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## BUILDING WORKER COLLECTIVE ACTION THROUGH TECHNOLOGY

RUBEN J. GARCIA\*

### ABSTRACT

*The COVID-19 pandemic has exacerbated the inequality between workers and their employers, and decreased worker power over their terms and conditions of employment. At the same time, the workers are more dispersed than ever, with more employers disestablishing the traditional office in favor of a hybrid model that further atomizes workers and makes collective action harder. At the same time, the ability for workers to organize themselves on social media and on company e-mail systems has been limited by recent decisions of the National Labor Relations Board (NLRB), and are always subject to possible employer discovery and retaliation. New technologies are needed to build collective action and solidarity among workers but also to provide a conduit to government agencies to make complaints and provide anonymous information. This Article sets a template for development of mobile applications (“apps”) that employees can use to communicate with each other and the government when necessary. Private companies, government agencies and unions have all developed technology tools to meet their needs. The challenge for the development of the next generation of apps will be, inter alia: 1) to require the employer to distribute these apps to their employees without the employer exerting control over them; (2) to assure the employees that the apps provide a space for candid exchange of information free from surveillance and retaliation; (3) to provide unions the ability to access these “digital spaces” while the courts and the NLRB have made access to physical spaces increasingly difficult; and (4) to provide a store of data for government agencies to enforce workplace law statutes, while at the same time maintaining employee privacy for sensitive information. This Article proposes ways to address each of these challenges. In the end, building worker power through technology also depends on increasing unionization, and lessening economic and technological inequality as well.*

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## INTRODUCTION

In May 2011, the President of the International Monetary Fund (“IMF”), one of the most powerful institutions in the world, was forced to resign.<sup>1</sup> On May 14, 2011, Dominique Strauss-Kahn resigned as IMF President after being accused of sexually assaulting a hotel housekeeper in New York City.<sup>2</sup> The Strauss-Kahn incident garnered international attention, but studies show that it is quite common for hotel guests to harass and assault housekeepers. In the rest of the hospitality industry, such as in bars and restaurants, harassment rates are even higher.<sup>3</sup>

The Strauss-Kahn incident was an early example of the #MeToo phenomenon that has since led to the downfall of many powerful men, such as Harvey Weinstein, Bill Cosby, and Matt Lauer.<sup>4</sup> The Strauss-Kahn incident shined a light on the specific issues faced by hotel housekeepers and others in the hospitality industry, leading to collective bargaining agreement provisions and local ordinances requiring employers to provide “panic buttons” to report to employers instances of sexual harassment and assault.<sup>5</sup>

The #MeToo movement has heightened the continued frequency of sexual harassment and sexual assault claims in the workplace, but there are a myriad of other workplace claims that go unreported and unresolved because of the individualization of workplace claims and the lack of collective action that comes with over ninety-percent of the private sector workforce not being

1. Gerry Mullany, *Strauss-Kahn Resigns from I.M.F. in Wake of His Arrest*, N.Y. TIMES (May 19, 2011), <https://www.nytimes.com/2011/05/19/business/19imf.html> [<https://perma.cc/ZJD5-58X2>].

2. Colin Moynihan, *Strauss-Kahn Sues Housekeeper; Says She Hurt His Career*, N.Y. TIMES, May 15, 2012, at A22.

3. Ann C. McGinley, *Harassing “Girls” at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. ILL. L. REV. 1229, 1261, 1273 (2007); see also Dorothy Sue Cobble, *Organizing the Postindustrial Work Force: Lessons from the History of Waitress Unionism* 44 INDUS. & LAB. REL. REV. 419, 421 (1991).

4. Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146 (2019); Anisa Purbasari Horton, *These Apps Try to Make Reporting Sexual Harassment Less of a Nightmare. Do They Work?*, FAST CO. (Feb. 2, 2019), <https://www.fastcompany.com/90303329/these-apps-try-to-make-reporting-sexual-harassment-less-of-a-nightmare-do-they-work> [<https://perma.cc/3GSG-QXE4>]; Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. L. REV. 155, 193–94 (2019).

5. See *How a Button Became One of the Greatest #MeToo Victories*, PUB. NEWS UPDATE (Oct. 1, 2019), <https://publicnewsupdate.com/how-a-button-became-one-of-the-greatest-metoo-victories/> [<https://perma.cc/34B8-VFAQ>]; Matt Rocheleau, *Most Women Never Report Their Brushes With Sexual Harassment*, BOS. GLOBE (Oct. 16, 2017), <https://www.bostonglobe.com/metro/2017/10/16/upwards-percent-who-experience-harassment-work-never-file-formal-charge/LIPWs0jfszIPnNH6wrgucL/story.html>.

represented by labor unions.<sup>6</sup> This Article proposes the development of technological tools and digital spaces to enhance the collective action of workers and to share information in the vast majority of workplaces that are not represented by a union.

Many employers have recently utilized technological tools to alert them to harassment or other whistleblower concerns in the workplace. These applications (“apps”) remain largely in the control of the employer and exist mostly for the employer’s protection. The challenge that this Article addresses is how to get technologies in the hands of most employees that they can use: (1) to report workplace problems to government agencies without fear of retaliation by the employer; (2) to share information with other employees, along with workplace hazards; and (3) to enhance and facilitate collective action among employees. In this way, the #MeToo movement can more likely lead to #WeToo collective actions among employees.

In Part I of this Article, I describe the context and settings of many workplace claims—the lack of worker power, the lack of information among workers, and the fear of retaliation even with anonymous complaints. In Part II, I discuss the legal landscape that privileges individualized claims that are managed by the employer and the limits on collective action by workers. Part III outlines technological solutions to enhance the voice of workers, such as digital “safe spaces,” mobile phone apps, and texting programs that allow workers to alert fellow workers either to workplace hazards or harassers. This Article begins the process of developing apps and tools for workers using creative design principles. The Article concludes by acknowledging that many of the structural issues identified here will not be solved by the development of the tech tools alone. These tools only facilitate the hard work of collective action that still requires changes to law and political economy that would make workplaces fairer and more equitable. Finally, the Coronavirus Pandemic of 2020 will have a profound impact on workplace inequalities and the use of technology in the new “workplace.”

