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LABOR ORGANIZING IN THE AGE OF SURVEILLANCE

CHARLOTTE GARDEN*

I. INTRODUCTION

How will big data and the rise of sophisticated and accessible workplace surveillance techniques affect union organizing? This Article discusses recent advances in workplace surveillance technology, including systems designed to collect vast quantities of data about what goes on in a workplace: when employees leave their work stations; to whom they talk; what they type; how quickly they complete tasks; even their mood. Moreover, the rise of “big data” means that employers can analyze this data to obtain an increasingly detailed and sophisticated picture of what workers are doing and how they feel about their work.

While these new technologies raise a host of privacy and other concerns,¹ this Article focuses on some of the ways they could chill workers’ collective action. Most obviously, workers may fear that anything they say could be electronically overheard by a system designed to help employers identify malcontents and agitators. Beyond that, systems designed to juice every ounce of productivity out of workers could simply leave them without the downtime at work that could lead to sharing information about their own workplace experiences and building trust. Yet the National Labor Relations Act (the “NLRA”)—a statute drafted to protect “the right of employees to organize and bargain collectively”² —has remarkably little to say about much employer surveillance. Instead, employers are mostly free to implement surveillance measures for purposes such as promoting productivity or improving security, even if those measures could also chill union organizing. This has been true since the days when workplace surveillance mostly had to be accomplished by human beings, conjuring up men in trench coats who would follow workplace rabble-rousers to the union hall in the evenings. The shift to surveillance by closed-

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1. See generally, Ifeoma Ajunwa, *Algorithms at Work: Productivity Monitoring Platforms and Wearable Technology as the New Data-Centric Research Agenda for Employment and Labor Law*, 63 ST. LOUIS U. L.J. 21 (2019).

2. 29 U.S.C. § 151 (2012).

circuit cameras and keystroke loggers placed the National Labor Relations Board's (the "NLRB") surveillance doctrine under stress—but omnipresent listening devices that collect mass amounts of data to be analyzed by computer could render that doctrine nearly useless.

This Article discusses recent advances in employers' surveillance capabilities, and what they mean for union organizing. Part II discusses new workplace surveillance technology. Then, Part III discusses the (limited) extent to which employer surveillance can constitute an unfair labor practice. Part IV draws the previous two parts together, arguing that the NLRA is not an adequate response to the unique challenges to collective action that are posed by new surveillance technology.

II. MODERN WORKPLACE SURVEILLANCE

Like many other aspects of work, technology has transformed worker surveillance. Employers have at their disposal an increasingly sophisticated set of tools with which to monitor every aspect of employees' work—and sometimes their private lives, too.

It is already commonplace and common knowledge that employers can use keyloggers and other tracking software to monitor what their employees type, what websites they visit and how much time they spend there, and more.³ But employer surveillance need not stop at employees' desks. Employers can also rely on closed circuit cameras to learn when employees get up and walk away from the computer, or they can require employees to use radio-frequency identification badges to enter rooms on the employer's premises—thereby creating a log of each employee's locations throughout the day.⁴ Further, many of these tools are not easily detectable by employees, unless employers decide that it is in their interest to be forthright about their workplace monitoring: just as a homeowner might post a security system logo in the window in the hope of deterring burglars, an employer might predict that employees' awareness that they are being monitored might itself change their behavior.

This technology reached maturity years ago, and it shows no sign of falling out of favor; to the contrary, its use seems to be on the rise. Surveys of employer behavior have obvious limitations, but for what they are worth, they generally reflect increasing surveillance of employees. For example, in a 2007 survey by the American Management Association and the ePolicy Institute, two thirds of the 304 employer respondents stated that they monitored their employees' use

3. See Matthew W. Finkin, *Employee Privacy, American Values, and the Law*, 72 CHI.-KENT L. REV. 221, 262–63 (1996).

4. *Id.*

of the Internet, and blocked access to certain websites.⁵ That same survey showed that nearly half of respondents used keystroke loggers and reviewed their employees' computer files, with most of these employers providing advance notice of this monitoring.⁶ Further, when compared to earlier versions of the same survey, this study suggests that employer surveillance is on the rise.⁷

In addition, employers now have at their disposal increasingly sophisticated, subtle, and effective means of surveilling their employees' actions, communications, and even attitudes, both inside and outside of work. For example, a profile of the Silicon Valley firm Humanyze recounts that both the company's own employees and its clients' employees are outfitted with "a microphone that picks up whether they are talking to one another; Bluetooth and infrared sensors to monitor where they are; and an accelerometer to record when they move."⁸ That technology is capable of yielding "metrics such as time spent with people of the same sex, activity levels and the ratio of time spent speaking versus listening."⁹ Another company sells a "happiness meter," which can "infer mood levels from physical movement."¹⁰ And a third takes email monitoring to a new level by scanning employees' email to understand how their "sentiment changes over time."¹¹

