Life in Hawtch-Hawtch:
Unfairness in Workplace Surveillance and Automated Management

Remarks of Commissioner Alvaro M. Bedoya
Federal Trade Commission

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Thank you, Terri, for your kind introduction. Thank you to the NYU Wagner Labor Initiative for hosting me and thank you all for coming. I also want to thank my staff, especially Danielle Estrada, Max Miller, Sophia Reiss, Brandon Liu, and Aaron Rieke for their help in preparing these remarks.

Disclaimers before I start: First, I speak for myself, not any other commissioner or our staff; these are my opinions. Second, I'll be discussing news stories and research reports that involve companies you're familiar with. I have not personally researched these allegations nor am I alleging these companies broke the law. I cite these reports, rather, to illustrate broader trends in our economy. With that out of the way, let's begin.
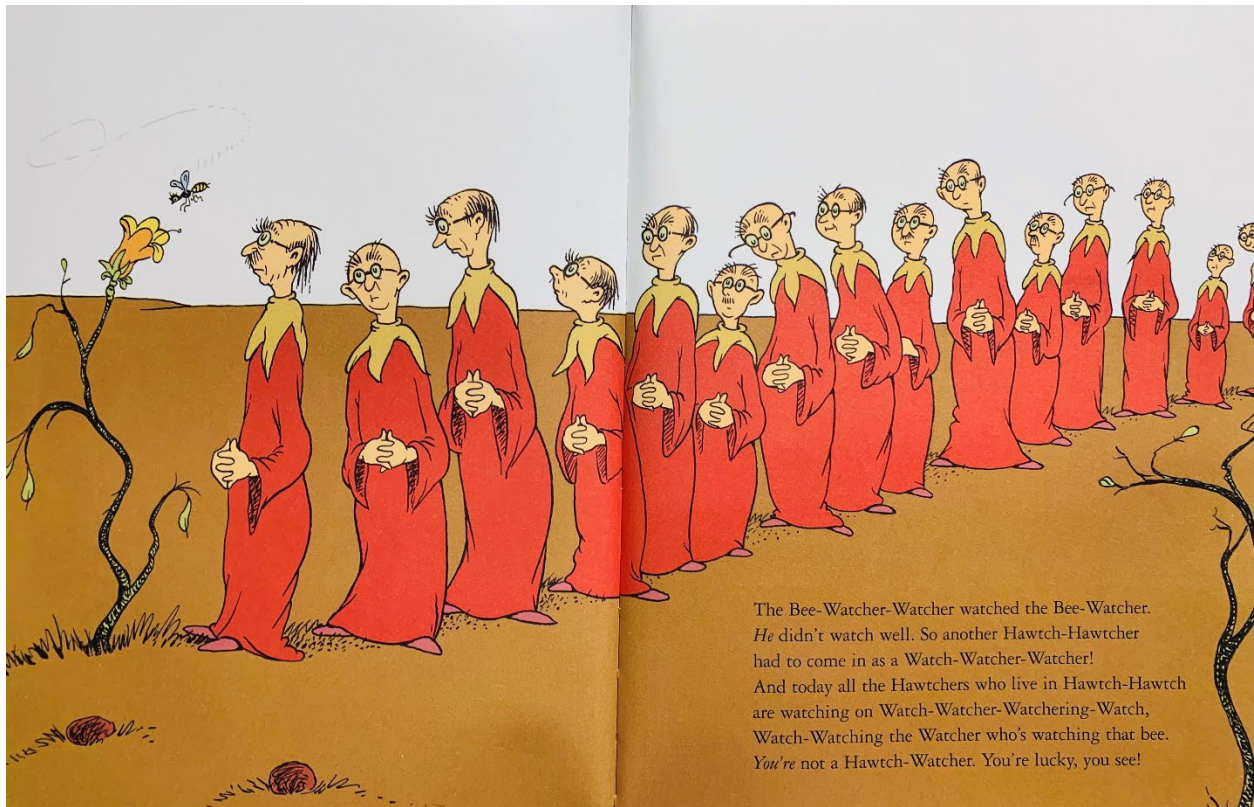
I.   Life in Hawtch-Hawtch

We tell ourselves a lot of stories about technology. Workplace technology is no exception. Neoclassical economists, for example, tell us that in general workplace technology makes workers more productive; it lets them do more with less. Why else would a business deploy it?[1] In this telling, more productive workers lead to more jobs, which lead to bigger paychecks. The moral of this story is that if you want shared prosperity, you want technology in the workplace.[2]

I look at workplace technology and think of a different story. Let me read it to you. It's a story about a town out west named Hawtch-Hawtch.

You see, the town of Hawtch-Hawtch made honey. But unfortunately the town bee was "lazy." So, the town hired a Hawtch-Hawtcher to work as a Bee-Watcher. "His job is to watch" – "to keep both his eyes on the lazy town bee. A bee that is watched will work harder, you see."

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[1] *See* BRISHEN ROGERS, DATA AND DEMOCRACY AT WORK: ADVANCED INFORMATION TECHNOLOGIES, LABOR LAW, AND THE NEW WORKING CLASS, at 15 (2023) (describing "neoclassical models of the labor market" which "presume that workplace technological change is productivity-enhancing—that is, it enables workers to produce more without increased effort—on the grounds that firms in competitive markets that do not maximize productivity will lose market share."). *See also* David H. Autor and David Dorn, *The Growth of Low-Skill Service Jobs and the Polarization of the US Labor Market*, 103 AM. EC. REV. 5 (Aug. 2013) at 1553 ("Technology in the canonical model is assumed to take a factor-augmenting form, meaning that it complements either high- or low-skill workers…").

[2] A critique of this theory is at the heart of Daron Acemoglu and Simon Johnson's recent book, *Power and Progress*. They refer to it as the "productivity bandwagon." *See* DARON ACEMOGLU & SIMON JOHNSON, POWER AND PROGRESS: OUR THOUSAND-YEAR STRUGGLE OVER TECHNOLOGY AND PROSPERITY at 14-19, 322 (2023).

