INTRODUCTION

American workers are facing a lack of power that has reached crisis levels. In addition to the decades long decline of unions, the expanded use of technology and outsourcing pose challenges from which contemporary labor law offers no shelter. As all these factors combine to undermine workers, it is essential for progressives to remember that the modern economy is not inherently inhospitable to worker interests. Rather, the silencing of the American worker is a choice; forward thinking reforms can bring about an era of renewed worker power, both in the context of traditional unions and throughout the rest of the labor market.

Some have posited that the well-documented decline of unions since the late 1970s is the natural result of modernization that has shrunk the manufacturing sector and opened US workers up to global competition. This analysis implies that worker power is weakening primarily due to natural causes. We reject the notion that technological or economic change necessitates the decline of worker power and, although limitations in traditional union protections must be addressed, we argue that union decline alone cannot explain the fall of worker standing. After all, at their peak, trade unions represented just one-third of the labor force, so it is obvious that workers exert and retain power through many pathways and policies outside of collective bargaining under the Wagner Act (DeSilver 2014). We take a broader definition of worker power, showing that the large and growing power disparity between workers and firms is rooted not just in the weakness of traditional labor law.

Poor enforcement of existing workplace protections has laid the foundation for a decline in worker power over the last several decades. In this environment, workers have lost the ability to advocate for their own rights, let alone bargain for better conditions. Weil (2012) shows that inadequate enforcement has had a chilling effect on the reporting of workplace abuses. This is corroborated by Freeman (2007), who found that the percentage of workers in unions declined even while worker interest in unionization had grown steadily since 1984. This fearful environment has emboldened firms to pursue increasingly aggressive anti-worker tactics. Bronfenbrenner (2009) finds robust evidence of increasingly aggressive anti-worker firm action during unionization campaigns, including a doubling of plant closing threats and employer-mandated anti-union meetings from the early 1990s to 2003. While these hostile tactics increased in frequency, appeasing strategies, such as offering raises or promotions to forestall unionization, fell precipitously over the same period, suggesting a monopsonistic labor market where firms are able to unilaterally set conditions without fear of losing the services of skilled workers.

Poor enforcement has set the stage for innovations in worker abuse. We outline three new ‘frontiers’ of worker abuse: Structural barriers to organizing arising from firm disaggregation, the use of digital intermediation to stymie worker power and advantage firms, and the rise of market power. Disaggregation is the process through which businesses push workers from full-time employment into franchised, part-time, temporary, sub-
contracting, or other contracting arrangements that are unprotected by current labor law. Digital intermediation is a broad term that reflects the rising role that technology is playing in hiring, managing tasks, and monitoring workers. These technologies have been deployed to keep a constant eye on workers, restricting their ability to organize and increasing the power disparity between firms and their workers. Finally, corporate consolidation and the rise of anti-competitive practices have ceded firms a degree of market power that antitrust policy had effectively combatted until the broad deregulatory revolution that took place under Reagan. Committing to antitrust policy that serves the public interest is a third essential step towards a more reasonable balance of power between workers and firms.

We outline each of these three areas of abuse, and the correlating policy solutions and worker initiatives that might serve to counter them.

**New Frontiers of Worker Abuse**

**New Barriers to Worker Organizing**

Workers, long-challenged by limitations of the processes and protections laid out in the Wagner Act, as well as the administrative deficiencies in the enforcement of labor law, increasingly face further organizing obstructions as firms reorganize in order to isolate employees and drive down labor costs. The rise of disaggregated firm structures – by which we mean platform work, sub-contracting, independent contracting, franchising, and other forms of decentralized workforce management – effectively pre-empt traditional organizing. Workers caught in these arrangements face physical, legal, and technological barriers to organizing.