## I. THE CONTEXT: CONTINUING #METOO CLAIMS, EMPLOYER CONTROL OF CLAIMS, AND WEAK WORKER POWER

### A. *The #MeToo Movement as a Catalyst*

The #MeToo movement has had a profound impact on the workplace and society ever since Tarana Burke coined the hashtag on social media to add her experiences and show solidarity to those who have suffered sexual harassment

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6. For a discussion of how the decline of the labor unions has led to growing inequality in the U.S., see Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 513 (2011).

or assault.<sup>7</sup> As important as that moment was in social media, women over decades have faced sexual harassment and the difficulties endemic in raising workplace law claims. Many of the obstacles that hamper workplace claims generally—lack of access to counsel, fear of retaliation, and lack of information about what other employees are going through—prevent more claims from being filed.

Notably, changes in legal doctrine did not spur the #MeToo movement. In the late 1990s, the United States Supreme Court decided several important sexual harassment cases that set the table for these claims over the next two decades before the #MeToo hashtag was coined. The Supreme Court has since decided several important retaliation and causation cases, but the standards for hostile environment cases were set in two Supreme Court cases in 1998.<sup>8</sup> Since then, the lower courts have developed what has been termed a “managerial jurisprudence” of sexual harassment claims, which largely protected managerial interests.<sup>9</sup>

#### B. *Atomized Claims and Collective Action Problems*

Over decades and several Supreme Court decisions, workplace law claims have become more individualized. Sexual harassment and sex discrimination claims, since first recognized by the courts in the 1980s, were often brought as class actions before various changes in the Civil Rights Act of 1991 made that arguably less attractive.<sup>10</sup> United States Supreme Court decisions, such as *AT&T Mobility LLC v. Concepcion* in 2011, allowed employers to require employees to waive their rights to bringing class claims in arbitration clauses that they must

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7. There has been much literature on the #MeToo movement. See, e.g., Ann C. McGinley, *Sex-and Gender-Based Harassment in the Gaming Industry*, 9 UNLV GAMING L. J. 147, 147–48 (2019); Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229 (2018); Mary Anne Case, *Institutional Responses to #MeToo Claims: #VaticanToo, #KavanaughToo, and the Stumbling Block of Scandal*, 2019 U. CHI. LEGAL F. 1, 1 (2019); Jessica A. Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37, 37 (2019).

8. *Faragher v. City of Boca Raton*, 524 U.S. 775, 784 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998). See *U. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013); see also *Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167 (2009).

9. See, e.g., ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 11 (2017); Lauren Edelman, *How HR and Judges Made It Almost Impossible for Victims of Sexual Harassment to Win in Court*, HARV. BUS. REV. (Aug. 22, 2018), <https://hbr.org/2018/08/how-hr-and-judges-made-it-almost-impossible-for-victims-of-sexual-harassment-to-win-in-court> [https://perma.cc/F3AC-8K7M].

10. See, e.g., *Jensen v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997); CLAIRE BINGHAM & LAURA LEEDY GANSLER, CLASS ACTION: THE STORY OF LOIS JENSON AND THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW 70–71 (2002); Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 813–14 (2004).

sign as a condition of their employment.<sup>11</sup> This decision has prevented many types of workplace law claims from ever seeing the light of a courthouse.

At the same time as class or collective claims have been suppressed by mandatory arbitration clauses, Supreme Court decisions have limited sex discrimination claims through interpretations of the class action requirements of the Federal Rules of Civil Procedure. In *Wal-Mart Stores, Inc. v. Dukes*, for example, the Court held that female employees of Wal-Mart could not bring their claims as a class against the giant retail company because “[i]n a company of Wal-Mart’s size and geographical scope, it is quite unbelievable that all managers would exercise their discretion” in exactly the same way.<sup>12</sup> Thus, this is another way of atomizing and individualizing discrimination, which by definition is a systemic problem.

In its most recent decision on Title VII, *Bostock v. Clayton County*, the Court once again reaffirmed the view that the statute protects individuals and not groups. In its decision holding that discrimination “because of sex” includes LGBTQ employees, the Court emphasized the dictionary definition of the statutory term “individual.”<sup>13</sup> “Congress could have written the law differently,” the Court wrote, listing alternative formulations Congress could have used. “It might have said that there should be no “sex discrimination,” perhaps implying a focus on differential treatment between the two sexes as groups. More narrowly still, it could have forbidden only “sexist policies” against women as a class.”<sup>14</sup> The Court found strong support in these textual roads not taken to find that Title VII protects LGBTQ individuals.

The text of the statute is plain, and the Court has reaffirmed this principle in previous cases. In *Connecticut v. Teal*, for example, the Court rejected an employer’s defending a disparate impact claim by claiming that its workforce was diverse among protected groups (the bottom-line defense).<sup>15</sup> Still, Title VII has been protective of groups, whether through the Supreme Court’s upholding of voluntary affirmative action plans or through cases that it struck down.<sup>16</sup> The individualized nature of most complaints, however, has been dominant over the years, as shown above.

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11. 563 U.S. 333, 342–344 (2011). See, e.g., Jean R. Sternlight, *Justice in a Brave New World?*, 52 CONN. L. REV. 213, 251–52 (2020); IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 10 (2013).

12. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 356 (2011).

13. *Bostock v. Clayton Cnty.*, No. 17-1618 (U.S. June 15, 2020).

14. *Id.* at 12.

15. *Connecticut v. Teal*, 457 U.S. 440, 442 (1981).

16. See *Johnson v. Transp. Agency*, 480 U.S. 616, 641–42, 664 (1987); *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 708, 709 (1978).

