

# AN ARGUMENT FOR POSITIVE POLITICAL THEORIES OF DATA GOVERNANCE

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## I. INTRODUCTION

This Essay distills some preliminary thoughts about the value of a positive political theory of data governance in law from remarks given at the 2022 Georgetown Law Technology Review Symposium. What do I mean by “positive political theory”? Typically, the interests recognized and operationalized by law in data about people are indexed via negative rights claims (i.e., what protection law affords people *against* being datafied). This essay will focus instead on legal interests in expressing (and perhaps even enacting) positive demands regarding social data, particularly privately held social data.

Such an approach to data interests is *political* in two capacities. First, this approach characterizes claims to data as claims regarding the exercise of a form of legally constituted power. Second, this approach structures the distribution of discretion regarding the exercise of that power among different entities.

This Essay argues that this approach to legal interests in social data is beneficial because it moves beyond an overly-blunt binary relationship to the

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exercise of that power. This achieves two benefits. It can better capture ways that datafication is wrongful. Additionally, it allows us to express affirmative claims about how to govern via data flows, not just how to prevent certain human behaviors from being datafied to begin with.

## II. BACKGROUND

How does the law currently index the claims people can make regarding their personal data? Standard views of these claims focus on the individual data subject herself and characterize the data subject's claims in one of the two ways discussed below.

The first option views governing data as governing the boundaries of a data subject's sphere of autonomy. This view casts data about the data subject as a commodified form of intimate, inner knowledge about the data subject—a bit of herself rendered legible via a data flow to some external knower (or set of knowers). Under this account, data governance law mediates the boundaries of the personal sphere (or bubble) of autonomy and knowability around the data subject. Like a cell wall, data governance law offers a permeable boundary that polices what enters and exits this inner sphere—who is granted access, to what degree, and on what terms. And of course, law has a well-established means of distinguishing legitimate from illegitimate access into a sphere of personal control: permission. Consider how the law treats the home, that classic sphere of personal control. If someone is in one's home without permission, that person is a trespasser; if they are in one's home with permission, then they are a guest. The distinguishing feature—what renders access legally sanctioned or not—is permission to enter a legally protected sphere of autonomy.

Such an approach to information is warranted in the face of concerns regarding what can be done with illicit knowledge gained about a data subject. On this view, datafication is a potential form of violation—akin to entering someone's home without permission. It disturbs one's ability to enjoy a privileged and secure relationship to one's self, and may undermine or corrupt that relationship. This datafication risks destroying the very sense of self this boundary or sphere is meant to cohere. What is a sense of self in the absence of such a privileged relationship to one's inner life, any more than how a home is no longer a home if one cannot control who has access to it?

This raises a related concern: by breaking down the sphere of selfhood, unconsented-to datafication violates core moral precepts to treat the data subject as her own moral agent. Inserting the goals and priorities of others into this inner sphere may render the data subject more amenable to ends that are

not her own, undermining her ability to form, enact, and express her own free will.<sup>1</sup>

A second approach views governing data as governing the fruits of one's labor. This account is responsive to a basic fact: data about people is a valuable asset in the digital economy. Alongside improvements in processing power, such data provides a basic input to improved forms of machine learning and other algorithmic techniques across a range of commercial and social applications. As such, datafying a data subject's life is fundamental to how companies make money in the digital economy.<sup>2</sup>

On this account, the data subject is owed some portion of the wealth created from data about her on the principle of free exchange. Such an approach to information is warranted in the face of concerns over the unfair distribution of wealth created by the digital economy. On this view, datafication is a form of theft, akin to demanding one labor or turn over valuable goods without payment.

This Essay proceeds from a different starting point regarding datafication: that data flows place us into, or materialize, or constitute and act on, social relations.<sup>3</sup> I refer to these datafied social relations as "data relations." What our data relations express is that data collected from a data subject is almost never just about that data subject, but also about others—this data can be used to guide predictions, inform decisions about, and impact other individuals as well.