The Bee-Watcher-Watcher watched the Bee-Watcher.
He didn't watch well. So another Hawtch-Hawtcher
had to come in as a Watch-Watcher-Watcher!
And today all the Hawtchers who live in Hawtch-Hawtch
are watching on Watch-Watcher-Watchering-Watch,
Watch-Watching the Watcher who's watching that bee.
You're not a Hawtch-Watcher. You're lucky, you see!

Excerpt from DR. SEUSS, DID I EVER TELL YOU HOW LUCKY YOU ARE? (1973)

Did it work? Well, "he watched and he watched. But, in spite of his watch, that bee didn't work any harder. Not mawtch."

"So then somebody said, 'Our old bee-watching man just isn't bee-watching as hard as he can. He ought to be watched by another Hawtch-Hawtcher! The thing that we need is a Bee-Watcher-Watcher!"

So… that Bee-Watcher-Watcher watched the original Bee-Watcher. But "[h]e didn't watch well" either. "So another Hawtch-Hawtcher had to come in as a Watch-Watcher-Watcher!"

And so "today all the Hawtchers who live in Hawtch-Hawtch are watching on Watch-Watcher-Watchering-Watch, Watch-Watching the Watcher who's watching that bee. You're not a Hawtch-Watcher. You're lucky, you see!"[3]

Now, if you're wondering what on Earth I'm talking about – bear with me for a moment and consider the experiences of the people who answer your phone calls to customer service.

The modern call center worker is also watched – they're videotaped. But they aren't just watched. Their calls are recorded. Their keystrokes are logged, their web browsing is tracked, their chats are saved. Screen grabs are taken of their computers. They are coached, in-real-time,

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[3] DR. SEUSS, DID I EVER TELL YOU HOW LUCKY YOU ARE (1973).

by AI assistants. And their voices are analyzed, in real-time, to ensure that they speak at the right pace, with the right words, and just the right amount of enthusiasm.[4]

And it's not like a call center uses just one of these surveillance technologies – they don't just go with that one Hawtcher. The average call center uses five forms of surveillance on its employees.[5]

The companies that sell these technologies to call centers say they can quantify empathy to a fraction of a percent.[6] They say their AI chatbots can tell operators what to say and when to say it.[7]

The workers say it is punitive and baffling. There was the chatbot that confidently told a seasoned operator his next caller wanted to buy a home repair plan, only for that operator to discover that the enraged caller had a repair plan, his house was flooding, and no one was there to repair it.[8] Another program set off an alarm for emotional distress any time a customer started laughing.[9] Still another AI kept on giving a worker low sentiment scores for her calls; she thought she wasn't using the right words with callers. But no one would tell her the words she needed to say.[10]

One worker said it was like having a "computer… standing over your shoulder and arbitrarily deciding whether you get to keep your job or not."[11] Another worker said "the stress has made me sick to my stomach and unable to get out of bed in the morning to do my job."[12] This kind of thing is common. In fact, a majority of call center workers are prescribed

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[4] A recent survey of call center workers identified not one, not two, but eight different ways in which their work is monitored. VIRGINIA DOELLGAST ET AL., AI IN CONTACT CENTERS: ARTIFICIAL INTELLIGENCE AND ALGORITHMIC MANAGEMENT IN FRONTLINE SERVICE WORKPLACES (2023) at 31 (cataloguing modes of tracking). *See ibid* at 2 (describing survey from December 2022 to January 2023). For an in-depth survey of different call center surveillance and managament technologies, *see generally* WOLFIE CHRISTL, SURVEILLANCE AND ALGORITHMIC CONTROL IN THE CALL CENTER (Mike Holohan eds., 2023).
[5] DOELLGAST ET AL., *supra* note 4, at 32.
[6] *See* Josh Dzieza, *How hard will the robots make us work? In warehouses, call centers, and other sectors, intelligent machines are managing humans, and they're making work more stressful, grueling, and dangerous,* THE VERGE (Feb. 27, 2020), https://www.theverge.com/2020/2/27/21155254/automation-robots-unemployment-jobs-vs-human-google-amazon.
[7] *Real Time Contact | Contact Center AI | Cogito,* COGITO CORP., https://cogitocorp.com/products/cogito-for-agents/.
[8] *See* Lisa Bannon, *AI in the Workplace is Already Here. The First Battleground? Call Centers,* THE WALL STREET JOURNAL (Feb. 18, 2023), https://www.wsj.com/articles/ai-chatgpt-chatbot-workplace-call-centers-5cd2142a ("She's supposed to make the job easier, not just make us do what she said," said Johnathan Bragg, the operator who relayed the account).
[9] *See* Dzieza, *supra* note 6.
[10] *See* Bannon, *supra* note 8, (describing the experience of Lise Hildebrand-Stern, who was reassured by a supervisor who heard her calls that she "was doing a really great job," but ultimately left the job after nine months because she was unable to improve her AI-generated sentiment evaluations).
[11] *See* Dzieza, *supra* note 6.
[12] *See* Communications Workers of America Comment Letter to White House, Office of Science and Technology Policy on Request for Information about Automated Worker Surveillance and Management (June 29, 2023), at 10 (The worker continued: "I've started taking FMLA time as a result of missing work days due to stress."); NELP & AFL-CIO, *Wheeling and Dealing Misfortune: How Santander's high pressure tactics hurt workers and auto loan customers*, (some workers "felt so powerless and worn down after their shift that they needed hours to decompress every day"); Dzieza, *supra* note 6 (discussing chronic anxiety and insomnia).

medication for a stress- or anxiety-related illness. One in four take this medication "constantly."[13]

Today, I want to talk with you about workplace surveillance and algorithmic management. First, I want to argue that certain uses of worker surveillance and algorithmic management may constitute what we at the Federal Trade Commission call "unfair trade practices."[14] I think that looking at workplace surveillance and algorithmic management through this lens may expand the range of law enforcers who can intervene to protect workers. It will also complement other relevant FTC authorities, including our authority to stop deceptive trade practices as well as our joint authority over the Fair Credit Reporting Act.[15]

But unfairness won't cover everything. And so my second goal today is to call for lawmakers to pass meaningful worker privacy laws to ensure that no one falls through those gaps.

