4 Workplace Privacy and Associational Power

Introduction

Soon after the Ford Motor Company implemented the moving assembly line in 1913, it confronted a problem of labor supply and discipline. Workers were quitting in huge numbers due to the rigors and stresses of the job, which required them to perform physically grueling and repetitive tasks, for long periods, without losing focus, in loud, hot, and dirty conditions. This was also an era of worker uprisings and labor violence, including the landmark 1912 Bread and Roses strike among textile workers in Lawrence, Massachusetts, and the 1914 Ludlow Massacre, where Colorado National Guard troops and private security forces killed more than twenty in an encampment of striking mine workers. In this heated political context, Ford sought to create an industrial workforce out of workers who had often been raised as peasants or sharecroppers, as well as to avoid labor militancy. As is well known, one of Ford's strategies to do so involved hiking wages to $5 a day.

In a development that is less well known today, Ford also created a so-called Sociological Department to screen and groom workers.[1] As the Henry Ford Museum of American Innovation now recounts, the department "established a system of rules and codes of behavior for Ford employees that they had to meet, in order to qualify for the $5 day pay rate."[2] Its staff did not just monitor workers while in the factory; they also made "unannounced visits to employees' homes" to check on their cleanliness and whether their children were attending school, and it "monitored bank records to verify that employees made regular deposits."[3] Through those efforts, the company's agents also kept an eye out for "labor disturbers," including communists and socialists. Ford also deployed detectives to

conduct independent investigations and tasked foremen with closely monitoring workers' shop-floor conversations. A union organizer who worked at a Ford plant in 1925 wrote that workers there were "not disposed to unionize" due to the Sociological Department's efforts, and Ford workers did not do so until 1941.[4] This sort of crude intervention in workers' off-the-job lives declined during and after the New Deal, especially as unions gained power.

Yet modern data-driven technologies are giving companies new means of shaping a pliant workforce that may be just as powerful as those used by Ford. Consider what a potential worker—call her Julia—may have to go through to get a job at a large company in retail, food service, logistics, or hospitality today. Julia may have to take an online test that asks her how she would respond to an underperforming colleague and makes clear that the company wants workers who will not question management. Before hiring her, the company may review Julia's public social media posts and turn her down if she has been a vocal supporter of political causes that the company or its managers oppose. If Julia is hired, the company may closely monitor her conversations with colleagues over email and other platforms, and by doing so may determine that they are seeking to unionize. If Julia and her coworkers go on strike, the company will surely prevent them from using its website or apps to appeal to the public. In an earlier era, Julia and her coworkers could have used those platforms' offline equivalents (like the sidewalk) to enlist support from customers.

In other words, companies today can use new technologies to curate, surveil, and discipline their workforces in a manner reminiscent of Ford's actions before the New Deal. These efforts raise legal issues that are more complex than those raised by automation and digital Taylorism. As chapters 2 and 3 noted, employers' rights to monitor employees as they are working in the workplace are now basically unquestioned. In contrast, the matters treated in this chapter often fall into more of a gray area, sometimes under the law and sometimes under privacy norms. A well-developed line of scholarship has warned that these developments are eroding traditional consumer and worker privacy rights and reinforcing inequalities on the basis of race, gender, national origin, and disability. This chapter draws from those studies to better understand how companies may use such technologies to prevent worker organizing. In each case, employers can exploit new information flows to learn aspects of workers' activities (or even personalities) that the

workers could previously keep secret. In this sense, algorithmic hiring and monitoring practices are a modern Sociological Department—one engineered to operate in the background of social life, often without employees even noticing, but with effects that may be just as profound.

Section 4.1 summarizes how new means of data aggregation and analysis are affecting employee privacy and equal employment opportunity. Section 4.2 discusses union-organizing strategies today and their complex relationship to workplace privacy and new technologies. Section 4.3 addresses how companies can use new technologies of surveillance, data aggregation, and inductive learning to resist and suppress workers' organizing efforts.

4.1 Data Aggregation, Privacy, and Equal Opportunity

Employers' uses of data to restructure hiring and human relations processes have built on consumer-facing companies' earlier efforts to reshape consumer markets and behavior through data analytics. As privacy scholars have shown, consumer-facing firms' efforts were facilitated by our "notice and choice" model of consumer privacy.[5] In that model, data harvesting and use is legitimate so long as companies disclose what they are going to do with the data and the data subjects choose to go along.[6] A major problem with that paradigm, as scholars have argued, is that individuals' "choices" in this context are highly constrained, both epistemologically and practically. Very few consumers read or could understand complex privacy notices, and even fewer can realistically monitor companies' revisions to privacy policies.[7] As Daniel Solove has put it, "Consent legitimizes nearly any form of collection, use, and disclosure of personal data."[8]

What's more, companies have learned that by aggregating data from multiple sources—web browsing histories and purchases, social media postings, geographical locations, magazine subscriptions, and so on—they can infer "*additional* information about the data subjects beyond what is directly observed."[9] The notice-and-choice paradigm has facilitated those efforts by encouraging many companies to vacuum up and hold as much data as possible, and to sell or share it with one another. Banks and automobile insurance companies have used data aggregation and analysis to determine individuals' credit risks, for example, and the Transportation Security Agency has used similar processes to develop no-fly lists.[10] Companies' use of modern data analytics in such processes can render the underlying

decisional processes opaque even to programmers—in Frank Pasquale's memorable phrase, the processes themselves are a "black box,"[11] raising major concerns about due process and self-governance.

