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## Surveillance Wages: Private Governing Power and the Future of Work

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## SYMPOSIUM REMARKS

# SURVEILLANCE WAGES: PRIVATE GOVERNING POWER AND THE FUTURE OF WORK

ZEPHYR TEACHOUT\*

**Teachout:** Well, good afternoon. I'm so sorry that I can't be there in person, but I am really honored to be here; to be invited by a friend of my father's, who is also a law professor; and to be part of this really critical symposium.

We often think of a form of corruption as being private powers corrupting institutions, as opposed to what we're talking about today, which is private powers becoming self-serving institutions and governing themselves. As Justice Douglas once said, "[A]ll power tends to develop into a government in itself."<sup>1</sup>

What I want to talk about today is an area that I am increasingly concerned about—a subset of this problem of radical concentration of power. I'm going to start with a few minutes discussing concentration of power and what governing power means, and then turn to this particular issue, which I'm going to call surveillance wages. I will then talk about three different possible strategies to approach the threat of surveillance wages: privacy laws, business laws—including the law of gambling—and antitrust law.

As I think you've already talked about somewhat today, we see radical concentrations of private power in our society as a kind of disease that is eating away at the institutions that make it plausible to have an economy with some level of equality—racial and economic—and to have a self-governing entity.

The good news is there is a major shift in public thinking about private power. President Joe Biden, this summer, showed up as one of the leading

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1. *United States v. Columbia Steel Co.*, 334 U.S. 495, 536 (1948) (Douglas, J., dissenting).

proponents of this shift in a remarkable and under-noticed speech in which he pushed forward executive actions across the administration.<sup>2</sup>

Biden highlighted particular areas of executive action, but more importantly, he pushed for a new vision, saying the last forty years of antitrust and antimonopoly thinking have failed.<sup>3</sup> The key moment—I caught my breath—was when he said the word “failed.”<sup>4</sup>

Biden then talked about the ways in which radical concentrations of power are pushing down wages and leading to unsustainable power at the top and disempowerment at the bottom, whether you look at workers’ rights or at consumers.<sup>5</sup> You also have Biden appointing Lina Khan to chair the FTC, Jonathan Kanter to lead the Antitrust Division at the Department of Justice, and Tim Wu at the White House.<sup>6</sup>

This highlights that at the leadership level, our country is committed to a new way of thinking about private power. These three appointments, along with Rohit Chopra at the CFPB.<sup>7</sup>

I come from democracy work; I come from voting rights; money and politics; gerrymandering, all of which are still very front and center today, needless to say. And I came to antitrust and antimonopoly work from concerns about our democracy.

As I’ve previously written, we should understand the antimonopoly fight as including the fight against private arbitration—what’s called mandatory arbitration, where basically corporate-controlled courts are making decisions.<sup>8</sup> We need to see how monopolized tech is undermining a free and open press by having a duopoly in digital advertising at the top, with Facebook and Google really controlling and sitting like kings above our

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2. Joe Biden, President, White House, Remarks by President Biden at Signing of an Executive Order Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/>.

3. *Id.*

4. *Id.*

5. *Id.*

6. Joe Biden, President, White House, President Biden Announces His Intent to Nominate Lina Khan for Commissioner of the Federal Trade Commission (Mar. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/22/president-biden-announces-his-intent-to-nominate-lina-khan-for-commissioner-of-the-federal-trade-commission/>; Joe Biden, President, White House, President Biden Announces Jonathan Kanter for Assistant Attorney General for Antitrust (July 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/20/president-biden-announces-jonathan-kanter-for-assistant-attorney-general-for-anti-trust/>; President Joe Biden, White House Announces Additional Policy Staff (Mar. 5, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/05/white-house-announces-additional-policy-staff/>.

7. Joe Biden, President, White House, Nominations Sent to the Senate (Feb. 13, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/13/nominations-sent-to-the-senate-2/>.

8. *See, e.g.*, Robin Kaiser-Schatzlein, *Monopolies Make Their Own Rules*, NEW REPUBLIC (July 7, 2020), <https://newrepublic.com/article/158372/monopolies-make-rules-zephyr-teachout-break-em-up>.

free press. And we should understand how companies like Amazon and Tyson sit at the center of the economy, governing their industries, as opposed to existing within them.