These technologies and the comprehensive information they offer about what employees do at work are not limited to office environments. Inviting inevitable comparisons to the "time and motion studies" that are key to Taylorism,¹² Amazon reportedly patented a wearable device designed to track the speed and accuracy with which warehouse workers packed boxes.¹³ The

5. *The Latest on Workplace Monitoring and Surveillance*, AM. MGMT. ASS'N (Sept. 3, 2018, 3:32 PM), <https://www.amanet.org/training/articles/the-latest-on-workplace-monitoring-and-surveillance.aspx> [<https://perma.cc/PUY7-QGR8>].

6. *Id.*

7. See National Workrights Institute, *Privacy Under Siege: Electronic Monitoring in the Workplace* at 9 <https://epic.org/privacy/workplace/e-monitoring.pdf> [<https://perma.cc/VZ8T-MT-ED>] (collecting various surveys from the early 2000s).

8. *There Will Be Little Privacy in the Workplace of the Future*, THE ECONOMIST (Mar. 28, 2018), <https://www.economist.com/special-report/2018/03/28/there-will-be-little-privacy-in-the-workplace-of-the-future> [<https://perma.cc/TP3B-BCKM>].

9. *Id.* (However, the article states that clients are not given information about individual employees, and that they instead receive only "team-level statistics").

10. *Id.*

11. *Id.*

12. Michael C. Harper, *The Continuing Relevance of Section 8(a)(2) to the Contemporary Workplace*, 96 MICH. L. REV. 2322, 2341 (1998) (discussing the "essential aspects of Taylorism," which result in workers being assigned simple, repetitive tasks, the pace of which are determined "by the speed of an assembly line or by quotas based on time and motion studies of workers by production engineer specialists").

13. Ceylan Yeginsu, *If Workers Slack Off, the Wristband Will Know. (And Amazon Has a Patent for It.)*, N.Y. TIMES (Feb. 1, 2018), <https://www.nytimes.com/2018/02/01/technology/amazon-wristband-tracking-privacy.html> [<https://perma.cc/6TDQ-JTQ9>].

device could also “nudge [workers] via vibrations” when it “judged that [they] were doing something wrong.”¹⁴ And while news of that patent made a splash, warehouse employees “said the company already used similar tracking technology in its warehouses,”¹⁵ which have—perhaps not coincidentally—acquired reputations as punishing workplaces.¹⁶ For its part, Walmart patented an “audio surveillance technology that measures workers’ performance, and could even listen to their conversations with customers at checkout.”¹⁷ According to the patent, the system would be sensitive enough to detect the length of a line at a cashier, or the speed at which groceries were being bagged.¹⁸

Enterprises can also keep watch over freelancers and those who work partially from home, raising a different set of privacy concerns. For example, the platform Upwork “tracks hundreds of freelancers while they work by saving screenshots, measuring the frequency of their clicks and keystrokes, and even sometimes taking webcam photos of the workers.”¹⁹ Upwork then uses this information to determine how freelancers will be paid.²⁰ Along the same lines, Uber introduced software designed to monitor drivers’ speed and other driving habits—a change with potential positive implications for safety, but also negative implications for drivers’ privacy and autonomy.²¹ Countless employers provide at least some of their employees with laptops or smartphones to take home with them; many of these devices contain recorders and cameras that can be triggered remotely, as well as the keyloggers and other trackers that have long been available. Finally, some employers issue Fitbits and other fitness and health tracking devices to their employees as part of “wellness” programs—these

14. *Id.*

15. *Id.*

16. See Dave Jamieson, *The Life and Death of an Amazon Warehouse Temp*, HUFFINGTON POST, <https://highline.huffingtonpost.com/articles/en/life-and-death-amazon-temp/> (last visited Aug. 28, 2018) [<https://perma.cc/J2FB-RVCB>]; Nina Shapiro, *Under Pressure, Afraid to Take Bathroom Breaks? Inside Amazon’s Fast-Paced Warehouse World*, SEATTLE TIMES (July 2, 2018), https://www.seattletimes.com/business/amazon/under-pressure-afraid-to-take-bathroom-breaks-in-side-amazons-fast-paced-warehouse-world/?utm_source=facebook&utm_medium=social&utm_campaign=article_left_1.1 [<https://perma.cc/PLP7-BBGM>].