Such efforts also threaten to eviscerate traditional understandings of consumer privacy—and by extension worker privacy—in a manner illustrated by the philosopher and privacy scholar Helen Nissenbaum, who has analogized data-aggregation efforts to a "food chain." Starting at the bottom of the chain and moving up, the steps in modern data analytics include tracking and monitoring that generate data, often with individuals' explicit consent; aggregating and analyzing that data to draw inferences; and finally, using the analyzed data to make a business decision.[12] Information flows upward through hierarchical steps, as companies apply more complex processing techniques to the data, and draw ever-finer inferences about data subjects. The chain is therefore a "hierarchy in which data of a higher order is a function of data of a lower order."[13] As a result, data that a consumer has willingly provided by using a credit card or joining a company's rewards program can help determine their access to goods across various domains. As is depressingly predictable, vulnerability to harms due to data aggregation skews along class and race lines both inside and outside the workplace, with less-skilled workers and people of color subject to more intensive and intrusive forms of surveillance than white and wealthier individuals.[14]

A well-known case arising at Target illustrates how such techniques can erode individual privacy. The company inferred that some customers were pregnant based on their purchases and sent them pregnancy-related advertisements.[15] Target moved "up" the food chain, in Nissenbaum's terms, from limited data about a consumer's behavior to a critically important inference about their health status. Many people reacted with horror to the story, reflecting the tension between existing normative understandings of consumer privacy and the capacities of modern inductive learning technologies. The norms are straightforward and reflected in health law and antidiscrimination law: information about toiletries and vitamins is different in kind from information about pregnancy, given the profound importance of pregnancy to individuals' well-being. As Nissenbaum argues, "instead of privacy norms about toiletries and vitamins attaching to pregnancy, those applying to pregnancy should travel *down* to toiletries and vitamins."[16] Yet efforts such as Target's are typically permissible under existing law.

Learning from such efforts in the consumer space, employers have increasingly incorporated data analytics in their hiring processes in recent years. Large companies often do so internally, while others may turn to labor market intermediaries such as hiring and screening platforms that operate at sufficient scale to make inductive learning possible.[17] By one estimate, around 90 percent of employers used online recruiting strategies by 2020.[18] To understand the landscape of algorithmic hiring, it may help to start at the bottom of the data food chain and move up. Some hiring programs just gather basic data from applicants to discern their qualifications and availability. For example, one Toronto-based start-up has helped large retailers with hiring by screening résumés, gathering information from applicants regarding their shift availability and skills via chatbot, and recommending qualified candidates.[19] Chatbots themselves can be quite helpful for this purpose since they can ask specific questions—Can you work evenings? Do you have a car? Do you have retail experience?—that generate yes or no answers. In a sense, all that has happened is that text-based factual and job-related information once disclosed on paper or in a job interview is now being provided online. Companies may nevertheless find these programs very helpful for hiring large numbers of less-skilled workers.

Moving one or two steps up the chain, various companies have sought to apply inductive learning to hiring practices.[20] The theory is that data analytics may identify aspects of applicants' experience or aptitudes that correlate with success in particular positions but which have not traditionally been taken into account. This is superficially plausible where there is a large supply of data about current workers, their backgrounds, and their performance, as well as a large supply of data about applicants. At that point, companies can use machine learning and related technologies to draw statistical inferences from the first data set (on current workers) and apply those inferences to sort the second data set (on applicants). There are some well-known success stories involving this technique. Deloitte, for example, reports that a client in the financial services industry learned that experience in sales and a lack of typographical errors on a résumé were better predictors of success in sales than which college the applicant attended.[21] That use case exemplifies the potential upside of people analytics: it can *reduce* bias and inequality by identifying objective criteria that are "correlated with business or employment success" and using that data to make decisions in ways that "replace subjective decisionmaking by managers."[22]

But those processes can also exacerbate inequalities on the basis of race, gender, immigration status, and disability.[23] As a number of scholars have argued, it is absurd on some level to ask artificial intelligence (AI) to be nonracist or nonsexist since AI is always trained by humans, using human-generated data, and therefore it will reflect social and economic divisions on the basis of ascriptive identities.[24] For example, companies may seek to hire workers who they expect will stick around for a while so they can recoup their training costs. In developing hiring algorithms, companies might seek to discern which aspects of applicants' backgrounds correlate with longer tenures. But if a key variable is how far applicants live from the worksite—since that determines their commuting times—such an algorithm may exclude African American or Latinx workers at a disproportionate rate depending on patterns of housing segregation.[25] Such a screening could also exacerbate the disadvantages faced by poor applicants who lack reliable transportation. Since training costs may be greater for managers, that sort of algorithm will also disproportionately sort white applicants into managerial roles. For similar reasons, machine-learning tools may correlate success in more technical positions with being a man when the existing workforce skews male.[26] Algorithmic wage-setting also seems to have generated a gender pay gap among Uber drivers because the algorithms rewarded drivers for driving more quickly, and men tended to drive faster than women.[27]

A similar set of issues arises when companies try to use algorithms to discern whether workers have the personality traits required for success. This is plausible, since the "big five" personality traits—openness to experience, conscientiousness, extraversion, agreeableness, and emotional stability—do have a documented relationship to job performance in some cases, and companies have used personality tests in hiring processes for decades.[28] Some online hiring platforms today purport to have automated such assessments. For example, the prominent platform HireVue records interviewees answering a series of questions via an AI-powered videoconferencing interface. HireVue's chief "industrial-organizational psychologist" told the *Washington Post* in 2019 that its thirty-minute assessments "can yield up to 500,000 data points" from applicants' facial expressions, word choices, and tone of voice, "all of which become ingredients" in the applicant's "employability" score.[29] The company claims to use that data to discern the applicant's "willingness to learn," "conscientiousness & responsibility" and "personal stability,"[30] traits that overlap with the "big five" personality traits.

