "microtargeted manipulation." BENKLER, FARIS, & ROBERTS, *supra* note 13, at 269.

[112] Page & Brin, *supra* note 65.

[113] *See How Search Algorithms Work*, GOOGLE, https://www.google.com/search/howsearchworks/algorithms/ (last visited Oct. 20, 2020) (providing an explanation generally on how search algorithms work); *see also* Kirsten Grind, Sam Schechner, Robert McMillan & John West, *How Google Interferes With Its Search Algorithms*

Second, it is clear that this business model's demand for data has compromised the search results. A 2015 study at the Harvard Business School found that Google began to develop its content as it expanded its product offerings.[114] For example, Google reviews compete with TripAdvisor and Google shopping competes with Amazon. But Google continues to act as a search service as well. It has a clear conflict of interest in these situations. But Google has invented a feature called "universal search," by which it "intentionally excludes content competitors and only shows Google's content."[115] The founders seem to think that allowing a third-party advertiser to influence search results is wrong, but it is acceptable for the search company to do so. The problem is that in either case, the advertiser gains and the trusting user who believes in the integrity of the search engine loses. One would struggle to call Google's practice ethical. This is a betrayal of the founders' concern for search integrity.

Third, search engine integrity also is at stake in another aspect of surveillance capitalism—personalization (tailoring online content to what will interest the individual user).[116] In 2005, Google began to personalize searches because it boosted revenue from advertising.[117] But personalization compromises

---

and Changes Your Results; The internet giant uses blacklists, algorithm tweaks and an army of contractors to shape what you see, WALL ST. J. (Nov. 15, 2019), https://www.wsj.com/articles/how-google-interferes-with-its-search-algorithms-and-changes-your-results-11573823753.

[114] Michael Luca, Timothy Wu, Sebastian Couvidat, Daniel Frank, & William Seltzer, *Does Google Content Degrade Google Search? Experimental Evidence* 2 (Harv. Bus. Sch. Working Paper No. 16-035, 2015), http://nrs.harvard.edu/urn-3:HUL.InstRepos:23492375.

[115] *Id*.; *see also* PASQUALE, *supra* note 54, at 66-69, 160-65.

[116] Commentators have been critical of personalization. Nicholas Carr has written, "[p]ersonalization's evil twin is manipulation." CARR, *supra* note 15, at 258. University of Maryland Law Professor Frank Pasquale has said, "Personalization means vulnerability as well as power." PASQUALE, *supra* note 54, at 79.

Eli Pariser, chief executive of Upworthy, has written, "But there's always a bargain in personalization: In exchange for convenience, you hand over some privacy and control to the machine." ELI PARISER, THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU 213 (2011). University of Michigan Professor John Cheney-Lippold believes that "personalization" (the assumption that you as a user are distinctive enough to receive content based on you as a person with a history and with individual interests) generally "does not exist." Instead, he believes that we are communicated to through "profilization" that allows our data to be categorized. JOHN CHENEY-LIPPOLD, WE ARE DATA: ALGORITHMS AND THE MAKING OF OUR DIGITAL SELVES 87 (2017).

[117] Thomas W. Simpson, *Evaluating Google As an Epistemic Tool*, 43 METAPHILOSOPHY 426, 437 (2012). For more details on the gradual process of personalization, *see* Chris Jay Hoofnagle, *Beyond Google and Evil: How Policy Makers, Journalists and Consumers Should Talk Differently About Google and Privacy*, 14 FIRST MONDAY (2009), https://firstmonday.org/ojs/index.php/fm/article/view/2326/2156#32.

the integrity of the search results. There are a number of factors in assessing the functioning of a search engine, such as precision, recall, and objectivity.[118] Personalization does not affect any of these except objectivity, but objectivity is critical for the informational task that a search engine performs.[119] And personalization diminishes objectivity in a search engine by reinforcing confirmation bias.[120] This means that people are more likely to: (1) justify disbelieving evidence that contradicts their preexisting beliefs, (2) not subject evidence that supports their preexisting beliefs to the same level of scrutiny, (3) and take as confirmatory evidence that is consistent with their preexisting beliefs.[121] Personalization reduces the chances that the search engine will inform the user of contrary opinions, or "unknown unknowns."[122] But objectivity in search results is a public good required by a democratic society.[123] Democracy requires a degree of objectivity that allows the public a sufficient understanding of the issues. If the search engine reinforces confirmation bias, then it will reinforce political polarization. Through personalization, Google's advertising-based business model thus not only reduces the objectivity of Google's search engine, it also weakens democracy. As in the case of the contradiction between search and advertising mentioned in the 1998 paper,[124] we will never know how much personalization lessens objectivity in Google searches. Personalization of search is a moral challenge and a moral hazard.

Search engine integrity is not the only way in which Google has weakened democracy. It seems clear that its search algorithm could decide an election. In a 2015 article, Robert Epstein, Senior Research Psychologist at the American Institute for Behavioral Research and Technology, recounted "How Google Could Rig the 2016 Election: Google has the Ability to Drive Millions of Votes to a Candidate with No One the Wiser." His research suggested that "Google, Inc., has amassed far more power to control elections—indeed, to control a wide variety of opinions and beliefs—than any company in history has ever had. Google's search algorithm can easily shift the voting preferences of undecided voters by 20 percent

[118] Simpson, *supra* note 117, at 437.
[119] *Id.* at 431-33.
[120] *Id.* at 438.
[121] *Id.*
[122] *See id.* at 430 (additionally attributing the term "unknown unknowns" to the previous United States Secretary of Defense Donald Rumsfeld).
[123] *Id.* at 441.
[124] *See* Page & Brin, *supra* note 65.

or more...with virtually no one knowing they are being manipulated."[125] As one example, he noted that:

> According to Google Trends, at this writing [August, 2015] Donald Trump is currently trouncing all other candidates in search activity in 47 of 50 states. Could this activity push him higher in search rankings, and could higher rankings in turn bring him more support? Most definitely—depending, that is, on how Google employees choose to adjust numeric weightings in the search algorithm. Google acknowledges adjusting the algorithm 600 times a year, but the process is secret, so what effect Mr. Trump's success will have on how he shows up in Google searches is presumably out of his hands.[126]

Out of the public's hands, and the public will never know how much the search algorithm benefitted Donald Trump. It seems morally wrong to give an unknowable search algorithm and its masters such power.

Behavioral advertising transforms the moral issue from one of privacy to one of autonomy.[127] "Autonomy" refers to governing "oneself, to be directed by considerations, desires, conditions and characteristics that are not simply imposed externally upon one, but are part of what can somehow be considered one's authentic self."[128] Autonomy is distinguished from "freedom," which concerns the ability to act without external or internal constraints, because it concerns the independence and authenticity of the desires (values, emotions, etc.) that move one

---

[125] Robert Epstein, *How Google Could Rig the 2016 Election: Google has the Ability to Drive Millions of Votes to a Candidate with No One the Wiser*, POLITICO (Aug. 19, 2015), https://www.politico.com/magazine/story/2015/08/how-google-could-rig-the-2016-election-121548.

[126] *Id.*

[127] This is why Marc Rotenberg has said, "Congress should not be examining privacy policies...They should be examining business practices. They should be examining how these firms collect and use the personal data of customers, of internet users." Singer, *supra* note 52.

[128] John Christman, *Autonomy in Moral and Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL., https://plato.stanford.edu/. "Autonomy" here is used in the sense of "personal autonomy" and "basic autonomy" and to autonomy as a "global condition" rather than a "local notion" as discussed by Christman.

to act in the first place.[129] Autonomy seems to be an "irrefutable value"[130] and it requires significant constraints on the application of market principles.[131] Our common moral intuitions and the basic principles of Kantian philosophy tell us that a person should never act so as to treat another person merely as a means to an end, but treat the other as an end in himself or herself.[132] But the behavioral-advertising business model undermines the individual user's right to make decisions free from manipulation or exploitation.[133] Through addiction, surveillance, and manipulation it undermines the user's autonomy.[134] The behavioral-advertising business model of surveillance capital is morally wrong.

Google started as an academic enterprise that valued above all else the integrity of its search engine, despised advertising, and believed that advertisements would irremediably compromise search results.[135] But adopting the business model of surveillance capitalism made it what it had despised—an advertising company. Ultimately, the moral issue was not only about the integrity of search, but also the integrity of the users—the compromising of their autonomy. This morally deficient business model also weakened democracy. Unfortunately, this model was adopted and further developed for social media by Facebook.

V. THE HISTORY OF FACEBOOK

A. BEFORE ADVERTISING

Facebook has been a phenomenally successful innovation—no human enterprise, technology, utility, or service has ever spread so widely and so

---

[129] *Id.* Some might argue that plentiful choices offered online would strengthen autonomy, but the abundance of choices overwhelms users, distracts them from critically reviewing the options not given and imposes a duty to control one's personal information. As a result, "choice becomes an illusion of empowerment or a burden." HARTZOG, supra note 9, at 57.

[130] Christman, *supra* note 128.

[131] ANDERSON, *supra* note 19, at 142.

[132] Thomas E. Hill Jr., *Autonomy of Moral Agents*, ENCYCLOPEDIA OF ETHICS 112 (Lawrence C. Becker and Charlotte B. Becker eds., 2001).

[133] Matt Zwolinski & Alan Wertheimer, *Exploitation*, STAN. ENCYCLOPEDIA OF PHIL. (Dec. 20, 2001), https://plato.stanford.edu/entries/exploitation/. The unfairness underlying the exploitation here would seem to be not only procedural but also substantive.

[134] Sarah Buss & Andrea Westlund, *Personal Autonomy*, STAN. ENCYCLOPEDIA OF PHIL., https://plato.stanford.edu/. There does not appear to be a non-arbitrary level to distinguish the degree of, or the presence or absence of, autonomy. *See* Christman, *supra* note 128. But, Professors Sarah Buss and Andrea Westlund have found widespread agreement that addiction itself alone is a paradigm threat to autonomy.

[135] *See* Page & Brin, *supra* note 65.

quickly.[136] This is a tribute to Mark Zuckerberg's grandiosity.[137] From almost the beginning, his motto was "Dominate!" and soon became "to make the world more open and connected."[138] These slogans reflected Mark Zuckerberg's grandiosity and his reckless haste, two traits to which Steven Levy who has written the inside history of the company, attributes virtually all Facebook's recent problems.[139]

Mark Zuckerberg was known as a computer whiz at Harvard and, in his sophomore year, established his hacker's cred. In the fall of 2003, he created "Facemash," the predecessor to Facebook, using photos he had hacked from the digital versions of "facebooks" for each of Harvard's undergraduate "houses" (dormitories).[140] He did this, of course, without asking permission.[141] One writer has described the moral issue by hypothesizing how Mark Zuckerberg rationalized his conduct: in a sense, it was stealing because he didn't have the legal right to the photos and because the university certainly didn't put them there for someone to hack and download.[142] But then, if information was hackable, didn't a well-intentioned hacker have the right to hack it? Who had the rightful authority to decide that he wasn't allowed access to something he could access so easily? Wasn't he really doing them a favor, teaching them a lesson? Even though the administrators wouldn't see it that way, wasn't he really doing a good deed by showing them the flaws in their system?[143] Another writer has speculated on the relevance to Mark Zuckerberg of the moral issue in this hacking, "the fact that he was doing something slightly illicit gave Mark little pause . . . . It's not that he set out to break the rules; he just didn't pay much attention to them."[144] This ethically challenged hacker ethos valuing brilliant, but heedless, disruption survived and flourished at Facebook.[145]

---

[136] John Lancaster, *You Are the Product*, 39 LONDON REV. OF BOOKS 3-10 (Aug. 2017).
[137] Roger McNamee, an early investor and advisor to Mark Zuckerberg, said: "[w]hat I did not grasp was that Zuck's ambition had no limit." MCNAMEE, *supra* note 58, at 64.
[138] *Id.* at 241.
[139] STEVEN LEVY, FACEBOOK: THE INSIDE STORY 16 (2020).
[140] Alex Horton, *Channeling 'The Social Network' Lawmaker Grills Zuckerberg on His Notorious Beginnings*, WASH. POST (Apr. 11, 2018) https://www.washingtonpost.com/news/the-switch/wp/2018/04/11/channeling-the-social-network-lawmaker-grills-zuckerberg-on-his-notorious-beginnings/.
[141] *Id.*
[142] BEN MEZRICH, THE ACCIDENTAL BILLIONAIRES 45 (2009).
[143] *Id.* at 45-46.
[144] DAVID KIRKPATRICK, THE FACEBOOK EFFECT 24 (2010).
[145] GARCIA MARTINEZ, *supra* note 2, at 284 (statement of former Facebook employee, Antonio Garcia Martinez) ("[T]he spirit of subversive hackery guided everything. [I]f you could get [tasks] done and quickly, nobody cared much about . . . traditional legalistic morality. The hacker ethos prevailed above all.")

But the hacking was only the first of the moral issues. Facemash was a Harvard version of the website HotorNot.com and placed photos of two students next to each other, asking the user to choose the "hotter" person.[146] Students condemned it as "hurtful and demeaning" and the staff of The Crimson, the Harvard college newspaper, criticized it as "cater[ing] to the worst side of Harvard students."[147] Mark Zuckerberg was called before Harvard's Administrative Board for violations of the college's code of conduct in connection with security, copyright, and privacy issues.[148]

He closed down Facemash and expressed particular concern about privacy, telling The Crimson that "issues about violating people's privacy don't seem to be surmountable...I'm not willing to risk insulting anyone."[149] But a comment in a messaging exchange, when he was appearing before the Administrative Board for the Facemash fiasco, yields a different insight on his judgement and ethics:

> [redacted friend's name]: But what are the grounds for kicking you out of school?
>
> Zuckerberg: Unethical behavior.
>
> [redacted friend's name]: Wouldn't that be dependent on the court case?
>
> Zuckerberg: Haha man come on. You can be unethical and still be legal that's the way I live my life haha.[150]

But early the next year, Zuckerberg created "TheFacebook," another social media site that retained Facemash's emphasis on connecting people with "a dash of

---

[146] *See* hotornot.com; Horton, *supra* note 140; Katharine A. Kaplan, *Facemash Creator Survives Ad Board*, HARV. CRIMSON (Nov. 19, 2003), https://www.thecrimson.com/article/2003/11/19/facemash-creator-survives-ad-board-the/.

[147] The Crimson Staff, *None M*A*S*H Online 'facemash' site, while mildly amusing, catered to the worst side of Harvard students*, HARV. CRIMSON (Nov. 6, 2003), https://www.thecrimson.com/article/2003/11/6/mash-for-the-most-monastic-undergraduates/.

[148] Kaplan, *supra* note 146.

[149] *Id.*

[150] *See* Nicholas Carlson, *Happy Birthday Facebook: The Secret IMs Revealing the Mark Zuckerberg of 2004*, BUS. INSIDER (Feb. 4, 2014, 10:04 PM), https://www.businessinsider.com/mark-zuckerbergs-secret-ims-from-college-2014-2 (revealing confidential AOL Instant Messenger exchanges which were disclosed in the discovery process for the ConnectU litigation referred to in footnote 154 *infra*). Some may object to using Mark Zuckerberg's private messages to judge his character; others might find it cosmic justice.

vanity and more than a little voyeurism."[151] It resolved some of the moral issues with Facemash. One change came from a suggestion in The Crimson: instead of hacking the pictures from the houses' websites, the users of TheFacebook would provide the photos themselves, thus avoiding one privacy issue.[152] But in an email exchange at the time about TheFacebook, Mark Zuckerberg offered another perspective: that the users of the site were stupid dupes.[153]

The private comments by Mark Zuckerberg contrast with the public comments he made about users' privacy when he shut down Facemash. Perhaps the public comments were insincere. On the other hand, maybe his email comments to a friend were just a bit of sophomoric bravado. But they seemed to show contempt for the privacy of schoolmates who had trusted him.

The launching of TheFacebook created two other moral issues: (1) whether Mark had stolen the idea for TheFacebook; and (2) whether he had sabotaged a competing platform. In December, 2002, a year before Facemash, fellow Harvard students, the brothers Tyler and Cameron Winklevoss and Divya Narendra, began to develop a business plan for a new type of website that would allow students of a college to create a network specific to that institution and allow students to meet, exchange information, discuss employment prospects and serve as an online dating service.[154]

---

[151]Amelia E. Lester, *Show Your Best Face*, HARV. CRIMSON (Feb. 17, 2004), https://www.thecrimson.com/article/2004/2/17/show-your-best-face-lets-talk/; WU, *supra* note 37, at 295-96; MEZRICH, *supra* note 142, at 94 (suggesting that Facebook's success was linked to its usefulness for "hooking up and that the thing that drove the social network was the same thing that drove life at college—sex); *see also* Kevin Roose, *Juul's Convenient Smoke Screen*, N.Y. TIMES (Jan. 11, 2019), ("Facebook, an outgrowth of a Harvard student's juvenile attempt to quantify the attractiveness of his classmates, now claims to have been motivated by a virtuous impulse to connect the world") https://www.nytimes.com/2019/01/11/technology/juul-cigarettes-marketing.html.

[152] *See* Lester, *supra* note 151 (discussing the pictures that Harvard students were now able to upload to thefacebook.com).

[153] Carlson, *supra* note 150 (The exchange was as follows:
"Zuckerberg: Yeah so if you ever need info about anyone at Harvard
Zuckerberg: Just ask.
Zuckerberg: I have over 4,000 emails, pictures, addresses, ...
[Redacted friend's name]: What? How'd you manage that one?
Zuckerberg: People just submitted it.
Zuckerberg: I don't know why.
Zuckerberg: They 'trust me'
Zuckerberg: Dumb fucks.").

[154] Complaint at 3, ConnectU v. Mark Zuckerberg, Edwardo Saverin, Dustin Moskowitz, Andrew McCollum, Christopher Hughes and TheFacebook.com a/k/a The Facebook, 240 F.R.D. 34 (D. Mass. 2004) (No. 04-1923).

These three students had developed a prototype for the website (called "Harvard Connection") but needed additional help to finalize it.[155] In the fall of 2003, they asked Mark Zuckerberg for help. He worked on the project for a time, but without a written contract.[156] Even though the "Harvard Connection" website was close to being completed, before they were able to launch, Mark Zuckerberg launched his own new site, TheFacebook.[157]

The Winklevosses and Narendra were taken aback. As Tyler Winklevoss said, "[Mark Zuckerberg] said he was working for us; he led us on; he took unfair advantage of us . . . [h]e's just not a fully formed individual, from an ethical standpoint."[158] The Harvard Connection, the site created by the two brothers and Narendra, finally launched in late spring 2004,[159] but TheFacebook had already seized the initiative and dominated the field. The Harvard Connection (renamed ConnectU) never achieved the success it seemed to promise. After discussions with Mark Zuckerberg failed to settle the dispute, ConnectU sued him in September, 2004, alleging "breach of contract, misappropriation of trade secrets, breach of fiduciary duty, unjust enrichment, intentional interference with prospective business advantage, breach of duty of good faith and fair dealing and fraud arising out of [Mark Zuckerberg's]...unauthorized use of [ConnectU's] source code and confidential business plans, and usurpation of business opportunity."[160]

In fact, both sites were variations of existing websites: Friendster, MySpace, and Club Nexus. Mark Zuckerberg admitted that, "there aren't very many new ideas floating around... The facebook [*sic*] isn't even a very novel idea. It's taken from all these others."[161] Indeed, the original inspiration for Facebook seems to have come from Kris Tillery's "Exeter Facebook"—a digital version of the photo address book at the Phillips Exeter Academy that appeared while Zuckerberg was a student there, and which he was aware of. [162] But TheFacebook did have a novel feature;

---

[155] Ben Mezrich, *Everything You've Read About Harvard's The Winkleross Twins is Wrong,* BOS. MAG. (May 29, 2019), *https*://www.bostonmagazine.com/arts-entertainment/2019/05/29/winklevoss-twins/.
[156] *See id.*
[157] *See id.*
[158] John Cassidy, *ME MEDIA*, NEW YORKER (May 8, 2006), https://www.newyorker.com/magazine/2006/05/15/me-media.
[159] *Id*.
[160] Complaint, *supra* note 154 at 1.
[161] Timothy J. McGinn, *Online Facebooks Duel Over Tangled Web of Authorship*, HARV. CRIMSON (May 28, 2004), https://www.thecrimson.com/article/2004/5/28/online-facebooks-duel-over-tangled-web/.
[162] *See* LEVY, *supra* note 139, at 34-35

he described it as bringing social connection to a "different level"—it was bringing the connections down to a specific domain, that is, limiting it to the Harvard community.[163] But a website designer, Victor A. Gao, a fellow student who worked first on the Harvard Connection and then later until November 2003 on TheFacebook, said that that novel feature was pioneered by Narendra and was Narendra's idea.[164]

The Crimson Staff's conclusion was that neither ConnectU nor TheFacebook was very original, but Mark Zuckerberg had the know-how and put in the effort to make his site successful and nobody else could take credit for that.[165] But the propitious timing of TheFacebook's launch was not merely the result of good faith hard work. Confidential emails that were disclosed at the trial, and never denied by Mark Zuckerberg,[166] suggest that he deliberately delayed his work on the Harvard Connection until TheFacebook launched.[167]

The complex litigation was finally settled in 2008.[168] The Winklevosses and Narendra reportedly received $65 million in cash and stock in Facebook.[169] The settlement may reflect that Mark Zuckerberg was innocent, but wanted to get rid of a nuisance suit—the amounts, however, suggest that the claims against him had some merit.[170]

The "don't ask permission" attitude, the self-proclaimed "unethical" way of life, the contempt for users, and the sabotaging of a competitor suggest ethically questionable behavior in Facebook's origins. In Mark Zuckerberg's defense, one

---

[163] Alexis C. Madrigal, *Before It Conquered the World, Facebook Conquered Harvard*, ATLANTIC (Feb. 4, 2019), https://www.theatlantic.com/technology/archive/2019/02/and-then-there-was-thefacebookcom/582004/.
[164] McGinn, *supra* note 161.
[165] The Crimson Staff, *Facing Off Over The Facebook*, HARV. CRIMSON, (Sept. 15, 2004), https://www.thecrimson.com/article/2004/9/15/facing-off-over-the-facebook-theres/.
[166] KIRKPATRICK, *supr*a note 144, at 81.
[167] Carlson, *supra* note 150. (The exchange is as follows:
"Zuckerberg: So you know how I'm making that dating site [Harvard Connection]
Zuckerberg: I wonder how similar that is to the Facebook thing
Zuckerberg: Because they're probably going to be released about the same time
Zuckerberg: Unless I fuck the dating site people [Harvard Connection] over and quit on them just before I told them I'd have it done.
[Redacted friend's name]: haha.").
[168] Charles Arthur, *Facebook paid up to $65m to founder Mark Zuckerberg's ex-classmates,* GUARDIAN (Feb. 12, 2009), https://www.theguardian.com/technology/2009/feb/12/facebook-mark-zuckerberg-ex-classmates.
[169] *Id.*
[170] *Id*.

can observe that the prefrontal cortex, the seat of the executive function and judgment in the human brain, is not fully developed until the age of 25.[171] As a sophomore born in May, 1984, he was only 19 when he launched TheFacebook and his lapses might be excused as biologically conditioned youthful exuberance. But the question remains whether his moral lapses were a stage in his maturing or whether they represent a fixed character trait.[172] In either case, his adoption of the behavioral-advertising business model ensured that the company would be morally challenged.

B. AFTER ADVERTISING

1. Formation, 2004-2012: The Issue of Privacy

Facebook's relationship with advertising can be divided into two periods. The first period, from the origins to 2012, exemplified the extraction imperative of surveillance capitalism: a formative time in which Facebook accumulated gigantic amounts of data, but did not know how to exploit them effectively in advertising. During this period, the moral issue was privacy. The second period, from 2012 to the present, exhibited the predictive imperative: a period of consolidation of the advertising model. By this time, Facebook had learned how to use the mountains of personal data to craft personalized advertisements to users; it had adopted behavioral advertising. At this time the moral issue was not merely control of an individual's personal information (privacy), but control of the individual himself or herself (autonomy).

The origins of Facebook would suggest that Mark Zuckerberg was not greatly concerned about privacy and never thought of autonomy as an issue. As a hacker, he was undoubtedly influenced by Silicon Valley's disdain for advertising. In early 2004, his business partner and fellow student Eduardo Saverin began to push him to think of advertising, but it was a tough sell. Mark Zuckerberg wanted to keep Facebook as a fun site and not make any money off it.[173] Later, Washington Post CEO Caroline Little, after a meeting with him about investing in Facebook,

---

[171] LUSTIG, *supra* note 111, at 114; JOAQUIN M. FUSTER, THE PREFRONTAL CORTEX 17 (2008); ROBERT M. SAPOLSKY, BEHAVE: THE BIOLOGY OF HUMANS AT OUR BEST AND WORST 45 (2017); *see also* LANIER, *supra* note 42, at 179-83 (commenting on neoteny); ALAN JASANOFF, THE BIOLOGICAL MIND 165 (2018) (Alan Asanoff, Professor of Biological Engineering at MIT, warns that accounting for the immature behavior of teenagers mainly in terms of the immaturity of their brains can be risky).

[172] MCNAMEE, *supra* note 58, at 141 ("From his time at Harvard, Mark Zuckerberg showed a persistent indifference to authority, rules, and the users of his products").

[173] MEZRICH, *supra* note 142, at 111.

opined that "Mark was kind of against ads, as far as we could tell . . . ."[174] A sales rep who worked for Facebook's first advertising firm said, "Mark never wanted ads."[175] Zuckerberg himself remarked "I don't hate all advertising. I just hate advertising that stinks."[176] The most perspicacious observer of Facebook, the writer David Kirkpatrick, has written that Zuckerberg was "ambivalent," "blasé," and had "contempt for advertising."[177] When Eduardo arranged for them to visit potential advertisers in New York, Mark slept through about half of the meetings.[178]

Mark Zuckerberg was forced to adopt a utilitarian view of advertising. He accepted it only in order to cover the costs of operation, not to make a profit.[179] The first advertisements, starting in April 2004, were for moving services, T-shirts, and other products attractive to college students.[180] They were few, cute, and harmless,[181] were all the standard-size banner ads and did not include any annoying pop-up ads.[182] For a time, he even placed small captions above the display ads reading "[w]e don't like these either but they pay the bills."[183] Like Larry Page and Sergey Brin, he was uninterested in advertising that interrupted the user's experience or distracted the user's attention; he wanted advertising that would be useful for the user.[184] In 2006, Facebook's Chief Operating Officer, Owen Van Natta, whose primary task was generating revenue, remarked that "[w]e almost shouldn't be making money off of [advertising], if it isn't adding value [to the user's experience]."[185] Facebook maintained a profound corporate ambivalence towards advertising.

But in 2008, Mark Zuckerberg hired Sheryl Sandberg from Google to improve Facebook's advertising strategy.[186] Google's strategy was to help people find what they had already decided to buy; Facebook's would be to help them decide what it was they wanted to buy. Google's advertising was "fulfill demand,"

---

[174] KIRKPATRICK, *supra* note 144, at 109.
[175] *Id*. at 43.
[176] *Id*. at 175.
[177] Id. at 159, 255, 235, 172.
[178] Mezrich, *supra* note 142, at 144.
[179] KIRKPATRICK, *supra* note 144, at 258.
[180] *Id*. at 37-38.
[181] WU, *supra* note 37, at 297; LANIER, *supra* note 8, at 98.
[182] KIRKPATRICK, *supra* note 144, at 43, 140.
[183] *Id*. at 43.
[184] *Id*. at 175, 176; WU, *supra* note 37, at 297.
[185] KIRKPATRICK, *supra* note 144, at 175.
[186] Brad Stone & Miguel Helft, *Facebook Hires Google Executive as No. 2*, N.Y. TIMES (Mar. 4, 2008), https://www.nytimes.com/2008/03/04/technology/04cnd-facebook.html.

while Facebook's would be "generate demand."[187] Sheryl Sandberg remarked that, "There has been this myth that everyone's waiting for our [Facebook's] revenue model. But we have the revenue model. The revenue model is advertising. This is the business we're in, and it's working."[188] Essentially, she introduced to Facebook the Google behavioral-advertising business model.[189] Facebook became an advertising firm, gathering enormous amounts of information about what all users of its site do and then selling the ability to reach them anonymously with advertising based on the profiles that the Facebook users had created for themselves.[190] By 2010, Facebook was the best social media site for mining data and finding customers.[191]

Sheryl Sandberg's introduction of behavioral advertising did not initially change Mark Zuckerberg's utilitarian view, nor did it overcome his complaints about advertising. The complaints were twofold. First, that advertising was disruptive; it interfered with the user's experience when accessing the site.[192] Second, that advertising was offensive; it was too commercial.[193] His insistence on preventing advertising from interfering with the user's experience on the site suggests that his opposition was primarily due to the disruptive effect.

But neither he, nor Sheryl Sandberg, nor her import of surveillance capitalism addressed the morality of the advertising-based online business model. The bartering of one's personal information in exchange for use of Facebook's platform is a Faustian bargain: free service for your data.[194] In the early days of Silicon Valley, the advertising-based business model was considered one of the

---

[187] KIRKPATRICK, *supra* note 144, at 200; *see also* SCOTT GALLOWAY, THE FOUR: THE HIDDEN DNA OF AMAZON, APPLE, FACEBOOK, AND GOOGLE 191 (2018) (explaining that another difference is that "Facebook is tracking more specific identities than Google, a huge advantage when selling the ability to reach a specific audience").

[188] KIRKPATRICK, *supra* note 144, at 273.

[189] ZUBOFF, *supra* note 56, at 92.

[190] TUROW, *supra* note 93, at 145.

[191] *Id.* at 143.

[192] KIRKPATRICK, *supra* note 144, at 259.

[193] *Id.*

[194] *See* GARCIA MARTINEZ, *supra* note 2 (arguing that Facebook does not, as some critics have charged, "sell" users' personal data to advertisers); *see also* Michal Kosinski, *Facebook's 'Data Sleight of Hand,'* N.Y. TIMES (Dec. 13, 2018), https://www.nytimes.com/2018/12/12/opinion/facebook-data-privacy-advertising.html (explaining that Mark Zuckerburg has argued the same, but that this argument is without merit); In re Google Inc., 806 F.3d 125, 153 (3d Cir. 2015) (noting that under the California Consumer Legal Remedies Act, the exchange of personal information for services is a non-tangible form of payment and does not constitute a "sale.")

worst "devils" that needed to be destroyed.[195] A leading internet legal scholar, Professor Tim Wu of Columbia Law School, has referred to the attention merchants (including Facebook and Google) as "those Faustian geniuses who thought they had beaten the Devil."[196] Other commentators have noted Facebook's "devil's bargain of advertising" and referred to its contract with users as a relationship with "a Faustian element."[197]

The "free" use of the platform is a key aspect of this Faustian bargain. "Free" is, of course, a misnomer. "Free" is not an accurate economic explanation, but a deceptive con game or a "bait and switch" ploy.[198] Experience tells us that everyone loves to get "something for nothing."[199] And framing transactions as "free" makes it very difficult for users to evaluate the fairness of information practices given that they often carry a hidden charge.[200] Psychologists tell us that people do not act rationally when they are told something is "free."[201] They overestimate the value of free and lose their normal sense of cost vs. benefit.[202] As a result, people end up trading their personal data for less than they should.[203] One perceptive historian, Yuval Noah Harari, has analogized the situation in the following damning terms: "[a]t present people are happy to give away their most valuable asset—their personal data—in exchange for free email services and funny cat videos. It's a bit like the African and Native American tribes who unwittingly sold entire countries to European imperialists in exchange for colorful beads and cheap trinkets."[204]

---

[195] LANIER, *supra* note 42, at 82.
[196] WU, *supra* note 37, at 325.
[197] FOER, *supra* note 63, at 210-11; Sarah Sands, *How to reconcile our fractured relationship with Big Tech*, FIN. TIMES (Jan. 3, 2019), https://www.ft.com/content/1b61c16a-0503-11e9-bf0f-53b8511afd73.
[198] Walter Kirn, *Easy Chair: The Silicon Mystique*, HARPER'S MAG.. (Dec. 2018), https://harpers.org/archive/2018/12/the-silicon-mirage/ (implying that Facebook's advertising is "bait and switch.") The bait is wanting to connect with others and the switch is becoming a supple data-puppet of advertisers. *See also* page 135-136 *infra*.
[199] ANDREW KEEN, THE INTERNET IS NOT THE ANSWER 128 (2015) (noting that the New York Times media columnist David Carr has even referred to the advertising-based business model as creating a "Something for Nothing" economy).
[200] Chris Jay Hoofnagle & Jan Whittington, *Free: Accounting for the Costs of the Internet's Most Popular Price*, 61 UCLA L. REV. 606, 608, 610, 670 (2014).
[201] BRUCE SCHNEIER, DATA AND GOLIATH 50-51 (2015).
[202] *Id*.
[203] *Id*.
[204] YUVAL NOAH HARARI, 21 LESSONS FOR THE 21ST CENTURY 79 (2018); *see also* ZUBOFF, *supra* note 56, at 193 ("Like the Tainos [indigenous people of the Caribbean], we faced something altogether new to our story: the unprecedented."); *see generally* COULDRY & MEJIAS, *supra* note 103 (explaining the colonizing concept).

2. Consolidation, 2012-present: The Issue of Autonomy

As noted above, advertising on radio and television is different from that on the internet. Although all three media use advertising, radio and television employ inefficient across-the-board, hit-or-miss ads. The innovation that made Facebook advertising phenomenally successful was its targeting.[205] While advertising represents itself as uncovering what consumers already desire, rather than informing them what they should want,[206] in fact, the goal of any advertising is to get people to buy—to create demand. Thus, targeted advertising is more effective because it is more manipulative.[207] But despite Sheryl Sandberg's focus on advertising until 2012, when Facebook made its initial public offering, its ads were not smart. Antonio Garcia Martinez, a product manager at Facebook, describing Facebook's poor monetization of ads, said that Facebook's monetization of ads was laughable compared to Google's, although the usage was ungodly.[208]

But in 2012, in preparation for its initial public offering and to show investors its market value, Facebook created an intelligent targeted advertising powerhouse.[209] The key was its "microtargeting," ads that were targeted or "personalized" to the type of individual user.[210] Facebook adeptly used the huge trove of personal data provided by a user to target ads to that specific type of user. It enjoyed three advantages in developing targeted ads: it had more users than anyone else (over one billion); it knew more about its users than anyone else; and it had unique access to the users through their friends.[211]

And the larger the amount of personal information that a service has, the greater the power to manipulate. Given the mountains of data Facebook had, its power to manipulate was very significant. In fact, one cogent critic of current digital practices, computer philosopher and Microsoft employee Jaron Lanier, has suggested that "advertising" is a misnomer; the proper name is "behavior modification" because Facebook users are bombarded with continuously adjusted stimuli without interruption as long as they are on the site and the options open to them are directly micromanaged moment to moment.[212] Technology mediated cues developed by B.J. Fogg, the inventor of "captology" (Computers As Persuasive

---

[205] *See* Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1400 (2000) (describing how and why targeted advertising works).
[206] ANDERSON, *supra* note 19, at 219.
[207] Cohen, *supra* note 205, at 1407.
[208] GARCIA MARTINEZ, *supra* note 2, at 275.
[209] MOORE, *supra* note 11, at 120.
[210] *See id.*
[211] *Id.*
[212] LANIER, *supra* note 8, at 6; LANIER, *supra* note 43, at 173-74.

Technology),[213] seem to be more effective than the physical cues used by the pioneer of behavioral modification B. F. Skinner.[214] As with Google, this behavioral modification was an advertiser's dream come true—not just enticing to buy, but causing a purchase. It was the nightmare foretold by advertising's critics in the twentieth century. These new behavioral advertisers were truly able to reduce the users' autonomy.

Behavior modification depletes autonomy through three processes: addiction, surveillance, and manipulation. Addiction and surveillance facilitate manipulation.

a. Addiction

As early as summer 2004, Mark Zuckerberg and his colleagues, observing how students used TheFacebook, described it as "the trance."[215] As Sean Parker, Facebook's first President, said, "[using TheFacebook] was hypnotic. You'd just keep clicking and clicking and clicking from profile to profile, viewing the data."[216] Roger McNamee, an early investor in Facebook and Google, has noted that Facebook "consciously addict[s]" its users in order to make their products and advertising more valuable.[217] One chronicler of Facebook's history has characterized the website as "addictive" from the very beginning.[218] Antonio Garcia Martinez, a Facebook product manager, has written, "[u]p there with heroin,

---

[213] *See generally* B. J. Foggs, Stanford Persuasive Technology Lab, STAN. UNIV., http://captology.stanford.edu/about/about-bj-fogg.html (discussing the various resources that the lab developed for the ethical creation of persuasive technologies); *see also* DOUGLAS RUSHKOFF, THROWING ROCKS AT THE GOOGLE BUS: HOW GROWTH BECAME THE ENEMY OF PROSPERITY 91 (2016).

[214] WADHWA & SALKEVER, *supra* note 5, at 43; CLIFF KUANG WITH ROBERT FABRICANT, USER FRIENDLY: HOW THE HIDDEN RULES OF DESIGN ARE CHANGING THE WAY WE LIVE, WORK, AND PLAY 255 (2019) (noting that Cliff Kuang, a product designer, has called Facebook a "Skinner box").

[215] KIRKPATRICK, *supra* note 144, at 93.

[216] *Id.*

[217] WADHWA & SALKEVER, *supra* note 5, at vi.

[218] MEZRICH, *supra* note 142, at 111; *see also* KUANG WITH FABRICANT, *supra* note 214, at 257 (explaining that addiction is the result of a drawn-out process—"user-friendliness wrought a world in which making things easier to use morphed into making them usable without a second thought. That ease eventually morphed into making products more irresistible, even outright addicting").

carbohydrates, or a weekly paycheck: that is how addictive and rewarding Facebook was."[219]

Until recently, few psychologists had concluded that social media sites, including Facebook, were "addictive," because addiction is generally associated with substances, not behavior.[220] Adam Alter, Associate Professor at NYU's Stern School of Business, notes that substance addiction and behavioral addiction activate the same brain areas and arise from the same aspects of human nature: the need for social engagement and social support, mental stimulation, and a sense of effectiveness.[221] He defines "addiction" as "something you enjoy doing in the short term that undermines your well-being in the long term—but that you do compulsively anyway."[222] In 2013, the fifth edition of the American Psychiatric Association's DSM (Diagnostic and Statistical Manual of Mental Disorders) added the official diagnosis "behavioral addiction" to the list.[223] David Greenfield, a clinical psychologist and founder of the Center for Internet and Technology Addiction, asserts that Zuckerberg knew from the beginning that the site was "addictive" and was designed to have social validation loops and intermittent reinforcement to push people to use it over and over again.[224]

The product designer Nir Eyal, the author of "Hooked: How to Build Habit-Forming Products," has laid out the "hook model" to addiction in four sequential steps used by internet service providers: trigger (the spark plug, such as a Web site link); action (behavior in anticipation of a reward); variable reward (unpredictable feedback loops create intrigue); and investment (the input of time, data, effort social capital or money by the user into the service).[225] One example of this design would

---

[219] GARCIA MARTINEZ, *supra* note 2, at 275; Scott Galloway, *Silicon Valley's Tax-Avoiding, Job-Killing, Soul-Sucking Machine*, ESQUIRE (Feb. 8, 2018), https://www.esquire.com/news-politics/a15895746/bust-big-tech-silicon-valley/ ("Anyone who doesn't believe these products [of Google, Facebook, Amazon, and Apple] are the delivery systems for tobacco-like addiction has never attempted to separate a seven-year-old from and iPad . . . ").

[220] *See* ADAM ALTER, IRRESISTIBLE: THE RISE OF ADDICTIVE TECHNOLOGY AND THE BUSINESS OF KEEPING US HOOKED (2017).

[221] *Id.* at 8-9, 71 .

[222] Claudia Dreifus, *Why We Can't Look Away From Screens*, N.Y. TIMES (Mar. 6, 2017), https://www.nytimes.com/2017/03/06/science/technology-addiction-irresistible-by-adam-alter.html.

[223] ALTER, *supra* note 220, at 80.

[224] Tim Bradshaw & Hannah Kuchler, *Smartphone addiction: big tech's balancing act on responsibility over revenue,* FIN. TIMES (July 23, 2018), https://www.ft.com/content/24eeaed6-8a7f-11e8-b18d-0181731a0340.

[225] NIR EYAL, HOOKED: HOW TO BUILD HABIT-FORMING PRODUCTS (2014). *But see*, Nellie Bowles, *Addicted to Screens? That's Really a You Problem*, N.Y. TIMES (Oct. 6,

be the "like" button on Facebook which changed tracking friends' lives from a passive activity to a deeply interactive one with the type of unpredictable feedback that contributes to addiction.[226] It has even been proposed that Facebook might have its own version of addiction—"Facebook Addiction Disorder."[227]

The British neuroscientist Susan Greenfield has stated that Facebook "likes" are "designed from the ground up to be addictive."[228] She described the neurochemistry of the process as follows:

> (1) fast-paced screen interaction is exciting and arousing; (2) as a consequence of this arousal, dopamine is released; (3) dopamine underlies systems for reward and addiction, and also inhibits the prefrontal cortex [the site of the brain's executive function]; (4) an underactive prefrontal cortex characterizes the brain-states of schizophrenics, the obese, compulsive gamblers and children, there the here-and-now trumps any consequences; (5) the screen will have more appeal as it offers strong sensory stimulation.[229]

The result on Facebook is addiction "to short-term, dopamine-driven feedback loops."[230] This is perfectly suited to Facebook's business model, which is online behavioral advertising. Advertising is driven by engagement, and the best way to engage is to keep delivering small dopamine hits.

Robert H. Lustig, Professor of Pediatrics at U. of C. San Francisco, has noted that markets, even if unpredictable and volatile, usually work, but he adds,

---

2019), https://www.nytimes.com/2019/10/06/technology/phone-screen-addiction-tech-nir-eyal.html (explaining that Nir Eyal's views have changed and his most recent book is on how to free ourselves from tech addiction).

[226] ALTER *supra* note 220, at 128; TAPLIN, *supra* note 7, at 150 (suggesting that Mark Zuckerberg's greatest insight was the "like" button because it meant that users would create all the content for free).

[227] SUSAN GREENFIELD, MIND CHANGE 297 n.35 (2015); Natasha Singer, *The Baroness Fighting to Protect Children Online*, N.Y. TIMES (Aug. 27, 2019), https://www.nytimes.com/2019/08/27/technology/baroness-kidron-children-tech.html (noting that in July, 2019, Senator Josh Hawley, a Missouri Republican, introduced a "social media addiction bill").

[228] Bradshaw & Kuchler, *supra* note 224.

[229] SUSAN GREENFIELD, YOU AND ME: THE NEUROSCIENCE OF IDENTITY 130 (2016).

[230] Farhad Manjoo, *How Does Facebook Feel About Making You Feel Bad?* N.Y. TIMES, Dec. 16, 2017, at B2 (quoting Chamath Palihapitiya, a former Facebook executive).

"[e]xcept when it comes to addictive substances."[231] If Facebook and Google are addictive, then it would be inappropriate to allow operation on market principles without restriction.

Google and Facebook's services operate through dopamine-feedback loops and on market principles and are addictive--"the twenty-first century version of Marx's 'opiate of the people.'" [232] And addiction is a "paradigm threat to personal autonomy."[233]

b. Surveillance

Obtaining the data necessary for the behavioral-advertising business model requires surveillance, or watching and tracking.[234] Mammals dislike surveillance, which is considered a threat because it indicates they are prey to predators.[235] But surveillance is widespread because people like freedom, enjoy convenience, and do not perceive the surveillance.[236] Great Britain's Information Commission Office's 2006 report described Western democracies as "surveillance societies"[237]; cyber security expert Bruce Schneier has called surveillance the "business model of the Internet"[238]; and Shoshanna Zuboff, as noted above, has described the current

---

[231] LUSTIG, *supra* note 111, at 199. University of Maryland Law Professor Julie Cohen has observed "[w]e accept without question that new drugs should be evaluated for their effects on human health; so too new technologies should be evaluated for their effects on human flourishing." JULIE E. COHEN, CONFIGURING THE NETWORKED SELF 266 (2012).

[232] GEOFFREY WEST, SCALE: THE UNIVERSAL LAWS OF LIFE, GROWTH, AND DEATH IN ORGANISMS, CITIES, AND COMPANIES 332 (2017).

[233] *See* Buss & Westlund, *supra* note 134. Rana Foroohar suggests another effect of addiction: "[w]e're all too addicted to our gadgets and apps and Facebook to address the problems of technology." FOROOHAR, *supra* note 91, at 28. Maya MacGuineas, President of the Committee for a Responsible Federal Budget, has described another serious consequence of addiction: "[t]his reliance [on technologies]—addiction is a better word for it—is undermining the basic tenets of the American economic model." Maya MacGuineas, *Capitalism's Addiction Problem*, ATLANTIC (April 2020) https://www.theatlantic.com/magazine/archive/2020/04/capitalisms-addiction-problem/606769/.

[234] SCHNEIER, *supra* note 201, at 126-27.

[235] *Id.*

[236] *Id.* at 49, 127; *see also* Stuart A. Thompson & Charlie Warzel, Opinion, *12 Million Phones, One Dataset, Zero Privacy*, N.Y. TIMES (Jan. 26, 2020), https://www.nytimes.com/interactive/2019/12/19/opinion/location-tracking-cell-phone.html ("The greatest trick technology companies ever played was persuading society to surveil itself").

[237] *See* KIERON O'HARA & NIGEL SHADBOLT, THE SPY IN THE COFFEE MACHINE ch. 1 (2014); *see* A REPORT ON THE SURVEILLANCE SOCIETY: SUMMARY REPORT (Kirstie Ball & David Murakami Wood, eds.) (2006).

[238] SCHNEIER, *supra* note 201, at 49.