17. Caroline O’Donovan, *Walmart’s Newly Patented Technology for Eavesdropping on Workers Presents Privacy Concerns*, BUZZFEED (Jul. 11, 2018), <https://www.buzzfeednews.com/article/carolineodonovan/walmart-just-patented-audio-surveillance-technology-for#.gia8Mn4Vg> [<https://perma.cc/LVS5-N9GW>].

18. *Id.*

19. Caroline O’Donovan, *This “Creepy” Time-Tracking Software Is Like Having Your Boss Watch You Every Second*, BUZZFEED (Aug. 7, 2018), <https://www.buzzfeednews.com/article/carolineodonovan/upwork-freelancers-work-diary-keystrokes-screenshot> [<https://perma.cc/67TZ-VJFQ>].

20. *Id.*

21. Michal Addady, *Uber Is Starting to Monitor Drivers for Bad Behavior*, FORTUNE (June 29, 2016), <http://fortune.com/2016/06/29/uber-monitor-driving-behavior/> [<https://perma.cc/TDL6-2LFQ>].

devices collect data about employees' physical activity, heart rates, and sleep patterns, including when they go to bed and get up.²²

Yet employees sometimes successfully resist new employer surveillance regimes. For example, Ifeoma Ajunwa, Kate Crawford, and Jason Schultz open their important article, *Limitless Worker Surveillance*, with an anecdote in which journalists at the Daily Telegraph noticed that devices called "OccupEye" had been installed at every workstation.²³ As the authors recount, "[e]mployees' suspicion that OccupEye's true purpose was mass surveillance of worker performance quickly led to public outrage, union pressure, and, ultimately, its ejection from the Telegraph building."²⁴ Further, employees who work in unionized workplaces will often be entitled to notice of, and an opportunity to bargain over, the imposition of new surveillance technology,²⁵ giving them an opportunity to argue for limits on both the use of employer surveillance devices, and the purposes for which the data they gather can be used. And even non-union employees who learn that their every move is being watched or listened to can express their displeasure in ways that range from mass walkouts to more subtle (and conscious or unconscious) slowdowns, to individual employees deciding to vote with their feet by quitting.²⁶

However, these responses are partial solutions at best—they will work only for employees who learn that they are being surveilled, and even then, only if they have enough leverage to successfully resist their employers. Solving this problem could be a job for labor law, which is intended to respond to workplace power imbalances, but it not yet up to the challenges that surveillance technology poses for workers' collective action, including union organizing. The next section discusses the limitations of the NLRB's surveillance doctrine, outlining the scope of labor law and describing how the NLRA fails to respond adequately to emerging worker surveillance techniques.

22. See Christopher Rowland, *With Fitness Trackers in the Workplace, Bosses Can Monitor Your Every Step – and Possibly More*, WASH. POST (Feb. 16, 2019), https://www.washingtonpost.com/business/economy/with-fitness-trackers-in-the-workplace-bosses-can-monitor-your-every-step—and-possibly-more/2019/02/15/75ee0848-2a45-11e9-b011-d8500644dc98_story.html?utm_term=.af1e92eb3841 [<https://perma.cc/VW26-P9AT>].

23. Ifeoma Ajunwa, Kate Crawford & Jason Schultz, *Limitless Worker Surveillance*, 105 CAL. L. REV. 735, 737 (2017).

24. *Id.*

25. See *Colgate-Palmolive Co.*, 323 N.L.R.B. 515, 517 (1997) (employer committed unfair labor practice by failing to bargain over installation of hidden surveillance cameras).

26. Recently, some employees at technology companies including Microsoft have organized around the ethical implications of some of their employers' projects and clients, such as US Immigration and Customs Enforcement. Nitasha Tikku, *Microsoft's Ethical Reckoning is Here*, WIRED (June 18, 2018, 8:00 PM), <https://www.wired.com/story/microsofts-ethical-reckoning-is-here/> [<https://perma.cc/2HUG-XQ39>]. See also Martin Skladany, *Technology Unions: How Technology Employees Can Advocate for Internet Freedom, Privacy, Intellectual Property Reform, and the Greater Good*, 98 J. PAT. & TRADEMARK OFF. SOC'Y 821 (2016).