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[13] *See* VIRGINIA DOELLGAST & SEAN O'BRADY, MAKING CALL CENTER JOBS BETTER: THE RELATIONSHIP BETWEEN MANAGEMENT PRACTICES AND WORKER STRESS, A REPORT FOR THE CWA, (JUNE 2020) at 1.2, 3.5 (showing results of a 2017 survey of over 2,000 call center workers in which 58% of respondents reported having been prescribed a medication for a stress or anxiety-related illness and 24% reported using such a medication "constantly"). The survey found that the respondents had worked at a call center the longest had the highest rate of prescriptions for stress medications. *See ibid* at 4.1. It also found that the people with highest stress were likely to be subject to more monitoring. *Ibid* at 4.4, ("We find that the total number of monitoring methods… positively associated with higher stress levels.").

[14] I'm not the first at the FTC to identify unfairness as a possible grounds for liability for certain deployments of workplace surveillance. The director of the FTC's Division of Privacy and Identity Protection, Ben Wiseman, made this argument earlier this year in a lecture for the Harvard Journal of Law and Technology. *See* Benjamin Wiseman, Remarks of Benjamin Wiseman at the Harvard Journal of Law & Technology on Worker Surveillance and AI (Feb. 8, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Jolt-2-8-24-final.pdf at 6 ("After all, a consumer's right to be protected from privacy harms and other injuries doesn't evaporate the minute they enter a factory or log into their computer. Companies that mislead workers about worker surveillance technologies, that fail to be transparent with workers about their collection of personal information, or that deploy technologies in ways that harm workers without corresponding benefits may face liability under the FTC Act.").

[15] This lecture will not address these other authorities. For more information on how they may apply to workplace surveillance and algorithmic management, *see* Wiseman, *supra* note 14, (discussing deception); Fed. Trade Comm'n, FTC Policy Statement on Enforcement Related to Gig Work, https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf (discussing a range of consumer protection and competition authorities); *CFPB Takes Action to Curb Unchecked Worker Surveillance: Booming 'black box' scores subject to federal standards, including accuracy and dispute rights*, CFPB (Oct. 24, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-curb-unchecked-worker-surveillance/ (discussing FCRA). The Commission regulates earnings claims made to gig workers through the FTC Act just as it would in any other business or money-making opportunity. *See, e.g.*, Decision and Order, Amazon.com, FTC Docket. No. C-4746 (Feb. 2, 2021) (FTC recovering $61.7 million in unpaid tips to Amazon Flex drivers, regardless of the drivers' employment classification), https://www.ftc.gov/news-events/news/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some-customer-tips-amazon-flex-drivers; The Commission has also proposed a rule addressing these claims. *See* Advance Notice of Proposed Rulemaking: Deceptive or Unfair Earnings Claims, Fed. Trade Comm'n, 87 Fed. Reg. 13,951, 13,953 & n.26 (Mar. 11, 2022).

II. Workplace surveillance and algorithmic management may constitute unfair trade practices

Our authority to stop unfair trade practices is set out in our authorizing statute, the Federal Trade Commission Act. There, Congress defined an unfair trade practice as an "act or practice that (1) causes or is likely to cause substantial injury to consumers which (2) is not reasonably avoidable by consumers themselves and (3) is not outweighed by countervailing benefits to consumers or competition."[16]

If you think about it, each step in that three-part test could be said to be the flip side of some assumptions we often make about workplace technology.

Some people assume that workplace surveillance and automated management will make workers more productive; it will help them. What if it hurts them? What if it causes them "substantial injury"?

Some claim that this technology will give workers more control over their work and work-life balance. What if it strips them of control? What if it makes it impossible to avoid those injuries?

We all tend to assume that this technology works. What if it doesn't? What if the advertised benefits of this technology are unvalidated? What if they are outweighed by the harm they cause working people?

So let's go through the steps in the unfairness test and compare them to workplace surveillance and automated management techniques we see in the market. And let's not look at start-ups. Let's look at three established industries that employ millions of Americans right now, today:[17] let's talk about warehouse workers; let's talk about rideshare drivers; and then, let's return to the call center.

A. Substantial injury

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[16] 15 U.S.C. §45(n). Congress also clarified that, in determining whether an act or practice is unfair, we may "consider established public policies as evidence to be considered with all other evidence." *Ibid.*

[17] Somewhere between 1.5 and 2 million Americans drive for Uber and Lyft. *See* Harry Campbell, *How Many Uber Drivers are There in 2024?* The Rideshare Guy (Mar. 17, 2023), https://therideshareguy.com/how-many-uber-drivers-are-there/#:~:text=How%20many%20Uber%20and%20Lyft,drivers%20drive%20for%20both%20companies (estimating a total of 1.5 to 2 million drivers for Uber and Lyft in the United States.) Mary Dorinda Allard & Kennedy Keller, *Keeping America Moving: Employment in transportation and warehousing industries,* U.S. Bureau of Labor Statis., (July 2024), https://www.bls.gov/spotlight/2024/keeping-america-moving-employment-in-transportation-and-warehousing-industries/#:~:text=In%20June%202024%2C%20the%20transportation,of%20all%20private%2Dsector%20jobs ("In June 2024, the transportation and warehousing industry had an employment level of 6.6 million"); Raphael Bohne, *Number of contact center employees in the United States from 2014 to 2023*, Statista (May 23,2024) https://www.statista.com/topics/2169/call-center-services-industry-in-the-us/#topicOverview ("In 2023, there were roughly 2.86 million people working in contact centers, a decrease when compared to the previous year" at 2.88 million.).

Let's start with substantial injury. In the United States, the idea that workplace innovation will help worker and employer alike runs back to one person: Frederick Winslow Taylor. Taylor was no tribune for the American worker; I can't call myself an admirer.[18] But pay attention to how the paragon of workplace productivity talked about productivity.

As many of you know, Taylor urged employers to minimize the distance a product travels before completion, and to carefully measure the movements of workers to figure out which maneuvers would cause the least strain.