Two takeaways about data relations are of particular legal relevance. First, data relations express and capture the basic fact of human sociality: that people are like one another and that the conditions of one's life are meaningfully constituted in relation to others. Relatedly, the ways people are

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<sup>1</sup> Salome Viljoen, *A Relational Theory of Data Governance* 131 YALE L.J. 573, 599, 623 (2021); Luciano Floridi, *On Human Dignity as a Foundation for the Right to Privacy*, 29 PHIL. & TECH. 307, 307–08 (2016); SHOSHANNA ZUBOFF, *AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* 521 (2019). This account is closely tied to the notion of informational self-determination. See, e.g., ALAN F. WESTIN, *PRIVACY AND FREEDOM: LOCATING THE VALUE IN PRIVACY* (1967).

<sup>2</sup> JULIE E. COHEN, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM* 44 (2019); Joseph Turow & Nick Couldry, *Media as Data Extraction: Towards a New Map of a Transformed Communications Field*, 68 J. COMM. 415 (2018); OSCAR H. GANDY, JR., *THE PANOPTIC SORT: A POLITICAL ECONOMY OF PERSONAL INFORMATION* 1–13 (1993); Lee McGuigan & Vincent Manzerolle, "All the World's a Shopping Cart": *Theorizing the Political Economy of Ubiquitous Media and Markets*, 17 NEW MEDIA & SOC'Y 1830, 1831–39 (2015); DAN SCHILLER, *HOW TO THINK ABOUT INFORMATION* 3–4 (2007).

<sup>3</sup> I really do mean "proceed from a different starting point." Both prior accounts are "true" in some sense; they capture and respond to relevant features of datafication. However, beginning with those observations leads to characterizations of datafication from which different legal agendas follow than those which flow from this Essay's account.

alike can reveal meaningful things about them that are economically and socially useful. In other words, our social relationships provide insight about the world; apprehending and intervening on them is one way to achieve some desired transformation in the world. Second, this basic and essential feature of human life gains new economic (and social) significance due to new technological capacity. The past few decades have seen enormous improvements in processing power, as well as new and improved machine learning methods. These technological capacities make it economically feasible for a growing number of private entities to make sense of datafied signals of the ways in which people relate to one another. These technological improvements allow companies to apprehend and act on our datafied relations at the scale and with the ubiquity of purposes and goals that typifies the digital economy.<sup>4</sup> The upshot of these two takeaways is that data relations are key to how data about people turns into money for companies in the digital economy.

### III. POSITIVE THEORY OF DATA RELATIONS

In prior work, I have argued that this alternative account of datafication captures many of the ways in which datafication is harmful, but that cannot be reduced to the two prevailing accounts laid out above.

For this class of unaccounted-for informational concerns, datafication itself is not of primary normative concern—either on the theory that such an act violates the data subject’s inner sphere, or that it denies her the fruits of her labor. Instead, what makes datafication normatively significant in these instances is what it *reveals and reifies* about social life’s constituting features. On this account, datafication matters because data relations rematerialize and reconstitute social relations within the particular political economic structures of data production. The reconstitution of social relations as data relations endows them with properties that make them amenable to wealth creation—the properties that express, apprehend, calcify, or intensify normatively concerning features of our social structure.<sup>5</sup> Data relations are harmful on this account when they either constitute and act on the data subject in a subordinating way, or they draft the data subject into the project of another’s oppression as a condition of her participation in digital life.

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<sup>4</sup> For more detail on this transformation, see, e.g., COHEN, *supra* note 2 at 44, Jathan Sadowski, *When Data is Capital: Datafication, Accumulation, and Extraction*, *BIG DATA & SOC’Y* 1, 1 (2019), KEAN BIRCH ET AL., *ASSETIZATION: TURNING THINGS INTO ASSETS IN TECHNOSCIENTIFIC CAPITALISM* (2020).

<sup>5</sup> See KATHARINA PISTOR, *THE CODE OF CAPITAL* 2–3 (2019) (on the use of law to endow assets with properties amenable to wealth creation); COHEN, *supra* note 2 at 44; Viljoen, *supra* note 1; Amy Kapczynski, *The Law of Informational Capitalism*, 129 *YALE L.J.* 1276 (2020).