There is also the ineffectiveness of many of these complaint processes, as has been shown by several scholars.<sup>17</sup> As with many of these processes, the claimants often feel victimized by the process itself.<sup>18</sup> They must at least attempt to use the process before seeking redress at the Equal Employment Opportunity Commission (“EEOC”) or the courts, but the data shows that very few claims generally make it to the EEOC or outside the company. There is reason to think the dispute resolution processes at many of these companies are flawed.<sup>19</sup>

*C. Employer Control of Claims and Fear of Retaliation*

Other areas of sexual harassment law have also incentivized employer prevention as a way to dispose of claims before resolution by trial. In a series of Supreme Court decisions in the 1990s, the Court outlined the steps for employers to be insulated from liability for sexual harassment claims by employees. First, the employer must have a policy for employees to make complaints about sexual harassment. Second, the employer must carefully respond to problems of co-worker harassment or be liable for their own negligence.<sup>20</sup>

From its inception, Title VII has protected employees who complain about discrimination and suffer retaliation for doing so. The “opposition” clause of the law states that employees shall not suffer retaliation because they have “opposed any practice made an unlawful employment practice by this chapter.”<sup>21</sup> Then there is the “participation” clause, which prevents retaliation because the employee has filed a charge, testified, assisted, or “participated in any manner in an investigation, proceeding, or hearing under this subchapter.”<sup>22</sup>

But these provisions have not always been protective.<sup>23</sup> First, in analogous contexts, the courts have sometimes formalistically determined what it means to “file a charge” or “file complaints.”<sup>24</sup> In *Kasten v. Saint-Gobain Performance Plastics Corp.*, the Supreme Court had the occasion to decide the scope of the anti-retaliation language of the Fair Labor Standards Act (“FLSA”), similar to Title VII’s language protecting against retaliation for filing “any complaint”

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17. See e.g., Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 964 (1999).

18. Nancy Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1273, 1249 (2010).

19. Alex Colvin, *Participation Versus Procedures in Non-Union Dispute Resolution*, 52 INDUS. REL. 259, 259 (2013).

20. *Faragher v. City of Boca Raton*, 524 U.S. 775, 784 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998).

21. 42 U.S.C. § 2000e-3(a) (2012).

22. *Id.*

23. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973) (holding that plaintiff Green’s action protesting discrimination was “seriously disruptive,” and he must show that he should be reinstated in spite of it.); see also RUBEN J. GARCIA, *MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION* (2012).

24. *Kasten v. St. Gobain Performance Plastics Corp.*, 563 U.S. 1, 4 (2011).

with the employer.<sup>25</sup> The question before the Court was whether Plaintiff Kasten’s informal complaint about the placement of the punch clock was protected even though he did not file a formal complaint with the Department of Labor (“DOL”).<sup>26</sup> The Court held that it was enough that Kasten put the employer on notice that there was an FLSA problem, rather than filing a complaint with the government agency.<sup>27</sup>

And yet, there are still employees who do not feel comfortable either raising formal complaints with state agencies or bringing them to the employer. Ideally, there would be full access to state agencies, short of making a complaint or truly anonymous complaint, but that is not always the experience with state agencies. The State of Washington, for example, has an app for workers to make complaints to the state occupational health and safety agency.<sup>28</sup> There are an increasing number of nonprofit legal tech firms that are trying to assist in making apps that would create forms for reporting sexual harassment complaints as well.

The foregoing demonstrates the limits of all our legal mechanisms for workers to raise problems with their employers and government agencies. Sexual harassment claims offer unique issues in terms of retaliation, so employees need avenues to ensure that they can make complaints anonymously. Many other types of workplace claims—for unpaid wages, for unequal pay, for whistleblowers—also need a direct line to government agencies both to make complaints, but also to store and share information. Even in this advanced technological age, many workers have to rely on texting, social media, and analog methods of making their claims known and gathering evidence. And as shown below, the employees’ ability to raise workplace claims online is limited by a shifting legal landscape and employer surveillance.

#### D. *Theories of Collective Action*

Employees generally face three collective action obstacles when facing problems at the workplace. First, they may believe that the issues they face are unique to them, and this may lead them to not raise the issue with their employer.<sup>29</sup> Take, for example, the employee who does not know that other employees are being sexually harassed, but simply believes it is only falling upon that employee. Second, they may think that they cannot change the conditions of their work by complaining, so they may exit. Alfred O. Hirschman, in his classic work *Exit, Voice, and Loyalty*, diagnosed the problem of collective

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25. *Id.* at 4.

26. *Id.* at 6, 7.

27. *Id.* at 14.

28. *HSEQ/WA APP (Good Observation, Near Miss and Accident Reporting)*, WASH. STATE DEP’T OF LAB. & INDUS., <https://lni.wa.gov/safety-health/grants-committees-partnerships/safety-health-investment-projects-grant-program/ship-grants-2016zc00314> [https://perma.cc/KQ5D-8U XM] (last visited Aug. 19, 2020).

29. ALFRED HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 28 (1970).



action in institutions and decided that there needed to be voice for institutions to grow stronger.<sup>30</sup> Third, The Logic of Collective Action, Mancur Olson's classic work, shows that workers will not be able to change their working conditions unless they engage with other employees at the worksite.<sup>31</sup>

## II. THE LEGAL LANDSCAPE: LIMITED COLLECTIVE ACTION ONLINE AND EMPLOYER MONITORING

The beginning point for employees to engage in collective action with their coworkers is the Norris La Guardia Act ("NLGA") enacted in 1932. Passed during the Great Depression, the Seventy-Second Congress found that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing . . ." <sup>32</sup> Over the years, the promise of those words has been lessened by decades of court decisions limiting labor rights.<sup>33</sup>

### A. *Online Concerted Activity*

With the increased use of technology in the workplace over the decades, many Twentieth Century labor rights have been tested in the new reality of the electronic workplace. Company e-mail was the first beachhead for battles about whether employers could limit discussions about organizing unions or engaging in concerted activity. Because employers can limit employee union activity to breaks and downtime, what are the limits for employees using company e-mail systems to conduct those discussions? The National Labor Relations Board ("NLRB" or "the Board") has addressed this question in different ways, differing with each presidential administration's political party because the administration appoints the Board members that adjudicate NLRB cases.<sup>34</sup> In the most recent decision on the topic, *Caesars Entertainment d/b/a Rio All Suites Hotel and Casino*, the Board (a majority of whom were appointed by President Donald Trump) held that employers can limit concerted activities on company-owned e-

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30. *Id.*

31. See generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 76 (1965).

32. H.R. Rep. No. 821, at 1 (1932).

33. See, e.g., Nat'l Labor Relations Bd. v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938); First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981); Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970), Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

34. Compare The Guard Publishing Co., 351 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1110 (2007) (where the majority of Board members were appointed by Republican President George W. Bush), with Purple Commc'n, Inc., 361 N.L.R.B. 1050 (2014), LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947.

mail systems.<sup>35</sup> With the Supreme Court very unlikely to weigh in on the Board's decision on labor law, the use of e-mail will likely shift back when the majority of the Board is appointed by a president of a different party.