III. SURVEILLANCE AND THE NLRA²⁷

The NLRA protects the right of most private sector employees to “form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”²⁸ Neither that core right nor the unfair labor practices enumerated in Section 8 of the NLRA²⁹ addresses employees’ privacy or employer surveillance explicitly. Still, it seems unimaginable that unlimited employer scrutiny of employees’ collective action could be consistent with the core of the NLRA’s protections, especially when employees are in the early stages of a union organizing drive—the potential for that collective action to be chilled because of employees’ reasonable fear of employer retaliation would be too great.³⁰

Accordingly, as one would expect, certain surveillance activities by employers have been illegal since the earliest days of the NLRA. In 1938, the Supreme Court considered an employer’s appeal from an NLRB unfair labor practice finding that related in part to the company’s “employment of industrial spies and undercover operatives.”³¹ The NLRB decision offered more detail about what that “employment of industrial spies” entailed:

[Consolidated] engaged the detective services of Railway Audit and Inspection Company . . . from October 1933 through October 1936. . . . services rendered

27. As this heading suggests, this Article does not address any other sources of law that could potentially bear on the employment relationship, such as privacy torts or the Stored Communications Act.

28. 29 U.S.C. § 157 (2012). (Employees who are not covered by the NLRA, such as public sector workers, or agricultural or domestic employees, may receive similar protection under state law. However, these laws are largely outside of the scope of this Article. Public sector workers may also receive protection from surveillance under the Fourth Amendment to the US Constitution). See *City of Ontario v. Quon*, 560 U.S. 746, 765 (2010) (holding that city’s review of police officer’s text messages on department-issued cell phone was a search that was covered by the Fourth Amendment, but City’s search was reasonable). But see Paul M. Secunda, *Privatizing Workplace Privacy*, 88 NOTRE DAME L. REV. 277 (2012) (the “understanding that public employees have more privacy protection in the workplace than their private-sector counterparts has been placed in considerable doubt.”). On the other hand, values such as public accountability, public safety, or the need to check the coercive power of the state may justify certain intrusions that would be unpalatable (if not illegal) in the private sector. See *Fraternal Order of Police, Lodge #7*, 34 PERI ¶ 178 at *1 (Ill. Lab. Rel. Bd., June 5, 2018), 2018 WL 3062486 (discussing whether public employer must bargain over police body-worn cameras); *In re. Belleville Educ. Ass’n*, No. A-2956-15T3, 2018 WL 3421392 at *3–4 (N.J. Super. Ct. App. Div. July 16, 2018) (discussing whether public employer must bargain over audio and video recording devices intended to help with responses to school shootings).

29. 29 U.S.C. § 158 (2012).

30. See Kate Bronfenbrenner, Econ. Pol’y Inst., Briefing Paper 235, No Holds Barred: The Intensification of Employer Opposition to Organizing 27 (2009), <https://www.epi.org/files/page/-/pdf/bp235.pdf> [<https://perma.cc/QPL7-AG4E>].

31. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 215 (1938).

... included investigation of the union activities of [Consolidated's] employees. Frequently [Consolidated] would send circulars, leaflets, and other literature to the Inspection Company for investigation by its detectives. Among the various types of literature ... were included the circulars and leaflets of the Independent Brotherhood [of Utility Employees], some of which contained the names of the leaders of that organization. Detectives ... also covered several of the meetings and conventions of the Independent Brotherhood throughout the year 1935. ...

... [D]etectives trailed Stephen L. Solosy ... and Philemon Ewing, both organizers for the Independent Brotherhood The detective who trailed Solosy was given a picture of him and told to trail him, which he did for two days ... Solosy was unaware that he was being shadowed, but Ewing was exasperated by the ineptitude of the detective who trailed him Both Solosy and Ewing were discharged on January 17, 1936.³²

The Court agreed that the NLRB could bar the company from continuing to use "outside investigating agencies."³³ However, perhaps because the Railway Audit and Inspection Company detectives' surveillance work was so extensive, neither the Court nor the NLRB discussed the scope or even the purposes of the NLRA's protection against employer surveillance.

Later cases and commentators sketched out the contours of that protection in greater detail. An employer's direct observation of union activity—here, think of a supervisor recording names of employees wearing union insignia on their clothing at work, or keeping close watch on a picket line—becomes unlawful "if the observation goes beyond casual and becomes unduly intrusive."³⁴ "Indicia of coerciveness include the 'duration of the observation, the employer's distance from employees while observing them, and whether the employer engaged in other coercive behavior during its observation.'"³⁵ Examples of surveillance that the NLRB has held violate the NLRA include watching employees with binoculars,³⁶ watching union activity on a daily basis and for hours at a time,³⁷ posting guards in previously unguarded areas,³⁸ photographing or videotaping employees and monitoring their phone calls in response to union activity,³⁹ and

32. *In re. Consol. Edison Co.*, 4 N.L.R.B. 71, 94–95 (1937).

33. *Consol. Edison*, 305 U.S. at 217.