Focusing legal inquiry on data relations also reveals a positive agenda. Like the status quo of social relations more generally, our data relations are marked by inequality: subordination, exploitation, and marginalization. But, like our social relations more generally, our data relations can be made more equal, too.

In a famous 1987 interview, then-Prime Minister Margaret Thatcher spoke against people who are “casting their problems on society,” saying “there is no such thing [as society]! There are individual men and women and there are families.”<sup>6</sup> This response to social demands (Thatcher lists several examples, like “I am homeless, the Government must house me!”)<sup>7</sup> offers a *conceptual* challenge to the social as relevant political (and by extension, legal) terrain. On this view, society and social demands, are not necessarily bad (or good). Instead, the concept of society is irrelevant as a category of analysis and we ought not to bother ourselves with it.

A positive agenda regarding data relations rejects the view that the social does not matter (or matters only incidentally) as a category of analysis for the legal puzzles and challenges of datafied social life. Instead of developing legal responses primarily equipped to abolish or unmake data relations, positive legal theories of data governance aim to develop legal responses to equalize and democratize the data relations that will constitute digital social life.<sup>8</sup> This does not reject or refute the idea that datafied social relations can be bad—they clearly can be. It does, however, defend the idea that they are worth bothering with.

To be clear, this is not how many legal advocates currently conceive of the interests people have with respect to their data relations, which presents a challenge for governments and other groups seeking to regulate the commercial and social effects of digital life. Consider an example: New York City recently issued an ordinance requiring delivery apps like DoorDash and Uber Eats to share customer data with the restaurants from which customers order. The aim of this ordinance is to help restaurants gain access to data about customers that are, according to the City, as much these restaurants’ customers as DoorDash’s or Uber Eats’ customers. Indeed, restaurants could derive value from such data in a number of ways. Restaurants could use this data to gain more insight about their customer base to improve their business, to obtain a

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<sup>6</sup> Interview by Douglas Keay, Editor at Woman’s Own Magazine, with Margaret Thatcher in London (Sept. 23, 1987).

<sup>7</sup> *Id.*

<sup>8</sup> The practical upshot of this view is still that many of our data relations ought to be unmade (i.e., work towards the legal institutions needed to develop and foster data relations marked by equal recognition and standing in setting the terms of those relations that mutually bind and constitute us).

commercial loan from a bank on more favorable terms<sup>9</sup>, or to bargain for more favorable terms from the delivery apps themselves.

In response, delivery companies are suing New York City on the basis that this provision violates their obligations to preserve customer privacy, and by extension, the right of individuals to determine how information about them is shared.<sup>10</sup> Indeed, under predominant approaches to data governance law, such arguments are compelling. If data governance polices the boundaries of a data subject's autonomy, one may plausibly question whether the city can, by fiat, alter the boundaries agreed to between data subject and company. If data governance structures the terms of exchange between data subject and company, one may plausibly ask what gives New York City the right to change the terms of this bargain.

Such arguments advance an essentially negative notion of data governance law. It provides data subjects with legal claims *against* certain datafication projects: rights against data processing, rights against being rendered knowable to particular entities for particular reasons (or more typically, rights against these things absent data subject consent). At their best, such legal interests strengthen the ability for data subjects to say *no*: to refuse being placed into data relations, and perhaps to dissolve data relations they have already been placed into.<sup>11</sup>

However, in light of the growing commercial value latent in data relations, arguments like those used against the New York City ordinance also risk ballooning the personal civil liberty of privacy into a theory against state regulation or interference in the private production and exploitation of social data resources. In short, such arguments deny that there is some collective—social—interest in these data relations, whose conditions New York City may lawfully regulate. Instead, these accounts argue that here are only individual

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<sup>9</sup> Claire Bushey, *United Airlines Pledges Mileage Programme to Secure Loan*, FIN. TIMES (June 15, 2020).