While expanding the protections and coverage of existing labor and employment law to all workers is an important first step, changes in the structure of work require additional considerations to ensure workers are able to make use of these protections to effectively counter firm power. Our current systems for building worker organization were created with the assumption that workers would have reasonable access to a majority of their coworkers via shared physical workspace or geography. The waves of worker organizing that built the modern labor movement in the mid-20th century relied on a combination of worksite-based organizing and clandestine meetings in union halls, bars, restaurants, and homes, as well as the federal government’s active protection against anti-union activism by employers. It is difficult to imagine key moments in the prior century’s labor history without the images of the Flint sit-down strike or farmworkers gathering together in the fields they worked on. Workers were able to find one another at their worksites and, as organizing and representation grew, were able to convene in person at local and regional halls to engage one another on key issues as a group.

In the digitally mediated and supply chain economy, there is no such centralizing mechanism, other than the employers themselves. This hub–spoke structure enables employers to thwart worker activism by both legal and illegal means. Franchise and supply chain workers at multinational corporations only ever see an infinitesimal fraction of their coworkers — certainly never enough to achieve the kind of density necessary to contest the power of their employer. And digital platform workers have no in-person access to their coworkers
at all, except in rare cases. This amounts to a de facto divide-and-conquer strategy for decentralized firms, whereby workers lack even the most basic ability to share information or discuss grievances, let alone organize themselves. For workers to achieve the density that would enable them to effectively negotiate their working conditions with firms, new avenues for collaboration must be provided and attempts by firms to prevent this convening must be considered a violation of those workers’ rights to freedom of association.

Just as the Internet offers opportunities to bridge the physical gap between workers, it also presents the danger that firms offering platform work will use that intermediary role to obstruct legal organizing between workers. For example, TaskRabbit’s Terms of Service state, “You may only use […] community areas to send and receive messages and material that are relevant and proper to the applicable forum. For the safety and integrity of the TaskRabbit Platform, you may not share your personal contact information with other Users” (TaskRabbit 2016). Preventing users from establishing alternative means to contact one another forestalls any ability for independent discussion of working conditions, a fundamental pillar of workers’ ability to organize. Policy and organizing strategy must adapt to a world in which firms seek to leverage their technological advantage in order to prevent workers from organizing. Although these anti-organizing strategies are related, for the purposes of this paper, we consider them distinct from the deployment of digital surveillance and algorithmic management, discussed in the following sub-section, that have handed firms increasing power, but which are not necessarily targeted at thwarting organizing activity.

The increasing legal barriers to unionization is a topic well-trodden by those analyzing the changing nature of work in America. As a smaller and smaller percentage of employees find themselves scattered in franchises across the country, or segmented into sub-contractor units within a supply chain, their ability to leverage numbers against the power of the firms that truly control their wages and conditions is greatly diminished. Rather than organizing against Walmart, for example, workers are forced to fight unionization battles on a store-by-store basis; this is similar to the fight retail workers would face against smaller independent outfits, except that in the case of Walmart they face off against an international conglomerate. Researchers like David Madland from the Center for American Progress have pointed to the need to expand the definition of a bargaining unit to include those defined by shared geography, sector or industry, and to protect secondary action and other organizing tactics currently outside NLRA protection. The legal intricacies of accomplishing such an expansion of protections is beyond the scope of this paper, but is discussed in great detail by Madland and Brishen Rogers. We focus instead on pathways to organizing that could offer complimentary or alternative routes around the rising legal barriers to organization.

Data equity, algorithmic accountability, and information symmetry

As formal organizing has become more and more difficult, firms have gained leverage through a wide range of digital surveillance and monitoring activities. Workers now sit at a stark informational and technical disadvantage. For many, the entire work experience is managed by opaque algorithms that require workers to be available to work at certain times of day, determine pay rates, assign tasks, and evaluate their reliability or job performance (Rosenblat and Stark 2016). Others in service, retail, and logistics sectors are partially managed by software that schedules their work hours, tracks productivity, and even determines health insurance rates based on personal choices to exercise or eat properly (DePillis 2015 & Kaplan 2015 & McGee
For white-collar workers, software even plays the role of supervisor and quasi-HR manager, collecting data on key strokes, email content, and peer contact in order to profile which workers may be worth promoting or, in some cases, watching more closely (Heath 2016).