But the topic I want to talk about today is the way in which a combination of monopoly power—the power to set terms and collection, is leading to a new form of setting the terms at work. I call this “surveillance wages.” What I mean by surveillance wages is wages are determined not by the task, nor by the set of responsibilities, but by individualized information about the worker collected by the employer. (I include in the definition of employer, the economic employer, not just the technical, state-by-state definition of what constitutes the employer.)

And so, what we have, then, is an extreme power imbalance between workers and dominant employers that is added to a growing industry of intrusive technologies. What we are seeing is that workers—and this is whether they’re classified as employees or independent contractors—are increasingly likely to be paid different amounts for the same labor; treated differently in terms of scheduling than somebody else who is doing the exact same task; have different benefits from other workers, and as part of this, increasingly likely to be experimented upon as subjects that are tested and prod.

The sunny way to put this is that there’s the rise of “personalized wages.” I’m going to talk about the examples we know about, but my prediction is that this is going to be one of the fastest-growing structures that we see in the workplace. Individualized, personalized surveillance wages.

One way to think about it from your seats at St. Thomas is to think about the shift in social media from a feed that was determined chronologically—when Professor Reid put something up at 1:00, and I put something at 1:10 and Zander put something up at 1:20, ten years or eight years ago, you would see each of those in sequence to a feed that is, now, in your social media structured based on what Facebook knows about you and your own proclivities—your own weaknesses; what will keep you on the site the longest and, therefore, allow them to sell you the most stuff.<sup>9</sup> What will change your heart rate and, therefore, attach you to social media.

In other words, we are used to highly personalized interaction in our consumer lives on social media. Increasingly, retailers have been taking the lead on this—we’re also seeing personalized pricing for consumer goods.

Have you ever been in a department store and gotten an ad on your phone, a coupon providing a slightly lower price? Retailers are tracking how you move throughout the stores and what prices will attract you, trying

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9. See Michelle Castillo, *Here’s How Facebook Ad Tracking and Targeting Works*, CNBC (Mar. 19, 2018), <https://www.cnbc.com/2018/03/19/how-facebook-ad-tracking-and-targeting-works.html>.

to identify your personalized pricing point.<sup>10</sup> This is happening both online and in physical retail.<sup>11</sup> What I'm talking about in this lecture is that same kind of individualized pricing, but for labor pricing.

Let's start by covering a bit of what we already know. This starts with collecting information, and we're still largely, for most employers, in the collection phase, but we all know that people don't stop collecting when it comes to data. It will inevitably get used. So, here's what we know already.

First, we know that there is a booming industry in employment surveillance technology. Companies already do things like measure time spent on various activities; run experiments on people's moods.<sup>12</sup> Of course, they follow your physical location, track productivity, identify when employees are multitasking, and collect information on friendships and other interactions online.<sup>13</sup>

Second, we know there is software that tracks mood, software that tracks tone, and software that tracks facial expression.<sup>14</sup> Employees are increasingly being recorded at work; keyboard strokes.<sup>15</sup> This has been around for a long time, but keyboard strokes have been studied, measured, and collected.<sup>16</sup> Your health and your speed of movement are watched.<sup>17</sup> When I say "you," I mean in all workplaces, but it is overwhelmingly used in lower-income workplaces and in jobs that are often occupied by Black and Brown workers.<sup>18</sup> So, the impacts of this surveillance technology unsurprisingly fall the heaviest on the most disadvantaged workers. We have thumb scans, ID badges, closed-circuit cameras, and geolocation tracking. Internet software that companies can buy to track your browsing history, your social media usage, your emails, and your phone calls.<sup>19</sup>

10. See Stephanie Clifford & Quentin Hardy, *Attention, Shoppers: Store Is Tracking Your Cell*, N.Y. TIMES (July 14, 2013), <https://www.nytimes.com/2013/07/15/business/attention-shop-per-stores-are-tracking-your-cell.html>.

11. *Id.*

12. See Darrell M. West, *How Employers Use Technology to Surveil Employees*, BROOKINGS INST. (Jan. 5, 2021), <https://www.brookings.edu/blog/techtank/2021/01/05/how-employers-use-technology-to-surveil-employees/>.

13. See *id.*

14. See John McQuaid, *Your Boss Wants to Spy on Your Inner Feelings*, SCI. AM. (Dec. 1, 2021), <https://www.scientificamerican.com/article/your-boss-wants-to-spy-on-your-inner-feelings/>.