<sup>10</sup> Delivery platforms assert several claims regarding customer data are violated by New York's municipal ordinance, spanning dignitarian and propertarian data claims from both data subjects and data collectors. See *DoorDash v. City of New York*, No. 21-cv-7695 (S.D.N.Y. Sept. 15, 2021), *Portier v. City of New York*, No. 21-cv-10347 (S.D.N.Y. Dec. 3, 2021), *Grubhub v. City of New York*, No. 21-cv-10602 (S.D.N.Y. Dec. 10, 2021). The cases were consolidated on December 15, 2021, with Roberta Kaplan serving as lead counsel.

<sup>11</sup> To be clear, data governance law is currently a long way from this and achieving it would be an improvement in many ways. The criticism of this alternative account is not to dismiss or minimize the importance of many ongoing campaigns to secure stronger negative conditions of freedom regarding data relations. Indeed, given the current conditions under which a great many of our data relations are being constituted, the desire to unmake and abolish them is understandable and largely defensible under both accounts.

data subjects and their contracting parties.<sup>12</sup> While these legal developments are still nascent in cases like the example above, the theories of social data that they advance risk undermining governments' abilities to regulate the information economy across several domains. This includes both laws to plan and administer local services,<sup>13</sup> and laws to ensure fair competition.<sup>14</sup>

Examples like these serve as test cases for the future. They are proving grounds for governments to enact and enforce any number of affirmative demands regarding social data resources, as well as opportunities for governments to redistribute claims to (and obligations regarding) social data resources.

What is overlooked when data governance law cedes such social interests as conceptually outside its terrain? Legal claims that grant the ability to make demands—affirmative, democratic demands—about and via data relations. The risk is that certain strategies to secure robust privacy protections today may foreclose the affirmative informational claims that underpin several legal agendas of reform.

Abolitionist writer and activist Derecka Purnell presents the following metaphor for police abolition:<sup>15</sup> We are living in a house with a leaky roof, with water streaming down. Police are like buckets that we place under the various leaks. As the leaks grow bigger and more numerous, people clamor for more buckets, and bigger buckets! But abolition, she argues, is pointing at the roof and suggesting that buckets are not the answer; to solve our leak problem, we need to fix the roof. Next, she asks—what does fixing the roof entail? Purnell provides a variety of answers, such as the creation of jobs that actually provide a livable wage, housing that actually provides safety and security to those who lack it, healthcare that is actually affordable and available to those that need it, and action to ensure the perpetuation of a climate that is livable for future generations. These are not merely negative demands against policing; they are positive demands to build the kind of society that no longer requires policing.

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<sup>12</sup> Or more accurately, insofar as there are social interests in these data relations, they are trumped by the individual interests that obtain in private sector data production and exchange.

<sup>13</sup> See, e.g., Los Angeles' Shared Mobility Device Pilot Program, L.A. MUN. CODE §186955 (2021).

<sup>14</sup> See, e.g., Commission Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), COM (2020) 842 final (Dec. 15, 2020).

<sup>15</sup> Derecka Purnell- "Becoming Abolitionists", THE DAILY SHOW WITH TREVOR NOAH (Sept. 29, 2021), <https://www.cc.com/video/0w8kcq/the-daily-show-with-trevor-noah-derecka-purnell-becoming-abolitionists>.

Purnell's demands are echoed by Amna Akbar in the *Harvard Law Review Forum*:

We are living in a time of grassroots demands to transform our built environment and our relationships with one another and the earth. To abolish prisons and police, rent, debt, borders, and billionaires. To decommodify housing and healthcare and to decolonize land. To exercise more collective ownership over our collectively generated wealth. Some of us are reimagining the state. Others are dreaming of moving beyond it. But these are more than dreams. These are demands for a democratic political economy.<sup>16</sup>

Those interested in social reform need not share Akbar's bold vision to share her commitment to addressing the "material and ideological crisis" of our times: that people's "basic needs are not being met" and that "[o]rdinary people have no way to determine the conditions of their lives."<sup>17</sup> The legal and political agendas that arise in response to that commitment are numerous—and they are, largely, not data governance agendas.