These algorithms become arbiters and recorders of work, effectively holding the key to a worker’s resume and access to future employment, with little transparency around how this process functions (Kessler 2015). Despite the enormous implications for workers’ well-being, policymakers have little to no understanding of the way this software is designed or applied, and certainly no regulation on the amount of data private companies collect on their workers. At their worst, such opaque practices facilitate prohibited anti-worker behaviors like surveillance, blacklisting, and wage theft.

All in all, these trends signal the repositioning of work beyond the protection of the traditional labor protections that guaranteed worker voice for much of the 20th century. As discussed at length by the Roosevelt Institute’s Next American Economy project, the shift away from traditional supports necessitates a broadening of the policies and institutions that protect and organize workers (Miller 2015).

Monopsony Power

While many proposals to address the asymmetries between firm and worker power focus on protecting workers and strengthening their ability to organize, the other side of this equation is the overwhelming preponderance of power in the hands of contemporary firms. In the labor market, monopsony power is the power of businesses to set the wages of their workers unilaterally, without fear of losing those workers to competing firms. Surveying recent literature, we find copious evidence that these are precisely the conditions that prevail today.

Since the trickle-down revolution of the 1980s, regulators have broadly failed to police imbalances of economic power. Because power is difficult to measure, and because its very acknowledgment runs contrary to free market dogma of mainstream economics, regulators have allowed for firms to corner markets and engage in anti-competitive behavior so long as they abstain from blatant price-fixing or gouging. But mounting evidence shows that this approach has systematically failed to create healthy, competitive markets, and — importantly — that workers suffer the greatest detriments of this policy failure.

In their recent report on the subject, the Council of Economic Advisors described how our anti-competitive environment has allowed firms to pursue many monopsonistic practices that drive down compensation and worsen working conditions. In broad strokes, this trend is evidenced by stagnating wages, rising inequality, and the decoupling of compensation and productivity. Put more simply, workers are no longer able to parlay their productivity into better pay and terms of employment. The rise of market concentration — that is, fewer firms dominating a given sector — as well as the decline of worker mobility coupled with similarly declining earnings-tenure — the decreasing premium on within-firm experience and the simultaneous inability of workers to move between firms — have created a system in which workers are unable to bid up their own wages (Hyatt and Spletzer 2016). Fewer competitors and startups means fewer places for workers to market their skills (Molloy et. al. 2016). Furthermore, studies show that those workers who do move are increasingly unsuccessful in securing better pay — further proof of a monopsonistic labor market (Cobb, Lin, and Gabriel...
The CEA and others have suggested that the lack of dynamism and competition reveals a skill gap or the existence of barriers to entry; however, Konczal and Steinbaum (2016) argue that it is instead the result of low demand and a permissive regulatory environment. In the subsequent sections we discuss policy solutions to address discrete components of this anti-competitive regime, such as the proliferation of non-compete agreements and collusion between employers. But first, it is important to discuss the large-scale trend of disaggregation that has been instrumental in the rise of monopsony power.

One major avenue for the exercise of power over workers has been the disaggregation of employers into distinct high- and low-wage firms. By pushing low-wage and other ancillary workers out of the firm, powerful employers are able to ensure that fewer workers can stake a claim on their profits. We posit that the rise of so-called “inter-firm inequality” described by Song et. al (2016) is a telling indicator of the power held by wealthy firms and the impact of large-scale disaggregation. The classic example is that of a janitor previously employed by Goldman Sachs; as a direct employee the janitor may have reasonable expectations of sharing in the profitability of that firm, but as a sub-contractor, the viability of that claim is greatly diminished. This is made possible only by a large imbalance of power in labor markets: In a less monopsonistic and more dynamic labor market, workers would not accept the low wages and poor conditions that result from this kind of outsourcing (Dube and Kaplan 2010) because new firms would form to harness their productivity.