In these e-mail cases, the Board has vacillated the importance that should be placed on the employer's property interest over the e-mail system, if any, balanced against the employee's statutory right to engage in protected concerted activities, as long as they do not interfere with the employer's legitimate interest in running the business. Technological advances have made the employer's property right in company e-mail weaker and weaker over the years, since many e-mail systems now exist ephemerally on "clouds" or in the Google campus. Employers have tried to use the disruption to the workplace as the justification for limiting employee organizing activities over e-mail,<sup>36</sup> even when they allow many other kinds of non-union distractions to come in over the e-mail transom.<sup>37</sup> And yet, the Board's recent decisions show an increased solicitude to the employer's control of their e-mail systems at work.

Though employers can exercise more control over their employees' e-mail world, social media remains a space that employees can use to collaborate outside the control of the companies themselves, but the potential for employer retaliation against employees for statements on social media that the employer does not like has increased. Facebook, Twitter, Instagram, and other platforms regularly host many types of invective, including politically, sexually, and racially harassing materials. Thus, the NLRB has had to determine the limits of collective activity on social media, primarily on Facebook.

In all concerted activity cases, the Board generally looks to whether the action is truly concerted—that there is more than one employee involved, the employees are calling for some changes to their working conditions, and they are doing so in a way that is not "indefensible."<sup>38</sup> The same conditions apply online. In fact, the employee can point to several "likes" by co-workers as evidence of concerted activity. The public nature of much social media is beneficial for employees to meet the concerted activity prong, but it increases the risk that employers will take action against the employee that is either retaliatory, or justifiable.

The Board during the Obama Administration set forth its enforcement strategy and summarized several Board opinions in two General Counsel

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35. *Caesars Ent.*, 368 N.L.R.B. 1 (2019), LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947.

36. *See id.*

37. *Moving Email to the Cloud: Understanding Cloud-Based Email*, PROSERVEIT (June 12, 2018), <https://www.proserveit.com/blog/understanding-cloud-based-email>.

38. *NLRB v. Int'l Brotherhood of Electrical Workers*, 346 U.S. 464 (1953).

Memoranda in 2012.<sup>39</sup> The thrust of the memoranda, and the Board cases up to that point, was that employees enjoyed a wide degree of latitude to speak about their working conditions online as they would in real life, provided they did not defame anyone, as long as they criticized their employer and connected their complaints about the employer to a “labor dispute” over wages, hours, and working conditions, no matter how inflammatory their speech might be.<sup>40</sup>

Recently, the Second Circuit Court of Appeals approved of the Board’s general approach by enforcing the order in *National Labor Relations Board v. Pier Sixty LLC*.<sup>41</sup> In that case, an employee of the Pier Sixty Catering Company posted on October 25, 2011, on Facebook using his personal iPhone the following profanity-laden diatribe against his supervisor, Robert McSweeney:

Bob [McSweeney] is such a NASTY MOTHER FUCKER don’t know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!<sup>42</sup>

On November 1, Pier Sixty fired Hernan Perez for this unwelcome outburst as “conduct unbecoming,” under the company’s handbook rule. Just two days after this post, employees voted on October 27 for union representation. After Perez’s firing on November 1, he filed a charge with the NLRB alleging that Pier Sixty had violated his rights to concerted action with his fellow employees, and the agency and five-member adjudicating body of the Board agreed with him.

In enforcing the Board’s Order holding that Perez had been fired in violation of the Act, the Second Circuit, Judge José Cabranes writing for the court, agreed that Perez’s statements were “vulgar and inappropriate,” but did not lose the protection of the labor law by posting his comments on Facebook, especially given that: (1) he connected his comments to the labor dispute; (2) there was some evidence that the workplace often tolerated such “salty” language, and McSweeney was often dishing it out; and (3) other employees “liked” it.<sup>43</sup> This was not “ad hominem” attack on an employer without reference to a labor dispute, such as when the Supreme Court denied Section 7 protection for labor speech because it was a disloyal “attack” that related itself to no labor practice of the company.<sup>44</sup>

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39. See NLRB OFFICE OF GENERAL COUNSEL, OM 12-31, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2012); NLRB OFFICE OF GENERAL COUNSEL, OM 12-59, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2012).

40. *Id.*

41. NLRB v. Pier Sixty, LLC, 855 F.3d 115 (2d Cir. 2017).

42. *Id.* at 117.

43. *Id.* at 124–25.

44. NLRB v. Int’l Brotherhood of Electrical Workers, 346 U.S. 476 (1953) (“The attack asked for no public sympathy or support. It was a continuing attack, initiated while off duty, upon the very interests which the attackers were being paid to conserve and develop.”).

*Pier Sixty* and earlier cases dealing with Facebook show that the NLRA equally applies on social media platforms. Social media can be an important platform for employees to share information with each other and organize collective action. It is possible that some are trying to keep many of these preparatory activities hidden from an employer until there is a decision to take these complaints to the employer. However, many of these actions are intended to be public and available for the employer to find.

The *Pier Sixty* case also shows that although the employee was brusque, brash, and ultimately successful in the union representation election, there might have been better ways to assure the employees' collective action. There may have been more polite ways to rally Perez's coworkers to union representation, but his actions were ultimately protected by the law and did not prevent the union from winning the election.