34. *Kenworth Truck Co., Inc.*, 327 N.L.R.B. 497, 501 (1999).

35. *Brasfield & Gorrie, LLC*, 366 N.L.R.B. No. 82, 2018 WL 2148472 at *5 (May 8, 2018) (quoting *Alladin Gaming, LLC*, 345 N.L.R.B. 585, 586 (2005)).

36. *Cook Family Foods, Ltd.*, 311 N.L.R.B. 1299, 1301 (1993).

37. *NLRB v. Collins & Aikman Corp.*, 146 F.2d 454, 455 (4th Cir. 1944).

38. *S.J.P.R., Inc.*, 306 N.L.R.B. 172, 189 (1992).

39. *Dep't Store Div. of the Dayton Hudson Corp.*, 316 N.L.R.B. 477, 478 (1995); *F.W. Woolworth Co.*, 310 N.L.R.B. 1197, 1197 (1993). The NLRB has held that photographing or videotaping employees' statutorily protected activities is a per se violation of the NLRA, unless the employer can "provide a solid justification" that the photography was required because of anticipated misconduct. *Brasfield & Gorrie, LLC*, 366 N.L.R.B. No. 82 at *5–6 (quoting *Nat'l Steel*

a manager beginning a new practice of sitting with employees at lunch or during breaks.⁴⁰

But surveillance qualifies as an unfair labor practice only if it involves more than an employer happening to see union activity taking place in public or in the open at work. Rather, the NLRB asks whether the employer's conduct is "out of the ordinary" in a way that would tend "to interfere with, restrain or coerce employees['']" collective action.⁴¹ There are two significant aspects to this test: first, it is objective, requiring the NLRB to assess whether the challenged surveillance would interfere with, restrain, or coerce a reasonable or typical employee's protected concerted activity.⁴² Second, it allows the employer to set the baseline: in general, employers can continue practices adopted before employees began to engage in concerted activity (usually a union drive), even if those practices later have the effect of allowing the employer to observe concerted activity once it begins.⁴³ This means employers may implement surveillance programs for reasons other than deterring union organizing, such as promoting productivity or maintaining security. For example, the NLRB rejected the contention that an employer engaged in unlawful surveillance when, during an organizing drive, it slightly expanded an existing "good-night" policy, which entailed a member of senior management standing at the door at the end of the workday to ensure that employees had exited the building and that their packages were appropriately sealed to prevent theft.⁴⁴ The "good-night policy," wrote an administrative law judge in an opinion adopted by the NLRB, could not reasonably deter concerted activity because it was "a practice with which the employees had become fully familiar."⁴⁵

Employees need not be aware of employer surveillance for it to violate the NLRA. For example, in one of the earliest cases dealing with this issue, the Ninth Circuit simply resorted to the text of the NLRA to affirm the Board's decision that surreptitious surveillance could be an unfair labor practice even though employees did not discover it until after the fact, because "[c]asual examination of the dictionary discloses that a person may be interfered with, restrained, or coerced without knowing it."⁴⁶ Additionally, the NLRB will find

& Shipbuilding Co., 324 N.L.R.B. 499, 499 (1997). *But cf.* U.S. Steel Corp. v. NLRB, 682 F.2d 98, 101 (3d. Cir. 1982) (rejecting the NLRB's per se approach in photographing cases).

40. Elano Corp., 216 N.L.R.B. 691, 695 (1975); Hawthorn Co., 166 N.L.R.B. 251, 251 (1967). *See also* Aladdin Gaming, 345 N.L.R.B. 585, 586-87 (2005) (discussing these and other cases).

41. 29 U.S.C. § 158(a)(1) (2012) (defining as unfair labor practice employer "interfere[nce] with, restrain[t], or coerc[ion]" with employees' rights to engage in concerted activity); Metal Industries Inc., 251 N.L.R.B. 1523, 1523 (1980) (routine or casual observation of workplace activity does not rise to the level of unlawful surveillance).

42. The Broadway, 267 N.L.R.B. 385, 400 (1983).

43. *See id.*

44. *Id.* at 389-90.

45. *Id.* at 400.