American economy as an example of "surveillance capitalism."[239] And Facebook is at the center of this economy, having the most pervasive surveillance system in the world[240] and being the biggest surveillance-based enterprise in the history of mankind.[241] According to WikiLeaks founder, Julian Assange, Facebook is also "the greatest spying machine the world has ever seen."[242] Facebook's surveillance involves not only the collection of Facebook users' information disclosed on Facebook but also information from other sources, including those from people who are not even on Facebook. It enables surveillance not only by commercial and political entities but also by Facebook users and government.[243] As the Edward Snowden revelations of 2013 showed, American intelligence services had access to the data acquired by Facebook and Google, demonstrating that state and commercial surveillance is inextricably linked.[244]

Information is power, and more information is more power.[245] Some information grants some control, and extensive information grants extensive control. As a source of information, surveillance facilitates control.[246] Facebook possesses unparalleled databases on users and has unparalleled power and control over them. One critic has observed that the chief danger from Facebook's surveillance system is in its concentration of power in Facebook.[247] Given the extensive reach of the federal criminal law, it seems likely that Facebook possesses information on many individuals sufficient to support an indictment, if not conviction, based on some obscure provision of the law.[248] As noted above, the government seems to have access to Facebook's data, making every Facebook user potentially subject to a careful review of their data for potential evidence of criminal offenses. Some may confidently assert that this has never happened, but there is no assurance that we would ever know if it has happened or that it will not happen in

---

[239] ZUBOFF, *supra* note 56.
[240] *See* VAIDHYANATHAN, *supra* note 34, at 35.
[241] Lancaster, *supra* note 136, at 3-10.
[242] KEEN, *supra* note 199, at 165.
[243] PASQUALE, *supra* note 54, at 51. "And once someone else has collected...information, little stops the government from buying it, demanding it, or even hacking into it." *Id.*
[244] JULIA ANGWIN, DRAGNET NATION 60 (2014); VAIDHYANATHAN, *supra* note 34, at 61-62.
[245] ANGWIN, *supra* note 244, at 19. Professor Pasquale believes that the core harm of surveillance is "that it freezes into place an inefficient (or worse) politico-economic regime by cowing its critics into silence." PASQUALE, *supra* note 54, at 52.
[246] SCHNEIER, *supra* note 201, at 113.
[247] VAIDHYANATHAN, *supra* note 34, at 59.
[248] *See also* Max Read, *Trump is President. Encrypt Your Email*, N.Y. TIMES (Apr. 2, 2017) https://www.nytimes.com/2017/03/31/opinion/sunday/trump-is-president-now-encrypt-your-email.html?auth=login-google; STUART RUSSELL, HUMAN COMPATIBLE 104 (2019) (noting that "automated, personalized blackmail" as the result of surveillance and algorithms).

the future. In sum, pervasive surveillance generates information that enables the manipulation of the users of Google's and Facebook's services.

c. Manipulation

Addiction and surveillance allow manipulation—treating another person not as a fellow rational agent who can be reasoned with, but as a device to be operated. Manipulation violates another person's autonomy.[249]

Manipulation by Facebook refers specifically to utilizing the cognitive biases of users to influence their perceptions and their behavior.[250] Addiction and surveillance entail manipulation particularly when something is new and poorly understood. The overwhelming majority of internet users have no formal training in it and lack a knowledge of how Facebook and other firms are manipulating them.[251] As University of Chicago Law Professor, Eric Posner, has said of the advertising-based business model, "[a]ll this is so new that ordinary people haven't figured out how manipulated they are by these companies."[252] Roger McNamee has warned, "Facebook exploits its users' fear and anger to such a degree that many are vulnerable to manipulation by those who exploit its algorithms and architecture to . . . harm the powerless."[253] When Facebook introduced its video tab, Watch, in August, 2017, the chief executive of the agency 360i said, "[o]ne of the things that Facebook has done here . . . is that they let the ad model lead the consumer behavior versus the other way around."[254] One tech investor surmised that the thought

---

[249] Robert Noggle, *The Ethics of Manipulation*, 3.3 *Manipulation and Autonomy*, and 3.4 *Manipulation and Treating Persons as Things*, STAN. ENCLYCOLPEDIA OF PHIL., https://plato.stanford.edu/. Philosopher Anne Barnhill has revised Noggle's definition of manipulation as follows: "Manipulation is directly influencing someone's beliefs, desires, or emotions such that she falls short of ideals for belief, desire, or emotion in ways typically not in her self-interest or likely not in her self-interest in the present context." Anne Barnhill, *What Is Manipulation?*, MANIPULATION: THEORY AND PRACTICE 72 (Christian Coons & Michael Weber eds., 2014).

[250] *See* Hanson & Kysar, *supra* note 17, at 637. The New Yorker writer Jia Tolentino has written that Facebook "captured our attention and our behavioral data; it used this attention and data to manipulate our behavior..." JIA TOLENTINO, TRICK MIRROR: REFLECTIONS ON SELF DELUSION 173 (2019).

[251] Eduardo Porter, *Getting Tech Titans to Pay for Your Data*, N.Y. TIMES, Mar. 7, 2018, at B1. Joseph Turow has said that "[b]eyond knowing they are being tracked, [people] have little understanding of how companies are allowed to handle their data." TUROW, *supra* note 93, at 184.

[252] *Id.*

[253] Roger McNamee, *Tighten the pressure on Big Tech to abandon its dark side*, FIN. TIMES, Feb. 14, 2018, at 9.

[254] Sapna Maheshwari, *Facebook Seen Steering Toward Video*, N.Y. TIMES, Jan. 22, 2018, at B1.

process of the Silicon Valley founders could be characterized as "[w]e have to understand people better in order to manipulate them better."[255]

This manipulation is enabled by the data collected through addiction and surveillance. This data, even in its initial form is not "raw," but reflects certain assumptions.[256] It is formatted through algorithms which contain further assumptions.[257] These formats of information then open and foreclose opportunities for the users.[258] Formatting is political work—the exercise of power. The resulting information allows control, not in the sense of a direct, perceived suppression of the user's autonomous will, but through framing the user's world through the direct and constant micromanagement of the options in front of the person. And this framing takes place beyond the user's gaze and without the user's comprehension; the user remains largely unaware of it. Stuart Russell, Professor of Engineering at the University of California, Berkeley, noted that Facebook's content-selection algorithms are designed to maximize the probability that the user clicks on presented items, but the end result is not simply to present items that the user likes to click on; it is to change the user's preferences so that they become more predictable.[259] He says, "Once surveillance capabilities are in place, the next step is to modify your behavior to suit those who are deploying this technology."[260]

Professor Russell, in treating content selection algorithms on Facebook, has described in the abstract what is different in this process from traditional advertising:

> First, because AI systems can track an individual's online reading habits, preferences, and likely state of knowledge, they can tailor specific messages to maximize impact on that individual while minimizing the risk that the information will be disbelieved. Second, the AI system knows whether the individual reads the message, how long they spend reading it, and whether they follow additional links within the message. It then uses these signals as immediate feedback on the success or failure of its attempt to influence

---

[255] John Thornhill, Opinion, *Silicon Valley is slowly learning how to speak human*, FIN. TIMES (May 14, 2018), https://www.ft.com/content/c5e59d7e-5747-11e8-bdb7-f6677d2e1ce8.
[256] *See* CHENEY-LIPPOLD, *supra* note 116, at vii., 155, 179-80.
[257] *See id.* at 55.
[258] *See id*. at 54.
[259] RUSSELL, *supra* note 248, at 104.
[260] *Id*.

> each individual; in this way, it quickly learns to become more effective in its work.[261]

Dutch Professors Mireille Hildebrandt and Bert-Jaap Koops give a specific example of manipulation:

> For example, if I am contemplating becoming vegetarian, profiling software may infer this from my online behaviour. It may for instance infer that there is an 83 per cent chance that I will stop eating meat within the coming month and sell this information to a retailer or industry that has an interest in me remaining a carnivore. Whoever bought this information may send me free samples of the type of meat I am inferred to prefer and may for instance place 'advertorials' on websites that I visit containing scientific evidence of the specific benefits of the consumption of beef. The profiling software may have calculated that such measure will reduce the chance that I stop eating by 23 per cent, thus making such investment worthwhile. Meanwhile I am unaware of all this activity.[262]

This manipulation is the inevitable result of the behavioral-advertising business model and the combination of addiction, surveillance, and manipulation is essential to this model.

d. Loss of Autonomy

Philosophers have questioned the nature of autonomy. Clearly, no one can conduct herself free from the influence that does not derive directly from her own authority. As Philosophy Professors Sarah Buss and Andrea Westlund have observed, "[e]verything we do is a response to past and present circumstances over which we have no control."[263] The critical question for philosophers then is: what distinguishes autonomy-undermining influences on a person's decision, intention,

---

[261] *Id*. at 105.

[262] Mireille Hildebrandt & Bert-Jaap Koops, *The Challenges of Ambient Law and Legal Protection in the Profiling Era*, 73 MOD. L. REV. 428, 435 (2010). And this unawareness is the reason that it is difficult to provide evidence of harm in the manipulation. It is also the answer to those who doubt the harm because there are no "dead bodies." Hannah Kuchler has made a similar point that people will not take the threat of hacking seriously enough when the evidence of the crimes is hidden. Hannah Kuchler, Opinion, *What we need to know about hackers*, FIN. TIMES, FT Weekend, Oct. 20/21, 2018, at 19.

[263] Buss & Westlund, *supra* note 134.

or will from those motivating forces that merely play a role in the self-governing process? Philosophers have been unable to reach a consensus on the answer to this question which is also the question of the precise nature of the threats to personal autonomy.[264]

One way of responding to this question in the current digital context of Facebook and Google, is the concept of the "autonomy trap" as conceived by Director of the Berkeley Center for Law and Technology, Professor Paul M. Schwartz. The "autonomy trap" refers to the fact that self-determination in the digital age is not self-determined, that is, self-determination itself is shaped by the processing of personal data.[265] The most concrete description of the implications of the "autonomy trap" has been given by Vice Dean of the University of Haifa, Law Faculty, Tal Zarsky. He describes the vicious cycle of the autonomy trap as follows:

> (a) Individuals inform the information providers which types of knowledge and information they are interested in and provide (both implicitly and explicitly) personal information such as their traits and interests;
>
> (b) The content providers supply individuals with specific information 'tailored' to the needs of every person, according to each provider's specific strategy, and chosen on the basis of the personal information previously collected;
>
> (c) The individuals require additional information. This time, however, the request is affected by the information previously provided;
>
> (d) Again, the information providers supply information, in accordance with their policies and discretion;
>
> And so on.[266]

---

[264] *Id*.
[265] Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1607, 1661 (1999).
[266] Tal T. Zarsky, *'Mine Your Own Business!': Making the Case for the Implications of the Data Mining of Personal Information in the Forum of Public Opinion*, 5 Yale J. OF LAW & TECH. 1, 38 (2002-2003).

The central feature of the "autonomy trap" is manipulation. Professors Buss and Westlund are correct that we respond to circumstances over which we have no control. We take the natural environment as given and would not consider it as limiting our autonomy. The key question is how the circumstances arise. Are they the result of the objective conditions of the general environment or are they directed at someone by someone else? This distinction is important for autonomy. We can see this when we consider slavery. Why is it that we find slavery is so morally egregious? "It is not just because the slave is not able to govern himself, it is because he is governed by someone else. The master has imposed his will on the slave in a way that the slave would not endorse."[267] When circumstances are intentionally arranged to influence the individual in a way that is beneficial to the influencer and detrimental to the individual, this is manipulation that depletes autonomy. The key is that the conditions are not natural or random, they are intentional.[268]

As we come to spend more and more time online, our online behavior not only influences our off-line behavior, it constitutes all our behavior.[269] As more and more of our commercial and personal relationships are migrating online, our choices for storing and exchanging information and for entertaining, informing, and expressing ourselves do so as well.[270] We are adopting a "digital form of life" and becoming "digital human beings."[271] Nicholas Carr has observed that the essence of computer systems is not emancipation, but control and the acts of control become harder to detect and those wielding control more difficult to discern.[272] More and more our online experiences are shaped to fit the commercial interests of Google

[267] J. S. Blumenthal-Barby, *A Framework for Assessing the Moral Status of Manipulation*, in MANIPULATION: THEORY AND PRACTICE 126 (Christian Coons & Michael Weber, eds. 2014).
[268] *See* Robert Noggle, *Manipulative Actions: A Conceptual and Moral Analysis*, 33 AM. PHIL. Q. 43, 50 (Jan. 1996) "The advantage of defining manipulative action relative to the intention of the actor is that doing so allows us to distinguish between manipulative and non-manipulative influences in a way that matches our intuitions and practices". *Id.* This is true even if one accepts that humans do not have free will and that sociality trumps individuality. *See* HEIDI RAVVEN, THE SELF BEYOND ITSELF 410 (2013).
[269] "More and more, we straddle the digital divide within us and increasingly fuse and confuse e-personality and personality, virtual life with life . . . ." ABOUJAOUDE, *supra* note 62, at 279.
[270] NICHOLAS CARR, THE BIG SWITCH: REWIRING THE WORLD, FROM EDISON TO GOOGLE 124 (2008).
[271] MICHAEL P. LYNCH, THE INTERNET OF US: KNOWING MORE AND UNDERSTANDING LESS IN THE AGE OF BIG DATA 10 (2016).
[272] CARR, *supra* note 270, at 191, 199.

and Facebook and we pay for the convenience with an erosion of our autonomy.[273] This is what the "autonomy trap" entails.

But as noted above, this manipulation is an affront to a person as a rational and moral being. It is a failure to respect the person's rational moral agency that is critical to personhood. It is to treat the person as something less than a person and is therefore wrong.[274]

C. THE BEHAVIORAL-ADVERTISING BUSINESS MODEL AND ITS IMPLICATIONS

1. The Economics of the Behavioral-Advertising Business Model

The immorality of the behavioral-advertising business model is the result in large part of its economics.[275] Economic incentives define critical aspects of the model. Surprisingly, online advertisements are not worth very much. One estimate in 2015 suggested that the average Facebook user spends a total of 20 hours on the platform per month and Facebook earns in profit only about 20 cents a month per user. [276] These paltry sums drive the business model and have three consequences: (1) only a platform with hundreds of millions of users can make substantial profits; (2) the platform must keep the users engaged so they can be advertised to; and (3) the platform must gather personal data from the users in order to target the advertisements and manipulate the users. But this business model conflicts with the desires of the users. Approximately two thirds of Americans do not want advertisements that target them based on tracking and analysis of personal data.[277] The users simply want to connect with other people, but the platforms must manipulate them to survive and make a profit. Many people believe that their Facebook feed shows everything that their friends post, but that is not so. The

---

[273] *Id.* at 241. *See also* WADHWA & SALKEVER, *supra* note 5, at xiii ("...increasingly the choices we make are subtly (and not so subtly) manipulated by the makers of our technology in ways intended to promote the makers' profit over our individual and collective well-being"). As Douglass Rushkoff, Professor of Media Studies at Queens College, has noted, "Whoever controls the menu controls the choices." DOUGLASS RUSHKOFF, TEAM HUMAN 64 (2019).

[274] *See* Noggle, *supra* note 268, at 52.

[275] Zeynep Tufekci, *What 'Free' Really Costs*, N.Y. TIMES, June 4, 2015, at A25. The profit figure is from Ethan Zuckerman, who helped found Tripod.com, an early ad-financed site with user-generated content.

[276] *Id.*

[277] Russell Heimlich, *Internet Users Don't Like Targeted Ads,* PEW RESEARCH CENTER (Mar. 13, 2012), https://www.pewresearch.org/fact-tank/2012/03/13/internet-users-dont-like-targeted-ads/.

algorithm decides what the user sees and it seeks, above all, to increase engagement and advertising revenue.[278]

The economic imperatives of the business model have led to immoral behavior in various forms as described below. One particularly egregious form is the exploitation of children—it not only adults who are subject to surveillance, data collection, and manipulation. U.K. Baroness Kidron, a member of the House of Lords, visiting Silicon Valley to listen to companies' objections to proposed rules to protect children online, said of her discussions: "[t]he main thing they are asking me is: [a]re you really expecting companies to give up profits by restricting the data they collect on children?'" she said, referring to various online services she had met with this year. 'Of course I am! Of course, everyone should.'"[279]

2. The Morality of the Behavioral-Advertising Business Model

Despite the general reluctance to surface moral issues inside[280] and outside Facebook, several commentators have questioned the morality of Facebook's business model. Chris Hughes, a roommate of Zuckerberg and former spokesman for Facebook, has said, "I hate selling ads. . . . It makes me feel seedy."[281] Professor Zittrain has suggested that aspects of the behavioral-advertising business model are incompatible with ethically serving users, as polluted streams are incompatible with ethically mining coal.[282] Reporter Eduardo Porter of the New York Times has noted that "the raw business models of the colossi of the data economy are creepy in and of themselves."[283] After disclosures that the company's priority on growth led to

---

[278] *See* Matthew Lynley, *This is How an Ad Gets Placed in Your Facebook Newsfeed*, BUZZFEED NEWS (Sept. 11, 2014), https://www.buzzfeednews.com/article/mattlynley/this-is-how-an-ad-gets-placed-in-your-facebook-news-feed.

[279] Singer, *supra* note 227, at B6; Kashmir Hill & Aaron Krolik, *Photos of Your Kids Are Powering Surveillance A.I.*, N.Y. TIMES, Oct. 13, 2019, at BU 1; *see* Editorial, *Defend Privacy Protections for Children*, N.Y. TIMES, Oct. 11, 2019, at A26 (noting the efforts by the technology industry to weaken protections for children); *see also* Jack Nicas, *Sex Trafficking via Facebook Sets Off a Lawyer's Novel Legal Crusade*, N.Y. TIMES, Dec. 4, 2019, at B1.

[280] Roger McNamee has said, "[i]f there was [at Facebook] any soul searching about the morality of intense surveillance and the manipulation of user attention, or about protecting users against unintended consequences, I have been able to find no evidence of it." MCNAMEE, *supra* note 58, at 77-78.

[281] FOER, *supra* note 63, at 136.

[282] Jonathan Zittrain, *Facebook Can Still Fix This Mess*, N.Y. TIMES, Apr. 8, 2018, at SR3. New Yorker reporter Andrew Marantz has suggested that Facebook's failure to censor hate speech is "immoral." *See* Andrew Marantz, *Free Speech Is Killing Us*, N.Y. TIMES, Oct. 6, 2019, at SR6.

[283] Eduardo Porter, *Before Fixing Our Data-Driven Ecosystem, A Crucial Question: How Much Is It Worth?* N.Y. TIMES, Apr. 18, 2018, at B1.

ignoring signs of disrupting elections, Rishad Tobaccowala, chief growth officer for the Publicis Groupe, one of the world's biggest ad companies said, "[n]ow we know Facebook will do whatever it takes to make money. They have absolutely no morals."[284] But perhaps most damning were the comments by Tim Cook, CEO of Apple, in a speech to the Electronic Privacy Information Center in Washington, D. C., in which he said "I'm speaking to you from Silicon Valley, where some of the most prominent and successful companies have built their businesses by lulling customers into complacency about their personal information. They're gobbling up everything they can learn about you and trying to monetize it. We think that's wrong."[285]

In late 2018, editorials in two of the world's most respected newspapers, The New York Times and The Financial Times, severely criticized Facebook's business model. On November 17, 2018, in an editorial titled "Facebook Cannot Be Trusted," The New York Times said, "Facebook's business model, which . . . capitalizes on personal information to influence the behavior of its users and then sells that influence to advertisers for a profit . . . is an ecosystem ripe for manipulation." [286] On December 2, in an editorial titled "Facebook must recognize it is more than a platform," The Financial Times said, "[a]nother company might at this point question whether its business model is ethically sound. Facebook instead remains largely in a state of denial . . . . Broad changes to its business model are required . . . . It is untenable for the doyen of social media to continue placing profits above privacy, and above democracy."[287]

3. Disregard for Moral Issues

Addiction, surveillance, and manipulation occur only after a person joins Facebook. It raises the question of why people ignore the moral issues and join Facebook in the first place. Perhaps the best explanation, but an abstract one, comes from the neuroscientist Professor Mathew D. Lieberman who said, "[c]reating ways to keep us connected is . . . the *central problem of mammalian evolution*."[288] People use Facebook because it has found a new way of keeping people connected. More specifically, three aspects make the service attractive: (1) it is free; (2) "network effects" (the value of a network grows as more people use it); and (3) "lock-in"

---

[284] Sapna Maheshwari, *'No Morals': Advertisers Voice Criticism of Tech Giant,* N.Y. TIMES (Nov. 15, 2018), https://www.nytimes.com/2018/11/15/business/media/facebook-advertisers.html.
[285] WU, *supra* note 37, at 335.
[286]Editorial, *Facebook Cannot Be Trusted*, N.Y. TIMES, Nov. 17, 2018, at A26.
[287] Editorial Board, Opinion, *Facebook Must Recognize It Is More Than a Platform*, FIN. TIMES (Dec. 2, 2018), https://www.ft.com/content/fe99f4ea-f31d-11e8-ae55-df4bf40f9d0d.
[288] MATTHEW D. LIEBERMAN, SOCIAL: WHY OUR BRAINS ARE WIRED TO CONNECT 99 (2013).

(difficulty of abandoning the network). These three factors seem to be more important than individual choice. If all your friends are on Facebook, how can you not join? Perhaps it's also affected by what Professor Aboujaoude calls "reverse parenting"—parents emulating their children in the virtual world rather than the other way around.[289] Roger McNamee has suggested a consumer rationale: "[a]s consumers, we crave convenience. We crave connection. We crave free."[290] But perhaps the enduring motive is not quite so crass. A study at the University of Connecticut found that although users generally signed up for Facebook to communicate with friends and relatives, fairly quickly they use it to fight boredom.[291]

The user often doesn't know the ramifications of using the site and doesn't understand the underlying economic goal of social networking—monetizing personal information.[292] The monetization of the user's information, the key to the devil's bargain of Facebook use, is by stealth; it is completely "frictionless"—immediate, effortless, silent, invisible, unnoticed, and automatic.[293] An empirical explanation comes from the scholar who has done the most relevant research on the topic, Professor Joseph Turow of the Annenberg School for Communication at the University of Pennsylvania. He has concluded that those who join Facebook are not participating in a rational exchange, they are giving up their personal information out of a lack of legal literacy, out of futility, and out of resignation.[294] As Professor Turkle has observed, "[a]s long as Facebook and Google are seen as necessities, if they demand information, young people know they will supply it. They don't know what else to do."[295]

One might ask why is Facebook so popular an employer in the tech industry if the business model is defective. Glassdoor, a site allowing employees to anonymously rank their employers, gave Facebook the No. 1 place in 2017.[296] Good salaries (starting at about $140,000 per year), generous benefits (Philz Coffee

---

[289] ABOUJAOUDE, *supra* note 62, at 145.
[290] MCNAMEE, *supra* note 58, at 202. Nicholas Carr has suggested that "consumerism long ago replaced libertarianism as the prevailing ideology of the online world." CARR, *supra* note 270, at 204.
[291] TAPLIN, *supra* note 7, at 151.
[292] LORI ANDREWS, I KNOW WHO YOU ARE AND I SAW WHAT YOU DID 4, 13, 130 (2011).
[293] *Id*. at 4.
[294] Sapna Maheshwari, *Giving Up Data Privacy with a Sigh*, N.Y. TIMES, Dec. 25, 2018, at B1; *Cf.* TUROW, *supra* note 93, at 190.
[295] SHERRY TURKLE, ALONE TOGETHER: WHY WE EXPECT MORE FROM TECHNOLOGY AND LESS FROM EACH OTHER 255 (2011).
[296] Brian X. Chen, *Facebook's in the News. And No. It's Not Good.*, N.Y. TIMES, Dec. 10, 2018, at B7.

on campus), and the allure of a famous company may explain the attraction.[297] As Olivia Brown, head of Stanford's Computer Science and Social Good Club said, "everyone cares about ethics in tech before they get a contract."[298] Recently, morale has suffered as employees have begun to question the company's business model. In April 2018, Westin Lohne, a product designer at Facebook who left said, "[m]orally, it was extremely difficult to continue working there."[299] At a gathering of young engineers at Berkeley in November 2018, many said they would avoid taking jobs at Facebook.[300] One engineering student invited to a Facebook recruiting event said, "I've heard a lot of employees there don't even use it . . . I just don't believe in the product because like, Facebook, the baseline of everything they do is desire to show people more ads."[301] Some students who were taking jobs there are doing so more quietly and advising friends they have carved out more ethical work at the company or would work from within to change it.[302] The Financial Times lauded Facebook's employees saying, "some tech company employees have highlighted how these companies' noble goals can clash with the daily reality of tricking people into clicking on advertisements . . . Bold tech employees are speaking out and holding their bosses to account for their fine words. They should be applauded for doing so."[303] In 2018, Facebook's ranking in the Glassdoor survey noted above declined from No. 1 to No. 7.[304]

More employees perceiving the moral deficiencies in the business model presents a threat to the companies. Maciej Ceglowski, the founder of the social bookmarking service Pinboard, has said that "[t]ech workers are the only point of leverage on these big companies."[305] Jaron Lanier has noted that "[t]he one thing

---

[297] *Id.*

[298] Nellie Bowles, *A Social Media Giant is Knocked Back on its Heels*, N.Y. TIMES, Nov. 16, 2018, at B4.

[299] Kevin Roose, Cecilia Kang, & Sheera Frenkel, *Facing Hot Seat, Zuckerberg Practices Sitting in One*, N.Y. TIMES, Apr. 8, 2018, at A14.

[300] Bowles, *supra* note 298, at B4.

[301] *Id.*; *see also* LEVY, *supra* note 139, at 472 (reporting that about 30 percent of students at a top AI school won't consider Facebook for employment due to moral concerns).

[302] *See* Bowles, *supra* note 298, at B4.

[303] Editorial, *Tech workers can help to police their employers*, FIN. TIMES, Nov. 2, 2018, at 8; *see also* Emma Goldberg, *The Campus 'Techlash,'* N.Y. TIMES, Jan. 12, 2020, at ST1; Sheera Frenkel, Mike Isaac & Cecilia Kang, *Facebook Employees Stage Virtual Walkout*, N.Y. TIMES, June 2, 2020, at B1. *But See* MCNAMEE, *supra* note 58, at 239 (stating that it is "incredibly disappointing" that Facebook employees have been reluctant to come forward as whistle-blowers).

[304] Chen, *supra* note 296.

[305] Kevin Roose, *Workers In Tech, Use the Force*, N.Y. TIMES, Apr. 26, 2018, at B1.

that will kill [the internet giants] totally is if the good engineers start leaving. Then the companies will die."[306]

When people talk about their Facebook use (at least to me), they do not explicitly talk about ethics or morality, but they express reservations. Respondents to my questions about Facebook use generally say something like, "[w]e are not on social media or Facebook," "I am on Facebook, but I have not posted anything in months," "I was on Facebook for a while, but I quit some time ago." Perhaps the most revealing statement was "I told my daughter 'Don't use it [Facebook]. It is not kosher.'" In the summer of 2018, a New York Times tech reporter, Daisuke Wakabayashi, found that "[f]or the first time, I noted people were making excuses as to why they were even on Facebook anymore as though it was an embarrassing vice."[307] In 2018, after the Cambridge Analytica revelations, Elon Musk, the CEO of Tesla, deleted his companies' Facebook pages,[308] and reporter Walt Mossberg of the Wall Street Journal, one of the most prominent tech columnists, deactivated his Facebook account saying, "I am doing this—after being on Facebook for nearly 12 years—because my own values and the policies and actions of Facebook have diverged to the point where I'm no longer comfortable here." [309] Another dissatisfied user summed up her experience on Facebook saying "[Facebook] took me right back to high school."[310]

Why don't more quit?[311] Because it keeps you from falling out of touch with people you don't see very often. Many do not quit because their friendships, their jobs, their spare time, their very sense of self is closely associated with Facebook. If they gave up Facebook, they would be severing part of their life or exiling themselves from society. [312] For others the reason is probably FOMO—the fear of missing out. [313] One of the most humiliating questions in the English language is,

---

[306] John Thornhill, *The Enemy of the Future is the Complacent Person*, FIN. TIMES, July 7/8, 2018, at 3.

[307] Daisuke Wakabayashi, *The Word Around the Barbeque: Facebook Fatigue*, N.Y. TIMES, July 9, 2018, at B4; *see also* Kirn, *supra* note 198, at 6 ("Most people I know have deleted a social media account recently").

[308]Nellie Bowles, *Musk, Escalating Feud, Backs #DeleteFacebook by Pulling Companies*, N.Y. TIMES, Mar. 24, 2018, at B2.

[309] Daniel Victor, *Journalist with a Focus on Tech Quits Facebook*, N.Y. TIMES, Dec. 19, 2018, at A23; *see also* Tiffany Hsu, *Desertions in Wake of Missteps by Facebook*, N.Y. TIMES, Mar. 22, 2018, at B1.

[310] TURKLE, *supra* note 295, at 182. Jaron Lanier has made an impassioned plea for quitting Facebook in JARON LANIER, *supra* note 8.

[311] Wade Roush, *Turning Off the Emotion Pump*, SCI. AM. 28 (May 2019).

[312] Nicholas Carr, *Is Facebook the problem with Facebook, or is it us?* WASH. POST (June 29, 2018), http://www.nicholascarr.com/?page_id=25.

[313] Cliff Kuang has opined that "Facebook *is* FOMO." KUANG, *supra* note 214, at 293.

"Oh! You mean, you haven't heard?" Some do not quit because of the group support they find on the platform.[314] One morally conflicted Facebook user, the mother of a special-needs child, suggested gathering members of a support group on Facebook and jumping ship together because "not that we need Facebook. We just need one another."[315] It appears that few people quit for moral reasons. A moral philosopher, S. Matthew Liao, Professor at NYU, whose focus was not the moral nature of the business model, asked "Do You Have a Moral Duty to Leave Facebook?" He decided that the answer for him was to await new information to see whether Facebook has crossed a moral red line.[316] Billions will continue to use Facebook regardless of a study of Facebook usage by researchers at NYU and Stanford that found that deactivating Facebook had a "positive . . . effect" on mood and life satisfaction.[317]

Some have asserted that they are not very concerned about the behavioral-advertising business model because they feel that their privacy and autonomy have not been affected; they do not feel manipulated.[318] There is no perfect answer to such assertions. But one might ask that individual: (1) "Have you ever looked at the data that Google and Facebook have collected on you?"[319] (2) The manipulation

---

[314] *See e.g.*, Sarah Zhang, *Facebook Groups As Therapy*, ATLANTIC (Oct. 26, 2018), https://www.theatlantic.com/technology/archive/2018/10/facebook-emotional-support-groups/572941/.

[315] Kathleen O'Brien, Opinion, *I Can't Jump Ship from Facebook Yet*, N.Y. TIMES, Apr. 15, 2018, at SR5.

[316] S. Matthew Liao, Opinion, *Do You Have a Moral Duty to Leave Facebook?* N.Y. TIMES, Nov. 25, 2018, at SR3.

[317] Benedict Carey, *Unplugging Facebook: The Results*, N.Y. TIMES, Feb. 1, 2019, at B7. The Financial Times has said that "[t]here is a case for thinking that if everyone were to leave Facebook, we might be individually inconvenienced, but collectively better off." Editorial, *Four simple questions Facebook should answer,* FIN. TIMES, Mar. 20, 2018, at 8.

[318] Perhaps the reason people do not feel manipulated is the same one journalist David A. Vise has given for privacy: "Most people don't worry about privacy issues until [they see that] their own privacy is violated." VISE, *supra* note 92, at 158.

[319] Farhad Manjoo has explained his experience of having his digital experience tracked: "What did we find? The big story is as you'd expect: that everything you do online is logged in obscene detail...And yet, even expecting this, I was bowled over by the scale and detail of the tracking..." Farhad Manjoo, *I Visited 47 Websites. Hundreds of Trackers Followed Me.*, N.Y. TIMES (Aug. 25, 2019), https://www.nytimes.com/interactive/2019/08/23/opinion/data-internet-privacy-tracking.html; *see also* Stuart A. Thompson & Charlie Warzel, *Twelve Million Phones, One Dataset, Zero Privacy*, N.Y. TIMES: ONE NATION, TRACKED (Dec. 19, 2019), https://www.nytimes.com/interactive/2019/12/19/opinion/location-tracking-cell-phone.html ("If you could see the full trove, you might never use your phone the same way again"). One veteran Silicon Valley investor who looked at the data discovered that Google had dramatically more information than Facebook. *See* Gillian Tett, *Facebook or Google—Which Should Worry Us More?* FIN. TIMES (May 2, 2018), https://www.ft.com/content/7dc8eae4-4d99-11e8-97e4-13afc22d86d4.

is inherent in the system, so the burden of proof should reverse.[320] "Can you show that you haven't been manipulated?" (3) "You think your autonomy hasn't been compromised? Just wait..." But by then it will be too late.[321]

4. Exploitation of Human Weakness

Some might say that the moral question of this behavioral-advertising business model is the user's lack of self-control. Columbia University Sociology Professor Duncan Watts asserted that Facebook's popularity was due to voyeurism and exhibitionism and had nothing to do with networking.[322] One could argue that individuals should exercise self-discipline and exhibit moral courage and resist peer pressure to join Facebook even when all their friends are on it. But as Professor H. Lustig of the University of California, San Francisco, has said, "addiction and depression are not choices that people make willingly. Our environment has been engineered to make sure our choices are anything but free."[323] More and more, we don't simply condemn opioid addiction as a lack of self-control. We should not do so for addiction caused by behavioral advertising.

But the larger question is whether as a society we want to allow the intrusion of market values and the profit incentive to allow such manipulation of other human beings in their personal relationships, their commercial activities, and their civic duties. MIT Professor, Sherry Turkle, has observed, "technology is seductive when what is offers meets our human vulnerabilities. And as it turns out, we are very vulnerable indeed." [324] Psychologists have described in detail many human vulnerabilities, such as the availability heuristic, the affect heuristic, WYSIATI, confirmation bias, the priming effect, the anchoring effect, hindsight bias, loss aversion, the endowment effect, the planning fallacy,[325] inattentional blindness,[326]

---

[320] This suggestion was inspired by Cathy O'Neill's comment that "The human victims of WMDs [Weapons of Math Destruction]...are held to a far higher standard of evidence than the algorithms themselves." CATHY O'NEILL, WEAPONS OF MATH DESTRUCTION 10 (2017).

[321] For Facebook, the fundamental ethical issue for privacy is "[w]ill the personal information be abused eventually?" From experience, "[t]he answer seems doomed to be yes."ANGWIN, *supra* note 244, at 171; *see also* JOEL BRENNER, GLASS HOUSES: PRIVACY, SECRECY, AND CYBER INSECURITY IN A TRANSPARENT WORLD 209 (2013) (describing electronic information as similar to water—it leaks. And, of course, Google and Facebook will have the users' personal information without time limitation).

[322] Cassidy, *supra* note 158.

[323] LUSTIG, *supra* note 111, at 147.

[324] TURKLE, *supra* note 295, at 1.

[325] WYSIATI stands for "what you see is all there is." *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 8, 12, 85, 81, 52, 119, 282, 293, 250 (2013).

[326] CHRISTOPHER CHABRIS & DANIEL SIMONS, THE INVISIBLE GORILLA: HOW OUR INTUITIONS DECEIVE US 6-7 (2009).

"ego depletion"[327] and many other heuristic biases arising from our proclivity to "think fast" rather than "think slow."[328] Many of these would apply to users of Google and Facebook. Privacy is especially sensitive to heuristic biases.[329] Tristan Harris, a former design ethicist at Google and co-director of Time Well Spent, has noted that the user's willpower is engaged in an unequal battle; it is competing with 1,000 people on the other side of the screen whose job it is to break down the self-regulation that a user has.[330] He describes ways they have devised to keep users on the site, such as controlling the menu to control the choices; stoking the fear of missing something important; using social approval and social reciprocity; instant interruptions; inconvenient choices; and auto play (Facebook deliberately auto plays the next video after a countdown).[331] Professor Turkle sums up the discussion with the conclusion of a precocious sixteen-year-old girl: "[t]echnology is bad because people are not as strong as its pull."[332]

5. Users as Lab Animals

The depletion of autonomy through addiction, surveillance, and manipulation and the perversion of personhood are incompatible with human dignity. An entity that tracks and collects the private information of its constituents or users has deprived them of their inherent dignity as autonomous individuals and treated them as objects to be understood and controlled.[333] Several critics have analogized Facebook users to lab animals: "[i]nternet designers are not treating us like humans, they're treating us like lab rats…"; "[w]e have become data-producing farm animals . . . We are the cows. Facebook clicks on us . . . "; "[w]e're being hypnotized little by little by technicians we can't see, for purposes we don't know. We are all lab animals now . . . "; and "[the behavioral-advertising business model] has turned most of the human race into part-time lab rats."[334] Specific acts of

---

[327] DAN ARIELY, THE (HONEST) TRUTH ABOUT DISHONESTY 100-16 (2012).
[328] *See* KAHNEMAN, *supra* note 325.
[329] MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 177 (2013).
[330] Natasha Singer, *Can't Put Down Your Device? That's by Design*, N.Y. TIMES (Dec. 6, 2015), https://www.nytimes.com/2015/12/06/technology/personaltech/cant-put-down-your-device-thats-by-design.html.
[331] Tristan Harris, *How Technology is Hijacking Your Mind — from a Magician and Google Design Ethicist*, MEDIUM (May 18, 2016), https://medium.com/thrive-global/how-technology-hijacks-peoples-minds-from-a-magician-and-google-s-design-ethicist-56d62ef5edf3.
[332] TURKLE, *supra* note 295, at 227.
[333] LYNCH, *supra* note 271, at 107.
[334] FOER *supra* note 63, at 214; VAIDYANATHAN, *supra* note 34, at 203; LANIER, *supra* note 8, at 5 and 94*; see also* RACHEL BOTSMAN, WHO CAN YOU TRUST? HOW TECHNOLOGY BROUGHT US TOGETHER AND WHY IT MIGHT DRIVE US APART 102 –03 (2017) (suggesting the statistical

manipulation have been reported in which Facebook without the knowledge or consent of its users has turned them into psychological study subjects and freely and secretly experimented on them.[335] Roger McNamee, commenting on remarks by Sheryl Sandberg, has noted that, "[i]f Sheryl's comments are any indication, running experiments on users without prior consent is a standard practice at Facebook."[336]

6. Unhappiness

Facebook also seems to sabotage users' inalienable right to the pursuit of happiness—it generates more unhappiness than happiness. Professor Lustig has asserted that "[w]e are our biochemistry, whether we like it or not. And our biochemistry can be manipulated."[337] He has written that "reward is not contentment, and pleasure is not happiness; reward is dopamine and contentment is serotonin; chronic excess reward interferes with contentment."[338] A two-week time-analysis study suggests that the more people use Facebook, the less subjective well-being they experience.[339] This can explain why many users initially feel excited by their Facebook use, but after a while experience unhappiness. In 2013, psychologists at the University of Michigan and Leuven studied two components of subjective well-being: how young people feel moment-to-moment and how satisfied they are with their lives.[340] The results showed that Facebook use predicted negative shifts on both components over time.[341] The psychologists concluded that, "[o]n the surface, Facebook provides an invaluable resource for fulfilling the basic human need for social connection. Rather than enhancing well-being, however,

---

likelihood that a Facebook user has been a guinea pig in one of Facebook's experiments is at 100 percent).

[335] *See* Robinson Meyer, Everything We Know about Facebook's Secret, Mood Manipulation Experiment, ATLANTIC (June 2014), https://www.theatlantic.com/technology/archive/2014/06/everything-we-know-about-facebooks-secret-mood-manipulation-experiment/373648/; *see also* SILVERMAN, *supra* note 3, at 203.

[336] McNamee refers to the 2014 Facebook study "Experimental Evidence of Massive-Scale Emotional Contagion Through Social Networks." MCNAMEE, *supra* note 51, at 88–89.

[337] LUSTIG, *supra* note 85, at 121.

[338] *Id.* at 221-2.

[339] *Id.* at 233.

[340] Ethan Kross et al., *Facebook Use Predicts Declines in Subjective Well-Being in Young Adults*, PLOS/ONE (Aug. 14, 2013), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0069841.

[341] *Id.*

these findings suggest that Facebook may undermine it."[342] Deactivating Facebook can have a positive effect on a user's mood and life satisfaction.

7. Critical Silence

It seems clear that the business model of Facebook is morally flawed. But the primary guardians of morality in America, the churches, have not condemned it. Perhaps they were led astray by a service that was free and convenient. Maybe they see the greater convenience of the Facebook platform over a Church webpage for connecting with members as sufficient justification for any moral qualms. Or perhaps it is because the pastors are following, not leading, their flocks. The churches are faced with a fait accompli—many of their members—particularly younger members—use Facebook, so in an environment of declining church membership, [343] they may have adopted a utilitarian stance that does not risk losing touch with their current and future members. Protestant churches and the Catholic church have websites and are on Facebook, but the Pope apparently is not, although he is reportedly on Twitter.[344] Granted, the churches have protested some uses of Facebook,[345] but their Facebook pages and their suggestions that parishioners can contact them through these pages lend the moral support of the churches to the business model. This absence of criticism and active support of the business model would seem to diminish the moral authority of the churches.[346] Perhaps they do not recognize the ethical issues in the advertising-based business model. Even if they decide they must participate, they could at least notify members that the church's participation is not an endorsement of the business model. It seems odd that Tim Cook can criticize the Facebook business model, but church leaders do not.

---

[342] *Id.*; *see also* Manjoo, *supra* note 230; Jean M. Twenge, *World Happiness Report 2019: Chapter 5: The Sad State of Happiness in the United States and the Role of Digital Media*, WORLD HAPPINESS REPORT (March 20, 2019), https://worldhappiness.report/ed/2019/ (relating the use of digital media, including social media, to a rise in unhappiness among Americans since 2012). Former Surgeon General Vivek Murthy told CBS News in 2017 that "for too many people technology has led to substituting online connections for offline in-person connections, and ultimately I think it has been harmful." *See* WADHWA & SALKEVER, *supra* note 5, at 118.

[343] *See e.g.*, Jeffrey M. Jones, *U.S. Church Membership Down Sharply in Past Two Decades*, GALLUP (Apr. 18, 2019), https://news.gallup.com/poll/248837/church-membership-down-sharply-past-two-decades.aspx.

[344] Lina Sharkey, *The reason why the Pope has a Twitter and not a Facebook account*, INDEPENDENT (May 23, 2014), https://www.independent.co.uk/news/people/the-reason-why-the-pope-has-a-twitter-and-not-a-facebook-account-9426746.html.

[345] *See* Chris Gayomali, *A Catholic Parish Calls Facebook the 'Opposite of Christian Culture,'* TIME (Apr. 11, 2011), http://techland.time.com/author/chrisgayomali2/page/3/?order=ASC.

[346] The same concerns apply to schools, colleges, and other not-for-profit institutions.

Schools, universities, and other educational institutions have put links to Facebook on their webpages and in communications with alumni. This common practice poses moral questions. First, one would think that as not-for-profit entities they would not be making recommendations for profit-making enterprises. Educational institutions are not typically in the business of promoting the goods or services of third parties.[347] Nor do universities in other contexts provide free advertising or promote other profit-making enterprises. Universities do not suggest that students and alumni use an Apple, rather than Dell, computer to contact the university on the internet. Why should they do so for Facebook? Second, Facebook is not a public utility.[348] It is a private enterprise that makes money by monetizing the personal information of its users. As a publicly listed company, it has very strong incentives to exploit this information in the future in any possible way[349]—ones that we cannot even imagine today. These incentives are a recipe for an immoral business model. Third, the free advertising by schools and universities put the integrity of these institutions at stake. Why is a profit-making company with an immoral business model given the advantage of free publicity? Of course, the superficial answer is that Facebook is popular with students. The better answer is that the institutions have lost their moral compass.

Another reason why there has not been a more forceful reaction against surveillance capitalism and its behavioral-advertising business model is market imperialism. Market imperialism discourages attention to morality and for many in the tech industry moral critiques are uncool.[350] But perhaps it is also because we, like the founders of Google and Facebook, did not understand advertising.[351] More specifically, this business model was unprecedented. It was poorly understood; people did not grasp how it worked or how the companies made money.[352] The technology implementing the model was dazzling, intimidating, and complex. In

[347] This analysis would likely differ when considering private educational institutions that are for-profit.

[348] This is true even though users may treat it that way and Mark Zuckerberg has so declared. But if it is truly a public utility, then it should be heavily regulated as are other public utilities. For "utility" comments, *see* KIRKPATRICK, *supra* note 144, at 144*; see also* LANIER, *supra* note 43, at 250. On a similar note, Nicholas Carr has suggested that, "[t]he PC age is giving way to a new era: the utility age." CARR, *supra* note 270, at 61.

[349] A major factor in business decisions for publicly listed companies is based on what shareholders will want: money.

[350] CARR, *supra* note 15, at 10.

[351] Sherry Turkle has warned that, "We're accustomed to media manipulation—advertising has always tried to do this. But unprecedented kinds of information about us...allows for unprecedented interventions and intrusions. What is at stake is a sense of a self in control of itself. And a citizenry that can think for itself." SHERRY TURKLE, RECLAIMING CONVERSATION 314 (2015).

[352] *See id.*

comparison with the physical world, the online environment made it harder to detect the acts of manipulation and control.[353] The legal environment was unprepared and caught off guard when Google and Facebook arrogated to themselves the right to "move fast and break things" or charge ahead, pushing technology into new areas without seeking permission.[354] The companies believed that new technology was both good[355] and inevitable[356] and we consented, switching off our critical faculties.[357] The two companies expended huge resources to take advantage of basic human desires for information and connection and exploited human weaknesses, such as heuristic biases and addiction. Perhaps we have not reacted more forcefully because, as Shoshanna Zuboff suggests, surveillance capitalism has left us feeling helpless, resigned, and numb.[358]

Nor should we disregard fear or intimidation. Anyone familiar with social media understands the power of troll swarms, bot armies, and denial of service (DoS) attacks. Criticism of Google and Facebook could lead to rapid and vicious attacks by those who value these services. Wael Ghonim, a former Google executive who organized the Arab Spring protests against the Egyptian dictator Hosni Mubarak through social media, remarked that ". . . it is much harder to actually stand up against the mainstream on Twitter than stand up against a

---

[353] CARR, *supra* note 270, at 199.