Nevertheless, these agendas to both build and sustain democracy do entail, however implicitly and downstream, data governance agendas. The ability for law to index and grant affirmative informational claims may be foundationally—if only instrumentally—important for the myriad other legal and political agendas to make life more equal and more fair. For instance, realizing redistributive demands will require, as a preliminary matter, rendering powerful entities such as large carbon emitters, corporate tax evaders, predatory landlords, and union-busting employers visible to the legal systems tasked with operationalizing, enacting, and enforcing redistributive claims against them.<sup>18</sup>

Demands to democratize the production and allocation of goods that are currently privately allocated—such as healthcare, education, or housing—or to invest public resources in the social means of economic transformation—such as clean energy and public transit—necessitate information flows to replace or supplement the information function currently provided via price mechanisms and individual market behavior.<sup>19</sup> Simply put, such demands

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<sup>16</sup> Amna Akbar, *Demands for a Democratic Political Economy: Responding to Michael J. Klarman*, 134 HARV. L. REV. F. 90, (Dec. 1, 2020) (Internal citations omitted).

<sup>17</sup> *Id.*

<sup>18</sup> This echoes the progressive motivations that initially underpinned the idea of transparency. See David Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100 (2018).

<sup>19</sup> At a high level of generality, private markets allocate goods of services based on ability to pay (ATP) as a proxy of willingness to pay (WTP). One critique of the status quo, wherein many social goods have been privatized and private wealth is heavily concentrated, is the large and growing gap between ATP and WTP in the allocation of private goods, a class that



entail replacing (or supplementing, as digitized markets increasingly already do) price as the prevailing organizing signal of human need with other signals of human need—signals that need to be reliable and reasonably efficient. Replacing or supplementing price signals in a private market exchange is a social data governance agenda. It requires affirmatively indexing indicia of various needs to prioritize among them and meet those needs responsibly, efficiently, and fairly.

If we adopt the view that data relations are the digital terms by which we relate to one another, then giving people a meaningful say in those terms is also important for its own sake. As social constructionists have long pointed out, our social relations are a primary means by which group identities coalesce into forms marked by subordination, marginalization, and material deprivation.<sup>20</sup> Such theorists offer a compelling account of how inferior status on the basis of group identity—be it ethnicity, sex, gender, race, caste—is not just conferred, but *constituted*, by how people relate to one another.<sup>21</sup>

By extension, as social life is increasingly datafied, data relations reproduce how inferior status on the basis of group identity is made socially meaningful (with material consequences). This suggests another avenue of legal reform that lies squarely in the realm of data governance law: identifying and intervening on the (legally relevant) forms of subordinating data relations. Affirmative data governance claims may also operationalize a right to have a say in the terms of certain, legally relevant forms of social constitution occurring via data relations. Such claims would serve to redistribute control over the promise of data flows to meet the goals and priorities of more than just a few companies in how we come to be “brought together and thought together” in digital life.<sup>22</sup>

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comprises almost all the bases of material well-being in the US. This gap, a function of money’s dual purpose as means of personal exchange and store of personal wealth, skews or distorts the information function of price. As a result, goods and services are not allocated in a socially optimal way. A related but distinct critique of the hegemony of private provision in our current political economy focuses on the injustice of allocating certain key (and arguably morally distinct) goods and services, like healthcare and housing, on the basis of maximizing private profit, used as a rather poor proxy in many settings for the satisfaction of human need.

<sup>20</sup> SALLY HASLANGER, *RESITING REALITY: SOCIAL CONSTRUCTION AND SOCIAL CRITIQUE* 3-32 (2012), IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (2011); Elizabeth Anderson, *What is the Point of Equality*, 109 *ETHICS* 287, 289 (1999), Elizabeth Anderson, *Toward a Non-Ideal, Relational Methodology for Political Philosophy: Comments on Schwartzman’s Challenging Liberalism*, 24 *HYPATIA* 130 (2009).

<sup>21</sup> *Id.*

<sup>22</sup> Gabriel Winant, *We Live in a Society*, N+1, (Dec. 12, 2020), <https://www.nplusonemag.com/online-only/online-only/we-live-in-a-society/> (quoting WENDY BROWN, *IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST* (2019)).