46. NLRB v. Grower-Shipper Vegetable Ass'n, 122 F.2d 368, 376 (9th Cir. 1941).

an unfair labor practice when an employer attempts (but fails) to watch its employees' union activity, such as by following an employee in the hope of learning the location of a union meeting that the employee does not ultimately attend.⁴⁷ And it is also an unfair labor practice when an employer deliberately creates the impression of surveillance—even if no information is actually collected—such as by placing in a break room a security camera that does not contain a tape or that turns out to be broken, or having a supervisor sit in a car while observing union activity and talking on the phone, even if the conversation is not a report on the union activity.⁴⁸ “The test in determining whether a statement constitutes creating the impression of surveillance is whether the employees could reasonably assume from the employer’s statements or conduct that their activities had been placed under surveillance.”⁴⁹

Taken as a whole, the NLRB’s surveillance doctrine reveals at least two general purposes. First, increased employer surveillance in response to union activity can have a chilling effect on that activity because employees will reasonably fear that the surveillance has been implemented in order to facilitate later retaliation by the employer—this explains why employers can violate the NLRA simply by creating the impression of surveillance, but without engaging in it.⁵⁰ Second, employer surveillance can give employers an unfair advantage in opposing an organizing drive, or facilitate other unfair labor practices, including retaliation against union supporters. This explains why employers’ surreptitious surveillance also violates the NLRA.

Although the tools available for employer surveillance have changed significantly, the NLRB’s approach to surveillance cases has mostly remained the same. For example, the NLRB folded videography into its rule on employer photography of concerted activity without modifying the rule to account for differences between the two technologies.⁵¹ In another case involving new(er) surveillance technology, *MEK Arden*, a supervisor (erroneously) told an employee that the workplace had voice-activated cameras, leading the employee to believe that her speech and that of other employees would be recorded.⁵² The NLRB concluded that “suggesting to an employee that the cameras were being used to monitor their activities” was an unfair labor practice.⁵³

47. *NLRB v. Nueva Eng’g, Inc.*, 761 F.2d 961, 967 (4th Cir. 1985).

48. *Cal. Acrylic Indus.*, 322 N.L.R.B. 41, 59 (1996) (“whether a video tape was actually in Saldana’s video camera or whether he actually pressed down on the record button . . . the ‘chilling effect’ of such on Respondent’s employees’ Section 7 rights was the same.”). *See also* *Eddyleon Chocolate Co.*, 301 N.L.R.B. 887, 887–88 (1991).

49. *MEK Arden, LLC*, 365 N.L.R.B. No. 109, 2017 WL 3229289 at *19 (July 25, 2017).

50. *Cal. Acrylic Indus.*, 322 N.L.R.B. at 59.

51. *F.W. Woolworth Co.*, 310 N.L.R.B. 1197, 1197 (1993).

52. *MEK Arden, LLC*, 365 N.L.R.B. No. 109 at *18–19.

53. *Id.* at 19.

The NLRB's most significant recent discussion of the intersection of surveillance and new technology came in a case known as *Purple Communications*, in which the NLRB held that employees had a presumptive right to use their work-issued email accounts to engage in collective action under certain conditions, including that employees limit their email concerted activity to non-working time.⁵⁴ Of course, as discussed above, many employers already monitor their employees' use of email, creating a potential conflict between employees' concerted activity and employers' desire to implement surveillance measures designed to monitor productivity.⁵⁵ The *Purple Communications* majority acknowledged as much—but stated that such a conflict could be resolved by applying its existing law on employee surveillance: “We are confident, however, that we can assess any surveillance allegations by the same standards that we apply to alleged surveillance in the bricks-and-mortar world.”⁵⁶ Then, the NLRB added the following:

An employer's monitoring of electronic communications on its email system will similarly be lawful so long as the employer does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activists. Nor is an employer ordinarily prevented from notifying its employees, as many employers also do already, that it monitors (or reserves the right to monitor) computer and email use for legitimate management reasons and that employees may have no expectation of privacy in their use of the employer's email system.⁵⁷

There are at least two ways to view this brief discussion. One is as a practical suggestion about how the NLRB would respond to an as-yet-theoretical problem raised in the context of a highly controversial case. But the other is as a missed opportunity: the NLRB could have signaled its openness to considering whether a law of employer surveillance that was designed for the real world is really appropriate for the digital world. In line with the second view, Professor Jeffrey Hirsch praised the main result in *Purple Communications*, but criticized the discussion of surveillance: “email monitoring can provide employers with information that is useful for legal attempts to thwart collective action . . . while electronic collective action provides many benefits to employees, it also exposes those efforts in ways that traditional coordination does not.”⁵⁸ Thus, Hirsch identified three specific problems with the NLRB's approach: first, that “[u]nlike picketing or other types of public acts, there is typically a veneer of privacy that attaches to email;” second, that the NLRB's approach effectively

54. *Purple Commc'ns, Inc.*, 361 N.L.R.B. 1050, 1064–65 (2014).

55. *Id.*

56. *Id.*

57. *Id.* at 1065.