In his book *The Fissured Workplace*, David Weil (2014) argues that this disaggregation is largely due to an increased obsession with shareholder value and short-term profit maximization. Weil points out that disaggregation is often carried out on questionable legal grounds, resulting in misclassification of employees as contractors. Beyond creating legal and transactional boundaries between profits and workers, studies show that outsourcing events associated with disaggregation lead to wage reductions. Lower wages, fewer benefits, and — as pointed out in the Uber example — increased risk placed on workers are not benefits to efficiency but transfers of wealth and stability from workers to firms. The fact that workers are not compensated for their shift into unprotected classifications and alienated firms, but are in fact often issued pay and benefits reductions, undercuts any argument that these shifts are not predicated on the abuse of monopsony power. In a relatively equal environment, workers may agree to sub-contract, but only if compensated for the increased risk assumed. In this context, it is clear that such maneuvers are in no way predicated on a mutually beneficial boost to efficiency or preference for greater autonomy.

Short of stopping the process of disaggregation altogether, some proposals suggest a way in which its worst ramifications could be nullified. In a paper for *Harvard Law & Policy*, Brishen Rogers (2016) argues that key protections could be extended to disaggregated workers through a reconsideration of legal employment tests. By using the “anti-domination principle” and taking into account a more qualitative analysis of the power dynamics within a given worker-firm relationship, Rogers argues, many current contractors would be deemed employees under the Fair Labor Standards Act. These workers would not qualify as employees under all legal definitions, but their subordinate position in the labor market would afford them legal guarantees of a safe working place, minimum wage, and bargaining rights.

It is worth noting that this expansion of employment protections stands in stark contrast to the narrowing of
these classifications, as suggested by Alan Krueger and Seth Harris in their 2015 paper for the Hamilton Project. In it, Krueger argues for a third classification called an independent worker, who would receive some but not all of the protections of an employee. Unfortunately for workers, the third classification would likely end up as a ceiling instead of a floor; employees could more easily be moved into the independent worker status than into the existing independent contractor status, and independent contractors lobbying for employee status would be effectively capped at the new classification. The regulation of this new category would also be problematic; The IRS, DOL, and NLRB would all have to devote staff and resources to defining this category, resulting in even more bureaucratic confusion and red tape. In short: This solution would be enormously problematic for workers and would likely complicate rather than simplify questions of worker classification. The goal should be to expand universal protections to all workers, not restrict them to increasingly specific and highly gameable groups.

Combatting the trend of rising monopsony in the labor market will require a large-scale rethinking of competition policy in the United States with the goal of rebalancing asymmetries of power in key areas. Without this guiding principle, the negative impact on the labor market is clear; skill, education, and experience matter less, while the power possessed by employing firms matters more (Rothstein 2014). Unfortunately, broad changes like these are unlikely in the current political environment. Again, though, this should not preclude a steady drumbeat of support for policies that American workers need.

Ultimately, the best check on firm power in the labor market, is a well-protected and organized workforce. With a short-term union rebound unlikely, progressives have begun to respond with proposals for new avenues of collective bargaining. This includes the work cited above by Madland (2016), who rightly pointed to the need for bargaining based on industry, sector, and geography, as well as the need to encourage new and existing worker organizations and strengthen existing labor protections. We agree that these reforms are important, but posit that even with them, workers will still face a stark disparity of power if monopsonistic labor practices are not addressed. We discuss some possible policy solutions at the end of the following section.

**Policy Responses: Three Pillars of Worker Power for the 21st Century**

New Pathways to Organizing

Though it can often be taken for granted, previous generations of workplace organizing rested simply on the centralizing force of the firm itself. But workers at franchises or within a supply chain layered with multiple levels of sub-contractors may only ever see a small fraction of their coworkers, and an even smaller percentage of fellow employees facing similar circumstances. Meanwhile, digital contractors, temp workers, and freelancers perform tasks in near isolation. In this context, establishing new pathways through which workers could connect with one another to share concerns would be a precursor to any attempts at organizing.