But there are reasons to doubt such claims. For one thing, it is simply not possible to discern individuals' emotions from facial expressions, as researchers in affective computing take pains to emphasize.[31] A recent metastudy of the issue by academic psychologists, for example, noted that "how people communicate anger, disgust, fear, happiness, sadness, and surprise varies substantially across cultures, situations, and even across people within a single situation."[32] This raises the question of exactly what HireVue's algorithm *does* measure. The company has been secretive about its specific technologies and clientele, citing trade secrets and the inscrutability of some machine learning processes.[33] A relatively benign explanation is that the algorithms test for certain outward *behaviors*—as opposed to personality traits—that service-sector employers value, such as speaking clearly and making good eye contact. Attempting to quantify interpersonal behaviors, however, can bring substantial bias into the process. If a company's workforce is almost entirely white, male, native-born, and Ivy League–educated, a hiring algorithm may "learn" that an ideal employee has linguistic, social, and other traits that correlate with those statuses.[34] In the case of HireVue and other platforms, some AI researchers have suggested that the system could end up "penalizing nonnative speakers, visibly nervous interviewees or anyone else who doesn't fit the model for look and speech."[35]

Analyzing verbal skills gets quickly into territory where facially legitimate job qualifications can conflict with patterns of racial, ethnic, national, and regional difference. Under our employment discrimination laws, an employer cannot deny employment to an applicant because they have a "Black" or "foreign" accent—but it can deny employment because that employee lacks the verbal skills to communicate effectively with customers or coworkers. The line between the two can be fuzzy.[36] Such tests may also reinforce biases against individuals with disabilities. The Americans with Disabilities Act restricts companies' ability to use personality tests to detect mental health disorders like depression, anxiety, or schizophrenia.[37] To the extent that algorithms pick up on behaviors that correlate with those disorders, companies may end up excluding individuals on forbidden grounds.

While these are serious concerns, they are now widely recognized, and both researchers and some companies are trying to address them.[38] Some algorithmic hiring companies already seek to detect bias at multiple stages of their screening processes, and may "downweight or remove" variables that correlate with race, gender, or another protected class.[39] In 2021 the

federal Equal Employment Opportunity Commission also began an initiative to better understand the issue, which may lead to rulemaking or new enforcement strategies.[40] Notably, while our employment discrimination laws do not take economic class specifically into account,[41] mitigating algorithmic bias would help mitigate class disparities. In many cases, companies are using algorithmic strategies to sort some workers into managerial or supervisory positions, and others into menial jobs. If an algorithm determines that the optimal manager has traits similar to white, college-educated employees, then individuals without those traits will be more often pushed into lower-paying, less prestigious positions. In that sense, just as existing forms of AI reflect existing racist and sexist practices, they also reflect assumptions about class: who is employable at all, who should be a relatively menial worker, and who should be a manager.

4.2 Informational Flows and Worker Organizing

New tools of workplace surveillance and data aggregation also shape and affect workers' capacity to organize and take concerted action. In that sense, those tools implicate both labor laws and privacy laws, which have traditionally been understood to protect quite different goods. Labor law is a means of managing class relations and is closely connected to issues of economic distribution, while privacy law protects a more varied and overarching set of individual and collective interests. Extending outward in concentric circles from the individual or data subject, those include rights of autonomy and individual expression, then dignity or freedom from humiliation, and then the ability to enter and maintain healthy intimate and professional relationships. None of those is necessarily connected to class politics—and yet a final privacy interest is. As various privacy scholars have observed, privacy protections can also foster the sorts of speech and nonintimate associations essential to strong communities and democracy more generally,[42] a category that includes working-class organizations like unions.

The relationship between privacy and associational power, therefore, cannot be captured by a privacy theory based on secrecy. It is better captured by theories that understand privacy as being about rules regarding information flows, and that account for how those information flows shape the dynamic relationship among individual and group concerns and identities.[43] Workers can best communicate with one another and organize in

tailored versions of what one privacy scholar has called "safe social spaces," or "environments of information exchange in which disclosure norms are counterbalanced by norms of trust backed endogenously by design and exogenously by law."[44] In particular, workers need spaces where they can deliberate and plan safely with one another while limiting companies' ability to learn about their efforts. Current doctrine, as discussed in this chapter, assuredly does not create those safe spaces in the workplace, and those few spaces that do exist risk being closed to workers via employer surveillance. The discussion below focuses on how our labor laws give companies and managers broad authority to shape and control informational flows in the workplace.