15. See, e.g., Alexander S. Gillis, *Keylogger (Keystroke Logger or System Monitor)*, TECHTARGET (Oct. 2021), <https://www.techtargget.com/searchsecurity/definition/keylogger>.

16. See *id.*

17. See, e.g., Matt Straz, *Wearables at Work? What You Need to Consider*, ENTREPRENEUR (July 25, 2016), <https://www.entrepreneur.com/science-technology/wearables-at-work-what-you-need-to-consider/279575>.

18. See, e.g., Saima Akhtar, *Employers' New Tools to Surveil and Monitor Workers Are Historically Rooted*, WASH. POST (May 6, 2021), <https://www.washingtonpost.com/outlook/2021/05/06/employers-new-tools-surveil-monitor-workers-are-historically-rooted/>.

19. See, e.g., Gillis, *supra* note 15.

Third, when it comes to customer service, the call centers that you are all familiar with interacting with, you have AI analyzing empathy and effectiveness;<sup>20</sup> software that flags negative attitudes;<sup>21</sup> and on top of all this, fourth, you have *Citizens United*, the now eleven-year-old decision that not only allowed big corporations to spend money through super PACs, but also gave a very clear signal to the legal departments of big corporations that they need not fear political tracking and political advocacy when the advocacy is backed by the fear of getting fired at work.<sup>22</sup>

So, we've already seen a growth in political activity between employers and their employees and have reason to believe—and I believe—that the tracking of political activity is also on the rise.

The way that employers talk about this is that this is all used to increase productivity. The more we track, the more we can increase productivity. But what it allows for is related to productivity but is something far more sinister, individually treating each person based on their own internal incentive systems. The frontlines, as always, are found in Uber. Uber is constantly on the cutting edge of figuring out mechanisms of exploitation.

Drivers don't know why they get paid what they get paid.<sup>23</sup> The numbers change; the amounts change; there's a black box; they get changing percentages.<sup>24</sup> They used to get a much higher percentage of every ride; now, they get a much lower percentage of every fee.<sup>25</sup> But they'll talk about bonuses that arise at the last minute when they're just about to go home.<sup>26</sup> The note says that there's a ride just around the corner.<sup>27</sup>

What we imagine is that Uber is going through a calculation that looks like this: “Okay, we know this is a kind of driver who will respond to these kinds of incentives, and therefore, we can extract more, push more.” Very individualized treatment that depends on surveillance.

We also know that Amazon has started to use a combination of gamification in surveillance in its warehouses. Using names like MissionRacer, PicksInSpace, Dragon Duel, and CastleCrafter, Amazon has introduced

20. See Mohamed Zaki, Janet R. McColl-Kennedy & Andy Neely, *Using AI to Track How Customers Feel—In Real Time*, HARV. BUS. REV. (May 4, 2021), <https://hbr.org/2021/05/using-ai-to-track-how-customers-feel-in-real-time>.

21. *See id.*

22. *Citizens United v. FEC*, 558 U.S. 310, 321 (2010).

23. Noam Scheiber, *How Uber Uses Psychological Tricks to Push Its Drivers' Buttons*, N.Y. TIMES (Apr. 2, 2017), <https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html?mtrref=www.google.com&gwh=5C5D1153364BECA89B2F1A393DF85034&gwt=regi&assetType=REGIWALL>.

24. *Id.*

25. Elisabeth Buchwald, *Drivers for Uber, Lyft Are Earning Less Than Half of What They Did Four Years Ago, Study Finds*, MARKETWATCH (Sept. 25, 2018, 8:42 AM), <https://www.marketwatch.com/story/drivers-for-uber-lyft-are-earning-less-than-half-of-what-they-did-four-years-ago-study-finds-2018-09-24>.

26. Scheiber, *supra* note 23.

27. Scheiber, *supra* note 23.

“games” that are brought into the warehouse that encourage—that are designed to incentivize workers, which means, of course, then they’re paid differently for the same task.<sup>28</sup> They have a reward called “Swag Bucks,” which has an internal currency that can be used to make purchases.<sup>29</sup> Amazon, of course, says this is designed to bring more joy into the workplace, but like Uber tools, it allows for individualized pricing of labor and individualized pricing of tasks.<sup>30</sup>

These practices are dangerous because they go right at the workers’ solidarity and the possibility of workers to organize together. Solidarity depends, in part, on workers getting paid the same amount for different tasks. The power of a company to call out the dissident troublemaker and pay her more or less, incentivize her differently, and destroy the solidarity that comes with similar wages and benefits is really quite significant. It is a power that does not need to be flexed to have force.

