Taking Business Law Back from the Economists: Building Worker Power Through Antitrust Reform

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- Hiba Hafiz, *Labor's Antitrust Paradox*, 87 **U. Chi. L. Rev.** 381 (2019).
- Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 **UCLA L. Rev.** ___ (forthcoming 2020), available at SSRN.

The political economy of work in the United States is on the skids. In April 2020, unemployment skyrocketed,reaching a level not seen since the worst days of the Depression in the 1930s. Many who are still going to work — so-called "essential workers" — are in low-wage jobs without basic legal protections (think of independent contractor delivery and truck drivers, home care workers), as a matter of policy choice, not as a matter of some irresistible law of economics . Many farmworkers and other food sector workers are undocumented – meaning that government deems their work both essential and illegal. People of color and immigrants are hardest hit by coronavirus deaths and unemployment.

Now is the time to rethink how antitrust weakens collective action by workers while allowing massive concentration and enhancing the power of capital. Hiba Hafiz and Sanjukta Paul are doing exactly that. Both Hafiz and Paul challenge the dominance of a particular school of economic thought in antitrust analysis. They reflect an exciting push back against what Sandeep Vaheesan has called the economism of antitrust law. Their work helps scholars of labor and judges to discuss when, whether, or why collective action by labor is legal rather than an anti-competitive restraint on trade, and to understand why law has failed to curb the economic concentration that has suppressed wages.

The public is getting a crash course in what low wage workers have known for years – the law isn't protecting workers. Huge companies have the ability to flout the law simply because they are huge. In California, app-based delivery and ride companies announced their refusal to comply with the California Supreme Court's Dynamex decision and AB-5, a state statute requiring them to classify their workers as employees. Finally, California's attorney general and a group of city attorneys filed suit to force Uber and Lyft to comply with the law. In May, Tesla announced it was re-opening its factory in defiance of a public health order, threatened to fire any worker who obeyed the public health order and failed to return to work, and the public health officials ultimately backed down and allowed the company to re-open even while the shelter-in-place order continued. App-based workers like Instacart shoppers have struck to protest the lack of safety protections and their low-wages. An Amazon warehouse worker got fired for protesting a lack of safety protections, and worker advocates filed a lawsuit over whether time spent handwashing would be held against workers at the same warehouse. But still the problems continue.

Workers need, and lack, the power to negotiate effectively for protections. Concentration of business has caused wage stagnation and has made it harder for workers to wrest wage increases and improved working conditions from business. The power of concentrated capital as compared to the power of workers demands action. Yet efforts of states to enable collective negotiation to balance the power of concentrated capital with a collective voice of workers have been stymied by antitrust litigation. As Hiba Hafiz explains the state of antitrust law today, "workers seeking to use antitrust law to challenge employer buyer power in the new era of labor antitrust will face difficulties. At the same time, they will expose themselves to potential antitrust liability if they seek to coordinate to counter that power." (Pp.

402-03.)

In some ways, we are back to where the country was between 1929 and 1931 – massive unemployment, unprecedented economic inequality, and yet many workers are unable to unionize because of the threat of antitrust litigation. As Lenin said in criticizing economists for condemning unionization and worker political agitation, what is to be done?

Paul argues that business, aided by a particular school of economic thought, deployed antitrust law to attack disfavored forms of economic coordination, including collective action by workers both through labor unions and through other forms. "Meanwhile," Paul says, "a very specific exception to the competitive order has been written into the law for one type of coordination, and one type only: that embodied by the traditionally organized, top-down business firm." (P. 42.) The result is that collective action by for-hire car drivers has been attacked as an antitrust violation even as Uber's own price-fixing survives challenge. Paul goes to the source of the problem and challenges the regnant regime of economic analysis and the notion that intra-firm arrangements (what Paul calls coordination) are immune from scrutiny.

Hafiz explains and critiques the antitrust law relevant to labor, showing why it fails to protect workers from the monopsony and collusive power of employers while preventing workers collective action as countervailing power. She proposes "regulatory sharing" as a way that antitrust enforcement and labor rights enforcement can protect consumers and workers, rather than seeing worker protection necessarily coming at the expense of consumer welfare.

Together, Hafiz and Paul help us go back to first principles in antitrust and labor to think about how to reconcile robust worker protection with robust protection for consumers.