Before doing so, it will help to review some basic aspects of worker organizing and the law. As discussed in chapter 1, unionization campaigns and tactics in the US are designed almost entirely to avoid or overcome managerial opposition. The major reason is that US employers have strongly opposed unionization, especially in comparison to their counterparts in other wealthy nations. That opposition is partly ideological and partly an economic response to our model of enterprise bargaining, which can place unionized firms at a competitive disadvantage.[45] Employers often terminate union supporters, which can permanently arrest a drive's momentum.[46] While that is clearly unlawful, it can take years before the National Labor Relations Board (NLRB) reaches a final judgment and orders the typical remedy, which is reinstatement and back pay.[47] In the meantime, under longstanding Supreme Court precedent, unlawfully terminated workers are required to mitigate their damages by finding another job.[48] Such delays are potent anti-union tools since rational workers will often choose not to take lawful concerted action rather than risk unlawful termination.

Then, even if workers demonstrate overwhelming and indisputable support for a union, companies may exploit legal procedures to delay an election for months, or even years.[49] If workers then *do* vote to unionize, companies have a duty to bargain in good faith, but the NLRB has no power to order them to accept particular terms. That creates further incentives to delay real bargaining in hopes that the union will lose support. Finally, as noted in chapter 2, workers have limited rights to strike under US law. Labor law scholars, therefore, have argued for decades now that the NLRB's union certification regime no longer adequately protects workers' rights to organize, and in fact facilitates management's efforts—both lawful and

unlawful—to delay and resist unionization.[50] In recent decades unions have often responded to this regime's weaknesses by attempting to sidestep it: demanding that an employer voluntarily recognize their union and begin bargaining rather than insisting on a drawn-out election and certification process.[51] (In April 2022, the NLRB's General Counsel urged the Board to return to a legal standard under which an employer must recognize a union based the union's showing of majority support, unless the employer can establish that it has a good faith doubt about the union's claims. The case was pending as this book went to press.)[52]

Given this hostile environment, successful organizing campaigns need to define, shape, or extend a solidaristic collective identity among workers. The reason is that workers who share such an identity—and who can take collective action to protect one another—will be in a better position to prevail despite management's near-certain opposition. That collective identity can be rooted in various axes of common experience: being colocated in a large factory or worksite and subject to the same set of managerial policies, sharing craft or occupational skills, or being part of a social group that may overlap with class position, such as race, gender, and nationality. In nearly all cases, however, that identity is *constructed* (or at least bolstered) by workers' concerted action during the organizing process.[53]

Workers who are leading organizing drives will therefore meet with coworkers to identify common concerns, and then press them—often through emotional appeals—to fight for better treatment. Unions often encourage workers to scale up those efforts in an iterative fashion over the course of a campaign. They might first take small steps in private, like signing a petition or union authorization cards, and then more public actions, like wearing union buttons, and ultimately a significant action, such as striking. Unions may also push workers to resolve disputes with management through concerted action during the drive so that folkways of solidarity and mutual support develop. Organizers sometimes call this "acting like a union," meaning exerting collective power well before certification.[54] The sociologist Rick Fantasia's account of the internal dynamics of a wildcat strike is illustrative. He found that many workers were initially noncommittal and decided to walk off the job only after emotional appeals by strike leaders. After the strike succeeded, however, many workers within the shop felt a new sense of empowerment. Fantasia argues that the strike created "a locus of oppositional sentiment . . . which remained solidly rooted in the

day-to-day culture of the department" and led to a second successful strike a few months later.[55]

Given the importance of interworker communications and trust, the rules governing workplace information flows shape workers' and employers' correlative powers through this process. In the initial stages of an organizing drive, workers may need to keep their discussions and plans secret from employers so that they may identify common concerns and chart a course of action before the employer learns of their campaign. At the same time, workers' identities cannot remain secret from one another since they need to be able to trust each other. In other words, such communications need to be nonanonymous in relationship to other workers, but anonymous in relationship to employers. In the later stages of an effort, workers will have stepped out publicly with demands, and their deliberations are no longer entirely secret. At that point, workers have autonomy interests that overlap with privacy concerns, the most important of these being the ability to speak and act publicly without suffering retaliation.

Yet existing law gives companies broad control over workplace information flows. For example, companies can lawfully exclude non-employee organizers from most parts of their premises, including many publicly accessible areas, which makes it much harder for workers to learn about and exercise their collective bargaining rights.[56] Once workers begin organizing, companies may call on consultants and law firms that specialize in advising companies how to resist organizing.[57] A common management tactic is to require workers to attend "captive audience" meetings, at which managers argue against unionization, but from which unions are excluded and in which workers may be prohibited from asking questions.[58] Through those meetings and other tactics, companies try to send the message that unionization is either irresponsible, futile, or unnecessary.[59] For example, management may suggest that the union itself is a third party in relationship to workers, and may allude to union "bosses" or the possibility of corruption. (Organizers with the Amazon Labor Union [ALU], which unionized the Staten Island warehouse, were less vulnerable to that argument because they were all either current or former workers at the warehouse, and because the ALU was not affiliated with a national union).[60] Or a company may suddenly present itself as open to workers' concerns, so workers do not need a collective representative.[61] Or managers may predict that unionization will lead to worksite closures, job cuts, or both.[62] The key is that management

tries to maintain and telegraph its unilateral control over information and the workplace generally.