And at a meta level, one can think of the power as coming from three sources: surveillance, monopsony—concentrated power over the employment sector, and radical information asymmetries. This combination of power sources joins in enabling maximal extraction from workers.

How much are you willing to work at \$15 an hour? How many hours? What are you willing to give up? This new power is an echo of what we are all now familiar with, a company trying to figure out the most they can get for you to pay for that special fancy triple-lighted toothbrush. Using similar techniques, they are trying to figure out, on a personalized level, the least they can pay workers for the work they do.

Perhaps talking about power seems superfluous, but I think the developments are misunderstood without it; power is at the root of the pathology. So, while we fight for a \$15 an hour or \$20 an hour minimum wage, we have to make sure our minimum wage does not become the maximum wage by giving employers the power to basically put a ceiling there by identifying each person’s individual proclivities.

Having laid out the problems, we have to admit that solutions are not all that easy. One can’t ban incentives at workplaces. One can’t and shouldn’t ban games. And experimentation to learn “what works” is important.

But we are actually empowered by a wealth of tools to address the problem. Let me talk about several different areas of law that have rich veins of thought that can be tapped into.

First, what can privacy law do? To understand, we need to first assess where privacy law is related to work. It will not surprise you, perhaps, that

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28. Greg Bensinger, *How Amazon Turned Boring Warehouse Work into a Game*, WASH. POST (May 21, 2019, 9:00 AM), <https://www.washingtonpost.com/technology/2019/05/21/mis-sionracer-how-amazon-turned-tedium-warehouse-work-into-game/>.

29. *Id.*

30. *Id.*

while the law does presume a reasonable expectation of privacy more broadly, the default is that the law does not have a reasonable expectation of privacy at work if “the search was motivated by a legitimate work-related purpose” and “was not excessive in scope.”<sup>31</sup> In fact, the default expectation, created at a very different time, is that for employer-issued devices, employment is a site of maximal intrusion and being watched, not a site of privacy and dignity.<sup>32</sup>

The law, as a default, allows for searches of employer-issued devices at any time without permission; any use of work, email, and phones can be studied without any permission.<sup>33</sup> Existing privacy laws are wildly insufficient to address surveillance at work, for many reasons, but in part because all the tools were put in place before artificial intelligence reshaped the field.

Arguably the broadest protection lies in the National Labor Relations Act—the prevention of employers from monitoring workers if the purpose is for union busting; you’re basically banned as an employer from spying if you’re spying in order to disrupt a lawful, concerted action.<sup>34</sup> There are also some other restrictions, like federal antidiscrimination laws and laws that ban discrimination on the basis of race, color, religion, national origin, disability, pregnancy, gender, and age.<sup>35</sup> At the margins, and Kate Crawford who has argued this, these laws could give rise to some protection from surveillance if you can prove—and it’s hard to prove—that the surveillance is designed to uncover this kind of information.<sup>36</sup> Health information has a pride of place in the American privacy regime, and there is some ongoing litigation about the wellness programs—gathering a lot of information about health—because of the federal laws banning discrimination on the basis of genetic information.<sup>37</sup>

There are also some state law-based claims. For instance, California has found that an employer using an email account to investigate compensation claims was basically an invasion of privacy tort.<sup>38</sup>

While state laws look good on paper, the invasion of privacy in most states is going to be hard to prove. It involves a rare situation, and it protects against intrusions that are highly offensive to a reasonable person. Of

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31. *City of Ontario v. Quon*, 560 U.S. 746, 764–65 (2010); *see also Katz v. United States*, 389 U.S. 347, 350–51 (1967).

32. Lisa Nagele-Piazza, *Privacy in the E-Workplace: What Employers Need to Know*, SHRM (Nov. 23, 2016), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-lawpages/privacy-in-the-e-workplace-stored-communications-act.aspx>.

33. *Id.*

34. National Labor Relations Act, 29 U.S.C. § 158; *see, e.g., Press Co. v. NLRB*, 118 F.2d 937 (D.C. Cir. 1940), *cert. denied*, 313 U.S. 595 (1941).