By doing all of this, Taylor wanted to lower the amount of effort required of workers while increasing their output.[19] In contrast, Taylor expressly rejected employers "whose attitude toward their workmen has been that of trying to get the largest amount of work for the smallest possible wages."[20]

Yet modern workers talk about those kinds of systems all the time.[21] Some of the most frequent allegations about pace of work come from warehouse workers. The journalist Josh Dzieza wrote an essay that profiled a man who worked fulfilling shoppers' orders at a warehouse in Florida. The journalist called him "Jake."

Jake's job, itself, was simple: He picked products up from a conveyor belt, hit a button, put the product in its assigned cubby, and hit another button. Everything else about the job was hard: Jake was basically twisting and lunging every 10 seconds for the entire day. His pace was automatically tracked and compared to his coworkers'; the fastest would be put on a digital leaderboard.

Supervisors would walk the warehouse, looking at those numbers, and telling people to go faster when their rate went down. If you slowed too much, you got fired – allegedly automatically. [22]

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[18] Taylor demeaned workers as "stupid," "mentally sluggish" loafers, and sometimes compared them to cattle. *See, e.g.*, FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1911) at 5 ("For every individual… who is overworked, there are a hundred who intentionally underwork – greatly underwork – every day of their lives"); at 21 (calling a worker "mentally sluggish"); at 30-31 (calling a worker "so stupid," "too stupid," and comparing him to "the ox").

[19] *See generally id.* Indeed, the first pages of his famous pamphlet proclaim that employer and employee will share in prosperity "*only*" when work is done with the *smallest* combined expenditure" of capital, raw materials, and "*human effort.*" *See id.* at 1-2. Indeed, Taylor touted as one of his success stories a team of ball-bearing inspectors whose workday he was able to shorten by two hours – with their pay remaining the same. He also implemented a system of giving the inspectors a 10 minute break for every 75 minutes of work. *See id.* at 44-45.

[20] *See id.* at 1.

[21] Call center workers are often subject to automated scheduling software that automatically assigns them calls 10 minutes after the end of their shift. *See* Comment Letter to OSTP, *supra* note 12, at 6. Software engineers working from home have reported being subject to programs that photograph their workspaces at random and dock their pay whenever they're not at their desk – forcing some to work extra hours to make up for that unpaid time. *See* Dzieza *supra* note 6. In meat processing plants across the South, line speeds have doubled in the last 35 years. *See* OXFAM AMERICA, LIVES ON THE LINE: THE HUMAN COST OF CHEAP CHICKEN, OXFAM RESEARCH REPORT (2015), https://s3.amazonaws.com/oxfam-us/www/static/media/files/Lives_on_the_Line_Full_Report_Final.pdf at 4.

[22] *See* Dzieza, *supra* note 6; Colin Lecher, *How Amazon automatically tracks and fires warehouse workers for 'productivity': Documents show how the company tracks and terminates workers,* The Verge, (Apr. 25, 2019) https://www.theverge.com/2019/4/25/18516004/amazon-warehouse-fulfillment-centers-productivity-firing-

"You're not stopping," Jake said. "You are literally not stopping. It's like leaving your house and just running and not stopping for anything for 10 straight hours, just running," he said.[23] Eventually, Jake damaged two discs and went on disability. He claimed that the company was found to be "100%" responsible for his injury.[24]

It wasn't just Jake who said that the pace of their jobs hurt them. In 2021 and again 2022, the Occupational Safety and Health Administration found a "direct connection" between this company's "employee monitoring and discipline systems" and the musculoskeletal injuries and disorders experienced by its workers in two of its other warehouses.[25] Some warehouses have vending machines that are stocked not with soda or chips, but painkillers.[26]

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terminations, (publishing company documents stating that its software "automatically generates warnings or terminations regarding quality or productivity without input from supervisors.") The company clarified that supervisors can override that process. *Ibid*. *See also* Dzieza, *supra* note 6. ("These automated systems can detect inefficiencies that a human manager never would — a moment's downtime between calls, a habit of lingering at the coffee machine after finishing a task, a new route that, if all goes perfectly, could get a few more packages delivered in a day. But for workers, what look like inefficiencies to an algorithm were their last reserves of respite and autonomy, and as these little breaks and minor freedoms get optimized out, their jobs are becoming more intense, stressful, and dangerous.").

[23] *See* Dzieza, *supra* note 6. *See also* Seeta Pena, Gangadharan, et. al., *Tracked and Targeted: A Word About Our Participatory Methodology*, Our Data Bodies (2023), https://www.odbproject.org/wp-content/uploads/2024/01/Tracked-and-Targeted.pdf at 18 ("I'm on a mega shift for ten hours and I have to meet a certain standard and I start forgetting who I am and what I need to do to take care of myself.") Note that this report used real testimonials from actual employees to create pseudonymous "composites" of those workers. *Ibid* at 13. *See also* Dzieza, *supra* note 6 (quoting a warehouse worker in Minnesota: "The concept of a 40-hour work week was you work eight hours, you sleep eight hours, and you have eight hours for whatever you want to do. […] But [what] if you come home from work and you just go straight to sleep and you sleep for 16 hours, or the day after your work week, the whole day you feel hungover, you can't focus on things, you just feel like shit, you lose time outside of work because of the aftereffects of work and the stressful, strenuous conditions?").

[24] *See* Dzieza, *supra* note 6.

[25] *See* Citation and Notice of Assessment of Amazon's Dupont Warehouse, Wash. State Dep't of Labor & Industries, Division of Occupational Safety and Health (May 4, 2021) at "Violation 1 Item 1"; Citation and Notice of Assessment of Amazon's Kent Warehouse, Wash. State Dep't of Labor & Industries, Division of Occupational Safety and Health, (Mar. 21, 2022) at "Violation 1 Item 1k". Some observers believe that "this is the first time in the 50-year history of the OSHA that an OSHA agency has determined that a company's pace of work, on its own, is so high that it constitutes a separate violation of the OSHA Act..." *The Injury Machine: How Amazon's Production System Hurts Workers*, Strategic Organizing Center, (Apr. 20, 2022) https://thesoc.org/wp-content/uploads/sites/342/The-Injury-Machine_How-Amazons-Production-System-Hurts-Workers-1.pdf at 10. A recent survey of 1,300 American workers found that workers who experienced more frequent monitoring more much more likely to report working "faster than is healthy or safe," and to report an injury on the job in the past year. The injuries reported by workers experiencing the most intensive surveillance were more likely to require medical attention. Alexander Hertel-Fernandez, *Estimating the prevalence of automated management and surveillance technologies at work and their impact on workers' well-being: Evidence from a new national survey and implications for U.S. federal policy*, Washington Center for Equitable Growth (Oct. 1, 2024), https://equitablegrowth.org/wp-content/uploads/2024/10/workplace-surveillance-report50.pdf at 15-16. A similar relationship existed for automated task management. These relationships were robust across work and demographic characteristics, "providing evidence suggestive" of a causal relationship. *Ibid* at 17.