Meanwhile, our labor law allows management to prohibit workers from using internal communications tools for organizing in many cases. This creates yet another skew in technology and class politics: networked information technologies are powerful tools of corporate integration and control, but not (yet) powerful tools of worker mobilization. The Supreme Court's 1945 decision in *Republic Aviation Corp. v. National Labor Relations Board* is an important backdrop. There, the Court held that an employer could not prevent employees from soliciting union support from other employees during nonworking time on the employer's property unless the employer could show that "special circumstances made the rule necessary in order to maintain production or discipline."[63] This infringement of the employer's property rights was justified, the Court reasoned, because the workplace is the "place uniquely appropriate and almost solely available to them" for organizing purposes.[64]

Despite the strength of that precedent, employers have established fairly broad powers to prohibit organizing activity on some of the modern technological equivalents of the locker room, the break room, and the plant entrance. The most prominent line of cases involved employees' use of their employers' email systems for organizing purposes during nonworking hours. There, the NLRB first held in 2007 that employers could legitimately ban workers from doing so, reversed course in 2014 (under the administration of Barack Obama), and then reversed course again in 2019 (under the administration of Donald Trump).[65] (Such shifts in doctrine are not uncommon at the NLRB when the presidency changes parties, and some of the Trump-era cases discussed in this chapter may be overturned before this book is published). The Trump-era case, *Caesar's Entertainment*, treated the issue as a straightforward question of employers' property rights: "an employer's communication systems, including its email system, are its property," the Board majority reasoned. "Accordingly, employers have a property right to control the use of those systems."[66] By extension, employers may also prevent workers from using other communications tools such as intranets, chat platforms, and Slack pages for organizing purposes unless those are the "only reasonable means for employees to communicate with one another."[67] In a sense, these cases reverse the presumption in *Republic Aviation* that the employer must cede some sovereignty over its property,

reflecting the general shift in labor law from industrial pluralism to workplace neoliberalism.

Another line of cases considered whether employers may ban employees from using cameras or other recording devices in the workplace. Several Obama-era cases held that employers could not enforce blanket bans on recording since that could stymie employee organizing.[68] In one, *Whole Foods Market*, the Board majority held that such efforts would be protected where they involved, for example, "recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment," or documenting an employer's inconsistent application of work rules.[69] The Trump NLRB changed course, however, in the 2017 *Boeing* case. There, the NLRB articulated a new approach to employer work rules cases that was significantly more employer-friendly than in *Whole Foods,* and held that Boeing's own ban on camera-enabled devices was justified. The Board did not rely on the common law property rights rationale of *Caesar's*, but rather on Boeing's stated interests in protecting classified data related to national security, trade secrets, and employee privacy.[70]

The analysis is somewhat different when workers use a communications platform that the employer does not control. The Obama NLRB extended protection to workers' speech and organizing efforts on social media, essentially holding that workers cannot be disciplined for otherwise lawful discussions about workplace issues on Facebook, Twitter, and other online forums.[71] While the law basically translates from the offline to the online context here, the fact that speech occurred on social media may alter some practical dynamics of litigation. Public social media posts provide clear evidence of what workers said and when they said it, which makes it far easier to prove that they were taking or planning collective action and that the employer knew about it. At the same time, where such posts are public, they are legible to management—especially given modern data-driven surveillance techniques. In contrast, in the absence of audio surveillance, an in-person conversation may remain strictly between the workers who spoke and never come to an employer's attention. As a result, social media posts may invite employer retaliation more readily than offline conversations.[72]

To the extent that workers' communications on social media are protected, however, it can be a powerful organizing tool. For example, users' ability to embed audio or video in social media posts has been central to mobilizations

against police violence. Worker organizers have done this as well. In Israel, for example, organizers have used WhatsApp to send audio and video messages to workers who speak the same language but do not necessarily read or write it.[73] Similarly, in a landmark 2018 teachers' strike in West Virginia, teachers organized and mobilized via Facebook pages, streamed their strike votes on "Facebook Live," and rejected an initial settlement offer following Facebook deliberations.[74] More recently, the Amazon Labor Union built support by posting campaign videos on TikTok, including some that showed organizers being arrested.[75] In such cases, social media can bolster and amplify workers' in-person organizing efforts.

Social media also enables genuinely new sorts of organizing among people who are not physically colocated and who do not know one another offline.[76] The internet has long brought to light latent but widespread grievances, or even latent ideologies, as individuals find communities of similar-thinking people online.[77] Some of those conversations take place on public forums such as Twitter or message boards. But given the obvious risk of employer surveillance in those contexts, the more fruitful efforts have often involved speech in nonpublic spaces. For example, Walmart workers who had few or no allies at their own stores have met up online through a platform set up by OUR Walmart, a union-affiliated organization, where they found that they had similar experiences and concerns. As one worker put it in an interview with a sociologist, "You're used to dealing with your individual store and then when you see it is nationwide and you're talking to other people—it kinda blows your mind away."[78] Fight for $15, a movement of low-wage workers in fast food and elsewhere who have been pushing for a $15 minimum wage and unionization, has used similar tactics to organize far-flung fast food workers who do not share a common worksite.[79]