[354] For example, Antonio Garcia Martinez has written, "there were almost no legal precedents covering any [of] this newfangled data-privacy stuff...Facebook and every major ads player...were making it up as they went along." GARCIA MARTINEZ, *supra* note 2, at 326. Nicholas Carr has noted that "Technological revolutions tend to race ahead of institutional responses, creating all sorts of social and legal quandaries." CARR, *supra* note 270, at 61.

[355] Mary Aiken, Adjunct Associate Professor at the Geary Institute for Public Policy at University College Dublin, reminds us that "what is new is not always good—and technology does not always mean progress." MARY AIKEN, THE CYBER EFFECT 303–04 (2016);
see ZUBOFF, *supra* note 56, at 225 (asserting the "[i]nevitability rhetoric is a cunning fraud designed to render us helpless and passive in the face of implacable forces...").

[356] SHERRY TURKLE, THE SECOND SELF: COMPUTERS AND THE HUMAN SPIRIT 4 (2005) ("[I]f we hope to construct the richest lives possible with this [computer] technology, we must not...see its current direction as inevitable or determined."). Daniel Kahneman believes the story of Google demonstrates the inevitability illusion. *See* KAHNEMAN, *supra* note 325, at 200–01; *see also* COHEN, *supra* note 231, at 241 (asserting "the fact that emerging patterns of information flow serve powerful economic and political interest, and thus might have been predicted by anyone paying attention to the distribution of incentives, does not make the patterns natural or just").

[357] Nicholas Carr, *The Internet as Innocent Fraud*, ROUGH TYPE (Sept. 12, 2017), http://www.roughtype.com/?p=8113.

[358] ZUBOFF, *supra* note 56, at 94–95. *But see* Shoshanna Zuboff, *You Are Now Remotely Controlled*, N.Y. TIMES (Jan. 24, 2020), https://www.nytimes.com/2020/01/24/opinion/sunday/surveillance-capitalism.html ("Anything made by humans can be unmade by humans. Surveillance capitalism is young…democracy is old…").

dictator."[359] If Facebook and Google felt threatened and wanted to mobilize, or just inspire, a crowd to attack their critics, what critic would stand a chance of a fair hearing? We should also not ignore the possibility of silent intimidation caused by the fear, or possible fear, of such an attack. What Wael Ghonim tells us is that the affordances of social media can be exploited for evil that is worse than the evil the protesters used social media to oppose.[360] That the cure of Twitter is worse than the disease of the oppressive Egyptian government because it is even more difficult to oppose.[361] It seems likely that fear of intimidation by a cyber mob has inhibited criticism of Google and Facebook.

8. Frictionless Sharing

For some, Mark Zuckerberg's lofty goal for Facebook ("to give people the power to share and make the world more open and connected")[362] excuses the immorality of the business model. More commonly, the veneration of technology assumes that innovation has only positive effects.[363] Invention is seen as good in itself with ethical oversight limited to greed prevention.[364] In a similar way, Mark Zuckerberg has believed from the beginning that connecting people through new technology and frictionless sharing was naturally good.[365] But, this belief has been called a "thinly veiled cover for the true goal of . . . increasing the amount of data available for ad targeting."[366] Whether the effects of a new technology connecting people are good or bad depends on the circumstances. Consider the old technology of the car horn and then a new technology that would allow people frictionless, direct connections: a tiny, but very loud, megaphone mounted on top of every car,

---

[359] ZEYNEP TUFEKCI, TWITTER AND TEAR GAS 79 (2017). For intimidation, *see also* Sarah Jeong, *How an Online Mob Created a Playbook for a Culture War*, N.Y. TIMES (Aug. 15, 2019), https://www.nytimes.com/interactive/2019/08/15/opinion/what-is-gamergate.html; RICHARD SEYMOUR, THE TWITTERING MACHINE 37 (2019) (referencing a trolling slogan "none of us is as cruel as all of us"); JAMES WILLIAMS, STAND OUT OF OUR LIGHT: FREEDOM AND RESISTANCE IN THE ATTENTION ECONOMY 76 (2018) (stating "[the] mob rule is hard-coded into the design of the attention economy").

[360] *See* TUFEKCI, *supra* note 359, at 79.

[361] *Id.*

[362] MCNAMEE, *supra* note 58, at 241.

[363] MOROZOV , *supra* note 33, at 167*; see also*, Janan Ganesh, *Against the cult of innovation*, FIN. TIMES (Dec. 27, 2019), https://www.ft.com/content/fa1f922e-2631-11ea-9a4f-963f0ec7e134.

[364] JASANOFF, *supra* note 26, at 251.

[365] Andrew Bosworth, Facebook Vice President, has said, "[t]he ugly truth is that we believe in connecting people so deeply that anything that allows us to connect more people more often is 'de facto' good." Sheera Frenkel & Nellie Bowles, *Facebook Employees in Uproar Over Executive's Leaked Memo*, N.Y. TIMES (Mar. 30, 2018), https://www.nytimes.com/2018/03/30/technology/facebook-leaked-memo.html.

[366] Kevin Roose, *Is Tech Too Easy To Use?*, N.Y. TIMES (Dec. 12, 2018), https://www.nytimes.com/2018/12/12/technology/tech-friction-frictionless.html.

allowing the driver to express his or her opinion about the drivers of the surrounding vehicles. Mark Zuckerberg should consider this megaphone a great improvement over the old car horn; it would be a wonderful way to have people share and connect more expressively. But most drivers recognize that it would result in an epidemic of road rage—drivers cursing at other drivers who were changing lanes without signaling, driving too slowly, etc. This example teaches us that new technology and connecting people are not necessarily good; it depends on the architecture or structure of the technology and the way it facilitates positive or negative human traits. If a technology brings out the worst in human nature, limits on connection can, in fact, be good.[367]

This example seems to illustrate one of the implications of the famous comment that "the medium is the message" by University of Toronto Professor Marshall McLuhan:[368] the architecture or structure of a technology, by limiting and focusing our perspectives, largely determines its effects.

---

[367] MOROZOV, *supra* note 33, at 346 ("Limits and constraints...can be productive—even if the entire conceit of the 'the Internet' suggests otherwise"); LANIER, *supra* note 42, at 107 ("[C]onstraints compensate for the flaws of human nature"). Friction may also play a positive role. The friction of face-to-face meetings is why comments in that context are rarely as rude or provocative as those issued through frictionless digital media. Further, as more people spend more time online, darkness, regression and impulsivity, characteristics of the e-personality, would probably exacerbate the problems with this new frictionless device. *See* ABOUJAOUDE, *supra* note 62. Julie Cohen has observed that human flourishing in the networked information society requires an effort to reverse, or at least cabin, the tendencies toward seamless continuity within infrastructures for information exchange. *See* COHEN, *supra* note 231, at 241; *see also* NICHOLAS CARR, THE GLASS CAGE: AUTOMATION AND US 182 (2014) ("Removing the friction from social attachments doesn't strengthen them; it weakens them"); ANDERSON, *supra* note 19, at 164 ("Higher, shared, and personal ways of valuing goods require social constraints on use."); Zeynep Tufekci, *Engineering the Public*, 19 FIRST MONDAY (June 30, 2014), https://firstmonday.org/article/view/4901/4097 ("computational politics removes a 'beneficial inefficiency'...that aided the public sphere").

[368] MARSHALL MCLUHAN, UNDERSTANDING MEDIA 7 (1964) ("[T]he medium is the message. This is merely to say that the personal and social consequences of any medium...result from the new scale that is introduced into our affairs...by any new technology"). Another example of the negative effects of a new technology on communication would be the computer programs that allow robocalls. These programs connect people with others (advertisers) frictionlessly but are perceived by the receivers of the calls as annoyances rather than positive experiences. Previously, such calls were not economically viable; it cost too much to have human operators make each call. But automation lowered the cost and spawned an entire industry. Unfortunately, another technical innovation, caller ID service, does not resolve the problem because the receiver's phone still rings. *See* Wade Roush, *Goodbye Phone Calls, Hello, Loneliness: Can you really "reach out and touch someone" via text?*, SCI. AM. (Nov. 1, 2019), https://www.scientificamerican.com/article/goodbye-phone-calls-hello-loneliness/.

Finally, this example also suggests the following question for Facebook and for Google: does the architecture of a new technology call forth the positive or the negative in human nature?[369] If more negative than positive, what is the moral basis for using the technology?

For Mark Zuckerberg and Facebook the answer is that the company, despite its failings, is still overwhelmingly a force for good in the world.[370] This belief rests on the assumptions that connectivity is *ipso facto* good, that connectivity is the preeminent good, that Facebook's mission is to connect people and, therefore, Facebook plays a positive role regardless of any shortcomings. Others who do not accept these assumptions differ as to Facebook's effects. Roger McNamee tells us that "[t]he time has come to accept that in its current mode of operation, Facebook's flaws outweigh its considerable benefits."[371]

9. Data Exhaust

The behavioral-advertising business model requires vast amounts of personal information. This personal information collected by Google and Facebook has been described as "data exhaust."[372] This term suggests analogies. One is "dumpster diving." Google's and Facebook's collection of data has similarities to dumpster diving. While dumpster diving is not generally prohibited, there are municipalities that do prohibit it under a theory of trespass.[373] The U. S. Supreme Court held in *California v. Greenwood*, 486 U.S. 35 (1988), that the Fourth

---

[369] *See* TURKLE, *supra* note 295, at 19 ("So, of every technology we must ask, does it serve our human purposes?"); MOROZOV, *supra* note 33, at 124 ("We must not fixate on what this new arsenal of digital technologies allows us to do without first inquiring what is worth doing"); RICHARD WATSON, FUTURE MINDS 222 (2013) ("[P]erhaps a question we should be asking ourselves more frequently in the future is not whether we *can* invent something but whether we *should*"). One suggestion is that we promote technologies that correct the problems created by the last technologies. *See* VAIDHYANATHAN, *supra* note 34, at 26.

[370] LEVY, *supra* note 139, at 16.

[371] MCNAMEE, *supra* note 51, at 247.

[372] *See* VIKTOR MAYOR-SCHONBERGER & KENNETH CUKIER, BIG DATA 113 (2013); Adam Baron, *Turning Trash into Treasure: Data Exhaust and A New Wave of Quant Data*, THOMSON REUTERS (Aug. 30, 2016), https://blogs.thomsonreuters.com/answerson/five-lessons-learned-data-exhaust/ ("Data exhaust is literally the modern day…equivalent of the old adage "one man's trash is another man's treasure.""); *see also* NICK COULDRY & ULISES A. MEJIAS, *supra* note 103, at 9 (stating that if data is seen as the "exhaust" of life processes, then "[d]ata is assumed to just be there for the taking").

[373] Ashlee Kieler, *Dumpster Diving for Beauty Products: Is It Legal and Safe?* CONSUMER REPORTS (May 31, 2017), https://www.consumerreports.org/consumerist/dumpster-diving-for-beauty-products-is-it-legal-and-safe/.

Amendment did not prohibit the warrantless search and seizure by government authorities of garbage left for collection outside the curtilage of a home because there was no socially accepted objectively reasonable expectation of privacy in the garbage.[374] But Justice Brennan in dissent expressed a commonsense revulsion at the police's conduct in that case:

> Most of us, I believe, would be incensed to discover a meddler—whether a neighbor, a reporter, or a detective—scrutinizing our sealed trash containers to discover some detail of our personal lives.... When a tabloid reporter examined then-Secretary of State Henry Kissinger's trash and published his findings, Kissinger was 'really revolted' by the intrusion and his wife suffered 'grave anguish.'[375]

Should the collection of our digital exhaust generate the same sense of disdain and repulsion as dumpster diving? One answer is that we are sharing our digital exhaust, but not abandoning it. Another answer is that the collectors of our digital exhaust obtain consent and this acquits them. But, as explained below, that answer is defective.[376] Should our digital exhaust be outside the reach of the market?

Consider two analogies that take the concept of "exhaust" a step further. Science has recently made it possible to gather a person's DNA and personal microbiome.[377] Assume in the future that these acquire a market value and companies strive to collect them. The janitors of public and private buildings will vacuum up the strands of hair containing DNA that people leave in rooms and corridors. The entrance to the building will predictably have a notice stating that entrance is free, but anyone entering consents to the collection of his or her DNA.[378] In the toilets of these buildings, devices will be put in the drainage pipes to catch human stool so that personal microbiomes can be collected. Again, on the door of every bathroom stall a notice will inform the visitor that he or she consents to the

---

[374] California v. Greenwood, 486 U.S. 35 (1988).
[375] *Id.* at 51-52.
[376] *See infra* at p. 142-43.
[377] *DNA Fingerprinting,* ENCYC. BRITANNICA, https://www.britannica.com/science/DNA-fingerprinting; Kara Rogers, *Human Microbiome,* https://www.britannica.com/science/human-microbiome.
[378] In *Skinner v. Railway Labor Executives' Assn*, 489 U.S. 602, 642 (1989) (Marshall, J. dissenting), it was expressed that privacy interest exist in a person's bodily fluids and excretions. Whether a notice of consent is sufficient to overcome this privacy interest remains a theoretical question.

collection of stool and the personal microbiome in exchange for free use of the facility. Would people find this acceptable? Likely, not. But this is essentially what Google and Facebook are doing already. If you have already given up your mind, it seems reasonable to render your body as well. But are these appropriate applications of market thinking?[379]

10. Threat to Democratic Practice

Behavioral advertising, through addiction, surveillance, and manipulation and the perversion of personhood, threatens democratic practice. It does so in two ways.

First, the behavioral-advertising business model threatens democratic elections by its policy of favoring demonstrably false and misleading political campaign advertisements. In 2019, after the Trump campaign put up on Facebook a false advertisement about Joe Biden, the Biden campaign demanded that Facebook take it down and Facebook refused.[380] Later, when Elizabeth Warren, another Democratic candidate, intentionally posted an ad with false information about Mark Zuckerberg to challenge the company, it refused to take it down.[381] Facebook responded that it "believes political speech should be protected."[382] But it is not that Facebook believes in free speech, it is that Facebook's algorithms favor disinformation that is inflammatory and provocative. This is the information that gets shared most often and most widely and this engagement generates more advertising revenue for Facebook.[383]

As in the case of the car megaphone, it is not that the technology is bad in and of itself, it is that the architecture of the technology and the surrounding circumstances determine whether the technology has positive or negative results. In the United States, the virality of misinformation caused by Facebook's

---

[379] Would we want to see Facebook and Google combine our personal data, DNA, and microbiome and upload the combination together with our brains to achieve Singularity? Ray Kurzweil, a Google employee, discusses this situation. *See* RAY KURZWEIL, THE SINGULARITY IS NEAR: WHEN HUMANS TRANSCEND BIOLOGY 198-200 (2005).

[380] Cecilia Kang & Mike Isaac, *Defiant Zuckerberg Says Facebook Won't Police Political Speech*, N.Y. TIMES (Oct. 17, 2019), https://www.nytimes.com/2019/10/17/business/zuckerberg-facebook-free-speech.html.

[381] Cecilia Kang & Thomas Kaplan, *Warren Dares Facebook with Intentionally False Political Ad*, N.Y. TIMES (Oct. 12, 2019), https://www.nytimes.com/2019/10/12/technology/elizabeth-warren-facebook-ad.html.

[382] *Id.*

[383] *See* Aja Romano, *The Scariest Part of Facebook's Fake News Problem: Fake News Is More Viral Than Real News,* VOX (Nov. 16, 2016), https://www.vox.com/2016/11/16/13626318/viral-fake-news-on-facebook.

algorithms damages democratic election campaigns. In underdeveloped countries like Myanmar, Sri Lanka, and India where civil institutions are weak, the virality of misinformation has led to mass violence and killing as mentioned below.[384]

Second, the data and algorithms of behavioral advertising have enabled attacks on American democracy by influencing elections. In the 2010 congressional elections, Facebook created an "I voted" icon and the bandwagon effect increased voting turnout by 0.39 %, enough to change the results of a close election.[385] In his discussion of this, Professor Zittrain, a co-founder of the Berkman Klein Center for Internet & Society at Harvard Law School, speculated at what might happen if Mark Zuckerberg decided to send a message encouraging voting only to those voters favoring the candidate he favored, and asked whether we should have a problem with that.[386] More recently, in the 2016 presidential race, just before the election the Trump campaign paid for a voter-suppression effort on the platform precisely targeted at potential Democratic voters.[387] Theresa Hong, the Trump campaign's digital-content director, said, "[w]ithout Facebook we wouldn't have won."[388] As for the 2020 presidential election, Texas Congressional Representative Lamar Smith has said that, "Google could well elect the next president."[389]

The influence is not necessarily by Facebook as an entity; its users can exercise influence. Data Scientist Cathy O'Neill wrote prophetically before the 2016 election that "Facebook's algorithms can affect how millions of people feel, and those people won't know that it's happening. What would occur if they played with people's emotions on Election Day?"[390] It is not clear whether Facebook did

---

[384] *See* discussion *infra* on pp. 157-160.
[385] Jonathan Zittrain, *Engineering an Election*, 127 HARV. L. FORUM 335, 335-36 (2014).
[386] *Id*. at 336.
[387] *See* Dan Sabbagh, *Trump 2016 Campaign Targeted 3.5m Black Americans to Deter Them From Voting*, GUARDIAN (Sep. 28, 2020), https://www.theguardian.com/us-news/2020/sep/28/trump-2016-campaign-targeted-35m-black-americans-to-deter-them-from-voting.
[388] April Glaser, *The Cambridge-Analytica Scandal Is What Facebook-Powered Election Cheating Looks Like*, SLATE (Mar. 17, 2018), https://slate.com/technology/2018/03/the-cambridge-analytica-scandal-is-what-facebook-powered-election-cheating-looks-like.html.
[389] Daisuke Wakabayashi & Cecilia Kang, *Google's Pichai Faces Privacy and Bias Questions in Congress*, N.Y. TIMES (Dec. 11, 2018), https://www.nytimes.com/2018/12/11/technology/google-pichai-house-committee-hearing.html?searchResultPosition=7; *see also* Kevin Roose, *Buckle Up for Another Facebook Election*, N.Y. TIMES (Jan. 10, 2020), https://www.nytimes.com/2020/01/10/technology/facebook-election.html.
[390] O'NEILL, *supra* note 320, at 184; *see* Natasha Singer, *What You Don't Know About How Facebook Uses Your Data*, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/technology/facebook-privacy-hearings.html (describing

so, but it is clear that Russian agents did so through Facebook, engaging with American voters to affect the results of the 2016 presidential election.[391] The Mueller Report and a report produced for the Senate Intelligence Committee based on data from Facebook and other companies disclosed that the Internet Research Agency, a Russian organization owned by an oligarch close to President Putin, had used false Facebook accounts to send messages to potential American voters, particularly African-Americans, to discourage them from voting or to otherwise influence their voting behavior to the advantage of Donald Trump.[392] The White House has issued an official statement that characterized the foreign interference in United States elections as "an unusual and extraordinary threat to the national security...of the United States."[393]

Historian Yuval Noah Harari, looking towards the future, offers a warning that Facebook's global connectivity may doom democracy. He assumes that referendums and elections are always about human feelings, not about human rationality.[394] He then posits that this reliance on them "might prove to be the Achilles' heel of liberal democracy. For once somebody (whether in Beijing or San Francisco) gains the technological ability to hack and manipulate the human heart, democratic politics will imitate into an emotional puppet show."[395]

The behavioral-advertising business model is morally deficient. Its design preferences inflammatory and provocative expression and promotes virality. It has

---

how Facebook lets third parties target its users); *see also* Keith Collins & Larry Buchanan, *How Facebook Lets Brands and Politicians Target You*, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/interactive/2018/04/11/technology/facebook-sells-ads-life-details.html?mtrref=www.google.com&gwh=F7966F5CD72754FDF4153C54D219BF9E&gwt=pay&assetType=REGIWALL.

[391] THE WASHINGTON POST, THE MUELLER REPORT 14-32 (2019); Scott Shane & Sheera Frenkel, *Russian 2016 Influence Operation Targeted African-Americans on Social Media*, N.Y. TIMES (Dec. 17, 2018), https://www.nytimes.com/2018/12/17/us/politics/russia-2016-influence-campaign.html. For an example of manipulation by a Google user, *see* Patrick Berlinquette, *I Used Google Ads for Social Engineering. It Worked.*, N.Y. TIMES (July 7, 2019), https://www.nytimes.com/2019/07/07/opinion/google-ads.html.

[392] THE WASHINGTON POST, THE MUELLER REPORT 14-32 (2019); Scott Shane & Sheera Frenkel, *Russian 2016 Influence Operation Targeted African-Americans on Social Media*, N.Y. TIMES (Dec. 17, 2018), https://www.nytimes.com/2018/12/17/us/politics/russia-2016-influence-campaign.html.

[393] *Notice Continuing the National Emergency With Respect To Foreign Interference In or Undermining Public Confidence In U.S. Elections*, THE WHITE HOUSE (Sept. 10, 2019), https://www.whitehouse.gov/briefings-statements/notice-continuing-national-emergency-respect-foreign-interference-undermining-public-confidence-u-s-elections/.

[394] HARARI, *supra* note 204, at 46.

[395] *Id.*

enabled the undermining of our system of democratic elections and endangered the national security of our country.

11. Threat to Rule of Law

The behavioral-advertising business model, through addiction, surveillance, and manipulation, also threatens our legal system and the rule of law. In 2018, it was reported that Sheryl Sandberg, in a potential "dirty tricks" attempt, hired a public relations firm to dig up negative information on George Soros because of his call for regulation of tech companies.[396] It seems unlikely that any user can now trust that Facebook management would not make use of data from the user, the user's spouse, or close relatives to blackmail a legislator about a piece of legislation of interest to Facebook or blackmail a judge or the close relatives of a judge in an important legal case. Of course, if this ever did happen, the chances are remote that we could ever learn of it. Especially if the response from Facebook to any accusation was that its actions were the result of its algorithm and any analysis of the algorithm would be a violation of its intellectual property rights. Or even if access were granted to the algorithm, artificial intelligence may well have rendered it unintelligible to humans.[397] The parties on the other side of legislation or litigation have no way to assure that this will not happen. Facebook's history and recent revelations show that the company is morally challenged and has subjected the rule of law to an unacceptable risk. One would think that the American Bar Association would have raised some concerns. But it has placed a Facebook icon on its webpage, encouraging lawyers to connect with it through Facebook.[398] Perhaps lawyers representing Facebook are a bit too influential in the relevant ABA Sections.

Sheryl Sandberg's potential "dirty trick" brings to mind Fordham Law School Professor Zephyr Teachout's comment that those with too much power, like

---

[396] Rana Foroohar, *A Year in a word: Techlash*, FIN. TIMES (Dec. 16, 2018), https://www.ft.com/content/76578fba-fca1-11e8-ac00-57a2a826423e; *see also* Sheera Frenkel et al., *Delay, Deny, Deflect: How Facebook Leaders Fought Through Crisis*, N.Y. TIMES (Nov. 14, 2018), https://www.nytimes.com/2018/11/14/technology/facebook-data-russia-election-racism.html.

[397] *See* SAMUEL ARBESMAN, OVERCOMPLICATED: TECHNOLOGY AT THE LIMITS OF COMPREHENSION 80 (2017) ("[T]he vast majority of computer programs will never be thoroughly comprehended by any human being").

[398] The bottom of the American Bar Association website contains an icon linking the reader to its Facebook page. *See* americanbar.org.

Google, cannot help but be evil.[399] It is not wrong for a company to aspire to grow to a large size nor wrong for it to try to protect its interests. Surveillance capitalism incentivizes companies to seek more raw material data and that requires Facebook and Google to grow. Size gives power and the temptation to protect a company's interests by exercising its power in ways that are morally–and often legally—improper. Google's size makes it harder to avoid "being evil."[400]

The behavioral-advertising business model is morally repugnant. It has not only threatened democratic practice, but also our legal system and the rule of law. It is morally wrong. But is it also legally wrong?

---

[399] Zephyr Teachout, *Google is coming after critics in academia and journalism. It's time to stop them*, WASH. POST (Aug. 30, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/08/30/zephyr-teachout-google-is-coming-after-critics-in-academia-and-journalism-its-time-to-stop-them/ (providing an example of Google's role in pressuring the not-for-profit New America to fire its Open Markets team after the team dared to speak up about Google in the mildest way); *see also* LEVY, *supra* note 68, at 6 (stating that Google is evil in another way despite its rhetoric of moral purity and "Don't Be Evil," because it seems to have a blind eye for the consequences of its own technology on privacy and property rights); Nancy Scola, *Why Liberals and Big Tech Companies Broke Up*, POLITICO (Mar. 17, 2019), https://www.politico.com/story/2019/03/17/democrats-candidates-2020-tech-silicon-valley-1229345 (stating Elizabeth Warren singled out Facebook for taking down her campaign ads and calling for its breakup).

[400] This is true regardless of whether Mark Zuckerberg and the Google founders are "good" or "nice" people. *See* Paul Lewis, *Our Minds Can Be Hijacked: The Tech Insiders Who Fear a Smartphone Dystopia*, GUARDIAN (Oct. 6, 2017), https://www.theguardian.com/technology/2017/oct/05/smartphone-addiction-silicon-valley-dystopia (citing Roger McNamee, "The people who run Facebook and Google are good people…"); *see also* Chris Hughes, *It's Time to Break Up Facebook*, N.Y. TIMES (May 9, 2019) https://www.nytimes.com/2019/05/09/opinion/sunday/chris-hughes-facebook-zuckerberg.html ("Mark [Zuckerberg] is a good, kind person"); Edward Luce, *The Zuckerberg Delusion*, FIN. TIMES (Nov. 15, 2017), https://www.ft.com/content/580f18d6-c951-11e7-aa33-c63fdc9b8c6c ("Mr. Zuckerberg suffers from two delusions common to America's new economy elites. They think they are nice people—indeed, most of them are. Mr. Zuckerberg seems to be, too"); Nellie Bowles, *Tech Embraces Its Doomsayer*, N.Y. TIMES (Nov. 11, 2018), https://www.nytimes.com/2018/11/09/business/yuval-noah-harari-silicon-valley.html (quoting Yuval Noah Harari, "I've met a number of these high-tech giants, and generally they're good people...They're not Attila the Hun. In the lottery of human leaders, you could get far worse"); LEVY, *supra* note 139, at 51 (stating Mark Zuckerberg's sister described him as a "very ethical and fair individual"). *But see* LEVY, *supra* note 139, at 11 and 59 (noting a report issued in a U.K. parliamentary study called Facebook "digital gangsters," New Zealand's Privacy Commissioner John Edwards said that Facebook's leaders were "morally bankrupt pathological liars," and Aaron Greenspan, a Harvard student and builder of small digital products, said of Mark Zuckerberg, "I didn't trust him from the moment I met him").

PART TWO: LEGALITY

I. CONTRACT LAW AND THE BEHAVIORAL-ADVERTISING BUSINESS MODEL

The behavioral-advertising business model poses a special problem for the legal system because it is unprecedented. It is unprecedented in the sense that it (and the contracts implementing it) depend on a technology (the internet) that is unique in its combination of characteristics: the technology has been distributed more widely, more quickly and has had deeper effects than any other technology in human history. This technology, business model, and the attendant contracts were never seen before and therefore, unfortunately, not foreseen. The unprecedented nature of this technology and business model explains why we have so far failed the challenge set for us more than 40 years ago by Harvard sociologist Daniel Bell, who wrote that, "[t]he major technological problem ahead will be the test of our ability to foresee the effects of social and technological change and to construct alternative courses in accordance with different valuations of ends, at different costs."[401]

In our defense we can say that technological revolutions tend to race ahead of institutional responses, creating a panoply of social and legal quandaries.[402] We can understand that a legal system based on precedent finds it difficult to deal with the unprecedented. But we can also recognize that history repeats itself, although often in a cunning disguise that prevents us from detecting the resemblance until it is too late.[403] Once we have seen the resemblance, then, as University of Chicago Law Professors Saul Levmore and Martha Nussbaum have suggested, "[o]ld solutions are sometimes appropriate for new problems."[404] Thus, the concept of inalienable rights that was the philosophical justification for American independence and an important element of the California Constitution can help us deal with this unprecedented business model and its contracts.

A. INALIENABLE RIGHTS

The unprecedented nature of this business model has meant that, for the most part, the response of the legal system to surveillance capitalism and the

---

[401] DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY 284 (1973) (emphasis added).
[402] CARR, *supra* note 270, at 184.
[403] Paraphrasing a quote from esteemed Chicago Sun-Times columnist Sydney J. Harris, "History repeats itself, but in such cunning disguise that we never detect the resemblance until the damage is done." *See* SYDNEY J. HARRIS, CLEARING THE GROUND: IF HE'S NOT GUILTY, WHY IS HE IN COURT? 24 (1986).
[404] Martha Nussbaum & Saul Levmore, THE OFFENSIVE INTERNET 5 (2010).

behavioral-advertising business model has been feeble and misdirected.[405] Legal scholars, government officials, and private practitioners have mostly viewed the current practices of Google and Facebook through the legal lenses of privacy and monopoly.[406] Efforts at privacy legislation and monopoly regulation have achieved some modest success,[407] but the advertising-based business model has not been seriously affected. Even the European Community's most aggressive effort yet, the General Data Protection Regulations, is primarily directed at privacy.[408] Monopoly

---

[405] MARK BARTHOLOMEW, ADCREEP (2017) ("At a time when a panoply of new marketing techniques is changing human behavior and eroding consumer agency, the legal system has stood still"). Perhaps this feeble response is partly a result of Google's influence over academia and the private sector. Shoshanna Zuboff has noted that a list of Google Policy Fellows for 2014 lists individuals from non-profit organizations that one would assume are leading the fight against Google: The Center for Democracy and Technology, The Electronic Frontier foundation, the National Consumers League, The Future of Privacy Forum and others. *See* ZUBOFF, *supra* note 56, at 126. *See also* CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY 361 (2016) (stating his belief that George Mason University Law School "has been used as a kind of academic front for Google's activities").

[406] ZUBOFF, *supra* note 56, at 193 ("The primary frameworks through which our societies have sought to assert control over surveillance capitalism's audacity are those of 'privacy rights' and 'monopoly'"). *Id.* at 54 ("These developments [of surveillance capitalism] are all the more dangerous because they cannot be reduced to known harms—monopoly, privacy—and therefore do not easily yield to known forms of combat. The new harms we face entail challenges to the sanctity of the individual, and chief among these challenges I count elemental rights that bear on individual sovereignty..."). For the monopoly perspective, *see* Tim Wu, *What Years of Emails and Texts Reveal About Your Friendly Tech Companies,* N.Y. TIMES (Aug. 4, 2020), https://www.nytimes.com/2020/08/04/opinion/amazon-facebook-congressional-hearings.html; *see also* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1057-63 (2000) (suggesting a role for contracts and a concept of legislative rules specifying certain contracts that would carry implied promises of confidentiality).

[407] *See generally* Biometric Information Privacy Act, 740 ILCS 14/ *et seq***.** (2008); *see also* Daisuke Wakabayashi, *California Passes Sweeping Law to Protect Online Privacy*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/2018/06/28/technology/california-online-privacy-law.html.

[408] *The General Data Protection Regulation* in CHARLENE BROWNLEE & BLAZE D. WALESKI, PRIVACY LAW (2019) § 5.02[3][d]; *see also Art. 4 GDPR Definitions*, GENERAL DATA PROTECTION REGULATION https://gdpr-info.eu/art-4-gdpr/ (last visited Sep. 13, 2020). The GDPR's emphasis on privacy means that it emphasizes "consent." *See* Art. 4 GDPR Definitions, GENERAL DATA PROTECTION REGULATION (GDPR), https://gdpr-info.eu/art-4-gdpr/ (last visited Sep. 13, 2020); *see also* Art. 6 GDPR Lawfulness of Processing, GENERAL DATA PROTECTION REGULATION (GDPR), https://gdpr-info.eu/art-6-gdpr/ (last visited Sep. 13, 2020); Art. 7 GDPR Conditions for Consent, GENERAL DATA PROTECTION REGULATION (GDPR), https://gdpr-info.eu/art-7-gdpr/ (last visited Sep. 13, 2020). Privacy is a cluster of problems, so it can be waived in part. But autonomy is unitary and cannot be waived; it is inalienable so consent is irrelevant. Emma Martins, Data Protection Commissioner, Office of the Data Protection Authority, Guernsey, CI, sees the GDPR as "a good starting point," but has stated that the way our

and privacy are not the main problem; the business model is. The new harms that threaten us are more than issues of privacy and monopoly; they undermine our autonomy and our democracy. Legal protection of privacy and restrictions on monopoly alone can never safeguard these existential interests because they do not address the basic problem of the immoral business model.

Inalienabilty is the legal system's way of saying that something is beyond the reach of the market.[409] Legally, it can be established by a Constitution or legislation, but it is important to recognize that courts have the power to interpret what is or is not inalienable.[410] And inalienable rights have occupied a central role in American moral and legal culture.[411] Most Americans are familiar with the stirring words of the Declaration of Independence: "[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness . . . ."[412] The presence of the words "unalienable rights" in the Declaration of Independence indicates their fundamental role in justifying the existence of the United States as a country. These rights were not some anomaly or minor exception to a world of market thinking, no generous concession granted by market analysis. Nor do they constitute an instance of market failure. They were the most basic and most important aspects of the social and political lives of citizens. These words were not included in the United States Constitution.[413] Therefore, their direct legal effect on surveillance capitalism is questionable as a matter of federal law. But, the constitutions of a number of states do include similar language.[414]

The Constitution of the State of California proclaims in Section 1 that "[a]ll people are by nature free and independent and have inalienable rights. Among these

---

personal data are used "goes well beyond notions of data privacy," and "goes to the heart of what it is to be an autonomous free citizen." Emma Martins, *Conversation about our data must involve us all*, Letter to the Editor, FIN. TIMES, Jan. 3, 2020, at 14. The distinction between privacy and autonomy holds even though the European conception of privacy differs from the American in its emphasis on dignity. *See* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L. J. 1151 (2004).

[409] *Inalienability*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[410] MARGARET JANE RADIN, CONTESTED COMMODITIES 161 (1996).

[411] Radin, *supra* note 21, at 1849.

[412] *The Declaration of Independence*, NAT. ARCHIVES, https://www.archives.gov/founding-docs/declaration (last reviewed Mar. 16, 2020) (emphasis added); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2482 (1966) gives "inalienable" as a synonym of "unalienable."

[413] *See* U.S. CONST.

[414] *See generally*, Steven G. Calabresi & Sarah Agugo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7 (2008).

are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness, and privacy." [415] California's Constitution is relevant because the relationship between Google or Facebook and its users is governed by California law.[416] The digital Terms of Service for both companies refer to California law and to California jurisdiction over all disputes in courts in California.[417] That relationship is therefore subject to the declaration of inalienable rights set forth in the California Constitution.

The invocation of California's Constitution here is not intended to assert that suing the companies for violations of Section 1 would be the most appropriate strategy. [418] Rather, the language of the Constitution is cited here primarily as an affirmation that, as a matter of public policy, California does not accept the idea of universal commodification; it recognizes that certain activities are not subject to market forces. In fact, it asserts that the most important rights that people have are necessarily not marketable, which are characterized as "inalienable." "Inalienable," of course, has various meanings. It can mean that the right may not be sold; that it may not be transferred; that it may not be bequeathed; that it may not be lost at all.[419] In the context of contract law it means that a person cannot give up the right by contract; that consent to do so is void.[420]

Statements in the political sphere, such as the California Constitution ("[a]ll people...have inalienable rights"), often express what David Ellerman, Visiting

---

[415] Cal. Const., § (emphasis added); Staughton Lynd has argued that "inalienable" in the Declaration of Independence is ambiguous. It could refer either to either rights seen as property, in which case they could be disposed of with consent, or as rights of conscience that by their nature could not be transferred. He concluded, however, that, "The statesmanship of the American Revolution...tended to reserve absolute inalienability for the life of the mind." STAUGHTON LYND, INTELLECTUAL ORIGINS OF AMERICAN RADICALISM 54 (1968).

[416] *See Google Terms of Service*, GOOGLE, https://policies.google.com/terms [https://perma.cc/F9LT-BF8D];
Terms of Service, FACEBOOK, https://www.facebook.com/legal/terms [https://perma.cc/EJN3-ATBQ].

[417]*See Google Terms of Service*, GOOGLE, https://policies.google.com/terms [https://perma.cc/F9LT-BF8D];
Terms of Service, FACEBOOK, https://www.facebook.com/legal/terms [https://perma.cc/EJN3-ATBQ].

[418] A suit alleging that the behavioral-advertising contracts violate the inalienable right of "liberty" or "privacy" in Article 1 could be attempted, and deserves further study. University of California Berkeley law Professor Chris Jay Hoofnagle has noted that waivers of the extensive privacy rights in the Constitution are unenforceable, citing Cal. Civ. Code §1798.84. HOOFNAGLE, *supra* note 405, at 172.

[419] Radin, *supra* note 21, at 1850.

[420] *See* Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL. 179 (1986).

Scholar at the University of California, Riverside, calls the "inalienist" tradition. In this tradition, the question of alienability, not consent or contract, is the heart of the liberal vision of both government and slavery.[421] In liberal thought there are two traditions. One is an "alienist" tradition, which believes that basic rights can be alienated.[422] This tradition sees basic rights as essentially property rights that can be alienated with full, free, and informed consent.[423] Capitalism is in the alienist tradition.[424] Under this view, a contract of self-enslavement would be permitted.[425]

Second, the "inalienest" tradition believes that basic rights are personal and cannot be alienated even with full, free, and informed consent.[426] A contract that purported to alienate these rights would be null and void.[427] Political democracy is in this inalienist tradition.[428] The inalienist tradition is the democratic tradition of liberal thought.[429] It would not permit a contract of self-enslavement.[430] Statements in the political sphere, as noted above, express the inalienist tradition, while those in the economic sphere follow the alienist tradition. Market thinking leans toward the alienist tradition.

The modern origins of inalienable rights can be seen in the concept of freedom of conscience which came from the formal separation of spiritual from temporal power and liberation of the human mind among fifth-century clergy.[431] Martin Luther later developed this idea further and it became a fundamental concept of the Reformation. He wrote:

> How one believes or disbelieves is a matter for everyone's own <u>conscience</u>, and since this takes nothing away from secular government, the latter should be content to attend to its own affairs and let everyone believe this or that as they are able and willing, and constrain no one by force."[432]

---

[421] DAVID P. ELLERMAN, PROPERTY AND CONTRACT IN ECONOMICS 72 (1992).
[422] *Id.* at 73.
[423] *Id.*
[424] *Id.*
[425] *See id.*
[426] *Id.* at 72.
[427] *Id.*
[428] *Id.* at 72-73.
[429] *See id.* at 73.
[430] *See id.*
[431] LARRY SIEDENTOP, INVENTING THE INDIVIDUAL: THE ORIGINS OF WESTERN LIBERALISM 133-34 (2014).
[432] MARTIN LUTHER, THE ANNOTATED LUTHER 111 (Hans J. Hillerbrand et al. eds.,1989) (emphasis added).

But it was two Scotsmen, George Wallace, a jurist, and Francis Hutcheson, a teacher of Adam Smith, who directly influenced the drafters of the Declaration of Independence. Wallace wrote that:

> Men and their liberty are not *in commercio*; they are not either saleable or purchaseable . . . For these reasons, every one of those unfortunate men, who are pretended to be slaves, has a right to be declared free, for he never lost his liberty; he could not lose it; his prince had no power to dispose of him.[433]

Hutcheson's views were very influential. Thomas Jefferson's division of rights into alienable and inalienable came from Hutcheson.[434] Hutcheson first made the distinction between alienable and inalienable rights in *An Inquiry into the Original of Our Ideas of Beauty and Virtue* (1725), but he developed it more fully in his influential *A System of Moral Philosophy* (1755), writing:

> Our rights are either *alienable*, or *unalienable.* The former are known by these two characters jointly, that the translation of them to others can be made effectually, and that some interest of society, or individuals consistently with it, may frequently require such translations. Thus our right to our goods and labours is naturally alienable. But where either the translation cannot be made with any effect, or where no good in human life requires it, the right is unalienable, and cannot be justly claimed by any other but the person originally possessing it.[435]

Hutcheson then continues:

> Thus no man can really change his sentiments, judgments, and inward affections, at the pleasure of another; nor can it tend to any good to make him

[433] GEORGE WALLACE, A SYSTEM OF THE PRINCIPLES OF THE LAW OF SCOTLAND 95 (1760).
[434] GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 213 (1978).
[435] FRANCIS HUTCHESON, A SYSTEM OF MORAL PHILOSOPHY 261 (2000).

> profess what is contrary to his heart. The right of private judgment is therefore unalienable.[436]

The culmination of the concept of inalienability came with John Stuart Mill in his argument against self-enslavement by contract. In *On Liberty*, he wrote of the person who sells himself into slavery:

> [H]e abdicates his liberty, he foregoes any future use of it beyond that single act. He therefore defeats in his own case, the very purpose which is the justification of allowing him to dispose of himself . . . The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom.[437]

The idea of inalienability went from the understanding that one's conscience was free to the principle that freedom itself prevents the alienation of freedom. Thus, one's freedom cannot be voluntarily disposed of. No form of consent, however free, full, and informed, will make such an alienation possible. This argument provides the basis for the reference to "inalienable rights" in the Declaration of Independence and in the California Constitution. German philosopher Ernst Casirer summarized this argument as saying that by self-enslavement, a man "would give up that very character which constitutes his nature and essence: he would lose his humanity."[438] More concretely, he would lose his autonomy.

The other tradition, the alienist tradition, has its history and supporters, but they are decidedly a minority. For example, few philosophers in the United States have taken the position that self-slavery is permissible; that a contract binding one to slavery should be enforceable. Harvard Professor Robert Nozick, one of the few, has asked "whether a free system will allow [an individual] to sell himself into slavery. I believe it would."[439] Another philosopher, Donald VanDeVeer, has suggested that "the wisdom, prudence, or moral acceptability of [self-slavery] remains an open question," but he has admitted that "[t]o the extent that a person's

---

[436] *Id.* at 261-62. In the same way, we can say that people cannot use their autonomy to deprive themselves of future autonomy because that would contradict the justification for allowing them autonomy in the first place.

[437] CAROLE PATEMAN, THE SEXUAL CONTRACT 74-75 (1988).

[438] ERNST CASIRER, THE MYTH OF THE STATE 175 (1963).

[439] ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 331 (1974); *see also* J. Philmore, *The Libertarian Case for Slavery: A Note on Nozick*, 14 PHIL. FORUM 45-58 (1982).

surrender of autonomy is more thorough and permanent . . . and to the extent that autonomy is regarded as a good or an ideal to which one should aspire, such acts will be morally suspect."[440] Others have suggested that the inalienability rule against slavery would not be justified if the rule were inefficient.[441] As Professor Radin has remarked, "[a]nyone who has no qualms about this argument bears witness to a (literally) demoralizing triumph of market methodology."[442]

This alienist tradition has not been accepted by the legal system. The Thirteenth Amendment prohibits both slavery and involuntary servitude, except as punishment for a crime.[443] It also authorizes Congress to enforce this prohibition by appropriate legislation. One piece of legislation, the Anti-Peonage Act of 1867, abolished peonage and rendered null and void "all acts, laws, resolutions...of any...State [establishing, maintaining, or enforcing] voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation or otherwise..."[444] The key term here is "voluntary." This statute clearly repudiates the idea that prohibited servitude must be involuntary. It accepts the notion that if a person were to voluntarily contract himself or herself into a type of servitude, peonage, such an act would be prohibited because it is so evil in its nature that the legal system will not allow even the victim's full, free, and informed consent to permit it.

B. ILLEGAL CONTRACTS: THE PRECEDENT OF THE PEONAGE CONTRACT

Peonage is a type of bondage. It was a nineteenth and twentieth century throwback to the earlier forms of bondage in the seventeenth and eighteenth centuries. Bondage was characteristic of America in the seventeenth, eighteenth, and nineteenth centuries. There were four types of bondage: indentured servitude,

---

[440] DONALD VANDEVEER, PATERNALISTIC INTERVENTION 133 (1986).
[441] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1112 (1972). Lawrence Alexander has suggested that "it is perhaps time to re-examine the regime of legal unenforceability of personal service contracts and its supporting arguments." Lawrence Alexander, *Voluntary Enslavement* in Coons & Weber *supra* note 249, at 245-46. Judge Richard Posner suggested that it is "puzzling" from an economic standpoint that a person cannot sell himself into slavery. RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW 187 (2d ed. 1977). Margaret Jane Radin has asserted that "the cases economists find mysterious are mysterious just because economists generally treat property as fungible, and those cases treat it as personal." Margaret Jane Radin, *Personhood and Property*, 34 STAN. L. REV. 957, 1004, 1015 (1982).
[442] RADIN, *supra* note 410, at 24.
[443] U.S. CONST. amend. XIII.
[444] 18 U.S.C. § 1581 (2012).

redemption, apprenticeship, and slavery.[445] Indentured servants were recruited in England, often through deceit and manipulation, to enter into indenture contracts for passage to America with an obligation to repay for the voyage by working in America for a term of years.[446] Indentured servitude was a major institution of colonial America.[447] It is estimated that after 1630, between one half and two thirds of white immigrants to the American colonies came under indenture,[448] and more than half of those who went to the colonies south of New England were servants in bondage.[449]

Redemption was indentured servitude of those who came as partially paid-up passengers.[450] Upon arrival, they entered into contracts of indenture in order to pay the remainder of the passage price and did so by working for a term, generally four years.[451]

Apprentices were often young boys and girls who were bound to a master for a period of years.[452] The master provided food, clothing, lodging, and training in the master's trade in exchange for obedience and work by the apprentice.[453] Bonded servants, whether indentured or redemptionist, were their masters' chattel, but, unlike slaves, they had the right of franchise. [454]

The first African slaves were brought to America in the seventeenth century, where slavery became widespread in the South, particularly after the demise of indentured servitude in the eighteenth century. [455] Over time, as free workers became more plentiful and less expensive, masters began to pay wages to employees rather than purchasing the time of a servant or slave.[456]

---

[445] *See generally, Indentured Servants in the U.S.*, PBS, https://www.pbs.org/opb/historydetectives/feature/indentured-servants-in-the-us/#:~:text=Servants%20typically%20worked%20four%20to,protected%20some%20of%20their%20rights (explaining the difference between indentured servitude and slavery);
[446] *Id.*
[447] *Id.*
[448] DAVID W. GALENSON, WHITE SERVITUDE IN COLONIAL AMERICA 3-4 (1982).
[449] RICHARD HOFSTADTER, AMERICA AT 1750 34 (1972).
[450] *Id.* at 50-51.
[451] *Id*.
[452] Mark Snyder, *The Education of Indentured Servants in Colonial America*, 33 (1/2) J. TECH STUDIES 67-69 (2007).
[453] *Id*.
[454] Hofstadter, *supra* note 449, at 51.
[455] *See* GALENSON, *supra* note 448, at 127, 179.
[456] SHARON SALINGER, TO SERVE WELL AND FAITHFULLY: INDENTURED SERVANTS IN PENNSYLVANIA, 1682-1800 54 (1987).