58. Jeffrey M. Hirsch, *Worker Collective Action in the Digital Age*, 117 W. VA. L. REV. 921, 954 (2015).

encourages employers to prophylactically adopt a broad monitoring policy; and third, that by carefully monitoring and searching their employees' computer use, employers might be able to discover information such as passwords to protected social media sites—which might in turn lead the employer to discover additional information about employees' concerted activity, among other private information.⁵⁹

Because of *Purple Communication's* context, the problems that Hirsch identified involve employers' monitoring of employees' computer use. But other types of new surveillance technology will raise equally sticky problems. I describe some of those problems in the next section, but the bottom line is that the NLRB's current approach, which essentially ignores surveillance adopted for purposes such as deterring theft or promoting productivity, is not up to dealing with emerging intrusive forms of workplace surveillance.

I. UPDATING LABOR LAW TO RESPOND TO SURVEILLANCE TECHNOLOGY

Some of the implications of surveillance technology for employers looking to prevent their employees from unionizing or engaging in other collective action are readily apparent. For example, Walmart's patented audio surveillance system, if implemented, would allow the company to listen not just for bagging speed, but also for employees talking about the Organization United for Respect at Walmart ("OUR Walmart"), which is sponsored by the United Food and Commercial Workers International Union.⁶⁰ Add to that Walmart's well-known history of anti-union tactics (including employee surveillance),⁶¹ and one can easily foresee that Walmart workers might curtail any talk of OUR Walmart, or even of any dissatisfaction with their treatment by their employer—even though the NLRA protects such talk, provided that it is confined to non-working time.⁶² Yet, as discussed above, the NLRA would have little to say about Walmart's decision to implement a surveillance system for the purposes of productivity enhancement, even though chilling employees' collective action would be a foreseeable result.

Newer methods and habits of work could also extend this chilling effect beyond the workplace's physical boundaries. For example, when employers issue computers and cell phones to their workforce, they may either welcome or tolerate the use of these devices for employees' personal communications.

59. *Id.* at 957–58.

60. See Susan Berfield, *How Walmart Keeps an Eye on Its Massive Workforce*, BLOOMBERG BUSINESSWEEK (Nov. 24, 2015), <https://www.bloomberg.com/features/2015-walmart-union-surveillance/> [<https://perma.cc/F2EJ-NF34>].

61. *Id.* See also Steven Greenhouse, *How Walmart Persuades Its Workers Not to Unionize*, THE ATLANTIC (June 8, 2015), <https://www.theatlantic.com/business/archive/2015/06/how-walmart-convince-its-employees-not-to-unionize/395051/> [<https://perma.cc/A23A-WDZK>] (describing Walmart's history of anti-union activity).

62. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 (1945).

Employees could reasonably see this practice as an office “perk,” but it also makes communicating free from employer surveillance difficult. Even if some employees are meticulous about using non-work devices, email addresses, and networks when typing something they don’t want the boss to know about, the likelihood that everyone else with whom they communicate will follow the same protocol is low. The result will be that employers who are determined to learn what their employees are doing and saying will almost certainly succeed—and, perhaps more important, savvy employees will know that they cannot expect their communications to remain secret from their employers. Relatedly, where employees carry smartphones or other GPS-enabled devices, they could fear that their employers will track who attends union meetings, or even which employees get together outside of work, making informal networks among employees visible to the employer.

There is also the possibility that employer surveillance will generally deter employees from talking with each other during the work day, even when their conversations would not relate to working conditions or collective action. This deterrence could result from employer audio recording, or from strict productivity quotas or monitoring intended to prevent “goofing off.” One predictable result would be that employees will not get to know each other very well. If that happens, there could be ramifications of many sorts—employees might enjoy their jobs less, their well-being might suffer, and they may become less likely to turn to each other to discuss workplace problems. Professor Michael Oswalt has discussed the importance of trust among workers as a prerequisite to collective action of any sort, but especially the spur-of-the-moment protests that are more likely in un-organized workplaces than unionized ones.⁶³ As he put it, “the connective quality that matters most [to “improvisational” collective action] is trust, specifically a special sort of trust—the kind built up over time through repeated, relaxed, informal interactions.”⁶⁴

Finally, a combination of pre-hire personality tests and workplace happiness monitoring could help employers avoid hiring the sort of worker who might be prone to collective action in the first place, and then respond on an individual basis to employees who become unhappy during their tenure, either by improving their pay or other working conditions, or by firing them. The net result will be that worker grievances will become less likely to catalyze collective action that could lead to improvements for all of an employer’s employees. Developing this argument, Nathan Newman has persuasively reasoned both that personality tests and workplace monitoring are likely to result