Workers can also use new technologies for *external* organizing, which involves broadcasting public messages regarding campaigns and enlisting public support. Here, new technologies have dramatically reduced certain communications costs for workers and unions, just as they have for businesses and civil society organizations.[80] For example, Fight for $15 has used social media to enlist allies to turn out for rallies and to press elected officials to pass stronger minimum-wage laws.[81] The Chicago teachers had a robust social media presence during their 2019 strike, in which teachers developed and posted videos of picket lines, often with teachers or supporters singing or performing dance routines or skits that garnered substantial

public attention. In both cases, the public support wasn't based simply on the workers' demands, but on the fact that unions were pushing more explicitly moral messages about worker power, neoliberalism, and the public good.[82] While most people who engage with those messages will only do so online, others will move into offline action, and in the process, their ties to the movement and one another may become much stronger.[83]

Due in part to the email and work rule case precedents, however, workers do *not* have a right that could be quite powerful today: the right to use their employer's website, app, or other technological platform to communicate with the public. There simply is no digital equivalent to the in-person picket line or leafletting effort on or near the employer's physical property. As a result, when consumers order goods online from a department store or grocer, workers who are on strike against that very retailer have no rights to use that website or app to inform the consumer of the labor dispute. In an earlier era, workers could leaflet consumers as they were entering stores. In fact, workers can be required to advance *companies'* political agenda through technological design choices, even when doing so is directly against the workers' interests. In one recent example, Uber and Lyft bombarded drivers and passengers with messages to support a California ballot initiative, Proposition 22, that reduced drivers' employment rights. There are even allegations that the companies required workers to express support for the initiative before logging in.[84]

Due to such restrictions, it is impossible to know at this point how effectively workers could use new communications technologies for organizing. On the one hand, none of the online organizing efforts discussed in this section—at Walmart, among fast food workers, and at Uber—have actually led to unionization. (West Virginia and Chicago teachers were already unionized at the time, and ALU's campaign involved nearly a year of constant in-person organizing.) On the other hand, that is unsurprising given the difficulties that workers have with organizing in general, and the fact that companies can simply deny workers access to many workplace communications platforms. This brings us back to the lopsided legal regime that workers confront. Without the ability to translate nascent associational power into formal bargaining rights, workers' gains through online organizing typically will be fleeting. Workers can mobilize around major shared grievances at certain moments, but they have a much harder time building organizations and institutions that can protect them on an ongoing basis.

4.3 Data-Driven Surveillance and Union Avoidance

Meanwhile, even as workers struggle to use new platforms to organize, companies can utilize new technologies to spot and suppress organizing efforts or to help ensure that organizing drives never begin in the first place. Such efforts build on a long tradition of workplace surveillance geared toward stopping unionization, which reach back before Ford's Sociological Department. In some cases, employer efforts remain rather crude: listening to workers' conversations, watching what they are doing, and harassing or terminating potential union activists. But data-driven technologies are augmenting companies' powers dramatically. Those efforts play out at the initial screening and hiring stages, as well as during workers' day-to-day activities once hired.

Hiring and union avoidance Employers have long sought to preempt workers from ever seriously considering unionization. As the legal scholar Mark Barenberg has put it, companies today often "weave a lawful 'anti-union campaign' into the organizational warp and woof of the enterprise."[85] Novel information technologies are in many ways enhancing their powers to do so by reducing the costs of information gathering and transmission, and enabling companies to sidestep legal protections for workers' rights to organize. For example, under the National Labor Relations Act (NLRA), it is illegal for employers to discriminate in hiring on the basis of workers' past union activities or opinions about unionization.[86] The NLRB has also held that employers can poll workers regarding their union sympathies only in very limited circumstances because such polling can chill collective action and enable an employer to retaliate against activists.[87]

But there is significant evidence that the personality tests and other preemployment screenings discussed in this chapter can be used to deter unionization.[88] To be clear, there is not much evidence that individuals' personality traits correlate with their propensity to support unionization.[89] Rather, there is evidence that preemployment screenings can be used to discern workers' beliefs about labor relations and to discourage pro-union workers from taking jobs. Indeed, union avoidance consultants often advertise their ability to elicit such information from workers so that companies can avoid hiring them.[90] In her book *Nickel and Dimed*, Barbara Ehrenreich recounts interviewing for one job where she was given a personality test that asked whether

she thought "management and employees will always be in conflict because they have totally different sets of goals."[91] An employer could clearly use that information to screen out individuals inclined to question management's authority. Such tests can also be designed to communicate that workers have little or no voice in the firm. At another point, Ehrenreich took a test that asked how strongly she agreed with the proposition that "rules have to be followed to the letter at all times," and she was marked down for agreeing "strongly" rather than "totally" with the statement.[92]

Some overseas automakers have used similar tactics when staffing for plants in the US. Gregory Saltzman, an industrial relations economist, participated in and studied one such plant's hiring process. As part of the screening, Saltzman wrote, applicants were required to watch a video where an employee asked for time off to take her daughter to the doctor, and the supervisor studied her attendance record before deciding whether she could take the time. Human resources (HR) staff then asked applicants a series of questions about the video, and applicants scored highly if they agreed that the worker's ability to take the time should depend in part on her attendance record. Saltzman argued that this process put applicants "on notice that they could expect long hours, no advance notice of overtime, and limited willingness of the employer to accommodate family needs."[93] His paper also matched hiring and tenure records with a survey that he performed of applicants regarding their union sympathies, finding that pro-union workers were "much more likely to withdraw their applications or quit shortly after being hired."[94]

Novel technologies could augment employers' capacities to thwart unionization during the hiring process. To be clear, the activities discussed next are extrapolations from established past and existing practices. I am not arguing that they are already in widespread use, but rather that they are technologically plausible and would be valuable to some companies. One option would be to use online screenings to deliver the same sort of message that Ehrenreich and Saltzman discuss. For example, many McDonald's franchisees use a centralized candidate screening system that makes some algorithmic assessments of workers before a manager ever reviews their applications.[95] A subtle or overt anti-union message could be woven into that process. For example, something like the video-screening portions of the automobile plant interview process studied by Saltzman could easily

be performed online. Over time, the data gleaned from such screenings also could be used to hone the company's messages about their own operations, as well as their insights about particular candidates.