Internet platforms offer the infrastructure for these kinds of workers to converge in digital space on a scale that matches the reach of multinational firms. Facebook groups and Reddit threads provided early convening spaces for workers, while more recent platforms such as Coworker.org and Dynamo have provided longer-term
solutions by experimenting with ways to sustain networks of people contesting power in their workplaces, and by supplementing those efforts with expert support, data analysis, and media outreach (Epstein 2015 & Salehi et. al. 2015). These efforts have demonstrated the potential for decentralized, digital collective-building to effect real change. Meanwhile, the National Labor Relations Board has repeatedly ruled in favor of non-union workers who faced retaliation for organizing in digital spaces, citing concerted activity protections outlined in Section 7 of the NLRA and asserting the right of workers to use firm-provided email accounts to communicate about union issues (Wattles 2016 & NLRB 2012 & Kaltenbach 2015).

There are additional policy considerations that will be necessary to ensure that these digital pathways continue to be open and can effectively be put to use. Firms that employ workforces through digital means should be expressly prohibited from preventing workers from contacting one another off-platform. This would require a review of Terms of Service agreements like TaskRabbit’s that aim to obstruct communication between workers. One could even go a step further, requiring that, because the structure of these work arrangements upends the presumption of shared physical space to facilitate peer organizing, firms should be expected to provide alternatives for reasonable access to a majority of a worker’s peers. This access could be provided on secure and independent platforms that mimic the same kind of space once offered by break rooms or offsite meeting locations. Such platforms could be run by worker organizations, trade unions, or other trusted third parties who provide the kind of research, legal, organizational, and representational support outlined in “The Union of the Future” (Miller 2015).

As the internet and independent worker-led digital platforms will provide the most natural gathering place for distributed workforces, corporate control of internet access must continue to be held at bay. To that end, policymakers concerned with ensuring freedom of association for workers must consider the protection of a free and open internet — net neutrality — to be a priority. A lack of equal access to independently run, worker-led online platforms would essentially undo any advancements made to provide a means for disaggregated workforces to build effective collectives.

This also means that workers should be assured their digital organizing activities will not be exposed by one employer to another, or to government entities with an interest in the suppression of more general protest activity. Tech platforms sharing and selling data to one another is already a contentious issue in the privacy space, but government regulators should also protect workers’ privacy when it comes to preserving labor rights. This may include levying penalties on companies that infiltrate protected online spaces through the use of agitators or employee espionage.

Correcting Information Asymmetry and Algorithmic Accountability

As algorithm-based software, machine learning, and automatic systems are increasingly being used to surmount the physical barriers presented by disaggregated and distributed workforces, a new set of complications and obstacles for worker agency arises. These systems are built on vast amounts of workforce data collection that feed opaque algorithms, which partially or wholly manage wage-setting, allocation of hours, and evaluation metrics related to hiring, promotions, and firing. Meanwhile, workers have essentially no influence over the way that these systems are designed, minimal information on how the systems use data inputs to make decisions, no access to or control over the data they generate in the systems, and no control over
the way firms use this data. This asymmetry in information and control makes it impossible to imagine bargaining over conditions in automated or semi-automated work environments: If workers do not have access to the work rules as established by these algorithms, they cannot determine when they are being abused, let alone adequately negotiate for changes to the rules that govern their work.

While the fraction of workers today accessing work through fully automated platforms is minimal, it is widely projected that these platforms will be introduced into other sectors like law, service, and logistics. Just last year, the Institute for the Future tested iCEO, a “virtual management system” that “points to a not-too-distant future in which these [software programs] will not only manage simple processes, but also help conceptualize and oversee an endless variety of projects — functions traditionally performed by management” (Fidler 2015). And many more workers are already partially managed by software-based systems: Scheduling, labor allocation, performance ratings, and time management are some areas where software is being introduced into more traditional work environments.