But the protection of collective action should not be subject to the vagaries of NLRB doctrine or employees, like Perez, staying on the right side of the line on social media. First, not everyone in the workplace participates in social media, and not all are on the same platform. Second, the platforms are dictated by corporate terms of service that can be oppressive and contractually limit certain activities.<sup>45</sup> And third, there is always the possibility of employer discovery and changes in the Board law that will limit protections for the employees because there is so much change in presidential administrations. In short, social media platforms can be a tool for collective action but are not sufficient in themselves.

### B. *Employer Surveillance of Technology*

With greater use of technologies, electronic surveillance is becoming an ever-increasing aspect of work life.<sup>46</sup> Employers engaging in surveillance, or giving the impression of surveillance, is a violation of the NLRA because it chills the activities and makes the workers fearful of retaliation. Electronic surveillance has an even greater potential to blunt organizing because it is ubiquitous, and workers have no way of knowing when their e-mail is being monitored continuously; they may feel that they are also being watched.

The usual protection against privacy violations is not effective against intrusions on collective actions. In all workplaces, employees have rights against invasions of privacy if those invasions violate the workers' reasonable expectations of privacy.<sup>47</sup> Most employees receive notice either at the beginning

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45. Nancy S. Kim, *Situational Duress and the Aberrance of Electronic Contracts*, 89 CHI-KENT L. REV. 265, 265–66 (2014).

46. Chris Stokel-Walker, *If You're a Remote Worker, You're Going to Be Surveilled. A Lot*, ONEZERO MEDIUM (Apr. 22, 2020), <https://onezero.medium.com/if-youre-a-remote-worker-youre-going-to-be-surveilled-a-lot-f3f8d4308ee> [<https://perma.cc/54GQ-26FM>].

47. See, e.g., CAL. CONST. art. I, § 1.

of their employment or some period thereafter that their electronic or e-mail activities are being monitored.<sup>48</sup> For most purposes, this will immunize the employer from liability for any electronic monitoring. This makes it difficult both to engage in online organizing and the anonymous reporting online.

In the era of COVID-19, there are even more incentives and opportunities for workers to be monitored.<sup>49</sup> Depending on how long the pandemic continues, unions will become more adept at online and social media organizing. If workers are hesitant to engage with unions online because they fear retaliation, and they cannot engage in person, at least during the pandemic, spaces will have to be developed for workers to organize free of interference.

The Clean Slate for Worker Power Project, based at the Harvard Law School Labor and Worklife Program, has advocated approaching labor law reform with the following question: What would labor law look like if written on a blank slate? The initial answers to that question came in the form of the Report *Building a Just Economy*, released in January 2020.<sup>50</sup> The Report offered a number of solutions for the inequalities that have been baked into labor law since the 1930s. The recommendations include the removal of the exemptions of domestic workers and agricultural workers from the protections of the NLRA, and the repeal of secondary boycott provisions, which prevent workers from organizing against third parties who can put pressure against their employer to reach a labor agreement. As with all ambitious plans, there are a number of details to be ironed out if digital spaces are going to be widely used. A digital safe space to organize and resolve workplace issues could have great value.

### III. A SOLUTION: THE #WETO APP

In order to facilitate organizing, the Clean Slate Project advocates a number of solutions to increase collective action by workers. One of them is the creation of digital safe spaces for workers. Although this is certainly important in the technology industry, there are a number of other workplaces where these spaces are needed. UNITE HERE innovated the use of panic buttons to alert workers in danger in guest rooms from threats to safety, making it part of city ordinances and collective bargaining agreements in Chicago, Las Vegas, and other cities.

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48. Charles J. Muhl, *Workplace E-mail and Internet Use: Employees and Employers Beware*, U.S. BUREAU OF LABOR STATISTICS: MONTHLY LABOR REVIEW, Feb. 2003 at 38.

49. Natasha Singer, *Virus-Tracing Apps Are Rife With Problems*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/08/technology/virus-tracing-apps-privacy.html> [https://perma.cc/CAJ9-Q3Z9] (highlighting that as countries race to deploy coronavirus-tracking software, researchers are reporting privacy and security risks that could affect millions of people and undermine trust in public health efforts).

50. Sharon Block & Benjamin Sachs, *A Clean Slate for Worker Power: Building a Just Economy and Democracy*, HARVARD L. SCH.: LAB. AND WORKLIFE PROGRAM, Jan. 23, 2020, at 83.

### A. *Digital Spaces for Organizing*

In this model, workers have access to a “safe space” free from employer surveillance.<sup>51</sup> Upon hire, workers would have a password protected area maintained by the employer for their discussions. This is a good idea, but as always there is the possibility for employer mischief just as in the real world. There is also the possibility that some employees will not be interested in collective action or try to sabotage it. Finally, there is the possibility that employees will not trust that the site is secure and forego it in favor of social media, perhaps to the chagrin of the employer.

But there is still much to be said for this approach compared to social media, as discussed above. Through regulation or legislation, the employer forgoes all rights to influence the dialogue in this space. Sanctions may include the usual tepid remedies under the NLRA, but civil penalties can also be instituted in new legislation, such as in the Protecting the Right to Organize (“PRO”) Act.<sup>52</sup>

### B. *There’s an App for That, and Employers Know It*

There are a wide variety of apps available to employers to help them comply with whistleblower protections and sexual harassment laws, among other regulations. Apps such as StopIt, WorkShield, KENDR, or #NotMe are available to employers to require their employees to download it on their phones and use it to report problems in the workplace.

The StopIt app, for example, works like many of them. Workers can attach pictures and videos to incident reports, which are then reviewed by company designated “report-managers.” The employee can then communicate with the report-manager through text who will then investigate the report further.<sup>53</sup>

These apps have positive attributes. Certainly, the employer should be aware of problems or illegalities going on in the workplace. These apps can have a preventative function but also a function to collect information about the workers themselves. This will be primarily for the protection of the employer, and also to keep such matters internal rather than being reported to government agencies.