[26] *See* Rogers, *supra* note 1, at 59 (describing vending machines off of warehouse floors offering Advil). In a recent Ofxam survey of this company's workers, large majorities reported feeling some kind of back pain, neck pain, arm pain, and foot pain. That is, for each kind of pain, a majority of workers reported experiencing it. OXFAM AMERICA, *supra* note 21, at 22 (showing 77%, 68%, 68%, and 79% of warehouse workers reporting back pain, neck pain, arm pain, or foot pain, respectively).

So we cannot assume that workplace surveillance and automated management increase productivity. We cannot assume they help workers. Because in some of the most sophisticated companies in the world, many of those systems seem to simply increase effort, they simply "get the largest amount of work for the smallest possible wages."[27] And they may increase that effort to the point where is substantially injures people.[28]

B. Reasonable avoidability

Substantial injury is the first requirement in an unfairness action. The second is that the conduct cannot be reasonably avoidable by the consumer. For this requirement, let's talk about the experiences of rideshare drivers.

Last month I sat down with some of those drivers here in New York, at a roundtable organized by the New York Taxi Workers Alliance; we met up at Fordham Law School. Reporters at *Bloomberg* interviewed many of those same drivers for a feature story that ran a few days later.[29]

The first speaker was a man named Mohamed Mohamed. He had started to drive for the apps in 2016, after he saw a collapse of the taxi industry. Like a lot of drivers, he had been attracted by this idea that the job would be flexible, and that he would be in control of his work.[30] He told me that he liked that the companies called him a "partner." "You're a partner for us," they told him. And he was a good partner. Over nine years, Mr. Mohamed logged 21,000 rides and maintained a 100% acceptance rate and a five-star rating.

But over the past few months, that control and flexibility had evaporated. Because when those drivers got up in the morning to drive, the apps informed them that they could not go online. Other times, they'd start the day, get a few fares – and then be kicked off the app the second they stopped for breakfast or a bathroom break.

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[27] *See* Rogers, *supra* note 1, at 73 ("…because it is difficult to generate breakthrough productivity gains in service occupations, and because so many sectors in the US are dominated by a low-wage, low-productivity model, companies frequently maintain profitability by squeezing ever-greater effort from workers."). *See also* ACEMOGLU & JOHNSON, *supra* note 2, at 19 ("Better monitoring of workers may lead to some small improvements in productivity, but its main function is to extract more effort from workers and sometimes also reduce their pay[.]"); *ibid* at 323 ("Monitoring enables employers to cut wages and get more work out of the workers. In this way, monitoring is a "rent- shifting activity," meaning that it can be used to prevent sharing of productivity gains and to shift rents away from workers, without improving their productivity much or at all.").

[28] *See* OXFAM AMERICA, *supra* note 21, at 20 ("…I don't know if you've ever watched [Squid Game]… it is a degrading job [with] this constant surveillance. […] If you take our facility alone, since the facility opened, every three days, first responders are called to that facility. And when I say that it's like [Squid Game], you see co-workers, you see friends, some workers have relatives, you see relatives who pass out, who are taken out of their facility on the stretcher.").

[29] *See generally* Natalie Lung, et al., *How Uber and Lyft Used a Loophole to Deny NYC Drivers Millions in Pay: The city's unique pay formula created a perverse incentive for Uber and Lyft to prevent drivers from logging on, even during periods of high demand,* BLOOMBERG (Oct. 10, 2024), https://www.bloomberg.com/graphics/2024-uber-lyft-nyc-drivers-pay-lockouts/?utm_source=website&utm_medium=share&utm_campaign=copy.

[30] Mr. Mohamed told *Bloomberg* he thought the apps would allow drivers to "set ourselves on a certain schedule and try to take the opportunity of Uber's flexibility." *Id.* Another driver, Kilifu Kadri, told *Bloomberg* that the apps would let him drop his son off at school, and pick him up, to "drive when you want to work and make money when you want to work." "It gave you freedom," he said. *See id.*

Bloomberg tracked Mr. Mohamed for one day to see what it was like. He got up at five, got dressed, opened the apps, and found out that he was locked out of both them. He got on the road around 6:30am; one of the apps had told him to go to a busier area. Suddenly at 7:37am, the app unlocked him, and he was able to get a fare in Brooklyn. Ten minutes later, the app locked him out again. Seven minutes after that, he was unlocked – again, without explanation. He took a passenger into Manhattan – and then got locked out yet again. This time the app told him he wouldn't be unlocked until 5pm – but then it unlocked him at 10:49am.

That day, alone, Mr. Mohamed couldn't get fares for three of the five hours he was on the road. "It's luck," he said. "I don't know how it works."[31]

Mr. Mohamed now has to do 12-hour shifts to earn the same amount he used to earn before. He now has $2,000 in credit card debt.[32] Other drivers incurred far more; many of them had invested tens of thousands of dollars to buy new cars that they now couldn't pay off. One driver couldn't afford to visit his wife in another state when she gave birth; another driver is so afraid of getting locked out that he will not stop for food or rest or bathroom when he is getting fares, staying on the road as long as 13 hours at a time. [33]

But this feeling of a total lack of control isn't limited to New York City rideshare drivers. Last year, Professor Veena Dubal published findings from eight years of research into the working conditions of rideshare drivers in the San Francisco Bay Area.[34]

The drivers she talked to had no idea how the apps set their pay. Some drivers reported being paid different fares for what's effectively the same drive; others reported that they would make more money per hour when they drove for less time.[35]

They talked about the apps' "casino mechanics," and how riding for the apps was like "gambling," because you never knew what you'd get – but "the house always wins."[36] One driver named Carlos told Professor Dubal: "I am not asking for a revolution. I am asking for fairness. I am asking to make enough to live. To know how much I am going to make from one day to the next. To have some predictability."[37]

Predictability – that is what gig economy companies have promised many Americans. We cannot assume they get it. Because in many instances, the automated management systems that power those platforms appear to make it impossible for working people to predict or avoid the injuries that may come with their jobs.