At the most basic level, workers should have a right to know how decisions related to their pay, mobility, and performance tracking are made. In traditional corporate hierarchies, access to this information has been mediated through direct relationships with supervisors and/or direct contact with coworkers. The basic expectations for employees were communicated at hire and decisions related to an employee’s ability to meet these expectations were transparent. As these decisions are buried under software, firms should be expected to go a step further in terms of communicating basic functionality of the software as it relates to managing work and changes to the software that impact workers’ earning power or performance. After all, software does not function autonomously; firms program their software intentionally, and hence it cannot become a means to circumvent labor law.

The current lack of information in this area undermines the promise of a more flexible and agile work environment in which workers can make informed choices about how and when they work, which has been the basis of support for these new modes of work in the first place. These systems also make it nearly impossible to effectively negotiate for improvements to these systems. Firms argue that data related to the algorithmic management of their workforces must remain private for the sake of market competitiveness. But this argument must be balanced against workers’ basic rights to understand the terms of agreements they are entering.

Currently, workers mitigate this information asymmetry by forming online groups and sharing anecdotal data to form a patchwork theory about how algorithms make decisions that prefer certain workers or increase rates at certain times. While this approach is clever and certainly admirable among workers who are already overburdened, it does not provide a reliable aggregate picture of working conditions as affected by mediating software. Furthermore, it does not provide a sufficient check on potential firm abuses. Workers cannot effectively negotiate the conditions of their relationships to platforms on a set of hunches and individual anecdotes. The lack of transparency effectively renders workers helpless to the whims of markets in a way that is destabilizing in aggregate. Some states have passed laws requiring temporary staffing agencies to provide basic information on pay rates and start/end times, among other critical pieces of information about the work day (State of Massachusetts). Former NLRB Chair Wilma Lieberman proposes that these same disclosure requirements could be extended to work platforms to ensure that the platforms are in compliance with basic
labor standards and “mitigate the asymmetry of information that exists on platforms that lack transparency about remuneration and client reputation.”

Though platforms manage and rate workers based on performance, the data related to that performance rating is not accessible to them. As digital platforms increase, workers’ abilities to move from one platform to another will be reduced if they cannot prove or certify the prior work performed on another platform. For task-based and service-based workers, this seems particularly fraught. On current task platforms, workers have an overall rating that helps consumers choose them to perform tasks. Without the ability to easily transfer that rating and related performance metrics over to a new platform, the likelihood that a worker can weather the financial risk of switching is diminished. In these cases, the workers’ ability to exit the workplace is stunted, undermining this longstanding cornerstone of labor power. The right to exit rests upon the reasonable ability for an individual worker to protest a decline in conditions by leaving one firm for another, holding employers to a minimum set of conditions. If workers cannot seamlessly move from one platform to another, they cannot exercise this right.

Further, workers should have the ability to contest consumer-based performance ratings. Simplistic star ratings systems effectively transfer management responsibility to consumers on peer-to-peer platforms. Yet consumers are not held to standards that protect workers from racial or gender-based discrimination, and it is unknown if the algorithms that collect that data take such biases into account in assessing performance. As Alex Rosenblat points out, “Through the rating system, consumers can directly assert their preferences and their biases in ways that companies are prohibited from doing. In effect, companies may be able to perpetuate bias without being liable for it.” In fact, Uber points to systemic racial bias in favor of white workers as their reason for not allowing in-app tipping. Attorney Shannon Liss-Riordan has filed a complaint with the Equal Employment Opportunity Commission asserting that Uber’s statements indicate that consumer ratings hold the same potential for racial bias. While there have been some effective strategies for contesting deactivations on these platforms, workers will only be able to address root causes by understanding (and potentially contesting) the ways in which their performance ratings are weighted. Workers should have access to individualized data packages that can be carried across platforms and some insight into what information is contained in the packages.