35. Civil Rights Act of 1964, 42 U.S.C. § 2000a(a).

36. Ifeoma Ajunwa, Kate Crawford & Jason Schultz, *Limitless Worker Surveillance*, 105 CALIF. L. REV. 735, 751 (2017).

37. *Id.* at 756.

38. *Id.* at 759.



course, highly offensive to a reasonable person depends on norms, and given that the norm is a high degree of surveillance, in general, it's incredibly hard to use invasion of privacy tort laws.

Finally, there are some states that have public sector worker protections and a growing number of states that are proposing privacy laws.<sup>39</sup> These are important. However, compared to the threat faced, most of these laws are not up to the challenge—they may ban very particular kinds of questions like, in many states now, you can't ask somebody for access to your password at work.<sup>40</sup> That's great, but that doesn't rise anywhere near the level of the kinds of surveillance we're talking about. There are some limits on employers' use of social media, but similarly, that misses the forest for a few particularly outrageous trees.<sup>41</sup>

(Even when we look at Europe outside the US, the proposals are weak sauce compared to the nature of the threat. The GDPR, if we look at Europe, basically grants a right to an explanation for why; make sure you have a right to not be subject to decisions based on automated profiling.)<sup>42</sup>

In sum, with few exceptions, most of the privacy laws place an enormous burden on someone who wants to bring a claim and presume that consent is sufficient for legitimate surveillance. Instead, it is time to consider a very different privacy regime, which is based on absolute bans on collecting certain kinds of information.

Absolute bans on collecting information outside of the workplace, for instance, should be a presumed baseline, regardless of consent. And we should supplement that with bans on the collection of information at work.

A second area that I'm really interested in, and I've done less work here, but I'm exploring, is gambling laws—other laws regarding gambling and gaming.

A third area is contract law and new ways of thinking about unconscionable, and therefore unenforceable, contracts. Professor Ryan Calo has suggested that given the quickly changing nature of contracts, we should conceptualize a new kind of “fleeting unconscionability.”<sup>43</sup> We're used to unconscionability as being sort of asking at this moment, was this an unconscionable contract? But the quickly changing nature, given the power dynamics at work of agreeing to changing terms—and that comes with experimentation, gaming, and surveillance—may give rise to fleeting unconscionability.

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39. *Id.* at 757–58.

40. *Id.* at 758.

41. *Id.*

42. See Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 1–88 (EU) (General Data Protection Regulation).

43. Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1661 (2017).

Fourth, we can call on human subject law and the rules from human subject law governing experimentation. If you have fifty workers and choose to treat thirty differently than the other twenty by giving different incentives, there's an element of gaming involved.

Fifth, we can call on the heart of business law. The most promising area in business law is to look at limits on business models like commissions, commission schemes, pyramid schemes, and gaming.

The line between gaming and gambling is very, very hard to define. Addiction researchers have looked at this, and I bring this up because when we're talking about the little we know about what's happening in Amazon and Uber and the growing technology, we know that one of the things they're doing is basically studying our mood, studying workers' moods and then, pushing people's incentives in a way that may be against their own self-interest.<sup>44</sup> The core basis of gambling law is to say, "Yeah, maybe people are voluntarily entering into these contracts, but there are certain kinds of contracts that we are not going to allow because they encourage people to work against their own self-interest."

Addiction researchers separate gaming from gambling by looking at interactivity, contextual indicators of success.<sup>45</sup> What is gambling on the other turn? Betting and wagering; chance-determined outcomes; risk and payout monetization features.<sup>46</sup>

I'm not actually suggesting that current gambling law is going to be successful in challenging what's happening at work; I'm suggesting that we don't need to just look at the modern-day but can look back in history at old ideas from the common law to think about this challenge of employers getting employees to work against their own self-interest.

We do it in multilevel marketing; banning certain multilevel marketing schemes; we do it in gambling, and maybe, we should investigate more deeply the limits of the kind of psychological push and pull that can be used at work.

Finally, the three most important tools are labor laws, labor monopoly laws, and pricing laws.

The key to stopping this move towards surveillance wages in its track is not only banning certain forms of collection but reducing the relative power of employers and increasing the relative power of employees. Because only when you have a more fair power balance can workers and employers at work negotiate a level of surveillance that maintains dignity.

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44. See, e.g., Scheiber, *supra* note 23.

45. See, e.g., Ashlee Humphreys & Kathryn A. Latour, *Framing the Game: Assessing the Impact of Cultural Representations on Consumer Perceptions of Legitimacy*, 40 J. CONSUMER RSCH. 773, 777–78 (2013).