Taking into account these four forms of bondage, it seems likely that the majority of the colonial and early republic population in America was subject to some form of bondage. With the exception of slavery, the other three forms of bondage constituted contractual bondage. Economic forces caused the decline of indentured servitude (including redemption) [457] and apprenticeship, and the Emancipation Declaration ended slavery. But in the nineteenth century a new form of contractual bondage arose—peonage.

The peonage system of bondage referred to in the Anti-Peonage Act seems to have originated in Spain and became widespread in Mexico under Spanish rule.[458] In New Mexico, the peons constituted a large class of persons who had very little or no property and worked mainly as servants or domestics.[459] They were not born into servitude, but rather signed contracts to become peons because the master advanced them money.[460] They were indebted to their master and labored to pay off the debt. Until they had paid off the debt, they were not free to leave the service of their master. If they did leave before the debt was paid off, the master or local officials could seize the peon and return him or her to service for the master.[461] A new master could pay off a peon's debt to their original master, and then the peon would be indebted and bound to the new master.[462] If the peon did not pay off the debt or work, he or she could also be let out to the highest bidder under a new peonage contract.[463]

The peon still retained rights. Certain local officials, called alcaldes, had the duty to authenticate the books of accounts between masters and peons.[464] The master was prohibited from using the whip against the peon, and a peon could sue a master for excessive punishment.[465] Peons did not lose political and civil rights; they were allowed to vote.[466]

---

[457] Professor Galenson found that "[t]he history of the final demise of indentured servitude in the United States remains obscure." GALENSON, *supra* note 448, at 179.
[458] This description is taken from *Jaremillo v. Romero*, 1 N.M. 190, 194-207 (N.M. 1857). For a full treatment of peonage, *see* PETE DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH 1902-69 (1972).
[459] Peonage Cases, 136 F. 707 (1905),
[460] Jaremillo v. Romero, 1 N.M. 190, 194-207 (N.M. 1857).
[461] *Id.*
[462] *Id.*
[463] *Id.*
[464] *Id.*
[465] *Id.*
[466] *Id.;* Peonage Cases, 136 F. at 707.

While peonage was native to New Mexico, the term was later used to refer to similar relationships in other parts of the country. Judicial opinions in courts in the East and South clarified and expanded this definition of peonage.[467] In the *Peonage Cases*, 136 F. 707 (D.C.E.D. Ark. 1905), peonage was defined as "the holding of any person to service or labor for the purpose of paying or liquidating an indebtedness due from the laborer or employee to the employer, when such employee desires to leave or quit the employment before the debt is paid off."[468] This definition seems to limit the condition of peonage to only those cases where the employee wanted to quit before paying off the debt. But Justice Hughes in *Bailey v. Alabama*, 219 U.S. 219 (1911), succinctly described the essence of it as "compulsory service in payment of a debt."[469] This definition and the case law support the notion that peonage can exist even before the employee desires to quit.

Outside New Mexico, peonage came to include fieldwork (picking sweet potatoes, cucumbers, tobacco, and other crops) on plantations or migrant labor farms; housekeeping in motels and hotels; serving as barmaids, hostesses, and prostitutes in a saloon and dancehall; tending to chickens in a chicken farm; and laboring in the forest as lumberjacks. Often, the original debt was for transportation of the worker from another place within the state, out of state, or even from abroad (Mexico or the Philippines). The employer, however, often provided food and housing on credit to the workers at prices that would never allow them to pay off the debts.

---

[467] This description and the discussion in the text below are based on the following peonage-related cases: Matter of Clark, 1 Black. 122 (1821); Jaremillo *v.* Romero, 1 N. M. 190 (N.M. 1857); Slaughter House Cases, 83 U.S. 36 (1872); Peonage Cases, 123 F. 671 (M.D. Ala.) (1903); United States v. McClellan, 127 Fed. Rep. 971 (S.D. Ga.) (1904); In re Peonage Charge, 138 Fed. Rep. 686 (N.D. Fla. 1905); Peonage Cases, 136 F. 707 (E.D. Ark. 1905); Clyatt v. United States, 197 U.S. 207 (1905); Hodges v. United States, 203 U.S. 1 (1906); United States v. Cole, 153 Fed. Rep. 801 (W.D. Tex. 1907); United States v. Clement, 171 Fed. Rep. 974 (D.S.C. 1909); Freeman v. United States, 217 U.S. 539 (1910); Bailey v. Alabama, 219 U.S. 219 (1911); United States v. Reynolds, 235 U.S. 133 (1914); United States v. Broughton, 235 U.S. 133 (1914); Bernal v. United States, 241 F. 339 (5th Cir. 1917); Taylor v. Georgia, 315 U.S. 25 (1942); Pollock v. Williams, 322 U.S. 4 (1944); United States v. Gaskin, 320 U.S. 527 (1944); Pierce v. United States, 146 F.2d 84 (5th Cir. 1944); United States v. Shackney, 333 F.2d 475 (2nd Cir. 1964); United States v. Bibbs, 564 F.2d 1165 (5th Cir. 1977); United States v. Booker, 655 F.2d 562 (4th Cir. 1981); United States v. Harris, 701 F.2d 1095 (4th Cir. 1983); United States v. Mussry, 726 F. 2d 1448 (9th Cir. 1984); United States v. Kozminski, 487 U.S. 931 (1988); United States v. Farrell, 563 F. 3d 364 (8th Cir. 2008).

[468] Peonage Cases, 136 F. 707, 708 (Dist. Ct. E. D. Ark. 1905).

[469] Bailey v. Alabama, 219 U.S. 219, 242 (1911). The Assistant Attorney-General, Charles W. Russell, defined peonage as "causing compulsory service to be rendered by one man to another on the pretext of having him work out the amount of debt, real or claimed." CHARLES W. RUSSELL, REPORT ON PEONAGE 3 (1908).

A report on peonage in the early twentieth century found that no general system of peonage existed in the United States, but sporadic cases existed in every state except Oklahoma and Connecticut.[470] The most complete system of peonage existed in the lumber camps in Maine.[471] In Maine, Florida, Georgia, and Alabama, criminal fraud statutes that criminalized taking money with no intention of performing the services, were used to enforce contracts of peonage.[472] If the laborer left before the debt was paid off, he or she was deemed prima facie to have intended to take the initial advance fraudulently without any intention of repaying it.[473] Peonage was authorized and enforced by the state not only in these states by suits from employers, but also in all states by the self-help of employers who seized runaway peons and forcibly brought them back.[474]

Peonage raises a challenging question: what exactly is it that makes it wrong?[475] Is it the loss of freedom? Is it the power imbalance? Is it the physical mistreatment? Is it the commodification? Undoubtedly, what made it wrong was a combination of these factors. Without presuming to arrive at a conclusive answer, we can say that the discussion of peonage in these cases provides us with a general framework for responding to this question. This general framework divides the evil of peonage into two general categories: physical abuse and loss of autonomy. Perhaps our humanitarian instincts lead us first to look at the physical side. When we think of slavery, we think of arduous field labor under a hot sun. Peonage took that form in some cases, but it could be domestic work and not extreme physical labor. In some cases, peons were beaten and brutalized, but, as noted above, in New Mexico the masters were prohibited from using the whip on them. In some cases, the peons were even guarded night and day and lacked freedom of movement.[476]

Peonage deprived the peon of something internal—a sense of autonomy. The answer to another question confirms this suggestion: assuming that slaves were treated better than their free counterparts, would slavery be acceptable? None but the most extreme utilitarian would answer "yes." The reason we reject a positive response is that our natural moral instincts tell us that the loss of autonomy is the key evil of slavery.[477] As noted slavery historian Yale Professor David Brion Davis

---

[470] Pollock v. Williams, 322 U.S. 4, 18-19 (1944).
[471] *Id.* at 19.
[472] *See id.* at 18-24.
[473] *Id.*
[474] For further discussion on different peonage laws in the United States, please refer to list of cases *supra* note 467.
[475] Radin, *supra* note 21, at 14.
[476] *See* Jaremillo *v.* Romero, 1 N. M. 190 (N.M. 1857).
[477] J. S. Blumenthal-Barby, *A Framework for Assessing the Moral Status of 'Manipulation,' in* Coons & Weber, *supra* note 249, at 126.

wrote: "Slavery is the perfect antithesis of individual autonomy or self-sovereignty."[478] But perhaps the most eloquent expressions of this idea were by two former slaves. Mum Bett, the first slave in Massachusetts to sue in 1781 for her freedom under the Massachusetts Constitution of 1780,[479] said, "[i]f one minute's freedom had been offered to me, and I had been told I must die at the end of that minute, I would have taken it." Additionally, the Reverend E. P. Holmes, a former slave, testified before a congressional committee in 1883:

> Most anyone ought to know that a man is better off free than a slave, even if he did not have anything. I would rather be free and have my liberty. I fared just as well as any white child could have fared when I was a slave, and yet I would not give up my freedom.[480]

The same logic holds for peonage. This is why the judges in the peonage cases refer to the concept of voluntariness. The statute, as noted, prohibits both "voluntary or involuntary servitude," so logically the voluntary nature of the peonage contract should not have influenced whether it was prohibited or not. As stated in the *Peonage Cases*, 136 F. 707 (1905), "[i]t is wholly immaterial whether the contract whereby the laborer is to work out an indebtedness due from him to the employer is entered into voluntarily or not. The laws of the United States declare all such contracts null and void, and they cannot be enforced."[481]

The judges, like John Stuart Mill, were not comfortable with the notion that one could contract to subject oneself to what could become involuntary service.[482] But they grappled with the question of voluntariness.[483] The opinion in the similarly named *Peonage Cases*, 123 F.671 (M.D. Ala. 1903), analyzed voluntariness from the perspective of time. "[i]f the [peonage] agreement . . . can ever be said to be voluntary, it certainly becomes involuntary the moment the person desires to withdraw, and then is coerced to remain and perform service against his will."[484]

---

[478] DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823, 264 (1975).
[479] *See Massachusetts Constitution and the Abolition of Slavery,* MASS. GOV. (last visited Oct. 3, 2020), https://www.mass.gov/guides/massachusetts-constitution-and-the-abolition-of-slavery#-the-mum-bett-case-.
[480] ERIC FONER, NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY 7 (1983).
[481] Peonage Cases, 136 F. 707, 708 (E.D. Ark. 1905).
[482] *Id.* at 709.
[483] *See id.* at 707-09.
[484] Peonage Cases, 123 F. 671, 680 (M.D. Ala. 1903).

Justice Brewer in *Clyatt v. United States*, 197 U.S. 207 (1905), distinguished voluntary from involuntary peonage on the basis of origin:

> Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law [such as, the fraud statutes noted above]. But peonage, however created, is compulsory service, involuntary servitude.[485]

The effort to deal with the issue of voluntariness shows that even though the statute prohibited a peonage contract and resulted in making one null and void, judges still justified their decisions to convict for peonage by referring to the involuntary nature of the ongoing relationship if not the commencement of it.

This is not to say that the judges ignored the arduous physical conditions peons endured. One judge even went so far as to say that, compared with a life of peonage, "the slavery of ante bellum days was a paradis [sic]."[486] Another judge referred to "those brutalities and outrages which have so greatly shocked the public conscience in some of the peonage cases."[487] But these statements are outliers. In any particular case, the specific physical conditions of either slavery or peonage could be worse, but generally it seems that peons fared better than slaves. The evil of peonage was not in the physical treatment, but in the loss of autonomy.

In recent decades, peonage has largely been classified as involuntary servitude or human trafficking. In 1984, the 9th Circuit Court of Appeals in *United States v. Mussry*, 726 F. 2d 1448 (9th Cir. 1984), expanded the scope of the Anti-Peonage Act. It noted that the most common method of forcing another into involuntary servitude was the use, or threatened use, of law or physical force, but, that "[c]onduct other than the use, or threatened use, of law or physical force may . . . violate the [Thirteenth] amendment and its enforcing statutes."[488] A Supreme Court decision a few years later, *United States v. Kozminski*, 487 U.S. 931 (1988),

---

[485] Clyatt v. United States, 197 U.S. 207, 215 (1905).
[486] United States v. McClellan, 127 F. 971, 977 (S.D. Ga. 1904).
[487] United States v. Clement, 171 F. 974, 976 (1909) (D.S.C. Carolina). This seems to be an earlier instance of the term "shock the conscience" than *Rochin v. California*, 342 U.S. 165 (1952) cited by FRIED & FRIED, *infra* Cover Page at 70 as the origin of the term.
[488] United States v. Mussry, 726 F. 2d at 1453.

held that a conspiracy to violate rights secured by the 13th Amendment must involve "the use or threatened use of physical or legal coercion[,]" and therefore these rights cannot be violated voluntarily.[489]

Later, the emergence of human trafficking as the predominant form of involuntary servitude led to legislation, particularly, the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA") which changed the discussion from "involuntary servitude" to "human trafficking."[490] This Act, in part a reaction to the *Kozminski* decision, changed the relevant jurisprudence in order to recognize nonphysical coercion as an element in human trafficking, and, specifically, that coercion could be established both indirectly and purely psychologically.[491] The problem of initial consent and later coercion in the relationship, as noted in the earlier cases, continues. Loyola Marymount University School of Law Professor Kathleen Kim has suggested that "[i]n actuality, many human trafficking cases appear to fall somewhere between consent and coercion. Those who are willing are easier to coerce."[492] The result is that the laws concerning human trafficking struggle to delineate the parameters of coercion and legal scholars have not yet provided guidance on this issue.[493]

For our purposes, the VTVPA's significance lies also in its proclamation of Congressional intent: that "Congress finds that . . . [t]he right to be free from slavery and involuntary servitude is among those inalienable rights [i.e., those referred to in the Declaration of Independence]."[494] Congress has thus expressed its intent that market thinking should not be applied to deprive people of these rights and subject them to peonage or involuntary servitude. That is, these political rights should not be converted into market commodities.[495]

---

[489] United States v. Kozminski, 487 U.S. 931, 944 (1988); *see also* Katherine Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 450-71 (2011) (arguing that the discussion is around the meaning of "coercion," not "voluntariness," and suggesting a "situational coercion 'framework as a better way to define coercion'").

[490] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 112 Stat. 1466 (codified as amended in scattered sections of 8, 18, 22 U.S.C.) [hereinafter VTVPA].

[491] *See* Kim, *supra* note 489, at 416.

[492] Kim, *supra* note 489, at 461. She has also expressed this distinction as follows: ". . . trafficking victims frequently begin as voluntary economic migrants, whose need and desire for a better life motivate their acceptance of risky employment. This initial consent is later vitiated by their employer's coercive actions. Yet, identifying the location of the shift from initial voluntariness to subsequent coercion is difficult, particularly where coercion is nonphysical." *Id.* at 415.

[493] *Id.* at 414.

[494] VTVPA, *supra* note 490, at 1468.

[495] The phrase "convert political rights into market commodities" is from Marc Rotenberg, *Fair Information Practices and the Architecture of Privacy (What Larry doesn't Get),* 2001 STAN. TECH. L. REV. 1, 2 (2001).

We can see that in peonage, as in slavery, the main wrong was in denying the person's autonomy. This was reason enough to outlaw peonage and make any contract of peonage null and void. But there was another aspect of peonage, not common with slavery, that also made it wrong and justified holding such contracts null and void—its threat to democratic government. As noted above, and as stated in the 1903 *Peonage Cases* opinion, "the peon was not a slave. He was a freeman, with political as well as civil rights."[496] This led Judge Jacob Trieber to declare that peonage was a greater threat to democracy than slavery. His opinion in the 1905 *Peonage Cases* states:

> Congress recognized that in a government like ours—a republic—such a system of peonage was more dangerous to the safety of our republican institutions than slavery was, for a slave was property, and possessed none of the rights of citizenship, could not vote, and had no voice in the administration of the affairs of the nation. On the other hand, the peon, although practically a slave as long as he was indebted to his master or employer, without the privilege of changing his vocation or leaving his master, no matter how small the debt, yet possessed all the rights of citizenship, including the right of franchise. To permit such a condition was deemed dangerous, as in the course of time it might happen that a very large number of people, compelled by their necessities, perhaps, or through ignorance or greed, might thus sell themselves to masters, and thereby come absolutely under their control, and yet, by reason of the privilege to vote, in which they would probably be controlled by their masters, have a sufficient voice in the selection of the officials to determine the result of an election.[497]

It can be concluded that a contract for peonage was declared null and void by Congress and by the federal courts because the resulting condition of peonage deprived the peon of autonomy.[498] The contemporary peonage contract, that of human trafficking, is null and void because Congress has declared that it violates

[496] Peonage Cases, 123 F. 671, 673 (M.D. Ala. 1903).
[497] Peonage Cases, 136 F. at 707-08.
[498] *See* VTVPA, *supra* note 490, at 1468.

an inalienable right as expressed in the Declaration of Independence. While the federal Constitution does not mention inalienable rights, the California Constitution does, so one could infer that such a contract should violate the California Constitution as well. Another reason for declaring a peonage contract null and void was that it posed a threat to our democratic institutions.

The parallel threats to autonomy, inalienable rights, and democracy in the Google and Facebook contracts are evident. Of course, there are significant differences between peonage contracts and those of the current internet behemoths. But couldn't these current contracts also be considered null and void for the same reasons—harm to autonomy, violation of an inalienable right, and threat to democracy? As Judge Harrison Lee Winter in his *Booker* opinion said, "[i]n short, the [peonage] statute must be read not only to render criminal the evil congress sought to eradicate so long ago, but, as well, its twentieth century counterpart."[499] His comments could also apply to peonage's twenty-first century counterpart—the online behavioral-advertising internet service contract.

Many commentators have spoken of the user's relationship with digital technology or social media in terms that reflect a loss of autonomy similar to that in slavery or peonage. These statements have no legal effect, but they highlight the similarities between the relationship of internet service user and peon. Nicholas Carr has described the advertising-based business model as "a modern kind of sharecropping system. Like plantation owners in the American South after the Civil War, a social network gives each member a little plot of virtual land on which to cultivate an online presence through the posting for instance of words and pictures, and then the social network collects the economic value of the member's labor through advertising . . ."[500] Additionally, Tim Wu has written, "Facebook's ultimate success lay in this deeply ingenious scheme of attention arbitrage, by which it created a virtual attention plantation."[501]

Others have compared internet services to feudalism or serfdom. Bruce Schneier stated, "[t]he relationship is more feudal than commercial. The companies are analogous to feudal lords, and we are their vassals, peasants, and—on a bad day—serfs. We are tenant farmers for these companies, working on their land by producing data that they in turn sell for profit."[502] Frank Pasquale has described the relationships as "self-incurred tutelage" and "digital feudalism of virtual

[499] United States v. Booker, 655 F.2d 562, 566 (4th Cir. 1981).
[500] CARR, *supra* note 270, at 31.
[501] WU, *supra* note 37, at 301.
[502] SCHNEIER, *supra* note 201, at 58.

worlds."[503] Jaron Lanier has suggested that "the information economy that we are currently building doesn't really embrace capitalism but rather a new form of feudalism."[504] Jacob Silverman has said that, "we're not just the product, we're also making the product. It's for this reason that some observers have come to think of our relationship to social media as something like feudalism. They call it 'digital serfdom.'"[505]

These comparisons raise the question of the correct terminology for the users of Google and Facebook services. Jaron Lanier has proposed that we should stop calling ourselves "users" because we are not using but being "used."[506] Considering the references to sharecroppers and serfs and the similarities of users to peons, perhaps we should call the users "digital peons."[507]

This review of the legal system's experience with peonage tells us that certain contracts entered into with full, free, and informed consent have been found null and void and without legal effect. The consent of the individual was not sufficient to make the contract effective because society had decided that the relationship established by the contract was too evil to merit support by the legal system. Consent could not legitimize an illegal contract. The key characteristic of these contracts was that they deprived the individual of autonomy. As a matter of principle, it seems reasonable that other contracts that deprive individuals of autonomy would also be found to be null and void and without legal effect.

As noted above, the California Constitution lends support to an argument that such contracts violate that document's declaration of the inalienable rights to "enjoying and defending life and liberty[] . . . and pursuing and obtaining safety, happiness, and privacy." But the California constitution does not specify what "liberty," "happiness," and "privacy" are in regard to contracts.[508] This general

---

[503] PASQUALE, *supra* note 54, at 163, 196.
[504] LANIER, *supra* note 43, at 79.
[505] SILVERMAN, *supra* note 3, at 255.
[506] LANIER, *supra* note 42, at 200.
[507] The term "cyber slaves" would be sibilant, but an overstatement. As would "cyber-self slave." *See* AIKEN, *supra* note 355, at 172. Danielle Allen, University Professor at Harvard, has suggested "serfdom,", so "cyber serfdom" would also be a possibility. *See* Danielle Allen, *The Road from Serfdom*, ATLANTIC, Dec. 2019, at 94-101. *See also* SILVERMAN, *supra* note 3, at 255.
[508] A few California cases merely note that the right of contract is a part of an individual's "liberty" protected by the California Constitution and that contracts are subject to regulation and limitations not prohibited by the California Constitution. *See* In re Moffett, 62 P. 2d 1190, 1194 (Cal. Ct. App. 1937); People v. Pond, 284 P. 2d 793, 799 (Cal. 1955); Lockheed Aircraft Corp. V. Superior Court of Los Angeles County, 171 P. 2d 21, 25 (Cal. 1946). One court has specified the three elements necessary to plead a violation of a privacy right under the Constitution: "(1) a

provision is helpful, but may not provide enough specificity to decide the issue of whether these contracts should be considered null and void. We look, therefore, to contract law.

C. TYPES OF ILLEGAL[509] CONTRACTS

Current contract doctrine restricts the justifications for declaring a contract null and void. In the eighteenth century, however, contracts were often not enforced.[510] The enforcement of a contract was a matter of discretion by Chancery, and only in the nineteenth century did lawyers and judges create the "will" theory of contracts that helped adapt the law of contract to a market economy.[511] The merger of law and equity further subjected a tradition of substantive justice to increasingly objective, formal, legal rules "which were stridently justified as having nothing to do with morality."[512] But in the nineteenth century, judges still occasionally used a broad interpretation of the public policy principle as a "freestanding reason" not to enforce contracts they found corrupt.[513] The historical development of contract law helps explain why market thinking, advances in technology, and the diminished regard for equitable concerns in the law could result in the failure to object to moral wrong in the behavioral-advertising business model. It also helps explain why Google's and Facebook's user contracts have not yet been declared illegal.

While the behavioral-advertising business model may be immoral, that does not mean that a contract used to implement it is necessarily illegal. Moral and legal

---

legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) conduct by the defendant that amounts to a serious, egregious invasion of the protected privacy interest." In re Google Inc. Privacy Policy Litigation, 58 F. Supp. 3d 968, 985 (N.D. Cal. 2014). For an extensive discussion of the right of "privacy" under the California Constitution, *see e.g., Hill v. National Collegiate Athletic Assn*., 865 P.2d 633 (Cal. 1994).

[509] The terms "illegal" and "unlawful" are synonyms and both are used in California to describe contracts that are unenforceable and void under California law. California courts and commentators use the term "illegal" to refer to contracts that the California Civil Code and other commentators refer to as "unlawful." *See, e.g.*, McIntosh v. Mills, 17 Cal. Rptr. 3d 66, 73 (Cal. Ct. App. 2004); 1 WITKIN, SUMMARY OF CAL. LAW §452 (11th ed. 2018); Cal. Civ. Code §1667; 2 FARNSWORTH, *supra* note 1, at 5. "Illegal" is used here because it has a commonly used noun form, "illegality," as compared with the unusual and awkward "unlawfulness."

[510] *See* P. S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 148 (2003).

[511] *See* Daniel Markovits, *Theories of Common Law Contracts,* STAN. ENCYCLOPEDIA OF PHIL. (Sep. 11, 2015), https://plato.stanford.edu/entries/contracts-theories/.

[512] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, 266 (1977).

[513] Zephyr Teachout, *The Unenforceable Corrupt Contract: Corruption in the 19th Century Contract Law*, 35 N.Y. U. REV. OF L. & SOC. CHANGE 681, 688 (2011).

standards differ. In most states, contract law is mainly a product of case law, with certain exceptions (for example, sales under the Uniform Commercial Code), But California has a Civil Code that sets forth broad principles of contract law. The Code itself, however, purports to be simply a codification of common law contract law.[514] And California also has a rich body of case law regarding contracts. And rules regarding contracts, and rules regarding contracts that injure the public welfare are found both in the Code and in the case law. For example, California contract law has a number of terms that it uses to analyze contracts inimical to the public welfare. The California Civil Code and case law both refer to contracts that are "illegal," "unlawful," "unconscionable," "against public policy," "contrary to good morals," and "contrary to the policy of express law."

We can analyze the services contract of the behavioral-advertising business model in terms of three categories of contracts that are illegal (including unlawful): (1) contracts that are unconscionable; (2) contracts against public policy (including those contrary to the policy of express law); and, (3) contracts contrary to good morals. The cases, of course, do not all follow this neat categorization; there is much overlap between these three categories.

1. Contracts Contrary to Good Morals[515]

The discussion above would suggest that the behavioral advertising service contracts of Google and Facebook should satisfy the criterion "contrary to good morals." But, such an assumption would ignore California legislation and court decisions that have established precedents for those specific contracts that satisfy this criterion. Under California law, the category "contrary to good morals" covers different types of contracts. Contracts that have been found to fall into this category include those concerning gambling, marriage, marijuana, prostitution, pornography, hush money, fiduciary duties, rules of professional conduct, and

---

[514] JOHN NORTON POMEROY, THE CIVIL CODE OF CALIFORNIA 50, 56 (1885); Maurice E. Harrison, *The First Half-Century of the California Civil Code*, 10 CAL. L. REV. 185, 186 (1922).

[515] "Good morals" would seem to be closely related to "good faith." California's Commercial Code defines "good faith" as meaning "honesty in fact and the observance of reasonable commercial standards of fair dealing." It also states that "[e]very contract or duty within this code imposes an obligation of good faith in its performance and enforcement." CAL. COM. CODE § 1201 (West 2017); CAL. COM. CODE § 1304 (West 2007); *see also* Woods v. Google, Inc., No. 05:11–CV–1263–JF, 2011 WL 3501403, at *7 (N.D. Cal. Aug. 10, 2011) (noting Google's obligation to carry out its responsibilities in good faith). Margaret Jane Radin has proposed that good faith and fair dealing are an inalienable right. RADIN, *supra* note 329, at 202. But it appears that a user's claim that Google and Facebook had violated this duty might be difficult to sustain.

arbitration.[516] To understand these restrictions on enforcement of contracts, we can review the case law on gambling and marriage.

Virtually at the inception of statehood, California adopted a conflicted policy on gambling. On one hand, it inherited the American common law rule that gambling was a misdemeanor and it considered gambling contrary to good morals.[517] On the other hand, it issued licenses authorizing gambling houses, but prohibited the enforcement of contracts involving gambling debts.[518] This prohibition had deep roots in Anglo–American jurisprudence, originating in 1710 in the English Statute of Anne, which declared gambling debts "utterly void, frustrate, and of none effect, to all intents and purposes whatsoever. . . ."[519] Two early cases before the enactment of the California Civil Code in 1872 clearly demonstrate the prohibition on the enforcement of gambling debts.

First, in the California Supreme Court case, *Bryant v. Mead*, 1 Cal. 441 (1851), the court, noting that Blackstone had said that gaming-houses were public nuisances, went on to say that "[w]agers, which tend to excite a breach of the peace, or are *contra bonos mores,* or which are against the principles of sound policy, are illegal; and no contract arising out of any such illegal transaction, can be enforced. These are principles of the common law which has been adopted in this State . . . ."[520] But this case also raised two other questions. First, did a California statute authorizing the granting of a license to keep a gambling-house, confer a *right to sue* for a gaming debt? The answer was in the negative; the license was protection solely against a *criminal prosecution.*[521] Second, was all gambling wrong? The answer was also in the negative; the innocent playing of cards as a recreation was not illegal, but gaming as a business involving significant stakes was illegal unless licensed.[522]

The other California Supreme Court case prior to the enactment of the California Civil Code, *Carrier v. Brannan*, 3 Cal. 328 (1853), affirmed the rule established in *Bryant*, but emphasized the moral basis for its decision: "It needs no authority or arguments to satisfy this court that the practice of gaming is vicious and immoral in its nature, and ruinous to the harmony and well-being of society."[523]

---

[516] *See* CAL. CIVIL CODE § 1667 and accompanying comments (1872).
[517] *See* discussion *infra* pp. 82-84.
[518] *See* discussion *infra* pp. 83-84.
[519] Metropolitan Creditors Service v. Sadri, 19 Cal. Rptr. 2d 646, 648 (Cal. Ct. App. 1993).
[520] Bryant v. Mead, 1 Cal. 441, 442, 444 (1851).
[521] *Id.* at 444.
[522] *Id.* at 442.
[523] Carrier v. Brannon, 3 Cal. 328, 329 (1853).

California case law after the enactment of the California Civil Code reflects the disapproval of gambling enshrined in the Code. Section 1667.3 states that "that is not lawful which is: . . . 3. otherwise contrary to good morals." An early case, *Shain v. Goodwin*, 46 F. 564 (C.C.N.D. Cal. 1891), involved notes on a debt for gambling with dice. The court cited Civil Code section 1667.3 to the effect that a contract "contrary to good morals" was not lawful. The decision quoted *Irwin v. Williar*, 110 U.S. 499 (1884), in which the U.S. Supreme Court said: "[g]enerally, in this country all wagering contracts are held to be illegal and void as against public policy."[524] The California court mentioned the moral basis for the policy, saying, "[i]n the United States wagering and gaming contracts seem to have met with no countenance from the courts, and consequently in nearly every state they are held illegal, as being inconsistent with the interests of the community, and at variance with the laws of morality." The court refused to enforce the contract.[525] Later cases concerning gambling debts reached the same conclusion.[526] Some of these decisions did not specifically mention section 1667.3 or the phrase "good morals,"[527] but referred to public policy specifically or in general. A number did refer to section 1667.3 and said that contracts for the payment of a gambling debt were "*contra bonos mores*" and unenforceable under that section.[528]

The court decisions noted several points that highlighted the evil nature of gambling. In *Pratt v. Padgett*, 191 P. 39 (Cal. Ct. App. 1920), the court stated that when a contract has for its object the violation of law, a court should *sua sponte* deny any relief to either party. In *Hamilton v. Abadjian*, 179 P.2d 804 (Cal. 1947), the court remarked that even Nevada courts refuse to lend their process to recover losses in gambling transactions.[529] In *Kelly v. First Astri Corp*., 84 Cal. Rptr. 2d 810 (Cal. Ct. App. 1999), the court found that in the absence of a statute authorizing

---

[524] Shain v. Goodwin, 46 F. 564, 565, 567 (Cir. Ct. N.D. Cal. 1891) (quoting Irwin v. Williar, 110 U.S. 499, 510 (1884); Scott v. Courtney, 7 Nev. 419, 421 (Nev. 1872)).

[525] *Id.* at 568.

[526] *See e.g.*, Foster v. Beau De Zart, 108 P. 875 (Cal. Ct. App. 1910) (implying that a transaction was legal because it was not a gambling contract); Pratt v. Padgett, 191 P. 39 (Cal. Ct. App. 1920); Hamilton v. Abadjian, 179 P.2d 804 (Cal. 1947); Lavick v. Nitzberg, 188 P.2d 758 (Cal. Ct. App. 1948); Jamgotchian v. Sci. Games Corp., 371 F. App'x 812 (9th Cir. 2010).

[527] *See* Kyablue v. Watkins, 149 Cal. Rptr. 3d 156, 160 (Cal. Ct. App. 2012) (noting that the legality of a contract may depend on public policy concerns for gambling in general, as not all acts of gambling are criminal in California).

[528] *See, e.g.*, Union Collection Co. v. Buckman, 88 P. 708, 709 (Cal. 1907); Braverman v. Horn, 198 P.2d 948, 949 (Cal. Ct. App. 1948); Kelly v. First Astri Corp., 84 Cal. Rptr. 2d 810, 820, 821 (Cal. Ct. App. 1999); *In re* Sir, No. 07-52029-RLE, 2010 WL 2179177, at *12 (Bankr. N.D. Cal. May 25, 2010); *In re* Camarillo, No. 03-45580-N7, 2005 WL 2203163, at *8 (Bankr. N.D. Cal. May 10, 2005).

[529] In 1983, Nevada changed the law to allow enforcement of gambling debts. *See* NEV. REV. STAT. § 463.368 (2019).

a cheated gambler to sue, the doctrine of *in pari delicto* barred a tort suit by the cheated gambler against the casino. In *Lavick v. Nitzberg*, 188 P.2d 758 (Cal. Ct. App. 1948), the court found that even though draw poker did not fall within the scope of California Penal Code, section 330 (which imposed a fine for gambling), the contract still was illegal under Civil Code section 1667.3. The two judges strengthened their decisions to deny enforcement by noting the prohibition of gambling in section 330 of the Penal Code.[530]

But the most sophisticated analysis of the evil of gambling was in *Metropolitan Creditors Service v. Sadri*, 19 Cal. Rptr. 2d 646 (Cal. Ct. App. 1993). This case articulated a distinction that was perhaps implicit in earlier law, but was never expressed. The court noted that the state's public policy on gambling had changed.[531] The state had passed the California State Lottery Act of 1984,[532] and pari-mutuel horse racing, draw poker clubs, and charitable bingo clubs had become common throughout the state.[533] Thus, the state's public policy on gambling itself, but not on the enforcement of gambling contracts, had changed. As the court said, "while the public policy against [gambling itself] has been substantially eroded, the public policy against [gambling on credit] has not."[534] The court discovered a significant distinction between different types of gambling debts.[535] The court perceived that the evil in gambling was in gambling on credit, not merely gambling itself and it interpreted the applicable precedents as applying to gambling debts that were incurred on credit.[536] The court additionally noted that the Statute of Anne, in fact, had permitted gambling at certain places under certain conditions, but limited such gambling to "ready money only."[537]

The court found addiction to be the special reason for treating gambling on credit differently from gambling itself; gambling debts are characteristic of pathological gambling.[538] The court noted that pathological gambling was prevalent in 2-3 percent of the population according to the Diagnostic & Statistical

---

[530] *See* Kelly v. First Astri Corp., *supra* note 528 at 812-13, 815; *see also* Lavick v. Nitzberg, *supra* note 526 at 759.
[531] Metro. Creditors Service v. Sadri, 19 Cal. Rptr. 2d 646, 650 (Cal. Ct. App. 1993).
[532] CAL. GOV'T CODE § 8880 (West 1984).
[533] *See* LEGIS. ANALYSIS OFF., *Gambling in California: An Overview* (Jan. 1999), https://lao.ca.gov/1998/12998gambling/12998gambling.html#gamblingca.
[534] Metro. Creditors Service v. Sadri, 19 Cal. Rptr. 2d 646, 650-51 (Cal. Ct. App. 1993).
[535] *Id.* at 652.
[536] *Id.*
[537] *Id.* at 651.
[538] *Id.* at 652.

Manual of Mental Disorders.[539] In the court's view, the pathological gambler is "out of control" and that is why:

> [E]nforcement of gambling debts has always been against public policy in California and should remain so, regardless of shifting public attitudes about gambling itself. If Californians want to play, so be it. But the law should not invite them to play themselves into debt. The judiciary cannot protect pathological gamblers from themselves, but we can refuse to participate in their financial ruin.[540]

In another case, *In re Sir*, in which enforcement of the gambling debt was refused, the debtor was a self-confessed "gambling addict."[541]

California law regarding gambling has deep roots, but is conflicted. Originally, gambling was considered by nature "vicious and immoral," "ruinous to the well-being of society," and "inconsistent with the interests of the community."[542] Over time, it lost some of its moral taint, but courts still refuse to enforce gambling debts. In addition, they will *sua sponte* find them unenforceable and refuse to allow a tort suit against a gambling house by a gambler for a gambling-related offense.[543] Today, a major concern underlying nonenforcement is addiction in the form of gambling on credit, particularly by a pathological gambler.[544] Addiction of the compulsive gambler contributes to the loss of self-control and autonomy. Accordingly, enforcing a gambling contract would be contrary to good morals. The contracts of the behavioral-advertising business model could also be described as "vicious and immoral," "inconsistent with the interests of the community" and "addictive." In fact, the internet critic Richard Seymour has said that "[t]he model for research into social media addiction is gambling addiction."[545]

A second set of cases citing the good morals provision of California Civil Code section 1667.3 concerns marriage. In the first case, *Heaps v. Toy*, 128 P.2d 813 (Cal. Ct. App. 1942), a man entered into an oral agreement with a divorced woman that if she did not remarry and would serve as his "companion" for the rest

---

[539] *Id*. at 651-52.
[540] *Id.* at 652.
[541] In re Sir, No. 07-52029-RLE, 2010 WL 2179177, at *1 (Bankr. N.D. Cal. May 25, 2010).
[542] Carrier v. Brannon, 3 Cal. 328, at 329; Shain v. Goodwin, 46 F. 564, at 567.
[543] *See* Bryant v. Mead, 1 Cal. at 444.
[544] *See* Metro. Creditors, 19 Cal. Rptr. 2d at 652.
[545] SEYMOUR, *supra* note 359, at 51.

of his life, he would support her and her two children for the rest of her life. When the man refused to perform the contract, the woman sued.[546] The court found two reasons to deny enforcement of the contract: legislation and morals.[547] At the time, California Civil Code section 1676 provided that, "[e]very contract in restraint of the marriage of any person, other than a minor, is void." Since the contract in this case provided that the woman gave up the chance to marry, it was found in restraint of marriage.[548] But, the court also determined that the contract violated section 1667.3 because the consideration (giving up the chance to marry) was contrary to good morals.[549] The assumption behind the decision was that marriage was a valuable social institution and needed to be encouraged even if that resulted in hardship for a woman.

Later court decisions evidence a change in views of what is contrary to good morals. In the well-known case, *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), Justice Tobriner established the precedent that courts should generally enforce contracts between nonmarital partners despite the contention that such contracts violated public policy. California Penal Code § 269a had previously prohibited "living in a state of cohabitation and adultery." The criminalization of this conduct demonstrated that it was contrary to good morals, but this provision was deleted from the Code before the Marvins' relationship ended.[550] In any case, the enforcement of contracts between nonmarital partners was subject to one condition: that the contract not be "expressly and inseparably based upon an illicit consideration of sexual services."[551] The reason for this exception was that a contract for the performance of sexual services would be "in essence, an agreement for prostitution and unlawful for that reason."[552] Justice Tobriner did not refer to section 1667 in his decision, but his reference to the unlawfulness of an agreement for prostitution confirms that such an agreement would be contrary to good morals.[553]

This decision thus recognized that views of morality had changed from refusing enforcement of agreements between nonmarital partners to enforcing them, and made enforcing these agreements the law of California, except where the relationship was meretricious.[554]

---

[546] Heaps v. Toy, 128 P.2d 813, 814 (Cal. Ct. App. 1942).
[547] *See id.*
[548] *Id*. at 814.
[549] *Id.*
[550] Marvin v. Marvin, 557 P.2d 106, n.4, 114 (Cal. 1976).
[551] *Id.* at 109.
[552] *Id*. at 116.
[553] *See id.*
[554] *See id.* at 110.

In *Alderson v. Alderson*, 225 Cal. Rptr. 610, 612 (Cal. Ct. App. 1986), the couple cohabited for 12 years, held themselves out as married, and had three children together. After they separated, the woman sued that, according to their implied agreement, she had a right to share equally in the property acquired during their cohabitation.[555] The man defended himself on the ground that the implied agreement was unenforceable because the consideration for the implied agreement rested on meretricious sexual services.[556] The court ruled that the implied agreement should be enforced and found three reasons that the agreement did not rest on meretricious services: (1) that the agreement was very general and nonspecific; (2) the agreement was based on "many things," none of which alone was crucial; and (3) it would be illogical to deny the enforceability of contracts between couples cohabiting when cohabitation was so common.[557] This court quoted *Marvin* to the effect that "[t]o equate the nonmarital relationship of today to [prostitution] is to do violence to an accepted and wholly different practice."[558]

In a 2001 case, *Della Zoppa v. Della Zoppa*, 103 Cal. Rptr. 2d 901 (Cal. Ct. App. 2001), the wife alleged an implied contract to share property acquired during cohabitation. The court relied on *Marvin* and *Alderson* to find that the agreement was not based on a meretricious relationship even though it provided that the wife would attempt to bear her husband's children.[559] The court cited three factors: (1) the term "meretricious" referred to prostitution; (2) the agreement contained no explicit reference to meretricious sexual services; and (3) § 1667.3 did not apply because mores had changed.[560] The court quoted *Alderson* to write that, "[i]n today's society when so many couples are living together without the benefit of marriage vows, it would be illogical to deny them the ability to enter into enforceable agreements in respect to their property rights."[561]

A subset of marriage cases denied enforcement and concerned divorce. In *Diosdado v. Diosdado*, 118 Cal. Rptr. 2d 494, 495 (Cal. Ct. App. 2002), the husband and wife signed a marital settlement agreement during their marriage to protect and preserve their marriage. The marital settlement agreement contained a provision for liquidated damages of $50,000 and other consequences if the husband

[555] Alderson v. Alderson, 225 Cal. Rptr. 610, 612 (Cal. Ct. App. 1986).
[556] *Id.* at 613.
[557] *Id.* at 616-17.
[558] *Id.* at 615-16.
[559] Della Zoppa v. Della Zoppa, 103 Cal. Rptr. 2d 901, 903-04 (Cal. Ct. App. 2001).
[560] *Id.* at 905-08.
[561] *Id.* at 907.

was unfaithful.[562] After the husband was unfaithful, the wife sought to enforce the agreement, to which the court refused.[563]

In 1969, the California legislature enacted Civil Code § 4506 (now Cal. Fam. Code § 2310) and changed the grounds for termination of marriage from a fault basis to a marriage breakdown basis. Henceforth, dissolution of marriage was based on irreconcilable differences which caused the irremediable breakdown of the marriage.[564] The court decided that under § 1667 the agreement was unenforceable because it attempted "to impose a penalty on one of the parties as a result of that party's 'fault' during the marriage."[565] This provision was "contrary to the public policy underlying the no-fault provisions for dissolution of marriage."[566] The court, quoting *In re Marriage of Bonds*, 5 P.3d 815 (Cal. 2000), noted that ". . . freedom of contract with respect to marital arrangements is tempered with statutory requirements and case law expressing social policy with respect to marriage."[567]

Two later cases involving divorce also denied enforcement, following the principle set forth in *Diosdado*. First, in *In re Marriage of Barapour*, No. H025603, 2004 WL 348969 (Cal. Ct. App. Feb. 25, 2004), the wife brought a marital dissolution action, but the husband sought to enforce a contract executed by the couple in Iran. The contract severely limited the wife's ground for divorce and deprived her of any share in the community property if she sought divorce.[568] The court held the contract was unenforceable under § 1667.[569] The court said that "the limitation in the Iranian contract on the wife's right to seek a divorce directly contravenes California's no-fault divorce policy."[570]

In re Marriage of Mehren and Dargan, 13 Cal. Rptr. 3d 522 (Cal. Ct. App. 2004) concerned a post-marital agreement under which the husband promised the wife all interest in community property if he used illicit drugs. When the husband used illicit drugs, the wife sued for divorce.[571] Once again, the court ruled that the agreement was unenforceable because it violated public policy favoring no-fault

---

[562] Diosdado v. Diosdado, 118 Cal. Rptr. 2d 494, 495 (Cal. Ct. App. 2002).
[563] *Id.* at 496-97.
[564] CAL. FAM. CODE § 2310 (Lexis 2020).
[565] Diosdado, 118 Cal. Rptr. 2d at 496.
[566] *Id.* at 497.
[567] *Id.*
[568] *In re* Marriage of Barapour, No. H025603, 2004 WL 348969, at *1(Cal. Ct. App. Feb. 25, 2004).
[569] *Id.* at *3.
[570] *Id.* at *3-4.
[571] *In re* Marriage of Mehren and Dargan, 13 Cal. Rptr. 3d 522, 523 (Cal. Ct. App. 2004).

divorce.[572] The court relied on *Diosdado* to decide that the agreement was illegal under section 1667, along with pointing out that the provision in § 578 of the Restatement (Second) of Contracts states, "[a] bargain, the sole consideration of which is refraining or promising to refrain from committing a crime or tort, or from deceiving or wrongfully injuring the promisee or a third person, is illegal."[573]

A marriage dissolution case that showed the limits on the principle of *Diosdado* was *Beale v. Beale,* No. B177640, 2005 WL 2850976 (Cal. Ct. App. Nov. 1, 2005). In the settlement of marriage dissolution, the wife agreed to withdraw a police report accusing the husband of domestic violence.[574] When the wife failed to sign a letter withdrawing the request for action, the court ordered her to sign it over the wife's First Amendment objection.[575] A dissenting judge referred to § 1667 and said that in his opinion the settlement agreement violated that section saying that, "[t]he strong public policy of encouraging victims of domestic violence to file police reports is set forth in California's statutes."[576]

As with gambling contracts found unenforceable, California law on the enforceability of contracts related to cohabitation or marriage changed significantly over time. While marriage is still revered as a valuable social institution, the perception of "good morals" has shifted so it does not exclude cohabitation. Prostitution is still against "good morals," but a relationship based on a number of different factors will not be considered meretricious. Further, California's no-fault divorce and encouragement of victims of domestic violence to report are considered public policy and will render unenforceable a contract contrary to them. These cases show that California's perception of "good morals" has been transformed to give women greater rights in contracts concerning cohabitation and marriage. A similar shift in the understanding of rights in the context of internet contracts could well have significant effects for the enforceability of contracts under the behavioral-advertising business model.