63. See Michael M. Oswalt, *The Right to Improvise in Low-Wage Work*, 38 CARDOZO L. REV. 959, 998–99 (2017).

64. *Id.* at 999.

in lower pay for workers as a whole, and that these techniques may violate the NLRA's prohibitions on polling employees about their union sympathies.⁶⁵

But if a union drive does begin—as occurred among Uber drivers in Seattle—the employer would be able to easily reach employees at home by sending notifications containing the employers' messages, links to podcasts discussing the union drive from the employer's perspective, and more to employees' devices.⁶⁶ While an employer's physical visit to an employee's home could be deemed a reason to order a new union election, the same is not (yet) true of an electronic visit—yet the electronic visit, perhaps even more than the physical visit, could arrive at a time when the worker was especially susceptible to suggestion, and with content the worker is especially likely to accept.⁶⁷

What could labor law do about all this? The answer to this question is multifaceted, but one aspect is clear: the NLRB should not simply apply case law that was developed for detectives holding clipboards, or even workplace cameras, to the emerging workplace surveillance technology discussed in Part II. As Professor Hirsch outlined in the context of employee email monitoring, the problem with that approach is that it does not grapple with the fact that employers can learn vastly more information, and more useful information, about their employees' actual and potential collective action through these new technologies than through previous methods of workplace surveillance.⁶⁸

Charles Craver has proposed that employers should be required to disclose the extent of their workplace surveillance and the specific activities that this surveillance is intended to deter, and also that monitoring authority be vested in particular pre-designated individuals, who are in turn subject to strict rules about what they can disclose about what they see or hear, and to whom.⁶⁹ And Ariana Levinson has suggested a set of rules designed to mimic the protections that apply to workers who are already unionized and living under a typical collective bargaining agreement.⁷⁰ These include notice of monitoring under most circumstances and limits on surreptitious monitoring, and allowing employees to respond before imposing discipline based on activity learned through

65. Nathan Newman, *Reengineering Workplace Bargaining: How Big Data Drives Lower Wages and How Reframing Labor Law Can Restore Information Equality in the Workplace*, 85 U. CIN. L. REV. 693, 738–39 (2017).

66. See Heidi Groover, *As Seattle Uber Drivers Try to Unionize, the Company Doubles Down on a Scare Campaign*, THE STRANGER (Dec. 7, 2016), <https://www.thestranger.com/news/2016/12/07/24731875/can-uber-convince-its-drivers-they-dont-need-a-union> [https://perma.cc/6PCD-9NGL].

67. Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 1017 (2014).

68. Hirsch, *supra* note 60 at 955–56.

69. Charles B. Craver, *Privacy Issues Affecting Employers, Employees, and Labor Organizations*, 66 LA. L. REV. 1057, 1076 (2006).

70. Ariana R. Levinson, *Industrial Justice: Privacy Protection for the Employed*, 18 CORNELL J. L. & PUB. POL'Y 609, 629, 656 (2009).

surveillance. Although these proposals were designed with general employee privacy concerns in mind, rather than a focus on preserving the conditions necessary for union organizing, they could also help curb the chilling effects that employer surveillance can have on collective action.

In addition, the NLRB (or Congress) should consider an additional measure, designed to balance employer needs and real concerns about chilling employees' collective action in the context of specific workplaces.⁷¹ Specifically, the NLRB should adopt a new set of presumptions for evaluating intrusive employer surveillance that predictably balance employer and employee needs.⁷² Under such a framework, the NLRB would presumptively bar some of the most intrusive workplace surveillance techniques unless employers can show they are necessary because of special circumstances. Conversely, the framework would presumptively permit less intrusive forms of surveillance under two conditions: first, the employer's demonstration of a legitimate purpose for their implementation; and second, that employees cannot show that they were adopted or are being deployed to deter protected concerted activity.

II. CONCLUSION

The digital revolution is not yet done transforming work, and it is unpredictable where the combination of emerging automation and artificial intelligence theories will lead. But labor law's approach to policing workplace surveillance is not yet ready to meet these challenges. In particular, the NLRA's current indifference to employers' baseline choices regarding workplace surveillance in non-union workplaces is inadequate, because new surveillance methods yield much more and much better information for employers aiming to nip workers' concerted activity in the bud. An updated legal regime would at minimum involve notice rights, but should also force employers to justify their surveillance choices, and facilitate worker input into those choices.

71. The proposal is laid out here only briefly, to be elaborated in future work.

72. This proposed framework is modeled on the presumptions initially created in the *Republic Aviation* case and later elaborated by the NLRB. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).