Another possibility is more dystopian. By aggregating data from multiple sources, companies may be able to predict which sorts of applicants are likely to challenge management. For example, a worker who in the past has filed an NLRB charge may be more likely to resist managerial authority. An algorithm that is intentionally designed to screen out such workers would likely be unlawfully discriminatory under the NLRA. However, as noted in chapter 2, employers in many states are permitted to discriminate among workers on the basis of their nonwork-related political and social activities *outside* the workplace.[96] Those activities might be a good proxy for attitudes toward managerial authority, and they might be discerned through analysis of social media posts and consumer spending. Moreover, because algorithmic hiring often takes place under a cloud of secrecy, workers and regulators may struggle to even access the underlying algorithms and discern any discriminatory intent or effect.

What's more, companies' abilities to spot workers' out-of-work activities are also far more powerful today than in the past. Data brokers may already possess clean and usable profiles on applicants that indicate their probable political beliefs. Meanwhile, as facial recognition software continues to develop, it may enable companies to determine quickly and cheaply whether particular individuals attended particular protests. Even if applicants did not post pictures of themselves on social media, their images may well have been posted by other attendees. Some protesters in Hong Kong and the US have already taken to covering their faces or carrying umbrellas in order to avoid facial recognition software, though they have been more worried about state than private repression.[97] Finally, the fact that hiring platforms themselves are becoming important labor market intermediaries could perpetuate such blacklisting. Hiring platforms may use data gathered about an individual from one company's application when that individual applies at another company later. In that case, Company A's rejection of that person could lead Companies B through X to reject them without even knowing why. Or if Company A uses a borderline or illegal screening mechanism, other companies may unknowingly rely on that mechanism down the line.

Again, it is not clear whether such tools are already in use. In fact, an empirical study published in 2021 found that employers did *not* take workers' past union activities into account in hiring, even when workers reveal those activities on their résumés. But the authors suggested that in today's economy, "union weakness itself" may have mitigated employers' incentives to screen out union supporters.[98] That research was also carried out before the post-COVID upsurge in worker activism, and if worker mobilization becomes a significant political-economic force again, the sorts of tools surveyed here could be potent. That would be the case even if the tools themselves were imperfect, delivering only a partial picture of workers' political beliefs and actions. After all, union avoidance often occurs at the margins. The whole point is to reduce the percentage of workers who are inclined to unionize not to zero, but to a level where organizing efforts cannot get off the ground. Statistical inferences from large data sets may be very helpful in that context.

Surveillance and union avoidance Meanwhile, there is substantial evidence that companies are already trying to use novel information technologies to detect and suppress nascent organizing efforts among their workers. In the workplace, much surveillance is actually open and obvious to workers, albeit not advertised as surveillance. As the labor historian Nelson Lichtenstein put it in a book on Walmart's transformation of retail, "The 'employee attitude survey' has long been a staple of the nonunion workplace. Sears perfected the system in the 1950s when it employed skilled social scientists to identify patterns of discontent and the employees who were most disloyal" before that sentiment led to a unionization drive.[99] Today, companies of all sorts utilize surveys and other means—including inductive techniques that run on masses of data about interworker communications—to detect signs of discontent. In an earlier era, this may have required reading memoranda or physically listening in on conversations, but today it can involve electronic monitoring and may be much less expensive.

For example, the tech giants appear to be developing anti-union tools that are both fairly crude and quite powerful. During the recent period of employee unrest at Google, employees often used enterprise software to set up meetings and to discuss workplace concerns. In late 2019, several worker activists discovered that Google had developed a tool that automatically notified management when workers created a "calendar event

with more than 10 rooms or 100 participants." Worker activists interpreted that as an attempt to determine when workers were meeting to discuss workplace concerns.[100] Google employees later learned that one of the HR officials who had driven the development of that tool had been meeting over the preceding months with a union avoidance consultant.[101] Amazon, similarly, has admitted that it closely monitors internal message boards, including boards that have been developed by workers from communities of color and other groups typically underrepresented in Silicon Valley, to detect union organizing.[102] Finally, in an internal presentation in June 2020 regarding "Facebook Workspace," a chat and collaboration platform meant to compete with Slack, Facebook executives noted that administrators could remove posts on certain topics and prevent such posts from trending. Among the terms that moderators suggested companies might want to block was "unionize."[103]

Other companies are aggregating data from both inside and outside their workplaces in an ongoing effort to remain union-free. For example, in 2020, journalists found that several companies, including Whole Foods and Amazon, had developed "heat maps" that sought to determine unionization risk "via a calculation that relied on employee survey data, timing of the last pay raise, and dozens of other factors."[104] As noted in this book's introduction, in 2020 Amazon posted a job announcement for "intelligence analysts" who could utilize data analytics and other tools to detect, among other things, "labor organizing threats."[105] Presumably such tools will continue to develop and become more powerful over time. For example, where companies have already deployed listening devices, keystroke monitors, and similar technologies across their worksites, those devices could likely be turned to this purpose, observing when workers use certain keywords—not just "union" but "meeting" and "protest" and "act together"—and then alerting management that workers may be planning concerted action.