2. Unconscionable Contracts

We next ask whether a contract to implement the behavioral-advertising business model might be found to be unconscionable.The contemporary doctrine of unconscionability dates from the adoption of the Uniform Commercial Code and specifically § 2-302. The UCC was incorporated in the California Civil Code in

[572] *Id.* at 524.
[573] *Id.* at 525.
[574] Beale v. Beale, No. B177640, 2005 WL 2850976, at *1 (Cal. Ct. App. Nov. 1, 2005).
[575] *Id.* at *2.
[576] *Id.* at *5.

1979 and made unconscionability applicable to all contracts, not just to sales of goods.[577] The UCC has been accepted as codifying the common law of unconscionability,[578] but one of its purposes was to replace the common law practice of courts determining that a particular contract clause was "contrary to public policy."[579] As noted below, however, the UCC has not served as a complete substitution for inquiries into a contract's conformity with public policy. In any case, the doctrine as applied is inconsistent, not systematic, or even coherent.[580]

California Civil Code §1670.5 states that:

> (a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.[581]

This provision does not explain what is "unconscionable," but the California Supreme Court, in *Baltazar v. Forever 21, Inc.*, 367 P.3d 6 (Cal. 2016), said that it "refers to an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[582] Ever since Yale Law School Professor Arthur Leff''s 1967 article "Unconscionability and the Code—The Emperor's New Clause,"[583] courts have divided the analysis of unconscionability in a contract into two steps. The first step is to determine whether there is "procedural" unconscionability.[584] The second step is to determine whether there is "substantive" unconscionability.[585] To find that the contract is unconscionable, the court should find both procedural and substantive

[577] Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L. J. 459, 461-62, 464-65 (1995).
[578] De La Torre v. CashCall, Inc., 422 P.3d 1004, 1011 (Cal. 2018).
[579] CAL. CIV. CODE, § 1670.5 (1979).
[580] *See* Prince, *supra* note 577, at 461.
[581] CAL. CIV. CODE, § 1670.5 (1979).
[582] Baltazar v. Forever 21, Inc., 367 P.3d 6, 12 (Cal. 2016) (quoting Sonic-Calabasas A, Inc. v. Moreno, 311 P.3d 184, 194 (Cal. 2013)).
[583] *See* Arthur Allen Leff, *Unconscionability and the Code: The Emperor's New Clause,* 115 U. PA. L. REV. 485, 487 (1967).
[584] *Id.* at 487 (procedural unconscionability deals with the *process* of how the contract is made).
[585] *Id.* (substantive unconscionability deals with the resulting contract).

unconscionability.[586] But, California courts have more recently suggested that all adhesion contracts are procedurally unconscionable.[587] Thus, for an adhesion contract to be found unconscionable in California, only substantive unconscionability needs to be proved.[588] California case law has defined "adhesion contract" to mean "a standardized contract, imposed upon the subscribing party without an opportunity to negotiate the terms."[589] The service contract between a user and Google or Facebook would be an "adhesion contract" under this definition.[590]

Under California case law, procedural and substantive unconscionability are still interrelated. Pursuant to the California Supreme Court decision in *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000), [591] the degree of procedural unconscionability will affect the degree of substantive unconscionability required for a determination that the contract is unconscionable. It seems that the Google and Facebook contracts are procedurally unconscionable because they are adhesion contracts, but compared with other contracts that are procedurally unconscionable, are they more or less substantively unconscionable?

It depends on how "oppressive" or "surprising" the terms are. In discussing procedural unconscionability, California courts determine whether a contract is procedurally unconscionable according to whether there is oppression or surprise.[592]

"Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." [593] The Google and Facebook contracts certainly exhibit "oppression" in the sense used in the cases: there is an enormous inequality of bargaining power between them and their users and there is no negotiation whatsoever over the terms. The issue of "choice" is not

---

[586] *See* Baltazar v. Forever 21, Inc., 367 P.3d 6, 12-13 (Cal. 2016).
[587] Flores v. Transamerica HomeFirst, Inc., 113 Cal. Rptr. 2d 376, 382 (Cal. Ct. App. 2001) ("A finding of a contract of adhesion is essentially a finding of procedural unconscionability").
[588] *See*, FARNSWORTH, *supra* note 1, at 585 ("Most cases of unconscionability involve a combination of procedural and substantive unconscionability, and it is generally agreed that if more of one is present, then less of the other is required").
[589] Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1281 (9th Cir. 2006).
[590] Professor of Law Nancy S. Kim of the California Western School of Law has suggested that, "[i]n addition to the doctrine of unconscionability, courts can apply the doctrine of reasonable expectations" to limit the enforcement of adhesive contracts. Nancy S. Kim, *Ideology, Coercion, and the Proposed Restatement of the Law of Consumer Contracts*, LOYOLA CONSUMER L. REV. (forthcoming), at 7-9, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3577250.
[591] Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d at 690.
[592] Carbajal v. CWPSC, Inc., 199 Cal. Rptr.3d 332, 344 (Cal. Ct. App. 2016).
[593] *Id.* at 344.

so clear. Some court cases say there is no choice when the weaker party has no "opportunity to opt out" of the unconscionable terms[594] or had "no meaningful choice but to accept the contract terms."[595] One case states that "oppression" refers not only to the lack of power to negotiate the terms of the contract, but also to "the absence of *reasonable* market alternatives."[596]

It might appear that there is "choice" in the sense that there exist other search and social media sites and a consumer could choose to use one of these other services. Other court decisions, however, have said that "a contract can be procedurally unconscionable when the party with substantially greater bargaining power presents a take-it-or-leave it contract to a customer—even if the customer has a meaningful choice as to service providers,"[597] and that the terms of an internet service agreement with no opportunity to opt out constitutes "quintessential" procedural unconscionability.[598] These decisions suggest that the Google and Facebook contracts in their terms for the collection, aggregation, and handling of the users' data would appear to be quite oppressive.

The other element in procedural unconscionability, surprise, generally "involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them."[599] California courts have also found the surprise requirement satisfied where the reasonable expectations of the weaker party were disappointed[600] or where "misleading bargaining conduct or other circumstances indicat[e] that a party's consent was not an informed choice."[601] What is a "prolix" document? One court found that a 20-page lease was not long enough to allow a judgment of "surprise."[602] Google's

[594] Jackson v. S.A.W. Entm't Ltd., 629 F. Supp. 2d 1018, 1023 (N.D. Cal. 2009).
[595] Olvera v. El Pollo Loco, Inc., 93 Cal. Rptr. 3d 65, 72 (Cal. Ct. App. 2009).
[596] Morris v. Redwood Empire Bancorp, 27 Cal. Rptr. 3d 797, 807 (Cal. Ct. App. 2005).
[597] Shroyer v. New Cingular Wireless Services, Inc., 498 F. 3d 976, 985 (9th Cir. 2007) (quotations omitted); *see also* Gatton v. T-Mobile, 61 Cal. Rptr. 3d 344, 353 (Cal. Ct. App. 2007).
[598] Aral v. Earthlink, Inc., 36 Cal. Rptr. 3d 229, 238 (Cal. Ct. App. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (holding that the Federal Arbitration Act preempts California's judicial rule regarding the unconscionability of class action arbitration waivers in consumer contracts).
[599] Zaborowski v. MHN Gov't Servs., Inc., 936 F. Supp. 2d 1145, 1151 (N.D. Cal. 2013) (quoting Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1280 (9th Cir. 2006)).
[600] *See* Chavarria v. Ralphs Grocery Co., 812 F. Supp. 2d 1079, 1085-86 (Cal. C. D. 2011).
[601] Olvera v. El Pollo Loco, Inc., 93 Cal. Rptr. 3d 65, 72 (Cal. Ct. App. 2009).
[602] *See* West v. Henderson, 278 Cal. Rptr. 570, 575 (Cal. Ct. App. 1991), *overruled on other grounds by* Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Assn., 291 P.3d 316 (Cal. 2013).

Terms of Service are about ten pages long.[603] The Facebook Terms of Service together with the Data Policy are over 20 pages long, but they differ from instances of what the courts have previously considered "surprise" which mainly have concerned arbitration, limitation of liability, warranty disclaimer, non-compete, and other related short provisions hidden in a much longer text. The Facebook Data Policy is substantially longer than the Terms of Service. It could be argued that the Facebook and Google Terms of Service fail to satisfy the "reasonable expectations" of the user or that other circumstances deprived the user of "informed consent," but it is unclear how successful such arguments would be if made by a litigant challenging the contract. Case law, however, also supports the argument that failure to read a detailed description of terms constitutes "surprise."[604] Most Facebook and Google users do not read the Terms of Service or the Data Policy.[605] Thus, there is an argument backed by case law that could support the belief that their contracts with the companies still satisfied the "surprise" component of procedural unconscionability.

But whether the procedural unconscionability is great enough to lessen the relative burden of substantive unconscionability is still difficult to judge. To err on the side of caution, we can assume that a claim of substantive unconscionability would have to meet the same level of substantive unconscionability as the case law suggests has generally been necessary in the past.

Under California law, substantive unconscionability is present where the unfairness of the contract or one of its terms is extreme.[606] The degree of extremity has been described in a number of cases as sufficient to "shock the conscience."[607] Other cases have stated that the contract or one of its terms must be "unduly harsh,"[608] "unduly harsh or oppressive,"[609] or have "overly harsh or one-sided

---

[603] *See Google Terms of Service*, GOOGLE, https://policies.google.com/terms [https://perma.cc/F9LT-BF8D].
[604] *See* Sabia v. Orange Cty. Metro Realty, Inc., 173 Cal. Rptr. 3d 485, 505 (Cal. Ct. App. 2014), *review granted and opinion superseded sub nom.*, Sabia v. Orange Cty. Metro Realty, 334 P.3d 685 (Cal. 2014); Bruni v. Didion, 73 Cal. Rptr. 3d 395, 411, 413 (Cal. Ct. App. 2008), *modified* (Mar. 24, 2008).
[605] *See* Caroline Cakebread, *You're Not Alone, No One Reads the Terms of Service Agreements,* BUS. INSIDER (Nov. 15, 2017), https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11.
[606] *See e.g.*, Sanchez v. Valencia Holding Co., LLC, 61 Cal. 4th 899, 900 (Cal. 2015).
[607] Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 923 (9th Cir. 2013) (quoting Parada v. Superior Court, 98 Cal. Rptr. 3d 743, 759 (Cal. Ct. App. 2009)).
[608]Grabowski v. Robinson, 817 F.Supp.2d 1159, 1173 (S.D. Cal. 2011) (quoting Davis v. O'Melveny & Myers, 485 F.3d 1066, 1075 (9th Cir. 2007)).
[609] Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893 (9th Cir. 2002).

results."[610] An example of contract terms that courts found to shock the conscience occurred in a telecom services agreement where the arbitration clause would always produce an arbitrator proposed by the telecom company, would preclude institutional arbitration rules that would select a neutral arbitrator, and would require the arbitrator at the outset to apportion the arbitrator's fees between the parties.[611] The court stated that the agreement lay "far beyond the line required to render an agreement invalid."[612]

Another example of a clause that was "overly harsh" or "one-sided" is from a telecom service contract. It contained a confidentiality clause that required any arbitration to remain confidential.[613] The court concluded that:

> [I]f the company succeeds in imposing a gag order, plaintiffs are unable to mitigate the advantages inherent in being a repeat player [in arbitration on the same clause]. This is particularly harmful here, because the contract at issue affects seven million Californians. Thus, AT&T has placed itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, AT&T accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract. Further, the unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct or unlawful discrimination against AT&T.[614]

Neither the Google nor Facebook Terms of Service contain arbitration provisions, so these precedents are not directly applicable. They do, however, illustrate the extremity that is required to constitute substantively unconscionable conduct.

In conclusion, the Google and Facebook Terms of Service are procedurally unconscionable because they are contracts of adhesion and exhibit both oppression

---

[610] Wayne v. Staples, Inc., 37 Cal. Rptr. 3d 544, 555 (Cal. Ct. App. 2006) (quoting Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000)); *see* Martinez v. Master Prot. Corp., 12 Cal. Rptr. 3d 663, 668 (Cal. Ct. App. 2004).
[611] Chavarria v. Ralphs Grocery Co., 733 F. 3d at 923.
[612] *Id.* at 926.
[613] Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2002).
[614] *Id.* at 1152

and surprise. Whether they also constitute substantive unconscionability will depend on whether these contracts or their terms "shock the conscience" or are "overly harsh" or "one-sided." In deciding whether these contracts are substantively unconscionable, one fact that should be considered is the dissimilarity of these contracts with the contracts in the case law. None of the California cases concern the nature of the services themselves, rather than merely an arbitration, limitation of liability, warranty disclaimer, non-compete, or similar clause. Although the behavioral-advertising internet services contract should by its very nature "shock the conscience," it is unclear whether such an unprecedented argument would fit within the narrow doctrinal confines of "substantive unconscionability" as created by California courts. A plausible argument could be made, however, that the California courts could currently find that the Google and Facebook Terms of Service are substantively unconscionable.

3. Contracts Against Public Policy

As noted above, there is some overlap among the categories of contracts against good morals, contracts that are unconscionable, and those against public policy. The concept of public policy was broadly applied in the 19th century and, as noted above, the UCC may have decreased the use of the "public policy" category. But it did not eliminate it. Contracts contrary to good morals, such as agreements to enforce gambling debts, were not only contrary to Civil Code section 1667.3, but were also against "public policy" as noted in the discussion above of *Williar* and *Metropolitan Creditors.*[615] The courts in *Marvin, Diosdado,* and *Mehren* also referred to the "public policy" of no-fault divorce and the court in *Beale* relied on the "public policy" of encouraging victims of domestic violence to file police reports.[616] While the public policy exception to the enforcement of contracts is similar to that for refusing to enforce contracts contrary to good morals and those that are unconscionable, it also differs in important respects. Its scope is broader and grants considerable discretion to judges.

The Restatement (Second) of Contracts § 178, has tried to summarize the reasons for refusing to enforce a contract on grounds of public policy.[617] Generally, courts will enforce contracts without passing on their substance.[618] But, when the

---

[615] *See* Irwin v. Williar, 110 U.S. 499 (1884); Metropolitan Creditors Service v. Sadri, 19 Cal. Rptr. 2d 646 (Cal. Ct. App. 1993).
[616] *See* Beale v. Beale, No. B177640, 2005 WL 2850976 (Cal. Ct. App. Nov. 1, 2005.
[617] RESTATEMENT (SECOND) OF CONTRACTS ch. 8, intro. note (AM. LAW. INST. 1981); *see generally* Cariveau v. Halferty, 99 Cal. Rptr. 2d 417, 420 n.7 (Cal. Ct. App. 2000) (noting the rule of section 178 of the Restatement is expressed in California Civil Code § 1667).
[618] RESTATEMENT (SECOND) OF CONTRACTS ch. 8, intro. note (AM. LAW. INST. 1981);

court decides that the interest in freedom of contract is outweighed by some overriding interest of society, it may refuse to enforce the contract on grounds of public policy.[619] "First, a refusal to enforce the promise may be an appropriate sanction to discourage undesirable conduct, either by the parties themselves or by others. Second, enforcement of the promise may be an inappropriate use of the judicial process in carrying out an unsavory transaction."[620] The Restatement sees the delicate balancing of these two factors with other factors favoring a transaction freely entered into by the parties as the key to the decision on whether to enforce the contract or not. This standard is a helpful general statement, but we look at California law for a better understanding.

California statutes do not contain a general provision covering the "public policy" exception to contract enforcement. Civil Code § 1667.2 states that "that is not lawful, which is: . . . (2) [c]ontrary to the policy of express law, though not expressly prohibited . . . ." This provision does not apply to case law because the term "express law" refers only to statutory law.[621] Therefore, for this provision to apply there must exist a specific statute that does not expressly prohibit the conduct that is the basis of the contract, but expresses a "policy" that the contract violates.[622] There does not appear to be any specific California statute that prohibits conduct that is the basis of the Google or Facebook service contracts.

The other relevant California Civil Code provision, § 1668, states that contracts exempting a party from responsibility for fraud, willful injury, or violation of law are "against the policy of the law."[623] The phrase "the policy of the law" has been interpreted to include "public policy."[624] But the scope of this provision is quite limited and does not appear relevant to the Google or Facebook user contracts.

California case law on "public policy" is not limited to this Code section. The California Civil Code contains many different policy reasons for not enforcing contracts.[625] Some of these rely on statutes, such as the California Government Code, which states in § 12920 that "[i]t is hereby declared as the public policy of

---

[619] *Id.*
[620] *Id.*
[621] CAL. CIV. CODE § 1667 (West 2020); *see* Della Zoppa v. Della Zoppa, 103 Cal. Rptr. 2d 901, 908 (Cal. Ct. App. 2001)
[622] *See* CAL. CIV. CODE § 1667 (West 2020).
[623] CAL. CIV. CODE § 1668 (West 2020).
[624] *See* Iskanian v. CLS Transportation Los Angeles, LLC, 327 P.3d 129, 148 (Cal. 2014) (quoting Civil Code § 1668 and stating "[a]greements whose object, directly or indirectly, is to exempt [their] parties from violation of the law are *against public policy*" [emphasis added] (quoting In re Marriage of Fell, 64 Cal. Rptr. 2d 522, 527 (Cal. Ct. App. 1997)).
[625] *See generally,* CAL. CIV. CODE (West 2020).

this state that . . . ,"(emphasis added) and the California Insurance Code, which states in section 676.1 that "[i]t shall be against public policy for a residential property insurance policy to provide coverage for liability . . . ."(emphasis added). Below we do not discuss the policy reasons based on statutes because they do not seem relevant: no federal or California laws prohibit behavioral-advertising internet service contracts.

California case law has emphasized the role of the legislature in determining "public policy." In a nineteenth century case, *Lux v. Haggin*, 10 P. 674 (Cal. 1886), the Supreme Court said,

> [T]he policy of the state is not created by the judicial department, although the judicial department may be called upon at times to declare it. It can be ascertained only by reference to the constitution and laws passed under it, or (which is the same thing) to the principles underlying and recognized by the constitution and laws.[626]

In the latter half of the twentieth century, California courts have repeated this deference. In *Hentzel v. Singer Co.*, 188 Cal. Rptr. 159 (Cal. Ct. App. 1982), the court said, "[w]e are mindful of the restraint which courts must exercise in this arena, lest they mistake their own predilections for public policy which deserves recognition at law."[627] In *Gantt v. Sentry Insurance*, 824 P.2d 680 (1992), the court said:

> [I]t is generally agreed that 'public policy' as a concept is notoriously resistant to precise definition, and that courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch[.][628]

Deference to the legislature means that a contract that violates a specific statute, such as the Securities and Exchange Act of 1934, is unenforceable because that Act declares the policy of maintaining an honest and fair national marketplace in

[626] Lux v. Haggin, 10 P. at 702.
[627] Hentzel v. Singer Co., 188 Cal. Rptr. at 163.
[628] Gantt v. Sentry Ins., 824 P.2d at 687, *overruled by* Green v. Ralee Eng'g Co., 960 P.2d 1046 (Cal. 1998).

securities a "national public interest."[629] And the public policy deference to the legislature also applies to administrative regulations issued by administrative authorities under authority granted by a statute.[630]

The marijuana case *Bovard v. American Horse Enterprises, Inc.*, 247 Cal. Rptr. 340 (Cal. Ct. App. 1988) also gave an eloquent description of the process of determining "public policy" in California. The court made a strong argument for a narrow interpretation of "public policy:"

> The question whether a contract violates public policy necessarily involves a degree of subjectivity. Therefore, . . . courts have been cautious in blithely applying public policy reasons to nullify otherwise enforceable contracts. This concern has been graphically articulated by the California Supreme Court as follows: [i]t has been well said that public policy is an unruly horse, astride of which you are carried into unknown and uncertain paths, . . . While contracts opposed to morality or law should not be allowed to show themselves in courts of justice, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations, and courts so recognizing have allowed parties the widest latitude in this regard; and, unless it is entirely plain that a contract is violative of sound public policy, a court will never so declare. The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. . . No court ought to refuse its aid to enforce a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled

[629] *See* Cariveau v. Halferty, 99 Cal. Rptr. 2d 417, 424 (Cal. Ct. App. 2000); 15 U.S.C.A. § 78b (West 2010).
[630] *See* Green v. Ralee Eng'g Co., 960 P.2d 1046, 1056, 1061 (Cal. 1998).

> public policy of this state, or injurious to the morals of its people.[631]

Despite this cautionary admonition, the court ruled that the contract was unenforceable.[632]

Two other California Supreme Court cases have taken a broad view of "public policy." In the first, the Court adopted a broad interpretation of what affected the public interest and constituted public policy. In the second, it found public policy not in a state or federal statute or regulation, but in the common law.

The first case, *Tunkle v. Regents of University of California*, 383 P.2d 441 (Cal. 1963), is perhaps the most instructive California precedent regarding the public policy exception. It concerned the public policy exception, but also relied on § 1668 of the California Civil Code which states that contracts exempting a party from liability for future negligence are "against the policy of the law."[633] Mr. Tunkl was treated by a charitable research hospital of the University of California and died from the hospital's negligent treatment.[634] Before entering the hospital, Mr. Tunkl signed a release that covered future negligence by the hospital.[635] California case law was such that an exculpatory clause could not stand if it "affects the public interest."[636] The question was whether the hospital's release "affected the public interest."[637] Justice Tobriner set forth six factors that could indicate that a release affects the public interest.[638] These factors were:

> 1. Was the hospital a business of the type suitable for public regulation?
>
> 2. Was the service of the hospital of great importance to and a matter of practical necessity for the public?
>
> 3. Did the hospital hold itself out as willing to perform services for any member of the public?

---

[631] Bovard v. Am. Horse Enters., Inc., 247 Cal. Rptr. at 343 (quoting Moran v. Harris, 182 Cal. Rptr. 519, 522 (Cal. Ct. App. 1982)) (internal quotations omitted).
[632] *Id.* at 346.
[633] Tunkle v. Regents of University of California, 383 P.2d at 442.
[634] *Id.*
[635] *Id.*
[636] *Id.* at 443.
[637] *Id.* at 442.
[638] *Id.*at 445-45.

> 4. Because of the essential nature of its service, did the hospital have a decisive advantage in bargaining strength?
>
> 5. Did the hospital use a "standardized adhesion contract" that gave no protection against negligence and did not allow the purchaser to pay an additional fee to obtain protection against negligence?
>
> 6. Was the other party's "person or property" placed under the hospital's control?[639]

In *Tunkl*, the hospital satisfied all these factors, but Justice Tobriner made clear that not all factors needed to be satisfied to qualify an agreement as "affecting the public interest."[640]

Clearly, Google and Facebook are not hospitals and their contracts do not specifically attempt to relieve them from future negligence.[641] But in other respects, the six factors could be appropriate factors for determining whether their contracts "affected the public interest" and could be analogized to contracts against the policy of law under section 1668. Certainly, Google and Facebook are businesses suitable for public regulation; like utilities, the services they provide are of great importance and could be seen as a practical necessity for the public; they offer their services to any member of the public with internet access; because of the nature of their services, they enjoy a decisive advantage in bargaining strength; they use a standardized "adhesion contract" that does not allow the user to opt out of surveillance; and the user places his or her "person" (in the sense of the person's extensive personal information) or "property" (the personal data) under the companies' control. Further, Justice Tobriner's opinion also found that it was irrelevant whether the patient was a paying or non-paying patient,[642] so the "free" service of Google and Facebook should not be a reason to distinguish their cases from the logic of the *Tunkl*e decision.

---

[639] *Id.*

[640] *See id*. at 444-45. *See* Benedek v. PLC Santa Monica, LLC, 129 Cal. Rptr. 2d 197, 202 (Cal. Ct. App. 2002) (providing an example of contract's failure to affect the publict interest. "Exculpatory agreements in the recreational sports context do not implicate the public interest and therefore are not void as against public policy").

[641] *See Terms of Service*, FACEBOOK (Oct. 01, 2020), https://www.facebook.com/terms.php (providing no mention of negligence); *Terms of Service*, GOOGLE (Mar. 31, 2020), https://policies.google.com/terms?hl=en-US (providing that the terms do not limit liability for gross negligence).

[642]Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 448 (1963).

The second case that found "public policy" in the common law is *Potvin v. Metro. Life Ins. Co.*, 22 Cal. 4th 1060 (2000). After an insurance company deleted a doctor from its "preferred provider" lists, he sued citing his common law right to a fair procedure and stating that the company should have given him reasonable notice and an opportunity to be heard.[643] The contract between the two allowed its termination "without cause." [644] The doctor argued that the public policy considerations supporting the common law right to fair procedure rendered the "without cause" clause in the contract unenforceable.[645] Justice Joyce L. Kennard in her opinion declared that "California courts . . . are loathe to enforce contract provisions offensive to public policy" and ruled that the termination clause was unenforceable to the extent it purported to limit an otherwise existing right to fair procedure under the common law.[646] In an extensive dissent, Justice Janice Rogers Brown stated that, "[w]e continue to believe that, aside from constitutional policy, the Legislature, not the courts, is vested with the responsibility to describe the public policy of the state." [647] Justice Brown quoted from another California Supreme Court decision, *Santisas v. Goodin*, 17 Cal. 4th 599, XX (1998), to the effect that "[h]istorically, this court has been reluctant to declare contractual provisions void or unenforceable on public policy grounds without firm legislative guidance." The 4-3 decision in *Potvin* would seem to indicate the fragile state of the expansive interpretation of "public policy" in the California Supreme Court.

California law on "public policy" has evolved over the years. It has narrowed since the nineteenth century, but still can apply to many different situations. As one prominent authority on California law has noted, although anything that has a tendency to injure the public welfare is, in principle, against public policy, determining which contracts fall into this vague category is very difficult.[648] The very nature of the public policy exception makes relying on case law doubtful. Public policy is a very expansive term that can apply to a wide variety of situations and is also variable with time and place. It therefore relies little on *stare decisis* and can allow a judge to be creative.[649] Given the unpredictability of determining what constitutes "public policy," the application of "public policy" to deny enforceability of the Google and Facebook contracts is certainly plausible.

---

[643] Potvin v. Metro. Life Ins. Co., 22 Cal. 4th 1060, 1063, (2000).
[644] *Id.* at 1064.
[645] *Id.* at 1063.
[646] *Id.* at 1073.
[647] *Id.* at 1081 (Brown, J., dissenting) (quoting Green v. Ralee Engineering Co., 19 Cal. 4th 66, 71, (1998)).
[648] *See* WITKIN, SUMMARY OF CALIFORNIA LAW, Contracts § 453 (11th ed. 2018).
[649] *Id.*

D. ILLEGALITY

1. Factors Affecting A Decision on Illegality

The discussion above has set forth the California law applicable to the question of the legality of the behavioral-advertising contracts. There are a number of other considerations, however, that could influence a court's balancing of the various factors for and against the legality of such contracts. These are federal government inaction, the tradition of judicial activism in California, procedural issues, changes in mores, changes to the business model, the threat to personhood, threats to a democratic society and democratic theory, paternalism, uncontrolled experiment, and bad beliefs and bad behavior.

a. Federal[650] Government Inaction

As noted above, when California courts are asked to make new law, they often look to the executive and legislative branches for guidance. The absence of any such guidance can embolden a court to act to rectify a serious problem. This may be true in the case of the loss of autonomy for users of Google and Facebook.

The executive and legislative branches of the federal government have not been active in addressing the dangers caused by behavioral advertising. The federal government[651] has not enacted any general privacy legislation and it has not moved to change the business model of internet service companies like Google and Facebook. The Federal Trade Commission (FTC), the main federal agency dealing with Google and Facebook, has recently fined Facebook, and Google's subsidiary

[650] Google and Facebook are active in all 50 states, but only the federal government has the authority to institute rules across the whole country and the world. The Attorney Generals of some states have shown interest in investigating Google and Facebook, but any actions will probably involve antitrust or privacy, not the business model. Kiran Stacey, Kadhim Shubber & Hannah Murphy, *Big Tech feels heat of five investigations*, FIN. TIMES, Oct. 30, 2019, at 4.

[651] For the prospects of passage at the end of 2019 and beginning of 2020, *see* Charlie Warzel, *Will Congress Really Pass a Privacy Bill?* N.Y. TIMES, Dec. 17, 2019, at A26 and Editorial, *Federal Privacy Law Can Keep Tech in Check*, FIN. TIMES, Feb. 3, 2020, at 16. But see the recent Justice Department suit against Google. United States v. Google, Dist. Ct., D. C., case 1:20-cv-03010, filed 10/20/20; Luigi Zingales, *Trump's Google Lawsuit Could Prove a Poison Pill for Biden*, WALL ST. J., Oct. 27, 2020, at A15.

YouTube, but has made no effort to change the business model.[652] Government inaction stems from many factors, but a few quotations show why effective action by the federal government is not likely.

The FTC's Views:[653]

A. "...the FTC staff [in a 2007 staff report] accepted that tracking and targeting had become part of the digital landscape, important for present and future business opportunities."[654]

B. "In a speech given in Washington DC on September 12, [2017,] Maureen Ohlhausen, the acting chair of the Federal Trade Commission in the US, tried to pour cold water on the idea [that politicians and regulators clamp down on Big Tech]. 'Given the clear consumer benefits of technology-driven innovation,' she said. 'I am concerned about the push to adopt an approach that will disregard consumer benefits in the pursuit of other, perhaps even conflicting goals.'"[655]

C. "Mr. Kohm, whose division [of the FTC] prosecutes boiler rooms, advertising scams, and other financial fraud schemes, responded [to questions from FTC employees] that the tech companies were legitimate

---

[652] The FTC fined Facebook $5 billion, but Representative David Cicilline of Rhode Island remarked that, "[t]he F.T.C. just gave Facebook a Christmas present five months early . . . . It's very disappointing that such an enormously powerful company that engaged in such serious misconduct is getting a slap on the wrist." Cecilia Kang, *F.T.C. Approves Facebook Fine of About $5 Billion*, N.Y. TIMES, July 12, 2019, at A1. Cicilline has been called "Big Tech's top threat." Steve Lohr*, Lawmaker May Be Big Tech's Top Threat*, N.Y. TIMES, Dec. 9, 2019, at B1. *See also* Stipulated Order for Civil Penalty, Monetary Judgment, and Injunctive Relief, *USA v. Facebook, Inc*., No. 19-cv-2184 (D.D.C. July 24, 2019); Natasha Singer & Kate Conger, *Google Is Fined $170 Million for Violating Children's Privacy on YouTube,* N.Y. TIMES (Sept. 4, 2019), https://www.nytimes.com/2019/09/04/technology/google-youtube-fine-ftc.html.

[653] Decisions by the FTC that would help resolve the problem of the behavioral-advertising business model would be for it to: (1) declare that the contracts underlying it constituted an "unfair or deceptive" practice under the FTC Act; (2) prohibit certain "unfair" acts of manipulation under § 5 of the FTC Act; and (3) declare that online profiling advertisements were "unfair." *See* Tal Z. Zarsky, *Privacy and Manipulation in the Digital Age*, 20 THEORETICAL INQUIRIES IN LAW 157, 186 (2019); Tal Z. Zarsky, *"Mine Your Own Business!": Making the Case for the Implications of the Data Mining of Personal Information in the Forum of Public Opinion*, 5 YALE J.L. & TECH 1, 38 (2003).

[654] TUROW, *supra* note 93, at 175.

[655] Rana Foroohar, Opinion, *Big Tech Makes Vast Gains at Our Expense*, FIN. TIMES (Sept. 8, 2017), https://www.ft.com/content/e1b5af54-9a2c-11e7-b83c-9588e51488a0.

businesses offering free services, and it was unclear how they had harmed consumers..."[656]

D. "The reason the FTC has done little is not because it lacks authority, but because its officials simply do not believe there is a problem to be solved."[657]

Personal Relations:

A. On September 19, 2019, when Mark Zuckerberg met with Donald Trump at the White House, "Mr. Zuckerberg quickly noted that the president had the highest level of engagement of any world leader on the social network. Mr. Trump—who previously savaged Facebook on a range of issues—immediately adopted a new tone, describing the conversation in social media posts as 'nice.' . . . Mr. Zuckerberg's simple flattery seems to have paid off. Mr. Trump hasn't publicly castigated the company since, and months later, he continues to tell audiences that he is 'No. 1' on the world's largest social network." [658]

B. On October 22, 2019, Mark Zuckerberg had dinner with Donald Trump, "[b]ut looming over the private dinner [was] a question: Did Mr. Trump and Mr. Zuckerberg reach some kind of accommodation? Mr. Zuckerberg needs, and appears to be getting, a pass both on angry tweets from the president and the serious threats of lawsuits and regulation that face other big tech companies. Mr. Trump needs access to Facebook's advertising platform and its viral power . . . Mr. Trump…has been notably softer on Facebook than on Amazon, Google, Twitter or Netflix at a moment when his regulatory apparatus often focuses on the political enemies he identifies in tweets . . . The Justice Department is currently conducting antitrust investigations of the tech giants.But while Google and Amazon face 'mature investigations,' the Facebook inquiry is 'not real at

[656] Nicholas Confessore & Cecilia Kang, *Data Abuses Define Era, But Will F.T.C. Bite?*, N.Y. TIMES, Dec. 31, 2018, at B1.
[657] Mat Stotter, *Democrats Need to Tame the Facebook Monster*, POLITICO (May 18, 2019), https://www.politico.com/magazine/story/2019/05/18/democrats-facebook-stoller-226930.
[658] Mike Isaac, Sheera Frenkel & Cecilia Kang, *Now More Than Ever, Facebook is a 'Mark Zuckerburg Production,'* N.Y. TIMES (May 17, 2020), https://www.nytimes.com/2020/05/16/technology/zuckerberg-facebook-coronavirus.html.

all,' a person who has been briefed on the investigation said. And Facebook has acted like a company with no worries in Washington."[659]

Lobbying:

A. "This year [2017], Google is on track to spend more money than any company in America on lobbying."[660]

B. "The four companies [Amazon, Apple, Facebook, and Google] spent a combined $55 million on lobbying last year [2018], doubling their combined spending of $27.4 million in 2016."[661]

C. "Ms. Pelosi [House majority leader] received nearly $43,000 in total donations for her 2018 re-election campaign from employees and political action committees of Facebook, Amazon and Alphabet, Google's corporate parent—each of which ranked among her top half-dozen sources of campaign cash."[662]

D. "Last month, the industry lobbying group, the Internet Association, which represents Amazon, Facebook and Google, awarded its Internet Freedom Award to Ivanka Trump, the President's daughter and White House senior adviser."[663]

E. "During the 2016 election cycle, [Chuck Schumer, Democratic Senate leader] raised more money from Facebook employees than any other member of Congress...Mr. Schumer also has a personal connection to Facebook: His daughter Alison joined the firm out of college and is now a marketing manager in Facebook's New York office . . . ."[664]

---

[659] Ben Smith, *What's Facebook's Deal with Donald Trump?,* N.Y. TIMES (June 21, 2020), https://www.nytimes.com/2020/06/21/business/media/facebook-donald-trump-mark-zuckerberg.html.
[660] Teachout, *supra* note 399.
[661] Cecilia Kang & Kenneth P. Vogel, *Tech Titans Build Lobbyist Army, Trying to Repel Threats to Power*, N.Y. TIMES, June 6, 2019, at A1.
[662] *Id.* at A16.
[663] *Id*.
[664] Sheera Frankel, et. al., *supra* note 396; Daisuke Wakabayashi, Stephanie Saul and Kenneth P. Vogel, *Kamala Harris and Big Tech: Friendly Ties, and Hesitancy to Regulate*, N.Y. TIMES, Aug. 21, 2020, at B1.

Regulatory Capture:

A. "Google, Amazon, and Facebook are deeply embedded in both parties, and their interests will be protected no matter who is in the White House."[665]

B. "Big Tech has quietly become the dominant political lobbying power in Washington, spending huge amounts of cash and exerting serious soft power in an effort to avoid regulatory disruption of its business model, which is now the most profitable one in the private sector."[666]

C. "On March 24, 2015, the *Wall Street Journal* revealed the existence of a leaked report from the competition bureau of the FTC recommending that Google be prosecuted for abusing its market position by recommending Google services over those of third parties . . . the full commission had, in a very unusual manner, overruled the staff recommendation and decided against prosecuting Google. The *Journal* alleged that the 230 meetings that Google had had at the White House in the run-up to the complaint dismissal had influenced the commission."[667]

D. In 2011, at Senate Judiciary Committee hearings "[i]ndustry lobbyists outnumbered . . . supporters [of a bill to outlaw stalking apps] 54 to 2."[668]

National Security:

A. "Why should Google worry about potential antitrust violations if its monitoring Internet access side by side with the DHS and the NSA? [I]t may be 'too important to surveillance' for the government to alienate the firm."[669]

B. "In June of 2013, Glen Greenwald, writing in *The Guardian*, revealed that in 2009, Facebook, along with Google and Apple (and four

---

[665] TAPLIN, *supra* note 7, at 131. If the Trump campaign believes that Facebook helped win the 2016 election as noted above, the President would seem to be disinclined to hurt it.
[666] Rana Foroohar, *Release Big Tech's Grip on* Power, FIN. TIMES (June 18,2017), https://www.ft.com/content/173a9ed8-52b0-11e7-a1f2-db19572361bb.
[667] TAPLIN, *supra* note 7, at 132.
[668] Alvaro Bedoya, Opinion, *Why Silicon Valley Lobbyists Love Big, Broad Privacy Bills*, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/opinion/silicon-valley-lobbyists-privacy.html.
[669] PASQUALE, *supra* note 54, at 50.

other online service providers), had given the National Security Agency direct access to their worldwide network for the agency's PRISM spying program."[670]

C. "[L]ots of surveillance data moves back and forth between government and corporations. One consequence of this is that it's hard to get effective laws passed to curb corporate surveillance—governments don't really want to limit their own access to data by crippling the corporate hand that feeds them."[671]

Using the Platform to Mobilize:

A. "On January 17, 2012, the film and music industries backed the Stop Online Piracy Act (SOPA): a proposed bill that aimed to crack down on copyright infringement . . . . The bill specifically targeted search engines such as Google that link to pirate sites. The day after the bill was introduced, Google put [an image with the message "[t]ell Congress: please don't censor the web!"] on its search page for 24 hours. The image was viewed by 1.8 billion people . . . the email servers of Congress were overwhelmed, and on January 20, 2012, the chairman of the House Judiciary Committee, Lamar Smith, withdrew the bill."[672]

These examples demonstrate that it is difficult to see how the executive and legislative branches of government will take the initiative to address the business model of Google and Facebook. This leaves the judiciary as a possible actor. As a defense lawyer in a recent prominent case remarked in another context, "[t]he court has a role to play . . . [i]t is the institution that most people have confidence in in these very troubled times."[673] It may also be difficult to see how courts could take the initiative to find this business model illegal, but California has a tradition of judicial activism.

---

[670] TAPLIN, *supra* note 7, at 157.
[671] SCHNEIER, *supra* note 201, at 80.
[672] TAPLIN, *supra* note 7, at 127-28. Google seems to have used "Travis's Law" named after Uber founder Travis Kalanick who forced New York Mayor Bill de Blasio to retreat from a plan to cap Uber's growth by mobilizing Uber's constituency online. Farhad Manjoo, *The New Urban Power Brokers*, N.Y. TIMES, June 21, 2018, at B1.
[673] Comment by Reid Weingarten, a lawyer for Jeffrey Epstein. Ali Watkins, Benjamin Weiser & Amy Julia Harris, *Epstein Accusers Share Their Fury at Justice Denied*, N.Y. TIMES, Aug. 28, 2019, at A19.

b. Tradition of Judicial Activism

The legal system has been weak in responding to the challenges of the unprecedented. But judges have a tradition of responding to new contractual abuses with strong criticism. An example is Justice Frankfurter's dissent in *U.S. v. Bethlehem Steel*, 315 U.S. 289 (1942), in which he criticized the inordinate profits of Bethlehem Steel on government contracts:

> Today it is held that because the circumstances of this case cannot be fitted into a neatly carved pigeonhole in the law of contracts, "daylight robbery," exploitation of the "necessities" of the country at war, must be consummated by this Court. It is said that familiar principles would be outraged if Bethlehem were denied recovery on these contracts. But is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?[674]

The California Supreme Court has a reputation as a pioneer in affirming the rights of the individual against traditional mores, corporations, and the government. The recognition that all adhesion contracts are procedurally unconscionable is one example. A major treatise, *Farnsworth on Contracts*, describes this as California having "gone to the extreme."[675] In the *Marvin* case described above, the California Supreme Court recognized the change in society towards cohabitation and broke new ground in enforcing an oral contract.[676] In three other cases, the California Supreme Court took progressive positions to protect the interests of consumers and gig workers: *People v. Krivda*, 5 Cal. 3d 357 (Cal. 1971), *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (Cal. 2005), and *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (Cal. 2018).

---

[674] U.S. v. Bethlehem Steel, 315 U.S. 289, 326 (1942); *see also* M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 786 (1969).
[675] FARNSWORTH, *supra* note 1, at 278.
[676] *See* Marvin v. Marvin, 557 P.2d 106, n.4, 114 (Cal. 1976).

In *People v. Krivda*, the question the California Supreme Court addressed was whether a householder has a reasonable expectation of privacy concerning items that are thrown away in a garbage can, which is then placed adjacent to the road to be collected, or in the alternative, if the householder abandoned the trash when the householder threw it in the garbage can.[677] The Court found that the placement of one's trash barrels onto the sidewalk for collection was not necessarily an abandonment of one's trash to the police or general public and the defendants' reasonable expectation of privacy was violated by unreasonable governmental intrusion.[678] This decision was a step forward for privacy advocates.[679]

In *Discover Bank*, the California Supreme Court held that a class action waiver was unconscionable and unenforceable when it occurred in an arbitration clause in a consumer contract of adhesion with small amounts of damages and deliberate cheating by the party with superior bargaining power.[680] The clause was unconscionable because it was, in effect, a violation of California Code § 1668 regarding exclusion of culpability.[681] At the time, this decision was a significant victory for consumers.[682]

In *Dynamex Operations,* the California Supreme Court established a clear standard for distinguishing independent contractors from employees, a contentious issue that had long plagued labor law. Under the ABC test set by the Court the hiring entity had to establish three factors to prove that a worker was an independent contractor.[683] A bill that passed the California Senate in September 2019 accepted the ABC test and showed promise of increasing wages and benefits for hundreds of thousands of struggling workers, especially those working for the ride sharing services Uber and Lyft.[684]

---

[677] *See* People v. Krivda, 5 Cal. 3d 357 (Cal. 1971).
[678] *Id.* at 366.
[679] This decision was overruled by the U.S. Supreme Court in *California v. Greenwood* 486 U.S. 35 (1988), discussed previously on page 56 which held that a homeowner did not have a reasonable expectation of privacy in their trash. It is possible that a decision of the California Supreme Court holding the Google and Facebook contracts illegal could be overruled by the U.S. Supreme Court, but generally the U.S. Supreme Court defers to the lower federal courts' interpretation of State law. *See e.g.*, Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415, 203 L. Ed. 2d 636 (2019).
[680] Discover Bank v. Superior Court, 36 Cal. 4th 148, 162-63 (Cal. 2005),
[681] *Id.*
[682] Later, however, its holding was overruled by an opinion of Justice Scalia in a 5-4 decision by the U. S. Supreme Court. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).
[683] Dynamex Operations West, Inc., v. Superior Court, 4 Cal. 5th 903, 957, 416 P. 3d 1 (2018) reh'g denied (June 20, 2018).
[684] Miriam Pawel, Opinion, *California Calls It 'Feudalism*', N.Y. TIMES, Sept. 14, 2019, at A27.

In 1974, the California Supreme Court did express the need for the law to reflect changed circumstances. Justice Tobriner's opinion in *Green v. Superior Court*, 517 P. 2d 1168 (1974), stated:

> In taking a similar step today [responding to the changes wrought by modern conditions by discarding outworn common law doctrines], we do not exercise a novel prerogative, but merely follow the well-established duty of common law courts to reflect contemporary social values and ethics. As Justice Cardozo wrote in his celebrated essay 'The Growth of the Law' chapter V, pages 136—137: '[a] rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the Mores of the day, may be abrogated by courts when the Mores have so changed that perpetration of the rule would do violence to the social conscience. . . . This is not usurpation. It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past.[685]

California judicial decisions in the future could also reflect changes in social values and ethics to outlaw the manipulation and loss of autonomy inherent in the behavioral-advertising business model.

c. Procedural Issues

A court in California will not have the chance to rule on the illegality of the Google and Facebook contracts unless someone brings this claim to the court. A suit brought by a user of Google or Facebook, could make claims based on contract, statutory violation, or tort, while raising the issue of illegality. According to the Terms of Service of Google and Facebook, the suit could be brought in either a federal court in the Northern District of California or in a state court.[686] Ordinarily, the plaintiff would have to raise the question of illegality of the contracts, but courts

---

[685] Green v. Superior Court, 517 P. 2d at 1184.

[686] *See* GOOGLE PRIVACY & TERMS, https://policies.google.com/terms (last visited Oct. 7, 2020), and FACEBOOK TERMS OF SERVICE, https://www.facebook.com/legal/terms (last visited Oct. 7, 2020).

do have the authority to raise it *sua sponte*.[687] In a 19th century case, the California Supreme Court in discussing its reversal of a case on points which one of the parties did not have the opportunity to discuss, said, "the court is bound to satisfy its own conscience, and cannot shut its eyes to the fact, although it is not put in issue. A court of equity will not allow itself to become a handmaiden of iniquity of any kind. It intervenes, not for the sake of the party who is benefited by the intervention, but for the sake of the law itself."[688]

A suit claiming the illegality of a contract is usually filed with breach of contract as the main claim. But in this case, a claim of breach of contract would seem to contradict the claim that the contract was void.[689] A claim of illegality could be added to current or future suits against Google or Facebook alleging other claims under federal statutes (such as the Wiretap Act, the Stored Communications Act, and the Electronic Communications Privacy Act); California statutes (such as the California Computer Crime Law, and the California Invasion of Privacy Act); the California Constitution; and the common law. One specific claim could be an allegation of a violation of an "autonomy privacy" right. The California Supreme Court established a right of "autonomy privacy" in *Hill v. National Collegiate Athletic Assn*., 865 P. 2d 633 (1994). This right concerns an interest in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference.[690] But the protection of this right "is to be determined from the usual sources of positive law governing the right to privacy—common law development, constitutional development, statutory enactment, and the ballot arguments accompanying the Privacy Initiative."[691] This possible claim deserves further study.