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51. *See id.* at 54. Management consultants are also arguing for safe spaces for employees, more as an employee perk than a space to organize. “A ‘safe space’ is the office Vegas—people enter, take a break from work or other life’s challenges, and express themselves freely with all the attendant emotions, and when they are through, they leave with their dignity intact. What happens in the safe space stays in the safe space; therefore, members agree to be confidential.” Maxine Attong, *Leading Edge: Creating a Safe Space for Employees*, TRAINING (Jan. 27, 2016), <https://trainingmag.com/leading-edge-creating-safe-space-employees/> [<https://perma.cc/9PPP-EV E9>].

52. Protecting the Right to Organize Act, H.R. 2474, 116th Cong. § 12(b) (2020).

53. Lydia Dishman, *Can Using an App Help End Workplace Harassment?*, FAST CO. (May 11, 2017), <https://www.fastcompany.com/40419585/can-using-an-app-help-end-workplace-harassment> [<https://perma.cc/YU3V-6TJU>].

### C. *Apps As Information Storage and Conduit to Government Agencies*

Many government agencies are starting to utilize apps to allow workers to make complaints and acquire information. Some federal agencies like the NLRB and the DOL have developed apps. The NLRB app allows workers to file a charge and find their local NLRB office. It also contains decisions. Several agencies of the DOL have their own apps, for everything from tracking wage and hour compliance, international supply chains, and local employment data.<sup>54</sup>

Right now, these apps are generally one-way. That is, they provide information from government agencies to citizens. It would be a helpful addition for employees to be able to make complaints to government and also to share information with other employees to warn them of potential workplace dangers.

Other scholars have discussed the role of information escrows in keeping a record of harassers to warn other employees.<sup>55</sup> Information escrows can be a place to park informal complaints and information short of a full complaint.<sup>56</sup> They may also provide a warning system to other employees, if they can access the data. The apps provided by the employer create a large amount of data that is owned by the app company and the employer. Employees should have access to and, ultimately, control over that data.<sup>57</sup>

### D. *Principles of Design*

In arriving at a technological solution to these issues, this Article will utilize the principles of the Stanford design school (“d. school”).<sup>58</sup> These creative problem-solving principles can help design a tool to address the issues that have been discussed in this paper.<sup>59</sup>

The first question of the creative design framework is this: What are we solving for? The solution must be easily accessible to a wide range of workers

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54. See, e.g., Bureau of Labor Statistics (BLS) Local Data App., Bureau of International Labor Affairs (ILAB) Comply Chain App., and Wage and Hour Division (WHD) Timesheet App, THE APPLE STORE, <https://www.apple.com/app-store/>.

55. Heidi Liu, *When Whispers Enter the Cloud: Evaluating Technology to Prevent and Report Sexual Assault*, 31 HARV. J.L. & TECH. 939, 945 (2019) (analyzing current reporting technologies on the market that combat sexual misconduct while suggesting ways to improve those mechanisms).

56. See generally Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1152 (2019) (discussing the inadequacy of formal systems); see also Deborah Tuerkheimer, *Unofficial Reporting in the #MeToo Era*, 2019 U. CHI. LEGAL F. 273, 276 (2019).

57. There are various proposals to accomplish this, but so far only California has been able to enact legislation. However, it does not go so far as to allow employees full control of the data that their employers collect about them. California Consumer Privacy Act of 2018, Cal. Civ. Code § 1798.120, [http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180AB375&search\\_keywords=consumer+privacy](http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB375&search_keywords=consumer+privacy) [<https://perma.cc/8FVB-HG65>].

58. STANDARD DESIGN SCHOOL, <https://dschool.stanford.edu/> (last visited Aug. 23, 2020) [<https://perma.cc/7N8K-K43C>].

59. See *id.* (roots of d. school principles).

with varying degrees of technical proficiencies. It must also be one that employers cannot easily intercept, even when they can provide location data that might be damaging to the employees' self-interest if they are implicated in being somewhere where they should not be.

As discussed above, e-mail and text messaging are imperfect modes of sharing information because employers will either claim that the e-mail or wireless system is their property, or that they must ensure order in the workplace, as the arguments went in the NLRB cases described above.<sup>60</sup> Then there needs to be a more seamless way for workers to communicate with each other outside of the reach of the employer.

Apps are becoming more prevalent for many institutions and employers. One of the values of apps is that they can be used in a variety of different types of devices. The other value is that employees can take the app with them as they go to a new job and can take their contacts with them to new employment. This can lead to a greater network of workers that are not tied to a particular employer. If the worker stays in the industry, that may lead to a possibility of bargaining or greater collective action in the sector or industry, much like Europe uses sectoral bargaining.

Also, with the use of apps like Uber and Lyft, apps are becoming the locus of control of so much of work life for employees and consumers. They are being used as panic buttons for both consumers and drivers who are put in a difficult position. The apps have also been a locus of greater collective action for the drivers as well; the drivers have used them to engage in strikes and work stoppages against Uber.<sup>61</sup>

#### *E. Plan for Design and Testing*

The next step is testing. It seems that a good beginning for such testing is in unionized workplaces in the hospitality industry. As it seems that the ability of workers to use panic buttons has been hampered by spotty Wi-Fi, there is a need to have these warning systems linked to a cell phone network. This also has the benefit of not giving the employer access to the cell network.

There is also a question about how data can be kept from the employer when employees are discussing workplace problems, while at the same time transmitting to the employer immediate information about workplace emergencies or assaults. The law of surveillance, properly applied, would find

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60. Compare *The Register-Guard*, 351 N.L.R.B. 1110, 1121 (2007) (majority of Board members appointed by Republican President George W. Bush), with *Purple Communications*, 361 N.L.R.B. 1050, 1050 (2014) (majority of Board members appointed by Democratic President Barack Obama).