I think it's reasonable to ask: If an app isn't treating you right, why don't you go to another one? Well, I suspect these workers would say, *It's not one app; it's both. And the taxi*

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[31] *See id.*
[32] *See id.*
[33] *Id.*
[34] *See generally* Veena A. Dubal, *On Algorithmic Wage Discrimination*, 123 COLUM. L. REV. 1929, 1961–1975 (2023) at 1961-1975.
[35] *Id.* at 1970.
[36] *Id.* at 1975-1976.
[37] *Id.* at 1970.

industry is a shadow of what it used to be because of the ridesharing industry. I think they would say that there's no avoiding it, outside of simply changing jobs.

C. Countervailing benefits

Reasonable avoidability is the second requirement in an unfairness action. The third requirement commanded by Congress is that the alleged injury suffered not be outweighed "by countervailing benefits to consumers or competition."

We've been talking about assumptions we make about workplace technology. I think our most basic assumption is that technology works.

Does it work? Let's return to the technology used at customer service centers – specifically, to the Speech Emotion Recognition (SER) technology that tries to analyze the "sentiment" of a call.

The *New York Times* recently profiled a call center worker named Ylonda Sherrod.[38] She had a tough childhood; she lost her mom at age five and her family depended on public benefits to get by. Ms. Sherrod's call center job helped her escape a life working manual, low-paying jobs in fast food and cleaning rooms at a nearby casino.

She loved the job. And she was good at it. Really good at it. Two years in a row, she was in the top 3% of the company's call representatives.

Then, the company started using AI to analyze and evaluate its employees' calls.

Speech Emotion Recognition (SER) technology tracks the words used by customer service representatives, as well as their tone and volume.[39] So, to achieve that, to "recognize" emotions, it is critically important that the technology understand exactly what call center workers are saying.

Ms. Sherrod is from Pascagoula, Mississippi, on the Gulf Coast. I recently met with some shrimpers down in Biloxi, which is just west of Pascagoula. And if you've been there, you know that people from that part of the country use a different tone and cadence when they speak than we do here in New York, or Washington, for that matter.

Ms. Sherrod started noticing that the transcripts for *her* calls were full of errors. The software had trouble with her accent. She also learned that soon, she would not be able to correct those call transcripts. She worried that these kinds of errors could cost her her job.

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[38] *See* Emma Goldberg, *'Training My Replacement': Inside a Call Center Worker's Battle with A.I.*, N.Y. TIMES (Jul. 19, 2023).

[39] For an overview of this technology, *see* CHRISTL, *supra* note 4, at 37–39.

There are many more of these anecdotes.[40] The *Wall Street Journal* interviewed a call center agent with a Filipino accent. She had been recognized as a top performer for four years in a row. Then automated emotion recognition came in, and her scores were too low, and she soon left the company – even though her boss continued to tell her that she was doing a good job.[41]

But it is more than anecdotes. Scientific literature suggests that this technology may perform differently depending on the speakers' gender, age, disability, and regional origin.[42]

Speech Emotion Recognition is not some niche technology of the future. Half of all call center workers report that the emotion in their voices is monitored. For one in four, it is monitored "constantly."[43]

Workplace surveillance and automated management technology may be marketed as sophisticated; it may be deployed by tech-savvy companies on thousands of workers. But we cannot assume the benefits of these technologies. We cannot assume they work as advertised. We cannot assume they work, period. Because some of this technology will indeed help workers.[44] But a lot of it is a one-way ticket to Hawtch-Hawtch.

It is more than plausible that some of these technologies may substantially injure people, in a way they cannot reasonably avoid, such that the harms of these technologies are not

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[40] *See* NELP & AFL-CIO, *supra* note 12, (describing how software used by one company was unable to recognize the speech patterns of a worker with "a minor lisp"); Letter from Rep. Gallego et. al. to Scott Powell, CEO of Santander (Nov. 15, 2017), https://rubengallego.house.gov/media-center/press-releases/32-democrats-hold-santander-accountable-potentially-discriminatory (letter from 32 members of Congress asking the company about what precautions it took to ensure that its software "does not have a discriminatory impact on your workforce"). *See also* CWA Comment Letter to OSTP, *supra* note 12, (quoting a worker of Black and German ancestry who reports that her direct manner on the phone is "not good enough" for the company's emotion analysis software).

[41] Bannon, *supra* note 8.

[42] *See, e.g.*, ISAAC SLAUGHTER ET AL., PRE-TRAINED SPEECH PROCESSING MODELS CONTAIN HUMAN-LIKE BIASES THAT PROPOGATE TO SPEECH EMOTION RECOGNITION (2023), https://aclanthology.org/2023.findings-emnlp.602/ at 8967 ("We find that 14 or more models reveal positive valence (pleasantness) associations with abled people over disabled people, with European-Americans over African-Americans, with females over males, with U.S. accented speakers over non-U.S. accented speakers, and with younger people over older people."); YI-CHENG LIN ET AL., EMO-BIAS: A LARGE SCALE EVALUATION OF SOCIAL BIAS ON SPEECH EMOTION (2024), https://arxiv.org/pdf/2406.05065#:~:text=Speech%20emotion%20recognition%20(SER)%20aims,to%20po-%20tential%20social%20harm at 1 (finding that "females exhibit slightly higher overall SER performance than males" and that "models trained with Mandarin datasets display a pronounced bias toward valence"); CRISTINA GORROSTEITA ET AL., GENDER DE-BIASING IN SPEECH EMOTION RECOGNITION (2019), https://www.isca-archive.org/interspeech_2019/gorrostieta19_interspeech.pdf at 2823 ("emotional activation model accuracy is consistently lower for female compared to male audio samples"). *See also* Joshua L. Martin & Kelly Elizabeth Wright, *Bias in Automatic Speech Recognition: The case of African American Language*, 44 APPL. LINGUIST. 613, 613 (2023) https://academic.oup.com/applij/article/44/4/613/6901317 at 613 ("studies have found that widely-used [automated speech recognition] systems function much more poorly on the speech of Black people").