46. See *id.*

So, I think understanding labor monopsony, pushing for stronger labor monopsony laws, and talking about pricing laws are key. What we're talking about here, as I suggested earlier, is pricing—labor pricing, right? In economic terms, we would call this “first-degree labor price discrimination.”<sup>47</sup>

I know you were talking about Brandeis earlier; we're going to talk about Brandeis for just a second here. Brandeis thought pricing law was absolutely critical and was very concerned about any first-degree price discrimination.<sup>48</sup> Third-degree price discrimination is when, basically, you get—like if you're going to the movie, the theater divides the moviegoers into seniors, adults, and children—different prices for every category.<sup>49</sup> That's third-degree.

Second-degree is when you get a different price for toothbrushes when you buy them in bulk.<sup>50</sup> First-degree is when a company charges a different amount for the same product for two different people.<sup>51</sup> Brandeis, by the way, hated first-degree price discrimination.<sup>52</sup> He didn't like coupons because coupons are a form of first-degree price discrimination.<sup>53</sup> You pay \$3 for this toothbrush; I pay \$1 for this toothbrush because I've got my coupon.

Just as a matter of reminder, for most of American history, pricing law was front and center and part of a major public debate.<sup>54</sup> Calling on that history of pricing law and understanding the deep dangers of first-degree price discrimination—or another way to put it, understanding that first-degree price discrimination is a very strong signal of monopoly power. Because if you have the power to charge two different people different prices, you are in a term-setting role and not engaging inside the market but atop it.

Returning, one thing we could think about is banning first-degree labor price discrimination in certain workplaces that are over a certain size. There's a reason that one of the key features of most contracts is lockstep structured pay structures. It is essential to solidarity at work. I suggested this before.

But think about saying, “Hey, at certain large employers, we are just going to use pricing law and pricing law deeply connected to antimonopoly

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47. *Price Discrimination*, ECONOMICS ONLINE (Jan. 20, 2020), [https://www.economicsonline.co.uk/business\\_economics/price\\_discrimination.html/](https://www.economicsonline.co.uk/business_economics/price_discrimination.html/).

48. *See, e.g.*, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

49. *Price Discrimination*, *supra* note 47.

50. *See Price Discrimination*, *supra* note 47.

51. *Price Discrimination*, *supra* note 47.

52. *See, e.g.*, Warren & Brandeis, *supra* note 48.

53. *See* LOUIS DEMBITZ BRANDEIS & MELVIN L. UROFSKY, LETTERS OF LOUIS D. BRANDEIS: VOL. IV, 1916–1921: MR. JUSTICE BRANDEIS 23 (1975).

54. *See, e.g., id.*

law”—I’d argue it’s part of antimonopoly law—“pricing law in this sphere.”

You could say, “What does this have to do with surveillance wages?” I think it has everything to do with surveillance wages because surveillance wages come, yes, they come from the new technology. But they also come from term setting.

If you actually are a warehouse worker in a decentralized market, where you actually have choices about where you go, and one employer is using surveillance wages, and the other one isn’t, you’re going to go to the place that isn’t using surveillance wages. When you have effectively the parallel to what Brandeis loved—posted prices—clear, reliable, stable wages for the same work. I think that breakups, blocking mergers, and updating labor monopsony law are key parts to responding to the threat of surveillance wages.

Just two days ago, there was an amazing report by Coworker, detailing this—it really was two days ago—detailing that my Cassandra warnings have not been crazy.<sup>55</sup> No, detailing the ways in which, basically in the last couple of years, you’re just seeing this explosion in the industry for surveillance at work technology.<sup>56</sup>

The bad news is it is very quickly on the rise. As I said at the beginning, this data is not going to sit quietly in a vault; it is going to be used to maximally extract from workers. The good news is it is still pretty early. It is still not the default at most workplaces.

I believe we have an opportunity to get out ahead of it using privacy law, gambling law, pricing law, and antitrust law to make clear that, at work, you should not be maximally experimented on and be paid the least amount that your own particular, unique psychology would allow.

Thank you for the opportunity to share something that I’m very passionate about, and I look forward to the discussion.