Beyond ownership of performance-based data, workers should also have the right to know exactly what data is being collected by their employers or firms and how that data is being put to use. For workers in fully digital environments, the pay they receive is generally based to the good or service they are providing to a paying customer. But if, in the process of providing that service, they are generating additional data that is of economic value to the platform, they should be aware of and potentially compensated for the value of that data. For example, Uber has never hidden its ambitions to move far beyond providing rides. All the way back in 2013, investor Shervin Pishevar described the company’s ambitions to build a “digital mesh — a grid that goes over cities,” establishing Uber as a global logistics empire (Vaccaro 2013). The grid for this potential empire, currently valued at $66 billion, is built on data provided by the hundreds of thousands of rides by drivers earning less than $13 an hour after expenses (O’Donovan and Singer-Vine 2016).

For service sector and white-collar workers, data collection systems related to productivity and performance are also frequently used (Rosenblat, Kneese, and Boyd 2014). The post-Snowden era has unleashed a torrent of
“insider threat” tracking software that collects interpersonal communications content, time management data, and physical location data to track employees (Goldhill 2016). This data is collected by employers to determine the threat potential of specific individuals, resulting in massive personal data files owned by private companies with economic power over their employees (Waddell 2016). Further, systems optimized to track “threatening” employees can also be used to profile potential internal agitators or organizers within a firm and target them for dismissal. Nathan Newman (2016) argues that this presents a “collective harm to the workforce” as the “benefits gained by internal agitators are extended to the general workforce” when these employers speak up for wage increases or improved safety protocols. Meanwhile, such software can simultaneously be used to identify workers who are unlikely to protest wage stagnation or a decline in conditions, due to a combination of personal circumstances, economic liabilities or emotional disposition that may surface in a firm’s analysis of behavioral data. In place of collective workplace improvements that raise standards for workers as a class, we find a sophisticated, data-driven targeting operation that winds up benefiting only the individual employees with pre-existing structural advantages and further entrenching vulnerable employees in lower-paying roles.

More generally, in a Panopticon-like work environment in which one’s every move is monitored, the peer solidarity that traditionally precedes and enables organizing is inhibited because workers lack space to casually air grievances or question authority. While there has been extensive research and policy advocacy around data collection as it relates to government surveillance, there are minimal limits on what firms can collect and keep as it relates to employees. As many people use personal technology in their work (from checking emails to performing work on platforms), lines between on-the-clock behavior and off-the-clock behavior can become blurred. In a 2013 article on PRISM, privacy activists David Segal and Sam Adler-Bell note that the cozy private–public partnerships between corporations and government could result in collusion to target and track perceived threats to security as they move through private and public spheres (Adler-Bell and Segal 2013). All of this limits workers’ ability to discuss and research issues related to their own working conditions and form the bonds necessary to advocate on their own collective behalf.

Workers should have a clear right to know what kinds of personal data are being collected by their employers and the ways in which it is being used to assess their performance. These policies and practices should not be embedded in arcane Terms of Service policies or individual contracts workers sign with specific firms. Policymakers and journalists also have a right to know this collective information, as it relates to a general sense of working conditions for citizenry.

Workers’ ability to effectively negotiate on their own behalf — either through third party organizations and agencies or via individual right to contract — requires equal access to information upon which these workers are judged. A requirement for this basic level of communication and transparency on the part of firms does not need to impact competitiveness.

Reforming Antitrust to Balance Labor Markets

The impact of market power and antitrust policy on workers and the labor market has become hard to ignore. By using their influence to structure markets, firms have effectively cut workers out of the bargaining process, leaving them with little or no say in determining the fair cost and conditions of their own labor. The topic was
the focus of a late-2016 report by the Council of Economic Advisors, which outlined the various pathways through which firms exert market power to the detriment of workers (CEA 2016). Remedying this will require re-envisioning antitrust policy to take into account a broader set of public interest considerations, including worker power and the health of the labor market. There are a number of policy approaches that could limit monopsony power and thus balance the voice of workers and firms in the economy.