[43] DOELLGAST ET AL., *supra* note 4, at 32.

[44] DOELLGAST ET AL., *supra* note 4, at 23 (showing small percentages of respondents describing workplace monitoring technologies as making their work more fair (9%), faster (11%), easier (8%), or more interesting (8%), with far larger percentages disagreeing with those sentiments (53%, 57%, 59%, and 58%, respectively)). *But see* Bannon, *supra* note 8, (profiling a call center worker, Chasity Miller, who "thinks her AI sentiment scores are more scientific and less prone to inconsistencies and human error because they are based on all her interactions, not just the one or two a week that were previously graded by a human manager").

outweighed by countervailing benefits to consumers or competition. In other words, it's more than plausible that they may constitute unfair trade practices.[45]

All 50 states have a similar prohibition against unfair trade practices on their lawbooks.[46] Those laws are not identical to the FTC Act. But I suspect that thinking of workplace surveillance and automated management through the lens of unfairness will expand the number of law enforcers who can protect working people.

That said, we need to recognize that these cases will take time. We also need to recognize that when these cases come up, companies will cite the "countervailing benefits" prong and point to the financial benefits of these practices. [47] That process will take time, also.

III.   The need for workplace privacy law

Candidly, I'm not sure we have a lot of time – because this technology is already pervasive. Two in three Americans report some kind of electronic monitoring on the job, and two in five already have schedules or tasks assigned by an automated system.[48]

That's why I think that if we're going to address the harms raised by workplace surveillance and automated management, we need to pair the use of our unfairness authority with

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[45] The Commission recently filed and settled an unfairness action against Rite-Aid for using a *face* recognition system to spot suspected shoplifters when they walked into their store. Staff alleged that the software misfired over and over again, particularly when it was used on certain racial minorities and women. One 11-year-old girl was stopped, searched, and accused of shoplifting—even though she had done nothing wrong. Complaint for Permanent Injunction and Other Relief, *Fed. Trad Comm'n v. Rite Aid Corp.* (E.D. Pa. Dec. 19, 2023); Statement of Comm'r Alvaro M. Bedoya on *FTC v. Rite Aid Corporation & Rite Aid Headquarters Corporation* (Dec. 19, 2023).

[46] Ala. Code § 8-19-1 to -15; Alaska Stat. §§ 45.50.471–.561; Ariz. Rev. Stat. Ann. §§ 44-1521 to -1534; Ark. Code Ann. §§ 4-88-101 to -207; Cal. Bus. & Prof. Code §§ 17200–17594 (West); Cal. Civ. Code §§ 1750–1785; Colo. Rev. Stat. §§6-1-101 to -115; Conn. Gen. Stat. §§42-110a to -110q; D.C. Code §§28-3901 to -3913; Del. Code Ann. tit. 6, §§2511–2627; Del. Code Ann. tit. 6, §§2580–2584; Fla. Stat. §§501.201–.213; Ga. Code Ann. §§10-1-390 to -407; Haw. Rev. Stat. §§ 480-1 to -24; Idaho Code Ann. §§48-601 to -619; 815 Ill. Comp. Stat. 505/1 to 505/12; Ind. Code §§24-5-0.5-1 to -12; Iowa Code §§714.16–.16A; Kan. Stat. Ann. §§50-623 to -640: Kan. Stat. Ann. §§50-675(a) to -679(a); Ky. Rev. Stat. Ann. §§367.110–.990 (West); La. Rev. Stat. Ann. §§51:401–:1420; Me. Rev. Stat. Ann. tit. 5, §§ 205A–214; Md. Code Ann., Com. Law §§13-101 to -501 (West); Mass. Gen. Laws Ann. ch. 93A, §§1–11; Mich. Comp. Laws §§ 445.901–.922; Minn. Stat. §8.31; Minn. Stat. §325F.67–.70; Miss. Code Ann. §§ 75-24-1 to -27; Mo. Rev. Stat. §§ 407.010–.307; Mont. Code Ann. §§30-14-101 to -142; Neb. Rev. Stat. §§59-1601 to -1623; Nev. Rev. Stat. §§598.0903–.0999; Nev. Rev. Stat. §41.600; N.H. Rev. Stat. Ann. §§358-A:1–:13; N.J. Stat. Ann. §§56:8-1 to -91 (West); N.M. Stat. §§ 57-12-1 to -22; N.Y. Exec. Law §63(12) (McKinney); N.Y. Gen. Bus. Law §§ 349–350 (McKinney): N.C. Gen. Stat §§ 75-1.1 to -35; N.D. Cent. Code §§51-15-01 to -11; Ohio Rev. Code Ann. §§ 1345.01–.13 (West); Okla. Stat. tit 5, §§751–763; Or. Rev. Stat. §§646.605–.656; 73 Pa. Stat. Ann. §§201-1 to -9.3 (West); R.I. Gen. Laws §§6-13.1-1 to -27; S.C. Code Ann. §§ 39-5-10 to -160; S.D. Codified Laws §§ 37-24-1 to -35; Tenn. Code Ann. §§47-18-101 to -125; Tex. Bus. & Com. Code Ann. §§17.41–.63 (Vernon); Utah Code Ann. §§13-11-1 to -23; Vt. Stat. Ann. tit. 9, §§ 2451–2480g; Va. Code Ann. §§59.1-196 to -207; Wash. Rev. Code §§19.86.010–.920; W. Va. Code §§ 46A-6-101 to -110; Wis. Stat. §100.18; Wis. Stat. §§100.20–.264; Wyo. Stat. Ann. §§ 40-12-101 to -114.