Prior cases against Google and Facebook seem to have been brought in federal court in California.[692] Under the Federal Rules of Civil Procedure, a

---

[687] FARNSWORTH, *supra* note 1, vol. 2, at § 5.1.
[688] Kreamer v. Earl, 27 P. 735, 737 (1891).
[689] A claim of breach of contract has been made in litigation against Google in *In re Google Privacy Litigation*, Case No. C-12-01382-PSG, 2013 WL 6248499 (N.D. Cal. 2013) at *1. A contract-based claim of breach of implied covenant of good faith and fair dealing has been made against Facebook in *In re Facebook Inc. Consumer Privacy User Profile Litigation*, MDL 2843, Case No. 18-MD-2843-VC, First Amended Consolidated Complaint, at v, https://cand.uscourts.gov/vc/fbmdl.
[690] Hill v. National Collegiate Athletic Assn., 865 P. 2d at 654.
[691] *Id*. at 654-55.
[692] Professor Radin has said that federal courts seem to ignore due process concerns in considering whether to declare certain kinds of contracts or clauses unacceptable. She sees the prospect for these courts dealing with the issue as "grim," but does not seem to consider the possibility of changing mores as discussed in the text below. Margaret Jane Radin, *The Fiduciary State and*

plaintiff must show subject-matter jurisdiction (Rule 12(b)(1)) and assert a claim on which relief can be granted (*see* Rule 12(b)(6)); otherwise a defendant may ask the court to dismiss the suit. Suits against Google, Facebook, and others alleging injury to data privacy interests for disclosures of personal information have had difficulty in satisfying the requirements for Rule 12 (b) (1) (often called "standing"). Unless standing is conferred by a statute or the Constitution, the plaintiff must establish it by showing (1) injury in fact, which is neither conjectural or hypothetical; (2) causation, such that a causal connection between the alleged injury and offensive conduct is established; and (3) redressability, or a likelihood that the injury will be redressed by a favorable decision.[693] In data privacy cases, it has been difficult for plaintiffs to show injury-in-fact. As Paul S. Grewal, United States Magistrate Judge of the U.S. District Court in Northern California, wrote in 2013:

> [I]n this district's recent case law on data privacy claims, injury-in-fact has proven to be a significant barrier to entry. And so even though injury-in-fact may not generally be Mount Everest, as then-Judge Alito observed, [694] in data privacy cases in the Northern District of California the doctrine might still reasonably be described as Kilimanjaro.[695]

But the climb might not be that steep for two reasons. First, California case law on illegal contracts described above seems to indicate that the specific harm of the individual contract is not as important as the abstract harm to society as a whole. This could be true in a case claiming the illegality of the Google and Facebook contracts as well. Second, in *In re Facebook Privacy Litigation*, 192 F. Supp. 3d 1053 (N.D. Cal. 2016), Judge Ronald M. Whyte said that "a California breach of contract claim for nominal damages may support [federal court] standing."[696] In a pending case against Facebook, Judge Vince Chhabria ruled that the dissemination

---

Private Ordering, *in* CONTRACT, STATUS, AND FIDUCIARY LAW 326-27 (Paul B. Miller & Andrew S. Gold, eds. 2016).

[693] In re Facebook Internet Tracking Litigation, 140 F. Supp. 3d 922, 930 (N. D. Cal. 2015).

[694] Danvers Motor Co. Inc. v. Ford Motor Co., 432 F. 3d 286, 294 (3rd Cir. 2005).

[695] In re Google Inc. Privacy Policy Litigation, Case No. C-12-01382-PSG, 2013 WL 6248499 (N.D. Cal. 2013). Perhaps a plaintiff alleging contract illegality could avoid a challenge claiming no injury-in-fact by asking the court, under Rule 201 of the Federal Rules of Civil Procedure, to take "judicial notice" of the Mueller Report and the White House Notice of September 10, 2019, and other government reports showing the deleterious consequences of social media, *supra* note 393 and accompanying text. For an example of "judicial notice" see *In re Yahoo Mail Litigation*, 7 F. Supp. 3d 1016, 1023-24 (N.D. Cal. 2104).

[696] In re Facebook Privacy Litigation, 192 F. Supp. 3d at 1060.

of the plaintiffs' sensitive information to third parties in violation of their privacy was sufficient to confer standing.[697] Finally, in *Patel v. Facebook*, Inc. 932 F. 3d 1264 (9th Cir. 2019), a $35 billion class action suit filed in California federal court, the court ruled that a violation of the Illinois biometric-data-privacy statute injures an individual's concrete right of privacy and alleges a concrete injury-in-fact.[698] From these cases it appears that standing is not an insuperable barrier to a suit against Facebook or Google.

Satisfying the requirement of Federal Rule of Civil Procedure 12(b)(6) [699] to allege sufficient facts to avoid dismissal has also been difficult. The applicable federal statutes that grant standing, such as the Wiretap Act or the Stored Communications Act, often are narrowly drafted with a particular purpose that does not cover privacy abuses.[700] The Wiretap Act's definition of "contents" of an electronic communication in a way that excludes information that Facebook intercepts through the use of cookies has prevented plaintiffs from successfully alleging sufficient facts.[701] The Stored Communications Act only contemplated temporary storage of data, but Facebook's persistent cookies resided permanently on the user's browser.[702] In a suit against Google under the California Consumers Legal Remedies Act, the court found that the plaintiffs could present no caselaw to support their interpretation of the word "sale" in the Act as including the barter of personal information for free services.[703] The court added that, "California federal courts have expressly rejected defining 'sale' as to include 'transactions' based on non-tangible forms of payment, including internet usage information specifically."[704] A suit against Google or Facebook would probably not be able to rely on a violation of either the Wiretap Act or the Stored Communications Act.

A suit against Google or Facebook should be a class action since Google and Facebook have a significant amount of users who have suffered similar harm. One hurdle these suits would face is comporting to the requirements of Federal Rule

---

[697] In re Facebook Inc. Consumer Privacy User Profile Litigation, MDL 2843, Case No. 18-MD-2843-VC, Pretrial Order No. 20, at 14, https://cand.uscourts.gov/vc/fbmdl.
[698] Patel v. Facebook, Inc. 932 F. 3d at 1267.
[699] California has a civil rule that mirrors the Fed. R. Civ. Pro 12(b)(c). *See* CAL. CIV. PROC. CODE § 438 (West 2019).
[700] *See e.g.*, 18 U.S.C.S. § 2520 (providing civil remedies for persons who's "wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter [18 USCS §§ 2510 et seq.]").
[701] In re Facebook Internet Tracking Litigation, 140 F. Supp. 3d 922, 935 (N.D. Cal. 2015).
[702] *Id.* at 936.
[703] In re Google Inc. Cookie Placement Consumer Privacy Litigation, 806 F. 3d. 125, 153 (3rd Cir. 2015).
[704] *Id.*

of Civil Procedure 23, which governs class actions. For example, the suit would have to show that the class is so numerous that joinder of all parties was impractical and that there were questions of law or fact common to the class.[705] In the past, plaintiffs have been able to overcome objections to class certification in suits against the companies.[706] In *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F. 3d 979 (9th Cir. 2015), the court defeated Google's challenge to class certification that asserted the action did not satisfy the requirement of Rule 23 (b) (3) that, "the questions of law or fact common to class members predominate over any questions affecting only individual members." Additionally, in *Patel v. Facebook*, 932 F. 3d. 1264 (9th Cir. 2019), the court rejected Facebook's challenge to class certification that complained that the class action was not "superior to the other available methods for fairly and efficiently adjudicating the controversy" as required under Rule 23(b)(3). Based on the cases out of California, a class certification challenge should not be an impossible hurdle for a class action suit against Facebook or Google.

Any individual contemplating such a suit would face a powerful opponent in Facebook or Google with virtually unlimited resources, but a class-action law firm, such as Edelson PC,[707] with possible assistance from organizations such as the American Civil Liberties Union, the Electronic Frontier Foundation, the Electronic Privacy Information Center, and the Center for Democracy and Technology could mount an impressive challenge.[708]

d. Changing Mores

The judicial system has always faced the challenge of its relationship to society. Should judges try to foresee the direction society is moving and expedite its movement or should they wait until society has already moved and the judicial system is already lagging behind? Regardless of a judge's answer to this question, the law must change as society changes. The question is only how quickly. As Samuel D. Warren & Louis D. Brandeis declared in their seminal article describing the right of privacy, "[p]olitical, social, and economic changes entail the recognition of new rights, and the common law in its eternal youth, grows to meet

---

[705] *See* FED. R. CIV. PRO. 23.
[706] *See* Patel v. Facebook, 932 F. 3d. 1264 (9th Cir. 2019); Pulaski & Middleman, LLC et al. v. Google, Inc., 802 F. 3d 979 (9th Cir. 2015).
[707] Conor Dougherty, *Jay Edelson, the Class-Action Lawyer Who May Be Tech's Least Friended Man*, N.Y. TIMES (Apr. 4, 2015), http://nytimes.com/2015/04/05/technology/unpopular-in-silicon-valley.html?_r=0.
[708] All these organizations assisted in the case *Patel v. Facebook*, 932 F.3d 1264 (9th Cir. 2019).

the demand of society."[709] Speaking of the creation of new rights, they said "[t]his development of the law was inevitable."[710]

One of the most important truths of the recent past has been that significant change in morals in liberal democracies (e.g., attitudes toward gambling, cohabitation, drug use, sexual harassment, and gay marriage) has been possible when the society was ready for it. Journalist Malcolm Gladwell's concept of the "tipping point"[711] helps to explain many mysterious changes that mark everyday life by describing them as epidemics. Three concepts at the heart of this idea are (1) contagiousness, (2) little causes have big effects, and (3) change happens at one dramatic moment.[712] The tipping point suggests that effecting change relies on a few dedicated people, the so-called connectors, mavens, and salesmen, and on factors such as stickiness and context.[713] The tipping point, however, seems to apply more to marketing behavior than to moral changes. As to social mores, New Yorker writer Adam Gopnik has remarked that the way that change has happened is not by hectoring and calling it necessary, but by moving it into the realm of the plausible: "once something is plausible...it has a natural momentum toward becoming real." [714] This "natural momentum" is implemented by norm entrepreneurs and information cascades as described by Harvard Law Professor Cass Sunstein.[715] Momentum can be generated by awareness that causes a public outcry. Financial Times columnist Rana Foroohar has opined that consumers are not troubled by many things, such as algorithmic credit biases, until they are aware of them:"I suspect that if we all knew how precisely we are being tracked and how richly we are being monetised by the platform tech companies, there would be more of a public outcry." [716] Perhaps Shosanna Zuboff's book *The Age of Surveillance*

---

[709] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
[710] *Id.*
[711] MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS MAKE A BIG DIFFERENCE 9 (2002). These changes can become "behavioral contagion." ROBERT H. FRANK, UNDER THE INFLUENCE 7 (2020).
[712] *See* GLADWELL, *supra* note 711, at 9.
[713] *See id.*, 34, 38-59, 60-69, and 70-87.
[714] ADAM GOPNIK, A THOUSAND SMALL SANITITES: THE MORAL ADVENTURE OF LIBERALISM 50 (2019).
[715] CASS R. SUNSTEIN, HOW CHANGE HAPPENS 8-10 (2019). Former tech insiders, such as Roger McNamee and Tristan Harris, could help promote a "tectonic shift." Brian Barth, *The Defector*, NEW YORKER, Dec. 2, 2019, at 32. Princeton Philosophy Professor Kwame Anthony Appiah has suggested that honor, properly understood, can also play a role. It can bind the private and the public together and lead from individual moral convictions to the creation of associations, meetings, petitions and public campaigns that are essential to the final success of a political movement proposing a moral revolution. *See* KWAME ANTHONY APPIAH, THE HONOR CODE: HOW MORAL REVOLUTIONS HAPPEN 178 (2010).
[716] Rana Foroohar, *America' new antitrust agenda*, FIN. TIMES, Feb. 4, 2019, at 9.

Capitalism will serve as the information industry's *Silent Spring* as suggested by Chris Jay Hoofnagle.[717] Or maybe Professor Liao, mentioned above, will decide that new information has persuaded him that we have a moral duty to leave Facebook.[718]

Seeing the Google and Facebook behavioral-advertising contracts as immoral, unconscionable, and against public policy would be a moral change that could occur as the result of a combination of factors. These could include the constant drip of privacy violations by Google and Facebook, a growing public understanding of the risks of collection and use of personal data,[719] an especially egregious and personally compelling addiction story, or the results of a study on the neurological effects of digital addiction.[720] One can see the beginnings of such a change. In 2016, the positive press that the tech giants had enjoyed turned negative.[721] In 2017, Rana Foroohar, speaking of Google, Facebook, and Amazon, said that they "are increasingly being seen not just as business threats, but moral hazards as well."[722] In the past four years the share of Americans who think technology companies have a negative impact on the U.S. has nearly doubled.[723] In 2019, Nir Eyal, wrote a book on how to free oneself from tech addiction and B. J. Fogg, the creator of "captology," has said that "[a] movement to be 'post-digital' will emerge in 2020 . . . . We will start to realize that being chained to your mobile phone is a low-status behavior, similar to smoking."[724]

---

[717] Chris Hoofnagle, "Zuboff's book is the information industry's Silent Spring." Dust jacket, ZUBOFF, *supra* note 56.

[718] *See* Liao, *supra* note 316 and surrounding discussion.

[719] For example, Americans might have a better appreciation of the possible negative consequences if they learned how the extensive repositories of personal data available not only from the public sector, but also from the private sector enabled the Nazis to efficiently round up, transport, and seize the assets of Jews. Pamela Samuelson, *Privacy as Intellectual Property*, 52 STAN. L. REV. 1125, 1143-44 (2000).

[720] A speculative example of a future scientific study: The question of whether the millennial generation lacked fully mature prefrontal cortexes and the accompanying executive function and judgment. Is it possible that the maturing of the prefrontal cortex can only occur within a specific critical period in adolescence; that the dopamine effects of intense screen interaction by adolescents adversely affect the prefrontal cortex and prevent its maturation during this time window; and as a result, the prefrontal cortex of a generation of adolescents that engaged in much screen time may never fully mature?

[721] Rurik Bradbury, *Twilight of the Tech Idols,* N.Y. TIMES, Oct. 11, 2019, at A27.

[722] Rana Foroohar, *Silicon Valley has too much power*, FIN. TIMES, May 15, 2017, at 9.

[723] Pilita Clark, *Facebook's biggest threat is its chief's fatal self-belief*, FIN. TIMES, Oct. 7, 2019, at 18.

[724] *See* Nellie Bowles, *5 Years After 'Hooked,' Author Has Antidote to Tech Addiction*, N.Y. TIMES, Oct. 7, 2019, at B1.

But it seems likely that such a change would come only after current users and institutions that support Google and Facebook recognize the immorality of the behavioral-advertising business model. Achieving this recognition would require an effort by church members to ask whether their church's use of Facebook was an endorsement of the ethics of the company's business model; by school students to ask their schools why a profit-making company with an immoral business model is given the advantage of free publicity by the school;[725] and for university students and alumni/ae to question why the university is promoting the use of Facebook, but not that of Apple versus Dell computers. Students and alumni/ae could also question their universities as to whether the schools are undermining their mission and demeaning students and alumni/ae by promoting a service with the values expressed in Mark Zuckerberg's messages quoted above (contempt, not respect, for a user's dignity, privacy, and autonomy). Efforts such as these by norm entrepreneurs could change the moral climate and provide an environment in which the employees of Facebook and Google could find social support for a decision to leave the companies.[726]

We may be seeing this change happening now. New Yorker writer Andrew Marantz has noted that "[w]ithin just a few years, the general public's attitude toward social media has swerved from widespread veneration to viral fury."[727] In May, 2019, noted digital commentator Wade Roush wrote, "[w]ithout revenue from emotion-pumped advertising, Facebook would wither and there could never be another social-networking-company that reaches its planetary scale. But I believe those would be <u>good</u> things."[728] In such an environment, a judge's decision to find the contracts illegal could find social acceptance.

Some would find it ironic that the norm entrepreneurs leading this change might rely on Google and Facebook to destroy their business model; others might

---

[725] Some promising signs: Mark Zuckerberg's alma mater, Exeter, has established a course in the Religion Department "Religion 597: Silicon Valley Ethics: Case Studies in the World of High Tech" taught by Peter Vorkink, an Episcopal Priest, that poses questions such as "Have we unwittingly paid for convenience with the erosion of fundamental values?" The course is reportedly very popular, https://www.exeter.edu/academics/courses. Further, at Harvard University, where Mark Zuckerberg studied, the course "Tech Ethics" taught by Michael Sandel is now the most popular undergraduate course. Lawrence Bacow, *Allston in focus*, HARV. MAG., 3 (Nov.-Dec., 2019). Finally, in 2018, Sergei Brin's and Larry Page's alma mater, Stanford, planned an initiative to focus on "ethics, society and technology." Andrew Jack & Hannah Kuchler, *Stanford to add ethics to its technology teaching*, FIN. TIMES, June 4, 2018, at 4.

[726] For an example, *see* Editorial, *Employees can help to make Big Tech ethical*, FIN. TIMES, July 22, 2019, at 16.

[727] Andrew Marantz, *The More Things Change*, NEW YORKER, Sept. 30, 2019, at 74.

[728] Roush, *supra* note 311, at 28 (emphasis added). For a boycott of Facebook by advertisers, see Tiffany Hsu & Mike Isaac, *Count Us Out, Facebook*, N.Y. TIMES, July 1, 2020, at B1.

find it unrealistic. The above discussion suggests that these companies might adjust their algorithms to decrease or eliminate cascades that criticize or threaten their current business model.[729] Or they might use professional "influencers" to counteract the efforts of the norm entrepreneurs.[730] But we will never know because either their algorithms are closely guarded business secrets, or because artificial intelligence has made them unexplainable to humans.[731] The fact that these companies are able to take these actions strengthens the argument of this essay: that the behavioral-advertising business model is immoral, and contracts implementing it are contrary to good morals, unconscionable, and contrary to public policy.

e. Changes to the Business Model

Changes in the environment could force changes to the business model of Google and Facebook that would render nugatory any court decision on illegality.[732] Although Mark Zuckerberg has vowed not to change Facebook's business model,[733] change could arise from a number of sources.

First, the business model may be inherently defective. Growth has been the lifeblood of the behavioral-advertising business model. The market-based system forces the companies to keep growing. But as Brian Wieser, an analyst at Pivotal Research, has said of Facebook and Twitter, "there are limits to growth; the market cannot grow forever. The faster they've been growing in recent years, the sooner

---

[729] Siva Vaidhyanathan's hope that "[w]e could even use Facebook to mount campaigns to rein in Facebook" seems unrealistic. Siva Vaidhyanathan, *Don't Delete Facebook. Do Something About It.*, N.Y. TIMES (Mar. 24, 2018), https://www.nytimes.com/2018/03/24/opinion/sunday/delete-facebook-does-not-fix-problem.html.

[730] *See* Annalisa Quinn, *Everyone Wants to 'Influence' You*, N.Y. TIMES MAG. (Nov. 20, 2018), https://www.nytimes.com/2018/11/20/magazine/everyone-wants-to-influence-you.html.

[731] John Herrman, a technology reporter for The New York Times, has asserted that "[w]e may never understand the extent of Facebook's influence on our politics—and not because Facebook doesn't know, but because it does." John Herrman, *How Secrecy Fuels Facebook Paranoia,* N.Y. TIMES MAG., Jan. 20, 2019, at 18.

[732] Changes greater than simply to the business model are possible. *See* GEORGE GILDER, *Life After Google* (2018) (foreseeing the end of Google's dominance in a future of the blockchain and its derivatives). Also, four pending cases against Google may cost it some money, but they seem unlikely to affect the business model because they all target specific acts, rather than the business model itself. *See* Dinerstein v. Google, *LLC*, Case No. 19-CV-04311 (N.D. Ill. June 26, 2019); Arizona v. Google LLC, Case No. 2020-006219 (Ariz. Super. Ct. 2020); Brown et al. v. Google LLC et al., Case No. 20-03664 (N.D. Cal. 2020); McCoy v. Alphabet Inc. et al., Case No. 5:20-CV-05427 (N.D. Cal. 2020).

[733] *See* Richard Waters, Tim Bradshaw, Barney Jopson & Hannah Kuchler, *Zuckerberg faces Capitol Hill grilling*, FIN. TIMES: THE WORD (Apr. 10, 2018, at 3:43PM), http://blogs.ft.com/the-world/liveblogs/2018-04-11/.

they were getting there."[734] By 2018, Facebook had almost fully saturated its most important markets in the United States and Europe.[735] It may also have "reached the limit of how much advertising its newsfeed can show."[736] Growth has been slowing and it has been opined that Facebook, in order to mitigate the possibility of running out of new users, should mine more data from current users.[737] Further, the numbers of users may be incorrect if one considers the number of fake accounts. In 2019, it was reported that Facebook deleted 800,000 "false" accounts a quarter, equivalent to one-third of its monthly active users, and that fake review pages were rife on Facebook.[738] Facebook has tried to lessen the impact of declining growth in users by trying to engage them more while also gathering more data from them, but this has been met with resistance from users.[739]

The current business model is under question. According to Jaron Lanier, the only hope for social networking sites from the business point of view is for the appearance of a "magic formula" which provides an acceptable method of violating privacy and dignity.[740] Otherwise, he believes that Google's and Facebook's business model of free information, surveillance, and manipulation, with insufficient user rights is not sustainable as technology advances. He asserts that giant remote companies owning everyone's digital identities become "too big to

---

[734] *See* Kate Conger, *Snap's Drop in Active Users Could Signal a Social Media Peak*, N.Y. TIMES (Aug. 7, 2018), https://www.nytimes.com/2018/08/07/technology/snapchat-users.html.
[735] *See* Mike Isaac, *Its Woes Mounting, Facebook Reports Slowing User Growth*, N.Y. TIMES, Oct. 31, 2018, at B7; Mike Isaac, *Facebook's Vision for the Future: Less News Feed, More Stories*, N.Y. TIMES (Oct. 30, 2018), https://www.nytimes.com/2018/10/30/technology/facebook-earnings-growth.html.
[736] Hannah Kuchler, *Facebook investors wake up to era of slower growth*, FIN. TIMES (July 27, 2018), https://www.ft.com/content/84a9e6c8-9075-11e8-b639-7680cedcc421.
[737] *See*, LEX, *Facebook/EU: bare-faced cheek*, FIN. TIMES, (Apr. 19, 2018) ("Much is made of the idea that Facebook will run out of new users in three years if uptake continues at its present pace."); Hannah Murphy, *Facebook's growth slows as it reaches maturity*, FIN. TIMES, at 14 (Jan. 31, 2020).
[738] *See* LEX, *Facebook: false friends*, FIN. TIMES, Feb. 1-2, 2019, at 16; Kate Beioley, *Fake review pages rife on Facebook, says charity*, FIN. TIMES, Aug. 6, 2019, at 12; Elaine Moore, *FT Big Read. Social Media*, FIN. TIMES, Nov. 20, 2019, at 8; Nicholas Confessore, Gabriel J. X. Dance, Richard Harris & Mark Hanse, *Buying Online Influence from a Shadowy Market*, N.Y. TIMES, Jan. 28, 2018; at A1; Jack Nicas, *Calculating How Much of Facebook Is Phony*, N.Y. TIMES, Jan. 31, 2019, at B1; and Tim Bradshaw, *Fraudsters milk 'tens of billions' from companies via fake clicks to online ads*, FIN. TIMES, Dec. 30, 2019, at 1.
[739] *See, e.g.*, Charlie Warzel, *Don't Trust Facebook With Your Love Life*, N.Y. TIMES, Sept. 7, 2019, at A22; Jamie Condliffe, *Facebook's New Privacy Idea? An Instagram app could promote constant sharing updates*, N.Y. TIMES, Sept. 2, 2019, at B4; Jamie Condliffe, *The Week in Tech: Are You Ready for Facebook's Future?,* N.Y. TIMES, Sept. 1, 2019 at B4.
[740] LANIER, *supra* note 42, at 55.

fail," and this degrades both markets and governments.[741] If it cannot come up with a broader business model, "[t]he death of Facebook must be an option if it is to be a company at all."[742] In a similar vein, writer Annalee Newitz has declared that "[s]ocial media is broken . . . nothing lasts forever. Facebook and Twitter are slowly imploding."[743] After talking with fiction writers and algorithmic experts, she has written that media companies need to figure out how to make money from helping consumers protect and curate their personal data.[744] "Slow media," or platforms limiting how quickly content circulates might be one solution.

Second, society's views of Google and Facebook could change. Today they are accepted as independent, private entities even though they possess unparalleled power and wealth. As noted above, they are used so widely that they can be seen as utilities. Mark Zuckerberg has called Facebook a utility; Jaron Lanier has remarked that it is becoming more like an electric utility every day.[745] It is a piece of necessary infrastructure, and government needs to assure the availability of such a utility for citizens and businesses. Facebook and Google are utilities that citizens depend on, but which they do not understand and are ripe for manipulation and loss of autonomy. These companies would seem to be ripe for strict governmental regulation like other utilities. However, regulation could result in significant changes to the business model. Or Congress might "get really ambitious" and "fund a rival to compete with Facebook or Google, the way the Postal Service competes with FEDEX and U.P.S."[746]

Third, ad blocking software could affect the behavioral-advertising business model. Some suggest this software will doom the model to extinction.[747] One survey found that 47% of Americans already use ad blocking software.[748] But websites have taken countermeasures including preventing users with ad-blockers

---

[741] *Id.* at 204.
[742] LANIER, *supra* note 42, at 250; *see also* West, *supra* note 232, at 404 (asserting that an American company today can expect to stay on the S&P 500 for only about eighteen years); Wu, *supra* note 37, at 261 (the "dinosaur effect" suggests that it might be at its largest size right before extinction).
[743] Annalee Newitz, *Nothing Lasts Forever*, N.Y. TIMES, Dec. 1, 2019, at SR 1.
[744] *Id.* One critic, Robert B. Reich, has suggested legislation to prevent Google and Facebook from using the aggregations of personal information. ROBERT B. REICH, THE COMMON GOOD 172 (2018).
[745] Lanier, *supra* note 43, at 250.
[746] Marantz, *supra* note 282, at SR6.
[747] ANDREW ESSEX, THE END OF ADVERTISING 15-27 (2017).
[748] Alexander Zambrano & Caleb Pickard, *A Defense of Ad Blocking and Consumer Inattention*, 20 (3) ETHICS & INFO. TECH. 143-55 (Sept. 2018).

from accessing their sites.[749] It seems likely that advertising will survive, and some will try to take advantage of the selection process involved in ad-blocking. For example, Google introduced ad-blocking software on Chrome, but was hit with ethical questions—was its ad-blocking unfairly advantaging Google?[750] It is not clear that ad blocking software will doom the behavioral-advertising business model.

Fourth, Facebook could face a permanent decline in its advertising revenue if it fails to prevent a boycott by advertisers upset at its failure to tamp down hate speech on the platform. Advertisers have expressed concern that their advertisements were appearing on the platform next to hate speech and misinformation and they have received pressure from politicians, supermodels, actors and others.[751] In June 2020, more than 300 advertisers agreed to boycott Facebook and as a result the company lost $75 billion in market value in one week.[752] Facebook has agreed to make certain changes, like adding labels to certain posts, but this is unlikely to satisfy the advertisers. Any substantive changes would contradict the business model, which allows hate speech and fake news, because relatively they generate more engagement, more personal data, and more advertising revenue.

Initial indications are that the COVID-19 pandemic devasted many consumer companies but does not seem to have negatively influenced the big tech firms.[753] Consumers isolated at home spend more time on their devices, and Google benefits from the increased use of mobile phones and growing share of Android

---

[749] Devin Coldeway, *Thousands of Major Sites Are Taking Silent Anti-Ad-Blocking Measures,* TECHCRUNCH (Dec. 27, 2020), https://techcrunch.com/2017/12/27/thousands-of-major-sites-are-taking-silent-anti-ad-blocking-measures/.

[750] David Mayer, *Why Google's Ad-Blocking in Chrome Might Prove Awkward for the Company*, FORTUNE (Feb. 15, 2008), http://fortune.com/2018/02/15/google-chrome-ad-blocking-2/.

[751] *See e.g.*, Kari Paul & Alex Hern, *Verizon Pulls Ads From Facebook Over Inaction on Hate Speech*, GUARDIAN (June 26, 2020), https://www.theguardian.com/technology/2020/jun/25/verizon-advertising-facebook-hate-speech-boycott (discussing the issues that Facebook has been having with advertisments pulled from their website).

[752] *See* Tiffany Hsu & Mike Isaac, *Count Us Out, Facebook*, N.Y. TIMES, July 1, 2020, at B1; Tiffany Hsu & Mike Isaac, *Advertiser Exodus Snowballs as Facebook Struggles to Ease Concerns*, N.Y. TIMES (June 30, 2020), https://www.nytimes.com/2020/06/30/technology/facebook-advertising-boycott.html; Hannah Murphy, *Facebook faces reckoning over hate speech*, FIN. TIMES, July 2, 2020, at 7.

[753] Daisuke Wakabayashi, Jack Nicas, Steve Lohr & Mike Isaac, *Big Tech Could Emerge From Coronavirus Crisis Stronger Than Ever,* N.Y. TIMES (Mar. 23, 2020), https://www.nytimes.com/2020/03/23/technology/coronavirus-facebook-amazon-youtube.html; Peter Eavis & Steve Lohr, *Big Tech Firms Tighten Grip on a Pandemic-Stricken Economy*, N.Y. TIMES, Aug. 8, 2020, at A1.

app sales.[754] But Facebook is perhaps the greatest beneficiary of the pandemic as two shifts have boosted it. First, users confined to home have rediscovered Facebook messaging and video calls, which reached record levels.[755] Second, there was an unprecedented increase in the consumption of news articles on Facebook.[756] This is a significant change because sharing of news stories had declined on Facebook for many years.[757] Further, it seems that users are looking for more authoritative news sources.[758] If this is due to adjustments to Facebook's algorithms to promote more high-quality content, then it might affect the company's business model.[759]

f. Threat to Personhood

The huge troves of data that result from the behavioral-advertising model raise questions not only of autonomy, but also of personhood. What is a person? Certainly, the physical body, including the brain, is, and always has been, the primary focus, but personhood[760] can also include some other things, including data.

In 1982, Professor Radin was among the first legal scholars to examine the connection between personhood, property, and the market. She divided property into two types: fungible and personal.[761] She suggested that some property interests can become personal because they are so closely associated with the individual that without them the individual would not have the opportunity to become a fully developed person.[762] These personal property rights should be protected against invasion by government or by conflicting fungible property claims of other people. She asserted that for an object close to the personal end of the continuum from

---

[754] *Id*.
[755] Kevin Roose & Gabriel J.X. Dance, *The Coronavirus Revives Facebook as a News Powerhouse*, N.Y. TIMES (Mar. 23, 2020), https://www.nytimes.com/2020/03/23/technology/coronavirus-facebook-news.html.
[756] *Id*.
[757] *Id*.
[758] *Id*.
[759] *Id*.
[760] *See* Thomas D. Williams & Olof Bengtsson, *Personalism*, STAN. ENCYCLOPEDIA OF PHIL. (May 11, 2018), https://plato.stanford.edu/, (the discussion of personhood assumes the personalist view, that "personhood [...] gives meaning to all of reality and constitutes its supreme value. Personhood carries with it an inviolable dignity that merits unconditional respect. [A person's] dignity is inherent and sets itself beyond all price. The language of dignity rules out the possibility of involving persons in a trade-off, as if their worth were a function of their utility. Every person without exception is of inestimable worth, and no one is dispensable or interchangeable").
[761] Radin, *supra* note 441, at 986.
[762] *See id*.

personal to fungible, there could be a *prima facie* case against taking it.[763] The premise underlying her personhood perspective is that, to be a person, an individual needs some control over resources in the external environment and this control can take the form of property rights.[764] We can assert that this property right is an inalienable property right. One's personhood should not be monetizable or alienable as proposed by universal commodification.[765]

This conception of personhood as including certain forms of property is applicable to our current digital environment. In discussing this environment, Colin Koopman, Philosophy Professor at the University of Oregon, has asserted that our digital information is active in making us who we are and the formats structuring data help shape who we are.[766] He concludes that our information composes significant parts of our very selves and that, "we are cyborgs who extend into our data." [767] Professor John Cheney-Lippold of the University of Michigan has asserted in his book *We Are Data*, that, "[i]n the present day of ubiquitous surveillance, who we are is not only what we think we are. Who we are is what our data is made to say about us."[768] We have algorithmic identities that are statistically ordained by correlation and nothing else[769] and they constitute part of our personhood. University of Maryland Law Professor Julie Cohen has said that, "networked information technologies do not simply empower the networked self; they configure it."[770] Sherry Turkle has noted that the concept of "second self," which was the title of her book, does not go far enough:"[o]ne is tempted, to speak not merely of second self, but of a new generation of self, itself."[771]

Our personhood is changing as we spend more and more time online, and our personal data that constitutes part of our personhood are considered fungible property and subject to the market. Digitization seems to make personhood

---

[763] *Id*. at 1015.
[764] *See id*.
[765] RADIN, *supra* note 410, at 9, 56; *see also* HARCOURT, *supra* note 27, at 26 ("the massive collection, recording, data mining, and analysis of practically every aspect of our ordinary lives begins to undermine our sense of control over our destiny and self-confidence, our sense of self. It begins to shape us, at least many of us, into marketized subjects").
[766] COLIN KOOPERMAN, HOW WE BECAME OUR DATA: A GENEALOGY OF THE INFORMATION PERSON vii., 8 (2019).
[767] *Id.* at 8.
[768] CHENEY-LIPPOLD, *supra* note 116, at xii.
[769] *Id*. at 58; *see also,* LANIER, *supra* note 42, at 20 (criticizing this phenomenon, saying, "[t]he deep meaning of personhood is being reduced by illusions of bits." Of Facebook, he has said, "[w]hatever a person might be, if you want to be one, delete your accounts. LANIER, *supra* note 8, at 139.").
[770] Cohen, *supra* note 231, at 46.
[771] TURKLE , *supra* note 356, at 5.

alienable. As New Yorker writer Jia Tolentino has written, Mark Zuckerberg "understood better than anyone that personhood in the twenty-first century would be a commodity like cotton or gold."[772] But, commodification is the antithesis of personhood as a supreme value which rules out the possibility of involving persons in a trade-off, as if their worth were a function of their utility. Making personhood marketable is a contradiction with personhood as we have known it; personhood, the supreme value, becomes a mere commodity.

Professor Charles Fried has described well the ultimate value of personhood:

> All other moral values gather their moral force as they determine choice. By contrast, the value of personhood...far from being chosen, is the presupposition and substrate of the very concept of choice. And that is why the norms surrounding respect for person may not be compromised, why these norms are absolute in respect to the various ends we choose to pursue.[773]

Shoshanna Zuboff has interpreted this threat to personhood as one to our humanity: "an information civilization shaped by surveillance capitalism will thrive at the expense of human nature and threatens to cost us our humanity."[774]

The changes in personhood can also be seen from the perspective of neuroscience. Our closest relative in the animal kingdom is the chimpanzee, but the prefrontal cortex of a chimp occupies only 17% of the adult brain versus 33% in humans.[775] Our prefrontal cortex makes us unique; it makes both the biological human being and the moral person.[776] And this particular organ exhibits neuroplasticity.[777] Under the influence of more and more screen time, the prefrontal cortex is changing: Susan Greenfield has called this "mind change" by analogy to climate change.[778] "Mind change" is an umbrella term that describes how modern technologies are changing the functional state of the human brain.[779] She believes that these changes in the brain, like climate change, may have serious and pervasive

---

[772] Tolentino, *supra* note 250, at 171; *see also,* HARCOURT, *supra* note 28, at 167 ("we have gotten used to the commodification of privacy, of autonomy, of anonymity").
[773] FRIED, *supra* note 23, at 29.
[774] ZUBOFF, *supra* note 56, at 347.
[775] GREENFIELD, *supra* note 227, at 88.
[776] *See Id.* at 88-89.
[777] NICHOLAS CARR, THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS 26 (2010).
[778] GREENFIELD, *supra* note 227 at 14.
[779] *See id.*

consequences. [780] Specifically, dopamine can disable the prefrontal cortex, and the underactivity of this key area can have a profound effect on holistic brain operations and contribute to a mindset where sensory trumps cognitive and individual identity is less emphasized.[781] She has noted that our new technologies have opened our brains to manipulation as never before in human history[782] and predicted that, given the malleability of the human brain and the large number of hours spent in front of screens, the minds of the future will be very different from any others in human history.[783] If that seems overly dramatic, she warns that we cannot afford to be complacent and assume that our brains are inviolate—to do so would result in a world in which our key values would be lost forever.[784]

Among these key values would be personhood itself. When our computer tools and our digitized data become so integrated with us that they are part of us, we become the very tools themselves. In such case, it seems likely that our personhood would cease to be an end in itself and would become merely a device to be used, a tool to be exploited.[785] A business model—*and a contract that implements it*—that promotes changes in personhood of this type are repulsive. This may help persuade a judge to seize the opportunity to declare such a contract illegal.

g. Threats to Democratic Society and Theory

The threat to democracy in the form of election interference was described above. In addition, there are two additional threats to democracy from the behavioral-advertising business model. This model and the contracts implementing it pose threats to a democratic society and also to the philosophical foundations of democracy.

i. Democratic Society

A number of scholars have warned about threats to a democratic society. Debra Satz has commented that "particular markets can . . . even undermine the conditions for a democratic society."[786] Sherry Turkle posed the question: "[w]hat is democracy without privacy?"[787] Yochai Benkler, Robert Faris, and Hal Roberts of Harvard's Berkman Klein Center for the Internet and Society concluded that,

---

[780] *Id.*
[781] *Id.* at 50.
[782] *Id.* at 129.
[783] *See* SUSAN GREENFIELD, ID: THE QUEST FOR MEANING IN THE 21ST CENTURY 160 (2009).
[784] *Id.*
[785] LYNCH, *supra* note 271, at 198.
[786] SATZ, *supra* note 27, at 208.
[787] TURKLE, *supra* note 351, at 50.

"the basic business of Facebook, when applied to political communication, presents a long-term threat to democracy."[788]

One of the earliest scholars to pose the issue was Professor Paul M. Schwartz of Berkeley Law School, who issued a prophetic warning in 1999:

> The utilization of information technology in cyberspace will act as a powerful negative force in two ways. First, . . . it will discourage unfettered participation in deliberative democracy in the United States. Second, the current use of information technology on the Internet can harm an individual's capacity for self-governance. These two negative effects are significant because our nation's political order is based both on democratic deliberation and on individuals who are capable of forming and acting on their notions of the good.[789]

More recently, Stanford Law Professor Nathaniel Persily has described some of the threats to a democratic society in his article "Can Democracy Survive the Internet?"[790] He has drawn attention to a number of factors from the 2016 presidential election: virality is now the coin of the campaign realm; the internet uniquely privileges above all outrageous campaign messages; viewers have considerable difficulty distinguishing between real and fake news; the prevalence of false stories online erects barriers to educated political decision making; democracy depends on both the ability and the will of voters to base their political judgments on facts; and the politics of never-ending spectacles.[791] He specifically criticizes Google's search engine.[792] The strength of such a search engine comes from the relevance of its search results, but "one man's relevant result . . . is another's filter bubble"—so the search for campaign information will lead the user in a direction determined by the user's prior searches.[793] In a similar fashion, Facebook does not prioritize the search for the truth, but instead provides the most engaging and meaningful experience to a user.[794] Users often find false, negative,

---

[788] BENKLER, FARIS & ROBERTS, *supra* note 13, at 270.
[789] Schwartz, *supra* note 265, at 1647.
[790] Nathaniel Persily, *Can Democracy Survive the Internet?* 28 J. OF DEMOCRACY 63 (Apr. 2017).
[791] *See id.*
[792] *See id.* at 74.
[793] *Id.*
[794] *Id.*

or otherwise outrageous speech to be more engaging and meaningful.[795] These downsides of Google and Facebook are the result of the behavioral-advertising business model that relies on addictive engagement.

Another internet critic who has described the threats to a democratic society is Zeynep Tufekci. Her comments concern the consequences and power of big data analytics made possible by the following conditions of behavioral advertising: (1) availability of big data; (2) a shift to individual marketing; (3) the potential and opacity of modeling; (4) the use of behavioral science in the service of persuasion; (5) dynamic experimentation; and (6) the growth of new power brokers on the internet who control the data and algorithms (such as Google and Facebook).[796] Three consequences of big data analytics are problematic for a democratic society because they undermine the civic experience.

The first consequence is deep and individualized profiling and targeting which allows for unprecedented focusing of advertising. Specifically, it allows candidates for office to focus their attention and resources on "swing" districts at an individual level and ignore unlikely or unpersuadable voters.[797] Previously inefficient data practices made such precision difficult and limited it to small local areas.[798]

The second consequence is the opacity of surveillance that derives from the information asymmetry and secrecy that are inherent in big data analytics. This opacity takes advantage of a heuristic bias in humans.[799] People will respond less positively to a message that they perceive as intentionally tailored to them. A hidden message that is indirect is more persuasive.

The third consequence is the assault on democratic deliberation, on the Habermasian public sphere.[800] It is the destruction of "status free" deliberation of

---

[795] *See* ANDREW MARANTZ, ANTISOCIAL: ONLINE EXTREMISTS, TECHNO-UTOPIANS, AND THE HIJACKING OF THE AMERICAN CONVERSATION 80 (2019) (writing that three MIT computer scientists found that the fake news on Facebook is consistently more likely to go viral than the truth.); *see also* Foroohar, *supra* note 91, at 8 (citing studies showing that fake news is 70 percent more likely to be shared than real news).
[796] Tufekci, *supra* note 367.
[797] *Id.*
[798] *Id.*
[799] *Id.*
[800] *Id.* Tufekci mentions only Jurgen Habermas, but democratic deliberation is something championed by others. *See e.g.*, JOHN DEWEY, 8 THE LATER WORKS, 1925-1954, 101-03 (1986); JOHN RAWLS, POLITICAL LIBERALISM 447-48 (2005).

ideas on their own merit regardless of who uttered them.[801] We now live in what she calls an "anti-Habermasian public sphere" in which all interactions are between individuals who are known quantities—the ideas they express are invariably linked to their personal backgrounds and reasoned debate and the public interest suffer.[802]

Of course, the threats posed to democracy do not all come directly from the behavioral-advertising business model. Think, for example, of the design of online spaces that favors consumers over citizens and corporate interests over the public interest; the lack of mutual respect in online discussions; trolling and flaming in online forums; and the online echo chambers that promote polarization.[803] This activity is not the direct result of the business model, but the business model facilitates much of this activity.

Marshall McLuhan suggested what is perhaps the most disheartening description of the situation for a democratic society: "[o]nce we have surrendered our senses and nervous systems to the private manipulation of those who would benefit by taking a lease on our eyes and ears and nerves, we don't really have any rights left."[804]

ii. Democratic Theory

The behavioral-advertising business model poses not only the practical threat to democracy in the election process and to a democratic society as noted above, but also in the theory of liberal democracy. The formation of liberal democracy was a complex process, but it can be said that modern liberal democracy started with the insistence on equality of all persons, asserted certain basic human rights, and then concluded with the argument for self-government.[805] The rhetorical tool used to explain self-government was the concept of contract. This is tied closely to the idea of consent. The theorists of government, such as Hobbes and Locke, assumed that men could take on obligations only if these were freely assumed.[806] Thus, all obligations appear under the name of promises and a man can be held to what he promised because he himself created the promise.[807] The most common way for a person to consent was through a contract. Thus, they adopted the concept of contract to their vision of how men transitioned from a state of nature

---

[801] Tufekci, *supra* note 367.
[802] *Id.*
[803] MATTHEW HINDMAN, THE MYTH OF DIGITAL DEMOCRACY 1-19 (2009).
[804] CARR, *supra* note 15, at 106.
[805] SIEDENTOP, *supra* note 431, at 359.
[806] *See e.g.*, Alex Tuckness, *Locke's Political Philosophy,* STAN. ENCYCLOPEDIA. OF PHIL. (Oct. 6, 2020), https://plato.stanford.edu/entries/locke-political/#ConsPoliObliEndsGove.
[807] GEORGE H. SABINE, A HISTORY OF POLITICAL THEORY 398 (4th ed. 1973).

to a government.[808] Locke was particularly insistent on the concept of consent. He wrote that "[n]o body doubts but an *express Consent*, of any Man, entering into any Society, makes him a perfect Member of that Society, a Subject of that Government" and "[t]he Liberty of Man in Society, is to be under no other Legislative Power, but that established, by consent, in the Common-wealth."[809] Hobbes wrote that "A Common-wealth is said to be Instituted, when a Multitude of men do Agree, and Covenant, every one, with every one, ..."[emphasis added].[810] Consent confers legitimacy.[811]

The emphasis on consent and contract presupposed at least one fact about men in a state of nature: they were free. Their consent had to be the result of their free choice. Both Locke and Hobbes assumed that at the moment of entering into the contract for government, men were free. Locke wrote that "[t]he Natural Liberty of Man is to be free from any superior Power on Earth, and not to be under the Will or Legislative Authority of Man, but to have only the Law of Nature for his Rule."[812] Hobbes wrote that "[a] Free-Man, is he, that in those things, which by his strength and wit he is able to do, is not hindered to doe what he has a will to."[813]

In the twentieth century, Harvard Philosophy Professor John Rawls also adopted the contract concept in conceiving his theory of justice.[814] Instead of a state of nature, he invented an original position of equality, not as a historical condition of culture but as a hypothetical situation. Like Hobbes and Locke, the obligations of the members of his society are self-imposed and they are "autonomous"[815] ("autonomy" being the twenty-first century equivalent of the seventeenth century "freedom" of Hobbes and Locke).[816] For Rawls, the relevant agreement or contract that the members of society make, however, is not to enter a given society or choose a given form of government, but to adopt certain moral principles.[817]

---

[808] *See* Alex Tuckness, *Locke's Political Philosophy,* STAN. ENCYCLOPEDIA. OF PHIL. (Oct. 6, 2020), https://plato.stanford.edu/entries/locke-political/#ConsPoliObliEndsGove.