61. See, e.g., Veena S. Dubal, *The Drive to Precarity: Work, Regulation, and Labor Advocacy in San Francisco's Taxi and Uber Economies*, 38 BERKELEY J. OF LAB. & EMP. L. 73, 129 (2017) (discussing collective actions by taxi workers).



the employer who surveils the app to be guilty of an unfair labor practice, since there is no business reason for it. But the app can also be designed to keep all employee communications from the employer.<sup>62</sup>

*F. Distributional Challenges*

As described above, several difficulties will remain about getting any apps that are developed in the hands of workers. There is a good deal of variation in the kinds of electronic devices workers will have. But there are inexpensive phones that can hold apps and allow workers to send messages among themselves. State agencies can require employers to distribute the apps to their employees. It seems that this would be similar to states requiring employers to post notices to information about their wage and hour or health and safety rights in breakrooms.

Unions, of course, are the ideal distribution channel for these apps, and many unions have their own apps, or at least sophisticated communications networks for their members. UNITE HERE has the FairHotel app and web site, which can be used by travelers to find unionized hotels in cities across North America.<sup>63</sup> UNITE HERE and the AFL-CIO also have sophisticated texting programs to reach millions of members in political and legislative action.<sup>64</sup> There are a variety of other products that unions can use to track grievances and organizing.

One of the positive things that panic buttons do is alert management to the location of the employee in case of danger. Global positioning systems (“GPS”) have long been used *by the employer* to find out about the whereabouts of a particular danger. In Las Vegas, the need for locating workers became more apparent after the October 1, 2017, shooting on the Las Vegas Strip at the Mandalay Bay Hotel and Casino.<sup>65</sup> The employer’s knowledge of the location of workers in this kind of emergency is important, but so is the employees’ knowledge of where other employees are in the facility. Some of this can also be done through geolocation technology. This can also be useful in identifying

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62. Certainly, there can be “moles” among the employees. It would seem to be very difficult to design around that. It might be possible, however, to create circles of employees within the apps that share common interests, or backgrounds, in a way that labor law does not currently recognize, but in the future, might be more recognized, such as minority unions. *See, e.g.,* CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* 17 (2005).

63. FAIR HOTEL, <https://www.fairhotel.org/> (last visited Aug. 28, 2020) [<https://perma.cc/VB8V-KZAM>]; Fair Hotel UNITE HERE App, THE APPLE STORE, <https://apps.apple.com/us/app/fair-hotel/id557229771> (last visited Aug 27, 2020).

64. AFL-CIO, *AFL-CIO Commission on the Future of Work and Unions* (Sept. 13, 2019), <https://aflcio.org/reports/afl-cio-commission-future-work-and-unions> [<https://perma.cc/AV3D-KSZ3>].

65. Tiffany Hsu, *Las Vegas Shooting Underscores Hotel Security Choices*, N.Y. TIMES (Oct. 2, 2017), <https://www.nytimes.com/2017/10/02/business/hotel-security-las-vegas.html> [<https://perma.cc/FR2D-26EZ>].

the location of safety hazards and possibly the location of employees if that is important for factual and investigatory reasons.

Some unions may have greater challenges than others in utilizing workplace apps. Unions in the construction trades, for example, may have a harder time utilizing Wi-Fi or location data but should be able to use cell service. Some workers are like those who the Supreme Court identified in *Lechmere v. NLRB*, who are “remote in location,” who can be solicited by nonemployee union organizers on the employer’s property.<sup>66</sup> As the years have gone by, unions have increasingly relied upon technology to reach employees. However, if internet service is spotty, the reasons to give them greater in-person access to employees thereby increases.

Another distribution channel for the app is worker centers. As the percentage of workers who are covered by unions has decreased, worker centers have become more important.<sup>67</sup> These centers often represent low-wage workers who have uneven access to technology. Many of these centers have used technology to organize and communicate through WhatsApp and basic cell phones.<sup>68</sup> The #WeToo app could also be used for workers to alert other workers of unscrupulous employers and wage theft. For example, a recent study of the Las Vegas labor market found thirty-percent of day laborers to be victims of wage theft.<sup>69</sup>

### G. Privacy and Surveillance

As with the development of all technologies, there is a large potential for intrusions on the privacy of individuals. Designing a solution with privacy in mind will be especially difficult if the government is to provide a forum for employees to make complaints. First, the challenge is going to be whether the data collected by the government becomes a public record subject to disclosure.<sup>70</sup> If collected by the federal government, the Privacy Act may provide protection for the records if they are about a specific individual. States will have to legislate the protection of records under their open meetings laws.<sup>71</sup>

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66. *Lechmere, Inc. v. NLRB*, 502 U.S. 841, 846 (1992).

67. JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF A DREAM 14 (2005); César Rosado Marzán, *Workers Centers and the Moral Economy, Disrupting Through Brokerage, Prestige, and Moral Framing*, 16 U. CHI. LEGAL F. 409, 410 (2018).

68. Interview with Cal Soto, Workers’ Rights Attorney, National Day Laborer Organizing Network (Aug. 27, 2020); *See, e.g.*, PIONEER VALLEY WORKERS CENTER, <https://pvworkerscenter.org/> (last visited Jan. 29, 2021) [<https://perma.cc/3V4V-XQP8>].

69. NIK THEODORE & BLISS REQUA-TRAUTZ, DAY LABOR IN LAS VEGAS, INDISCRETIONS IN SIN CITY 4 (Jan. 2018).

70. Cameron F. Kerry, *Why Protecting Privacy is a Losing Game Today—And How to Change the Game*, BROOKINGS (July 12, 2018), <https://www.brookings.edu/research/why-protecting-privacy-is-a-losing-game-today-and-how-to-change-the-game/> [<https://perma.cc/NW4A-TCLB>].

71. The Privacy Act, 5 U.S.C. § 552 (2018).

There is a federal law that prohibits interception of communications by employers or any other person from intercepting private communications over the internet or telephone lines.<sup>72</sup> The NLRA also prevents employers from engaging in surveillance, or giving the impression of surveillance, of concerted or union organizing activities.<sup>73</sup> The remedies available for the violations of the law are not, however, generally sufficient to deter employers from engaging in electronic monitoring. The Electronic Communications Privacy Act (“ECPA”) is hard to enforce unless there is real-time interception of the communication. And if the employer violates the NLRA’s prohibition on unlawful surveillance, provided there is no other attendant unlawful retaliation against employees, the only sanction is that the employer will be required to post a notice to the employees that they will not break the law again.