[47] Ten major call centers who used a prominent emotion analysis software reported 13% increases in customer satisfaction, and a substantial decrease in call times. *See* Alejandro De La Garza, *This AI Software Is 'Coaching' Customer Service Workers. Soon It could be Bossing You Around, Too,* TIME, July 8, 2019, https://time.com/5610094/cogito-ai-artificial-intelligence/. *See also* Bannon, *supra* note 8, ("From management, [the AI chatbot] Charlie is getting rave reviews for her efficiency and is about to get a promotion.").

[48] Hertel-Fernandez, *supra* note 25 at 9-10.

the passage of meaningful workplace privacy laws. I call on Congress and the states to do so today.

To underscore the need for these kinds of laws, I'll share one last story about something that I do think is a technology of the future.

Well, around twenty years ago, actor and martial artist Jet Li was approached about starring in one of the sequels to *The Matrix*. It was a dream job; it was a sure to be a hit. But there was a catch; if Mr. Li took the job, he would have to agree to have all of his moves scanned and saved into a digital library.

Mr. Li said no. "I've been training my entire life," he said. "And we martial artists could only grow older. Yet they could own [my moves] as intellectual property forever."

His account is jarring. But what jumps out at me is that he was told the job would involve body scanning, he was told who would scan him, and who would own the data – and he was given the option to accept or decline.[49]

A few months ago I heard an NPR interview with a modern motion actor named Jasiri Booker. He is one of the movement actors used to create the Spider-Man for the video game adaptation of the Marvel movie franchise. Mr. Booker's job was to spend hours and hours on set in a full bodysuit covered in bright reflective sensors, performing parkour, capoeira, or break dancing.

And even though he was doing precisely what Jet Li was asked to do, Mr. Booker had no idea what was happening to his data. Mr. Booker, who was on strike at the time, told NPR that "[o]ur ask is not that they don't use AI altogether. We're saying, at the very least, please inform us and allow us to consent to the performances that you are generating with our AI doubles."[50]

It's not just motion actors. Social media around the time of the actors' strike was full of stories of background actors who were tapped on the shoulder and told to submit to full-body scans – often with no notice, no contracts, no extra pay, and next to no information about how that data would be used in the future.[51]

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[49] *See* Alvaro M. Bedoya, *Opinion: Your body, your work? Hollywood is scanning actor's moves. What that could mean for the rest of us*, L.A. TIMES, (Sept. 4. 2023), https://www.latimes.com/opinion/story/2023-09-04/writers-strike-artificial-intelligence-actors-body-scans-chatgpt-jet-li.

[50] Mandalit del Barco, *Video game performers want protections from artificial intelligence,* NATIONAL PUBLIC RADIO, (Aug. 28, 2024), https://www.kunc.org/2024-08-28/video-game-performers-want-protections-from-artificial-intelligence.

[51] Justine Bateman (@JustineBateman), X (Aug. 16, 2023, 2:04PM), https://x.com/justinebateman/status/1691873571319201812?s=46.

And it isn't just actors. Some of the algorithms used in call centers were trained on the voices of current call center workers.[52] "Am I training my replacement?" Ms. Sherrod asked The *New York Times*.[53]

Technology is replacing workers through automation. It already *regulates* them. In the future, it will *replicate* them. And the question of whether a worker should be scanned and replicated should not come down to a three-part legal test. Workers need strong, bright line protections against this conduct – and they need them soon.

Right now, there are two roads to get those kinds of protections. The first is collective bargaining. The Screen Actors Guild won strong protections to ensure that digital replicas would not be made of actors without their knowing about it, agreeing to it, and being paid for it.[54] The Communications Workers of America have made sure that emotion analysis software can't be used to punish or discipline their workers.[55]

The second path is through the passage of a workplace privacy law.

If your bank or your hospital or your email provider goes out and sells your records to the highest bidder, law enforcement does not need to listen to arguments about how much money those companies made when they sold your data. All that law enforcement needs to show is that those companies broke privacy laws.[56] This legislation could be developed arm-in-arm with representatives from organized labor, to ensure it is responsive to workers who actually experience this tracking. And it should include protections not just on data collection and sharing, but also algorithmic management.

Some people may think it's absurd to talk about Hawtch-Hawtch. I think it's absurd that almost no privacy laws protect the workplace.[57]

How can I be that when I sit at home and buy something with my credit card, turn on cable, or watch a show online, privacy laws may govern that data; but when I go to *work*, seemingly anything goes? How can it be that people show up at work with no idea who will scan them and measure them and analyze them, with no control over those processes and no idea of that data will be used?

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[52] *See* Dzieza, *supra* note 6 ("A Voci spokesperson said the company trained its machine learning program on thousands of hours of audio that crowdsourced workers labeled as demonstrating positive or negative emotions."); VIRGINIA DOELLGAST, INES WAGNER, SEAN O'BRADY, NEGOTIATING LIMITS ON ALGORITHMIC MANAGEMENT IN DIGITALISED SERVICES: CASES FROM GERMANY AND NORWAY, TRANSFER: EUROPEAN REVIEW OF LABOUR AND RESEARCH (2023) at 112 (describing a call center where all calls are recorded to "train chatbots").
[53] *See* Goldberg, *supra* note 38.
[54] *TV/Theatrical 2023: Regulating Artificial Intelligence*, SAG-AFTRA, https://www.sagaftra.org/sites/default/files/sa_documents/AI%20TVTH.pdf.
[55] *See* CWA Issue Brief: Protections Against Abusive Monitoring, https://cwa-union.org/sites/default/files/protections-against-abusive-monitoring_cwa-issue-brief.pdf.
[56]*See, e.g.*, Stored Communications Act, 18 U.S.C. § 2701, 2702 (2024); HIPAA Privacy Rule, 42 U.S.C. § 1320d *et al* and 45 C.F.R. Parts 160 and 164, 45 C.F.R. § 164.502(a); Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809, §§ 6821-6827.
[57] *See* Rogers, *supra* note 1, at 52 "there are in reality few legal restrictions on employers' rights to monitor employees while they are performing work tasks." *But see* Cal. Civ. Code § 1798.100 –.199.100; 15 U.S.C. § 1681.

That is what's absurd. And I think it's high time we fix it.

Thank you for your time.