[809] JOHN LOCKE, TWO TREATISES OF GOVERNMENT, 2nd Treatise 283, 347 (1988) (emphasis added).

[810] THOMAS HOBBES, 2 HOBBES' LEVIATHAN 161 (1909).

[811] PATRICK J. DENEEN, WHY LIBERALISM FAILED 31 (2018).

[812] LOCKE, *supra* note 809, at 283 (emphasis added).

[813] HOBBES, *supra* note 810, at 161 (emphasis added).

[814] JOHN RAWLS, A THEORY OF JUSTICE 14 (1999).

[815] *Id*. at 12.

[816] Of course, the concept of "freedom" in the seventeenth and eighteenth centuries was not the exact equivalent of our current concept of "autonomy." Christman, *supra* note 128. But it seems likely that before the invention of the term "autonomy" in the nineteenth century, the term "freedom" in the seventeenth and eighteenth centuries encompassed what the term "autonomy" expresses today.

[817] RAWLS *supra* note 814, at 14.

As Professor Rawls makes clear, the concept of contract is hypothetical, not historical.[818] This is also true of the contract theories of Hobbes and Locke.[819] But there is a logical paradox in using a hypothetical contract theory with an assumption of a state of nature (Hobbes and Locke) or original position (Rawls).[820] If citizens are using the internet more and more (including the services of Google and Facebook), then it seems likely that they are sacrificing more and more of their autonomy. Even more so if important functions of their life are conducted online and involve the use of these services. Given the addiction, surveillance, and manipulation noted above, are they free or autonomous persons as assumed by Hobbes, Locke, and Rawls? Do they have the basic prerequisites that philosophers of liberal democracy have posited as necessary for the establishment of a representative government or a theory of justice?[821] Of course, if the concept of contract is only an abstraction, there is only a philosophical inconsistency, not an actual one. But this philosophical contradiction should alert us to a real problem: the commonsense conclusion that a business model that contradicts the intellectual foundations and rationale of democracy is unacceptable. This fact could be helpful to influence a judge trying to determine whether the contracts of Google and Facebook are illegal.

h. Paternalism

Another factor that could influence a judge is paternalism. A judge would not want to be accused of paternalism in ruling that the contracts of Google and Facebook were illegal. Philosophy Professor Emeritus at the University of California, Davis, Gerald Dworkin, has defined "paternalism" as "the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm."[822] This concept seems to date from the nineteenth century. In the 1840s and 1850s, there was an attempt to prevent the overtly political uses of law and to

---

[818] *Id.* at 10.

[819] For a discussion of the hypothetical versus historical view of contract, *see* JOHN DUNN, THE HISTORY OF POLITICAL THEORY AND OTHER ESSAYS 40-42 (1996).

[820] There is a second paradox as well. A contract assumes a judicial mechanism to enforce its obligations, but logically no such mechanism exists in the state of nature or the original position. This logical inversion renders the concept of contract suspect as an attempt to validate the normative status of a practice whose validity has not been already independently established. *See* J. W. GOUGH, THE SOCIAL CONTRACT: A CRITICAL STUDY OF ITS DEVELOPMENT 4 (1936).

[821] One might argue that Hobbes, Locke, and Rawls were talking about the origins of government or a system of justice, not about an existing society, but it seems logical that people in a society or a system of justice would also have to be free or autonomous.

[822] Gerald Dworkin, *Paternalism,* STAN. ENCYCLOPEDIA OF PHIL., https://plato.stanford.edu/.

create a system of legal thought free from policymaking.[823] For the new market regime, new rules of contract, property, and commercial law devoid of paternalistic and protective doctrines gained prominence. Deviations from market principles came to be seen as abnormal and improper. Paternalism acquired a negative connotation that characterizes it today.[824]

In light of this negative connotation, contemporary scholars have struggled to explain and justify paternalism. Harvard Law Professor Duncan Kennedy proposed that paternalism was necessary when a person underestimated the risks associated with certain behavior or exhibited recklessness.[825] He believed there was no overarching test that would tell us when paternalism was appropriate, he advocated an *ad hoc* approach.[826] Other scholars have expressed similar views. Yale Law School Professor Anthony Kronman in his discussion of paternalism tried to "reintroduce" the concept of judgment into thinking about contract law.[827] He did not try to justify every paternalistic rule but thought that judgment could lead us in certain cases to limit by an inalienable entitlement a person's contractual powers, as in cases of slavery or peonage.[828] Dan W. Brock, Professor Emeritus at Harvard Medical School, has suggested that paternalism concerns the conflict between two values, autonomy and well-being.[829] Thus, it requires a determination of which value we take to be more important in a particular situation. Associate Professor Shmuel I. Becker of Victoria University of Wellington and Professor Yuval Feldman of Bar-Ilan University School of Law have proposed a democratic justification of paternalism. They assert that legal rules that express concern for consumers' wellbeing can be seen as an exercise in self-government.[830] They simply replicate rules people would have voluntarily established for their protection.[831]

---

[823] HORWITZ, *supra* note 512, at 259.
[824] RADIN, *supra* note 410, at 41 (noting that "inalienabilities are often said to be paternalistic . . . the term 'paternalism' has largely been used pejoratively by advocates of negative liberty").
[825] Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with special reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 627 (1982).
[826] *Id.* at 638-649.
[827] Anthony Kronman, *Paternalism and the Law of Contracts*, 92 YALE L. J. 763, 797 (1983).
[828] *Id.* at 764.
[829] Dan W. Brock, *Paternalism and Autonomy*, 98 ETHICS 500, 551 (1988) (reviewing JOEL FEINBERG, HARM TO SELF (1986) and DONALD VANDEVEER, PATERNALISTIC INTERVENTION (1986)).
[830] Shmuel I. Becker & Yuval Feldman, *Manipulating Fast and Slow: The Law of Non-Verbal Market Manipulations*, 38 CARDOZO L. REV. 459, 506 (2016).
[831] *Id.*

A group of scholars associated with the University of California, Berkeley, have tried to turn the table on those accusing others of paternalism. They have suggested that the term "paternalism" should apply to the activities of tech companies implementing behavioral advertising.[832] When applied to modern privacy regulations the label is misplaced because these regulations do not make choices for consumers, but enable choices.[833] They assert that the term "paternalism" is more appropriately applied to the tech companies using behavioral advertising to push personalization even where consumers express preferences against it.[834]

But perhaps the most cogent response to an accusation of paternalism in a judge's finding that the behavioral-advertising contracts are illegal would be the self-contradiction stated by John Stuart Mill.[835] If a person cannot voluntarily abdicate his liberty, as Mill noted, then it should also be true that allowing a person to alienate her autonomy is to deny her autonomy.[836] Thus, it must be allowed to restrict a person's autonomy to preserve that very autonomy. Autonomy, like personhood, is a supreme value. Humans take autonomy as a supreme value because our culture and history tell us so, although this principle, like all others, ultimately ends up grounding on something arbitrary, but essential.[837]

A judge applying good judgment to a decision to declare the behavioral-advertising contracts illegal would find support in the commonsense logic of Mill's self-contradiction to reconcile any concern about paternalism.

i. Uncontrolled Experiment

A number of commentators have stated the obvious fact that our experiences with Google and Facebook are a novel experiment in human behavior. But they

---

[832] Chris Jay Hoofnagle, Ashkan Soltani, Nathaniel Good, Dietrich J. Wambach & Mika D. Ayenson, *Behavioral Advertising: The Offer You Cannot Refuse*, 6 HARV. L. & POLICY REV. 273, 290 (2012).
[833] *Id.*
[834] *Id.*
[835] *See* Radin, *supra* note 21, at 1899 ("If we reject the notion that freedom means negative liberty, and the notion that liberty and alienation in markets are identical or necessarily connected, then inalienability will cease to seem inherently paternalistic. If we adopt a positive view of liberty that includes proper self-development as necessary for freedom, then inalienabilities needed to foster that development will be seen as freedom-enhancing rather than as impositions of unwanted restraints on our desires to transact in markets").
[836] *Id.* at 1889-91.
[837] Lynch, *supra* note 271, at 47.

have also questioned the nature and consequences of this experiment. For example, Tufts University Professor Maryanne Wolf put the issue in an academic context:

> No self-respecting internal review board at any university would allow a researcher to do what our culture has already done with no adjudication or previous evidence: introduce a complete, quasi-addictive set of attention-compelling devices without knowing the possible side effects and ramifications for the subjects . . . .[838]

New York Times journalist Max Fisher, speaking of the tech giants, has questioned the experiment's results: "[w]hether they set out to or not, these companies are conducting the largest social re-engineering experiment in human history, and no one has the slightest clue what the consequences are."[839]

Roger McNamee has found the consequences so far to be negative: "[w]e are running an uncontrolled evolutionary experiment, and the results so far are terrifying."[840]

Sean Parker, calling himself a "conscientious objector" to social media, has expressed concern about the consequences for the next generation: "God only know what it's doing to our children's brains."[841]

Shoshanna Zuboff has called Facebook's operation a "vast experiment in behavior modification...on the broadest possible social and psychological canvas."[842]

And as Susan Greenfield has mordantly observed:

> In any case, we cannot afford to wait for a generation to come to a dysfunctional maturity, or rather immaturity, to have unwittingly served as the guinea pigs in an informal experiment, before we devise

---

[838] MARYANNE WOLF, READER COME HOME 125 (2018).
[839] Max Fisher, Social Re-engineering, From Myanmar to Germany, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/technology/personaltech/social-media-effect-myanmar-germany.html.
[840] MCNAMEE, *supra* note 58, at 277.
[841] Evan Osnos, *Ghost in the Machine*, NEW YORKER (Sept. 17, 2018), https://www.magzter.com/article/Culture/The-New-Yorker/Ghost-In-The-Machine.
[842] ZUBOFF, *supra* note 56, at 469.

> means enabling us to harness the clear benefits of the screen but at the same time to minimize the risks.[843]

Sheila Jasanoff, Professor of Science and Technology Studies at the Harvard Kennedy School, has asked: "[i]s it fitting that societies of such infinitely creative capacity as ours should reflect on the ethical implications of such far-reaching technological experiments only after a threat to human dignity comes knocking at the door?"[844]

Silicon Valley entrepreneur and critic Andrew Keen has claimed that "by so radically socializing today's digital revolution, we are, as a species, collectively jumping off a cliff."[845]

Common sense in this situation would suggest the application of the precautionary principle to this uncontrolled experiment. This principle states that a lack of decisive evidence of harm should not be a ground for refusing to protect against risks.[846] Cass Sunstein has objected that this principle is useless because it forbids all course of action.[847] But a mild, banal version of it would be appropriate. The application of the precautionary principle to this uncontrolled experiment would suggest that in the face of the threats to democracy, the legal system, and personhood, we should not allow the manipulation and loss of autonomy inherent in the behavioral advertising business model. One way to prevent these harms would be for a court to declare the contracts illegal.

Our experiences with Google and Facebook can also be seen as an experiment in another sense—as an initial trial in the use of artificial intelligence—perhaps a precedent. Professor Russell proposes a new approach to artificial intelligence he calls "provably beneficial machines."[848] He has warned of the danger of enfeeblement of human capabilities and the loss of autonomy when artificial intelligence becomes more widespread.[849] He has suggested that the solution to this problem is cultural, not technical: "[w]e will need a cultural

---

[843] GREENFIELD, *supra* note 227, at 128.
[844] JASANOFF, *supra* note 26, at 252.
[845] ANDREW KEEN, DIGITAL VERTIGO: HOW TODAY'S ONLINE SOCIAL REVOLUTION IS DIVIDING, DIMINISHING, AND DISORIENTING US 17 (2012).
[846] SUNSTEIN, *supra* note 715, at 202 (expressing the same idea more forcefully, saying that the absence of evidence of harm is not evidence of absence); *see also* GREENFIELD, *supra* note 227, at 128.
[847] Sunstein, *supra* note 715, at 204.
[848] *See* RUSSELL, *supra* note 248, at 248.
[849] *Id.* at 248.

movement to reshape our ideals and preferences towards autonomy, agency, and ability and away from self-indulgence and dependency . . . ."[850] If we fail to resist the loss of autonomy from the behavioral-advertising of Google and Facebook in our initial trial with artificial intelligence, there does not seem to be much hope in resisting the even greater dangers of the much improved AI that will confront us in the future. Declaring the contracts illegal would be a precedent-setting move to reshape our ideals and preferences.

j. Bad Beliefs and Bad Behavior

A final factor that may influence a judge's decision on the illegality of Google's and Facebook's user contracts is a combination of bad beliefs and bad behavior—the ignorant and arrogant attitudes of the founders and the shady practices and broken promises that have plagued the two companies.

The founders share a set of bad beliefs—market values—that weaken moral sanctions, sabotage their own legitimacy, and make an argument against their business model more attractive. These include the following:

> 1. "Valley denizens . . . tend to believe that their priorities should override the privacy, civil liberties, and security of others. They simply can't imagine that anyone would question their motives, given that they know best. Big Tech should be free to disrupt government, politics, civic society, and law, if those things should prove to be inconvenient." [851]
>
> 2. "Rules are made to be broken" and "It is better to ask for forgiveness than to beg for permission."[852]
>
> 3. "'Who will stop me.' [*sic*] This became the central tenet of Internet disrupters . . . ."[853]
>
> 4. "What I'm struck by is the lack of intellectual modesty in the computer science community."[854]

---

[850] *Id.* at 255-56.
[851] FOROOHAR, *supra* note 91, at 48.
[852] *Id.* at 44, 47.
[853] TAPLIN, *supra* note 7, at 72.
[854] LANIER, *supra* note 42, at 51.

> 5. "We fail to ask, on a more fundamental level, if there are limits appropriate to the human condition, a scale conducive to our flourishing as the sorts of creatures we are. Modern technology tends to encourage users to assume that such limits do not exist; indeed, it is often marketed as a means to transcend such limits."[855]

Bad beliefs led to bad behavior. An example is the bait-and-switch strategy both companies used over many years.[856] Professor Hoofnagle has called both Facebook and Google "a kind of privacy long con."[857] Facebook changed its disclosure settings over time to make user profiles much more public but claimed that users wanted to be "more open."[858] Google proudly claimed its opposition to intrusive advertising and its support for objective search results, but over time it secretly began using behavioral data in search.[859] The two companies lured users into a relationship that they promised would be different from their competitors, but they later went on to imitate their competitors.

Google's violations of users' trust seem to be less egregious, but more insidious, than those of Facebook. Google's violations include the episodes described below:

> 1. "[C]ustomers were never asked if Google Street View cameras could take pictures of their front yards and match them to addresses in order to sell more ads. [Google] adhered to the maxim that says it's better to ask for forgiveness than to get permission—though in truth they weren't really doing either."[860]
>
> 2. "Google suffered a major blow on Tuesday after European antitrust officials fined the search giant a

[855] L. M. Sacasas, *The Tech Backlash We Really Need*, THE NEW ATLANTIC (Spring 2018), https://www.thenewatlantis.com/publications/the-tech-backlash-we-really-need.
[856] Hoofnagle, *supra* note 405, at 353-354.
[857] *Id.*
[858] *See id.* at 181-82.
[859] *See* discussion *infra* pp. 10-20.
[860] FOROOHAR, *supra* note 91, at 47.

> record $2.7 billion for unfairly favoring some of its own services over those of rivals."[861]
>
> 3. "What we are witnessing is the computational exploitation of a natural human desire: to look 'behind the curtain,' to dig deeper into something that engages us. As we click and click, we are carried along by the exciting sensation of uncovering more secrets and deeper truths. Youtube leads viewers down a rabbit hole of extremism, while Google racks up the ad sales."[862]
>
> 4. "The program, known as Duplex, is an automated voice assistant capable of making hair appointments, booking restaurant reservations and conducting other tasks over the phone . . . . At no point in the demo were the receptionists on the other end of the calls informed that they were talking to a computer rather than another human . . . . The onstage demo of Duplex drew lots of oohs and aahs . . . . But the demo . . . raised a lot of hackles. Zeynep Tufekci, a professor and writer, called Duplex 'horrifying' and said Google's willingness to use A. I. to fool humans—and to brag about its ability to do so on stage at a public event—showed that 'Silicon Valley is ethically lost, rudderless and has not learned a thing.'"[863]
>
> 5. "European authorities fined Google a record $5.1 billion…for abusing its power and ordered the company to alter its practices . . . . 'Google has used Android as a vehicle to cement the dominance of its search engine,' said Margrethe Vestager, Europe's antitrust chief. 'These practices have denied rivals the chance to innovate and compete on the merits. They have denied European consumers the benefits

[861] Mark Scott, *Google Fined Record $2.7 Billion in E.U. Antitrust Ruling*, N.Y. TIMES (June 27, 2017), https://www.nytimes.com/2017/06/27/technology/eu-google-fine.html.
[862] Zeynep Tufekci, *YouTube, the Great Radicalizer*, N.Y. TIMES, Mar. 11, 2018, at SR 6.
[863] Kevin Roose, *Critics Say Google's A.I. Phone Calls Have Everything, Except Ethics*, N.Y. TIMES, May 14, 2018, at B6.

> of effective competition in the important mobile sphere.'"[864]
>
> 6. "In the first major example [of how European regulators would use their newfound authority against the most powerful technology companies], the French data protection authority announced Monday that it had fined Google 50 million euros, or about '$57 million, for not properly disclosing to users how data is collected across its services . . . to present personalized advertisements.'"[865]
>
> 7. "A collective lawsuit against Google for allegedly tracking the personal data of 4m iPhone users can proceed in the UK courts, three judges have ruled."[866]
>
> 8. "Google agreed on Wednesday to pay a record $170 million fine and make changes to protect children's privacy on YouTube, as regulators said the video site had knowingly and illegally harvested personal information from children and used it to profit by targeting them with ads."[867]
>
> 9. "Australian regulators on Tuesday accused Google of misleading consumers about its collection of their personal location information through its Android mobile operating system . . . ."[868]

---

[864] Adam Satariano & Jack Nicas, *E.U. Fines Google with $5.1 Billion in Android Antitrust Case*, N.Y. TIMES (July 19, 2018), https://www.nytimes.com/2018/07/18/technology/google-eu-android-fine.html.

[865] Adam Satariano, *Google Is Fined 57 Million Euros Under Europe's Data Privacy Law*, N.Y. TIMES (Jan. 21, 2019), https://www.nytimes.com/2019/01/21/technology/google-europe-gdpr-fine.html.

[866] Jane Croft, *Google faces UK Class Action Over Collecting iPhone Data*, FIN. TIMES (Oct. 2, 2019), https://www.ft.com/content/a0a0a1ac-e4ff-11e9-b112-9624ec9edc59.

[867] Natasha Singer & Kate Conger, *Google Is Fined $170 Million for Violating Children's Privacy on YouTube* N.Y TIMES (Sept. 5, 2019), https://www.nytimes.com/2019/09/04/technology/google-youtube-fine-ftc.html.

[868] Isabella Kwai, *Australia Says Google Misled on Phone Tracking*, N.Y TIMES, Oct. 30, 2019, at B6.

> 10. "[Google] was a culture in which the metrics were always right. The company was simply serving users, even if that meant knowingly monetizing content that was undermining the fabric of democracy."[869]

A partial listing of Facebook's prevarications include the following[870]:

> 1. "'The past decade shows that user concerns over privacy appear to have little teeth on changing how [Facebook] behaves, aside from a recycling of contrite statements and promises to do better from its C.E.O.' she [Zeynep Tufekci] said."[871]

> 2."'For a leader [Sheryl Sandberg] of the most profitable company of its size in the history of capitalism, who has herself personally garnered over $1bn in stock gains based on the company's success, to claim that the business side of the company, which she runs, has never worked to maximise its profits, seems disingenuous to say the least,' Mr. Kirkpatrick [author the The Facebook Effect] said."[872]

> 3. "'The thing that is concerning here is that Facebook said it had totally turned off the permission to share data for the friends of people who had an app but in the case of hardware

[869] FOROOHAR, *supra* note 91, at 53.

[870] *See e.g.*, LEVY, *supra* note 139, at 273-4; Natasha Lomas, *A Brief History of Facebook's Privacy Hostility Ahead of Zuckerberg's Testimony*, TECH CRUNCH (Apr. 10, 2018), https://techcrunch.com/2018/04/10/a-brief-history-of-facebooks-privacy-hostility-ahead-of-zuckerbergs-testimony/.

[871] Sheera Frenkel, *Facebook, Stung by Data Harvest, Says It Will Centralize Its Privacy Settings*, N.Y. TIMES, Mar. 29, 2018, at B6.

[872] Hannah Kuchler, *Facebook determined to regain its balance*, FIN. TIMES, Apr. 7/8, 2018, at 12.

> manufacturers they didn't do that,' he [Sandy Parakilas, a former Facebook employee] said." [873]
>
> 4. "After stalling for weeks, Facebook eventually agreed to hand over the Russian posts to Congress. Twice in October 2017, Facebook was forced to revise its public statements, finally acknowledging that close to 126 million people had seen the Russian posts."[874]
>
> 5."'At the same time that Facebook was publicly professing their desire to work with the committee to address these issues, they were paying a political opposition research firm to privately attempt to undermine that same committee's credibility,' Senator Mark Warner of Virginia, the top Democrat on the panel, said in a statement. 'It's very concerning.'"[875]
>
> 6. "In the [Senate Intelligence Committee] reports, Google, Twitter and Facebook . . . were described by researchers as having 'evaded' and 'misrepresented' themselves and the extent of Russian activity on their sites. The companies were also criticized for not turning over complete sets of data about Russian manipulation to the Senate."[876]
>
> 7. "For years, Facebook gave some of the world's largest technology companies more intrusive access to users' personal data than it had disclosed."[877]
>
> 8. "The agency [FTC] found that Facebook's handling of user data violated a 2011 privacy

[873] Hannah Kuchler, Tim Bradshaw, & Aliya Ram, *Facebook denies misuse of user data in Apple and Amazon pacts*, FIN. TIMES, June 5, 2018 at 16.
[874] Sheera Frankel, et al., *supra* note 396.
[875] Jack Nicas & Matthew Rosenberg, *How Facebook's Attack Dog Tried to Undermine Senators*, N.Y. TIMES, Nov. 16, 2018, at B5.
[876] Sheera Frenkel, Daisuke Wakabayashi & Kate Conger, *Reports Detail Russian Trolls and Foot-Dragging by Tech*, N.Y. TIMES, Dec. 18, 2018, at B1.
[877] Gabriel J. X. Dance, Michael La Forgia & Nicholas Confessore, *Facebook Offered Users Privacy Wall, Then Let Tech Giants Around It*, N.Y. TIMES, Dec. 19, 2018, at A1.

> settlement with the F. T.C. That earlier settlement, which came after the company was accused of deceiving people about how it handled their data, required the company to revamp its privacy practices."[878]
>
> 9. "Facebook…agreed to pay $550 million to settle a class-action lawsuit [*Patel v. Facebook*, 932 F. 3d. 1264 (9th Cir. 2019)] . . . the suit said the Silicon Valley company violated an Illinois biometric privacy law by harvesting facial data from the photos of millions of users . . . without their permission . . . Facebook has said the allegations have no merit."[879]
>
> 10. "Facebook promised users that it would not share their personal information with advertisers. It did."[880]

Of the two companies, it appears that Google has not faced severe criticism for its misconduct. Roger McNamee believes this is because Facebook's conduct is so much worse than Google's.[881]

2. Consequences of Illegality

a. Contract Unenforceable and Void

A court, in weighing the pros and cons of declaring the Google and Facebook contracts illegal, would not be oblivious to the consequences of a decision that the contracts were illegal. To analyze the consequences, we can start with some basic questions. If a contract is "unlawful" is that the same as "illegal"? If a contract is unlawful or illegal, is it merely "unenforceable" or is it "void"? If void, is it so from its inception or only at a later time?

---

[878] Cecilia Kang, *$5 Billion Fine for Facebook on User Data*, N.Y. TIMES, July 13, 2019, at A1.
[879] Natasha Singer & Mike Isaac, *Privacy Suit Has Big Sting for Facebook*, N.Y. TIMES, Jan. 30, 2020, at B1.
[880] PASQUALE, *supra* note 54, at 144.
[881] MCNAMEE, *supra* note 58, at 260.

Black's Law Dictionary[882] calls an "illegal contract" one whose formation or performance is expressly forbidden by statute or where a penalty is imposed for doing the act agreed upon; "unlawful" would involve acts not positively forbidden but disapproved by law and not recognized because they are against public policy[883] Black's Law Dictionary defines "unenforceable contract" as meaning that the contract has no legal effect or force in a court action; a "void contract" as one having no legal force or binding effect.[884] California case law and the Civil Code use both "void" and "unenforceable."

The California Civil Code contains provisions concerning both contracts that are unenforceable and contracts that are void. For example, California Civil Code § 1670.5, specifies that a court will not "enforce" an unconscionable contract. California Civil Code § 1598 states that contracts in which the object is unlawful, impossible, or unascertainable are "void," and § 1916-2 states that a usury contract is "void." The word "void" in the cases and Civil Code refers to "void" in the strict sense, and does not include the sense of "voidable" (meaning that a defect in the contract can be cured to make it effective).[885] It is not clear whether the term "void" refers to a time period beginning with the inception of the contract or a later time, but it seems logical for it to refer to the inception unless the context requires a different meaning.

As noted above, California Civil Code § 1667 defines "unlawful" contracts and § 1599 states that "that part of a contract which is unlawful is void." Although the cases noted previously often refer to contracts that are contrary to good morals, unconscionable, or against public policy as being "unenforceable," the contracts are also void under § 1599.

The concept of voidness is important for its consequences when dealing with the Google and Facebook contracts. If the contract were found void, then the consent found in the Terms of Service of Google and Facebook would also be

---

[882] CAL. CIV. CODE § 1667 forbids contracts that are against good morals, unconscionable, or contrary to public policy. Such contracts thus qualify as "illegal" under the BLACKS LAW DICTIONARY definition of "illegal contract." *See Illegal Contract, infra* note 883.

[883] *Illegal Contract,* BLACK'S LAW DICTIONARY (6th ed. 1990); *Unlawful,* BLACK'S LAW DICTIONARY (6th ed. 1990).

[884] *Unenforceable Contract,* BLACK'S LAW DICTIONARY (6th ed. 1990); *Void Contract,* BLACK'S LAW DICTIONARY (6th ed. 1990).

[885] *Id.* at 1573.

void.[886] The companies would then have no legal basis for gathering and monetizing personal information.

The California Civil Code has one provision on unjust enrichment that potentially could apply to the situation with Google and Facebook. CAL. CIV. CODE § 1589 (Consent by Acceptance of Benefits) states that: "[a] voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

Clearly, the users of Google and Facebook accept the benefit of the search or social media services and this acceptance could be interpreted as "consent" to their obligation to allow their persona data to be collected and monetized by the companies. A serious question arises however as to the extent the "the facts" are "known" to the users. Further, the collection and monetization of the personal information leading to the loss of autonomy could be seen as sufficient justification for finding the "transaction" immoral and against public policy.[887]

b. Statutory Violation or Common Law Tort?

Assuming that the consent in the Terms of Service was void or the transaction itself was void, the question would be whether the gathering and monetization of the personal information would constitute a civil or criminal statutory violation or a tort.

The applicable civil legislation would be privacy legislation. There is no federal general privacy statute. A number of federal statutes protect privacy in specific sectors, but they do not cover all commercial entities in their collection and

[886] The current consent in Google's Terms of Service is the statement, "[t]his license allows Google to: host, reproduce, distribute, communicate, and use your content." Google, *Google Terms of Service* (August 17, 2020), https://policies.google.com/terms?hl=en [https://perma.cc/F9LT-BF8D]. The current consent in Facebook's Terms of Service is the statement, "[b]y using our Products, you agree that we can show you ads that we think will be relevant to you and your interests. We use your personal data to help determine which ads to show you." Facebook, *Facebook Terms of Service* (August 17, 2020), https://www.facebook.com/legal/terms [https://perma.cc/EJN3-ATBQ].

[887] The acceptance of benefits can have other consequences. For a short period in 2014, General Mills provided in its terms of service that anyone who received something of value (including "liking" General Mills on Facebook) could not sue it. It does not appear that anything similar appears in the Terms of Service of Google or Facebook. There would seem to be a question of whether such a term would also be against public policy. *See* SILVERMAN, *supra* note 3, at 26.

use of personal information.[888] Currently, none of these statutes that protect certain areas of privacy have been used successfully to attack the business model of Google or Facebook for their use of personal data. California is reputed to have the strongest privacy statutes in the country, but these statutes still have limitations.[889] California's Consumer Privacy Act of 2018 that came into effect in January 2020 gives users of Google and Facebook more rights over personal data, but it does not specifically attack, or cover, their business model.[890] These statutes do not purport to give users a right to sue Google or Facebook for use of personal data collected from users. These statutes, therefore, would not help determine the possible liability of Google and Facebook for collection and use of the personal data.

The other statutory basis under which a claim might allege a violation would be "petty theft" under California's Penal Code.[891] Professor Lori Andrews, Director of the Institute for Science, Law and Technology at Illinois Institute of Technology, has described the practice of behavioral advertising as "theft." She explains that:

> If someone broke into my home and copied my documents, he'd be guilty of trespass and invasion of privacy. If the cops wanted to wiretap my conversation, they'd need a warrant. But without our knowledge or consent,[892] virtually every entry we make on a social network or other website is surreptitiously being tracked and assessed. The

[888] DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 876 (2018). A survey of these statutes could reveal whether any one of them conditions legality of the activities they cover on consent. If so, then a court decision declaring the Google and Facebook internet service contracts illegal would also make the companies' conduct under the relevant statute illegal.
[889] *Id*. at 789.
[890] *See* Natasha Singer, *Advocates Behind California's Landmark Privacy Law Aim to Toughen It*, N.Y. TIMES, Sept. 25, 2019, at B3; Natasha Singer, *Weighing How to Comply 'With a New Privacy Law*, N.Y. TIMES Dec. 30, 2019, at B1; *see also* Natasha Singer, *Why California Has Better Data Protections*, N.Y. TIMES, Sept. 30, 2019 (showing efforts to broaden privacy rights by ballot initiative); Nicholas Confessore, *Big Tech's War on Privacy*, N.Y. TIMES MAG., Aug. 19, 2018, at 28. The essence of the California Consumer Privacy Act of 2018 (CAL. CIVIL CODE §1798 (2018)) is the obligation to "inform" the consumer (§ 1798.100), while the consumer has a "right to request" (§ 1798.120 (a)) that the business that "sells" personal information not sell it to third parties. Google and Facebook claim that they do not "sell" personal information to third parties. Further, the burden is on the consumer to proactively assert his or her rights. A criticism of the Act is that it creates too much work for too many people.
[891] CAL. PENAL CODE § 488 (1927).
[892] As explained above, the consent would be void if the contract containing the consent was void.

> information is just as sensitive. The harms are just as real. But the law is not as protective.[893]

She then concludes that "[t]he guiding force behind this enormous theft of private information is behavioral advertising."[894] Her conclusion of "theft" has been explained in advance by her comment that "the law is not as protective."[895]

Professor Cass Sunstein, commenting on manipulation, has asserted that where the manipulator is focused on his own interests rather than on those of the chooser, "a self-interested manipulator can be said to be stealing from people—both limiting their agency and moving their resources in the preferred direction."[896] Given the manipulative nature of the contracts implementing the behavioral-advertising business model, the internet service contracts of Google and Facebook should meet this standard.

It does not appear that Facebook or Google has faced serious charges of theft. Professors Andrews and Sunstein have highlighted the moral deficit in behavioral advertising that would support an argument that the contracts of Google and Facebook are contrary to good morals, unconscionable, and against public policy.

The other possible liability would be under tort law. Current tort law has a restricted scope. Depriving a person of autonomy through the collection and aggregation of personal information does not yet qualify as a tort. Common law courts have, however, created new torts when the need arises.[897] The tort that is analogous is that of privacy and this tort is particularly salient for these purposes. First, the Restatement of Torts (Second) seems to invite lawyers and judges to find new torts to fit new circumstances. It lists the four typical privacy torts: unreasonable intrusion upon the seclusion of another; appropriation of the other's name or likeness; unreasonable publicity given to the other's private life; and publicity that unreasonably places the other in a false light before the public.[898] It then states:

---

[893] ANDREWS, *supra* note 292, at 18; *see also* FOROOHAR, supra note 91, at 47 (calling these situations "lawful theft").
[894] ANDREWS, *supra* note 292 (emphasis added), at 18.
[895] *Id*.
[896] CASS R. SUNSTEIN, THE ETHICS OF INFLUENCE: GOVERNMENT IN THE AGE OF BEHAVIORAL SCIENCE 99 (2016) (emphasis added).
[897] RADIN, *supra* note 329, at 198 (proposing a new tort of "intentional deprivation of basic legal rights").
[898] RESTATEMENT (SECOND) OF TORTS § 652A.

> Other forms may still appear, particularly since some courts and in particular, the Supreme Court of the United States, have spoken in very broad general terms of a somewhat undefined 'right of privacy' as a ground for various constitutional decisions involving indeterminate civil and personal rights. These and other references to the right of privacy, particularly as a protection against various types of governmental interference and the compilation of elaborate written or computerized dossiers, may give rise to the expansion of the four forms of tort liability for invasion of privacy listed in this Section or the establishment of new forms. Nothing in this Chapter is intended to exclude the possibility of future developments in the tort law of privacy.[899]

Second, the history of the right of privacy demonstrates how courts can respond to changing circumstances and social mores. The current privacy law in the United States originated in a famous law review article written by Samuel D. Warren and Louis D. Brandeis in 1890. They opined that "[p]olitical, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society."[900] They saw the development of new rights as "inevitable," the newest being the right to privacy, or the "general right of the individual to be let alone."[901] Although the New York Court of Appeals rejected any such right a few years later, this narrow right of protection against the intrusive interests of both the press and its readers was enacted into law over the succeeding decades by many state legislatures.[902] Over the years, judicial interpretation expanded the scope of the right of privacy to include the right of a woman to make her own decisions about whether or not to terminate a pregnancy. In *Roe v. Wade*, Justice Blackmun writing for the United States Supreme Court in a 7-2 decision, found such a right of privacy in the Constitution, even though no general right of privacy was explicitly mentioned there.[903] This decision demonstrates that courts have been willing to accept the challenge posed in the

---

[899] RESTATEMENT (SECOND) OF TORTS § 652A, cmt. c (AM. LAW INST. 1979).
[900] Warren & Brandeis, *supra* note 709.
[901] *Id*. at 205.
[902] DAN B. DOBBS, THE LAW OF TORTS § 424 (2000).
[903] Roe v. Wade, 410 U.S. 113, 152-53 (1973).

Restatement and recognize new forms of the privacy tort when changes in society make it appropriate.[904]

To date, the judiciary has not recognized harm to autonomy as a tort.[905] Until the recognition of such a tort, the closest analogy is unauthorized disclosure of personal information. As lawyers Charlene Brownlee and Blaze D. Waleski have noted, occurrences of unauthorized access to and misuse of personal information have increased because of the prevalence of data aggregation and advanced technologies to automate the collection, access to the information, and use of this information, particularly over the Internet.[906] The growing number of lawsuits caused by breaches of data security have alleged various offenses: negligence, intentional or negligent breach of privacy, violation of promises made to customers, invasion of privacy, possessory rights, breach of contract, violation of unfair trade practices and violation of a specific legislative act. None of these causes of action would seem to explicitly fit deprivation of autonomy, but they provide some helpful lessons for how to frame an autonomy tort suit.

Previously scholars have analyzed the collection and aggregation of personal information, but they did not agree on the nature of the problem. Professor Jerry Kang of UCLA Law School saw the issue as one of surveillance in tension with human dignity and proposed a rule that personal information may be processed only in functionally necessary ways.[907] Professor Daniel Solove of George Washington Law School on the other hand believed that the problem was not surveillance but a problem with the helplessness, frustration, and vulnerability one experiences when a large bureaucratic organization has vast dossiers on individuals.[908] Fordham Law Professor Joel R. Reindenberg suggested that the lack of participation by citizens in decisions about the gathering of their information is inherently manipulating citizens.[909]Berkeley Law Professor Paul M. Schwartz,

---

[904] However, Paul M. Schwartz had a more pessimistic outlook on this issue in 1999, that "unless courts expand these [privacy] torts over time, which is unlikely . . . ." Schwartz, *supra* note 265, at 1634.

[905] *See e.g.*, Hill v. National Collegiate Athletic Assn., 26 Cal.Rptr.2d 834, 835 (1994) (declaring California has recognized a constitutional "autonomy privacy" right).

[906] BROWNLEE & WALESKI, *supra* note 408, at § 7.04a.

[907] Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1263 (1998).

[908] Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393 (2001).

[909] Joel R. Reindenberg, *Setting Standards for Fair Information Practice in the U.S. Private Sector*, 80 Iowa L. Rev. 497, 539 (1995).

however, saw the problem as a lack of privacy protection that exposes information about a person's communication and consumption of ideas.[910]

Other scholars have suggested the creation of new specific forms of tort. Professor Jessica Litman of Wayne State proposed a tort of breach of confidence or breach of trust.[911] Professor Andrew J. McClurg of Florida International College of Law has suggested a tort of appropriation.[912] Sarah Ludington, Senior Lecturing Fellow at Duke Law School, has promoted the idea of a tort of misuse of Fair Information Practices (transferring the principles of Fair Information Practices in the Privacy Act of 1974 from the public sector to the private sector).[913]

These proposals and suggestions indicate the direction that tort law could take to adjust, as it has in the past, to changing social mores and circumstances. Such adjustment is likely to take time. It seems unlikely that currently the Google and Facebook behavioral-advertising contracts would be found to involve theft or a tort—but they could still be found void. Is there an alternative business model that would serve users but not violate California standards of good morals, unconscionability, and public policy?

c. Alternative Business Model[914]

Any court presented with the task of deciding whether the Google and Facebook contracts were illegal would consider the effect on users. The court would want to consider whether there was an alternative business model that would not violate California standards of good morals, unconscionability, and public policy.

---

[910] Schwartz, *supra* note 265, at 1646.

[911] Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283 (2000).

[912] Andrew J. McClurg, *A Thousand Words Are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling*, 98 NW. U. L. REV. 63, 69 (2003).

[913] Sarah Ludington, *Reining in the Data Traders: A Tort for Misuse of Personal Information*, 66 MD. L. REV. 140 (2007).

[914] Assuming that the new business model would be that of Google and Facebook, some have suggested challenging or rivaling such companies using public funding. *See* Diane Coyle, *We need a publicly funded rival to Google and Facebook*, FIN. TIMES (July 10, 2018), https://www.ft.com/content/d56744a0-835c-11e8-9199-c2a4754b5a0e; *see also* Evgeny Morozov, *The case for publicly enforced online rights*, FIN. TIMES (Sept. 27, 2018), https://www.ft.com/content/5e62186c-c1a5-11e8-84cd-9e601db069b8. Others have suggested an "alt-Facebook" nonprofit. Tim Wu, *Don't Fix Facebook. Replace It*, N.Y. TIMES (Apr. 3, 2018), https://www.nytimes.com/2018/04/03/opinion/facebook-fix-replace.html.

There is an alternative—a subscription model.[915] This model was available to the founders of Google and Facebook, but was ignored in favor of the despised, but useful, advertising model. In 2015, Mark Zuckerberg justified the rejection of the subscription model. When a new Facebook employee suggested a subscription model to him, Mark stopped the employee with the comment, "Facebook's mission is to make the world more open and connected. I don't understand how subscriptions would make the world either more open or more connected."[916]

A subscription model would avoid the moral and legal problems of behavioral advertising. The user would no longer be a product, but would become a customer. Google and Facebook would look to the customers, not advertisers, as the source of their revenue and the focus of their attention. They would use the personal data of their customers only to improve services for the customer, not monetize it through behavioral advertising. The companies would no longer have an incentive to addict the customers to use of their services. They would not collect and maintain enormous amounts of personal data. They would not addict, surveil, or manipulate their users. They would not compromise the users' autonomy. The contracts would not be found contrary to good morals, unconscionable, or against public policy. This poses a "wishful and wistful" question: would we prefer a paid option for social media?[917]

The major difference in the subscription model is, of course, that the customer has to pay. That change is likely to be unwelcome to users. Free services have become a virtual right, although they are an anomaly created by the distinctive environment of the early internet. The long period of free access to services in the late 1990s accustomed users to free services.[918] As a result, some observers believe the subscription model is unrealistic. Former Facebook manager Antonio Garcia Martinez has disdainfully dismissed the idea of a paid option, saying, "[o]h, and spare me your claims that you'd be willing to pay for Facebook instead of seeing ads. It's not even clear what Facebook should charge you."[919]

---

[915] SILVERMAN, *supra* note 3, at 276; *see also, id.* at 346 (comments by journalist David Roberts stating "[a]s soon as you're ad-based, attention is your currency. You're not trying to improve your customers' lives. You're trying to get them to look at you as often as possible, and you're fated to be distracted and annoying.").

[916] LEVY, *supra* note 139, at 388.

[917] WADHWA & SALKEVER, *supra* note 5, at 35.

[918] ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY 211 (2018).

[919] GARCIA MARTINEZ, *supra* note 2, at 325.

Additionally, New Yorker reporter Ken Auletta believes that, given stagnant incomes and already large subscription payments, the economics do not support this "noble idea."[920] He cites a Brookings study reporting that, after adjusting for inflation, American wages have risen only 0.2 percent over the past forty years, and today the average household already pays monthly subscription charges of $267 per month not including electricity, gas and other unavoidable monthly bills.[921] But he does not try to estimate what subscriptions to Google and Facebook would cost. One study found that the average American spends more than $1,300 on digital media a year.[922] Others have made estimates of the value of the services: $8,500/year for search and $300/year for social media as what users would accept as payment to quit using them.[923] Another calculation in 2017 was for the average ad revenue per user: for Facebook, the average revenue per U.S. user was $6/month, but it was suggested that few would agree to pay in exchange for the protection, rather than the monetization, of their personal information.[924] In a 2015 suit, plaintiffs alleged that the monetary value of the information of each user each year was $59.20.[925] Zeynep Tufekci has stated that she would be happy to pay more than 20 cents per month (estimated to be Facebook's profit per user per month) for a Facebook or a Google that did not track her, upgraded its encryption and treated her as a customer whose preferences and privacy matter.[926]

But if the subscription model is unrealistic, why is it successful? Consider the subscription services for internet connectivity, cellphone service, and a number of internet service providers, such as HBO, Netflix, Spotify, and Patreon, are currently successfully selling subscriptions for online services.[927] The Financial Times in discussing ad-driven online businesses said that "[n]ews sites that have

---

[920] *See* KEN AULETTA, FRENEMIES: THE EPIC DISRUPTION OF THE AD BUSINESS (AND EVERYTHING ELSE) 312 (2018).
[921] *Id.* at 313.
[922] Kevin Roose, *Online Cesspool Got You Down? You Can Clean It Up, for a Price*, N.Y. TIMES MAG. (Nov. 13, 2019), https://www.nytimes.com/interactive/2019/11/13/magazine/internet-premium.html.
[923] Tim Harford, *Treat social media like email and search engines*, FIN. TIMES (Apr. 18, 2018), https://www.ft.com/content/a9ac257e-4897-11e8-8ae9-4b5ddcca99b3.
[924] Editorial, *Digital Privacy is more than just opting in or out*, FIN. TIMES (Mar. 31, 2017), https://www.ft.com/content/6bb17082-15f1-11e7-80f4-13e067d5072c.
[925] *See In re Facebook Internet Tracking Litigation*, 140 F. Supp. 3d 922, 928 (N.D. Cal. 2015).
[926] Zeynep Tufekci, *Mark Zuckerberg, Let Me Pay for Facebook*, N.Y. TIMES (June 4, 2015), https://www.nytimes.com/2015/06/04/opinion/zeynep-tufekci-mark-zuckerberg-let-me-pay-for-facebook.html; *see also* KUANG, *supra* note 214, at 275.
[927] For discussion on the most popular video streaming subscription services, *see* Todd Spangler, *Best Video Streaming Services: Netflix, HBO Max, Disney Plus, Hulu, Amazon, Apple Tv Plus*, VARIETY (May 25, 2020), https://variety.com/2020/digital/news/best-video-streaming-services-2020-1234615484/.

prospered have done so on subscriptions, not ads."[928] In 2018, New York Times tech columnist Farhad Manjoo discovered the beginning of a remarkable renaissance in art and culture based on subscription payments[929] and observed that the way to save a local newspaper is to have people pay for it—$5 or $10/month or more.[930] One small example he cites is the news service The Information, which charges $399/year for a subscription, has a subscriber base of 10,000 and a positive cash flow.[931] Subscriptions are now being considered a status symbol.[932] Perhaps the most promising subscription model would be one that was combined with a progressive, digital-ad revenue tax, as suggested by Nobel Prize winning economist Paul Romer. The tax would encourage the breakup of Google and Facebook into smaller companies and make it easier for new companies to enter the market.[933] In fact, social media platforms such as Vero and Idka already exist[934] and a new platform, Openbook, was started in 2018.[935]

The subscription model also has the potential to change the psychology of the relationship of users to each other and to Google and Facebook. It seems plausible that a subscription model could discourage some of the negative behavior that is so common on Facebook. When the user has a commercial relationship rather than enjoying a "free ride," it seems likely that the user would be more responsible. But, further research is needed here. A starting point for such an effort could be to examine the experience of the existing subscription social media platforms.