The CEA has already called for a broad inter-agency competition review, but that will be less specific to growing monopsony power, which is the primary area of concern for antitrust policy as it applies to the labor market. On the more extreme end, in response to the paper, Adam Ozimek (2016) suggested that unionization be made a condition for merger approval as a means of balancing employer and worker power. And while this is radical and would represent a major departure from current competition policy, mitigating the threat of monopsony should absolutely be incorporated into merger review. Short of mandated unionization, several specific ideas related to bringing competition policy to bear in a monopsonistic labor market follow.

*Noncompete Clauses*

Noncompete clauses should be viewed by competition authorities as vertical restraints that prevent workers from exercising the essential choice to exit. A dense enough concentration of noncompete clauses among workers in a given sector, market, or job description could amount to an attempt among employers to close off hiring opportunities to their workers, so as to avoid competing for their labor. Federal authorities have thus far left policy on noncompete clauses to the states, but with mounting evidence of their aggregate impact on workers, and with strong remedies available under federal statute, there’s no reason to continue with that hands-off approach.

*Mandatory Arbitration*

Mandatory arbitration agreements and class action waivers may themselves be evidence of a monopsonistic labor market because, like noncompete clauses, they remove legal rights and market options from workers without compensation for potential future losses. By removing litigation and discovery as bargaining tools, they also serve to directly transfer wealth up the wealth distribution (Khan 2014). Most importantly, mandatory arbitration closes off the possibility of private antitrust enforcement through civil litigation — a critical component of U.S. competition policy. Unfortunately, the Supreme Court has increasingly read the Federal Arbitration Act, a relatively minor piece of 1920s legislation, as a super-statute that overrides rights guaranteed by other laws, like labor organizing, non-discrimination, or, in this case, competition (SCOTUS Blog).

The policy proposal here is, first of all, to roll back those judicial opinions in coordination with other relevant agencies with statutory authority to regulate bilateral contracts, like the National Labor Relations Board and the Consumer Financial Protection Bureau (Vaheesan 2016). The competition authorities could participate in a regulatory procedure to challenge the use of such agreements throughout the economy, on the understanding that they are both anti-competitive themselves and preclude the important private litigation channel for the enforcement of competition policy.

*Antitrust in the Fissured Workplace*
Competition law could also play a role in regulating the aforementioned fissuring workplace, as indicated by the private antitrust lawsuit against Uber and its CEO (Steinbaum 2016). The idea is that classifying workers as independent contractors, which are technically businesses themselves, changes the firm–worker relationship into a firm–firm relationship, which is under the purview of antitrust and the law of vertical restraints. Under these conditions, restrictions like requiring contractors to accept orders, fixing the prices they can charge, and mediating the terms on which they are paid by customers become legally anti-competitive. The core issue here is that fissuring is a strategy for avoiding labor law, but that should not create a regulatory black hole. Instead, the competition authorities should enforce the guarantee of market access on fair terms contained in the antitrust laws as they were first conceived (Vaheesan 2014).

Bringing the powerful weapons of federal competition policy to bear on the problem of monopsony would be a substantial departure from recent practice. Insofar as the competition authorities have regarded the labor market at all, they have tended to focus on restrictions on supply rather than demand, and at a recent FTC microeconomics conference, panelists were far more comfortable with the idea of reviewing state-level occupational licensing rules than they were confronting the other, more empirically grounded issues in the CEA’s monopsony brief (FTC 2016). But as Renata Hesse, acting Assistant Attorney General of the DOJ’s Antitrust division, pointed out in a recent speech, the antitrust laws were meant to oppose market power wherever it may reside. For the most part, we have the legal structures in place to make the labor market more competitive—the only question is whether we have the political will to do so (Hesse 2016).

Conclusion

These suggestions provide a snapshot of the additional considerations required of policymakers to provide a more robust worker protection regime in the 21st century economy. They indicate that the task at hand goes beyond simply expanding the reach of labor and employment law to cover workers unitarily. As the very structure and culture of work is experiencing a radical shift, we must be prepared to consider reforms that recognize the overall context in which work is taking place and emerging mechanisms through which firms have power over their workers.

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