**Moderator (Professor Reid):** *“Professor Teachout, if I might begin the discussion with a question and that is this: We have seen over the last two years now, with the pandemic—eighteen months—we’ve seen now the emergence of work at home; remote working; distance working. What we’re seeing is a change in the nature of work, of course, but a change in the nature of the workplace, which would seem to expand the scope of surveillance wages far beyond anything you’ve spoken about so far. Consider the laptop your employer has helpfully provided to you and its capacity to surveil both your work and your leisure activities. Thanks to “generosity” of your employer, you have brought Panopticon home with you. How would you address that?”*

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55. *Bossware and Employment Tech Database*, COWORKER.ORG (Nov. 17, 2021), <https://home.coworker.org/worktech/>.

56. *Id.*

**Teachout:** Great. I love that your first answer is that your dystopia isn't dystopian enough. That's great.

I think you're exactly right. When we're all touching different parts of the elephant and connecting the surveillance of you, as a worker, but then, you're in your home, so it's surveillance of your home; of what you're eating; what you're saying at home. Connecting those datasets and that power to you, as a consumer, we are talking about a significant governing role—a panopticon-like governing role, but it's not a prison. It's all the people in society.

**Moderator (Professor Reid):** *“It's the laptop your company gave you.”*

**Teachout:** It's the laptop your company gave you that is also collecting data. A nice example of this is John Deere. You buy a tractor from John Deere. According to John Deere, you buy the metal, but you are leasing the software. You may know about these major fights on the right to repair that; basically, John Deere says, “Oh, no, no. You can only repair it at our shops,” but you know what else John Deere's doing? It's collecting weather information, which it is using in ways that are totally unrelated to you because your tractor has weather sensors that it can then use, collect, sell, and monetize.<sup>57</sup>

To your point, Professor, the tractor is the computer. You bring the tractor home, and the tractor then becomes a spying machine on your land. The informational value of your land goes back to John Deere, but here we have the employer being able to take the informational value of the spy that you bring into your own home.<sup>58</sup>

I think the risk—basically, as bad as it is, we haven't seen anything yet, in terms of companies haven't actually figured out how to use all this data, yet, but we shouldn't sit blindly by and say, “They're not all using it yet,” but rather assume—I don't know if you remember when a few years ago, it turned out a few members of the NSA were using their capacity to spy on their girlfriends' phone calls.<sup>59</sup>

What that said to me is, remember human nature. If people have access to data, they're going to use it in all the human ways that people have had access to data and have used it throughout world history for revenge and for personal reasons. There's an incredible threat of inequality and extraction, but there's also just a domination problem of being able to be in a position where like, “Hey, I'm looking at this data about people at work. I'm going to look at so-and-so that I have a vendetta against.” If we don't protect

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57. Dan Charles, *All Things Considered: Should Farmers Give John Deere and Monsanto Their Data?*, NPR (Jan. 22, 2014, 4:45 PM), <https://www.npr.org/sections/thesalt/2014/01/21/264577744/should-farmers-give-john-deere-and-monsanto-their-data>.

58. *Id.*

59. Evan Perez, *NSA: Some Used Spying Power to Snoop on Lovers*, CNN (Sept. 27, 2013, 7:58 PM), <https://www.cnn.com/2013/09/27/politics/nsa-snooping/index.html>.

against it, it will be used in all kinds of dangerous ways and is a new form of dangerous governance, tyrannical governance.

**Moderator (Professor Reid):** *“Thank you. Questions from the audience?”*

**Audience Question:** *“I kind of wanted to touch on what your opinion is on how unions can play a role in this. I think we know that unions aren’t what they used to be, but they still pose a clear threat because Amazon wouldn’t have spent all that money down in Alabama to bust the union if they weren’t afraid of them.<sup>60</sup> How do you think the role of the union can help, especially as you noted in certain communities, this is predominantly happening to those kinds of workers, and they tend to get the most benefits out of unions already, so what their role could be in combatting this new system that corporations are putting in place?”*

**Teachout:** Thank you for asking that because I feel like I wasn’t sufficiently clear. I think the answer to monopoly power and its abuses—and this is one of its abuses—is breaking up big monopolies and building union power. If you think of antitrust or antimonopoly more broadly, union power enables the organization of people, and antimonopoly disables the organization of capital.

I think unions play an absolutely critical role, and I should have included that. Laws that make it easier to unionize are central to taking on surveillance wages because—I want to put a little finer point on it. Some level of surveillance is going to happen at work. Some level of watching is going to happen in the workplace, and some level of experimentation is going to happen in the workplace. If we’re talking just at work, getting rid of all spying outside of work.