Even though much of the legal framework of employee privacy is stuck in the 20<sup>th</sup> Century, employers continue to make use of the tools that tech companies innovate to monitor the productivity and online activities of their employees. As more employees work from home online, there is growing evidence that employers are making use of these technologies.<sup>74</sup>

There have been several proposals to modernize the laws that protect worker privacy online. Although there are some examples of protective state laws, it is unlikely that there will be any legislation at the federal level, particularly in the chaotic 2020 election year. However, the Clean Slate for Worker Power Project recently released a report with recommendations for a number of reforms stemming from the COVID-19 crisis, including a section on reforms that would strengthen worker collective power in digital spaces. One of those reforms, the Protecting Right to Organize (“PRO”) Act, which has passed the Senate, would impose civil penalties for surveillance violations of the NLRA.<sup>75</sup>

#### H. *Constitutional Issues*

There have been claims that postings are compelling the employer to adopt a message in violation of the compelled speech doctrine of the First Amendment. When the NLRB required employers to post notices explaining the rights that employees have to unionize, there was a constitutional challenge to the

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72. The Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2501 (2018).

73. NLRA Section 8(a)(1) makes it an unfair labor practice to “restrain or coerce any employee in the exercise of the rights guaranteed by Section 7.” *See, e.g., Allegheny Ludlum Corp. v NLRB*, 301 F.3d 167, 174 (3d Cir. 2002) (upholding the Board’s finding of surveillance violations where employees apparently consented to being filmed).

74. James Vincent, *Tim Cook Warns of “Data-Industrial Complex” in Call for Comprehensive US Privacy Laws*, VERGE (Oct. 24, 2018), <https://www.theverge.com/2018/10/24/18017842/tim-cook-data-privacy-laws-us-speech-brussels>.

75. Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. § 12 (2019-2020) (Section 12 imposes civil penalties for violations of NLRA Section 8(a), which includes garden variety Section 8(a)(1) violations for surveillance, interrogation etc.).

regulation.<sup>76</sup> The D.C. Circuit struck down the regulation under the First Amendment, arguing that the employer was being “forced” to carry the message that labor law allows employees to unionize if they choose. With the change in the NLRB brought by the Trump Administration, it remains to be seen whether and when such a rule will ever return, but the D.C. Circuit’s opinion is unlikely to be the last word on the matter.<sup>77</sup>

There will still undoubtedly be constitutional objections to a requirement that employers provide employees with access to technologies that will allow workers to communicate with each other and perhaps ultimately organize a collective bargaining unit that the employer might oppose. But this is not new for the architects of what Professor Charlotte Garden has called the “deregulatory First Amendment,” or, the effort to use the Constitution as a sword to strike down regulations similar to the efforts at the turn of the 20<sup>th</sup> Century under the due process clause, resulting in decisions such as *Lochner v. New York*.<sup>78</sup> Still, it seems very unlikely that requiring an employer to provide an app to its employees could be considered “speech,” unless the definition of what is speech is significantly expanded by a United States Supreme Court that now includes three appointees of President Trump.

### *I. The Impact of COVID-19 on the “Workplace”*

At this writing, the coronavirus global pandemic has claimed more than 500,000 lives in the United States alone and nearly 3 million worldwide.<sup>79</sup> From early 2020 through the summer, millions of workers refrained from going to their workplaces in order to prevent the spread of the COVID-19 disease. This radically remade the concept of the workplace as a physical space and dramatically increased the electronic workplace as a locus for the building of collective action, and also the possibility of electronic surveillance of the workplace.

It is difficult to appreciate the full scope of the changes that will be brought by the global pandemic at this point. Many aspects of the workplace will change irrevocably, while others will revert back to their pre-pandemic state over time.

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76. *Chamber of Commerce v. NLRB*, No. 12-1757 (4th Cir. 2013); *Nat’l Assoc. of Mfrs. v. NLRB*, No. 12-5068 (D.C. Cir. 2013).

77. See Amanda L. Ireland, *Notification of Employee Rights Under the National Labor Relations Act*, 13 *NEV. L. J.* 937, 955 (2013).

78. Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 *HARV. C.R.-C.L.* 323, 323 (2016).

79. Julie Bosman & Mitch Smith, *Is America’s Pandemic Waning or Raging? Yes.*, *N.Y. TIMES* (June 5, 2020), <https://www.nytimes.com/2020/06/01/us/coronavirus-united-states.html> [https://perma.cc/M7UT-725J].

## CONCLUSION

The #MeToo movement has had a positive impact on workplace sexual harassment claims. But all workplace claims are inhibited by structural problems. These problems include a lack of information about what other employees are experiencing in the workplace and a reticence to blow the whistle for fear of raising issues with management or suffering retaliation. The law can always improve protections from retaliation. But there are collective action problems that prevent workers from utilizing the law for their protection. Workers need the opportunity to share information and feel comfortable going to state regulators.

While not the entire solution, technology can help bridge the gap between the law's promise and reality. Anonymous hotlines and panic buttons represent a beginning in terms of employees enforcing the law, but they are isolated and individualized remedies. Technology can be used to share information widely, but it can also be coopted by the employer and threaten employees' privacy.

It is possible that some of these new technologies can exacerbate the digital divide. Without doubt, these reforms require legislators to prioritize expanded digital access, net neutrality, and free internet. In the end, we have to expect that technology will not be the salvation for all of the inequalities of the workplace. If more employees had access to unions, these technologies could be even more powerful, allowing unions to communicate directly to workers through the devices. In the meantime, they will work best through government agencies. It must be remembered that these technologies merely facilitate collective power; they cannot substitute for the courage and willingness of employees to assert their rights in the face of powerful incentives to stay silent.