In weighing the pros and cons of finding the behavioral-advertising contracts illegal, a judge would need to understand what the harm to users would be. The existence of the subscription model would not completely change the services the companies offered, and customers would still be able to communicate with friends they currently communicate with. The other services could continue as

---

[928] LEX, *Facebook: regulation=validation*, FIN. TIMES (Apr. 10, 2018), https://www.ft.com/content/c6dd9d12-3c12-11e8-b7e0-52972418fec4.
[929] Farhad Manjoo, *How the Internet Is Saving Culture, Not Killing It*, N.Y. TIMES (Mar. 15, 2007), https://www.nytimes.com/2017/03/15/technology/how-the-internet-is-saving-culture-not-killing-it.html.
[930] Farhad Manjoo, *A Crazy Idea for Funding Local News: Charge People for It*, N.Y. TIMES (Feb. 7, 2018), https://www.nytimes.com/2018/02/07/technology/funding-local-news-charge-people-money.html.
[931] *See* https://www.theinformation.com/.
[932] Roose, *supra* note 922.
[933] Paul Romer, *A Tax That Could Fix Big Tech*, N.Y. TIMES (May 6, 2019), https://www.nytimes.com/2019/05/06/opinion/tax-facebook-google.html.
[934] Maija Palmer, *Are there any viable alternatives to Facebook?*, FIN. TIMES (Apr. 25, 2018), https://www.ft.com/content/057fb3e8-474e-11e8-8ee8-cae73aab7ccb.
[935] Hannah Kuchler, *Privacy pioneers plan 'zero tracking' rival to Facebook*, FIN. TIMES (July 16, 2018), https://www.ft.com/content/fb5235e4-8564-11e8-96dd-fa565ec55929.

well. Further, asking a customer to pay for a service is not something exceptional or extraordinary; it is the way the market economy works.[936] The subscription model would eliminate the huge profits that both companies have enjoyed, but leaders of both companies have been aware of the moral deficiencies of advertising from the very beginning. The declaration that the contracts are illegal and the need to change to a subscription model should not come as a big surprise to both companies.

d. Ownership of Data[937]

The subscription model would renew the question of ownership of the personal data of the customers. Yuval Noah Harari believes this may be the most important political question of our era.[938] Warren and Brandeis in their seminal article said that "where the value of production [of a literary or artistic composition] . . . is found . . . in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property, in the common acceptation of that term."[939] But as early as 1971, Harvard Law Professor Arthur Miller noted that one of the most facile approaches to safeguarding privacy was the notion that personal information is a type of property.[940] Later, in 2011, Lori Andrews suggested resort to "novel legal theories to give people a property right over their own data."[941] Currently, the United States, unlike other Western countries, does not have a basic data protection law.[942] There is no legal right to personal data in the United States. The result is that different laws determine the privacy of different types of information. In 1998, UCLA Law School Professor

---

[936] Jim Chappelow, *Market Economy*, INVESTOPEDIA (Apr. 6, 2020), https://www.investopedia.com/terms/m/marketeconomy.asp.

[937] There is also a question as to whether attention should be a market commodity. In 1996, Professor Radin criticized this notion, saying, "[w]here attention is property, noncommodified political and social ideas and interactions may wither." Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J. L. & COM. 509, 517 (1996). Google states in its Terms of Service that, "[y]our content remains yours…[,]" but if the contract is void, then this statement would seem to have no legal effect. *See* GOOGLE TERMS OF SERVICE, https://policies.google.com/terms. Facebook's terms of use have also stated "[y]ou own all of the content and information you put on Facebook . . . ." HARTZOG, *supra* note 9 at 318 (citing FACEBOOKS STATEMENT OF RIGHTS AND RESPONSIBILITIES, https://ww.facebook.com/terms.php?ref=pf). Professor Julie Cohen has suggested that there is a stalemate on the legal status of personal data but that such data is (de facto if not de jure) proprietary information property. JULIE E. COHEN, BETWEEN TRUST AND POWER, 25, 44 (2019).

[938] HARARI, *supra* note 204, at 80.

[939] Warren & Brandeis, *supra* note 709, at 200-01.

[940] ARTHUR R. MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS 211 (1971).

[941] *See* ANDREWS, *supra* note 292, at 43.

[942] *See* SCHNEIER, *supra* note 201, at 200.

Jerry Kang outlined the basic conflict: users assumed that their data belonged to them, the collectors of the information asserted equal rights in the data because it arose from a mutual interaction.[943] In practice, who holds the data decides how to exploit it.

The discussion above on "digital exhaust" and "dumpster diving" would suggest an analogy to abandoned property. Are the users of Google and Facebook effectively abandoning their personal information as if they were placing it for disposal outside the curtilage of their home? If so, it would presumably belong to the first person who found it—probably Google and Facebook. That result would be harsh, and to date does not seem to have been suggested seriously.[944]

Proposals for property legislation have been made for many years. In 1967, Alan Westin, Professor of Public Law at Columbia, suggested that legislation should define personal information as a property right.[945] In 2011, Paul M. Schwartz developed a model of "propertized personal information" that (1) limited the alienability of personal information; (2) established opt-in default rules; (3) created a right to rescind data trade agreements; (4) conferred liquidated damages to successful litigants to effectively deter violations ; and (5) defined institutional roles in regulating the information market.[946] One recent proposal by University of Chicago Booth School Professors Luigi Zingales and Guy Rolnik is for a Social Graph Portability Act that would give Facebook users ownership of all the digital connections that they create (their "social graph").[947]

The concept of ownership raises the question of the purpose of granting ownership rights. Proponents of ownership rights often have seen them as a way to protect privacy. Both Arthur Miller and Lori Andrews proposals were seeking to protect people's privacy. Others have noted that the purpose of creating property rights in data can be to facilitate alienability. Wayne State Law Professor Jessica Litman has said, "[w]e deem something property in order to facilitate its transfer."[948] She believes that "[t]he market in personal data is the problem. Market solutions based on a property rights model won't cure it; they'll only legitimize

---

[943] *See* Kang, *supra* note 907, at 1246.
[944] *See* K. Reed Mayo, *Virginia's Acquisition of Unclaimed and Abandoned Personal Property*, 27 WM. & MARY L. REV. 409, 413 (1986). The described scenario would probably not qualify as theft under California's Penal Code. *See also* CAL. PENAL CODE § 485 (1927) ("Theft; appropriation of lost property with knowledge or means of inquiry as to true owner").
[945] *See generally,* ALAN WESTIN, PRIVACY AND FREEDOM 262 (1967).
[946] Paul M. Schwartz, *Property, Privacy and Personal Data*, 117 HARV. L. REV. 2056 (2004).
[947] Luigi Zingales & Guy Rolnik, *A Way to Own Your Social-Media Data*, N.Y. TIMES, July 1, 2017, at 23.
[948] Litman, *supra* note 911, at 1296.

it."[949] She has proposed a model under which personal information could not be property, and it would be illegal to buy it or sell it.[950]

Jerry Kang also hypothesized that viewing personal data as a civil or human right would entail a rule of inalienability, though he summarily rejected such a possibility because it would risk "surrendering control over information privacy to the state".[951]Berkeley Law Professor Pamela Samuelson has written, "the common justification for granting property rights—to enable market allocations of scarce resources—does not apply to personal data. What is scarce is information privacy, not personal data."[952] She notes that it would be unusual for a property rights regime to establish a rule or strong presumption against alienability and suggests that if we consider information privacy as a civil liberty, then, just as it does not make sense to commodify voting rights, it would not make sense to propertize personal data.[953]

Stanford Law Professor Mark A. Lemley believes that creating an intellectual property right in individual data is "a very bad idea."[954] To quote Bruce Schneier's comments on privacy, "[t]he . . . fundamental problem is the conception of [autonomy] as something that should be subjected to commerce in this way. [Autonomy] needs to be a fundamental right, not a property right."[955] To paraphrase Nicholas Carr, we should not come to see autonomy as something to be traded for apps and amusements.[956]

True to Jessica Litman's concern, recent discussion on ownership has been conducted in terms of payment. If the users' data is so valuable, then shouldn't they

---

[949] *Id*. at 1301 (emphasis added).
[950] *Id*. at 1302.
[951] Kang, *supra* note 907, at 1266.
[952] Samuelson, *supra* note 719, at 1138.
[953] *Id.* at 1143. She concedes that one type of property might be considered: "*droit moral*" or "moral rights." Under French law, moral rights conceive of artistic and literary works as emanations of the author's personality and can include rights of attribution, integrity, divulgation, and withdrawal. Two advantages of such a moral rights-like approach over a contract rights approach would be that they could be asserted against infringers who were not parties to a contract and that an injured party could seek an injunction rather than damages. Most importantly, moral rights in France are inalienable and, presumably, any similar American right should also be inalienable. But Professor Samuelson believes that a general grant of property rights in personal data might be constitutionally questionable. *Id.* at 1146-47, 1141.
[954] Mark A. Lemley, *Private Property*, 52 STAN. L. REV 1545, 1547 (2000).
[955] SCHNEIER, *supra* note 201, at 201.
[956] Nicholas Carr, *Is Facebook the problem with Facebook, or is it us?* WASH. POST (June 29, 2018), https://www.washingtonpost.com/outlook/is-facebook-the-problem-with-facebook-or-is-it-us/2018/06/28/5949992e-5939-11e8-8836-a4a123c359ab_story.html?noredirect=on&utm_term=.809148b1cda5.

be paid for it? Jaron Lanier voiced support for this idea, attributing it to Ted Nelson, a formative figure in the development of online culture.[957] Lanier wrote, "[i]n a world of digital dignity, each individual will be the commercial owner of any data that can be measured from that person's state or behavior."[958]

The term "commercial owner" seems to emphasize the right to alienate the data. Lanier was originally concerned with finding ways to compensate artists, authors, and other creative people.[959] The individual would receive nanopayments proportional both to the degree of contribution and the resultant value.[960] It is not clear whether search history or social media data would warrant nanopayments. One effort to theorize how such a scheme would work is that of Professor Eric Posner, and E. Glen Weyl, a principal researcher at Microsoft, who have proposed the commodification of personal data through online auctions in "radical markets.[961] But Chris Jay Hoofnagle and Jan Whittington have identified the problem with Lanier's proposal to compensate artists, authors and other creatives: it suggests that "the only way to address the inequities of the information economy is for the consumer to be fully engaged in the commercialization of identity.[962] Lanier's proposal is misguided because it rationalizes and justifies the commercialization of a person's autonomy.

---

[957] LANIER, *supra* note 42, at 100-01.

[958] LANIER, *supra* note 43, at 20; *see also* Jaron Lanier & E. Glen Weyl, *A Blueprint for a Better Digital Society*, HARV. BUS. REV. (Sept. 26, 2018), https://hbr.org/2018/09/a-blueprint-for-a-better-digital-society.

[959] *See* LANIER, *supra* note 42, at 101("I believe most people would embrace a social contract in which bits have value instead of being free. Everyone would have easy access to everyone else's creative bits at reasonable prices—and everyone would get paid for their bits. This arrangement would celebrate personhood in full, because personal expression would be valued").

[960] *Id.*

[961] POSNER & WEYL, *supra* note 918, at 205-49.

[962] Hoofnagle & Whittington, *supra* note 200, at 667. Two other problems with payment are reciprocity and risk assessment. As Gillian Tett, the Financial Times Editor-at-Large US, has predicted, if the tech giants started paying for the data, then they would they also start charging for the formerly "free" services. One can imagine a new form of debt peonage where Google or Facebook charges more for the service than the user will be able to earn in payments in data.Gillian Tett, *Should Amazon and Google pay us for the data?* FIN. TIMES, Sept. 27, 2018, at 10; Samuelson, *supra* note 719, at 1145. (identifying the difficulty for individuals judging risks in selling property rights in personal data); *see also* Joshua Adams, *Getting Cash for Our Data Could Actually Make Things Worse*, THE GOOD MEN PROJECT (Jan. 22, 2020), https://goodmenproject.com/feaured-content/getting-cash-for-our-data-could-actually-make-things-worse/.

History tells us that autonomy has for centuries been a fundamental right that cannot be commercialized. It is something that is beyond the scope of market thinking. It is a "basic right."[963] It is an inalienable right. It is a human right.

Of course, not every bit of personal information is crucial to a person's autonomy—it is a question of aggregation and scale. Standards for data collection and use have been suggested: those in the 1973 Code of Fair Information Practices, those in the 2012 Consumer Privacy Bill of Rights, those of Paul Schwartz, Jerry Kang's concept of allowing the processing of personal information only in "functionally necessary ways,"[964] and those described by Zeynep Tufekci.[965] They could serve as the start of a discussion—not on Facebook or Google—but rather on the extent to which collection and aggregation of personal data can be done without causing the contract with the customer to be judged illegal and void. Together with a fiduciary duty, such standards could help resolve many of the current privacy issues.

e. Bankruptcy

The overwhelming portion of the income of Google and Facebook currently comes from advertising and it seems unlikely that a subscription model would generate the same profits as behavioral advertising. Thus, a decision that declared the contracts of the behavioral advertising model illegal would have catastrophic consequences for both companies. They could include:

i. The bankruptcy of the two companies.

The loss of the overwhelming portion of their income, their inability to use the users' data to sell advertising would in all likelihood quickly lead to the bankruptcy of the companies. This would be a case of true "disruptive innovation."[966]

ii. The conversion of the companies to a subscription business model.

The conversion of the companies to a subscription model would be a decision by each company. If they could devise a business model that did

[963] SATZ, *supra* note 27, at 95.
[964] Kang, *supra* note 907, at 1271.
[965] Zeynep Tufekci, *What Should They Ask Zuckerberg?* N.Y. TIMES, Apr. 10, 2018, at A25 (proposing that data collection only happen if (1) it is done through an "opt in;" (2) if users can access the data the company is collecting; and (3) the data is only used for specifically enumerated purposes).
[966] Harvard Business Review, *Disruptive Innovation Explained,* YOUTUBE (Mar. 30, 2012) https://www.youtube.com/watch?v=qDrMAzCHFUU&feature=emb_logo.

not involve exploiting the users' personal data, the contracts implementing that model would presumably not be found illegal. The interest of users in continuity of service would be preserved, but users would have to pay for the service.

iii. The creation of a limiting principle on the collection of the users' personal data.

The illegality of the present contracts would be based on the fact that the companies developed a business model that collected more data than necessary for the maintenance and improvement of their services to the user. A limiting principle for the collection of data, such as that of the suggestion of Jerry Kang,[967] would need to be accepted.

iv. The imposition on the companies of a fiduciary duty in the handling of the users' personal data.

In order to protect the interests of the users, the bankruptcy court should permanently enjoin the companies from using the data or algorithms based on it for advertising purposes. The court or the legislature should then establish a fiduciary duty in Google, Facebook, and other collectors of personal data.[968] Courts can establish a fiduciary relationship by applying the principles of fiduciary relationship or applying similarities to traditional fiduciary relationships. [969] Fiduciary duties are imposed on many professions, such as doctors, lawyers, and accountants, and roles, such as agents, executors, and trustees. Once the sensitivity and power of personal data are recognized, it is clear that the collector and holder should bear a fiduciary duty.

f. International Consequences

A decision declaring the user contracts of Google and Facebook illegal and the ensuing bankruptcy of both companies would have greater impact abroad than

[967] Kang, *supra* note 907, at 1271.
[968] *See* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2015-2016); SCHNEIER *supra* note 201, at 204-05; *see generally* Jonathan Zittrain, *Facebook Can Still Fix This Mess*, N.Y. TIMES (Apr. 8, 2016), https://www.nytimes.com/2018/04/07/opinion/sunday/zuckerberg-facebook-privacy-congress; Merryn Somerset Webb, *Data Gatherers should be regulated like financial advisers*, FIN. TIMES, Mar. 31-Apr. 1, 2018, at 1; Sylvie Delacroix & Neil Lawrence, Letter to the Editor, FIN. TIMES, Dec. 10, 2019, at 8 (suggesting data trusts are a way to deal with data vulnerability).
[969] *See* TAMAR FRANKEL, FIDUCIARY LAW 62, 65, 68 (2011).

in the United States. This is for two reasons. First, the number of users of both companies' services are more numerous abroad than in the United States. Google's search service has over one billion users worldwide,[970] but it has only 246 million users in the United States.[971] Of Facebook's 2.41 billion users, only 220.5 million are in the United States.[972] The impact of the companies abroad is far more extensive than in the United States.

Second, the impact is often more extreme abroad. In the United States, unrestrained or violent messages that have occurred on Facebook have inspired some radical rightwing violence, but abroad the reaction has been much worse. In countries with weak institutions, Facebook's behavioral-advertising business model has been much more destructive.[973] This business model requires ever more data gleaned from ever more engagement. Facebook's algorithm-driven newsfeed emphasizes whatever content draws the most engagement from users and that content is often the most negative and provocative, stirring primitive emotions of anger and fear. Facebook not only amplifies existing prejudices within a filter bubble and boosts extremists, it also changes the way they see others and incites them to violence. In countries like Sri Lanka, India, Libya, and Myanmar, Facebook users have incited massacres of Moslems, the Rohingya, and other minorities.[974] Mary Fitzgerald, an independent researcher on Libya, told reporters for The New York Times in 2018 that, "[s]o many times over the past seven years . . . I heard people say that if we could just shut down Facebook for a day, half of the country's problems would be solved."[975]

---

[970]Anita Balakrishna, *Here's how billions of people use Google products, in one chart*, CNBC, https://www.cnbc.com/2017/05/18/google-user-numbers-youtube-android-drive-photos.html (last visited Sept. 12, 2020).

[971] J. Clement, *Google Statistics and Facts*, STATISTA (Feb. 2, 2019), https://www.statista.com/topics/1001/google/.

[972] J. Clement, *Number of Facebook users worldwide 2008-2019*, STATISTA, (July, 2020), https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/; MCNAMEE, *supra* note 58, at 228 (noting the United States and Europe are its most profitable markets).

[973] Max Fisher & Amanda Taub, *In Search of Facebook's Heroes, Finding Only Victims*, N.Y. TIMES, Apr. 23, 2018, at A2; *see* Amanda Taub & Max Fisher, *As Attacks on Refugees Rise, A Link Is Uncovered: Facebook*, N.Y. TIMES, Aug. 23, 2018, at A1(discussing how violence is not limited to countries with weak institutions).

[974] Amanda Taub & Max Fisher, *Where Facebook Rumors Fuel Thirst for Revenge*, N.Y. TIMES, Apr. 22, 2018, at A1; Vindu Goel & Shuhasini Raj, *How WhatsApp Leads Mobs To Kill in India*, N.Y. TIMES, July 21, 2018, at B4; Declan Walsh & Suliman Ali Zway, *Libyan Fighters Wield Facebook Like a Weapon*, N. Y. TIMES, Sept. 4, 2018, at A1; Alexandra Stevenson, *Facebook Admits Role Platform Had in Fueling Violence in Myanmar*, N.Y. TIMES, Nov. 7, 2018, at B2.

[975] Walsh & Zway, *supra* note 974, at A10.

But Facebook does not seem willing to change, much less shut down. One reason is that Mark Zuckerberg strongly believes in free speech even when people do not tell the truth. Steven Levy writes that "[h]e held a Panglossian view of the goodness of humanity, and felt that people would sort out for themselves what was true."[976] Mark Zuckerberg told Steven Levy, "[t]he big lesson from the last few years is we were too idealistic and optimistic about the ways that people would use technology for good and didn't think enough about the ways that people would abuse it."[977]

But as in the case of the micro megaphone, this ignores the architecture of the technology and the surrounding circumstances. Professor Russell has suggested that access to true information is a prerequisite for freedom of thought, but observed that unfortunately democracies "seem to have placed a naïve trust in the idea that the truth will win out in the end."[978] They—and Mark Zuckerberg—do not seem to grasp that the "truth value of information is not the same as its economic value."[979]

Another reason is the immoral business model. As noted above, Andrew Marantz has called Facebook's refusal to censor hate speech immoral.[980] Maria Ressa, the chief executive of the Philippines-based new website Rappler, gave a reason why Facebook will not act: "[i]f Facebook wanted to solve this they could, but doing it would curb growth . . . troll armies have real engagement."[981] Zeynep Tufekci has asked why Facebook can't discover problems itself and take action. Her answer: "follow the money: Silicon Valley is profitable partly because it employs so few people in comparison to its user base of billions of people. Most of its employees aren't busy looking for such problems."[982] The change to a subscription model would eliminate the need for more engagement, more provocative content, and more data collection. It could help mitigate the problem of hate speech generally and particularly of violence incited on Facebook in countries with weak institutions.

Facebook's experience abroad reminds us of the lesson of the car megaphone: contrary to Mark Zuckerberg's belief, frictionless connection and

---

[976] LEVY, *supra* note 139, at 357.
[977] *Id*. at 523.
[978] RUSSELL, *supra* note 248, at 108.
[979] SEYMOUR, *supra* note 359, at 148.
[980] *See* Marantz, *supra* note 282.
[981] John Reed & Hannah Kuchler, *Facebook's Asian balancing act*, FIN. TIMES, Apr. 4, 2018, at 7.
[982] Zeynep Tufekci, *Russian Meddling Is a Symptom, Not the Disease*, N.Y. TIMES, Oct. 4, 2018, at A23.

radical transparency are not always positive. Whether the results are positive or negative depends on the architecture of the technology and the surrounding circumstances. In the experience of Facebook's foreign usage, it is clear that the lack of social and political institutions that could provide some friction to communication through Facebook led to vicious attacks on minority groups. This is simply a more extreme version of the negative consequences of Facebook's use in the United States.

PART THREE: CONCLUSION

I. MORALITY

The behavioral-advertising model now predominates for internet service contracts. Google and Facebook were the most successful innovators of this model and have suffered the most criticism of it. But the critics have not analyzed the business model from the perspective of morality or law. Specifically, there is little discussion on whether the business model is immoral or illegal and whether the contract between the user and the company might be defective. The absence of such a perspective seems to be due to market imperialism (that is, the predominance of market reasoning), particularly in law schools, during the last fifty years. Market imperialism has crowded out moral analysis and espoused universal commodification. The result has been a new business model that violates the user's inalienable right to autonomy. It is this violation that makes the contracts implementing this business model both clearly immoral and plausibly illegal.

The central problem of the behavioral-advertising business model is advertising. Philosophers in the 1980s believed that persuasive advertising was immoral because it manipulated people and reduced autonomy. The advertising they criticized was that on radio and television. These medias had no way of directly collecting personal information on users, so manipulation was more theoretical than actual, but the public was left with concerns about the probity of advertising. The founders of Google (Larry Page and Sergey Brin) and of Facebook (Mark Zuckerberg) were strongly opposed to advertising because they saw it as sleazy and distracting. For the Google founders it also posed a moral dilemma—the potential for advertising to compromise the integrity of the search engine. Mark Zuckerberg seems to have been concerned about advertising only because it affected user experience. He expressed contempt for concern about the key moral issue at the time—users' privacy.

The founders were able to maintain their disdain for advertising during the early years. At that time, the ads, similar to those on radio or television, were not

very effective commercially or bad morally. Ironically, it was only when the ads became truly abusive in exploiting the users' personal information to manipulate and weaken their autonomy that the founders stopped criticizing advertising.

Two things: grandiosity and public listing, changed the founders minds. First, the founders were exemplars of the "e-personality," the unwitting creation of extensive online interaction. A key characteristic of the e-personality is grandiosity, and the founders had oversized ambitions. The Google founders' grand scheme was to "organize the world's information and make it universally available and useful." Mark Zuckerberg's was "to make the world more open and connected." Larry Page, considering the fate of Nicola Tesla, the brilliant inventor who died in poverty, believed he needed abundant resources to avoid the same destiny. Both he and Sergey Brin felt they had to build a huge company to realize their dreams. To make the world more open and connected, Mark Zuckerberg needed a company of worldwide scope.

Second, the founders realized that they needed substantial funds to expand and gain the scale they required. They understood that the most practical way to do this was to take their companies public on Wall Street. Google went public in 2004, Facebook in 2012. But as public companies, they were subject to the demands of their investors for a more profitable business model.

The solution was the behavioral-advertising business model that Google pioneered. Under this new advertising model, advertisers bid in an auction on search words to win the right to place their ads alongside search results. At the beginning the ads were not directed to specific individuals, but Google learned that it could mine the data "surplus" (more data than needed to serve users) to target individual users. This was the birth of "surveillance capitalism." When Sheryl Sandberg moved from Google to Facebook in 2008, she brought the behavioral-advertising business model with her.

This business model is immoral because it uses addiction, surveillance, and manipulation to deprive the user not only of privacy, but of autonomy. While addiction is generally associated with substances, "behavioral addiction" has now achieved recognition and is included in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. Google and Facebook website designers include social validation loops and intermittent reinforcement to "hook" users and cause addiction. This process involves fast-paced screen interaction that excites and arouses, causing the release of dopamine that underlies systems for reward and addiction and inhibits the prefrontal cortex. The result is addiction to short-term, dopamine-driven feedback loops—addiction to Google and

Facebook. Arguments that users should exercise self-discipline fail when the user's environment has been engineered to make sure that choices are not free and when the latest findings of psychology on human weaknesses are applied in the design of the platforms of Google and Facebook. Addiction is a paradigm threat to personal autonomy.

Obtaining the data necessary to the behavioral-advertising business model requires watching and tracking—*surveillance*. Facebook has been called the biggest surveillance-based enterprise in history.[983] It not only collects the information of its users, it also obtains personal information on people who are not on Facebook. Information is power and more information is more power. Facebook and Google, which have unparalleled data bases on individuals, also have power over these individuals.

Given that the government has access to this information, every Google and Facebook user is potentially subject to a careful review of their data for potential evidence of criminal offenses. It also creates an enormous temptation to use the data for the benefit of the companies, for "dirty tricks," and for undermining critics, and influencing—or even blackmailing—legislators, administrators, and judges. Any accusation of such conduct could be met with a flat refusal to make available the relevant evidence—an algorithm—because it was a confidential business secret.

Addiction and surveillance allow manipulation. Manipulation is the treating of another person not as a fellow rational agent, but as a device to be operated. Manipulation violates another person's autonomy. It is easier to successfully manipulate people when using something that is new and poorly understood. The overwhelming majority of internet users have no formal training in it and lack a knowledge of how Google and Facebook are manipulating them. Once surveillance capabilities are in place, the next step is to modify the user's behavior to benefit Google and Facebook.

Philosophers have not reached consensus on the precise nature of threats to autonomy. But it is clear that we take the natural environment as given, and do not consider it as limiting our autonomy. But, when the environment is intentionally arranged to influence the individual in a way that is beneficial to the influencer and detrimental to the individual, the individual is manipulated, and autonomy depleted. As we adopt a digital form of life, our environment online is intentionally arranged by Google and Facebook for their benefit. Our online experiences are shaped to fit

[983] John Lancaster, *You Are The Product*, LON. REV. OF BOOKS (Aug. 17, 2017), https://www.lrb.co.uk/the-paper/v39/n16/john-lanchester/you-are-the-product.

the commercial interests of Google and Facebook and we pay with an erosion of our autonomy.

Autonomy depletion is in large part determined by the economics of the business model. The amounts Google and Facebook earn from each user is paltry, so they need to gather as much personal data as possible from hundreds of millions of users who are continuously engaged on the platform. The economic imperatives of this business model lead to the exploitation of human weaknesses and immoral behavior, such as treating users as lab rats, and using surveillance and data collection to manipulate children. The lack of criticism about the depletion of autonomy from religious, educational, and civil institutions may be due to the belief that the new technology was both good and inevitable. This lack of criticism also suggests that these institutions have so valued the instrumental advantages of the platforms that they have ignored their moral responsibilities to their members, students, and citizens. Silence on the moral defects of the platforms may also be attributed to silent intimidation caused by the fear of a troll swarm, bot armies, or DoS attacks instigated or encouraged by the platforms.

The grandiose goals of the founders do not excuse the immorality of the business model. These goals were based on a faulty presumption: that innovation has only positive effects. This belief shows a dangerous, adolescent understanding of human nature. The simple example of the car micro megaphone tells us that connecting people is not necessarily positive; it depends on the architecture of the technology and whether if facilitates positive or negative traits of human nature. Facebook and Google are not necessarily good; it depends on how they affect people, and how people use the platforms. It depends on the conclusion of our moral intuitions, not the novelty of the technology.

The collection, aggregation, and handling of personal data do not seem, so far, to have caused high levels of concern among users, perhaps because they do not sense the addiction, surveillance, and manipulation. Maybe users will awake to the use of their data exhaust only when they are made aware of the collection of other more concrete forms of exhaust, such as their DNA in their hair and the microbiome in their stool. Morally, the collection of their personal data is more damaging than the collection of their DNA and microbiome, although less noticed, because it leads to diminished autonomy.

The business model of surveillance capitalism is morally reprehensible in another respect: it poses a threat to democratic elections. The threat is twofold. First, behavioral advertising preferences inflammatory and provocative expression and promotes virality. Political messages that are false and misleading are shared

most widely and most often. Second, the data and algorithms of behavioral advertising have enabled attacks on American democracy by influencing elections, particularly the 2016 presidential election. A 2019 Presidential Notice has stated that foreign interference in American presidential elections constitutes "an unusual and extraordinary threat to the national security . . . of the United States."

Concerns about morality have followed Google and Facebook from their very beginnings. This should not surprise us if we remember that Mark Zuckerberg was "just not a fully formed individual, from an ethical standpoint." Democratic Congressman Tom Lantos of California told the tech companies during a televised hearing in 2017, "[w]hile technologically and financially you are giants, morally you are pygmies."[984] Internet critic Professor Zeynep Tufekci of the University of North Carolina noted in May, 2018 that "Silicon Valley is ethically lost, rudderless . . . ."[985] It should not surprise us that Google and Facebook's business model is immoral. In fact, the essential characteristics of the advertising-based business model entail moral challenges both in its early stage when privacy is the major issue, and at a later stage when microtargeting diminishes autonomy through techniques of behavior modification: addiction, surveillance, and manipulation. Universal commodification is morally wrong, [986] and this includes the commodification of our personal data through behavioral advertising. Grave threats to human dignity, democracy, and the rule of law follow directly from the demands of this business model for ever more personal data. The business model itself is wrong and its inevitable effects are antithetical to a free, democratic society of autonomous individuals.

For Larry Page, Sergey Brin, and Mark Zuckerberg the ends were grandiose, but naïve; the means expedient, but immoral. In advertising, they first rebuffed the bad, but then welcomed worse. And grandiosity—together with misplaced faith in technology—helped them to forget and to ignore the moral issues. In a moment of reflection last year, Mark Zuckerberg mused that, "[o]ne of the most painful lessons I've learned is that when you connect two billion people, you will see all the beauty and ugliness of humanity."[987] But he did not mention, as

---

[984] Andrew Jacobs, *Suit Asks Yahoo to Refill Fund for China Dissidents*, N.Y. TIMES, Apr. 12, 2017, at B3.

[985] Kevin Roose, *Critics Say Google's A.I. Phone Calls Have Everything, Except Ethics*, N.Y. TIMES, May 14, 2018, at B6 (quoting Zeynep Tufekci).

[986] Radin, *supra* note 21, at 1851.

[987] MARANTZ, *supra* note 795, at 74; *see also* MARGARET O'MARA, THE CODE: SILICON VALLEY AND THE REMAKING OF AMERICA 404 (2019) (quoting Mitch Kapor, the founder of Lotus Software, a big success of the 1980s, to the effect that "We were astonishingly naïve … We couldn't imagine what is now obvious: if people have bad motives and bad intentions they will use the internet to amplify them.").

he might have fifteen years ago, the inevitable connection between advertising and the ugliness. Clearly, over the last decade what has become suddenly normal—a business model that divests users of privacy and autonomy through intentional addiction, pervasive surveillance, and constant manipulation—is morally wrong.[988]

What are the implications of this immorality? First, it is clear that the theoretical judgment that the business model and the contracts are immoral does not by itself cause any change. For change to occur, several things must happen. Users must be persuaded of this immorality and choose to act on it as members of educational, religious, and civic organizations. The legal implications, of course, will become clear only when and if a court rules that the contracts are illegal under the contract law of California (where Google and Facebook's headquarters are located). But there could be serious business consequences before such a ruling. If the value of a stock is a reflection of the estimated risk and reward, it seems likely that the stock price of the two companies does not reflect an unacknowledged threat to the business model of the companies. The realization that the business model is potentially subject to a devastating attack on the legality of the contracts that implement it should affect the price of the stock.

Another implication of this moral judgment should be a restraint on the companies' (and Silicon Valley's) libertarian philosophy of "move fast and break things," of "who will stop me?" and of "creative disruption." The companies may achieve a new awareness that innovation is not always positive, that the application of new technology in ways that are detrimental to human flourishing can bring misfortune to those who do it. Young digital entrepreneurs, if not the founders, may learn that if they "move fast and break things," eventually society will "brake"—if not "break"—them. If hubris was the true sin of the founders, perhaps they could learn some humility.

The immorality of Google's and Facebook's business model, not the ingenuity or convenience of the technology, should also be the underlying presumption of every discussion, every examination, every congressional hearing about the role of these tech behemoths in our society. The unease that citizens and congressmen feel about the two companies is essentially a moral concern, but market thinking's dominance has made people hesitant and inartful in expressing this concern. Senators and representatives in hearings should seize the initiative to raise the issue of morality—something the founders are unfamiliar with and

[988] LANIER, *supra* note 8, at 7.

uncomfortable with—and put them on the defensive, asking them to justify themselves to society.

Perhaps we can revise the famous quotation about wealth creation attributed to Honoré de Balzac and say that, "behind every great fortune lies not an equally great crime, but an equally great moral failure."[989]

II. LEGALITY

Commentators and academics have raised the issue of the legality of the activities of both Google and Facebook under privacy and antitrust law, but no one has analyzed the legality of the business model. This essay has analyzed the immorality of the behavioral-advertising business model of surveillance capitalism from another legal perspective—that of contract law. Once we understand that this business model is immoral, then we must ask what we, as a society, will do about it. Some may say that the business model is the natural consequence of market forces, and is therefore efficient and acceptable. But the legal system, specifically contract law, tells us that certain contracts are so pernicious that society will not enforce them. Among those contracts are those that deprive people of inalienable rights.

The inalienable rights stated in the Declaration of Independence, and in many state Constitutions, were basic to the creation of the United States. These rights were not some anomaly or minor exception to a world of market thinking, no generous concession granted by market analysis. Nor do they constitute an instance of "market failure." They were the most basic and most important aspects of the social and political lives of citizens. Citizens could not lose them even through full, free, and informed consent. These rights were beyond the reach of the market; society had decided that they should not be commercialized. These inalienable rights depend on the autonomy of each citizen. The formative philosophers of liberal democracy, Hobbes, Locke, and Rawls, all posited that autonomous individuals were necessary for a representative government and a theory of justice.

American history tells us that contractual relationships depriving people of their autonomy were very common in the seventeenth and eighteen centuries. But as society progressed, the inherent evil in these contractual relationships led courts to declare them illegal and null and void. Slavery was the most obvious example, but several forms of bondage were common in the seventeenth and eighteenth centuries. In the nineteenth century another form of contractual bondage became

[989] The attribution may be false. *See* Oliver Corlett, Letter to the Editor, *Balzac and the secret behind a great fortune*, FIN. TIMES (Jan. 10, 2014), https://www.ft.com/content/40399358-77ca-11e3-807e-00144feabdc0.

common in the United States—the contract of peonage, a contract under which advances of money, often for transportation, were repaid by labor in the home, farm, or worksite. What made peonage intolerable to the legal system was not the physical conditions under which the peons worked, but the loss of autonomy. In this respect, peonage was similar to slavery. But peonage was a greater threat to democracy than slavery because the peons were citizens who could vote and, because of their loss of autonomy, their masters could exert undue influence over their votes. For these reasons, peonage was outlawed by statute and courts found contracts of peonage null and void in the late nineteenth and early twentieth centuries.

The internet service contracts of Google and Facebook, through addiction, surveillance, and manipulation, also deprive the users of their autonomy. From a historical perspective, the users of these platforms are essentially "digital peons," and, like peons, they have voting rights. Clearly, these companies are not leading society into a bright future of individual choice and freedom. They are taking us backwards to a society in which large numbers of citizens are subject to contracts of bondage. In the twenty-first century, we may see a society in which, as in the seventeenth and eighteenth centuries, a majority of citizens live under contracts of bondage. The behavioral-advertising business model is not progress, but regress; not moral advance, but moral retreat. If we define progress as human flourishing,[990] then surely surveillance capitalism is a step back. The illusion of progress is a cruel joke.

Both Google and Facebook are based in California and the standard Terms of Service in their internet service contracts specify that any suits against them must be brought in a court in California. The law of California governs the service contracts. The contract law of California provides three bases for a court to declare a contract illegal and therefore null and void. These are: (1) violation of good morals; (2) unconscionability; and (3) conflict with public policy.[991] The legal meanings of "good morals" and "unconscionability" are different from those of common usage, but still carry moral opprobrium.

No California cases seem to have addressed the internet service contracts, but many are helpful in hypothesizing how an internet service contract case could be resolved. California law on illegal contracts has evolved over the last few

[990] The capability approach is one way in which human flourishing can be evaluated. *See* Amartya Sen, *Capability and Well Being, in* THE QUALITY OF LIFE (Martha Nussbaum & Amartya Sen eds. 1993); *see generally* Martha C. Nussbaum, *Constitutions and Capabilities: Perception against Lofty Formalism*, 121 HARV. L. REV. 4 (2007); MARTHA C. NUSSBAUM, CREATING CAPABILITIES (2011).

[991] CAL. CIV. CODE § 1667 (West 2020).

decades and could evolve further. First, as to good morals, California cases on gambling and marriage indicate that courts will hold a contract illegal if it involves addiction (in the case of gambling) or unduly restricts the rights of women (in the case of marriage). If a California court were to accept addiction as an integral part of the behavioral-advertising business model and the internet service contract supporting it, then the court could well find the contract against good morals.

Second, California law holds a contract unconscionable if it is both procedurally and substantively unconscionable. The Google and Facebook Terms of Service are procedurally unconscionable because they are contracts of adhesion, and exhibit both oppression and surprise. Whether they also exhibit substantive unconscionability depends on whether these contracts or their terms: "shock the conscience," are "overly harsh," or "one-sided." It seems clear that the behavioral-advertising internet services contract should by its very nature "shock the conscience," but it is unclear whether such an unprecedented argument would fit within the narrow doctrinal confines of "substantive unconscionability" as created by California courts. A reasonable argument could be made, however, that the California courts could currently find that the Google and Facebook Terms of Service are substantively unconscionable.

Third, California courts have recognized that the scope of "public policy" is very broad and vague. At times, the courts have been reluctant to find that a particular contract is against public policy, but they have often followed the axiom that "whatever is injurious to the interests of the public is void, on the grounds of public policy." Given the unpredictability of determining what constitutes "public policy," it seems that the application of "public policy" to deny enforceability of the Google and Facebook contracts is plausible.

In addition to the California statutory and case law on contracts, there are a number of other background factors that would influence a court in deciding whether to rule that the Google and Facebook contracts are illegal. There is a growing perception that these companies are violating the public trust, but have such overwhelming influence in the executive and legislative branches of the federal government that probably only the judicial branch is able to nullify their business model. This perception together with the historical judicial activist role of California courts in the development of the law could persuade a California judge that it would be appropriate for a court to act in view of the paralysis by the other branches of government. Changes in mores and business could also influence a court to take action by ruling the contracts illegal.

The public perception of the companies has become less favorable in the last few years, and as users learn more about the use of their personal data, the chances of a major public relations disaster increase. Once a movement gathers momentum—becomes plausible and reaches a tipping point—it becomes inevitable. Judges are sensitive to such changes in public opinion.

Another change that could affect a judge's decision is a variation in the business model of the two companies. The current business model, which is dependent on continuous growth, may not be sustainable; the companies could be turned into public utilities; or their business model might be destroyed by ad blocking software. Any one of these changes could render moot a decision on contract illegality.

Other factors could influence a judge to rule against the companies. These include the loss of personhood, which would become data and cease to be an end in itself. Personhood would become merely a device to use used; a tool to be exploited. Other possibly influential factors are threats to democratic society and theory. The big data analytics enabled by the huge data troves of the behavioral-advertising business model undermine the civic experience that is essential to a democratic society. Further, the behavioral-advertising business model, by depleting autonomy, negates the intellectual foundations and rationale of democracy. The fact that the companies' internet business model is essentially an uncontrolled experiment on human beings suggests an application of the precautionary principle—limiting the manipulation of people. Finally, the two companies' long record of arrogant behavior and unrepentant violations of public commitments[992] would make a decision contrary to their interests seem like cosmic justice. These factors would not directly cause a judge to issue an otherwise unsupportable decision, but, they make it more likely that a judge would rule against the companies where the case against them, although unprecedented, was reasonable.

What are the implications of contract illegality? Cosmic justice comes with severe consequences for the companies and challenges for society. First, if the contracts are illegal, they are null and void and without legal effect. The contracts' consent provisions granting the companies the right to collect and use the data would be null and void. The companies would have no legal right to collect and monetize the users' personal data.

[992] *See* discussion *infra* Sections IV & V.

Second, the collection and monetization of the persona data could be a statutory violation or a tort. The legal system would need to clarify the nature of the statutory violation or tort.

Third, without a legal right to the data and the possibility of statutory violations or tort prosecutions, the companies would have to change their business model. The most likely alternative would be a subscription model that would not involve the exploitation of addiction, surveillance, manipulation, and loss of autonomy.

Fourth, the illegality of the current contracts would raise the question of the ownership of the personal data collected by the companies. Scholars have suggested a number of alternative arrangements for the rights to the data. As society discusses these alternatives, it will be important to understand that the user's rights in data must be seen has a human right that is inalienable. Restrictions on alienation must be maintained to avoid manipulation and loss of autonomy.

Fifth, the two companies would suffer the loss of their principal sources of revenue, payment for advertisements, and would probably go bankrupt. Some would see this as a case of true "disruptive innovation."

Sixth, a limiting principle on the collection of the users' personal data would be necessary. One suggestion is that of the collection of personal data for use only in "functionally necessary ways." Society would have to debate and work out this limiting principle.

Seventh, fiduciary duties similar to those imposed on doctors, lawyers and accountants in the handling of the users' personal data would need to be placed on the companies. Again, this is a challenge that society would have to address.

This essay is not intended to suggest that the two companies' contracts will be found illegal tomorrow. Public mores and the law have not developed to that extent. But, it is the intent of this essay to suggest that in the future such a decision is plausible and, as time proceeds, perhaps more and more likely.

In addition to these challenges arising from the illegality of the contracts, this essay on the morality and legality of the behavioral-advertising business model suggests some other, larger challenges for society:

> 1. Can we reap the advantages of the market while keeping its activities confined to the goods proper to it?[993]
>
> 2. "Should human beings in the twenty-first century accept a world in which their lives are unceasingly appropriated through data for capitalism"?[994]
>
> 3. "When presented with a new technology, can we ask whether it serves human purposes?"[995] Can we ask whether it brings out the best or the worst in human beings?
>
> 4. "Can we design systems that utilize our data collectively for the benefit of society as a whole, but at the same time protect people individually?"[996]
>
> 5. In the future when we will confront the extreme dangers of much-improved artificial intelligence combined with other new technology and a deeper understanding of human weaknesses, does our experience with the behavioral-advertising business model suggest that we can sufficiently reshape our ideals and preferences towards autonomy, agency, and ability and away from self-indulgence and dependency so as to maintain our commitment to the autonomy of the individual human?[997]

This essay ends not with a question, but a suggestion. Russell Baker, the straight-talking founder of Baker & McKenzie, the largest and most international law firm in the world, once visited Harvard Law School to give an informal luncheon talk to the East Asian Legal Studies program at the invitation of Professor Jerome Cohen. The topic of his talk was the law firm's Tokyo office, which

---

[993] ANDERSON, *supra* note 19, at 167.
[994] COULDRY & MEJIAS, *supra* note 103, at xvi.
[995] TURKLE, *supra* note 295, at 19.
[996] SCHNEIER, *supra* note 201, at 236-37.
[997] *See* RUSSELL, *supra* note 189, at 255-56; YUVAL NOAH HARARI, HOMO DEUS 343 (2017)("we will just have to give up the idea that humans are individuals, and that each human has a free will . . . . Humans will no longer be autonomous entities directed by the stories their narrating self invents. Instead, they will be integral parts of a huge global network").

consisted primarily of Japanese lawyers with one or two Americans. After he had finished, one student asked him what he thought of those American lawyers who, because of a special privilege under the American Occupation of Japan, had been granted the right to practice Japanese law even though they did not read or speak Japanese. Mr. Baker responded: "[w]ell, I have a suggestion for those lawyers. Take a pickaxe and shovel and go earn an honest living!" To right another wrong, we can tell Larry Page, Sergei Brin, and Mark Zuckerberg: "Your aversion to advertising was right. Your embrace of it was wrong. Take a subscription model and go earn an honest living!"[998]

[998] An appropriate messenger for this suggestion to Mark Zuckerberg would be his Harvard classmate and good friend, Jessica Lessin, who established the successful subscription model news service, The Information. *See* Roose, *supra*, note 922; Edmund Lee, *Maybe Information Actually Doesn't Want to Be Free*, N.Y. TIMES (Feb. 7, 2020), https://www.nytimes.com/2020/02/07/business/media/the-information-jessica-lessin.html; *see also* Bret Stephens, *Plato Foresaw the Foibles of Facebook*, N.Y. TIMES, Nov. 17, 2018, at A27 ("Start over, Facebook. Do the basics. Stop pretending that you're about transforming the state of the world. Work harder to operate ethically, openly and responsibly"). New York Times columnist Farhad Manjoo has suggested that Mark Zuckerberg should just move on and retire. Farhad Manjoo, *Zuckerberg Should Just Retire*, N.Y. TIMES, Oct. 24, 2019, at A23. For Larry Page and Sergei Brin, the messenger could be Sridhar Ramaswamy, the former head of advertising at Google, who left to establish Neeva, a subscription-based search engine. Daisuke Wakabayashi, *A Former Google Executive Takes Aim at His Old Company with a Start-Up*, N.Y. TIMES, Jun. 22, 2020, at B2.