So, negotiating for that workplace, what is actually necessary to improve—in a nonexploitative way—productivity and what is absolutely off limits is actually the classic job of collective bargaining. It is going to be different for different industries.

When I was thinking about those sequencing, step one, privacy, is like bans on collection outside of work. Step two, gambling, bans certain kinds of psychological manipulation. Step three is we need to have a negotiating table that allows for individualized workplaces to be negotiated in different ways because they’re going to have to be negotiated in different ways.

I actually think it’s absolutely critical and what we’re seeing now is—look, I’m a union household; I joined my first union when I was 18; I’m a major supporter of unions, and I think that—and I’ve written about this.<sup>61</sup> I think that in the ‘80s, ‘90s, and ‘00s, unions were not sufficiently vigilant

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60. Alina Selyukh, *Morning Edition: It’s a No: Amazon Warehouse Workers Vote Against Unionizing in Historic Election*, NPR (Apr. 9, 2021, 1:28 PM), <https://www.npr.org/2021/04/09/982139494/its-a-no-amazon-warehouse-workers-vote-against-unionizing-in-historic-election>.

61. See, e.g., Jake Whitney, ‘We Have to Reduce Corporate Power’, *PROGRESSIVE MAG.* (Oct. 13, 2021, 9:15 AM), <https://progressive.org/magazine/zephyr-teachout-interview-whitney/>.

about the dangers of monopoly power. There are a lot of reasons for that, including that there used to be sort of a large workplace surplus and bonus, better treatment—a lot of reasons for that.

And then, as we've seen, massive consolidation has led to the weakening of unions. We're at a different moment now. We have the Teamsters out front pushing for antitrust laws in New York and around the country because they understand that union power and monopoly power are deeply connected.<sup>62</sup>

That's a longer answer than you were asking for, but I think of unionization and antimonopoly as being connected—deeply connected in a moral economy, one that we don't have right now.

**Audience Question:** *“I was curious if you had any comments regarding different wage gaps between genders and people from marginalized communities and how this topic relates to that. Because I even think of this push sort of for millennial women to know what their counterparts are making; how much they are making, so I can use this to leverage my individual identity, experiences, and talents to push for more money in terms of salary and just extinct some of those wage gaps. How do some of these threats perhaps perpetuate that? Do some of these solutions tie into that?”*

**Teachout:** Yeah. We have a massive problem with wage gaps. The Black/White wage gap, right now, is very significant and has been growing.<sup>63</sup> Young Black women have been incredibly hard hit.<sup>64</sup>

Two things: One, unionization is clearly critical. Two, Professor Dubal has been writing some amazing work on this, which I highly recommend, about gig work.<sup>65</sup> I think she would also put it in quotations—as a direct legacy of racial wage codes.<sup>66</sup> She does a really fantastic job drawing the line between the two because the communities and the people who are the most likely to be subject—to be “gig workers.”<sup>67</sup>

Everything I talked about relates to gig work, but let me be more precise about how. It's that a lot of the first stage of experimentation, surveillance wages, is happening not in what the law necessarily calls employment. I would call it employment. Situations where you have private contractors.

So, you see this justification for exploitation. The justification for the need to track, for instance. “Make sure she's doing her job.” Maximizing

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62. See *Who We Are*, TEAMSTERS JOINT COUNCIL 16, <https://teamsters.nyc/who-we-are/>.

63. Elise Gould, *Black-White Wage Gaps Are Worse Today Than in 2000*, ECON. POL'Y INST.: WORKING ECON. BLOG (Feb. 27, 2020, 5:34 PM), <https://www.epi.org/blog/black-white-wage-gaps-are-worse-today-than-in-2000/>.

64. *Id.*

65. See, e.g., Veena B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 101, 112–20 (2017).

66. See *id.*

67. See *id.*

productivity falls into a lot of racist stereotypes, so I think there are a lot of different interactions. I've touched on a few of them here. There's a historical interaction; there's a justificatory interaction like effectively, "We can't trust and, therefore, need to maximally surveil. We can't trust and, therefore, need to incentivize and maximally incentivize," that come directly from longstanding racist tropes in American employer/employment history.

Then, in terms of solutions, unionization, and bargaining power, are key parts of the solution to address these inequalities that are not just the technical ones I talked about—about monopsony and surveillance—but also longstanding inequalities of power.