Being neither a scholar of antitrust nor an economist myself, I want to suggest why it benefits scholars of labor and employment to consider their work. Chief among them is the growth of organizing among workers who do not presently enjoy the status of employee under the National Labor Relations Act and, therefore, the labor exemption from antitrust liability for collective action. Lawyers have faced antitrust enforcement for going on strike to protest the abysmally low rates paid to handle criminal defense of indigent people. Even playwrights face antitrust litigation when they try to improve labor standards by acting collectively. As more and more companies have realized they can lower labor costs and increase share price by classifying their workforce as independent contractors, the scope of the labor exemption to antitrust shrinks. The relevance of antitrust to labor grows correspondingly.

Hafiz and, especially, Paul (in this and other works) shed light on the intellectual history of the particular form of economic analysis that came to dominate antitrust theories. Looking back at the history of antitrust's evolution, particularly in its engagement with labor, illuminates the significance of rethinking antitrust now. Use of antitrust to formulate labor policy rarely turned out well for either antitrust law and policy or labor. This is a familiar story in the period between 1890 and 1932, when – as Herbert Hovenkamp notes – the majority of antitrust actions were filed against unions rather than against business combinations. Herbert Hovenkamp, Principles of Antitrust, Chapter 16.b.3 (West 2017).

But even at the height of the New Deal, and even with the progressive Thurman Arnold in charge, antitrust proved to be a threat to worker collective action. In 1937 – the very year the Supreme Court upheld the constitutionality of the National Labor Relations Act and it seemed that worker collective action would finally, for the first time in American history, be safe from criminal and civil litigation aimed at suppressing it — Thurman Arnold's division of the Department of Justice filed half a dozen enforcement actions against labor unions nationwide, including unions in the construction trades, the American Federation of Musicians, and others. Targeted by either DOJ or companies in those years were

activities that some considered illegitimate, such as sit-down strikes, secondary boycotts and jurisdictional strikes, picketing for recognition, or collective action by independent contractor fishermen and drivers.

As Harvard labor law professor (and later Attorney General) Archibald Cox tartly observed of this campaign, although Arnold "gave assurance that there would be no interference with legitimate organizational techniques or collective bargaining," the Antitrust Division was quite vague about "how it proposed to distinguish the legitimate from the restrictive," and the antitrust lawyers' own "views on labor policy were highly influential." (P. 261.)

Cox rightly spotted the hazards of Arnold's campaign against unions. Opening the door to lawyers in the Antitrust Division, and federal judges, to decide which expressions of worker solidarity were desirable would revive the very problems that the National Labor Relations Act and the Norris-LaGuardia Act had been enacted to eliminate. Although the Antitrust Division lost its suits, and the Supreme Court ruled that antitrust would have no role to play in regulating union activity, some of the conduct that the Antitrust Division branded as illegitimate – notably, picketing for recognition, secondary activity, and jurisdictional strikes — were later banned by the Taft-Hartley Act and thus brought back into federal courts' purview. And the sit-down strike tactic that was targeted in Apex was declared unprotected by federal law and prohibited by state criminal law. Federal judges and federal juries still grant injunctions and damages judgments, sometimes crushing ones, against expressions of worker activism that they deem illegitimate. Some secondary activity is speech protected by the First Amendment under NAACP v. Claiborne Hardware Co. But some – like the lawyers' protest about the low rates paid for indigent criminal defense — might not be.

Hafiz and Paul explain the dominance of a certain kind economic analysis in antitrust law, and show how it has been used to reduce worker power while allowing massive economic concentration and inequalities of wealth. It is also worth noting the historical controversy over which styles of economics have been considered acceptable in analyzing labor collective action. As Hafiz explains in other work, in 1940 and 1947, Congress amended the NLRA to specifically prohibit the NLRB from hiring "individuals for the purpose of conciliation or mediation, or for economic analysis." Congress' target – the Division of Economic Research – was thought (wrongly, as it happens) to be a hotbed of communism. The economists at the NLRB in those days were, in Congress' view, the wrong kind of economists — the kind who used the empirical and mathematical skills of the discipline to document, understand, and combat labor exploitation.

If a new political economy of labor is to emerge from the present crisis, it will be important to avoid repeating the mistakes of the mid-twentieth century, when the upsurge of labor organizing failed to produce a durable legal regime to protect workers against the power of capital. As we think about that, reading Hiba Hafiz and Sanjukta Paul's work (along with that of many other progressive antitrust scholars) will help those thinking about a new start for labor.

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