Under existing doctrine, some such efforts are unlawful, others are lawful, and still others borderline. In an early case, the Supreme Court had no difficulty holding that an employer's use of "industrial spies and undercover operatives" to review a union's literature and activities and to follow several organizers outside of work violated the NLRA.[106] At the same time, employers have extensive rights to monitor the workplace, and even conversations within the workplace, under current law. Balancing those considerations, the NLRB has held that an employer's intentional observation

of workers' concerted action becomes unlawful once it "goes beyond casual and becomes unduly intrusive."[107] Such efforts are most likely to run afoul of the law when they are either targeted at specific union supporters or suspected supporters—in which case they may constitute discrimination on the basis of union support—or where they are intensified in response to union activity, in which case they constitute interference with that activity.[108] Facebook's monitoring of online conversations to detect and block words like "unionize" would very likely constitute unlawful surveillance.

That said, under Trump-era doctrine, companies have another option: they could ban union speech on their internal platforms so long as they also prohibit all other political and associational speech on those platforms. In that case, the company would be acting within its rights to limit the use of those platforms for nonwork activities. Facebook did just that following some worker unrest.[109] Another option, which is again increasingly practical, is simply to weave intensive surveillance into the "warp and woof" of the enterprise. Under existing doctrine, employers are permitted to engage in pervasive surveillance of the workplace for productivity or security purposes, even if in doing so they also thwart some worker organizing.[110] This is because, like much other privacy doctrine, NLRB doctrine here takes existing monitoring and surveillance activities as a baseline, and tends only to police or forbid surveillance efforts that are unusual for that worksite.[111] Plus, detecting the surveillance itself is necessary before workers can bring a charge to the NLRB, and in most cases workers are not permitted access to their employer's algorithms.[112] As data-driven surveillance becomes easier and cheaper over time, companies may therefore have incentives to implement the most extensive surveillance possible, potentially avoiding the scrutiny that would result if they ramp up surveillance when a unionization drive has begun. Chapter 6 will return to this issue, arguing that the only way to effectively protect workers in this context may be to prevent a great deal of workplace data-gathering in the first place.

Conclusion

The introduction to section 4.2 noted the overlap between workplace privacy and workplace organizing rights. The discussion that followed also suggests a conceptual overlap between some branches of critical privacy theory and critical labor law theory. Both are focused on the relationship

among information flows, individual self-understandings and actions, and the social context within which we all operate. With protections for and against particular informational flows, workers can talk to coworkers about their concerns and plan collective action without worrying that their employers will find out or take action against them. This process does not enact preferences, but rather *shapes and creates* preferences—and even a class identity. Workers' ability to take such action rests upon a foundation of interpersonal communication and trust, and on strong protections against employer interference or domination. Theories of privacy that understand it as protecting individuals' right to keep certain information secret simply do not capture the complexity or the normative implications of informational flows in this context. Among other things, existing rules and practices around workplace information enable employers to suppress workers' organizing efforts, and therefore to minimize labor costs.

Addressing these issues will require reforms on many fronts, including substantial reforms to the governance of workplace data and technology. Chapter 6 will discuss those possibilities in more detail. But workers' abilities to build associational power within their workplaces or companies would necessarily remain foundational to any project to change the political economy of work and technology. Workers need to be able to discuss common concerns and the merits of collective action, up to and including unionizing quickly and easily—often without their employers' knowledge, and certainly without their employers' resistance. Given the broad consensus around such matters, labor-affiliated members of Congress have frequently introduced legislation to remedy these shortcomings of existing law. The most recent, the Protecting the Right to Organize Act (PRO Act), would also bolster the NLRB's power to deter and remedy unfair labor practices, streamline the certification process, and expand workers' rights to strike.[113] This would enable significantly more worker mobilization and working-class power.

Yet it would not fully address technological threats to workers' associational power. So long as companies can access extensive data on worker speech and performance in the workplace, they will be able to use it to detect and then thwart organizing. Moreover, so long as employers or hiring platforms can aggregate data from multiple sources including employee screenings and supervision, they may be able to use it to curate a workforce that is less inclined to unionize or protest. One way of protecting

workers in this context may be to borrow a strategy from the consumer privacy field and prevent the gathering or distribution of that sort of data in the first place—in effect, intervening at a lower stage of the data food chain.[114] Another would be to subject data-gathering and usage processes to democratic control at multiple levels. This reflects a point made by the legal scholar Salomé Viljoen, that the harms of data-gathering and aggregation today are irreducible to an individual worker's or citizen's interests. The very fact that inductive learning operates at population-wide levels and draws inferences about individuals from limited data suggests that appropriate policy responses must be social rather than individual in nature.[115] That could include devolving some governance rights over workplace data to workers themselves as part of a broader strategy to democratize workplace governance. Chapter 6 elaborates such an agenda.

Data and Democracy at Work

Advanced Information Technologies, Labor Law, and the New Working Class

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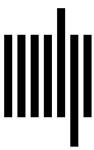

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